

RESOLVING THE TENSION BETWEEN GENDER EQUALITY AND CULTURE: COMPARATIVE JURISPRUDENCE FROM SOUTH AFRICA AND BOTSWANA

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Introduction

Issues of gender equality and cultural diversity are highly contested the world over. Some of the complex questions that arise out of enquiries on gender equality and cultural rights include:

- Where the rights of the individual and those of a collective conflict, which rights should take precedence over the other, and why?
- In terms of the customs and traditions of a particular tribe, should a female be appointed as the chief (leader) of a tribe that favours male succession to the chieftainship?
- Should a man be allowed to invoke his traditional custom of ‘marriage by capture’ to a charge of rape?
- Should a rapist or child defiler escape criminal liability by offering or being made to marry the victim?
- Should the system of male primogeniture be upheld regardless of whether it meets its traditional purposes or not?

The word “culture” is defined in the Oxford Advanced Learner’s Dictionary as, *inter alia*, “the custom and beliefs, art, way of life and social organisations of a particular country or group”.³ Cultural practices would thus be those things which members of a particular cultural group do to express their way of life. As culture is a way of life of a group of people, this means that cultural practices are associative – that is, they can only be enjoyed in communion with other members of a particular group or community.⁴

The aim of this paper is to illustrate how an aspect of attaining justice in society - by resolving the inherent tension between gender equality and cultural diversity - can be achieved, with a focus on the role the judiciary can play in resolving this tension. This paper reviews the tension between gender and culture and then discusses how courts have sought to resolve tensions that arise when the pursuit for gender equality comes into conflict with cultural practices using the South African

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3 Seventh Edition (2006) 357. It should be noted that the word “culture” is very difficult to define. However, the definition herein cited is a working definition for the purpose of this paper.

4 *MEC for Education, KZN and Others v Pillay* 2008 (1) SA 474 (CC). It should be noted that “culture” is not an uncontested concept. For some, culture is static and bounded, whilst for others it is fluid and open to change as society changes. Legal scholars and courts have increasingly adopted a context-sensitive approach to resolving the tension between gender equality and culture. Such an approach acknowledges that society, and culture, adapts over time.

Constitutional Court and Botswana Court of Appeal as case studies.

Tension between gender and culture

It is generally agreed that there are moral implications of ascribing rights to groups – rights are asserted in order to protect marginalised groups (often regarded as minority groups) from interference by the majority. This is not a new phenomenon, as human rights are viewed as ‘tools’ that are used to protect those things which are considered as being fundamental to the enjoyment of human life. The argument has thus been that – if subscribing to a particular way of life in one’s community is important to the enjoyment of human life – then the rights-based approach must be adopted in order to safeguard such a lifestyle. Jones⁵ writes to this effect:

[I]n moral philosophy and political life we commonly assert rights in relation to matters that we reckon to be of fundamental significance. Yet some of what is fundamentally important for people relates to identities that they can possess and to practices in which they can engage only in association with others. Consequently, it can seem merely arbitrary to insist that people can have rights only to goods that they can enjoy individually and never to goods that they can enjoy only collectively.⁶

The fact that groups are capable of possessing rights does not mean that they should infringe on the rights of individual members of that group. Our contention is that group rights are, in fact, only recognisable to the extent that the members of the group value the said individual rights. It is trite however that groups do indeed trample on the rights of their members in certain instances.⁷ This is particularly true where women’s rights and children’s rights are concerned.

Okin⁸ highlights two very important connections between culture and gender. The first connection is the sphere of personal, sexual, and reproductive life functions. She refers to these as the “central focus of most cultures, a dominant theme in cultural practices and rules.”⁹ She goes on to state that religious and cultural groups are often concerned with “personal law” – laws of marriage, divorce, child custody, division, and control of family property and inheritance – the areas in which the rights of women and girls are often grossly violated. Okin states that the defense of “cultural practice” advanced by collectives has a much greater impact on the lives of women and girls than it does on their male counterparts – because the former pour most of their “time and energy ... into preserving and maintaining the personal, familial, and reproductive side of life.”¹⁰

The second connection Okin identifies is the control of women by men – what she declares as being the principal aim of most cultures (traditional or religious). These points substantiate, to a great extent, the claim made by feminists that multi-culturalism poses a threat of assimilation of

5 P Jones “Group Rights and Group Oppression” (1999) 7(4) *J Pol Phil* 353.

6 *Id* 353.

