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**Discrimination against Women under Customary Law in South Africa  
with Reference to Inheritance and Succession**

**By**

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**A Mini-Dissertation Submitted in Partial Fulfilment for the Degree of  
Masters of Arts (Human Rights), Faculty of Law, University of Fort Hare,  
South Africa**

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**January 2012**

## DECLARATION

I, Siyabulela Welcome Mashalaba, declare that this thesis contains no other person's work which has been used without due acknowledgement in the main text of the thesis. This thesis has not been submitted for the award of any degree of diploma in any other tertiary institution.

Signed.....

Date.....

Supervisor: Prof. NS Rembe

Signature.....

## **ABSTRACT**

In South Africa, it is evident that women are uniformed of their essential human rights, especially their inheritance and succession rights, including protection of such rights. Human rights are international norms that protect individuals everywhere from the states' political, legal and social abuse. Human rights are entitlements which human beings have in order to enhance their human condition. They are the fundamental entitlements or minimum standards to be met for individual so that they live with dignity.

This study focused on discrimination of women under customary law in South Africa with reference to inheritance and succession. The study validated the findings of other researchers on the impact of cultural practices on women's rights to inheritance and succession. In addition the findings revealed that efforts to eliminate traditional practices, should foremost come from men and from communities that hold such destructive attitudes towards women. The outcomes and recommendations of this study would assist the government and other institutions to adopt effective measures to empower women and especially educate them so that they can assert and defend their human rights.

## **DEDICATION**

I dedicate this work to my late grandparents, Nontethelelo Lillian and Colbert Mnconywa Mashalaba. I promise to keep and cherish your lovely thoughts.

## ACKNOWLEDGEMENTS

God, the Almighty the creator, I hail to Thee...

*Ningependa kutoa shukrani nyingi kwa Profesa N.S REMBE kwa uongozi na uvumilivu wake ambao umenipa mwanga na kuniwezesha kuwa a maendeleo mazuri hata wakati nimekuwa karibu nikate tamaa.*

### ***English Translation***

I would like to express my gratitude to Professor N.S Rembe for encouraging and giving me direction when I almost lost hope.

To my cousin sister Nombulelo, and my family.

Special thanks also go to Noluvo Nyathi and the Ferim Family; you are amazing.

## LIST OF ABBREVIATIONS

UN	United Nations
GA	General Assembly
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
PAIA	Promotion of Access to Information Act
BAA	Black Administration Act
UDHR	Universal Declaration of Human Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
HRC	Human Rights Committee
OAU	Organizations of African Union
AU	African Union
AHRAJ	Africa Human Rights Access to Justice
ILO	International Labour Organization

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*Bato Star Fishing (Pty) Ltd v Minister of Environment and Others* 2004 7 BCLR 687 (CC).

*Bhe & Others v Magistrate Khayelitsha & Others* 2005 (1) SA 580 (CC).

*Brink v Kitshoff NO* 1996 (4) SA 197 (CC).

*Daniels v Campbell NO and others* 2004 (5) SA 331 (CC).

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

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

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*President of the RSA v Hugo* 1997 (4) SA 1 (CC).

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*Shibi v Sithole*, Case No 7292/01, 19 Nov, 2003.

*Shilubana and Others v Nwamitwa* 2008 (9) BCLR (CC).

*South African Human Rights Commission v President Republic of South Africa* 2005 (1) BCLR 1 (CC).

*The First National Bank v Land and Agricultural Bank of South Africa* 2000 (3) SA 626 (CC).

*The President of the Republic of South Africa v Modderklip Boedery* 2005 (5) SA 3 (CC).

*Van Breda v Jacob* 1921 AD 330.

*Zondi v The President of the Republic of South Africa* 2000 (2) SA 49 (N).

## List of Statutes

### International Instruments

Convention on the Elimination of All Forms of Discrimination Against Women, adopted on the 18<sup>th</sup> December 1979. RES.34/180, UN GAOR, 34<sup>th</sup> Sess, Supp.No.46, U.N. Doc. A/34/46, 1249 U.N.T.S.13.

Convention on the Rights of the Child adopted 20 November 1989.

International Covenant on Civil and Political Rights adopted on the 16<sup>th</sup> December 1966. Res.2200A (XXI).

International Covenant on Economic Social and Cultural Rights adopted on the 16<sup>th</sup> December 1966. Res.2200A (XXI).

The International Convention on the Suppression and Punishment of the Crime of *Apartheid*. Res. 3068 (XXVIII), 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1974), 1015 U.N.T.S. 243.

United Nations Charter, adopted in June 26, 1945, 59 Stat. 1931, T.S. 993, 3 Bevans 1153, entered into force Oct. 24, 1945.

Universal Declaration of Human Rights A/Res217A (III) adopted on the 10 December 1948.

### Regional Instruments

African Charter on Human and Peoples' Rights, June 27, 1981, O.A.U. Doc.CAB/LEG/67/3 rev.5, 21.

African Charter on Human and Peoples', (1982) entered into force Oct. 21, 1986.

African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999.

Convention on the Rights of the Child. Res 44/25, annex, 44 U.N. GAOR Supp (NO. 49).

International Convention on the Elimination of All Forms of Racial Discrimination Adopted in 21 December 1965.

Protocol on the Rights of Women in Africa Resolution AHG/Res.240 (XXXI) the recommendation of the African Commission on Human and Peoples' Rights to elaborate a Protocol on the Rights of Women in Africa in June 1995.

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2<sup>nd</sup> Ordinary Session, Assembly of the Union, adopted July 11, 2003.

### **South African Acts and other legislations**

Black Administration Act 38 of 1927.

Government Notice R200 of 1987

Government White Paper on South African Land Policy of the Department of Land Affairs of 1997.

Intestate Succession Act 81 of 1987.

Promotion of Access to Information Act 2 of 2000.

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

South African Constitution of 1996.

Transkei Land Amendment Act No 4 of 1968.

Wills Act No.7 of 1953.

# CHAPTER ONE

## THE GENERAL OUTLINE OF THE STUDY

### 1.1 Background of the study

South Africa has a long and disastrous history of colonial conquest, racial domination, social injustice and gender discrimination. One of the major fatalities was human rights. Before the advent of democracy, many people's human rights were violated, especially the rights of women among the black communities of South Africa. The apartheid era played a vital role in condoning discrimination and division amongst the people of South Africa.<sup>1</sup> Women married under customary law were subjected to all kinds of human rights violations and degrading practices that discriminated against them.

Black communities of South Africa were exposed to indigenous and cultural practices as compared to international norms. Bennett<sup>2</sup> states that customary law is a legal system that has existed from time immemorial, which manifests in the day to day cultural practices, rituals and traditions of the people. In the case of *Van Breda v Jacobs*,<sup>3</sup> it was held that, for a custom to qualify as law, there are certain requirements that need to be considered, namely: it must be immemorial; it must be reasonable; it must have continued without exception since time immemorial; and its content and meaning must be certain and clear.

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<sup>1</sup> Women's Rights to Land and other Natural Resources, Available at [www.fao.org/docrep/005/Y4311E/y4311e04.htm](http://www.fao.org/docrep/005/Y4311E/y4311e04.htm).

<sup>2</sup> TW Bennett, *Human Rights and African Customary Law under the South African Constitution*, Juta and Company Ltd, 1995, 63.

<sup>3</sup> 1921 AD 330.

Therefore, the exercise of women's rights was affected by cultural attitudes and perceptions, often internalized by women themselves.<sup>4</sup> Black communities in South Africa have not yet been exposed to international laws that protect human rights. Customarily, there were no precautions taken against discrimination, especially against women. Bekker<sup>5</sup> states that culture is an important component of human identity and may change over time. However, in various instances, the cultural practices did not weigh the competing rights and grounds of discrimination in these customs.

According to Bennett<sup>6</sup>, customary law rules were grouped in the same manner as common law ones in concepts such as marriage, succession and property that cause discrimination against women. After democracy, discrimination against women was an issue of focus in the landmark case of *Bhe and Others v Magistrate Khayelitsha & Others* (hereinafter referred to as the *Bhe* case)<sup>7</sup> where succession along the male line was challenged. The Constitutional Court held that the rule of primogeniture was inconsistent with the Constitution, on the grounds that it was discriminatory against women and extramarital children.<sup>8</sup>

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<sup>4</sup> Gender, available at, <http://www.fao.org/DOCREP/005/Y3872E/y3872e0a.htm>.

<sup>5</sup> JC Bekker and JJJ Coetze, *Seymour's Customary Law in Southern Africa*, (1981) Sixth Edition, Cape Town, Juta & Co Ltd,273.

<sup>6</sup> *Op.cit*, note 2.

<sup>7</sup> 2005 1 SA 580 (CC).

<sup>8</sup> *Mthembu v Letsela and Another* 1998 (2) SA 675 (CC), this case dealt with the issue of inheritance and it was held that its practices were discriminatory in paragraph 4(2) it was stated that regulation 2 of the Regulations for the Administration and Distribution of the Estate of Deceased Blacks, made in terms of section 23 (10) of the Act promulgated under the

It is believed that African customs were distorted by apartheid and violated women's right to dignity<sup>9</sup> and equality.<sup>10</sup> Van Niekerk,<sup>11</sup> commented on the different interpretations of the types of laws co-existing in the country, which could be applied by the state in conformity with the values of women. The sustained bearing of these customary laws in society indicates the existence of legal dualism in many African countries.

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Government Notice R200 of 6 February 1987, (the Regulations), to be invalid on ground of being inconsistent with the Constitution of the Republic of South Africa Act of 1993 (Interim Constitution), as it was later remedied in *Bhe* case.

<sup>9</sup> In *President of the RSA v Hugo* 1997 (4) SA 1 (CC), the court held that "dignity is a core value and purpose of the right, whilst retaining the idea of solving disadvantage within the overall assessment of unfair discrimination. In paragraph 41 it was stated that "the prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups". It was further stated that "the achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked".

<sup>10</sup> In *Pillay v Kwazulu-Natal MEC of Education* 2006 (10) BCLR 1237 (N), it was held that in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (hereinafter referred to as Equality Act), a school's practice of prohibiting a learner from wearing a nose stud prevented her or her community from enjoying their culture and practising their religion. In paragraph 39, it is stated that "the Equality Act is clearly the legislation contemplated in Section 9 (4) and gives further content to the prohibition of unfair discrimination". It was held that "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 eliminate unfair discrimination; to prevent hate speech; and to provide for matters connected therewith". Section 9(4) of the Constitution reads as follows: "No person may be subjected to unfair discrimination direct or indirect against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination". It is further stated that "Section 6 of Equality Act reiterates the Constitution's prohibition of unfair discrimination by both the State and private parties on the same ground of course religion and culture". Section 6 of the Equality Act reads: "Neither the State nor any person may unfairly discriminate against any person". The "prohibited grounds" on which discrimination is barred, are defined in section 1 which repeats the list in Section 9(3) of the Constitution.

<sup>11</sup> GJ Van Niekerk "*Legal Pluralism*" in JC Bekker, JMT Labuschagne and LP Vorster (eds) *Introduction to Legal Pluralism Part 1. Customary Law* (2005) 3 -18.

This study focuses on the rights of women in a democratic South Africa and examines how such rights have been undermined by customs, traditions, religion and patriarchal principles that persist in parts of the African continent. Various scholars have researched customary law rules that violate women, but there still are unclosed gaps. Hence, the researcher seeks to close those gaps by investigating customary law rules which are discriminatory to women in South Africa, when dealing with succession and inheritance.

## **1.2 Statement of the problem**

It is believed that customary practices played, and are still playing an important role in the lives of African people. However, some of these practices can no longer withstand constitutional scrutiny. South African customary law is a body of law which regulates the lives of many South Africans, with inheritance and succession forming part of customary law rules. In other words, South African women are vulnerable to customary law in issues relating to succession and inheritance which cause discrimination.

