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Is Customary Law a Hindrance to Womens Rights in Democratic South Africa?

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Abstract- The constant clash between customary law and women's rights continues to bedevil the desired development and protection of women's rights in Africa. African women suffer injustices through restrictions imposed on them in the application of certain customary laws. Customary laws pertaining to marriage, property and succession are amongst the most restrictive and unjust in African customary law. Marriage laws that allow polygamy for example would be an impediment to principles of equality and would even pose health risks with the prevalence of HIV/AIDS, while customary laws that govern succession in many parts would discriminate unfairly between male and female heirs.

This dissertation was prompted by issues raised in cases such as *Bhe* and *Shilubana* decided in the Constitutional Court of South Africa. In these landmark decisions, the Constitutional Court dealt with the development of customary law so as to align it with the spirit and purport of the Constitution, which is the supreme law in South Africa. The decisions of the above mentioned cases are of particular import to the essay because not only do they seek to advance women's rights, they also recognise customary law as a cardinal source of law in South Africa. By so doing customary law is accorded its proper place in the South African legal context. The essay focuses on South Africa and the development of women's rights against recognition and continued practice of customary law.

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Simbarashe Tavuyanago

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A comparison between the recognition of customary law and development of women's rights in other jurisdictions, particularly Ghana, Zambia and Zimbabwe and that of South Africa will be made. In as much as South Africa is more progressive in terms of the Constitution, the question still remains whether customary law and certain customary law practices do not undermine or circumvent the ideals of the Constitution.

"Injustice anywhere is a threat to justice everywhere." – Martin Luther King Jr.

I. INTRODUCTION

African Customary law as a source of law has been in existence since time immemorial. It is the law of the natives of any particular area, which has from generation to generation been passed on not as written law, but through oral tradition and practice. It finds its expression in the day to day cultural practices, rituals and traditions of a people.¹ This essay seeks to explore the extent to which customary law conflicts with the development of women's rights in democratic South

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¹ T.W Bennet, Human Rights and African Customary Law under the South African Constitution (1995) 63.

Africa and whether such conflict is a hindrance to such rights. The relevance of customary law is also put to question in a system of legal pluralism, where there are many different sources of the law and expressions of the law.

II. CONTEXT

My own definition of a customary law would be;

A traditional, common rule or practice that has become an intrinsic part of the accepted and expected norm or conduct in a society that it is treated as a legal requirement and contravention of which will result in retribution.

Although customary law as per definition is still alive and plays an important role in the lives of many South Africans, there are certain rules or practices that are not in line with the Constitution.² In the *Bhe* case³ Judge Langa remarked:

The exclusion of women from inheritance on the grounds of gender is a clear violation of Section 9 (3) of the Constitution. The principle of primogeniture also violates the right of women to human dignity as guaranteed in Section 10 of the Constitution as, in one sense, it implies that women are not fit or competent to own and administer property.

Some of the practices therefore put women in a subordinate position compared to men and are in conflict with ideals of the Constitution such as equality and dignity. This conflict erodes the Constitutional base of such practices.

This essay was greatly influenced by the minority judgement of the *Bhe* case. Allusion is made to the fact that even though the judgement is a landmark decision, there is still room to improve women's position in democratic South Africa and in Africa as a whole. The minority judgement scrutinises African jurisprudence and provides an insight into how women's rights would develop further if customary law were to be developed in line with fundamental human rights.⁴

² Constitution of Republic of South Africa Act 108 of 1996, supreme law in South Africa.

³ *Bhe and Others v Magistrate Khayelitsha and Others; Shibi v Sithole; South African Human Rights Commission v President, Republic of South Africa* 2005 (1) BCLR 1 (CC).

⁴ "The defect in the rule of primogeniture is that it excludes women from being considered for succession to the deceased family head...It needs to be developed so as to bring it in line with our Bill of Rights."

The right to equality is enshrined in the Constitution as one of the founding values.⁵ Statutory instruments have even been enacted to safeguard this core value and the right to equality is further protected in the Promotion of Equality and Prevention of Unfair Discrimination Act⁶. This shows that equality is a fundamental value enshrined in the Constitution. The weight placed on the principle of equality is further enunciated in the Constitutional Court decision of *Fraser v Children's Court, Pretoria North and Others*⁷ where Mohammed DP opines, "There can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised."

Against such a backdrop, recent developments in the field of customary law of marriage, in particular the taking of a sixth wife (fourth concurrent) by the President of the Republic of South Africa, Jacob Zuma have sparked debates on human rights of equality versus culture and customary law. The debates are not only limited to customary law of marriage, but include property rights and the right to inheritance as well. It is imperative in light of the recent debates, to measure the democratic rights of women against customary practices that seem to undermine those rights.

South Africa is an example of a country that has managed to move progressively towards gender justice and gender equality albeit piecemeal. It is a country that preaches equal opportunities, equal employment, equal access to resources and an equal power to influence decisions in society and communal development. In as much as there are still customs that may be seen as derogatory towards women, unfairly discriminate against women or do not promote the spirit of equality, by and large there have been great strides made in the development of women's rights since 1994.

The study will look at the development of women's rights in democratic South Africa and how the customary law has been adapted to safeguard such rights. The South African position will be juxtaposed with that of other African countries, such as Ghana and Zimbabwe, in a comparative analysis to show South Africa's position relative to other African countries.

III. PURPOSE OF THE STUDY

In this study, the researcher seeks to demonstrate conflict of laws in a legal pluralistic system. On the one hand, there is the Constitution, written law which is supreme and purports values of human dignity and equality; on the other hand there is customary law,

unwritten, living law that has been in practice for many years. The question the researcher will attempt to address is whether or not customary law poses a threat to the rights enshrined in the Constitution. Should this be the case, to what extent are Constitutionally enshrined rights threatened? The researcher will also attempt to look at whether customary law can be developed and aligned with the Constitution or whether it is regressive and should become abrogated.

The major task for the researcher will be to convince the reader that customary law does not pose a threat to women's rights, because it can be developed to align with the core values in the Constitution. Development in case law over the years will be used to substantiate the notion that the South African legal system is progressive and more than one two systems of law can co-exist in harmony.

The study also seeks to come up with further recommendations on how to harmonise customary law with the Constitution, which is the supreme law. The researcher will use a comparison between South Africa and other jurisdictions, mainly Zimbabwe. This comparison will be important for the following reasons:

- 1) Both countries are members of the African Union and have ratified the Banjul Charter⁸. Both countries have also pledged to develop the continent as a model of African culture and heritage.
- 2) Both countries have a legal pluralistic system, where they have more than one system of law. The systems are the Common Law, which is codified and Customary Law, which is the traditions and customs of the indigenous people.
- 3) Both countries are Constitutional democracies, having undergone a period of upheaval during colonialism.
- 4) Both countries are signatories to various International human rights instruments, thereby pledging their allegiance to the fight for development of human and women's rights.

IV. METHODOLOGY

To make sure that a thorough investigation and research has been conducted, the researcher will make use of various different resources:

a) Primary Sources

The primary sources will include inter alia, the various Constitutions of concerned countries, the pieces of legislation that were enacted with the view of furthering or safeguarding the concerned issues and the most relevant case law covering women's rights and the development of customary law.

⁵ The preamble of the Constitution talks about South Africa as a country where everyone would be treated equally, Section 9 also sets out provisions for equal treatment and non-discrimination, invariably supporting the notion of equality.

⁶ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

⁷ 1997 (2) SA 261 (CC) para 20 at 272A.

⁸ African Charter on Human and People's Rights, adopted June 27, 1981, OAU.

b) Secondary Sources

The secondary sources will include literature on legal pluralism and customary law such as books and journal articles published in the various law journals

V. LITERATURE REVIEW

The Parliament and Judiciary in South Africa are the main vehicles of the development of women's rights. Parliament encourages women's rights development through the enactment of legislation whose very core is aimed at promoting the values of equality, human dignity and women's rights. The Judiciary assists the development of women's rights through landmark decisions that have advanced women's rights and alleviated the position of women in democratic South Africa. It is imperative to expatiate how the various pieces of legislation have contributed to the development of women's rights.