7 C Albertyn “‘The Stubborn Persistence of Patriarchy?’ Gender Equality and Cultural Diversity in SA” (2009) 2 *Const Ct Rev* 165, 179.

8 S Okin “Is Multiculturalism Bad for Women?” in Cohen, Howard & Nussbaum (eds) *Is Multiculturalism Bad for Women?* (1999).

9 *Id* 13.

10 *Id* 13. See L Mushota “International Law, Women’s Rights, and the Courts: A Zambian Perspective” in this publication.

women's interests into majority cultures. Oloka-Onyango and Tamale¹¹ justify resistance to multiculturalism by stating that:

The real objective of the culturalist argument is the maintenance of structures of dominance and control and ... has little or nothing to do with the "cultural" wrappings of the argument. The one element that all the arguments have in common is the suppression of the human rights of women.¹²

Considering the above discussion, it is important to acknowledge that cultural beliefs and practices (and thus customary law) significantly influence public opinion on different aspects of life – including perceptions of fundamental rights. This has the ultimate effect of upholding or denying human rights. If indeed the real objective of culturalists is to maintain structures of dominance and control, the result will inevitably be that women's human rights will never be fully achieved. If culture is, however, allowed to develop with national and international human rights norms, the realisation of women's human rights will become a reality.

There are several notable benefits to belonging to a cultural group, such as the self-worth and self-identity that come with belonging to and upholding cultural practices, and the social capital of community life. However, feminists and some advocates of human rights have been concerned that if cultural groups are able to live according to their own value systems – without any challenge or change – these systems will continue to ignore the negative effects they have on women and they will perpetuate gender inequality.

Resolution of conflicts between gender and culture

If conflict arises between gender equality and cultural rights, it is the duty of judges, among other things, to ensure that they give effect to the rights of those most vulnerable – by respecting, protecting, and fulfilling their rights. This is the ultimate purpose of human rights.¹³ This section critically discusses the approaches open to the courts for resolving such conflicts.

South Africa

Both the right to (gender) equality and culture are guaranteed rights under the Constitution of South Africa. The Constitution, however, does not explicitly state which right takes precedence over the other, where a conflict arises. Thus the government (all wings of government: executive, legislature, and judiciary) as principal duty-bearer for human rights, has to explore ways in which both these rights are respected, promoted, and protected in the manner contemplated by the Constitution.

Section 9 of the Constitution of South Africa provides for the right to equal treatment and protection from unfair discrimination from the state and private entities. The starting point in determining equal treatment is ascertaining whether similarly placed people are treated in a similar way. Discrimination occurs when a difference in treatment occurs. Among the prohibited

11 J Oloka-Onyango & S Tamale "The Personal is Political,' or Why Women's Rights are Indeed Human Rights: An African Perspective on International Feminism" (1995) 17(4) *Hum Rts Q* 691.

12 *Id* 708-09.

13 KA Bentley *Whose Right is it Anyway? Equality, Culture and Conflicts of Rights in South Africa* (2003) 3.

grounds of discrimination is that of gender. Thus, no one may be unfairly discriminated against on account of their gender. Section 9(2) of the Constitution recognises that there may be occasions when differential treatment may be necessary to fulfill the substantive right to equality. Such differentiation will not amount to unfair discrimination.¹⁴

It should be noted that the right to equality – as contained in section 9 of Constitution of South Africa – is a non-derogable right. This means that as long as it is proved before a court of law that a statute or conduct unfairly discriminates against a complainant, based solely on the grounds of gender (or any of the other prohibited grounds of discrimination), such statute or conduct would be deemed to be in violation of the right to equality.