As such, this study seeks to close the gap caused by customary law rules which discriminate women in South Africa with regard to succession and inheritance. This gap is caused by the power that men have over women when they make decisions based on gender, sex and birth. Last but not least, men take *lobola* as a token that allows them to

do as they please with women. While the main aim of *lobola* is to unite two families as one.<sup>12</sup>

### **1.3 The purpose and the objectives of the study**

The researcher seeks to reveal the current effects of the co-existence of customary law and the evolving law on women's rights particularly in South Africa. Customary law is generally known for not respecting such rights. The study explores how customary law principles and traditional practices can operate without being discriminatory against women in South Africa. This was done with the aim of giving recognition to the enjoyment of women's rights. The study exposes the inequalities that exist in the legal system of South Africa with regard to the right of inheritance and succession of women, and further assesses whether customary norms are unconstitutional and violate women's rights.

The study will therefore, close the gap between customary law and the current legal system that protects women in South Africa. It will examine whether women in South Africa are aware of their human rights. In addition, it will identify the factors that influence discrimination against women's rights of inheritance and succession in South Africa. Further, the study will assess the extent to which culture impacts on discrimination against women in terms of inheritance and succession in South Africa.

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<sup>12</sup> South African traditional marriage customs: Lobola and polygamy, available at, [www.southafricaweb.co.za/.../south-african-traditional-marriage-cust...](http://www.southafricaweb.co.za/.../south-african-traditional-marriage-cust...)

#### **1.4 Research questions**

1. Does customary law in South Africa influence discrimination against women with regard to inheritance and succession?
2. To what extent do cultural practices discriminate against women with regard to inheritance and succession?
3. Are South African women aware of their human rights?
4. Are legislative policies of South Africa effectively protecting women's rights against discrimination with regard to inheritance and succession?
5. What can be done to protect women against discrimination with regard to inheritance and succession?

#### **1.5 Assumption of the study**

This study assumes that the customary laws of inheritance and succession are discriminatory in nature with regard to women and children. It is further assumed that regional and national laws are discriminatory against women with regard to inheritance and succession which are linked to culture among the black communities. It is assumed that international and regional conventions and other domestic legislations that protect human rights are not easily understood by the people, particularly in rural areas.

## **1.6 The significance of the study**

The significance of the study is to gain an understanding of discrimination against women in terms of inheritance and succession. This study will highlight the significance and impact of customary law of inheritance and law of succession prior to, and after, the introduction of the Constitution. This study will create awareness among women of their rights to equality and non-discrimination. It will give a platform to the black communities to fight against discrimination in their communities. It will enable policy makers and practitioners to enforce effectively policies and strategies that will assist in ending all forms of discrimination against women.

## **1.7 Delimitation of the Study**

This study focuses on discrimination against women with regard to inheritance and succession in South Africa. It examines the rights of women with regard to inheritance and succession in the rural and urban areas of South Africa.

## **1.8 Definition of concepts**

### ***1.8.1 Law of Succession***

The law of succession forms part of Private law. It prescribes what becomes of a person's estate after death, who the beneficiaries are and what they will inherit. It also

determines the different rights and duties that persons, for example, beneficiaries may have in a deceased's estate.<sup>13</sup>

### **1.8.2 Discrimination**

Discrimination means any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life.<sup>14</sup>

### **1.8.3 Male primogeniture**

Male primogeniture is the right by law or custom of the first born male to inherit the entire estate. An estate includes things such as money, land, and homes being passed down to the eldest son of a family after the death of the parent. The term male primogeniture excludes females.

It is believed that the first born son inherits the entire father's wealth, estate, title or office. The heir would be responsible for any further passing of the inheritance to his siblings. In the absence of children, inheritance passes on to the collateral relatives in

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<sup>13</sup> Juanita Jamneck (Ed), Christa Rautenbach (ED), Mohammed Paleker, Anton van Der Linde, Michael Wood-Bodley, *The Law of Succession in South Africa*, Oxford University Press Southern Africa (Pty) Ltd, Cape Town, 2009, 2.

<sup>14</sup> What is discrimination? available at <http://www.humanrightscommission.vic.gov.au/index>. (Accessed in 12 August 2011).

order of seniority of the males of collateral lines at the expense of the available women. Although presently this tradition is largely out of practice, it has survived in many parts of the world for centuries.<sup>15</sup>

#### **1.8.4 Family**

The family is the basic form of kinship grouping in a community consisting of a husband, a wife and their children either own or adopted.<sup>16</sup>

#### **1.8.5 Inheritance**

Inheritance is the portion of the deceased estate taken by an heir.<sup>17</sup>

#### **1.8.6 Heir**

An heir is a person who is by law entitled to inherit the estate of someone who fails to make a valid last will and testament.<sup>18</sup>

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<sup>15</sup> What is Primogeniture? available at, <http://www.wisegeek.com/what-is-primogeniture.htm>. Accessed on 01 Mar 2011).

<sup>16</sup> TW Bennett, *A Sourcebook of African Customary Law for Southern Africa*, 1991, First Edition, Juta & Co Ltd, 149.

<sup>17</sup> HJ Erasmus & MJ de Waal, *The South African Law of Succession*, Butterworth, Durban 1989, 4.

<sup>18</sup> Wills- <http://www.wills.about.com/od/termsbeginningwithh/g/heiratlaw.htm>.

### **1.8.7 Estate**

All the property that a person owns is part of an estate. An estate can include clothes, a house, land, cash, cars, stocks and other items owned by a person. After a person dies his or her estate must be distributed.

## **1.9 Methodology**

To cover this study, a qualitative research method will be used. Since it is a desktop study based on comparing and describing findings, a qualitative research method is suitable. This study will focus more on South African black women who seem to be vulnerable to cultural practices.

### **1.9.1 Data collection**

The data presented in the study focuses first, on the period of apartheid, when common law was supportive of customary law and second, the period after the new Constitution was introduced. The researcher used the information collected from three types of sources which are primary and secondary sources and internet sources dealing with succession and inheritance as they apply to women. The primary sources consisted of, *inter alia*, legislation and the relevant constitutions of various countries as well as case law covering women's rights issues with regard to inheritance and succession.

Secondly, this study used secondary sources which included literature on customary law, such as books and articles published in various law journals. Thirdly, this study used the World Wide Web, which is a huge repository of information on trends obtainable globally. The comparative nature of the study demands that an avenue for resource material of this nature cannot be ignored.

### **1.9.2 Data analysis**

The researcher used the qualitative research method to analyse the data. The research compares the information methodologies of this study, thus bringing relevant insight into the dynamics of human rights and African cultures and traditions. The study further compared International, Regional and South African legislations that protect women from discrimination in inheritance and succession.

### **1.10 Ethical Considerations**

This is a review of already published material. Therefore, the reviewer needs no ethical permission to conduct this study. Given the extensive use of the literature, a potential ethical problem that may arise will be copyright issues. To prevent this, the reviewer will only quote selectively from references and will acknowledge all references used. This will prevent plagiarism, which is prohibited by the research policy of the University of Fort Hare.

## **1.11 Chapter outline**

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

The first Chapter is an introduction to the study. It set out the background of the study, the statement of the problem and rationale of the study, the methodology pursued and ethical considerations.

### **Chapter Two: Literature Review of the Legal Position of Women under International, Regional and National Human Rights instruments**

This Chapter deals with the human rights instruments that have an impact on the legal position of women with regards to inheritance and succession. It assesses the constitutional provisions that protect the rights of women in South Africa.

### **Chapter Three: Historical development of the Customary Law of succession in South African Law.**

This Chapter deals with the historical development of the customary law of succession and inheritance in South African law.

### **Chapter Four: The current legal position of women in South Africa**

This Chapter deals with legal principles contained in statutes, the Constitution and legislation that protects women against discrimination with respect to the right to succession and inheritance.

## **Chapter Five: Recommendations and Conclusion**

This Chapter deals with the conclusion and recommendations.

## CHAPTER TWO

### LITERATURE REVIEW OF THE LEGAL POSITION OF WOMEN UNDER INTERNATIONAL, REGIONAL AND NATIONAL HUMAN RIGHTS INSTRUMENTS

#### 2.1 Introduction

The preceding Chapter dealt with the background and provided an introduction to discrimination against women with regard to inheritance and succession under customary law in South Africa. It highlighted the discrimination against women caused by customary laws in black communities in South Africa. This Chapter deals with a literature review of the legal position of women under international, regional and national human rights instruments.

It is stated that the protection of women's rights against all forms of discrimination is entrenched in the international principle of equality and equal protection of human rights.<sup>19</sup> These principles are articulated in international and national instruments which protect human rights. The Universal Declaration of Human Rights (hereinafter referred to as UDHR)<sup>20</sup> has inspired the adoption of two covenants which are the International

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<sup>19</sup> Women and Children's Rights, available at [http://www.wacolnigeria.org/women\\_and\\_children\\_right.doc](http://www.wacolnigeria.org/women_and_children_right.doc).

<sup>20</sup> A/Res 217A (III) adopted on the 10 December 1948.

Covenant on Economic, Social and Cultural Rights<sup>21</sup> and the International Covenant on Civil and Political Rights (hereinafter referred to as ICCPR).<sup>22</sup>

These two covenants together with the UDHR are referred to as the International Bill of Rights. They are binding on member states that ratified them. The International Bill of Rights comprises a wide range of human rights and freedoms related to all spheres of life: political, economic, social, cultural, civil, and personal.<sup>23</sup> They include, *inter alia*,

- (1) The right to marry and found a family on the basis of equality;
- (2) The right not to be discriminated against; and
- (3) The right to property and inheritance.

The International Bill of Rights and International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter referred to as CERD)<sup>24</sup> does not only look at the rights of women but also recognises and protects the rights of every individual. Furthermore, the above instrument emphasises the principles of non-discrimination and equality. The focal point of this Chapter is to outline information on human rights entrenched in international, regional and national instruments comprising the international legal framework that prohibits discrimination against women.

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<sup>21</sup> Adopted in 1966. It was further confirmed in *Fraser v Children's Court, Pretoria North and Others* 1997(2) 261 at 272A.

<sup>22</sup> Adopted in 1966.

<sup>23</sup> Fact Sheet No.16 (Rev.1), The Committee on Economic, Social and Cultural Rights, available at <http://www.ohchr.org/Documents/Publications/FactSheet16rev.1en.pdf>.

<sup>24</sup> Adopted in 21 December 1965.

The key international instruments include the Universal Declaration of Human Rights,<sup>25</sup> the International Convention on the Elimination of All Forms of Racial Discrimination,<sup>26</sup> the two international Covenants of 1966 and more importantly, the Convention on the Elimination of All Forms of Discrimination Against Women.<sup>27</sup>

### **2.1.1 Universal Declaration of Human Rights**

The UDHR is the first international instrument to articulate the rights to be accorded to every individual. It states that “All human beings are born free and equal in dignity and rights”.<sup>28</sup> The General Assembly unanimously adopted the Declaration as an international pledge to human rights. UDHR recognises ‘the inherent dignity and equality of all members of the human family as the foundation of freedom, justice and peace in the world’.<sup>29</sup>

Article 2 of the UDHR provides for the enjoyment of the rights contained therein without distinction of any kind, including sex or other status. The UDHR sets out a common standard which gives rights of entitlement to all persons. It provides that everyone has the right to property and it gives full recognition to property rights as human rights.<sup>30</sup>

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<sup>25</sup> *Op.cit*, note 20.

<sup>26</sup> *Op.cit*, note 24.

<sup>27</sup> Adopted in 1979.

<sup>28</sup> Article 1 of the UDHR.

<sup>29</sup> Preamble of the UDHR, paragraph 1.

<sup>30</sup> Article 17.

Property rights are understood to be acquired by an act such as purchase or transmission through gift or inheritance.

Property rights are viewed as special rights based distributive justice,<sup>31</sup> where everyone has the right to own property and to have ones property respected. This means that property rights are recognised as human rights and therefore all persons who own property are guaranteed the enjoyment of their property and freedom from discrimination on the basis of gender, race, and social status. It is understood that personal ownership of property creates a sense of responsibility and dignity. This means that everyone should have access to property.

### ***2.1.2 International Convention on the Elimination of All Forms of Racial Discrimination<sup>32</sup>***

Article 1 of CERD refers to the term “racial discrimination” as any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. CERD has a number of factors that need to be taken into consideration with regard to women’s rights of inheritance.

