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John Cantius Mubangizi

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By John Cantius Mubangizi[1]

Abstract

South Africa is infamous for its history of disenfranchising most of its population under the dehumanizing policy of apartheid. A country of almost 50 million people, South Africa has a diverse array of languages, races, religions and ethnic communities, and has faced significant challenges - political, cultural and socio-economic - since the advent of democracy in 1994. The writers of the 1996 Constitution faced the unenviable task of accommodating the diverse viewpoints that inevitably derived from South Africa's fractured history and society. The Constitution is one of the most progressive in the world, and notably includes a Bill of Rights, which in addition to including civil and political rights typically protected by international human rights instruments, includes protection of socio-economic and cultural rights. Cultural rights are protected in Sections 30 and 31 of the Constitution, although such protection is not without limitation. This highly complex interplay and "competition" between human rights and culture is the golden thread that traces through the paper, which focuses on several cultural practices and traditions which, it is suggested, violate certain human rights norms in South Africa. These practices and traditions, all of which relate to women, are reviewed – together with the sections of the South African Constitution that they are considered to violate. Using the example of curbing the practice of female genital mutilation (FGM) in other African countries through the NGO Tostan, it is emphasized that the law is only one component of a multidisciplinary approach, and that civil society, government and other role-players are all needed to change perceptions and attitudes. In conclusion, general recommendations are made about reducing the conflict between culture and human rights in South Africa. These include the use of human rights education, human rights advocacy on gender issues, legislative measures, and developing customary law to ensure compatibility with the South African Constitution.

Keywords: South Africa, human rights, culture and human rights

Introduction

South Africa is a country of many cultures. Its multicultural nature is reflected in its array of languages, races, religions and ethnic communities. The country has a population of about 49 million people, 79.5 per cent of whom are Black, 9.2 per cent White, 8.8 per cent of mixed race (colloquially referred to as 'Coloureds'), and 2.5 per cent being of Indian/Asian descent.[2] The Black population comprises numerous ethnic groupings, the most populous being the Zulu and Xhosa in the eastern provinces of

[1] John Cantius Mubangizi is a Professor of Law and Deputy Vice-Chancellor and Head of the College of Law and Management Studies at the University of KwaZulu-Natal, South Africa. He is the author of a book entitled *The Protection of Human Rights in South Africa: A Legal and Practical Guide* (Juta & Company: 2004) and he has published more than thirty peer-reviewed articles in accredited South African and international journals and written several chapters in academic books

[2] See Statistics South Africa, 2010 Mid-year population estimates [cited August 2, 2010]; Available from: http://www.statssa.gov.za/publications/P0302/P03022010.pdf

KwaZulu-Natal and the Eastern Cape, respectively. In terms of language, there are eleven constitutionally recognized official languages, which are mainly spoken by and along the various ethnic groupings. It is important to note, that as with language, cultures are specific to individual groupings, and hence the extensive cultural diversity in South Africa.

"Culture" has been defined in various ways. A modern definition of the concept however, is provided by the Merriam-Webster Online Dictionary as "the integrated pattern of human knowledge, beliefs, and behavior that depends upon man's capacity for learning and transmitting knowledge to succeeding generations."[3] According to this definition, "culture" includes "the customary beliefs, social forms, and material traits of a racial, religious, or social group."[4] Simplistically speaking then - in the South African context and as defined in this paper - culture could be said to mean a way of acting, thinking and doing things, that is unique to a particular group of people.

The South African Constitution (1996) is regarded as one of the most progressive in the world, and contains a Bill of Rights providing for all categories of human rights, that are ordinarily included in most international human rights instruments. The uniqueness of the South African Bill of Rights, however, is the ambitious inclusion of the controversial socio-economic and cultural rights - in addition to the traditional civil and political rights. The inclusion of socio-economic rights should be seen in the context of South African history - a history characterized by gross human rights violations, denial of access to social goods and services to most citizens, and lack of access to economic means and resources by these people. The inclusion of cultural rights has its origins in the fractured history of South African society, in which the cultures and cultural diversity of the majority were, for centuries, disparaged and ignored - first under colonialism, and then under apartheid from 1948 to 1994 (Grant, 2006: 3).

This paper briefly reviews several cultural practices and traditions - circumcision/female genital mutilation (FGM), virginity testing, marriage by abduction, bride price, polygamy and primogeniture - that might clash with certain human rights norms in South Africa. Much has been said about these practices in the African literature, but not in the South African constitutional context, and it is here that the value and contribution of this paper lies. The practices are generally rooted in a culture of discrimination against women, and as violations of human rights they function as instruments for socializing women into prescribed gender roles in South African society, and socializing men into a particular facet of masculinity vis-à-vis these practices – which in turn promotes their perpetuation. The cultural practices concerned are also linked to the unequal position of women in political, social, and economic structures of the society where they are practiced, and represent a particular society's control over women (WHO, 2008).