Sections 30 and 31 of the Constitution of South Africa provide for cultural rights. In terms of section 30, everyone has the right to speak any language and live the cultural life of their choice, as long as such cultural practice is consistent with the other rights contained in the Bill of Rights. Section 31, on the other hand, guarantees “the right of persons belonging to a cultural, religious or linguistic community to enjoy their culture, practice their religion and use their language: and to form, join and maintain cultural, religious and linguistic associations and with other organs of civil society”¹⁵ - as long as these are done in a manner consistent with the provisions of the Bill of Rights. Section 30 ascribes cultural rights to individuals, so as to enable them to freely choose which way of life they want to follow. Thus, no person can be coerced to subscribe to a way of life that they do not want. However, beyond having a choice to decide on the cultural life one will live, it is difficult to see how an individual can enjoy a cultural life in the absence of a community to share practices with. For example, the Constitution guarantees the right of individuals to use the language of their choice, but in the absence of others to speak the language with, the right becomes meaningless. Section 31 is therefore critical. It ascribes cultural rights to individuals, but these can only be enjoyed in association with other members of a cultural group.

Furthermore, section 31 protects a community from interference with its cultural life, either by persons who are not part of that group or by those who want to divert from the core purposes of the cultural community.¹⁶ Claims under section 31 of the Constitution can only be brought by individuals who are part of a cultural group and who are claiming a violation of a cultural right that is practiced in association with other members of the group. Both sections of the Constitution reinforce the celebration of the cultural diversity of South Africa, as espoused in the Preamble of the Constitution.¹⁷

The Constitutional Court of South Africa, in the ground-breaking cases of *Bhe and Others v Magistrate Khayelitsha and Others*, *Shibi and Sithole and Others*, and *South African Human Rights Commission and Another v President of the Republic of South Africa and Another*,¹⁸ considered the conflict between gender equality and culture. In the *Bhe* and *Shibi* cases, the estates of the

14 I Currie & J De Waal *The Bill of Rights Handbook* Fifth Edition (2005) 239.

15 Constitution of South Africa section 31.

16 I Currie & J De Waal *The Bill of Rights Handbook* Fifth Edition (2005) 625.

17 *Id.*

18 2005 (1) SA 580 (CC). This case is also discussed in E Macharia Mokobi “Lingering Inequality in Inheritance law: The Child Born out of Wedlock in Botswana” in this publication.

deceased had devolved to their relatively distant male relatives, without considering the rights of the surviving direct relations, on account of the latter being female. In *Bhe*, a mother brought an action on behalf of her two minor daughters against her father-in-law (the paternal grandfather of her daughters) to enable them to inherit their late father's house. *Shibi*, on the other hand, brought an action against her cousin who had inherited the estate of her late brother, who had been providing for her and another minor relative. In both cases, the system of male primogeniture – inherent in the cultures of the parties – enabled the male relatives to inherit the property of the deceased. In discussing the interpretation of the customary law and practice, Langa DCJ, as he then was, stated as follows:

Sections 30 and 31 of the Constitution entrench respect for cultural diversity. Further, section 39(2) specifically requires a court interpreting customary law to promote the spirit, purport and objects of the Bill of Rights. In similar vein, section 39(3) states that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by customary law as long as they are consistent with the Bill of Rights ...

[C]ustomary law is subject to the Constitution. Adjustments and developments to bring its provisions in line with the Constitution or to accord with the “spirit, purport and objects of the Bill of Rights” are mandated.¹⁹

Langa DCJ found that the customary law rule on male primogeniture did not reflect changes in society and did not justify the violation of rights of women and children. He wrote to this effect:

The primogeniture rule as applied to the customary law of succession cannot be reconciled with the current notions of equality and human dignity as contained in the Bill of Rights. As the centerpiece of the customary law system of succession, the rule violates the equality rights of women and is an affront to their dignity. In denying extra-marital children the right to inherit from their deceased fathers, it also unfairly discriminates against them and infringes their right to dignity as well. The result is that the limitation it imposes on the rights of those subject to it is not reasonable and justifiable in an open and democratic society founded on the values of equality, human dignity and freedom.²⁰

Interestingly, despite the apparent conflict between gender equality and certain notions of culture, the Court did not shy away from declaring the rule of male primogeniture to be incompatible with the Bill of Rights:

The exclusion of women from inheritance on the grounds of gender ... is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order.²¹

Subsequently, the Constitutional Court of South Africa, in the case of *Gumede v President of the Republic of South Africa*,²² held that a customary law which provided that women had no right to property upon divorce discriminated against them on the basis of gender. The Court recognised

19 *Id* at paras. 41, 44.

20 *Id* at para. 95.

21 *Id* at para. 91.