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<sup>31</sup> Justice in a Free Society, available at [www.quebecoislibre.org/younkings27.htm](http://www.quebecoislibre.org/younkings27.htm).

<sup>32</sup> *Op.cit*, note 24.

Article 5 (c) (v) and (vi) of CERD obliges State parties to prohibit and to eliminate racial discrimination in all its forms and to guarantee the rights of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(v) The right to own property alone as well as in association with others;

(vi) The right to inherit.

This Convention therefore, prohibits discrimination in the enjoyment of rights, including property and inheritance.

### ***2.1.3 The International Convention on the Elimination of All Forms of Discrimination against women***

Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women (hereinafter referred to as CEDAW),<sup>33</sup> views discrimination as any distinction or restriction made on the basis of sex in the political, economic, social, cultural, civil or any sphere of life. CEDAW has detailed provisions which a member state has an obligation to fulfil. One of the obligations imposed on all states parties is to constantly move towards gender equality, which is a goal that no country has achieved as yet.

Article 3 of CEDAW emphasizes that State parties have to take:

“...all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise

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<sup>33</sup> *Op.cit*, note 27.

and enjoyment of human rights and fundamental freedoms on a basis of equality with men.”

These obligations are used as a yardstick that applies to all countries all the time. CEDAW stipulates that gender equality is the goal to be attained, which requires full recognition of all human rights of girls and women, and the elimination of discrimination.<sup>34</sup> In its preamble, it is admitted that extensive discrimination against women continues to exist, and that such discrimination violates the principle of equality of rights and respect for human dignity.

By ratifying CEDAW, a member State commits itself to undertake a series of measures to end discrimination against women in all forms,<sup>35</sup> including:

- The integration of the principle of equality of men and women in their legal system,
- The abolition of all discriminatory laws and the adoption of suitable laws prohibiting discrimination against women;
- The establishment of tribunals and other public institutions to ensure the efficient protection of women against discrimination; and
- The elimination of all acts of discrimination against women by

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<sup>34</sup> Salil Shetty, 'Millennium Declaration and Development Goals: Opportunities for Human Rights, SUR' - *International Journal on Human Rights*, Human Rights University Network, 2005,16.

<sup>35</sup> Ensuring equal rights for women - *The Brunei Times*, available at [www.bt.com.bn/opinion/2011/06/29/ensuring-equal-rights-women](http://www.bt.com.bn/opinion/2011/06/29/ensuring-equal-rights-women). (Accessed in 29 June 2011).

persons, and organisations.

Article 6<sup>36</sup> presents the foundation for recognizing equality between women and men. It recognises the right to consent to marriage and the right to equality in marriage thus:

“States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that: a) no marriage shall take place without the free and full consent of both parties”.

Customarily, the consent of women in terms of decision for marriage was not important. Under tradition and custom women regarded men as superior to them. This created a gap between the sexes for centuries and men took advantage of women. CEDAW tried to close this gap in the provisions that provide for the equal access of women to property and inheritance. Member states undertook to promote and protect the enjoyment of all human rights and fundamental freedoms for women.<sup>37</sup>

CEDAW guarantees women’s reproductive rights and targets culture as an influential force in shaping gender and family roles.<sup>38</sup> CEDAW affirms that human rights have to acquire, change or to retain their nationality and their children. These provisions ensure:

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<sup>36</sup> Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 2<sup>nd</sup> Ordinary, Assembly of the Union, adopted 11 July 2003.

<sup>37</sup> Gender, available at <http://www..fao.org/DOCREP/05/Y3872E/y3872e0a.htm>.

<sup>38</sup> Article 5 and 16 of CEDAW.

- Comprehensive prohibition of discrimination against women,<sup>39</sup>
- Equality before the law,<sup>40</sup>
- Promotion of the rights of women in rural areas.<sup>41</sup>

CEDAW ensures change in social and cultural behavioural patterns of women and men, and joint responsibility of women and men for the upbringing and development of their children.<sup>42</sup>

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

Article 2(2) provides that the rights enunciated in the Covenant will be exercised without discrimination of any kind in race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status. The ICESCR contains an equality provision which prohibits discrimination on a specified number of grounds in Article 2. Furthermore, Article 10 gives recognition to the right to marry and found a family.<sup>43</sup>

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<sup>39</sup> *Ibid*, Article 2.

<sup>40</sup> *Ibid*; in Article 15 to Article 16, and it is confirmed in Article 26 of the International Convention on Civil and Political Rights of 1966 where it stipulates that the prohibition of discrimination is part of human right of equality.

<sup>41</sup> *Ibid*, Article 14.

<sup>42</sup> *Ibid*, Article 5.

<sup>43</sup> Article 10 (1) of the ICESCR is similar in content to Article 16(3) of the UDHR.

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

ICCPR guarantees the right to equality and non-discrimination,<sup>44</sup> to women and men and minimum rights for children.<sup>45</sup> State parties to the Covenant agreed to guarantee that women and men benefit from all the civil and political rights in it on an equal basis. Article 2 (1) of the ICCPR provides that:

“Each State Party to the present Covenant undertakes to respect and ensure to all individuals... the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Every Member State has a duty to enact legislations to prohibit unfair discrimination so that human rights can be promoted and protected. The International Covenants enshrine the principle of non-discrimination. This means that all human beings are created equal and with equal rights.<sup>46</sup> The rights of all individuals should be protected and promoted equally, regardless of their race, sex, language, economic status, national and social origin. The ICCPR recognizes the equality between men and women.

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<sup>44</sup> *Op.cit*, note 22, Article 26.

<sup>45</sup> *Ibid*, article 24.

<sup>46</sup> The Declaration of Independence, available at, [www.ushistory.org/declaration/document/](http://www.ushistory.org/declaration/document/).

The ICCPR guarantees that the situation of women and gender should be accomplished especially property rights and inheritance. Such accomplishments should be done through the respect, promotion and protecting of the human rights of every person. Additionally, the ICCPR stipulates that all people are equal before the law, they are entitled to equal protection of the law without discrimination, and that they shall be guaranteed equal and effective protection against discrimination.<sup>47</sup>

This Covenant ensured that individuals do not feel deprived of their rights on the basis that they are inferior to others in terms of gender or sex. Contrary to these stipulations, under customary law women lacked awareness of their rights and they were not allowed to make decisions in their families.

For instance, women and their children were disowned by the heir of inheritance of their deceased father (even in legal marriages). This deprived them of their rights because decisions were made on their behalf. Member states of ICCPR have to endeavor, at all times, to promote democracy and strengthen the rule of law. One of the significant obstacles to the elimination of discrimination is that illiteracy is prevalent in South Africa. It is most unfortunate that the socio-economic structure of South Africa has made it impossible for the vast majority of women in rural areas to have access to education.

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<sup>47</sup> *Op.cit*, note 22.

The government preaches the right to education<sup>48</sup> and access to information<sup>49</sup> every day. The question is whether the government evaluates the resources it issues out to the people, and whether these resources serve the purpose for which they are meant. It is believed that for one to have access to justice one must have access to education. If there is nothing done about education then women's rights will be violated and discrimination will continue to prevail.

## **2.2 Regional human rights instruments**

### ***2.2.1 The African Charter on Human and Peoples' Rights<sup>50</sup>***

Article 2 of the African Charter on Human and Peoples' Rights prohibits discrimination on the grounds of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other states. It guarantees equality to everyone in every sphere in the community and it prohibits any form of discrimination. Nonetheless, in many parts of the African continent, women's rights to inherit land and other property are severely limited.<sup>51</sup> Customarily, women were not given the opportunity to own property, and only had the right to clean and raise children after the *lobola* had been paid.

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<sup>48</sup> Good governance practices for the protection of human rights, available at, [www.ohchr.org/documents/publications/goodgovernance.pdf](http://www.ohchr.org/documents/publications/goodgovernance.pdf).

<sup>49</sup> *Ibid.*

<sup>50</sup> Adopted on 27 June 1981.

<sup>51</sup> Africa Human Rights Access to Justice Women's Rights Programme (AHRAJ), [www.escr-net.org/usr\\_doc/rules\\_of\\_standing.doc](http://www.escr-net.org/usr_doc/rules_of_standing.doc).

### **2.2.2 The Protocol to the African Charter on Human and Peoples' Rights of Women in Africa**

The Protocol to the African Charter of Human and Peoples' Rights on the Rights of Women in Africa<sup>52</sup> contains provisions for protection against discrimination and stipulates far-reaching measures for the promotion of gender equality. Other measures target discrimination and violence against women, harmful cultural practices, as well as equal rights for political participation, property rights, right to inheritance, marriage, divorce, and the rights of women in the context of family planning and reproductive health.

The Protocol on the Rights of Women in Africa<sup>53</sup> was adopted to ensure that all state parties would undertake to implement the necessary measures including providing resources for the full and effective recognition of the rights therein. The Women's Protocol has provisions and mechanisms for monitoring the fulfilment of women's rights to property and equality.<sup>54</sup> Social and economic rights and forms of food security and the right to sustainable development are also provided for in the Protocol.<sup>55</sup>

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<sup>52</sup> *Op cit*, note 37.

<sup>53</sup> Resolution AHG/Res.240 (XXXI) the recommendation of the African Commission on Human and Peoples' Rights to elaborate a Protocol on the Rights of Women in Africa in June 1995 (hereinafter referred to as Women's Protocol).

<sup>54</sup> Economic, social and cultural rights - Wikipedia, the free encyclopedia. Available at, [www.en.wikipedia.org/wiki/Economic,\\_social\\_and\\_cultural\\_rights](http://www.en.wikipedia.org/wiki/Economic,_social_and_cultural_rights).

<sup>55</sup> Article 15 and Article 19 of the Women's Protocol .

Customarily, only men were regarded as breadwinners and the people who can sustain the family development. Women were not given a chance. To counter this, the Protocol recognises the rights of women in marriage, divorce and widowhood.<sup>56</sup> This was done because of the lack of respect for women in their families, where they are not recognised as equal in status with men. The Women's Protocol gave recognition to women's rights because, previously, women had no right to land and property.<sup>57</sup>

Article 19 and Article 15 are linked because they both deal with an adequate standard of living for all women under the Protocol. Article 19 (c) which serves as the central part of protection states that:

“Women shall have the right to fully enjoy their right to sustainable development. In this connection, the States Parties shall take all appropriate measures to promote women's access to, and control over, productive resources such as land and guarantee their right to property”.

This Article is important because it directly relates to women's access to and control over land with the right to fully enjoy the right to sustainable development. Article 15 (a) confers the rights of women to nutritious and adequate food and access to land so that they can sustain their family after the death of a husband. This was reinforced by CEDAW where it was stated that the protection of women's rights to property within the

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<sup>56</sup> Article 6, Article 7, and Article 21.

<sup>57</sup> *Op.cit*, note 53.

household and family settings are of great importance in relation to the influence of customs and traditions and the possible effects of an unequal relationship between the spouses.<sup>58</sup>

## **2.3 South African law and legislations**

### **2.3.1 The South African Constitution<sup>59</sup>**

South Africa has endorsed and ratified a number of international human rights instruments that protect women's rights against discrimination such as CEDAW, CRC,<sup>60</sup> ICCPR,<sup>61</sup> ICESCR<sup>62</sup> etc. Its norms and standards are being implemented in the national sphere, for example in the Promotion of Access to Information Act<sup>63</sup> and the Promotion of Equality and Prevention of Unfair Discrimination Act.<sup>64</sup> South Africa can also request technical assistance and support from the United Nations and its specialised agencies, such as the ILO on how best to make its national legal system conform to international norms and standards.

Although South Africa became a democratic country seventeen years ago, it still is facing challenges in promoting equality. The South African Constitution of 1996 is the

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<sup>58</sup> General Recommendations made by the Committee on the Elimination of Discrimination Against Women. Available at: <http://www.un.org/womenwatch/daw/cedaw/.../recomm.htm>.

<sup>59</sup> The South African Constitution of 1996 (hereinafter referred to as the Constitution).

<sup>60</sup> Convention on the Rights of the Child adopted 20 November 1989.

<sup>61</sup> *Op cit*, note 22.

<sup>62</sup> *Op cit*, note 21.

<sup>63</sup> Act 2 of 2000 (hereinafter referred to as PAIA).

