

The Paradox between Customary Law and Human Rights Law in South Africa: The Patriarchal Nature of Customary Law

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Abstract: *The aim of this article is to highlight the paradox between customary law and human rights law and the extent to which the patriarchal nature of customary law violates fundamental rights of equality, human dignity, privacy, property, and security of the person with particular reference to women and children. In furtherance to this, the patriarchal nature of customary law perpetuates gender stereotyping by allocating specific rights and duties to different members within the community and family structures. This is evidenced in instances where women and children are allocated less important roles owing to their nature as inferior figures within the community and family structures. Often this manifests itself in gender discrimination as women are excluded from participating in roles considered too complex for their nature as mothers and wives. As a result, roles such as that of family head and traditional leadership are generally reserved for males. Likewise, children are considered subject to community and family customs and practices. As a result, children are subjected to discriminatory cultural practices and customs such as virginity testing and circumcision. Perhaps, the reason for all these violations of human rights and discriminatory tendencies against women and children associated with the patriarchal nature of customary law is because its defenders view customary law rules, practices, and customs as a preservation of culture. However, with the advent of the constitutional era such argument cannot be sustained. Notably because the Bill of Rights condemns all forms of discrimination including social practices that perpetuates inequality.*

Keywords: Patriarchy, harmful practices, human rights, discrimination, succession, gender inequality

Introduction

In South Africa, like in many African countries customary law has evolved over the years in South Africa customary law has notably gone through two distinct evolutionary stages namely customary law prior 1994 and under the present the constitutional dispensation. The two stages are discussed below. The distinctive feature of these states is that prior 1994 customary law was based on discriminatory practices such as the principle of patriarchy (Bennett, 1995: 80-81). The pertinent features of customary law and its principle of patriarchy prior 1994 were namely; the discriminative

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and stereotyping tendencies towards women, categorisation of children and discriminatory cultural practices towards women and children.

However in 1994, when South Africa attained democracy one of the goals of the new government was to eradicate discriminatory tendencies within social, political and economic circles (Preamble South African Constitution, 1996; section 1 of the Constitution, 1996). The changes brought by the enactment of the Constitution included the full recognition of customary law under the prescripts of the Constitution, regional and international instruments (s231-233 of the Constitution). In addition, section 30 of the Constitution provides that everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights. Furthermore it bears to mention that section 31(1) of the Constitution provides that persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community-

- (a) to enjoy their culture, practise their religion and use their language; and
- (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

Therefore, the inclusion of the right to culture in the Constitution (Sections 15, 30 and 31 of the Constitution) and the recognition of institutions (Section 211 and section 181(1)(c) of the Constitution) that uphold cultural rights indicate the need to promote customary law on the same footing as other sources of law. Moreover, since 1994 specific aspects of customary law such as customary marriages proprietary (law of succession), and certain cultural practices especially those affecting children are regulated by legislation such as the Recognition of Customary Marriages Act 120 of 1998, the Reform of Customary Law of succession and Regulation of related matters Act 11 of 2009 and the Children's Act 38 of 2005 (Section 12 of the Children's Act 38 of 2005). It also appears that in the near future traditional courts will be formally regulated Traditional Courts Bill of 2008). Therefore, the enactment of the Constitution has not only kept the legislature on its toes but it has as already indicated also lead to several landmark decisions on issues of customary law being handed down by the Constitutional Court. The most prominent cases in this regard are the Bhe Case, the Shilubana case and the Gumede case amongst others.

Research methodology

The research methodology adopted in this article involves an in depth analysis of literature, case laws, international and regional instruments relating to customary law and human rights law in so far as the two systems of law co-exist in South Africa. The article further discusses the impact of human rights law on customary law especially in so far as proprietary succession and acquisition, succession to chieftainship and child specific customary practices are concerned in South Africa. In so doing, the study reveals that the place of customary law as it existed before South Africa become a constitutional state does not pass the constitutional test when measured against the Bill of Rights.

The attributes of customary law prior to 1994 in South Africa

According to Bennett prior 1994 customary law was based on the principle of patriarchy (Bennett, 1995: 80-81). Firstly, the principle of patriarchy was based on the premise that males are dominant figures in relation to their female counterparts (Kagnas & Murray, 1994: 7-8). As a result, the principle of patriarchy perpetuated discriminative and stereotypical tendencies that resulted in women being viewed a less important within the social structures of Africans including the family unit (Ndulo, 2011: 88-89). These discriminative and stereotypical tendencies include allocating women roles that are considered feminine such as procreation, taking care of the home and upbringing of children (Kuenyehia, 2006). These roles are considered suitable to women's nature as mothers and wives. On the other hand men are allocated roles considered to be vital for the success of the community such as head of family and traditional leadership positions (Tebbe, 2008: 466-472). Therefore, such differentiation between males and females in customary law weighs down the importance of women within the community and the family structure.