The paper concludes by suggesting how the clash between culture and human rights in the South African context, could be minimized. In this regard, the paper reviews, with particular reference to FGM, the experience and lessons learned in some African countries - especially the work of the NGO Tostan in West Africa - which South Africa might heed. It is clear that legislation is just part of the holistic solution - which lies in

[3] Keith Eppich, "The Progress of 'Culture'" Available from: http://rhetoric.sdsu.edu/lore/1_3/progress_culture.htm.
[4] Ibid.

education, consultation, empowerment and encouraging positive deviance from particular cultural practices by both genders.

The constitutional context

The 1996 South African Constitution - adopted after the advent of democracy in 1994 - was crafted to accommodate a wide variety of views, ranging from political to social and economic, from cultural to religious and linguistic, and from ideological to practical and pragmatic. Cultural rights are protected in sections 30 and 31. Section 30 provides for an individual right to culture and language, while section 31 (which provides for rights of cultural, religious and linguistic communities), introduces a collective dimension and emphasizes the idea of belonging to a community - which underpins the whole concept of culture. This is because cultural rights "are by their nature group oriented since individuals share their culture with other persons constituting a group or community" (Devenish, 1998: 422).

The protection of cultural rights in sections 30 and 31 is given further impetus by section 185 of the Constitution, which provides for the creation of a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. It is also recognized by section 211(3), which provides for the application of customary law by the courts, "subject to the Constitution and any legislation that specifically deals with customary law." This is because, it has been argued, the right to culture implies the right to recognition and application of customary law (Grant, 2006: 7).

The cultural rights in Sections 30 and 31 are not unlimited. They have to be exercised in a manner that is not inconsistent with any provision of the Bill of Rights. The subjection of these rights to the Constitution and the Bill of Rights was a subject of bitter contestation during the negotiations that led to the 1993 Interim Constitution, and was again reflected in the process of ratification of the 1996 Constitution - through lobbying by traditional leaders to have culture excluded from the reach of the Bill of Rights (Grant, 2006: 8). Needless to say, this lobbying and in particular the attempt to exempt culture and customary law from the requirements of the right to equality enshrined in Section 9 of the 1996 Constitution, was fiercely resisted by women's groups. As is now clear from the Bill of Rights, support for the requirements of the right to equality over culture and customary law, carried the day. Therefore, any attempts to undermine the fundamental right to equality under the guise of cultural rights, can only be seen as a contradiction and violation of the constitutional position on that right.

Further limitations to the cultural rights in sections 30 and 31 of the Constitution are imposed by Section 36. This general limitation clause permits limitations that are "reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom." It is in the context of this limitation clause and the limitations built into Sections 30 and 31, that the clash between culture and human rights must be seen. It is also by virtue of those limitations, that the cultural practices and traditions discussed below might become particularly problematic.

Cultural practices and traditions that violate human rights

Female circumcision

Also known as female genital mutilation (FGM), the practice involves the incision and removal of parts of the female external genitalia. There are three main variations of

female genital mutilation. The first consists of the removal of the clitoral prepuce or tip of the clitoris (Shelley, 1993: 1944, 1946). This mild form of FGM is mainly practiced in Muslim societies, and is known as *sunna* (which means tradition) (Shelley, 1993: 1944, 1946). The second form involves the removal of the entire clitoris and the labia minora. This is known as clitoridectomy, and is also referred to as excision[5]. The third and most severe form of FGM is known as infibulation, also referred to as pharaomic circumcision (Ibid). This involves the removal of the entire clitoris, the labia minora, and most of the labia majora. The process closes off the entire area, leaving only a small opening to allow passage of urine and menstrual blood.

Because the cultural practices associated with FGM often take place in villages far from proper hospitals and medical facilities, the procedures are often done in unsanitary conditions, using unsterilized instruments such as razor blades, kitchen knives, broken glass or scissors (see Grant, 2006; Shelley, 1993: 1944, 1946; Lewis, 2009; Mswela, 2009; Sipsma et al., 2012). Sometimes, neither anesthesia nor antiseptic techniques and materials are used. Apart from the obvious physical effects, infections of the genital and surrounding areas usually occur, and the dangers of HIV transmission are very real.

The reasons usually given for the practice of FGM vary from community to community and depend on the particular cultural context and aspect of FGM concerned. It is not possible to list all the reasons here, but they usually include: religious requirements and traditions (particularly Islam), preservation and enhancement of fertility, coming of age rituals/initiation, preserving chastity and fidelity, and promoting social and political cohesion (see Shelley, 1993; Lewis, 2009). It is important to note that while some women or girls who are circumcised do not consent or are too young to give informed consent, there are many others who do it willingly, given the known social and economic advantages of FGM in the often complex cultural context.