For example, the enactment of The Recognition of Customary Marriages Act⁹ provided a major stepping stone for the development of women's rights by stipulating that the modalities that govern customary marriages be placed on an equal footing with those providing for marriage under the Common Law.¹⁰

The Traditional Leadership and Governance Framework Act¹¹ provides for equal treatment of women when it comes to community involvement and leadership.¹² These provisions are in line with the equality provision in the Bill of Rights and the charge lies on the state to create instruments through which such values may be realised.

In a bid to further protect the values enshrined in the Bill of Rights, particularly the right to equality; the legislature has also enacted the Promotion of Equality and Prevention of Unfair Discrimination Act.¹³ The Act prohibits religious, cultural or traditional customs and practices that undermine the principle of equality. It provides for many grounds on which not to discriminate on, with gender being one of them, thereby putting women on an equal footing with men.¹⁴

As alluded to above, the development of women's rights has not only been championed through

legislation alone, but through landmark decisions of the Constitutional Court and the various divisions of the High Courts that have been handed down in the recent past.

The landmark and colossal decision of the Constitutional Court in *Bhe v Magistrate Khayeltsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa*¹⁵ declared the principle of primogeniture unconstitutional. The court emphasized the need to move away from inequalities and prejudices of the past, including the disqualification from inheritance of an illegitimate child, or where *lobolo* for the wife had not fully been paid. Such circumstances could no longer preclude offspring of a deceased man from inheriting from the estate of their late father.¹⁶

The progressive thinking of the judiciary was also reflected in the decision in *Mabena v Letsoalo*¹⁷ where the court developed the customary law with regards to *lobolo* negotiations, particularly the ascension to the position of family head by a woman where the male head was not available. In this case, a woman was allowed to negotiate and accept *lobolo*, a duty previously regarded to be that of the male family head.

Another landmark decision with regards to the development of customary law was that of *Shilubana v Nwamitwa*¹⁸ where a woman was allowed to take over the traditional position of Chief, traditionally reserved for male members of the family. The decision in *Shilubana* is of particular import to the paper because not only did it ensure the realisation of the Constitutional right to equality, it also cemented recognition of traditional leaders and their autonomy as envisaged by Section 211 of the Constitution.¹⁹

The decisions of courts of foreign jurisdictions are also considered on a comparative basis. In this regard, the decision of the High Court of Zimbabwe in *Chawanda v Zimnat Insurance Co. Ltd*²⁰ is worth mention. In the decision, the court confirmed the recognition of an unregistered customary marriage concluded in terms of customary law, where a wife

⁹ Act 120 of 1998.

¹⁰ In terms of Section 6 of the Recognition of Customary Marriages Act, a customary law wife has equal status and capacity to that of a wife in a civil marriage, including the capacity to acquire property and to enter into contract independently.

¹¹ Act 41 Of 2003.

¹² Section 2 (3) of the Act provides, "A traditional community must transform and adopt customary law and customs relevant to the application of this Act so as to comply with the relevant principles contained in the Bill of Rights in the Constitution, in particular by; (a) preventing unfair discrimination; (b) promoting equality and (c) seeking to progressively advance gender representation in the succession of traditional leadership positions."

¹³ Act 4 Of 2000.

¹⁴ Section 8 Of the Act provides, "Subject to Section 6, no person may unfairly discriminate against any person on the ground of gender..."

¹⁵ 2005 (1) BCLR 1 (CC). The cases dealt with the same issue of prohibited inheritance by women because of the rule of primogeniture. The rule was derived from customary law of patriarchy, where male children were considered the rightful heirs to their father's inheritance.

¹⁶ On page 49 of the judgement, Judge Langa remarks, "the exclusion of women from heirship and 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 father, husbands or the head of the extended family."

¹⁷ 1998 (2) SA 1068 (T).

¹⁸ 2009 (2) SA 66 (CC).

¹⁹ Constitution of the Republic of South Africa Act 108 of 1996.

²⁰ 1990 (1) SA 1019 (ZH).

claimed loss of support as a result of the wrongful killing of her husband.

Lastly, it is worth noting that the development of women's rights and the protection thereof has been greatly advocated for and advanced by Regional and International Organisations that seek to promote peace and development in Africa.

For example, the African Union (formerly Organisation of African Unity) came together and enacted the Banjul Charter²¹ which seeks to, "Promote and protect human and people's rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa."²² Chapter 1 of the Charter, in particular articles 2 and 3 speak to the very ideals of equality and fairness enshrined in the South African Constitution.²³

VI. RECOGNITION OF CUSTOMARY LAW

Customary law, as alluded to in the introduction, has been in existence since time immemorial. It is the unwritten law which consists traditions and practices adhered to on a day to day basis by a certain demographic, particularly the natives of an area. South Africa's legal system is pluralistic in nature, where more than one system of law is accepted as binding. Customary law in South Africa is not only recognised because of its day to day practice, but has been issued with a Constitutional basis.

Section 15 of the Constitution provides for the enablement of the enactment of legislation recognising and protecting customary law.²⁴ The encouragement to provide instruments of realising different beliefs and opinions presupposes the recognition of such freedoms. The recognition of a system of customary law is further evidenced by Sections 30 and 31 respectively of the Constitution which provide for the right to language and culture and cultural, religious and linguistic communities.²⁵ Such recognition ensures that customary law is an intrinsic separate part of the South African legal system as it is granted a Constitutional basis.

Customary law has been confirmed through enactment of legislation that refers specifically to customary law. For example Section 11 (1) of the Black

Administration Act²⁶ provides, "Notwithstanding provisions of any other law, it shall be the discretion of the courts of native commissioners in all suits...to decide such questions according to the native law applying to such customs, except insofar as it shall be repealed or modified." The section alludes to the existence of customs and customary, indigenous law that is to be applied in disputes arising from that jurisdiction.

Section 1 (1) of the Law of Evidence Amendment Act²⁷ provides for the recognition of customary law as a separate legal system. Thus, "Any court may take judicial notice of indigenous law insofar as it can be ascertained readily and with sufficient certainty, with the proviso that such law shall not be opposed to the principles of public policy and natural justice." The referral to indigenous law is to the law of indigenous peoples, which is also known as customary law. It can therefore be argued that when the Act speaks of judicial notice, it is to be taken of a system that is already in place and recognised as law.

The Recognition of Customary Marriages Act²⁸ is also another piece of legislation that places beyond any shadow of doubt the fact that customary law is a separate legal system that is recognised as a source of law in South Africa. In terms of Section 1, "A customary marriage is a marriage concluded in accordance with *customary law*" and according to Section 2 (1) of the Act, "A marriage which is a valid marriage *at customary law* and existing at the commencement of this Act is for all purposes recognised as a marriage" (own emphasis). The reference to a different system of law, customary law, is proof that the legislator accepts customary law as a valid system of law that is recognised in South Africa.

The existence of customary law and its importance has also been affirmed in a number of judicial precedents. In *Mthembu v Letsela* the High Court confirmed that, "Customary law has been accepted by the framers of the Constitution as a separate legal and cultural system which may be freely chosen by persons desiring to do so."²⁹ The recognition of customary law as a separate legal system by the Constitution is of important because the Constitution is the supreme law and every other law is subordinate to it. It reaffirms the position of customary law in South Africa as an independent system of law as it is granted a Constitutional basis.

The recognition of customary law in the South African legal realm was also confirmed in the decision of *Van Breda v Jacobs*³⁰ which sought to elucidate what constituted a custom and thus qualified as customary

²¹ African [Banjul] Charter on Human and People's Rights, adopted June 27, 1981, OAU.

²² As per preamble.

²³ Article 2: "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, religion, political or any other opinion, national and social origin, fortune, birth or other status."

Article 3: "1. Every individual shall be equal before the law. 2. Every individual shall be entitled to equal protection of the law."

²⁴ Section 15 (3) (a) Act 108 of 1996.

²⁵ Section 30 provides for right to Language and Culture; Section 31 provides for the right to Cultural religious and linguistic communities.

²⁶ Act 38 of 1927.

²⁷ Act 45 of 1998.

²⁸ Act 120 of 1998.

²⁹ 1997 (2) SA 936 (T) at 944 B-C.