<sup>64</sup> Act 4 of 2000 (hereinafter referred to as PEPUDA).

supreme law of the land. This Constitution was the result of a remarkably detailed and inclusive negotiation. Those negotiations were difficult but determined and they were carried out with an acute awareness of the injustices of the country's non-democratic past.

The Constitution of South Africa sets out the rights and duties of the citizens of South Africa. The Constitution defines the structure of the government of the Republic of South Africa and serves as a contract between the state and its subjects. The Constitution set out different type of rights and freedoms that are inherent to every South African. Section 1 of the Constitution reaffirms the following values that were already contained in the interim constitution:

- Universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.
- Supremacy of the Constitution and the rule of law; and
- Non-racialism and non sexism.

The Constitution promotes and protects human rights and values their importance. It sets out the way which women in a democratic country should be treated and their human dignity respected. Human rights, like human dignity,<sup>65</sup> the achievement of equality and the advancement of human rights and freedoms are rights that are

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<sup>65</sup> Section 10.

protected in the Constitution. The most important rights which need to be examined with regard to inheritance by women are equality,<sup>66</sup> and non-discrimination, freedom of expression,<sup>67</sup> property rights,<sup>68</sup> education,<sup>69</sup> access to information,<sup>70</sup> and access to the courts.<sup>71</sup>

### **2.3.2 Promotion of Access to information**

The prohibition of discrimination is part of the human right of equality; this means that if only men are given access to information such as education, then women's right to access to information is violated. Section 32 of the Constitution stipulates that '(a) everyone has the right of access to any information held by the state; (b) and any information that is held by another person and that is required for the exercise or protection of any rights'.

It is stated that the system of government in South Africa before 27 April 1994, amongst others, resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations.<sup>72</sup> PAIA is in line with the provisions of section 8 of the Constitution. If women are treated like minors and

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<sup>66</sup> Section 9.

<sup>67</sup> Section 16.

<sup>68</sup> Section 25.

<sup>69</sup> Section 29.

<sup>70</sup> Section 32.

<sup>71</sup> Section 34.

<sup>72</sup> The Preamble of PAIA.

have no access to information, then it will deprive them of their rights to access information.

The Constitution states that everyone has a right to education,<sup>73</sup> which means that if women are given the right to education they can learn and claim what is rightfully theirs. The right to access information provides a culture of transparency and accountability in public and private bodies by giving effect to the rights at hand. Secondly it actively promotes a society in which the people of South Africa have effective access to information in order to enable them to exercise and protect all their rights.

### ***2.3.3 Promotion of Equality and Prevention of Unfair Discrimination<sup>74</sup>***

In South Africa, the Promotion of Equality and Prevention of Unfair Discrimination (hereinafter referred to as PEPUDA) was developed and put into practice. As a result, it paved the way for women to be empowered and developed. This was done because there were inequalities and discrimination that remained deeply entrenched in communal structures, and customs and attitudes in societies which affected inheritance and succession by women.

The endorsement of PEPUDA brought change to individuals and communities which were deprived of human dignity. The rule of male primogeniture with regards to inheritance of property by women is inconsistent with the Constitution. The

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<sup>73</sup> In terms of Section 29 (2) (a)-(c) and (3) (a), of the Constitution.

<sup>74</sup> *Op.cit*, note 59.

Constitutional Court found that the rule is invalid to the extent that it excludes women and extra marital children<sup>75</sup> from becoming heirs of deceased's property. In the preamble of PEPUDA it is stated that South Africa also has international obligations under binding treaties and customary international law in the field of human rights which promote equality and prohibit unfair discrimination.

PEPUDA gives effect to the constitutional rights to equality. The Constitution is mandated by the provisions in the Bill of Rights to enact a supplementary national legislation such as PEPUDA.<sup>76</sup> PEPUDA is intended to fulfil the functions it was created for.<sup>77</sup> Democracy in South Africa requires the elimination of social and economic inequalities that are systemic in nature. These inequalities were created by colonialism, apartheid and patriarchy.<sup>78</sup>

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<sup>75</sup> *Op.cit*, note 37, where it was noted that on behalf of a unanimous court there can be no doubt that the guarantee of equality lies in the heart of the Constitution. As we all know that the Constitution has provisions that are against the discrimination in terms of sexism and equality.

<sup>76</sup> Section 9 (2) reads; "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 and section 32(2). These provisions are found in Section 9 (4) of the Constitution where it requires national legislation to be enacted to prevent or prohibit unfair discrimination. In section 32 (2) of the Constitution requires the enactment of national legislative to give effect to respectively, the rights of access to information. South Africa is confronted by challenges in the rural areas where women have no access to information. At times the information reach these areas but no one have the responsibility to educate others.

<sup>77</sup> The PEPUDA prohibits unfair discrimination by both state and private person, secondly it provides remedies for the victims of unfair discrimination and lastly it promotes the achievement of substantive equality.

<sup>78</sup> Republic of South Africa, Available at [www.pmg.org.za/docs/1999/appendices/E9-000118.htm](http://www.pmg.org.za/docs/1999/appendices/E9-000118.htm).

The above three manifestations brought pain and suffering to the great majority of the people, especially women. This Act was adopted because of the prevalence of discrimination in South Africa. It is stated clearly that neither the State nor any person may unfairly discriminate against any person.<sup>79</sup> In terms of this study, discrimination is the focal point, which means that this Act prohibits the distinction existing between women and men.

South Africa has international obligations under binding treaties and customary international law in the field of human rights which promote equality and prohibit unfair discrimination. No person may be unfairly discriminated against by any person on the grounds of gender, including traditional, customary or religious practice, which impairs the dignity and equality of men and women including undermining the dignity and well-being of the girl child.<sup>80</sup>

Apartheid and customary practices were the causes of this discrimination in terms of gender. Equality and non-discrimination are regarded as pillars of human rights protection in South Africa and PEPUDA was enacted to effect the provisions of the Constitution. In cases like *Bhe and Others v The Magistrate, Khayelitsha and Others*,<sup>81</sup> *Shibi v Sithole and Others*,<sup>82</sup> and *the South African Human Rights Commission and*

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<sup>79</sup> In section 6 of the PEPUDA which is the prevention and general prohibition of unfair discrimination.

<sup>80</sup> Section 8 (d) of the PEPUDA, which is Prohibition of unfair discrimination on ground of gender.

<sup>81</sup> 2005 (1) SA 580 (CC).

<sup>82</sup> 2005 (1) BCLR 1 (CC).

*Another v President of the Republic of South Africa and Another*,<sup>83</sup> it was observed by the court that its judgments did not address:

- The position of children adopted in terms of customary law;
- The protection of discarded spouses;
- The position of supporting marital unions;
- The procedure for resolving conflicts arising from intestate succession; and
- The position of the family home upon the death of any spouse.<sup>84</sup>

With the discovery of these loopholes mentioned above, the South African Law Reform Commission<sup>85</sup> had to rely on the Constitutional provisions that the recognition of customary law and the principles of equality, Section 5 and Section 25 of the PEPUA binds the state when enacting legislation to promote equality,<sup>86</sup> while Section 2 (b) (iv) gives effect to the prevention of unfair discrimination and the protection of human dignity. The Commission had made recommendations that all children, irrespective of age and sex, need to be considered as intestate heirs of the deceased.

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<sup>83</sup> Case no. 7292/01, 19 November 2003.

<sup>84</sup> The Impact of the Law of Inheritance **on** the **Family**, available at, [www.aifs.gov.au/conferences/aifs7/preece.pdf](http://www.aifs.gov.au/conferences/aifs7/preece.pdf).

<sup>85</sup> South African Law Reform Commission, (hereinafter referred to as the Commission): Project 90 Customary Law of Succession Report: April 2004, Available in [http://www.justice.gov.za/salrc/reports/r\\_prj90\\_CustomaryLawSuccession2004.pdf](http://www.justice.gov.za/salrc/reports/r_prj90_CustomaryLawSuccession2004.pdf).

<sup>86</sup> The objectives of the Act are reaffirmed by section 9 of the Constitution, which are to give effect to the purport and spirit of the Constitution. These objectives consider in particular the equal enjoyment of all rights and freedoms by every person and the promotion of equality.

### **2.3.4 Customary Marriages Act<sup>87</sup>**

Customarily, men viewed the payment of *lobolo* as the sale of women to obey every rule they confer upon women. According to the Customary Marriages Act the payment of *lobolo* is not a specific requirement for the formation of a customary marriage. However, the Act determines that a customary marriage 'must be negotiated and entered into or celebrated in accordance with customary law.'<sup>88</sup>

Section 6 of the Recognition of Customary Marriages Act determines that a wife in a customary marriage has, on the basis of equality with her husband, and subject to the matrimonial property system governing the marriage, full status and capacity, including the 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 under customary law.

## **2.4 Conclusion**

This Chapter has reviewed the literature on international, regional and South Africa human rights instruments that deal with discrimination against women in respect of their right to succession and inheritance. The international legal framework and the national measures taken by the state to protect women's rights against discrimination were also highlighted. The following chapter deals with discrimination of women with regards to inheritance and succession under customary law in South Africa in the period before and after apartheid era.

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<sup>87</sup> Act of 1998.

<sup>88</sup> *Ibid*, Section 3(1)(b).

## CHAPTER THREE

### THE HISTORICAL DEVELOPMENT OF THE CUSTOMARY LAW OF SUCCESSION IN SOUTH AFRICAN LAW

#### 3.1 Introduction

The preceding Chapter dealt with a literature review of International, Religious and South African human right instruments that protect women from discrimination in matters of inheritance and succession. This Chapter deals with discrimination against women with regard to inheritance and succession under customary law in South Africa in the period before and after apartheid era.

#### 3.2 The Historical development of the customary law of succession and inheritance in South Africa

##### 3.2.1 *The system under the colonial period*

The law of succession and inheritance prescribes legal rules that determine what happens to a person's estate after his or her death. The law of succession and inheritance comprises the legal rules and norms that determine how succession should be placed in cases where a testator fails to regulate succession upon death by way of a valid will or a *pactum successorium*<sup>89</sup> contained in antenuptial contract.<sup>90</sup> Colonialism in

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<sup>89</sup> It means an agreement of succession. A *pactum successorium* is believed to be a bilateral judicial act that operates the consequences of succession law *inter vivos*.

<sup>90</sup> *Antenuptial Contract*, [www.antenuptial-contract.co.za](http://www.antenuptial-contract.co.za).

its various forms had a considerable impact on the development of the law of inheritance and succession in South Africa.<sup>91</sup>

South Africa was largely inhabited by black communities before the advent of colonization. The indigenous people believed in customs and traditions as the law that regulated their lives. Customary law is a set of rules which are practised but are not written down. Inheritance among the indigenous people was regulated by three main aspects of customary law, namely:

- The continuation of the family lineage of the husband as the family head, along with the principle of primogeniture.<sup>92</sup>
- The concept of the family and collective rights and responsibilities within each respective family grouping.<sup>93</sup>
- The exclusion of women, daughters and children born out of wedlock.

These principles mentioned above have continued to be applied in black communities and they have regulated the law of succession and inheritance for years. Women's rights to inherit land and other property from their husband's estates were severely limited. This created a gap and differentiation in term of sex and gender which customary laws were based upon. Traditionally, a man is regarded as the head of the family.

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<sup>91</sup> Women's rights to Land and Other Natural Resources,  
[www.fao.org/docrep/005/Y4311E/y4311e04.htm](http://www.fao.org/docrep/005/Y4311E/y4311e04.htm)

<sup>92</sup> NJJ Olivier, *Indigenous Law*, Butterworths, Durban, 1995, 147.

<sup>93</sup> JC Bekker, *Seymour's Customary Law in Southern Africa*, 5<sup>th</sup> Edition, Juta, Cape Town, (1989) 273.

Bennett,<sup>94</sup> states that in Natal, the Code of Zulu law described women as perpetual minors and therefore, they are subject to their husbands' marital power. This was further confirmed by Mwambene<sup>95</sup> who states that under customary law a woman is deemed to have acquired a right through her family head. In other words, the heir that succeeds the deceased has to be a male and not a female.<sup>96</sup> Customary law was mainly concerned with the inheritance of property, which includes land, livestock, houses and all assets of the deceased.