Furthermore, the principle of patriarchy not only perpetuates social disparities but also economic disparities. That is so because the exclusion of women from being entrusted with the position of family head in terms of customary law meant that women could not acquire property. In terms of customary law the family head has control over the family property. This practice meant that women had no land rights and faced evictions upon divorce or when their husbands died as they were sometimes expected to vacate the matrimonial home (Classens, 2005: 42-81). This often leads to women being left destitute (Himonga, 2011: 122-124). The principle of patriarchy as alluded above and as it existed during pre-colonial times continued to exist both under the British and National Party regime. The retention of customary law was due to the fact that Africans remained a majority population in South Africa and hence, customary law was used to control their social affairs (Bennett, 1995:18-19). According to Ndulo (2011: 95) from the inception of the colonial rule customary law was applicable on two conditions namely;

- that it was not repugnant to justice, equity, or good morality and;
- that it was neither in its terms nor by necessary implication in conflict with any written law.

Accordingly, customary law was accorded a status inferior to that of common law and customary law continued to apply to the different colonies according to the enacted codifications (Bennett, 1995: 35-41). The Natives Administration Act 38 of 1927 permitted the application of customary law in traditional courts presided by traditional leaders or native commissioners in so far as the matter was between blacks (Bennett, 1995: 41-42). Hence, Natives Administration Act 38 of 1927 (now the Black Administration Act of 38 of 1927) was the most important codification being the Black Administration Act 38 of 1927 (BAA) as amended which had as its sole purpose to provide for the better control and management of Black affairs (Rautenbach, 2003: 1-15). As a result of section 11(1) of the BAA, customary law was recognised as a source of law for the first time. Needless to say the provisions of the BAA extended to family structures. The rule of primogeniture was formalised and as a result,

women were regarded as perpetual minors under their husbands' tutelage in terms of section 11(3) of the BAA (Jansen, 2006: 39-40).

In addition to the BAA several legislative frameworks were enacted to regulate black citizen's family affairs before 1994. The negative impact of such laws was recently illustrated in the case of *Gumede v President of the Republic of South Africa* (2009 (3) SA 152 (CC)), the Constitutional Court declared Sections 7(1) and 7(2) of the RCMA, Section 20 of the KwaZulu Act on the Code of Zulu Law 16 of 1985, Sections 20 and 22 of the Natal Code of Zulu Law published in Proclamation R151 of 1987 invalid and unconstitutional. The Court held as follows

"There can be no doubt that the marital property system contemplated by the KwaZulu Act and the Natal Code strikes at the very heart of the protection of equality and dignity our Constitution affords to all and to women in particular. That marital property system renders women extremely vulnerable by not only denuding them of their dignity but also rendering them poor and dependent" (Gumede case para 36)

Secondly, having indicated the negative aspects of the principle of patriarchy in respect of women, it is important to further allude its discriminative aspects in relation to children within the community and family unit. In customary law like women children are not accorded any special rights (Ngidi, 2009:228). According to Songca (2011: 352) under customary law, parents and members of the extended family have the primary responsibility of the upbringing of the child. Hence, children derive their rights from the family they belonged to. Kaime (2005: 225) expresses the value placed on children in African societies using the three African maxims which in essence mean children are the future. Despite the fact that children are valued as the future upon which the family lineage is secured, the importance of children depends on the status they hold within the family unit. (Venter & Nel, 2005: 91-92). Hence, children are categorised in a form of hierarchy which indicates the status of a particular child within the family unit. The categorisation of children in customary law is important for the purposes of allocating rights to a particular child. For instance male children belonging to the husband's family could succeed their fathers in accordance with the rule of primogeniture.

According to Ngidi (2009: 228) in the African society children could be categorised into the following classes;

- (a) Children of an unmarried woman who belonged to her family;
- (b) Children of married woman who belonged to the family of the husband
- (c) Children given in adoption who belonged to the adoptive family;
- (d) Children born of an ukungena/levirate relationship belonged to the deceased husband's family.

