

**DENIAL OF INHERITANCE RIGHTS FOR WOMEN UNDER INDIGENOUS LAW
A VIOLATION OF INTERNATIONAL HUMAN RIGHTS NORMS**

by

NICOLETTE MOODIE

Student number: 3148-399-2

submitted in part fulfilment of the requirements for the degree of

MASTER OF LAWS

at the

UNIVERSITY OF SOUTH AFRICA

SUPERVISORS: PROFESSORS JOAN CHURCH AND NEVILLE BOTHA

DECEMBER 2000

ACKNOWLEDGEMENTS

My sincere thanks to Professors Joan Church and Neville Botha for their guidance and support in the writing of this dissertation and for the confidence they placed in me. I particularly want to thank Prof. Church, who went beyond the call of duty in providing invaluable assistance with the formalities and logistics of submitting this paper from overseas. I also wish to thank Ms Christa Cromhout and Mrs E.C. Venter for their assistance and support.

SUMMARY

Throughout sub-Saharan Africa, women and girls are denied their right to inherit from their husbands and fathers as a result of the operation of the indigenous law rule of male primogeniture, in terms of which an heir must be male. This violates prohibitions on gender discrimination, as well as other, more specific provisions found in international human rights treaties. However, courts in both South Africa and Zimbabwe have in recent years upheld the rule. States Parties to relevant treaties have an obligation to ensure equal inheritance rights for women and girls. In the case of South Africa, provisions of the Constitution are also relevant.

After discussing the operation of the indigenous law of inheritance, the international human rights provisions violated by it, as well as the recommendations of the South African Law Commission and legislative proposals on this issue, the writer suggests that legislation should be adopted to ensure equality for women and girls, while retaining the positive aspects of indigenous law and culture.

KEY TERMS: Indigenous law, sub-Saharan Africa, culture, inheritance, male primogeniture, distortion of indigenous law, duty of support, gender equality, international human rights norms, international law, treaties, Constitution, Bill of Rights, universality, non-discrimination, accountability, cultural relativism, judicial resolution, legislation, South African Law Commission.

346.52068 MOOD



0001783046

TABLE OF CONTENTS:

I. INTRODUCTION	1
II. INDIGENOUS LAW – THE PAST AND PRESENT.....	1
III. INHERITANCE UNDER AFRICAN INDIGENOUS LAW	5
IV. DETRIMENTAL EFFECT OF THE RULE OF MALE PRIMOGENITURE ON WOMEN AND THEIR CHILDREN 7	
V. APPLICATION OF THE RULE OF MALE PRIMOGENITURE BY THE COURTS.....	10
VI. VIOLATION OF INTERNATIONAL HUMAN RIGHTS NORMS.....	16
<i>A. Universality and Indivisibility of Human Rights</i>	17
<i>B. Accountability</i>	17
<i>C. Non-Discrimination</i>	20
<i>D. Relevant Human Rights Provisions</i>	21
<i>E. Regional Human Rights Treaties</i>	26
<i>F. World Conferences</i>	27
VII. CULTURAL RELATIVISM VS. UNIVERSAL APPLICATION OF HUMAN RIGHTS.....	28
VIII. JUDICIAL RESOLUTION VS. LEGISLATIVE INTERVENTION	30
IX. LEGITIMACY OF LEGISLATION	33
X. CONCLUSION	35
BIBLIOGRAPHY	36
TABLE OF CASES.....	41
TABLE OF STATUTES.....	42
LIST OF ABBREVIATIONS.....	43

I. Introduction

Women who are married under African customary, or indigenous law, do not have the same rights to inheritance as those married under the general law of the land. In the absence of legislation providing otherwise, this is the case most countries of sub-Saharan Africa.

It is my contention in this paper that this is not only severely detrimental to the well-being of women and their children, but is also in violation of international human rights norms, where the country in which a woman lives is a signatory to relevant international human rights treaties. Yet the courts have not found it so. Therefore I will elaborate on and give justification for this argument in this paper.