22 2009 (3) BCLR 243 (CC).

that the customary law rule was based on traditional gender roles which ignored women's value and agency in society and marital relationships, and perpetuated their poverty and dependency.²³ Interestingly, in that case, the Department of Home Affairs and MEC for Traditional and Local Government Affairs had opposed Gumede's claims on the basis that the Court was constitutionally obliged to apply customary law as is – thus applying a static view of culture.²⁴

Moseneke DCJ noted that customary law, in itself, has been influenced by the colonial history in many countries, and was often codified at a time when women's rights in general were not acknowledged:

This grudging recognition of customary marriages prejudiced immeasurably the evolution of the rules governing these marriages. For instance, a prominent feature of the law of customary marriage, as codified, is male domination of the family household and its property arrangements. Whilst patriarchy has always been a feature of indigenous society, the written or codified rules of customary unions fostered a particularly crude and gendered form of inequality, which left women and children singularly marginalised and vulnerable. It is so that patriarchy has worldwide prevalence, yet in our case it was nurtured by fossilised rules and codes that displayed little or no understanding of the value system that animated the customary law of marriage.²⁵

In contemplating a remedy, Moseneke DCJ described the benefit of adapting customary law in line with constitutional imperatives:

The adaptation of customary law serves a number of important constitutional purposes. Firstly, this process would ensure that customary law, like statutory law or the common law, is brought into harmony with our supreme law and its values, and brought in line with international human rights standards. Secondly, the adaptation would salvage and free customary law from its stunted and deprived past. And lastly, it would fulfil and reaffirm the historically plural character of our legal system, which now sits under the umbrella of one controlling law – the Constitution. In this regard we must remain mindful that an important objective of our constitutional enterprise is to be “united in our diversity.” In its desire to find social cohesion, our Constitution protects and celebrates difference. It goes far in guaranteeing cultural, religious and language practices in generous terms provided that they are not inconsistent with any right in the Bill of Rights. Therefore, it bears repetition that it is a legitimate object to have a flourishing and constitutionally compliant customary law that lives side by side with the common law and legislation.²⁶

In analysing the above judgments, Albertyn notes that:

[T]he Constitutional Court has generally accepted an approach that results in important norm-setting judgments about the place of women in families and communities. These judgments are not mere impositions of constitutional standards, but attempt to affirm customary practice as reflected in ‘living law’.²⁷

23 *Id* at para 36. C Albertyn “‘The Stubborn Persistence of Patriarchy?’ Gender Equality and Cultural Diversity in SA” (2009) 2 *Const Ct Rev* 165, 198–199.

24 C Albertyn “‘The Stubborn Persistence of Patriarchy?’ Gender Equality and Cultural Diversity in SA” (2009) 2 *Const Ct Rev* 165, 199.

25 *Gumede v President of the Republic of South Africa* 2009 (3) BCLR 243 (CC) at para. 17.

26 *Id* at para. 22.

27 C Albertyn “‘The Stubborn Persistence of Patriarchy?’ Gender Equality and Cultural Diversity in SA” (2009) 2 *Const Ct Rev* 165, 206.

Botswana

Botswana – like Zambia and other countries with older, post-independence constitutions – exempts customary law from the application of the prohibition on discrimination.²⁸ Increasingly, however, as human rights norms and treaties gain credence in countries, courts have sought to interpret such exclusion clauses in constitutions in a manner that does not approve of discrimination.²⁹ The examples are numerous throughout Africa, but Botswana is discussed here as an example of this movement towards recognition of women’s rights in customary law matters.

The case of *Ramantele v Mmusi and Others*³⁰ in Botswana is a good illustration of how recognition of women’s rights in customary law matters can be achieved. In this case, Mmusi and her sisters sought a declaration that the customary rule practiced amongst her tribe, which arguably qualified only the last-born son of deceased parents to inherit the family home as intestate heir – to the exclusion of his female siblings – was contrary to sections 3 and 15 of the Constitution of Botswana. Section 3 of the Constitution provides for equal treatment before the law, while section 15 prohibits discrimination on the basis of sex, among other prohibited grounds of discrimination. The applicants (Mmusi and her sisters) therefore alleged that this customary law subjected women to discrimination. In opposition to this argument, the Attorney General argued that this type of discrimination against women was permitted under section 15 of the Constitution of Botswana, which provided for an exception in matters of laws relating to inheritance.