Female genital mutilation is not originally a South African custom. It is believed to have been 'imported' by immigrants from other African countries and beyond - who have been flocking into South Africa over the last two decades. Be that as it may, there are those who believe that the practice is indeed taking place in some parts of South Africa, and that it is no longer just another foreign custom (Mswela, 2009). According to the Immigration and Refugee Board of Canada, although FGM is not widespread in South Africa, it is practiced in some parts of the Eastern Cape and KwaZulu-Natal[6].

The cultural practice of FGM is in conflict with and violates several international human rights norms, and many provisions of the South African Bill of Rights. In terms of international law, the right not to be "subjected to torture or to cruel, inhuman or degrading treatment or punishment"[7] immediately comes to mind. Several international human rights instruments provide for this right.[8] Under the South African Constitution,

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[5] Peter Aikman, 'Female Genital Mutilation: Human Rights Abuse or Protected Cultural Practice?' Available from: http://www.qhsj.org/attachments/082_fgm.pdf.

[6] See, South Africa: Report on female genital mutilation (FGM); Available from: http://www.unhcr.org/refworld/publisher,IRBC,,ZAF,3f7d4e3e2a,0.html.

[7] This is the wording of Article 7 of the International Covenant on Civil and Political Rights (1966).

[8] These include the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the American Convention on Human Rights (1969), and the African Charter on Human and Peoples' Rights (1981).

Section 12(1) provides for "freedom and security of the person" which includes the right to be free from all forms of violence from either public or private sources,[9] and the right not to be tortured in any way.[10] The Section also includes the right not to be treated or punished in a cruel, inhuman or degrading way.[11] Moreover, Section 12(2) provides for the right to bodily and psychological integrity, which includes - *inter alia* - the right to security and control over one's body. FGM falls foul of all these rights.

The right to life is also protected in all relevant international human rights instruments, including the African Charter on Human and Peoples' Rights. In the South African Constitution, it is protected under Section 11. The importance of the right to life was explicitly acknowledged by the Constitutional Court, in *S V Makwanyane & Another* [12] - as "the most important of all human rights and the source of all personal rights."[13] Due to a conspiracy of silence on FGM-related deaths, it is however impossible to estimate the numbers of deaths from FGM with any measure of certainty. However, judging by the estimates from other parts of Africa[14], deaths from FGM are not uncommon, particularly taking into account the likelihood of HIV transmission through the ritual, as mentioned earlier. FGM is therefore in direct conflict with the right to life.

Section 10 of the South African Constitution protects the right to dignity. It states that "everyone has inherent dignity and the right to have their dignity respected and protected." Dignity is not only a pre-eminent value in the Constitution, but it has also been said to be a central value of the objective, normative value system.[15] The nature and practice of FGM practices might be a direct impairment and violation of the dignity of the women on whom such are performed, but here again the particular cultural context is important and relevant.

Reference was made earlier to the fallacy of undermining the right to equality under the guise of cultural rights and practices. FGM is pertinent here. Provided for under Section 9 of the Constitution, the right to equality is symbolically one of the most important rights in the Constitution. The right - among other things - prohibits discrimination. Within certain contexts, FGM is a form of indirect discrimination, which "occurs where certain requirements, conditions or practices have an effect or result that is unequal or disproportionate on a person or a group of persons."

Because female circumcision is usually performed on girls under 18 years of age, it inevitably violates their rights as children. Under Section 28(1) of the South African Constitution, "every child has the right to be protected from maltreatment, neglect, abuse or degradation." Moreover, Section 28(2) stipulates that "a child's best interests are of paramount importance in every matter concerning the child." Considering that FGM poses a serious psychological and physiological health risk to children on whom it is performed, it is unlikely to protect them or to be in their best interests. The passing of the

[9] Section 12(1)(c).
[10] Section 12(1)(d).
[11] Section 12(1)(e).
[12] 1995 (6) BCLR 665.
[13] Para 144.
[14] Due to the lack of antibiotics in certain areas of Sudan, it is estimated that one-third of the girls who undergo FGM there actually die (See 'Female Genital Mutilation – The Facts'; Available from: http://www.path.org/files/FGM-The-Facts.htm.)
[15] See *Carmichele v Minister of Safety and Security* 2004 (4) SA 938 (CC) at para 54.

Children's Act[16] which includes a total prohibition on FGM[17], has done little or nothing to eliminate or reduce the practice.

There are several other rights with which the cultural practice of FGM clashes, including the right to privacy. A closer look at this right will be undertaken under the discussion of another cultural custom - virginity testing - which now follows.