This had the effect of undermining the rights of the vulnerable widow by making them conditional upon her residing at her late husband's homestead.<sup>97</sup> Customarily, upon the death of a man, the ownership of his property is vested in his heir, who is entitled to the sole control of such property. Bekker<sup>98</sup> states that the customary rules of intestate succession were primarily designed to perpetuate a bloodline and transmit a deceased's rights and duties to selected members of his close kin. The widows of the

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<sup>94</sup> TW Bennett, *A Sourcebook of African Customary Law for Southern Africa*, 1991, First Edition, Juta & Co Ltd, 31.

<sup>95</sup> Carmel van Niekerk and Lea Mwambene, *The Gumede judgment: Another lost opportunity to develop customary law and protect women's rights?*, *Speculum Juris*, Vol 23 No1, LexisNexis Publishers (Pty) Ltd, Morningside,(2009) 94.

<sup>96</sup> *Mthembu v Letsela and Another* 1998 (2) SA 675. In this case it was noted that the customary rule of succession excludes African women or girls from participating in the intestate succession.

<sup>97</sup> *Myuyu v Nobanjwa* 1947 NAC (C&O) 66.

<sup>98</sup> JC Bekker, *Seymour's Customary Law in Southern Africa*, 5<sup>th</sup> Edition, Juta, Cape Town, 1989, 273.

deceased are entitled to benefit from the deceased's estate subject to their residing at the deceased's kraal or at a kraal approved by the heir.<sup>99</sup>

### **3.2.2 The system under apartheid**

Customary law had never been fully recognized as a fundamental part of the South African legal system. Instead, Roman Dutch law was introduced and treated as the common law of the land.<sup>100</sup> In 1652, the Dutch came to South Africa via the Cape colony. Since then the South African legal system is sometimes referred to as Roman Dutch Law. Roman Dutch Law is understood to be a mixture of two legal systems, namely, Roman Law and Dutch Law.

The mixture of the two legal systems has influenced current South African Common Law. Rautenbach,<sup>101</sup> backs up this statement by stating that South African law comprises of a conglomeration of the so-called transplanted law made up of Roman Dutch Law and English Common Law as well as indigenous laws, otherwise referred to as customary law. In addition, Nagel<sup>102</sup> states that the South African legal system is, therefore, a mixed or a hybrid system, with Roman-Dutch Law having been influenced and amended by local customs and legislation, decisions of the courts and English law.

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<sup>99</sup> *Op.cit*, note 97.

<sup>100</sup> TW Bennett, *Customary Law in South Africa*, Juta &Co LTD. 2010, 34.

<sup>101</sup> C Rautenbach , *Electronic Journal of Comparative Law*, South African Common Law of Intestate Succession: A question of Harmonization, Integration or Abolition. Available at: <http://www.nwu.ac.za/export/site/default/.../ProfChristaRautenbachMrt2011.pdf>. (Accessed in 16 March 2011).

<sup>102</sup> CJ Nagel (ed, *Commercial Law*, Third Edition, LexisNexis, Butterworths, Durban, 2006, 5.

Customary law of the indigenous people was the only law which had an impact on their lives. The indigenous people lived their lives under the regulation of their customary law. Law is a body of rules or norms that facilitate and regulate human interaction. This means that law orders society and gives it certainty. It is stated that not all norms and regulations are legal rules.<sup>103</sup> Schoeman-Malan<sup>104</sup> noted that the law is general and not stagnant and, like English Law, must be sought in court decisions and individual statutes.

It is understood that in the Cape of Good Hope, a mixed jurisdiction came into being after the arrival of the Dutch East India Company. In the seventh century, Jan Van Riebeeck was one of the officials that established a refreshment station in the Cape. Palmer<sup>105</sup> also confirms this statement as follows:

“In the Cape Colony, a mixed jurisdiction came about after the Dutch who had transplanted the law of the seventh century Holland to the Cape of Good Hope soon after setting up a supply base there on 06<sup>th</sup> April 1652, handed over authority in 1806 to the English who began introducing elements of their own legal system.”

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<sup>103</sup> Duard Kleyn and Frans Viljoen, *Beginners Guide for Law Students*, Third Edition, Juta, Cape Town, (2002) 2.

<sup>104</sup> MC Schoeman Malan, *Recent Developments Regarding South African Common and Customary Law of succession*. Available in <[http://www.<http://www.ejcl.org/142/abs142-8.html](http://www.ejcl.org/142/abs142-8.html)>.

<sup>105</sup> VV Palmer, *Mixed Jurisdiction Worldwide: The third legal family*, Cambridge University Press, Cambridge, 2001, 83.

This means that as from 1652, an element of change was introduced in the indigenous law of South Africa. The law of South Africa was influenced by Roman Dutch Law and English Law in the Cape Colony. According to Rautenbach,<sup>106</sup> it is not a secret that colonialism had a considerable impact on the existence and development of the law of succession and inheritance in South Africa. In South Africa, the law of verification of succession and inheritance is of Roman Dutch Law origin while the implementation and interpretation of wills has been strongly influenced by English Law.

Customary law was the only law which the majority of black South African inhabitants were familiar with. Indigenous inhabitants could rule themselves according to indigenous laws in matters that concern succession, inheritance, chieftainship, marriage, etc. Those matters were attended to by *iiNkosi*<sup>107</sup> and *Izibonda*.<sup>108</sup> During that time a change occurred and a new legal system of Native Administration was established. The indigenous people were influenced and accommodated by the new rules of common law.

The law of succession and inheritance in South Africa faced challenges partly because of the importance of the promotion of gender equity. Van der Meide,<sup>109</sup> states that control of and access to property is key to social empowerment, and an African woman

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<sup>106</sup> *Op.cit*, note 101.

<sup>107</sup> *linkosi* is the Xhosa name that refers to traditional leaders.

<sup>108</sup> *Izibonda* is the Xhosa name that refers to headmen.

<sup>109</sup> Wayne van der Meide, *Gender Equality v Right to Culture*, Volume 28, (1999) South African Law Journal, University of London, School of Oriental and African Studies, International African Institute, 100.

is legally prevented from attaining this goal through the patriarchal socio-legal structures in terms of section 23(10) of the Black Administration Act.<sup>110</sup> During apartheid women's right to land was limited.<sup>111</sup> Due to the patriarchal systems in most African societies, many women were left disempowered by inheritance and succession laws.

Matters of customary law were administered by traditional leaders, with the right of appeal to the Native Appeal Courts. The Native Courts were a body of commissioners who administered a law that the indigenous people knew nothing about.<sup>112</sup> The colonialists firstly ignored customary law, then tolerated it, but eventually recognized it, though with certain conditions. The recognition of customary law was subject to the rules set for black people by the colonial administration.

These rules were influenced by the provisions of the BAA and also the Intestate Succession Act.<sup>113</sup> Section 23 of the BAA specifies that all movable property of a black person will, upon his death, devolve and be administered under black law and custom. This provision made a distinction between the property of blacks and whites, which emphasizes the element of discrimination in the legal system. It is further stated in the same section that immovable property will, in accordance with custom, devolve to a

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<sup>110</sup> Act 38 of 1927.

<sup>111</sup> RM Mqeke, *African Family and Statutory*, Development affecting the Legal Rights of Women in the New South Africa, *Speculum Juris*, Vol 18 No1, Lovedale Press, 2004, 28.

<sup>112</sup> Wikipeddia, Free Encyclopaedia (indigenous People), Available in [http:// Wikipedia.org/wiki/indigenous\\_people](http://Wikipedia.org/wiki/indigenous_people)>.

<sup>113</sup> Act 81 of 1987.

male person. This was done without considering the rights of women with regard to property.

Bennett,<sup>114</sup> further confirms that an African woman has no rights to any part of the deceased's estate, should her husband die intestate. This resulted in recommendations being introduced by colonialists on how the estates of black people were to be administered and distributed. The Intestate Succession Act regulated intestate succession. If a person dies intestate in respect of any property succession, the Succession Act applies.

The Succession Act has the following general principles<sup>115</sup> that need to be followed in order to be considered such as:

- A person dies intestate if he leaves no will<sup>116</sup>,
- A person dies leaving a void will,
- There is a will that has been revoked<sup>117</sup>,
- Or if the deceased makes a disposition subject to a condition which fails<sup>118</sup>,
- If a person has failed to dispose of the whole estate,

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<sup>114</sup> TW Bennett, *A Sourcebook of African Customary Law for Southern Africa*, First Edition, Juta & Co, Ltd, 1991, 400.

<sup>115</sup> Will- [http://www.wills.about.com/od/termsbeginning with/g/heiratlaw.htm](http://www.wills.about.com/od/termsbeginning%20with/g/heiratlaw.htm).

<sup>116</sup> In terms of section 23 (7)(a).

<sup>117</sup> *Fram V Fram's Executrix* 1947 1 SA 787 (W).

<sup>118</sup> *Ex Parte Dodgson* 1942 CPD 199.

- Or if a beneficiary predeceases the deceased or for some reason cannot or will not take, and there is no substitute or residuary and no accrual to co-heirs takes place.

Regulation 2(d)(iii),<sup>119</sup> stipulates that when any deceased Black is survived by any partner who was at the time of his death living with him as his putative spouse; or by any issue of himself and any such partner, and the circumstances are such as in the opinion of the Minister render the application of Black law and custom to the devolution of the whole, or some part, of his property inequitable or inappropriate, the Minister may direct that the said property or the said part thereof, as the case may be, shall devolve as if the said Black and the said partner had been lawfully married out of community of property, whether or not such was in fact the case, and as if the said Black had been a European. Due to the fact mentioned in this section women were excluded and discriminated in terms of succession and inheritance.

The Minister may direct that the said property or part thereof, as the case may be, shall devolve as if the said Black and the said partner had been lawfully married out of community of property, whether or not such was in fact the case, and as if the said Black had been a European. The apartheid era brought pain and suffering to South African people and undermined their human rights. The difficulties which are faced by South Africa are terrifying and affect the development of the country.

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<sup>119</sup> Regulations for the Administration and Distribution of the Estates of Deceased Blacks. No. R.200 of 06 February 1987.

This is complicated even more by the fact that the ex-subjugated and historically disadvantaged black women in South Africa were excluded from succession. For equality between men and women to be achieved, communication between the state and its subjects must be vital at all times. Customary law rules were used until South Africa became a democratic State, when a new Constitution was introduced. Through this painful treatment, women could have been protected because every person is equal before the law.

### ***3.2.3 The current position of inheritance with regards to women in South Africa***

Before democracy many people's human rights were violated, especially those of women in the black population. The apartheid era played a vital role in condoning discrimination and division amongst the people of South Africa. Apartheid was declared by the United Nations to be a crime against humanity.<sup>120</sup> A drastic change was made, but South Africa is still struggling with inequality and other forms of discrimination.

It is of importance that the South African government is committed to the promotion and protection of human rights. It is the prerogative of the government to make sure that every person enjoys equality, dignity, social justice, fundamental human freedoms and fairness. The rules of inheritance are designed to establish in advance who will take

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<sup>120</sup> Article 1 of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, G.A. res. 3068 (XXVIII), 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1974), 1015 U.N.T.S. 243, entered into force July 18, 1976.

over the property and responsibility of a deceased person.<sup>121</sup> Customary law existed long before the adoption of the South African Constitution.

Customary law had rules that were applied in communities and those rules were obeyed. Some of those rules were in conflict with human rights. The main function of the Constitution therefore is to neutralize the unsettling effect of death on the integrity of a family unit. This Constitution has not yet achieved its goal because of the persistence of discrimination against women with regards to inheritance. In most cultural traditions, women are disqualified from being traditional leaders of their tribes.<sup>122</sup>

### **3.3 Intestate law of succession**

Intestate succession is regulated by the Intestate Succession Act<sup>123</sup>. A person dies intestate in respect of any property succession which is not regulated by a valid will. Intestate succession has general principles,<sup>124</sup> that need to be followed.. The law of succession was governed by the principle of male primogeniture which was later declared to be unconstitutional. This resulted in the adoption of a number of significant laws and policies that aimed at addressing the customary practices that are

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<sup>121</sup> The purpose and the nature of rules of succession- SAFLII Home/SAFLII. Available at <<http://www.saflii.org>> Database.