³⁰ 1921 AD 330.

law. It was decided that to qualify as a customary law, "A practice must be certain, uniformly observed for a long period of time and be reasonable."³¹ Through the test in *Van Breda*, customary law was properly defined and thus by necessary implication recognised.

The position of customary law in South Africa was expatiated in the judgement of *Alexkor Ltd and Another v Richtersveld Community and Others*³² where the importance of customary law was brought to light, thus;

Customary law must be recognised as an integral part of our law and an independent source of norms within the legal system. It is a body of law by which millions of South Africans regulate their lives and must be treated accordingly.

The quotation speaks to the recognition and importance of customary law. It is not just another system of law, but a system of law which millions of South Africans adhere to. It is therefore duly recognised as a separate legal system that is granted independence insofar as it is consistent with the ideals of the Constitution.

In *Amod v Multilateral Motor Vehicle Accident Fund*³³ the recognition of customary law and the diverse legal pluralism of the South African system was evidenced. A marriage concluded in terms of Muslim rites was recognised to be a valid marriage in South Africa. This is because it was concluded according to Muslim customary law, which is envisaged by Section 2 (1) of the Recognition of Customary Marriages Act. The recognition of a marriage concluded in terms of Islamic law is the highest point of recognition of different customs and customary laws. One can therefore see that through legislation and judicial precedent, customary law is legally recognised as a separate legal system of law in South Africa.

VII. WOMEN'S RIGHTS AND CONFLICT WITH CUSTOMARY LAW

The development of gender rights and gender justice is a recent development that saw recognition start in International instruments such as the United Nations and has been trickling down into national legislation of the various countries that ratify Conventions and Treaties that govern human and women's rights. A regional example would be the Banjul Charter on human and people's rights³⁴ which advocates equality, equal treatment and equal opportunities for all, ideals enshrined in the South African Constitution.

In as much as efforts are being made to advance women's rights and attempt to achieve gender justice, there has been a constant battle between customary law and the actualization of women's rights. In the context of customary law, women are affected adversely by some of the customary practices and rules perpetuating gender inequality. Some of the practices not only violate women's rights but human rights as well as provided for in the Bill of Rights.³⁵

These practices are usually consequences of marriage under customary law, customary law of property and customary law of inheritance. I will look at the practices that pose a threat not only to women's rights but human rights at large. The discussion will be divided into two categories, viz (a) Customary law of marriage and (b) Customary law of property and inheritance. I will also focus on the rights that are potentially infringed by such practices.

a) Customary law of marriage

i. Lobolo

According to Section 1 of the Recognition of Customary Marriages Act³⁶ *lobolo* means:

The property in cash or kind, whether known as *lobolo*, *bogadi*, *bohali*, *xuma*, *lumalo*, *thaka*, *ikhazi*, *magadi*, *emabheka* or by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage.

It is one of the key essentials of a customary marriage and must be paid before a customary marriage can be deemed to be concluded. According to Section 3 (1) (b) of the Recognition Act³⁷, which provides for the requirements of a valid customary marriage, it provides that, "The marriage must be negotiated and entered into or celebrated in accordance with customary law." Prof. I.P. Maithufi argues that *lobolo* is a silent requirement in customary marriages.³⁸ Although not expressly required, it is inconceivable that a customary marriage can be concluded without a negotiation of the *lobolo* as it is one of the customs envisaged by Section 3.

However, a couple of concerns pertaining to women's rights arise with the negotiation and payment of *lobolo*, thereby causing the friction between customary law and women's rights. Firstly, there is a school of thought that propounds that payment of *lobolo* infringes on a woman's right to dignity as envisaged by the Bill of Rights.³⁹ This school or thought argues that in paying *lobolo*, a husband or prospective husband is

³¹ Reasonableness is to be measured through compliance of the custom with the Constitution.

³² 2003 (12) BCLR 1301 (CC).

³³ 1999 (4) SA 1319 (SCA).

³⁴ African [Banjul] Charter on Human and People's Rights, adopted June 27 1981.

³⁵ Section 2 of the Constitution Act 108 of 1996.

³⁶ Act 120 of 1998 (also referred to as the Recognition Act).

³⁷ Ibid.

³⁸ I.P. Maithufi and J.C. Bekker, The Recognition of Customary Marriages Act of 1998 and the impact on family law in South Africa CILSA at 186-187 (2002); SALRC.

³⁹ Section 10 of the Constitution Act 108 of 1996.

buying his prospective wife, which may lead to him objectifying her in the marriage and thereby depriving her of her Constitutional right to dignity. Secondly, the payment of *lobolo* may also be seen as infringing on the Equality clause.⁴⁰ The argument is that because a husband pays for the wife, the wife is then forced into subordination and subservience as she is likened to any other object that the husband pays for or buys, going against the ethos of equality. Lastly, payment of *lobolo* means that the bride is paid for, and a divorce is not usually granted unless the bride's family can repay the amount. This may lead to a bride being stuck in an unhappy and abusive marriage simply because her family have no means of paying back the *lobolo*.

ii. Polygamy

Polygamy is the practice or custom of having more than one wife or husband at the same time. It can be divided into polygyny and polyandry. Polygyny is the practice where one man may marry more than one wife, while polyandry is the practice where one woman may marry more than one husband. In terms of South African customary law, the only recognised form of polygamy is polygyny, a woman is therefore not allowed to have more than one husband, although marriages between women are sometimes recognised at customary law.⁴¹

Polygamy is given recognition and effect in the Recognition Act.⁴² Reference to polygamous marriages is made in Section 2 (3), "If a person is a spouse in more than one customary marriage, all valid customary marriages entered into before the commencement of this Act are for all purposes recognised as marriages" and Section 2 (4), "If a person is a spouse in more than one customary marriage, all such marriages entered into after commencement of this Act, which comply with the provisions of this Act, are for all purposes recognised as marriages." Such reference is confirmation of the existing customary law practice of polygamy.

However, questions have been raised whether the principle of polygamy is in line with the values enshrined in the Constitution. Arguments have been advanced that the principle of polygamy goes against guaranteed rights in the Bill of Rights. There is a clash between the right to equality as provided for in Section 9 of the Constitution and the principle of polygamy. The practice of polygyny brings into question the right to equality, where men are allowed to marry more than one woman, but women are not allowed to marry more than one man. This system puts women at a disadvantage as they are not treated equally and not granted equal opportunities as men. This also goes against Article 2 of Chapter 1 of the Banjul Charter, to which South Africa is

a signatory and provides, "1. Every individual shall be equal before the law. 2. Every individual shall be entitled to equal protection of the law."⁴³

Another argument that can be advanced against the customary practice of polygamy is that it weakens the women's emotional and financial positions. Emotionally, the women have to share a husband, who might not be emotionally available when the woman needs him. The husband's attention is divided amongst the number of women and the lack thereof when needed might lead to clinical depression. The financial position of the women is also weakened because of the subordinate relationship that exists.

The women, in being answerable to their husbands, are also accountable when it comes to earnings and produce. They have to declare whatever they make and in some cases hand it over to the head of the house for distribution due to them being regarded as perpetual minors as provided for in the Black Administration Act and the Transkei Marriages Act.⁴⁴ This severely weakens the position of the woman in that she is not independent enough to manage her own fiscal affairs. The weaker emotional and financial position of the woman in a polygamous relationship points back to equality, or the lack thereof. It can thus be argued that polygamy goes against the principle of equality as provided for by the constitution.

Polygamy poses a serious health risk with the advent of HIV/AIDS. In the global fight against the HIV/AIDS pandemic, the main message that is being preached is that of faithfulness to one sexual partner. The argument goes, in a polygamous marriage, where the husband has more than one sexual partner thereby increasing the risk of infecting all his wives if he is infected. From this perspective, polygamy counters the fight against HIV/AIDS. Another angle that may be used is that polygamy encourages promiscuity. The man can go around sleeping with women that are not his wives in the knowledge that he can always make the woman his official wife. This argument is therefore in support of the proposition that polygamy may be a vehicle in spreading HIV/AIDS.