Virginity testing

The custom of virginity testing is neither new nor unique to South Africa. It is a longstanding practice that exists in many countries across the globe (Pelin, 1999). In South Africa it is mainly prevalent among the Zulu people, largely in the province of KwaZulu-Natal. The custom had apparently died out in the middle of the 20th century, but re-emerged with renewed vigor in the 1990s - reportedly as one of the defenses against the spread of HIV/AIDS (Le Roux, 2006: 16). Because of that, some believe that virginity testing enjoys tacit support in some quarters, including higher levels of government (George, 2008: 1455).

The practice of virginity testing involves the physical examination of a girl's genitalia, in order to determine whether the hymen (a small membrane that stretches across part of the vaginal opening) is intact. A girl whose hymen is found intact, is considered to be a virgin. A girl whose hymen is found broken will have failed the test. Testing procedures may vary from one tester to another, and from one community to another, and while in the past tests were usually performed privately by a mother or aunt, today virginity testers are usually elderly women recognized in the community as such. Testing is usually conducted at big venues, such as at public celebratory events (Ibid).

As with female genital mutilation, the practice of virginity testing is in conflict with, and violates, several rights in the South African Bill of Rights. To begin with, it infringes the right to privacy that was alluded to earlier. Protected under Section 14 of the Constitution, the right covers a general right to privacy, together with specific rights relating to certain circumstances. The invasion of privacy has been defined as "an international and wrongful interference with another's right to seclusion in his (or her) private life" (McQuoid-Mason, 1978: 100). The practice of virginity testing falls foul of the three delictual elements of that definition, namely violation of privacy, wrongfulness and intention.

Closely related to the right to privacy, is the right to bodily and psychological integrity, which includes the right to security in and control over one's body.[18] Indeed, the concept of bodily integrity lies at the heart of many of the rights in the South African Constitution, and viewed from the perspective of women - it "identifies control over sexuality and reproduction as essential to women's enjoyment of all rights" (Copelon, 1995: 195). In that regard, both the right to privacy and the right to bodily integrity are closely linked to the right to dignity. The importance of the right to dignity cannot be overemphasized. In *S v Makwanyane and Another* [19], O'Regan J stated as follows:

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[16] 38 of 2005.

[17] According to Section 12(3) of the Act, female genital mutilation or circumcision is an offence, and in terms of Section 305(1)(a) and (6), anyone who is found guilty of this offence can be fined or imprisoned for 10 years, or be given both a fine and a term of imprisonment.

[18] Section 12(1) and (2).

[19] 1995 (6) BCLR 665(CC).

> "The importance of dignity as a founding value of the new Constitution cannot be overemphasized. Recognizing a right to dignity is the acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of the other rights that are specifically entrenched."[20]

It could be argued that because the right to dignity is a foundational and core value, from which rights such as bodily integrity and privacy derive, the violation of those rights is always simultaneously a violation of the right to dignity. In the specific context of virginity testing, the coercive and physically invasive nature of the practice, the way in which private and personal matters are attended to in public, and the possible consequences of a 'negative' test - all amount to a violation of the right to dignity.

With regard to the right to equality, the argument made earlier in relation to FGM also applies to virginity testing, namely that it is a form of indirect discrimination. Similarly, the arguments made earlier regarding children's rights, are also applicable here. However, just as with FGM, the inclusion of a prohibition of virginity testing in the Children's Act[21], has had little or no impact. Section 12(4) of the Children's Act prohibits virginity testing of children under the age of sixteen, and certain conditions are specified in terms of which virginity testing may be performed on children above that age. Despite this legislative prohibition, however, the practice has continued unabated.[22] It is for that reason that the United Nations Committee on the Elimination of Discrimination against Women (CEDAW), has called upon the South African government to amend the Children's Act, and to completely abolish virginity testing regardless of age.[23]

"Ukuthwala"

Ukuthwala is a Xhosa word, that literally means "to carry" (Koyana, 1980: 1). *Ukuthwala* refers to the practice of marriage by abduction, which involves the waylaying or capturing of a girl and taking her to a man's home in marriage. The "capturing" is usually done by a group of people, one of whom is the future husband. In many cases the girl is unaware and unwilling, but in other cases the girl may be complicit in the plan. What follows is anyone's guess, but some have described it as a rape (Wadesango, Rembe and Chabaya, 2011: 121, 123). This is followed by several processes which include making a report at the girl's home, and starting negotiations for *lobola* (bride price). A relationship then develops between the two families. If the *lobola* negotiations are unsuccessful, the girl is returned to her parents' home, and the man's family is required to pay damages (Curran and Bountuys, 2005: 617, 615). If, however, the negotiations are successful, as they most usually are, the girl's status then changes to that of a young wife, and the marriage is sealed.