Ukungena can be best described as an institution whereby the deceased husband's name is carried on when a male relative of the deceased engages in a relationship with the wife of the deceased. According to Dlamini (1991: 80). The object of ukungena was to maintain things as they were before, to keep the children in the kraal, or the very young ones would have to go with their mother for some

time at least, and to maintain friendly relations between the kraal and the people of the widow. Therefore, children born of an ukungena relationship were considered to be those of the wife's deceased husband. A point worth noting is that these children (males) ranked third in the order of succession (Jansen, 2006: 96). However, despite having the above rights children born out of wedlock, that is illegitimate children where *isondlo*(maintenance) was not paid could not succeed or inherit from their father in terms of customary law upon the father's death (Burman, 1991: 47-48).

Bennett (1991a: 315-316) gives a vivid illustration of how classification of children would be applied in according such children succession rights. He states that in terms of the rule of primogeniture children who are biologically related to the deceased are preferred to those who may have been as a result of an illegitimate affair or adopted. In simple terms when a family head dies, the estate passes to the eldest son and his descendants (Tebbe, 2008: 472-473). A point worth noting is that in customary law female children like their mothers are treated less favourable than their male siblings (Tebbe, 2008: 477-480). However, one acceptable fact under customary law is that irrespective of whatever class children belonged they had a right to be fed, clothed, and housed by the family they belonged to (Bennett, 1995: 96-97).

Thirdly, apart from its patriarchal nature customary law consists of practices that negatively impact on women and children's rights as contained in human rights instruments. Practices such as female circumcision, rites of passage, male circumcision, and virginity testing are widely practiced in South Africa (Bennett, Mills & Munnick, 2010: 264-270). However, due the injurious nature of such practices they are considered contrary to human rights law (Odeku, 2014: 32-35).

Customary law vis á vis Human Rights law in South Africa post 1994

In South Africa, human rights law is contained in the Constitution and other legislative frameworks e.g. the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 and the Children's Act 38 of 2005 amongst others. A point worth noting is that the South African Constitution is almost a replica of the International Bill of Rights. The South African government has also ratified several UN Conventions/instruments giving effect to human rights including the Convention on the Elimination of Discrimination Against Women, the African Charter on Human and Peoples' Rights, the African Charter on the Rights and Welfare of the Child, the Protocol on the Rights of Women in Africa, the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights.

As a result, South African courts in deciding matters before them must take into consideration international law (section 39 of the Constitution). Furthermore, the courts must promote the spirit and purport of the Bill of Rights in their decisions (Rautenbach, 2003:1-20). Needless to say human rights law is based on what is good for the individual rather than what is good for the group (Bennett, 1991b: 20-23). This entails that individual rights are given paramount importance than group rights in so far as civil and political rights are concerned (Bennett, 1991b: 18-25). On the other hand, as already customary law preserves the common good of the community or group (Pieterse, 2000: 38).

Moreover, customary law preserves customs that are considered contrary to modern democracies such as male descent, male dominance and family lineage. As a result, this leads to varying views on the constitutionality of certain aspects of customary law rules and practices and its compatibility with human rights law as entrenched in the Bill of Rights. This section discusses customary law in respect of proprietary succession, traditional leadership and cultural practices such as virginity testing and male circumcision.

Reform in proprietary succession in light of the Constitution

For one to understand the nature of proprietary succession under customary law, it is important to know the principles on which such succession is based. In this instance Schoeman-Malan (2007:10) outlines the three basic principles of customary law succession namely;

- a family unit is a cultural concept in which the material needs of the component family members are not the main ingredients;
- primogeniture and
- the male line of descent.

Therefore consistent to the three principles I outlined above, under customary law, property considered valuable such as land and livestock was entrusted to men (Mamashela, 2004: 621; Bennett, 1991a: 254). Although individuals could not own land, the land allotted to each family unit was controlled by the head of the family and upon death such land was inherited by his heir notable the eldest son. Likewise all the properties belonging to the family unit belonged to the head of the family and on his death was inherited by the heir (Bennett, 1995: 122-123). Therefore, it followed as earlier stated that women had little control over property save for personal effects and domestic property which they used for the day to day upkeep of the family. This meant that upon the death of the family head or upon the termination of the marriage women suffered economic hardship.