Judging from the above arguments against polygamy, it can be concluded that the traditional practice of polygamy suppresses women's right to equality and fair treatment. It encourages patriarchy and ensures that women remain subordinate to their husbands.

iii. Ukuthwala

In the customary law of marriage, the custom of *ukuthwala* was prevalent amongst the Nguni communities. According to Bekker and Koyana in *De*

⁴⁰ Section 9 of the Constitution Act 108 of 1996.

⁴¹ B. Oomen, Traditional Woman to Woman Marriages and the Recognition of Customary Marriages Act. *Journal of Contemporary Roman Dutch Law*, 274 – 282 (2000).

⁴² Recognition of Customary Marriages Act 120 of 1998.

⁴³ African [Banjul] Charter on Humans and People's Rights, adopted June 27, 1981, OAU.

⁴⁴ Section 11 (3), Act 38 of 1927 and Section 38, Act 21 of 1978.

*Jure*⁴⁵, the intending groom, together with a friend or two would waylay the intended bride in or around her home, quite often late in the day and forcibly take her to the groom's home. Sometimes, the girl would be caught unaware, although in many instances it would be according to an agreement between her parents and the parents of the groom. On the same day, those who had effected the *thwala* custom were required to report to the girl's home that her parents need not be worried as their child was safe and no harm would come to her.

The groom's family then had to indicate how many cattle they were prepared to pay and thus commence *lobolo* negotiations. Where *ukuthwala* took place and there was no offer of marriage it constituted a delict and a fine of one beast, known as the *thwala* or *bopha*, was imposed by custom. The *thwalaed* girl would be returned home to her parents and there would be no marriage. It was against custom for a young man who *thwalaed* a girl to have intercourse with her. However, it was not and is not always the case where the proper customary practices or channels were followed.

It can be argued that not only is the customary practice of *ukuthwala* an archaic one; it may also qualify as a crime of kidnapping. According to Snyman 2008,⁴⁶ "Kidnapping consists in unlawfully and intentionally depriving a person of his or her freedom of movement and/or if such person is a child, the custodians of their control over the child." The practice of *ukuthwala* may be seen to be inconsistent with a number of constitutionally guaranteed rights.

Firstly, *ukuthwala* violates the right to dignity⁴⁷ in that it strips the woman of her honour, if she can just be abducted without her consent or against her will. Secondly, the custom violates the woman's right to freedom and security of the person.⁴⁸ Section 12 (2) (a) specifically provides, "Everyone has the right to bodily integrity and psychological integrity, which includes the right to security in and control over their body." It can be argued therefore that by abducting someone, one would be restricting control over their body. Thirdly, the custom violates the woman's right to freedom of movement.⁴⁹ By abducting and holding the girl at the groom's house, the groom would be infringing on the girl's right to freedom of movement as she will not be allowed to leave the home.

With South Africa being a signatory to a number of international instruments that seek to advance and protect the rights of women, traditional customs like *ukuthwala* may be seen as a stumbling block to international progressiveness. Article 21 of the African

Charter on the Rights and Welfare of the Child⁵⁰ provides:

State parties to the present charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child in particular those customs and practices prejudicial to the health or life of the child, and those customs and practices discriminating to the child on the grounds of sex or other status.

The custom of *ukuthwala* is counter to the provisions of the charter in that it is prejudicial to the welfare of the girl child who is subjected to it. It can therefore be argued in conclusion that the custom of *ukuthwala* is rather regressive when it comes to the recognition, advancement and protection of women's rights in South Africa.

b) Customary law of property and inheritance

i. Property

Under colonial influence, heads of families who were married males were perceived to be the only persons with full legal capacity in terms of customary law. Evidence would be Section 11 (3) of the Black Administration Act⁵¹, which portrayed women as perpetual minors in lacking capacity to own property or manage their own affairs. This however does not imply that other members of the family did not have rights to property; the rights of an individual were protected through the family (head), through which they were also acquired. The division of property was as follows:

ii. Family property

This was property not allocated to any individual house and does not automatically accrue to an individual house. This property was controlled by the head of the family (married male). The allocation of such property was then done by the family head using his discretion.

iii. House property

This was property that accrued to a specific house consisting of a wife and child (ren) and used for the benefit of that house. Although used for the benefit of a specific house, the family head remained in control of the house property and could use his discretion on what the property was to be used for. The property included earnings of the members of that house and their livestock, which would be put under the curatorship of the family head.

iv. Personal property

This was property which belonged to an individual who had acquired it through his or her own sweat and labour, but was under the control of the

⁴⁵ D.S Koyana and J Bekker, The Indomitable Ukuthwala Custom in De Jure Vol. 1 2007.

⁴⁶ C.R Snyman, Criminal Law 2008 Lexis Nexis 5th ed 479.

⁴⁷ Section 10, Act 108 of 1996.

⁴⁸ Section 12, Act 108 of 1996.

⁴⁹ Section 21, Act 108 of 1996.

⁵⁰ OAU Doc CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999. Ratified by South Africa on Jan 7, 2000.

⁵¹ Act 38 of 1927.

family head. Although the individual who acquired the property had the power to use and dispose of it, they still had to consult the family head and seek guidance and advice.

It can be seen from the above exposition that in every system of property ownership, women had no rights and were not included. In all the forms of property, effective control lay with the family head, who had to be a married male. Even the traditional allotment of land was made to male family heads, sidelining women in the ownership of property and therefore not providing an equal footing in customary marriages.

v. *Succession/Inheritance*

The law of succession deals with the devolution of the estate of the deceased person, that is, what happens to a person's estate after his or her death.⁵² It can either be testate or intestate. A person dies testate where he executed a valid will⁵³ in which he expresses his last will and testament of his wishes. The devolution of the state therefore takes place in terms of the stipulations made in the will. A person dies intestate where he or she did not execute a valid will.⁵⁴ Maitthufi⁵⁵ argues that in terms of South African law, the estate devolves in terms of legislation or common law. Where the common law is applicable, the estate devolves in terms of the Intestate Succession Act 81 of 1987.

Succession in customary law is universal and onerous, the heir does not only acquire rights, but also duties of the deceased, in particular the duty to maintain the surviving dependants. Succession also follows the male lineage. Heirs are identified by their relationship to the deceased through the male line until all the known male relatives of the deceased have been exhausted in which case the inheritance devolves on the paramount Chief of the deceased's tribe.⁵⁶ Only men could take charge of the family head's affairs. The customary law of succession is based largely on the principle of male primogeniture, which entails that the eldest male child of the deceased inherits his estate.⁵⁷

It is evident that the customary law of succession is hinged on gender, with the male heirs having the right to take over the affairs of the deceased. This goes against the guarantee of the right to equality enshrined in the Constitution. In particular it contravenes

Section 8 (d) of the Promotion of Equality and Prevention of Unfair Discrimination Act⁵⁸ which provides:

Subject to Section 6, no person may unfairly discriminate any person on the ground of gender, including 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.

The custom can therefore be seen as an impediment to the realisation of women's rights as it oppresses women by treating them as subordinate to men.

VIII. CONCLUSION

It has been my aim in this section of the essay to dissect the various cultural practices that pose a threat to the development of women's rights. Polygamy for example violates the right to equality provided for in Section 9 of the Constitution. *Ukuthwala* violates the right to dignity provided for in Section 10 of the Constitution, the right to freedom and security of the person provided for in Section 12 and the right to freedom of movement provided for in Section 21 of the Constitution. The domination of customary law of property and inheritance by males is greatly disturbing as women do not feature anywhere in the picture. This goes against the principle of equality, where both women and men are supposed to be afforded equal opportunities and are treated equally.

In the next section of the work, I will look at legal reform that has taken place over the years in trying to alleviate the plight of women in democratic South Africa. I will look at the development that has taken place in terms of enactment of legislature to protect women's rights and some landmark decisions that have seen the plight of women get better.

IX. THE DEVELOPMENT OF WOMEN'S RIGHTS

Since the dawn of the Constitutional era, South Africa has taken some remarkable strides in the direction of advancing human and women's rights. The progress has greatly been facilitated by one of the most, if not the most progressive Constitutions in Africa. Chapter 2 of the Constitution includes the Bill of Rights, a blueprint to the recognition and advancement of human and women's rights. At the core of the Bill of Rights, lies the right to equality⁵⁹ which has played a cardinal role in the progression of women's rights in South Africa. The bulk of the legal reform that has taken place in post-apartheid South Africa is hinged on the pivot that is the right to equality.