<sup>122</sup> *Shilubana v Nwamitwa* 2008 (9) BCLR (CC).

<sup>123</sup> DD Ndima, "*Judicial Review and the Transformation of South African Jurisprudence with Specific Reference to African Customary Law*, *Speculum Juris*, Vol 21 Part 1, 2007, LexisNexis, Butterworths Publishers (Pty) Ltd, Morningside.

<sup>124</sup> HJ Erasmus & MJ de Waal, *The South African Law of Succession*, Butterworth, Durban 1989,21.

discriminatory in nature such as the Promotion of Equality, the Prevention of Unfair Discrimination Act and the Promotion of Access to Information Act.

Equality is without doubt a fundamental norm and an essential element of our constitutional order. Consequently, the principle of male primogeniture has been examined and assessed by the courts. By abrogating the rule of male primogeniture, the Constitutional court brushed aside the application of customary law of intestate succession with one stroke of its pen.<sup>125</sup> It is believed that the customary law of succession can now be applied if so chosen by means of freedom of testation.<sup>126</sup>

There are principles that underlie common and customary law of succession. These principles apply mainly to Coloreds, Whites and, Indian South Africans as they are rather easy to find. If one dies intestate, the Intestate Succession Act provides the following principles:

- The circle of potential intestate heirs can be easily identified and is drawn comparatively tightly;
- Men and women (spouses) receive equal treatment; and first born children do not receive special treatment.<sup>127</sup>

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<sup>125</sup> Christa Rautenbach, *South African Common and Customary Law of Intestate Succession: A Question of Harmonisation, Integration or Abolition*, available at <http://www.ejcl.org/121/art121-20.pdf>.

<sup>126</sup> *Ibid.*

<sup>127</sup> M.C Schoeman Malan, *Recent Developments Regarding South African Common Law and customary Law of Succession*. Available at <http://ejcl.org/142/abs142-8.html>.

The division of labour based on male and female differentiation is at the heart of gender inequality. This is underpinned by the patriarchal family structure where the man is the highest authority and sole provider and there is a rigid division of tasks and responsibilities, regulated by social norms that have become ingrained over time.

### 3.4 Testate Succession

The law of testate succession originated in the Wills Act<sup>128</sup> and common law rules. This type of law of succession relates to wills and testate succession in general. The common law rules of testate succession are based on the principle of freedom of testation<sup>129</sup>. A will is a document by a testator concerning the disposition of property and other matters within his control<sup>130</sup>. A will takes effect only after the death of the testator. The testator has a right at any time before his or her death to revoke his or her will.

The objectives of a will are:-

- To restrict a person's right of free testation;<sup>131</sup>

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<sup>128</sup> Wills Act No.7 of 1953.

<sup>129</sup> J Unger- *The Inheritance Act and the Family*, The Inheritance Act and the Family in <http://www.jstor.org/stable/1089627>.

<sup>130</sup> *Oosthuisen v Die Weesheer* 1974 2 SA 434 (O), where it was held that a testamentary disposition must identify the property bequeathed, the extent of the interest bequeathed, and the beneficiary.

<sup>131</sup> When it comes to contra bono mores and against the public policy provisions on the testamentary instrument.

- an avoidance of the formalities required in respect of testamentary instruments. This is done to avoid any conflicts which may arise when the estate of the deceased has been collected for distribution amongst the beneficiaries.

Section 25(1) of the Constitution states that no one may be deprived of property except in terms of the law of general application, and no law may permit the arbitrary deprivation of property. Devinish<sup>132</sup> states that the law of general application is intended and so crafted to protect individuals from being deprived of their property by laws which single them out for discriminatory treatment. The provision guarantees the right of succession to whom the right disposes of one's property. This provision gives the right to a person who wishes to dispose his or her property to the person he or she intends.

This is helpful because when a person dies he leaves assets and liabilities which make up the deceased's estate. This is why it is important for one to have a will to prevent a conflict from occurring. If the will is made in time, without any element that is *contra bono mores* such a will is valid, although, there are limitations that need to be judged such as economic and social considerations.

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<sup>132</sup> G.E Devinish, *The South African Constitution*, LexisNexis, Butterworths, Durban, (2005) 130.

### **3.5 Conclusion**

The underlying principle of the Constitution is to make sure that everyone has the right to be treated with respect and dignity by any person and by the government. Societies which still practice discriminatory customs must recognize the negative impact that they have on women. It must be emphasized that all the provisions of the Bill of Rights must be understood in the context of the preamble to the Constitution as well as the founding principles in Section 1.

The effect of the constitutional order is to improve the quality of life of all citizens and to free the potential of each person. An option should be created for people who wish to continue practicing customary law and it should incorporate aspects of customary law values that are compatible with the Constitution.

## CHAPTER FOUR

### THE CURRENT LEGAL POSITION OF WOMEN IN SOUTH AFRICA

#### 4.1 Introduction

The preceding Chapter dealt with discrimination against women with regards to inheritance and succession under customary law in South Africa in the period before and after apartheid era. This Chapter will deal with the current legal position of women in South Africa. This study focuses more on complaints in court cases that involve discrimination against women with regard to succession and inheritance.

This study draws on the current position of black women in South Africa under customary law rules that prevail in law of succession and inheritance. Things such as inheritance of land and livestock of African people are regarded as the most important property, and provide the whole family with subsistence and a place to live. In the case of *Bhe and others v Magistrate Khayelitsha and Others*,<sup>133</sup> it was held that the right to equality is related to the right to dignity. Discrimination conveys to the person who is discriminated against that such a person is not of equal worth.

The discrimination against women conveys a message that women are not of equal worth as men. Where women under indigenous law are already a vulnerable group, this

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<sup>133</sup> 2005 (1) SA 580 (CC), paragraph 187.

offends their dignity. Under customary law ownership of property was not individualistic but collective.

This means that there is no distinction of who will be the owner of the family property in terms of gender, which means that everyone has the right to inherit and to own property. Men had the wrong perception of ownership of family property..They did not consider that women can inherit or look after the property of the deceased. Men think that if the property is given to women the continuation of the family name would pass out of the control of the family of the deceased.

This perception undermines the status of women to the extent that they cannot take care of family property. Mqeke<sup>134</sup> states: “In a new constitutional democracy such as ours that means that courts have to devise means of protecting and enforcing fundamental rights that were not recognised under the common law”. Mqeke refers to the rights that were discriminatory in nature such as the rights of inheritance by women which were not recognised.

In the case of the *President of the Republic of South Africa v Modderklip Boedery* (hereinafter referred to as the *Modderklip* case),<sup>135</sup> the owner of the land was seeking the enforcement of his rights guaranteed in the Constitution in terms of section 25(1).<sup>136</sup>

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<sup>134</sup> As said by Froneman J as quoted by RM Mqeke in the Constitutional Court’s Pronouncements on Land Invasions, *Law and Transformative Justice in Post Apartheid South Africa*, Spekboom Publishers, Louis Trichardt, South Africa, (2010), 250.

<sup>135</sup> 2005 (5) SA 3 (CC).

<sup>136</sup> This section reads as follows: “No one may be deprived of property except in terms of

Section 25(1) and (4) acknowledge the right to property where land is the property.<sup>137</sup> It is believed that the social status and economic viability of any group of persons or individuals depends on the ownership and the use of land by such individuals or group.<sup>138</sup> Therefore, women have to be recognised and afforded the chance to own land and property.

It is stated that 'African women produce about 75 percent of the continent's food and provide about 80 percent of Africa's farm labour, but they cannot own or inherit these lands that they till.'<sup>139</sup> This proves that women can use the land but not own it, and that they have limited rights to ownership of land and property. Currie and De Waal,<sup>140</sup> state that property encompasses the real rights recognised by the law of property, such as ownership, mortgage, lease, servitude, mineral rights,<sup>141</sup> liens.<sup>142</sup>

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general application, and no law may permit arbitrary deprivation of property. The provision of this section does not apply only to the right of men as the applicant was a male but to everyone who is directly deprived of his or her property arbitrary".

<sup>137</sup> Section 25 (4) (a) and (b) reads as follows: "for the purpose of this section- (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources and (b) property is not limited to land".

<sup>138</sup> Martin Adams, Siphos Sibanda and Stephen Turner "Land Tenure Reform and Rural Livelihoods in Southern Africa" (1999) 39 *Natural Resource Perspectives* 2, available at <http://www.odi.org.uk/nrp/39.html>, (accessed 10 November 2005).

<sup>139</sup> RB Mqoke, *African Family and Statutory Development affecting the Legal Rights of Women in the New South Africa*, *Speculum Juris*, Vol 18 No. 1, Lovedale Press, Alice, 2004, 28. He states that in terms of section 8 of the Transkei Land amendment Act No 4 of 1968, stipulates that the widow enjoys usufructuary rights in respect of her late husband's land until she remarries or dies. Also in *Brief: April 2002* of the LandWeb (NGOs and Land Advocacy in Eastern and Southern Africa), "African Women and Land Ownership" available at <http://www.mwengo.org/land/inbrief-april02-1.htm> (accessed on 10 November 2005).

<sup>140</sup> I Currie and J De Waal, *The Bill of Rights Handbook*, 5<sup>th</sup> Edition, Juta and Company Ltd, (2005) 538.

<sup>141</sup> *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa*

African women play a vital role today and this type of discrimination is not acceptable and should not be allowed. This chapter seeks to explore the degree to which South Africa bargains women issues particularly women's access to land, marriage and succession.

In the case of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*,<sup>143</sup> Ngcobo J contended that the purpose of equality is to improve the quality of life of those who are disadvantaged, and to perpetuate the privileges of the advantaged. This was evident in that men are favoured, and do not consider the interests of women when it comes to cultural practices such as inheritance. In the case of *Brink v Kitshoff*,<sup>144</sup> O'Regan J emphasized the Constitution's commitment to eliminating discrimination against women when she held that gender discrimination in our society has resulted in deep patterns of disadvantage which are particularly discriminating in the case of Black women, and where race and gender discrimination have overlapped.

#### **4.2 South African principles and guidelines that are recognized in terms of women's human rights**

The South African Constitution adopted principles and guidelines with the aim of promoting and protecting the human rights of everyone. The recognition of these

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2002 (1) BCLR 23 (T).

<sup>142</sup> *Attorney-General of Lesotho v Swissbourgh Diamond Mines (Pty) Ltd* 1997 (8) BCLR 1122 (Lesotho CA).

<sup>143</sup> 2004 7 BCLR 687 (CC).

<sup>144</sup> 1996 (4) SA 197 (CC).

principles and guidelines with regard to women's human rights were made to advance the integration of gender in South Africa by ensuring that:

- All South African citizens enjoy equality and non-sexism and non-racism;
- Women's rights are seen as human rights;
- Customary and cultural practices are subject to the right of equality;
- Economic empowerment of women is promoted;
- A transformation process is created that will heal the past when it comes to gender discrimination;
- Appropriate training to improve knowledge, skills and attitudes in gender analysis and gender equality is provided to all policy makers, strategic and operational managers.<sup>145</sup>

As the result, South Africa has passed a number of legislations to alleviate the wrongs suffered by women in the area of inheritance under customary law. The Land Affairs Ministry is still trying to redress the injustices of the past.<sup>146</sup> The Constitution and other related legislations highlighted above reveal the clear purpose of the law of succession free from discrimination of one group over the other in terms of gender and sex.

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<sup>145</sup> Gender Equality Strategy 2008-2011, available at, [www.undp.org/women/.../Gender-Equality-Strategy-2008-2011](http://www.undp.org/women/.../Gender-Equality-Strategy-2008-2011).

<sup>146</sup> The Government White Paper on South African Land Policy of the Department of Land Affairs (1997).

The Land Affairs Ministry reveals that property of a deceased person should be left to the benefit of his or her closest relatives or those who were dependent upon him or her during his or her lifetime.<sup>147</sup> This means that where the deceased is a man, his widow continues to be in possession of the estate until her death after which the estate is divided amongst her children.