According to Mamashela (2004: 621; Mbatha, 2005: 43) in terms of customary law a married woman could not be allocated land in her own right; she could only access it through a male figure, her father, her husband, her brother or her son. This entails that females could not inherit property from their husbands and if the couple had no male heirs the estate devolved to the deceased's father or, if he is no longer alive, to the nearest male relative (Tebbe, 2008: 473). Hence, the resultant effect of the application of the principle of primogeniture on customary law of succession was that the rights to equality and human dignity as envisaged in human rights law were undermined. Women and female children were marginalised due to the inferior status accorded to them (Walker, 2009: 467-490). In *Mthembu v Letsela* (2000 (3) SA 867) the customary law rule of primogeniture and regulation 2 of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks, made in terms of s23(10) of the Black Administration Act 38 of 1927 was challenged on the basis that it excluded women from inheriting intestate. Mpati AJA held as follows;

"What needs to be stressed from the outset is that the regulation in issue did not introduce something foreign to black persons. It merely gave legislative recognition to a principle or system which had been in existence and followed, at least, for decades. It is not inconceivable that many blacks, even to this day, would wish their estates to devolve in terms of black law and custom" (Mthembu case para 880C-D).

In the *Bhe and Others v Magistrate Khayelitsha and Others* (2005 (1) BCLR 1 (CC)) case such differentiation was rejected and the court held that;

"to the extent that the primogeniture rule prevents all female children and significantly curtails the rights of male extra-marital children from inheriting, it discriminates against them too. These are particularly vulnerable groups in our society which correctly places much store in the well-being and protection of children who are ordinarily not in a position to protect themselves. In denying female and extra-marital children the ability and the opportunity to inherit from their deceased fathers, the application of the principle of primogeniture is also in violation of section 9(3) of the Constitution" (*Bhe* case para 93).

Although Langa DCJ in the *Bhe* case remarked as follows;

"The positive aspects of customary law have long been neglected. The inherent flexibility of the system is but one of its constructive facets. Customary law places much store in consensus-seeking and naturally provides for family and clan meetings which offer excellent opportunities for the prevention and resolution of disputes and disagreements. Nor are these aspects useful only in the area of disputes. They provide a setting which contributes to the unity of family structures and the fostering of co-operation, a sense of responsibility in and of belonging to its members, as well as the nurturing of healthy communitarian traditions such as Ubuntu. These valuable aspects of customary law more than justify its protection by the Constitution" (*Bhe* case para 45; Bennett, 2011: 30-61).

Despite Langa DCJ's sentiments on the importance of customary law in regulating family affairs, the differentiation based on gender as prevailed in terms of customary law of succession could not be justified in terms of human rights law and therefore fell short of the fundamental rights protected in terms of the Bill of Rights more specifically sections 9 and 10 of the Constitution. According to Mbatha (2005: 43-46) reform that addresses the injustices of the past is necessary when it brings about equality. This entails that there exist a need to ensure that women and female children are accorded equal rights and chances to inherit from their deceased male relatives. Himonga (2005: 89-90) in relation to customary marriages argues that the changes in respect of proprietary succession brought by the RCMA are important in the dissolution of marriages because,

"Leaving the dissolution of marriage to traditional institutions may result in the continued application of customary law regulating divorce and its consequences to the new marriage, which may not always be to the advantage of women. This is particularly the case if one considers the dominance of men in traditional dispute forums and the likelihood that these men would seek to reinstate customary patriarchal norms favourable to their positions in marriage and society"

A close analysis of Himonga's argument reveals that customary law cannot be permitted to exist within the context that is characterised by discriminatory and stereotypical tendencies that perpetuate inequality between sexes. Accordingly, differentiation based on gender roles and stereotyping cannot be justified in light of the Bill of Rights. Therefore, an interpretation favouring the principle of male primogeniture and male dominance cannot stand constitutional scrutiny and as a result should be curtailed by both judicial and legislative reform (Bekker & Koyana, 2012: 571-584).

Pursuant to the Bhe case, the Reform of Customary Law of succession and Regulation of related matters Act 11 of 2009 (Act 11 of 2009), was enacted to ensure that the customary law of succession adequately caters for the welfare of family members without any distinction based on gender and class particular children belong to. Finally, the ever-changing community values make it difficult to observe customary law as it was observed during pre-constitutional era. Moreover, the right to equality is the backbone of the Constitution; hence, social practices that perpetuate inequality cannot be tolerated (Deane & Brijmohanlall, 2003: 92-100).