⁵² Matshilane Mokotong, The impact of the Constitution of the Republic of South Africa on certain selected aspects of customary law of succession (2002) *Speculum Juris* 63.

⁵³ In terms of the Wills Act 7 of 1953.

⁵⁴ De Waal and Schoeman, Introduction to the Law of Succession 2000, 34.

⁵⁵ I.P Maitthufi, Marriage and succession in South Africa, Baphuthatswana and Transkei: A legal pot-pourri (1994) TSAR 276.

⁵⁶ J.C Bekker, Seymour's Customary Law in Southern Africa 1989 Juta 5th ed 274.

⁵⁷ For detailed discussion on principle of male primogeniture see Bhe case which declared the practice unconstitutional.

⁵⁸ Act 4 of 2000.

⁵⁹ Section 9, Act 108 of 1996.

It is important to note that not only has the Constitutional epoch sought to advance women's rights at the possible expense and abrogation of tradition and customary law, but it has also sought to strike a balance between tradition and the rights of women. An example would be the Recognition of Customary marriages Act 120 of 1998, which performs the dual task of confirming the existence and importance of customary law, while safeguarding the rights of women from tyrannical customary practices.

Section 39 (2) Of the Constitution provides for the balance between customary law and spirit of the Bill of Rights thus, "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."⁶⁰ The same section makes mention of developing common or customary law, opining that the law is not stagnant. Customary law can therefore be developed where necessary in order to align itself with the spirit of the Bill of Rights, particularly women's rights.

a) *Constitutional protection*

The Constitution, being the supreme law has been the fundamental point of reference when it comes to the championing of women's rights. It provides for equality in an open and democratic society, promoting recognition and appreciation of women as equals in every aspect. A couple of Sections stand out in the Constitution when it comes to recognition of women's rights, viz:

b) *Section 9 – The Equality clause*

Equality lies at the very heart of the Bill of Rights. Section 9 (1) of the Constitution echoes the words of Article 2 of Chapter 1 of the Banjul Charter, "Everyone is equal before the law and has the right to equal protection and benefit of the law." The Constitution was thus drafted bearing in mind the allegiance owed to International instruments that also champion human and women's rights. The equality clause has precipitated remarkable legal reform with the most notable result being the Constitutional Court decision in the *Bhe*⁶¹, which declared primogeniture unconstitutional on the basis of equality. The principle of equality has also led to legal reform in the promulgation of legislature aimed at promoting and safeguarding the right to equality.⁶²

c) *Section 10 – Right to Dignity*

Section 10 which provides for the right to dignity also protects a right that is also protected internationally.

Article 21 of the African Charter on the Rights and Welfare of the Child seeks to, "...eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child..."⁶³ The inclusion of the right to dignity in the Constitution is therefore in line with the international effort to protect such rights. The right to dignity has also resulted in some legal reform in *Mabuza*⁶⁴ where the siSwati custom of *Ukumekeza*⁶⁵ was deemed to be contrary to the spirit of the Constitution as it requires a bride to cry for her to be accepted into a family, violating her right to dignity.

d) *Legislation*

There have been a number of Acts that have been promulgated that seek to strike a balance between customary law and the ideals outlined in the Constitution. Some of the Acts have served the purpose of repealing other laws that were inconsistent with the Constitution and by so doing, develop the customary law and align it with the values enshrined in the Constitution as envisaged by Section 39 (2) of the Constitution. Some of the legislation has sought to promote a single fundamental ideal as set out in the Bill of Rights.

e) *The Recognition of Customary Marriages Act 120 of 1998*

The Recognition Act serves a dual purpose in the conflict between customary law and women's rights. On the one hand, it recognises customary law as a source of law in South Africa and on the other; it seeks to protect women from some of the despotic practices and traditions found in customary law.

The Recognition Act lays to rest whether the customary practice of polygamy is legal or not when it recognises customary law as a separate, independent system of law in South Africa. In terms of Section 2 (1) of the Act, customary marriages are given due recognition, "A marriage which is valid at customary law and existing at the commencement of this Act is for all purposes recognised as a marriage."⁶⁶ The effect of this section is not only to give recognition to customary marriages, but to also confirm by implication that customary law as a system is recognised in South Africa.

The Recognition Act not only recognise customary marriages and by implication customary law, it also seeks to protect women in customary marriages and their rights. Section 6 for example provides for the equal status and capacity of spouses involved in a customary marriage.

⁶⁰ Section 39 (2), Act 108 of 1996.

⁶¹ *Bhe and Others v Magistrate Khayelitsha and Others; Shibi v Sithole; South African Human Rights Commission v President, Republic of South Africa* 2005 (1) BCLR 1 (CC).

⁶² Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

⁶³ Article 21 OAU Doc CAB/LEG/24.9/49 (1990).

⁶⁴ *Mabuza v Mbata* 2003 4 SA 218 (KH).

⁶⁵ The custom would require a bride to cry when she was being handed over to the groom's family after *lobolo* negotiations had been concluded. The bride would in some cases be beaten up for her to cry.

⁶⁶ Section 2 (1), Act 120 of 1998.

A wife in a customary marriage, has on the same basis of equality with her husband and subject to the matrimonial property system governing their marriage, full status and capacity, including capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law.⁶⁷

Section 6 gives effect to Section 9 of the Constitution, speaking to the value of equality and equal status between men and women. This was a major achievement and a huge step forward in the quest to attain equality for all as it enshrined the concept of equality in more than one document or piece of legislation.

The Act also seeks to strengthen the weakened financial position of women involved in customary marriages that are polygamous. Usually in such marriages, the husband is the one who controls the finances and the wives are accountable to him, having to declare and submit their independent earnings to him. However Section 7 of the Recognition Act provides for a mechanism through which wives in customary marriages can protect their financial interest. Section 7 (6) provides, "A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages." Through this section, the legislator seeks to protect the woman's interest in property, which is a triumph for women's rights considering past prejudices suffered in terms of property. The legislator even goes further to provide that the distribution of the property must be equitable⁶⁸ ensuring the same equal opportunities even when it comes to economic rights.

It is evident from the provisions made in the Recognition Act, on one hand, to officially recognise and preserve customary law and on the other hand to safeguard and advance women's rights. It is also evident that the intention of the legislator was to strike a balance between the customary law and the impact it has on women's rights. In the spirit of Section 39 (2) of the Constitution the customary law has been developed so as to align itself with the values entrenched in the Constitution. The Recognition of Customary Marriages Act has been a beacon of gender justice and thus a vital piece of legislation when it comes to the protection of women's rights in South Africa.

f) The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

South Africa is a country that is based on Human dignity, the achievement of Equality and the

advancement of Human Rights and freedoms.⁶⁹ The right to equality is echoed in Section 9 of the Constitution, the equality clause. The drafters of the Constitution in making equality a fundamental principle kept in line with the international community in the fight to advance women's rights. The Banjul Charter for example which South Africa ratified is based on the principle of equality, everyone being equal before the law and having equal protection of the law.⁷⁰

The same instrument challenges the member states to further the advancement of human and people's rights, "The Member States of the Organization for African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative and other measures to give effect to them."⁷¹ In seeking to stay true to the cause of instruments such as the Banjul Charter and adopt legislative and other measures, the South African legislature promulgated the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

The Act seeks:

To give effect to Section 9 read with item 23 (1) of Schedule 6 to the Constitution of the Republic of South Africa, 1996, so as to prevent and prohibit unfair discrimination and harassment; to promote equality and prevent unfair discrimination; to prevent and prohibit hate speech; and to provide for matters connected therewith.⁷²

Section 9 of the Constitution provides, "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."⁷³ The Promotion of Equality and Prevention of Unfair Discrimination does exactly that; that is promote the achievement of equality, promote the values of non-racialism and non-sexism contained in Section 1 of the Constitution and to prevent unfair discrimination and protection of human dignity as contemplated in Sections 9 and 10 of the Constitution.