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[20] At para 329.
[21] Act 38 of 2005.
[22] See CEDAW, Concluding Observations of the Committee on the Elimination of Discrimination against Women: South Africa, Forty-eighth Session, 17 January-4 February 2011; Available from: http://advocacyaid.com/ecdnewsflash/CEDAW_C-ZAF-CO-4_closing_comments_2011.pdf.
[23] Ibid.

Although *ukuthwala* is mainly practiced among the Xhosa people in the Eastern Cape Province, it also occurs among other tribes, such as the Zulu people in KwaZulu-Natal Province. Disturbingly, girls as young as 12 to 15 years of age are sometimes targeted, and forced to marry older men through this practice. There is, however, a lack of serious attempts by government to condemn and intervene in halting this violation of human rights. Indeed, the voices of condemnation have been muted. In fact, some well known people in the public domain - including legal academics - have spoken and written in support of the custom. Writing in *De Jure*, D. S. Koyana and J. C. Bekker have criticized "those who think that customary law and customary practices like *ukuthwala* and *lobola* can be wished away just because we are in the new millennium" (Koyana and Bekker, 2007: 139, 143). The duo have also challenged "the introduction of legislative measures by parliament and the handing down of judgments by the high courts of the land which purport to develop customary law when in fact they are killing it 'softly' or in a clever manner."[24] Koyana and Bekker instead find praise for the judgment of Pakade J in the unreported case of *Feni v Mgudlwa*[25], which gave "unqualified support for the *ukuthwala* custom as a basis for the formation of valid customary marriage" (Koyana and Bekker, 2007: 143).

Despite the lack of serious efforts to halt the practice of *ukuthwala* and the apparent support by some, the clash between the custom and human rights is self-evident. The arguments made earlier regarding the violation of the right to equality, the right to dignity, the right to bodily integrity, and children's rights in relation to female circumcision and virginity testing, also apply here.

It is important to note that Section 12 of the Children's Act, which lists prohibited social, cultural and religious practices that are detrimental to a child's health or well being, does not mention *ukuthwala* by name, nor are the words "forced marriage" actually used. Reference is made to the "minimum age set by law for a valid marriage"[26] and not giving a child "in marriage or engagement without his or her consent."[27] Moreover, the practice of *ukuthwala* is not targeted by the offences created and listed under Section 305 of the Act.[28] In view of the human rights violations occasioned by the practice, a more assertive legislative approach in the Children's Act, could have been expected.

"Lobola" (bride price)

The term *"lobola"* has been variously translated as "bride price", "bride wealth" or "dowry". It has also been defined in various ways, with definitions changing over time due to the shift from the transfer of property that *lobola* was originally intended to entail, to a transfer of cash as is currently the practice. Such transfer was intended to join the two families of the marrying couple through the payment of property by the family of the

[24] Ibid. They were referring to the cases of *Bhe v Magistrate, Khayelitsha (Commissioner for Gender Equality as amicus curiae)*; *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC), which abolished the rule of primogeniture in customary law of succession.

[25] Transkei High Court Case No 24 /2002 (unreported).

[26] Section 12(2)(a).

[27] Section 12(2)(b).

[28] Section 305 is the overarching penalty clause that lists all the offences applicable for the violation of any of the provisions of the Act.

man, to the family of the bride. The "property" mainly used to be cows. Cows have been replaced with money, and consequently "the meaning of *lobola* has changed, as has the cost associated with its payment" (Kaufman, 2001: 147, 153). A recent publication describes marriage as a social contract and *lobola* as a formal means of expressing that contract.[29] *"Lobola"* it goes on to say, "is an agreed sum or value which is paid by the man and his family to the family of the woman; before the couple is considered fully married, it must be paid in full."[30]

The advantages and disadvantages of the cultural practice of *lobola* have always been a source of protracted debates. Among the arguments used against the custom are issues of human rights. Central to these is the right to equality and the prohibition of discrimination between men and women. Why should men 'pay' for women when women are now recognized as equal to their husbands? And, why should some women draw 'a higher price' than others if all are equal in the eyes of the law? There is also a clash between the practice of *lobola* and the right to dignity. Some consider it to be "a problematic tradition that is potentially degrading to a woman, because she is being treated as goods for sale …"[31]

It must be emphasized, however, that the custom of paying *lobola* is not unique to South Africa. It is an old-age cultural tradition that is practiced and accepted in many parts of Africa and elsewhere. Any human rights arguments against it are therefore likely to meet the strongest resistance from many cultural groups, in comparison with the other cultural practices discussed in this paper.