An argument can (and has) been made that women's position under indigenous law in South Africa is contrary to the constitutional guarantees of gender equality. I will focus on the situation in South Africa and Zimbabwe, where courts have in recent years upheld discriminatory inheritance laws.¹ However, most of what follows is true for vast numbers of women throughout Africa, at least those living in countries that have not intervened legislatively in the rules relating to inheritance by women in terms of indigenous law. As Church and Edwards state, "it is clear that in the multitude of tribal laws of the many African peoples of non-Western origin who are still embedded in the tribal and customary milieu, there are fundamental underlying principles that are uniform."² My focus will therefore be on international human rights norms, not domestic ones.

II. Indigenous law – the past and present

The argument I make in this paper, namely that the African indigenous law concept of succession by male primogeniture is a violation of women's human rights, is not

¹ See *Mthembu v Letsela*, 1997 (2) SA 936 (T); *Mthembu v Letsela*, 1998 (2) SA 675 (T); *Mthembu v Letsela*, 2000 (3) SA 867 (SCA); *Venia Magaya v Nakayi Shoniwa Magaya*, Zimbabwe Supreme Court Civil Appeal No 635/92, unreported.

² Church and Edwards, "Introduction to Indigenous Law and the Comparative Method", in Hosten *et al.*, *Introduction to South African Law and Legal Theory* (1995), 1248, at 1251. The rules regarding succession are broadly similar among different groups, at least in South Africa and Zimbabwe. See also South African Law Commission, "Customary Law", Discussion Paper 93, Project 90, 2000, at 25.

meant as a wholesale attack on indigenous law. The African legal tradition and the traditional African concept of family have positive attributes not found in their Western equivalents.³ The traditional concept of the extended family, and the pre-eminence given to mediation of conflicts, for example, stand to benefit women and families and help them cope in times of change and upheaval.⁴ What is needed is to retain these positive attributes of indigenous law, within the context of ensuring women's human rights.

However, indigenous law has been so distorted by years of colonial manipulation, and in the case of South Africa by apartheid, that it is sometimes difficult to determine just what its true nature is. The South African Law Commission (SALC) notes that it is "now generally acknowledged that the 'official version' of customary law, although frequently consulted as the most readily available source, is often inaccurate and misleading."⁵

Colonial administrators found that Africans governed their relations by unwritten rules or practices that were very different from European concepts of law. In order to assert their control over Africans, they attempted a compromise between principles that made sense to themselves and those that had meaning for their subjects and accorded with their social values. To this end they sought Western equivalents for local principles and superimposed these on indigenous law when they set about codifying or restating it.⁶ In this way, principles of indigenous law were corrupted into something they weren't before, with little social basis for their existence.⁷ "This has resulted in the creation of much 'paper law', or law at variance with the practices of the people, and therefore lacking in legitimacy, as well as effectiveness."⁸

³ See Bronstein, "Reconceptualizing the customary law debate in South Africa", *South African Journal of Human Rights*, Vol. 14 (1998), 388, at 409; Church, "Constitutional equality and the position of women in a multi-cultural society", *Comparative and International Law Journal of South Africa*, Vol. XXVIII (1995), 289, at 295.

⁴ See Armstrong *et al.*, "Uncovering reality: Excavating women's rights in African family law", *International Journal of Law and the Family* 7 (1993), 314, at 319 for a more detailed discussion of the social and economic meaning of the extended character of the African family.

⁵ South African Law Commission, *supra* note 2, at 24.

⁶ See Bronstein, *supra* note 3, at 397.

⁷ See Van der Meide, "Gender Equality vs. Right to Culture", *The South African Law Journal*, Volume 116, Part 1 (1999), 100 at 105; Church and Edwards, *supra* note 2, at 1253; Dlamini, "The future of African customary law" in Sanders (ed.), *The Internal Conflict of Laws in South Africa* (1990), 1 at 3,4.