Reform in chieftainship succession post Shilubana

In African societies a traditional leader is the most important and powerful member of his community (Bennett, 1995: 66). In pre-colonial times leaders did not act as dictators rather servants of their subjects, hence the adage *kgosikekgosikabatho* (a chief is a chief through his people) Therefore, a traditional leader earned respect and was respected by his subjects. Therefore, succession to chieftainship, like all other positions of authority was in most African societies reserved for males (Bekker & Boonzaaier, 2006: 115) The reason was that female activities are judged inferior in patriarchal systems (Mmusinyane, 2009: 147-150). The other reason was that upon marriage a woman ceases to be part of her father's household and becomes part of her husband's family, this would distort the ruling lineage as her children belongs to another bloodline (Bekker & Boonzaaier, 2008: 457-458).

However, a few exceptions could be found in some African societies where woman hold the position of chieftainship in lieu of their male counterparts. In South Africa, the Balobedu of Modjadji is one such tribe (Prinsloo, 2005: 814-820). Although generally, chieftainship follows the principle of male primogeniture, being that the traditional leader is succeeded by his eldest son born to him by the principal wife (Bekker & Boonzaaier, 2006: 115-117); however, in the most recent case of Shilubana, succession to traditional leadership took an unexpected turn when the Constitutional Court upheld the installation of a female chief in a patrilineal lineage and held that

“In deciding as they did, the Valoyi authorities restored the chieftainship to a woman who would have been appointed Hosi in 1968, were it not for the fact that she is a woman. As far as lineage is relevant, the chieftainship was also restored to the line of Hosi Fofozza from which it was taken away on the basis that he only had a female and not a male heir” (Shilubana case para 70).

The court in the Shilubana case developed the principle of male primogeniture to conform to the Constitution on the basis that the Valoyi Royal family had amended their succession rules by virtue of section 211(2) of the Constitution and given effect to gender equality. Although in Shilubana, van der Westhuizen J remarked that the Shilubana decision does not entitle all women to claim chieftainship, it is doubtful that any court faced with a similar situation would decide otherwise. My argument finds basis in the fact that the Bill of Rights affords greater protection to women and children as indicated in the Bhe and Gumede cases. Therefore any standard of deviation would fall foul of the rights to equality and human dignity. At the same time the Shilubana case has raised extensive debates and

criticism among academic writers on whether or not the development was proper or unfairly undermined customary law..

Bekker and Boonzaaier (2008: 459-462) appear to criticise the manner the Constitutional Court per van der Westhuizen J ruled in the Shilubana case. They argue that the court relied on what it thought was the Valoyi customary law and did not bother to find out the 'living law'. Ntlama (2009: 355) argues that that the Shilubana decision undermines the role of customary law as an independent source of norms and standards within the South African legal system and that the judgment fails to take into account that customary law is a body of law that regulates the lives of many South Africans by allowing the development of customary law to give prominence to the powerful, who are able to manoeuvre the legal system for their personal gain. On the other hand Mmusinyane argues that the appointment of Ms Shilubana must be seen as advancement towards non-discrimination more specifically based on gender in chieftainship succession (Mmusinyane, 2009: 150-156) .

Taking into account the different academic views advanced above, I am of the opinion that in as much as a large portion of South Africa still practices customary law in their day-to-day social life, it is also important that such practices reflect the values entrenched in the Bill of Rights. The fact that customary law has received full recognition in terms of the Constitution entails that like all other laws customary law should be subjected to judicial scrutiny to ensure compliance with the constitutional provisions.

In reference to the Shilubana decision I am of the opinion that official customary law as entrenched in the Constitution should be used as a guiding principle in deciding customary law issues where a conflict arises between living law and official law especially in instances where a principle of living law contravenes the Bill of Rights. For example had the Valoyi Royal Council not amended their customary law to reflect constitutional values, such failure would not have changed the fact that the principle of male primogeniture as observed by the Valoyi tribe contravenes the rights to equality and human dignity. The oversight would only mean that the principle of male primogeniture remains unchallenged and gender stereotyping is condoned. Having regard to the above discussion it is apparent that the Shilubana is a step closer in ensuring that customary law rules and practices that condone gender inequality will not pass constitutional scrutiny. The decision reflects a positive advancement towards gender equality and eliminates social stereotyping brought about by the principle of patriarchy.