The enactment of this Act has provided a much needed pillar for the guarantee and protection of women's rights in South Africa. Section 8 provides, "Subject to section 6, no person may unfairly discriminate against any person on the ground of gender ..."⁷⁴ This provision guarantees the equal status

⁶⁹ Section 1 (a), Act 108 of 1996.

⁷⁰ Article 3, Chapter 1 of the African [Banjul] Charter on Human and People's Rights.

⁷¹ Article 1, Chapter 1 of the African [Banjul] Charter on Human and People's Rights.

⁷² ACT, Act 4 of 2000.

⁷³ Section 9 (2), Act 108 of 1996.

⁷⁴ Section 8, Act 4 of 2000.

⁶⁷ Section 6, Act 120 of 1998.

⁶⁸ Section 7 (7) (a) (2), Act 120 of 1998.

of women and men in democratic South Africa. It also provides for equal opportunities, be it in employment or service delivery, as gender can no longer be used to elevate one and denigrate the other. The equal status afforded to both men and women was witnessed in the landmark Constitutional Court decisions of *Shilubana*⁷⁵, where it was decided that a woman was to assume chieftaincy based on equality and prevention of gender discrimination. The *Bhe case*⁷⁶, involved the declaration of the unconstitutionality of the principle of primogeniture due its contravention of the equality clause and contravention of the prevention of unfair discrimination.

It can be concluded therefore that the promulgation of legislation aimed at giving effect to Section 9 of the Constitution has gone a long way in advancing women's rights against patriarchal customary traditions. The equal status provided for by the Act ensures that whatever decision is made, whoever is appointed and whoever is left out will be based on merit and not on gender. It is plausible to argue that in as much as customary law still forms part of the South African legal potpourri, it has been greatly developed to be consistent with the spirit and purport of the Constitution. Ideals which seek to promote equality and protect the rights of women through enactment of legislation such as the Promotion of Equality and Prevention of Unfair Discrimination Act, which gives effect to such notions.

g) *Judicial precedent*

This essay has mainly been prompted by the colossal decisions in the Constitutional Court of South Africa which have seen the breaking of customary dogma and greatly advanced women's rights in a democratic South Africa. I will provide an expose of the most significant cases that have championed the development, advancement and protection of women's rights. The decisions in the cases were given a Constitutional basis by the Constitution of the Republic of South Africa, in that they seek to promote the spirit and ideals of the Constitution.

h) *Bhe and Others v Magistrate Khayelitsha and Others; Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa 2005 (1) SA 563 (CC); 2005 (1) BCLR 1 (CC)*

This is a trilogy of cases where the Constitutional Court addressed the constitutionality of the customary rule of primogeniture and related intestate succession provisions of the Black

Administration Act, which excluded women and others⁷⁷ from succession under customary law.

The court struck down the impugned statutory provisions of Section 23 of the Black Administration Act 38 of 1927 and Section 1 (4) (b) of the Intestate Succession Act 81 of 1987, which excluded women from the right to inherit and were in direct contravention of Sections 9 (equality), 10 (dignity) and 28 (rights of children) of the Constitution. The *Shibi* case dealt with a confirmation order of the constitutional invalidity made by the Pretoria High Court in finding that Section 23 (10) (a), (c) and (e) of the Black Administration Act⁷⁸ and regulation 2 (e) of the Regulations for the Administration of Estates of Deceased Blacks unconstitutional and invalid. Section 1 (4) (b) of the Intestate Succession Act⁷⁹ was also declared unconstitutional in so far as it excluded estates regulated under Section 23 of the Black Administration Act.

The *Bhe* case involved an application by a mother on behalf of her two minor daughters in respect of the deceased estate of their father. The bone of contention before the Constitutional Court was that the customary law rule of primogeniture and the impugned statutory provisions unfairly discriminated against the children on the ground of gender by excluding them from inheriting the estate of their deceased father where the estate had been taken over by the grandfather of the deceased's daughters.

The South African Human Rights Commission case involved direct access to the court, a class action on behalf of all women and children prevented from inheriting by reason of the impugned provisions and the rule of primogeniture. The court held that the principle of primogeniture, in the form that it has come to be applied, discriminates unfairly against women and children born out of wedlock and accordingly declared it unconstitutional and invalid. The court held that although it was supposed to develop customary law and align it with the Constitution as provided for in Section 39 (2), it was not feasible in this matter to do so. The order of the court was made with retrospective effect, dating back to the 27th of April 1994, with completed transfers of ownership insulated.

The decision was a major victory for the rights of black women and generally women who were married under customary law. The declaration of unconstitutionality of the principle of primogeniture confirmed the equal status of women in democratic South Africa. In line with Section 9 of the Constitution

⁷⁷ Others refers to even male heirs of the same bloodline of the deceased, the rule of primogeniture promoted the oldest male heir of the same bloodline as the deceased, thereby alienating other male heirs. It also refers to children born out of wedlock. Illegitimate children were not considered of the deceased's bloodline for purposes of inheritance and were therefore excluded from inheriting.

⁷⁸ Act 38 of 1927.

⁷⁹ Act 81 of 1987.

⁷⁵ *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC).

⁷⁶ *Bhe and Others v Magistrate Khayelitsha and Others; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) BCLR 1 (CC).

and the Promotion of Equality Act, the equal status of women in terms of all aspects pertaining to marriage was confirmed. Since equality is universal in every facet of the marriage, women in customary marriages now enjoy equal succession rights as those of their counterparts in civil marriages and men. This was a remarkable breakthrough even in the sphere of the customary law of property, as women can now acquire, own and dispose of their own property with equal status and rights as men.

The decision was also pivotal in advancing the rights of the girl child. A boy and a girl child, regardless of birth position enjoy equal status and opportunities and they both have equal succession rights in the case of death of their father. This realisation is what was envisaged by the African Charter on the Rights and Welfare of the Child, when it sought to encourage;

“State parties to the present charter to take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child...and those customs and practices discriminating to the child on the grounds of sex or other status.”⁸⁰ The decision has also resulted in the recognition of the best interest of the child as provided for in Section 28 of the Constitution, where there is no longer any differentiation between the children born of a recognised marriage and those born out of wedlock. Both the children have equal inheritance rights, thus realising the morals behind the promulgation of the Promotion of Equality Act, which advocates equality and non discrimination on any grounds.

In concluding the *Bhe* case, cognisance must be made of the fact that the decision was a major victory not only for women’s rights and the protection thereof, but for the safeguarding of the basic human rights provided for in Chapter 2 of the Constitution.⁸¹ The law no longer recognises the concept of “*Indlalifa*” or universal heir as this is contrary to the principle of equality. All the heirs have an equal share in a deceased estate now, regardless of gender or age. Thus the case of *Bhe* is and will remain the most significant precedent when it comes to the balance between customary law and the recognition of human and women’s rights.

i) *Shilubana and Others v Nwamitwa (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC)*

The matter concerned a woman being appointed as a chief, a position that was traditionally seen as one to be held by an elder male member of the community who shared the same bloodline as the previous chief and which she was previously deprived of by virtue of gender discrimination. The main issue was whether the community had the authority to restore a

position of traditional leadership to the house from which it was removed by reason of gender discrimination even if the discrimination took place prior to the advent of the Constitution, and by so doing develop their custom so as to promote gender equality in the succession of traditional leaders.

The argument advanced was that the Valoyi tribe in appointing Miss Shilubana as chief were acting in accordance with Section 211 of the Constitution, “A traditional authority that observes a system of customary law may function according to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.”⁸² Based on this premise, the Valoyi were acting well within their constitutional mandate to amend their customs and traditions where they deem necessary and to reflect the change in circumstances as well.

The Valoyi were also acting in accordance with the legislature specifically enacted to govern traditional matters. The Traditional Leadership and Governance Framework Act states:

A traditional community must transform and adapt customary law and customs relevant to the application of this Act so as to comply with the relevant principles contained in the Bill of Rights in the Constitution, in particular by –

- (a) Preventing unfair discrimination;
- (b) Promoting equality; and
- (c) Seeking to progressively advance gender representation in the succession to traditional leadership positions.⁸³

The actions of the Valoyi tribe were in line with all the provisions of the abovementioned section. They sought to develop their customary law so as to promote gender equality in succession, thereby achieving the ideals set out in the Bill of Rights. Reference was made to the *Bhe* case and the principle of equality elucidated therein, and in passing of judgement, the *Bhe* case was used as a yardstick so as to prevent deviation from the principles set out therein.