Polygamy

Polygamy is another age-old custom that is not unique to South Africa or to the African continent. It is a practice that takes place in many parts of the world, and it extends beyond the realm of culture into religion and family law. Just like *lobola*, polygamy is hotly debated and contested, with proponents arguing that there is nothing wrong with it and that those who reject it do so merely on the basis of their western and Christian mindsets that disregard other traditional and religious thinking. Others have defended polygamy on the ground that those who enter into polygamous marriages choose to do so freely and consensually. However, those opposed to polygamy, argue that it is "often fraught with difficulty within the family circle not only amid the wives, but between the wives and the husband" (Mswela, 2009: 4). They point to the potential for infidelity, the high risk of contracting and spreading HIV/AIDS, and the complications surrounding issues of inheritance after the death of a polygamous husband.

From a human rights perspective, polygamy impacts directly and indirectly on the fundamental rights of women. The right to equality immediately springs to mind. Despite one commentator's argument that "as far as polygamy is concerned, it is hard to identify in what way it is incompatible with notions of human rights" (Murray, 1994: 37, 38), it is submitted that polygamy is actually in direct conflict with the notions of equality between men and women. It could also be argued that the potential for differential treatment of the

[29] See, Understanding lobola; Available at: http://health.iafrica.com/psychonline/qa/general/124598.html.
[30] Ibid.
[31] Mbuyiselo Botha, 'Lobola and the Misuse of Culture'; Available from: http://www.genderjustice.org.za/in-issue-1-may-2011/lobola-and-misuse-of-culture.

wives in a polygamous marriage is so real, as to result in unfair discrimination. Moreover, the fact that polygamy is only practiced by men marrying several wives and not vice-versa, could be interpreted as discriminatory to men.

The right to dignity is another right that risks violation by the practice of polygamy. In this regard, Section 8(d) of the Promotion of Equality and the Prevention of Unfair Discrimination Act[32] is significant. It provides for the prohibition of unfair discrimination on the grounds of gender, "including any practice which impairs the dignity of women and undermines equality between men and women." It is submitted that polygamy does just that. In fact, the Human Rights Committee of the United Nations has categorically pronounced on this, by stating that:

> "It should also be noted that equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle [the right of women to marry only when they have given free and full consent]. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist."[33]

It must be acknowledged that South African law recognizes polygamy and *lobola* through the Recognition of Customary Marriages Act.[34] The Act regulates customary marriages, and by implication, polygamy, and makes the payment of *lobola* one of the requirements of a valid customary marriage. It is submitted, however, that this legal recognition of polygamy and payment of *lobola* does not remove the violation of the rights to equality and dignity. In this regard, in the case of *Bhe v Magistrate Khayelitsha*[35], Langa D. C. J. noted that:

> "The rights to equality and dignity are the most valuable rights in an open and democratic state. They assume special importance in South Africa because of our past history of inequality and hurtful discrimination on grounds that include race and gender."[36]

The importance of the rights to equality and human dignity cannot be over-emphasized. They are not only enshrined in sections 9 and 10 of the Constitution, but they are also mentioned among the values upon which the Republic of South Africa is founded as a sovereign democratic state.[37] Moreover, they are also mentioned several other times in various sections of the Bill of Rights.[38] In view of the overriding importance of these rights in the Constitution, therefore, it can be argued that in the

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[32] 4 of 2000.

33 Para 24: HRC General Comment No. 28, Equality of Rights between Men and Women (article 3) CCPR/C/21/Rev/Add 10, adopted by the Committee at its 1834th meeting (sixty-eighth session) on 29 March 2000.

[34] 120 of 1998.

[35] 2005 (1) BCLR 1 (CC).

[36] Para 71.

[37] Section 1 of the Constitution.

[38] Sections 7(1), 36 and 39 (1)(a).

inevitable clash between culture and the rights to equality and dignity, the rights must necessarily take priority.

Primogeniture

The rule of primogeniture refers to the right of the eldest surviving male to inherit the estate of the parents. This cultural practice effectively excludes women from inheritance, and sometimes places them under the guardianship of the male heir. This exclusion of women from inheritance has its genesis in the deeply entrenched system of patriarchy that characterizes traditional African society. Over the years it found its legal basis in the Black Administration Act[39], section 23 of which endorsed the practice of male primogeniture.

Male primogeniture unfairly discriminates against women and places them in a position of subservience and subordination. It is therefore not surprising that the practice has been widely challenged in the South African courts, and, as a consequence, the South African Constitutional Court has had an opportunity to pronounce on the matter. In the aforementioned case of *Bhe v Magistrate Khayelitsha*[40], the Constitutional Court did not only declare section 23 of the Black Administration Act to be unconstitutional, but it also found the rule of primogeniture to be unconstitutional and invalid - to the extent that it excluded or hindered women and extramarital children from inheriting property. The Constitutional Court's decision was hailed as a significant step in the fight for women's rights, and the right to equality.