The Court of Appeal emphasised, with regard to interpreting rights, that it must adopt a generous approach “to breathe life into the Constitution having regard to its liberal democratic values and (where necessary) with the aid of international instruments and conventions on human rights to which Botswana has subscribed”.³¹

In reading sections 3 and 15 together, Lesetedi JA, in the Court of Appeal, found that the section 15 limitation was not beyond reproach and stated that:

[A] derogation as contained in section 15(4) does not permit unchecked discrimination which is not consistent with the core values of the Constitution. Where there is a derogation the Court must closely scrutinise it, give it a strict and narrow interpretation and test whether such discrimination is justifiable having regard to the exceptions contained in section 3 of the Constitution. It is only when the Court is satisfied that a discrimination passes that test that the Court can find that the derogation is constitutionally permissible.

I therefore agree with the respondents (Ms Mmusi and others) that the derogations contained in section 15(4) of the Constitution are not unchecked. They must be rational and justifiable either as being intended to ensure that the rights and freedoms of any individual do not prejudice the rights and freedoms of others *or* as being in the public interest.³²

28 See Constitution of Botswana, section 15, and Constitution of Zambia, article 23.

29 M Ndulo “African Customary Law, Customs and Women’s Rights” (2011) 18(1) *Ind J of Global Legal Stud* 87, 91. A number of cases have established the right to gender equality under customary law. See for example: *Muojekwu v Ejikeme* [2000] 5 NWLR 402 (CA); *Mojekwu v Mojekwu* [1997] 7 NWLR 283 (CA); *In Re the Estate of Andrew Manunzyu Musyoka* (2005) eKLR (HC); *Ephraim v Pastory* (2001) AHRLR 236 (HC).

30 CAGCB-104-2012 (CA).

31 *Ramantele v Mmusi and Others*, CAGCB-104-2012 (CA) at para. 69.

32 *Id* at paras. 71-72. Here, the Court’s decision was very similar to that of the Kenya Court of Appeal in *Rono v Rono* (2005)

The Court of Appeal's method of determining the dispute is worth considering. In essence, the Court held that it is important to determine, factually, what the customary law in issue is – looking not just at past texts on customary law, but also contemporary records, case studies, and oral evidence to ascertain the current state of customary law. The Court held that the evidence suggested that the customary law in issue was flexible:

It is axiomatic to state that customary law is not static. It develops and modernises with the times, harsh and inhumane aspects of custom being discarded as time goes on; more liberal and flexible aspects consistent with the society's changing ethos being retained and probably being continuously modified on a case by case basis or at the instance of the traditional leadership to keep pace with the times ... For after all what is customary law but a set of rules developed by society to address issues around certain values which protect the community's social fabric and cohesion.³³

The Court further held that – irrespective of the constitutional provisions – for a customary law to achieve the status of law, it must be compatible with morality, humanity, and natural justice, as set out in the Customary Law Act. The customary law must accordingly comply with “any notion of fairness, equity and good conscience”.³⁴

The Court concluded that “there is no rational and justifiable basis for sticking to the narrow norms of days gone by when such norms go against current value systems”,³⁵ and declared that the customary law of inheritance at issue does not prohibit the female or elder children from inheriting as intestate heirs to the family homestead of their deceased parents.

Conclusion

From the above discussion, it is clear that when interpreting constitutional provisions that seemingly conflict with each other, the courts can take an approach that best gives effect to the protection of the fundamental rights of the weaker party. In doing so, courts in Botswana and South Africa have been attentive to the fact that customary law is not static and have taken extra precaution to establish what the lived customary law actually is.

Specifically, regarding the resolution of the tension between cultural rights and gender equality, it should be noted that some cultural practices will be masked under the aegis of rights, when in fact they seek to preserve inequality and dominion. In such cases, the courts have a duty to promote and protect the rights of the weaker party and safeguard against unfair discrimination.

AHRLR 107 (CA), where it also declared a customary law unconstitutional despite a similar clause in its Constitution excluding customary law from the prohibition against discrimination. The *Rono* case is discussed in more detail in L Mushota “International Law, Women's Rights, and the Courts: A Zambian Perspective” in this publication.

33 *Id* at para. 77.

34 *Id* at paras. 49-50.

35 *Id* at para. 80.