It was held that customary law like any other law is protected by the Constitution and subject to the Constitution. Customary law must therefore be consistent with the Constitution and must seek to promote the spirit and ideals entrenched therein. In amending and developing the customary law of succession of traditional leaders, the community was well within the bounds of Section 211 (2) of the Constitution, thereby making such amendment constitutional. Finally it was held that because the principle of primogeniture had been declared unconstitutional, Miss Shilubana and all potential heirs

⁸² Section 211 (2), Act 108 of 1996.

⁸³ Section 2 (3), Traditional Leadership and Governance Framework Act 41 of 2003.

⁸⁰ Article 21, African Charter on the Rights and Welfare of the Child.

⁸¹ The Bill of Rights, Act 108 of 1996.

were therefore eligible for the ascension to the seat if the chieftaincy. The taking of the throne of chieftaincy by Miss Shilubana was therefore declared to be constitutional and in line with the ideals of gender equality and non discrimination.

The decision in *Shilubana* is another landmark decision that has safeguarded women's rights in South Africa and seen the recognition and protection thereof increase. It reiterated the guaranteed rights to equality and non discrimination that had been confirmed in previous decisions such as *Mabena v Letsaolo*, where a woman was allowed to take part in *lobolo* negotiations and accept *lobolo* in the absence of a male head of the family.⁸⁴ The *Shilubana* decision also cemented the right to women's involvement in collective, community decision making which is a huge step in terms of gender equality. The decision also served the dual purpose of acknowledging the existence and independence of customary law as a separate legal system by alluding to the fact that customary law, like any other law is protected and subject to the Constitution. The recognition of customary law and the advancement of women's rights in the same case, points to the harmonisation of customary law and women's rights. It is evidence that customary law can be adapted to the changing times and be brought in line with women's rights and the ideals of the Bill of Rights.

X. CONCLUSION

The *Bhe* and *Shilubana* decisions are in my view the epitome of gender justice and recognition of women's rights. These cases broke the traditional creed and paved the way for the recognition and advancement of women's rights. They are the quintessence of the values of equality, dignity and non-discrimination as envisaged by the Constitution. What is more interesting is that in championing women's rights, the Constitutional Court does not abrogate customary law, rather in the same cases, reference is made to the existence, independence and importance of customary law in an open and democratic society. What the court seeks to do is develop customary law practices that are doctrinaire and bring them in line with the core values of the Constitution and in so doing, harmonise the advancement of women's rights and customary law. In my view, the court has managed to achieve the feat of developing customary law yet preserving its very essence to a large extent. In as much as women's rights have ascended to the top of the agenda of progressive legal discourse, it has not been at the expense or the attrition of the fundamental customary law. It is this balance that the researcher sought to expose and has hopefully done.

⁸⁴ *Mabena v Letsaolo* 1998 (2) SA 1068 (T)

XI. FOREIGN JURISDICTIONS

The fight for the recognition and advancement of women's rights is not only limited to South Africa, it is a global fight that seeks to see women all around the world treated as equals. To this end, international instruments have been enacted to help champion the advancement of gender justice. These instruments are binding on member states that ratify and adopt them. A regional example would be the Banjul Charter, which seeks to promote and protect human and people's rights, taking into account the principles of fairness, equality, human dignity and non-discrimination.⁸⁵ In keeping with the spirit of the Charter, all the member states have been in the process of developing their law, either common or customary, to conform to the values enshrined in the Banjul Charter. I will look at what a select few countries have done to promote gender justice and women's rights as provided for by the various international instruments that they are parties to.

a) Ghana

The Ghana Intestate Succession Law of 1985 has a reputation that precedes it. It is hailed as the most progressive inheritance and succession law on the continent. It is for certain the most progressive in West Africa. The reason for its fame is that it directly challenges the customary tenets of inheritance which militate against women's rights as they exclude them from inheritance. The drafters of the law have acknowledged the changing times and lifestyles and seek to develop customary law accordingly. For example, women have been playing a more significant role in the household economy because of the advancement in education and professional qualifications; they therefore deserve to receive a share in the inheritance they help to build.

The Act provides that a surviving spouse and children inherit the house and household chattels (objects in regular use in the household).⁸⁶ The residue of the estate then passes to the spouse, children, parents and other customary heirs in specified fractions.⁸⁷ If the deceased was survived by a spouse and no children, half the estate goes to the spouse and the other half is divided between the parents and other customary heirs.⁸⁸ To prevent fragmentation of the family unit and to ensure that the beneficiaries receive an economically viable portion, small estates devolve upon the surviving spouse and children to the exclusion of other relatives. The Act further criminalises the

⁸⁵ African [Banjul] Charter on Human and People's Rights.

⁸⁶ Sections 3 and 4 of the Intestate Succession Law of 1985.

⁸⁷ In terms of Section 5, the spouse receives 3/16; the children receive 9/16; the parents receive 2/16 and the rest of the customary heirs receive 2/16 of the estate.

⁸⁸ Sections 6, 7 and 8 deal with situations where the deceased is not survived by a spouse or by a spouse and children.

ejection of a widow and children from a home without a court order.⁸⁹

The effect of this watertight legislation is that it protects the spouse's right to inherit from her deceased husband, something not commonplace in customary law of succession. This guaranteed inheritance furthers socio-economic women's rights that were previously not recognised because of the patriarchal nature of customary law of succession. Beyond advancing women's rights to inheritance and property, the Act also protects the best interests of the child. In protecting and guaranteeing the child (ren)'s right to inheritance Ghana keeps in line with the spirit of the Banjul Charter (which Ghana ratified) of promoting and protecting human and people's rights.

b) Zambia

As a member state of the African Union and having ratified the Banjul Charter, Zambia has also been involved in the fight to recognise, advance and protect human and people's rights as intended by the charter. A piece of legislation of note in the aim to achieve the goals of the Banjul Charter is the Intestate Succession Act 5 of 1989. The Act seeks to provide better protection for women's rights to inheritance and property. In terms of the Act, women are provided with a share in the joint estate, so as to safeguard their economic interests.

Where a man dies intestate, the children are entitled to 50% of the estate, the spouse is entitled to 20%, parents of the deceased are entitled to 20% and the rest of the relatives are entitled to 10% of the estate. In a bid to further protect the economic interests of women where more than one marriage exists, a 1996 amendment to the Act was made.⁹⁰ In terms of the amendment, a woman's share of 20% will be divided equally with any other woman who can prove a marital relationship with the deceased. The Act in specifying specific shares that are applicable when it comes to the distribution of the estate advances the rights of women in ownership of property and in inheritance. The provision of an equal distribution of the share of one spouse promotes the right to equality and non discrimination as everyone has an equal right in the inheritance of the deceased. The Act also protects the rights of children in safeguarding their property interests by stipulating a bare minimum of what the children should get in terms of distribution of the deceased's estate.

c) Zimbabwe

Zimbabwe, which is a member of the African Union and has also ratified the Banjul Charter owes its allegiance to the fight for democratisation and the promotion and protection of human and people's rights as charged by the Charter. In the efforts to realise the

aims and objectives of the Charter, the Administration of Estates Amendment Act 6 of 1997 has played a major role. The Act seeks to protect the property and inheritance rights of spouses of customary marriages and the children thereof, where the deceased dies intestate. For purposes of fair and equitable distribution of the deceased's estate upon the reporting of death, the Master summons the deceased's family and appoints an executor to draw up a distribution plan. Where the executor and the Master draw up a distribution plan, cognisance must be taken of the following rules pertaining to intestate succession:

- (a) If the deceased is survived by two or more spouses and one or more children, 1/3 of the estate will devolve to the spouses and 2/3 of the estate will devolve to the child (ren).⁹¹
- (b) If the deceased is survived by one spouse and one or more children, the wife will get ownership in or usufruct over the house and household goods and a share in the residue and the children will divide the residue in equal shares.⁹²
- (c) If the deceased is survived by a spouse but no children, the spouse will get ownership of the house or a usufruct and ½ of the residue. The other ½ is to be shared between the parents and the siblings of the deceased.