It is as a result of the Constitutional Court's stance in *Bhe v Magistrate Khayelitsha* and similar cases, that the Reform of Customary Law of Succession and Regulation of Related Matters Act[41] was promulgated. The main import of the Act is the legislative abolition of the male primogeniture rule, and the recognition of equal inheritance rights for all surviving children and spouses. This fundamental shift was intended to bring succession and inheritance matters in line with the Constitution and the notions of equality and human dignity enshrined therein.

Despite the aforementioned legal developments, however, male primogeniture is still practiced in several parts of South Africa - particularly in rural areas. This is largely ascribed to 'culture' and the age-old slogan that 'customs die hard'. As with all the cultural practices discussed in this paper, male primogeniture will continue to clash with the constitutionally accepted norms of human rights in the foreseeable future, particularly in the context of South African society, in which both culture and human rights enjoy significant competing interests. There are, however, several things that can and should be done, to alleviate the clash between culture and human rights, and which are now discussed.

Minimizing the clash: The success of the West African NGO Tostan

This paper focuses on cultural practices that directly or indirectly violate the rights of women. What is clear, though, is that despite the constitutional protection of human rights through the South African Bill of Rights and an array of relevant international human rights instruments, several of these offensive cultural practices

[39] 38 of 1927.
[40] 2005 (1) BCLR 1 (CC).
[41] 11 of 2009.

continue to take place. This is because culture is so deeply entrenched in many traditional African communities, that any efforts to eradicate traditional customs and practices, through legislation, are limited. Given this seemingly intractable difficulty, the manner in which unpalatable cultural practices elsewhere in Africa have been dealt with, is worthy of consideration. Accordingly, the experience with one such practice – FGM – in certain African countries is now discussed.

Outside of Africa and certain countries in the Middle East and Asia, FGM is considered to be a "harmful traditional practice" that ought to be prohibited (Finke, 2006: 14). Furthermore, in at least 16 African countries, measures banning the practice are evident in legislation and even in constitutions (Wakabi, 2007). At the second meeting of the African Union in Maputo (Mozambique), in July 2003, a protocol was added to the African Charter on Human and People's Rights – The Protocol on the Rights of Women in Africa (Ibid). This protocol came into force in November 2005 and was intended to protect the rights of women. Amongst other things, it established a ban on FGM.

Over the past decade, many states where FGM is practiced have amended their criminal code and child protection law, and have developed regulations to prevent and eliminate the practice. It has been recognized, however, that the law is only one component of a multidisciplinary approach required to halt FGM (Cottingham and Kismodi, 2009). Involvement by civil society, government and other role-players is needed to change perceptions and attitudes about FGM, and where FGM has been abandoned, this has resulted from a process of social change - often through educational activities which have been widely applied to particular communities (Ibid).

Tostan is a West African NGO based in Senegal, which has had significant success with reducing FGM in the region. There is an enormous range in the incidence of FGM across West Africa, from 2.2 per cent in Niger to 94 per cent in Sierra Leone, and with 6.6 and a remarkable 88.1 per cent of the respondents in these two countries, respectively, believing the practice should continue (Sipsma et al., 2012). Sierra Leone's high incidence relates to the dominance of the all female bondo secret society, which directs girls' rites of passage to adulthood, and with FGM being a requirement (Mgbako et al., 2010). Tostan's success has not been through instructing communities to abandon FGM, but rather through educating them about democracy and human rights so that those concerned understand the dangers of FGM and then abandon it voluntarily (Wakabi, 2007). Tostan uses various techniques such as theatre, role-playing, and other hands-on methods to educate communities. As a result of this, members of the community are engaged and then reach a consensus themselves about how to deal with issues such as FGM.

Tostan's community-based human rights approach to dealing with FGM has been so successful, that WHO and UNICEF have named it as a model programme for battling to end the practice (Ibid). Tostan has a remarkable FGM abandonment success rate of 77 per cent (Lakhani, 2012). Furthermore, at least 5000 communities in five different countries have publicly announced their abandonment of FGM because of Tostan's intervention (Kopper, 2010). Successful outcomes in The Gambia, for example, can be ascribed to Tostan's holistic, respectful approach, based on human rights (Ibid). An "organized diffusion model", starting with a few villages and targeting every one of both genders is used, and as the word spreads, the message is spread to other villages (Irin Global report, 2009). In effect, an initial core group (the critical mass), recruits others

through organized diffusion, until a large enough proportion of the community (the tipping point), is ready to abandon FGM; all this meaning that commitment of the communities concerned is essential to ensure abandonment of the practice (Mackie and LeJeune, 2009).