#### **4.2.1 Gender relations**

It is believed that the ideology of respect for human rights and equality between men and women comes from the United Nations Charter.<sup>148</sup> Its preamble reaffirms:

*“...Faith in fundamental human rights, in the dignity and worth of the human person, in the equality rights of men and women...”*

South Africa is in a process of transformation with regard to equality. One of the key objectives in this process is the transformation of gender relations.<sup>149</sup> The challenge is to create a broad transformation plan in a way which acknowledges the compatibility of the transformation of gender relations to the broader institutional change process. Section 9 of the Constitution guarantees the right to equality to everyone, in that, when

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<sup>147</sup> Customary law, available at [www.vanuatu.usp.ac.fj/library/Online/Customary\\_law/South.htm](http://www.vanuatu.usp.ac.fj/library/Online/Customary_law/South.htm).

<sup>148</sup> Adopted in June 26,1945.

<sup>149</sup> Gender Mainstreaming Initiatives in the Public Service, Available at [www.info.gov.za/view/DownloadFileAction?id=70069](http://www.info.gov.za/view/DownloadFileAction?id=70069).

the courts interpret any legislation or law, they must promote the spirit, purport and objects of the Bill of Rights.

Gender justice does not mean that women and men are the same but that opportunities and life chances should not depend on sex or gender.<sup>150</sup>

#### **4.2.2 The right to Property**

The right to property is enshrined in the Constitution.<sup>151</sup> In Africa, women's right to land and property was limited since women required permission from their husbands to own property. Mohan,<sup>152</sup> states that many legal systems around the world fail to protect property rights equally for men and women, leaving women dependent upon their husbands or male relatives to provide housing and land on which to subsist. This lead to women not being able to enjoy their human rights to land and adequate housing as men do.

It is believed that everyone has the right of access to housing without discrimination in terms of gender and sex. In Africa and South-Asia particularly, women are systematically denied their human rights to access, own, control or inherit land and

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<sup>150</sup> Concept Paper A Perspective on **Gender** in the IAEA, available at, [tc.iaea.org/tcweb/strategy/gender/ConceptPaper.pdf](http://tc.iaea.org/tcweb/strategy/gender/ConceptPaper.pdf).

<sup>151</sup> Section 25 of Constitution of South Africa.

<sup>152</sup> SS Mohan , The Battle After the War: Gender Discrimination in Property Rights and Post-Conflict Property Restitution, *The Yale Journal of International Law*, Vol. 36, 461,2011. Available at: <http://www.yjil.org/docs/pub/36-2-note-mohan-battle-after-the-war.pdf>>.

property.<sup>153</sup> This potentially permits the eviction of widows from their homes by the family of the deceased.. In the case of *Harksen v Lane NO and Others*,<sup>154</sup> it was held that :

“No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.”<sup>155</sup>

Many countries have now recognized women’s equal rights in their constitutions because of the standards and obligations set out in international human rights instruments. South Africa adopted legislation to give full recognition to women’s rights in the Constitution, among them, the Promotion of Access to information Act<sup>156</sup> and the Promotion of Equality and Prevention of Unfair Discrimination Act.<sup>157</sup>

#### **4.3 South African cases reported under constitutional legality**

The widows of deceased persons are entitled to the benefits of the deceased’s estate subject to the condition that they reside at the deceased’s kraal or at a kraal approved

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<sup>153</sup> M Beschop, *Women's Rights to Land and Property*, Women in Human Settlements Development – Challenges and Opportunities. Available at: [http://www.unhabitat.org/downloads/docs/3546\\_30551\\_ILP%205.doc](http://www.unhabitat.org/downloads/docs/3546_30551_ILP%205.doc).

<sup>154</sup> 1998 (1) SA 300 (CC).

<sup>155</sup> Section 8(2) in paragraph 85.

<sup>156</sup> Act 2 of 2000 (Hereafter referred to as PAIA).

<sup>157</sup> Wayne van der Meide, *Gender Equality v Right to Culture*, *South African Law Journal*, Volume 28, (1999) South African Law Journal, University of London, School of Oriental and African Studies, International African Institute, 100.

of by the heir.<sup>158</sup> In the case of *Ryland v Edros*,<sup>159</sup> these principles were found to be discriminatory in nature. The court in this case stressed that there is a duty placed on the judiciary to apply the values of equality and tolerance of diversity, which radiate the concepts of public policy. This means that some customary practices were applied although they were in violation of women's right to inheritance and succession.

Under the present constitutional order, male domination is contrary to the guaranteed rights<sup>160</sup> entrenched in the Constitution. In the case of *Mnani*<sup>161</sup> it was stated that the deceased's obligations to his dependents are transmitted to his heir, who becomes responsible for supporting the widows and minor children. The deceased's responsibilities towards his dependants, including his wife, are transmitted to his heir. Through this statement it is evident that the widow can claim maintenance from the heir. This means the capacity of the widow is undermined by the law with regards to her husband's property.

In *Shilubana and Others v Nwamitwa*<sup>162</sup> the dispute was that culturally, women were disqualified from being traditional leaders of their tribes. The Constitutional Court noted that in the past it was not permissible by the Valoyi's for a female child heir to be allowed to be a chief. This amounted to discrimination under the new Constitution

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<sup>158</sup> *Myuyu v Nobanjwa* 1947 NAC (C&O) 66.

<sup>159</sup> 1997 (2) SA 690 (C).

<sup>160</sup> Equality in terms of section 9 and dignity in terms of section 10 of the Constitution.

<sup>161</sup> 1977 BAC 264 (S).

<sup>162</sup> 2008 (9) BCLR (CC).

because of the equality clause. In terms of democracy and the new Constitution of the Republic of South Africa it is now permissible for a female child to be heir since she is also equal to a male child.

In the case of *Du Plessis and Others v de Klerk and Another*,<sup>163</sup> Sachs J, stated that sooner or later the question of the relationship between the Constitution and customary or indigenous law will have to be confronted. The Court further held that: patriarchal principles which underlie much of indigenous law would be outlawed by the Bill of rights, thereby undermining the core of indigenous law.

In *Zondi v The President of the Republic of South Africa*,<sup>164</sup> the deceased who was married and had two illegitimate children, died intestate in 1995. The marriage was not one in community of property in terms of section 22 (6) of the Black Administration Act.<sup>165</sup> His estate therefore fell to be administered in terms of Regulation 2<sup>166</sup>

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<sup>163</sup> *Du Plessis and Others v de Klerk and Another* 1996 (3) SA 850 (CC).

<sup>164</sup> 1999 (11) BCLR 1313 (N).

<sup>165</sup> N Ntlama, "The equality Act: Enhancing Capacity of the Law to Generate Social Change for the Promotion of Gender Equality," *Speculum Juris* Vol 21 Part 1, June 2007, 113, LexisNexis, Butterworths Publishers (Pty) Ltd, Morningside, She states that Equality Act was passed in response to the constitutional obligation to ensure that national legislation was enacted to give effect to the right to equality, including gender equality. Section 9(4) of the Constitution states that no person may unfairly discriminate directly or indirectly against anyone on one grounds in terms of subsection 3. National legislation must be enacted to prevent or prohibit unfair discrimination. In terms of section 22(6) a black person could enter into one of three types of marriage (i) by ante-nuptial contract; (ii) in community of property and (iii) out of community of property. NJJ Olivier, *Indigenous Law*, LexisNexis, Butterworths, Durban, 1995, 190, states that the BAA was introduced with a view to the establishment of national system for *inter alia* the recognition and application of customary law and the certain of a separate court structure.

<sup>166</sup> Article 1 of the International Convention on the Suppression and Punishment of the Crime of *apartheid*, G.A. Res. 3068 (XXVIII), 28 U.N.GAOR Supp. (NO.30) at 75, U.N

(hereinafter Regulation) that is, in accordance with customary law. The heir stepped into the shoes of the deceased family head and became responsible for the maintenance and welfare of the family.

In the case of *Ryland v Edros*,<sup>167</sup> these principles were found to be discriminatory in their nature. The court in this case stressed that there is a duty placed on the judiciary to apply the values of equality and tolerance of diversity, which radiate the concepts of public policy. This means that some customary practices were applied although they were in violation of women's rights. Under the present constitutional order male domination is contrary to the guaranteed rights entrenched in the Constitution.

In the case of *Mthembu v Letsela*,<sup>168</sup> the issue was about the constitutionality of the customary law rule of succession which prohibited women from inheriting. This was influenced by the principle of male primogeniture. The court found itself unable, due to a lack of information, to make an order relating to the validity of a customary marriage, and subsequently referred the matter for oral evidence.

Furthermore, the court found in favour of the customary rules of intestate succession, but adhered to the parties' submission that it was common cause that no customary marriage existed. It was hoped that the appeal would give the matter a different

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Doc A/9030 (1974), 1015 U.N.T.S. 243, *enter into force* July 18, 1976.

<sup>167</sup> 1997 (2) SA 690 (C).

<sup>168</sup> 1998 (2) SA 675 (CC).

complexion, but unfortunately the court decided the matter without referring to the existence of a valid customary marriage. This has changed the perception that men had of women in the society.

In *Moseneke v The Master*,<sup>169</sup> a man died intestate. His estate included immovable property, motor vehicles, shares, unit trusts and insurance policies. He had a wife and four sons. The estate of the deceased was reported to the Master of the High Court in terms of the BAA. The Master passed on the estate to the magistrate in Pretoria, to be dealt with in terms of the BAA. The Women's Legal Centre Trust joined as *amicus curiae* and argued that both section 23 (7)(a) and regulation 3(1) are unconstitutional, because they discriminate directly and indirectly against African women on the grounds of race, gender and culture. They supported the immediate invalidation of both section 23(7)(a) and regulation 3(1).

According to them the administrative procedures under the Administration of Estates Act were far more protective of African women than those employed under the Black Administration Act. The Women's Legal Centre Trust stood up and emphasised that in this case of intestate succession of deceased Africans, race, gender, and culture interacted in a way which discriminated directly and indirectly against African women. This case brought change, in that, the wife of the deceased was allowed to inherit.

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<sup>169</sup> *Moseneke v The Master* 2001 (2) SA 18 (CC).

In the case of *Shibi v Sithole*<sup>170</sup> the deceased died intestate without being survived by a wife, children, parents, or grandparents. The deceased was survived by his two cousins who were males. The deceased was also survived by his sister who was excluded in terms of the customary law principle of male primogeniture. The sister obtained an order declaring that she is the sole heir to her brother's estate. Furthermore, if the cousins do inherit from her brother's estate that would mean discrimination against her in terms of gender and sex.

One thing which is in common in the above cases is the exclusion of women in terms of inheritance. It is commonly assumed that women are not allowed to inherit in terms of customary law. This violated and discriminated against women's rights on the grounds of gender and sex. The decisions taken under the rule of primogeniture did not take cognisance of women's rights. The existence of the Constitution brought harmony and breached the gap that existed between the men and women so that all people are treated the same and equally.

#### **4.4 Conclusion**

This chapter covered the current legal position of women in South Africa. Furthermore, this study focused on the rights set by the constitution which protect women against any type of discrimination such as property, equality and educational rights. The next chapter will deal with conclusions and recommendations.

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<sup>170</sup> *Shibi v Sithole* Case No 7292/01, 19 Nov 2003.

## **CHAPTER FIVE**

### **CONCLUSION AND RECOMMENDATIONS**

#### **5.1 Introduction**

The preceding Chapter explored the current legal position of women and focused on court cases that involved discrimination against women with regard to succession and inheritance in South Africa. It further looked at the rights of women that are protected by the Constitution, with regard to inheritance and succession. The purpose of this Study was to investigate and provide an understanding of the factors that contribute on discrimination of women against succession and inheritance.

This chapter provide a brief summary of customary law rules that discriminated against women in inheritance and succession. It also highlighted women's rights as they are protected in the Constitution and national legislations. The chapter pointed out some of the central arguments and conclusion of this research.

This was done by comparing customary law rules that existed before and after the Constitution. This chapter further discussed the principle of equality under customary law which was influenced by international human rights law and the Constitution as well as other policies which protect women. The study focused on South African black women who seemed to be the vulnerable because of cultural practices. This research was motivated by ignorance and the constant violation of women's human rights through loyalty to their traditional beliefs.