The place of (harmful) cultural practices in a constitutional state

Cultural practices such as virginity testing, genital mutilation (female circumcision), male circumcision, and initiations form an integral part of African societies or communities (Maluleke, 2012: 5-8). In South Africa, the month of June marks the beginning of initiation (passage to adulthood) rites and other related cultural practices. These rites involve both female and male participants. However, they differ from tribe to tribe even from community to community. In African societies these practices are

seen as a way of preserving African morality (Twala, 2007: 22-33). According to Scorgie (2002: 64) the importance of cultural practices such as virginity testing is associated with dignity and pride among its proponents. For the individual girls, their families and communities the practice is seen as a way of preserving morality (Vincent, 2006: 23; Wickstroom, 2010: 534-540). However, in terms of human rights law these practices are considered discriminatory, harmful, and degrading as they infringe on protected fundamental rights such as the right to bodily integrity, the right to privacy, the right to human dignity, and the right to equality (Kaime, 2005: 228-238).

International and regional instruments such as the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (Children's Charter) make provision for the practice of such cultural rights provided they are not harmful to children. Article 24(3) of the CRC provides that States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children. Article 21(1)(a) and (b) of the Children's Charter provides that States parties shall take all appropriate measures to abolish customs and practices harmful to the welfare, normal growth and development of the child and in particular;

- (a) those customs and practices prejudicial to the health or life of the child; and
- (b) those customs and practices discriminatory to the child on the grounds of sex or other status.

In 2007 Taylor et al (2007: 27-35) conducted a research on the perceptions and attitudes secondary school students in KwaZulu-Natal towards virginity testing. Some of the reasons for partaking in this cultural practice can be summarised as follows;

- the practice is a cultural practice;
- it gives the girls reason to be proud of themselves ;
- it decreased the likelihood of sexual activity ;
- it enabled parents to be proud of their daughters.

Whether the acceptability of this practice in modern South Africa is genuine or not, is a question that remains unanswered. This is so because family and peer pressure plays a major role in influencing the participants' decisions and children often do not want to be ostracized and hence consent to be tested (Taylor et al., 2007:31-32; Vincent, 2013). As a result, this has prompted the government to permit such cultural practices within certain legal parameters (Moodley, 2008:72-77). Section 12 of the Children's Act 38 of 2005 as amended sets certain parameters on when can children be subjected to virginity testing and circumcision. Virginity testing of girl children is permitted when the child is older than 16 and the provisions of section 12(5) have been complied with. The results of such test may not be disclosed without the consent of the child and the child cannot be marked in any manner (Sections 12(6) and (7) respectively of the Children's Act). In the same manner the male child can only undergo male circumcision if he is older than 16 years (section 12(9)(b) and (c) of the Children's Act). However exceptions exist where a male child may be circumcised before the age of 16 years owing to religious purposes and medical reasons (section 8 of the Children's Act).

Moreover, South Africa ratified the African Charter. Article 17 of the Charter provides that every individual has the right to freely take part in the culture of his community and that the promotion and protection of morals and traditional values recognised by the community shall be the duty of the state (Article 17(3) of the African Charter). Article 22(1) provides for the rights of all peoples to their cultural development, with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. Articles 18, 27 and 29(7) of the African Charter provide that the family must preserve moral values and family heritage.

Having regard to the above human rights provisions each ethnic group in South Africa must enjoy their own culture and traditions without interference or any form of discrimination from the State and its organs and the courts. However, the phrasing of sections 30 and 31 of the Constitution places a restriction on the exercise of the right to culture to be practiced within the ambit of the Bill of Rights (See Section 39(3) of the Constitution). Therefore, taking into account the fact that South Africa has a multicultural society with diverse African communities, it is only proper to conclude that the basis of delimiting cultural practices through legislation and the Constitution is meant to preserve the cultural identity of African communities still embedded in their culture. Therefore, aligning customary law with the provisions of the Bill of rights and relevant human rights instruments presents a step closer to curbing harmful cultural practices especially those targeted at vulnerable groups such as women and children (Odeku, 2014: 33-34).

Conclusion

From the above discussion, it is clear that customary law has outlived its patrilineal characteristics and that there exist no justification for the blatant discrimination against women and children that is prevalent under customary law. Further that the stringent limitation that is imposed on the practice of harmful cultural practices is an indication that South Africa considers its international and regional commitments to non-discrimination and stereotyping of utmost importance. Hence, the enactment of legislative frameworks consistent with these obligations present a welcome measure to ensure that human rights are respected and no individual is subjected to degrading and inhuman treatment under the pretense of culture.

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