Conclusion: the way forward in South Africa

It is clear from the example of the NGO Tostan, just discussed, that dealing with the clash between culture and human rights within specific contexts, requires a pragmatic, open-minded and multi-faceted approach, in order to attain a meaningful measure of success. There cannot be a complete reliance on legislative and constitutional measures, although such are still important. A good example of this outside South Africa, has been the ineffectiveness of legislation against FGM in Ghana (Ako and Akweongo, 2009). Furthermore, criminalizing the practices may merely push them underground or even encourage them - through attempts to "beat the deadline". Overcoming deeply entrenched beliefs requires that communities be supplied with credible new information about the feasibility and desirability of abandoning offensive practices, or adopting benign alternatives (Mackie and LeJeune, 2009). This could be termed a form of positive deviation. Reversing particular cultural practices is similar to reversing social conventions, and needs to be a carefully considered process that promotes human rights, while at the same time being respectful of the culture and values of particular communities (Ibid). Gruenbaum (2001) - with reference to FGM - considered that the viewpoints of outsiders about particular cultural practices are often simplistic and do not appreciate the diversity of cultural contexts, the complex and variable meanings of the practices concerned, and the differing and sometimes conflicting responses to change them.

It is clear that human rights education is pivotal in minimizing the clash between culture and human rights - but that it should be focused on particular cultural and community contexts. Human rights education can and does play an important role in building a culture of human rights in culturally diverse societies such as South Africa. The overall goal of human rights education has been stated to be "the establishment of a culture where human rights are understood, respected and promoted" (Ssenyonjo, 2007: 39-67, 65). Generally speaking, in South Africa, human rights education has been inadequate. There is still a significant need to educate the public, and to create a wider awareness of the Bill of Rights and the processes and mechanisms of its enforcement, if notable progress is to be made, and before more focused programmes can be designed and implemented.

Human rights advocacy on gender issues is also critically important. In this regard, the role of non-state actors such as Tostan in West Africa, is crucial. The traditional human rights law paradigm, which focuses on the state, is typically inadequate for dealing with human rights abuses that take place in deep rural communities - where culture, tradition and custom are profoundly entrenched. Due to its unique history, South Africa is known to have numerous human rights NGOs, some of which focus on advocacy relating to women's issues. These NGOs could be vehicles for continuing the debate and issues discussed in this paper, and for formulating possible solutions in consultation with particular communities. The Women's Legal Centre (WLC) based in Cape Town is one example. It was started in order to advance the struggle for the equality

of women, particularly Black women, and it seeks to fulfill this objective through the promotion of women's human rights. Other women's NGOs include the Rural Women's Movement, the Women's Lobby, Agenda, Masimanyane Women's Support Centre, Black Sash, Tshwarananga Legal Advocacy Centre, and the Gender Advocacy Programme. In addition to these, there are several women's organizations attached to academic institutions. These include the Centre for Women's Studies (University of South Africa), the Centre for Gender Studies (University of Venda), the Centre for Gender Studies (University of KwaZulu-Natal), and the Community Law Centre (University of the Western Cape). All these bodies could play an important advocacy role in addressing the violation of women's rights that, as discussed in this paper, takes place under the guise of culture and tradition.

Mention was made earlier of the South African government's attempts at legislative intervention, through the promulgation of the Children's Act[42] - section 12 of which lists prohibited social, cultural and religious practices that are detrimental to a child's health or well-being. Similarly, the Reform of Customary Law of Succession and Regulation of Related Matters Act[43], was promulgated to abolish the practice of male primogeniture and to recognize equal inheritance rights for all surviving children and spouses. However, these legislative measures are grossly inadequate. A more assertive legislative approach is required. Although the passing of laws does not necessarily guarantee equality between men and women, it would go a long way in signaling government's disapproval of the practices that entrench inequality. The laws would also provide a legal platform on which other interventions could be based and reinforced.

Finally, developing customary law to ensure compatibility with the South African Constitution would markedly help to minimize the clash between culture and human rights. Most cultural practices that violate human rights usually take place in rural areas, where customary law is largely respected and applied. At the same time, it must be remembered that the South African Constitution envisages a system of legal dualism, by providing for the application of customary law in addition to common law. Whereas both common law and customary law are subject to the Bill of Rights, customary law is not sufficiently developed, as was clearly demonstrated in *Bhe v Magistrate Khayelitsha*, as was previously discussed. The question in fact, is whether the development of customary law should be undertaken by the courts or by the legislature. My view is that it should be done by both. The courts, which are in any case authorized by the Constitution to develop customary law[44], may do so by striking down those aspects of customary law that offend human rights norms in the Bill of Rights. The legislature, on the other hand, may do so by passing legislation that reforms customary law, as was done by the enactment of the Reform of Customary Law of Succession and Regulation of Related Matters Act.[45] A reformed and developed customary law system, that is consistent with the South African Constitution, would be another important tool for protecting vulnerable people such as women, whose rights are routinely violated in the name of culture in South Africa.

[42] 38 of 2005.
[43] 11 of 2009.
[44] Section 39(2) of the Constitution.
[45] 11 of 2009.

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