Further, it was motivated by the ineffectiveness of policies and reported cases which seek to protect women against discrimination in inheritance and succession. The study was limited to South Africa and obtained information by reviewing books, human rights instruments, internet sources and current reported cases that protect women.

Having presented the summary of the study, the conclusions and recommendations drawn from reported cases will be addressed. Thereafter, attention will be directed towards constitutional considerations as far as human rights are concerned.

## **5.2 Conclusion based on reported cases**

A number of reported cases<sup>171</sup> observed that certain customary principles violated human rights. The adoption of the Constitution and laws protecting women<sup>172</sup> and children aimed at closing this gap. Furthermore, the male primogeniture rule is no longer fully practiced in communities as before, but even so there are many considerations to be taken into account.<sup>173</sup> Those considerations include the right to equality before the law which ensures that everyone has the right to property and inheritance regardless of his or her gender.

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<sup>171</sup> *Shilubana & Others v Nwamitwa* 2008 9 BCLR (CC); *Zondi v The President of the Republic of South Africa*; *Moseneke v The Master* 2001 (2) SA18 (CC) and the cases were found to be in violation of human rights and the principles of male primogeniture that was the cause of this violation was remedied in the case of *Bhe and Others v Magistrate Khayelitsha & Others* 2005 1 580 (CC);

<sup>172</sup> Article 2 of CEDAW.

<sup>173</sup> Mmusinyane B, *The role of traditional authorities in developing customary laws in accordance with the Constitution*. Available at, [www.scielo.org.za/scielo.php?pid=...script=sci\\_arttext](http://www.scielo.org.za/scielo.php?pid=...script=sci_arttext).

The study revealed a number of factors which contributed to the discrimination against women. Firstly, there is the dependence of women on their husbands because of their marital status. Secondly, the power vested in their husbands limits their capacity in decision making. They also have to obey cultural practices which violate their human rights.

### **5.3 Recommendations based on reported cases**

There is a lot to be learned about cultural practices and women's rights to succession and inheritance. It is clear that in South Africa there is a growing body of literature on the impact of traditional practices on women's rights to inheritance and succession. It is evident that women's views and position on traditional practices have not been clearly assessed and valued by case law. This study has highlighted the importance of the recognition of women's rights with regard to succession and inheritance.

This study further revealed that it is not only women, who are not allowed to inherit, but also girls and children born out of wedlock. In addition, the findings revealed that efforts to eliminate traditional practices should also come from men and from communities with attitudes that undermine women. It is evident that many women are uninformed of their essential human rights, their succession and inheritance rights, including legislations protecting such rights.

It is through lack of knowledge that the acceptance and, consequently, the continuation of the violation of women's rights to succession and inheritance persists. Raising

awareness and empowering women to drive the process of change is essential. The outcomes and recommendations of this study could assist the government and other institutions to adopt effective measures to empower and educate women so that they can defend their human rights.

## **5.4 Rights that must be afforded to everyone**

### ***5.4.1 The right to human rights education***

The most important recommendation of this study is the need for human rights education. This right requires women to be empowered and made aware of their rights and existing legislation and policy adopted to protect women. Women should also challenge every traditional practice that is contrary to the enjoyment of their rights. The equality provision in the Constitution must be the point of departure when a right is violated.

A lot more has to be done especially where gender roles are concerned. Community radio stations, Television, and other media should be utilised to mobilise organize, educate and disseminate information to the public and to the affected and vulnerable victims. It is very important that the community be exposed to the predicaments of women and the need for African societies to embrace a culture of respect for women, understanding and harmony. Continuous education will help to encourage the participation of women, as well as men, in overcoming entrenched forms of resistance against transforming certain cultural practices.

Despite the existence of several international instruments prohibiting discrimination against women and providing equality and respect for human rights, discrimination and inequality still persist in practice.<sup>174</sup> These instruments should be translated into every local language in South Africa so that the information can be accessible to the majority of the people.

#### **5.4.2 Dealing with custom and traditional practices**

Every attempt to eliminate any violation of human rights should be examined, preferably by engaging both men and women. Often men make decisions that affect women without taking cognisance of their rights and interests as women.<sup>175</sup> Society must challenge every custom and traditional norm that causes discrimination or inhibits any member's full enjoyment of his or her rights. Therefore, it is essential to raise awareness and disseminate information on the negative aspects of such customs and traditions, and of their potential effect on women and children.

In this regard, marriage provides the entry point since it is the focal point of the family and ideas about patriarchy and gender roles. In order for a customary marriage to be valid, there are requirements that should be met such as the agreement between the families of the marrying parties. The payment of *lobolo* by the groom's family to the

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<sup>174</sup> Women and Girls | The Human Rights Protection of Vulnerable Groups. Available at: <<http://www.humanrights.is/...human-rights.../humanrightscasesandmaterial.>>

<sup>175</sup> Gender consideration in Constitution-making. Available at <[http://www.safhr.org/index.php?option=com\\_docman&task=doc](http://www.safhr.org/index.php?option=com_docman&task=doc)>.

bride's family will commence after negotiations have been completed. The agreement will be followed by a dignified ceremony to transfer the bride to the husband's family.

Customary marriage was, and is still observed, as a union between two families rather than two individuals. Customary law, initially, was not concerned with a consensus between the two marrying parties. Often the decision of the elders was final and the views of the couple that intends to marry were not considered. The essential requirement was that the initiators reach an agreement on behalf of the two marrying parties.

Customary practice allowed the girl to be abducted to the other family in order to force her family to give permission for the marriage. This is known as *ukuthwala*, and it was done without the girl's consent. However, today the *ukuthwala* custom is no longer permissible because it is regarded as a crime (abduction). When dealing with customary marriage the individual's concerns are not as important as those of the family. Therefore, the head of the family chooses a girl that will make a good wife for their son. Customary law does not have a specific age requirement. Today this will not be permissible because the law requires that for a person to be married, she or he must be eighteen years old.<sup>176</sup>

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<sup>176</sup> Marriageable age - Wikipedia, the free encyclopedia, [en.wikipedia.org/wiki/Marriageable\\_age](https://en.wikipedia.org/wiki/Marriageable_age).

### **5.4.3 Community awareness, specifically in rural areas**

To transform people's behaviour, one must try to change their views, mind-sets and attitudes concerning discrimination against girls and young women.<sup>177</sup> Raising the awareness of all members of society is vital and cannot be underestimated. Men and women, girls and boys, religious leaders, traditional leaders and political leaders should not just be taught about the effects of discrimination but empowered to recognise and respect human rights. The right to equality, non- sexism and not to be discriminated against as provided for in the Constitution is the point of departure for a new approach to women's rights.

The courts observed that the application of the right to equality and their methods of interpreting it, as well as the limitations of this right are important in understanding the legal structure of inheritance.<sup>178</sup> Section 36 of the Constitution outlines the relation to the recognition of women's property rights in accordance with customary communal tenure. The State should develop a comprehensive strategy for disseminating knowledge about international human rights instruments and national legislation throughout society, including providing women with the necessary information sources, as well as assistance and advice.<sup>179</sup>

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<sup>177</sup> Ending all Harmful Traditional Practices **against Girls and Young Women**. <[http://www.plan-norge.no/Om%20Oss/.../NoMoreExcuses%20rapport\\_ferdig.ash](http://www.plan-norge.no/Om%20Oss/.../NoMoreExcuses%20rapport_ferdig.ash)>.

<sup>178</sup> General recommendations made by the Committee on the Elimination of Discrimination Against Women, available at [www.un.org/womenwatch/daw/cedaw/.../recomm.htm](http://www.un.org/womenwatch/daw/cedaw/.../recomm.htm).

<sup>179</sup> National policy for the empowerment of women. Available at <http://wcd.nic.in/empwomen.htm>.

#### **5.4.4 Engaging men and boys in eradicating harmful traditional practices**

Men can play a key role in bringing about gender equality since, in most societies, they exercise considerable power in nearly every sphere of life.<sup>180</sup> Changes in men's knowledge, attitudes and behaviour are necessary conditions for achieving a harmonious relationship between men and women.<sup>181</sup> Therefore, the objective is to promote gender equality and to encourage and enable men to take responsibility for their behaviour in their social and family roles so that men and women can be equal partners in public and private life. This can be done through campaigns, and role plays that portray the negative consequences of the offending customary and traditional practices. When this is achieved, gender equality will significantly be enhanced. This is an essential prerequisite for women to gain equality and equal recognition with men.

#### **5.5 Possible challenges of case law**

Although the South African government has tried valiantly to implement the right to equality, women are still struggling to access education and information on their rights.<sup>182</sup> For South Africa to achieve the goal of recognizing women's rights to succession and inheritance, more research is needed on cultural practices that violate

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<sup>180</sup> Gender Inequality. Available at <http://www.delmar.edu/socsci/rlong/problems/chap-09.htm>. (Accessed in 31 May 2010).

<sup>181</sup> Gender – Engaging Men and Boys. Available at <http://www.gender.care2share.wikispaces.net/Engaging+Men+%26+Boys>. (Accessed in 01 July 2011).

<sup>182</sup> Global South Development Magazine July 2010. Available at: <http://www.docstoc.com/.../Global-South-Development-Magazine-July-20...>. (Accessed on 1 Jul 2010).

women's rights. The following ideas from this study may assist policymakers in finding solutions to the problems associated with women's right to inheritance and succession.

- Future research should be carried out on the reasons why women allow traditional practices to violate their rights, as well as the challenges and other social obstacles that hinder efforts to recognize women's rights to inheritance and succession;
- Research on the role of education in eliminating detrimental traditional practices should be carried out. The government should assist and empower women in urban and rural areas by involving them in educational and development programmes.
- Information relating to the effects of custom and tradition should be accessible and disseminated in the local languages to promote community and public awareness of the existence of cultural practices that violate women's human rights;<sup>183</sup>
- There should be a feedback on the operation of current laws, intercessions and programmes at the community level that are intended to eliminate the practices targeted.<sup>184</sup> Such feedback should identify the gaps that exist and how they should be addressed.

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<sup>183</sup> Women's Legal Rights Initiative: Annual Report on good practices. Available at: <[http://www.usaid.gov/our\\_work/cross.../WLR\\_Y3\\_BestPractices\\_JUNE\\_06.pdf](http://www.usaid.gov/our_work/cross.../WLR_Y3_BestPractices_JUNE_06.pdf)>

<sup>184</sup> Nicky's hope in the making: Theories of poverty. Available at: <<http://www.nicky-nickyshopeinthemaking.blogspot.com/.../theories-of-poverty...>> (Accessed on 18 Apr 2009).

## 5.6 Recommendations

These recommendations can be used to persuade the government to adopt and create a more efficient system that will recognise equality. Gender equality, in particular, without empowering women and educating both men and women on their rights are, and without enlightening them on the impact of discriminatory customary and traditional practices on the full realisation of such rights, will not be achieved.

This study emphasised that culture is the main cause of the violation of women's rights, in that women are deprived of the full control over their lives. Furthermore, this study revealed that women lack the knowledge and awareness of the human rights that would assist in bringing about equality between men and women.

From the findings, it is logical to conclude that there is a desperate need to fight all forms of discrimination against everyone. Stereotypes and cultural practices against women should be replaced with human rights and respect. Women have to be educated from an early age on the negative impact that some customary norms and traditional practices have on their rights. If women rights to equality, property, succession and inheritance are fully recognized, women can enjoy these rights. However, if this fails, the enjoyment of these rights will not be possible.

Similarly, men should be educated to respect women's rights particularly gender equality. These are the fundamental rights as well as values enshrined in the Constitution.<sup>185</sup> The government should provide and disseminate programmes to

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<sup>185</sup> In terms of section 1 of the Constitution.

disseminate information in the local languages concerning specific and relevant provisions in national laws prohibiting discriminatory customary practices, and especially those against women.

The government must do all in its power to initiate programmes that sensitize parliamentarians, local authorities, and law enforcement personnel on the negative impact of some customs and traditional practices. This should be done with the intention of ensuring the implementation of laws aimed at eliminating traditional practices that are harmful to the society and should include the protection of the rights of those adversely affected as well as their potential victims.

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