The provisions of the Act are very significant in the advancement of women's rights. They seek to protect the spouse's economic interest by guaranteeing a specific portion of inheritance. This may be seen as developing the customary law of inheritance as women were sidelined and excluded from inheriting. The provisions in the Act also promote the rights of children as their right to inheritance is also safeguarded through the specific shares that each group of people is to get. It could also be argued that the provisions of the Act also promote equity, in as much as the portions provided for are not equal; there is a guarantee however that everyone will get a portion. This is contrary to the traditional customary law of inheritance where women's and other rights were bedevilled by the grabbing of inheritance without a system.

d) *Chawanda v Zimnat Insurance Co. Ltd 1990 (1) SA 1019 (ZH)*

The decision in *Chawanda* was a landmark decision with regards to the recognition of customary marriages and the protection of women's rights who are spouses in customary marriages. The case involved a woman suing an insurance company (Zimnat Insurance) for compensation for the loss of support because of the death of her husband who had been killed by a driver

⁸⁹ Section 16 of the Intestate Succession Amendment Law of 1991.

⁹⁰ The Intestate Succession Bill of 1996 (21 February 1996).

⁹¹ Section 68F (2) (b) of the Administration of Estates Amendment Act 6 of 1997.

⁹² The share is to be determined by the Deceased Estates Succession Act.

insured by the defendant. The woman had been living with the deceased in an unregistered customary union and the question was whether this constituted a valid marriage in which the spouse would have a claim for the wrongful causing of death of her husband.

It was held that a woman living with a man in an unregistered customary union has the right to compensation for the loss of support if the man was unlawfully killed. A customary marriage is a valid marriage and all rights and obligations of a marriage ensue. The woman's right to compensation was therefore protected as she was deemed to be a lawful spouse. The decision echoed the sentiments of *Kambule v The Master*⁹³ where it was decided that the failure to register a customary marriage does not invalidate it. The declaration made in the decision that the marriage was a valid marriage regardless of the non-registration was a major stride in the advancement of women's rights as the socio-economic right to compensation for the wrongful killing of one's husband was protected. The case is also of import with regards to the recognition of customary law. The court declared that a marriage at customary law is a valid marriage; this goes to prove the recognition of customary law by making reference to its existence and its importance. The case therefore not only advances and protects the rights of women but also preserves the customary law.

XII. CONCLUSION

It is evident from the above consulted pieces of legislation and case law that the fight to promote and protect women's rights is not peculiar to South Africa; it is an ongoing global fight that is being championed by a lot of other countries as well. It is also evident that in the efforts to realise women's rights, there is a constant clash with customary law and certain traditions that pose as stumbling blocks to the development and recognition of women's rights. However the clash is not irreparable as there has been proof of development of the customary law in the various African countries to strike a balance between customary law and gender justice. It is therefore possible to preserve customary law and champion women and human rights at the same time.

XIII. CONCLUDING REMARKS

Each African country has the task of recognising, advancing and protecting women's rights, which they attempt to do through the Bills of Rights in their respective Constitutions. South Africa is no different from any of the other African and non-African countries that are involved in the global movement of realising and protecting women rights. South Africa's Constitution has

been hailed as one of the most progressive, if not the most progressive in Africa, boasting a Bill of Rights that preaches the principles of equality, dignity, non-discrimination, and provides for an open and democratic society. However, in the effort to realise such rights and freedoms, there are always stumbling blocks, and sometimes barriers.

The task of this research has been to evaluate whether the recognition of customary law and the practice of customary law provides a hindrance to the development of women's rights. The findings of the research are that customary law is not a hindrance to the development of women's rights in South Africa.

a) *Constitutional Basis of Customary Law*

Customary law is given a Constitutional basis through the various sections of the Constitution that seek to recognise and protect customary law. Section 15 of the Constitution provides for the freedom of religion, belief and opinion, encouraging the right to practice whatever custom one deems fit. Sections 30 and 31 of the Constitution provide for the right to language and culture and the right to belong to cultural, religious, and linguistic communities. Section 39 (2) provides for the developing of customary law, paying cognisance to its existence and recognition. Chapter 12 of the Constitution provides for traditional leaders, leaders of customary societies.

The same Constitution that provides for the rights to equality, dignity and non-discrimination, advocating for the advancement of women's rights is the one that provides for the recognition of customary law and its importance in an open and democratic South Africa. If customary law were a hindrance to the development of women's rights, the Constitution, being the supreme law would declare it unconstitutional and invalidate it. Yet, it is the aim of the Constitution to preserve customary law and promote more customary societies. As long as customary law does not contravene the fundamental principles that underlie the Constitution, it will not be a hindrance to the development of customary law.

b) *Legislative Recognition*

Not only is customary law recognised and protected by the Constitution, legislation has also been enacted to guarantee and protect customary law. The most notable piece of legislation is the Recognition of Customary Marriages Act. The Act seeks to recognise all marriages that were concluded and are concluded according to customary law as valid marriages and afford them equal standing with civil marriages and in so doing preserve the traditions and practices provided for by customary law.

Another piece of legislation that seeks to preserve customary law is the Traditional Leadership and Governance Framework Act. The Act's main purpose is to provide for the governance of traditional

⁹³ *Kambule v The Master of the High Court and Others* (85) [2007] ZAEHC 2.

and cultural communities in accordance with customary law. My contention is that if customary law were a threat to the development of women's rights, legislature would not sit and promulgate legislation that seeks to advance customary law and preserve the different customary traditions. I therefore submit that customary law is not a hindrance to women's rights in South Africa.

c) *Judicial Precedent*

Quite a number of cases have been decided where the bone of contention was whether customary law was an impediment to the development of women's rights. *Alexkor v Richtersveld Community* for example provides that customary law must be recognised as an integral part of South African law, as it is a body of law by which millions of South Africans regulate their lives and must be treated accordingly. In the case of *Thembisile and Another v Thembisile and Another*, a customary union (union concluded in terms of customary law) was recognised as a valid union, also being protected by Section 15 of the Constitution which provides for freedom of conscience, religion, thought and belief.

The fact that decisions have been made and continue to be made based on customary law is a clear indication that customary law is living law that is duly recognised in South Africa. It also points out to the fact that customary law is consistent with the values entrenched in the Constitution, otherwise it would have been abrogated. The recognition of customary law by the Constitution, by legislation and by judicial precedent is all evidence of the fact that it forms an integral part of the South African legal regime. For any law to qualify for application in the South African system it has to pass a series of tests, in particular it has to be consistent with the core values enshrined in the Constitution. Customary law has passed all those tests and is applicable in South Africa; therefore it cannot be a hindrance to women's rights.

Some may argue that the Constitutional Court in cases such as *Bhe* and *Shilubana* found some customary law practices to be unconstitutional in that they were inconsistent with the basic principles of the Constitution such as equality and dignity. The argument would go further to state that since these practices were inconsistent with the Constitution, they were a hindrance to women's rights. The rebuttal to such an argument would be that one practice does not make law; customary law as a system of law is a collection of numerous traditions and practices. The fact that one tradition has contravened certain principles does not mean that customary law as a system has failed. As evidenced in *Bhe*, the practices or traditions that are inconsistent with the Constitution will be severed, so as to make sure that the customary law that is accepted and practised is in line with the Constitution and

therefore does not cause any hindrance to the development of women's or any other rights.

It is my humble submission in summation that customary law as a system does not pose a threat to the realisation, advancement or protection of women's rights. It is as a system subject to the supreme law, which means it must be consistent with the values of equality, human dignity and non-discrimination. In being subordinate to the Constitution, it is submitted that if any practice has become archaic or threatens the realisation of the rights guaranteed in the Constitution and gender justice, such custom or practice is susceptible to severance or at least development to align it with the Constitution.

Having considered the above argument, it is therefore reasonable to conclude that customary law is not a hindrance to women's rights in democratic South Africa. I rest my case.

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