In time, these distorted principles were defended as true “customs” by those who stood to gain.⁹ Male African leaders latched on to concepts that had the potential of entrenching their power, concepts given legitimacy and enforced by colonial or apartheid powers. In this, African leaders were supported by colonial or apartheid governments, who needed them to maintain control over their subjects. These leaders became accountable to the colonial (or apartheid) governments, no longer primarily to their own people, destroying one of the most important checks on power in indigenous law.¹⁰ Indigenous law as we now know it, is aptly described by Currie as “the product of a long history of collaboration between colonial administrators and indigenous elites and [was] not the lived ‘folk’ law it is claimed to be”.¹¹ Indigenous law “is more an invented tradition than a ‘genuine product of African culture’.”¹²

What has made this corruption of indigenous law even more problematic is that it was codified - set in stone, so to speak.¹³ Culture is flexible - social and cultural norms are continually evolving as social change happens and new challenges and opportunities arise, very often through contact with other cultures.¹⁴ The strength of indigenous law in its original concept, was that it adapted with the times, as internal and external factors brought about cultural change, while retaining its essential nature. The codification of indigenous law upset this natural relationship by fixing rules in place and letting them stagnate while the culture continued evolving. “Codification of the previously fluid customary law system not only created a set of rules designed to uphold values and meanings approved by the colonial authorities and powerful indigenous groups, it also fixed these rules in rigid legal form, reducing its (sic) capacity for development and change.”¹⁵ In this way, indigenous law lost one of its

⁸ Dlamini, *supra* note 7, at 3.

⁹ See Kaganas and Murray, “The Contest between Culture and Gender Equality under South Africa’s Interim Constitution”, *Journal of Law and Society* Volume 21, Number 4, (1994), 409 at 423

¹⁰ See Bronstein, *supra* note 3, at 397.

¹¹ Currie, “The Future of Customary Law: Lessons from the Lobolo Debate” (1994) *Acta Juridica* 146, at 146, quoted in Bronstein, *supra* note 3, at 398. See also Kaganas and Murray, *supra* note 9, at 424.

¹² Sinclair, “Pluralism in South African Marriage Laws: Race, Culture and Religion”, in *The Law of Marriage*, Vol. 1 (1996) 207, at 240, fn 94.

¹³ See Kaganas and Murray, *supra* note 9, at 423; Bronstein, *supra* note 3, at 394, 398.

¹⁴ See Kaganas and Murray, *supra* note 9, at 421-423. For discussions of culture as a construct, see *Ibid.*, at 425; Costa, “The Myth of Customary Law”, *South African Journal on Human Rights*, Vol. 14 (1998), 525, at 530.

¹⁵ Kaganas and Murray, *supra* note 9, at 423. See also Van der Meide, *supra* note 7, at 111; Dlamini, *supra* note 7, at 4.

most important attributes. As the SALC notes, "[t]he customary law with which we now have to deal is, in many respects both inequitable and out of date."¹⁶

The corruption of indigenous rules by Western concepts and their loss of flexibility, combined with the patriarchal nature of both Western law at the time of codification and indigenous law, resulted in a body of rules that very often discriminates against women. For example, the exact nature of a woman's status within the family had no exact equivalent in Western law, but the concept of guardianship seemed to be the closest match. The principle that a woman was under the perpetual guardianship of a male - her father or husband, most often - so found its way into indigenous law. Not only did it make sense in terms of western legal concepts, but would serve to entrench male power. It is, however, a distortion of the true nature of a woman's position in pre-colonial society.¹⁷

A note of caution is in order here. Although women were better off than under codified indigenous law, the pre-colonial African society they lived in was decidedly patriarchal and so were its rules. This provided fertile ground for the further subjugation of women through the distorted codification of indigenous law.¹⁸ African society today is still, as Church and Edwards put it, "typically patriarchal."¹⁹

In a patriarchal system, men hold the power and the purse strings. Armstrong *et al* observe that "[o]ften, men own and control the basic resources of most families and thereby acquire leverage over women. In this scenario women suffer from inequality which is either sanctioned by law or at least to which the law turns a blind eye."²⁰ A woman's status becomes especially precarious when her husband dies.

¹⁶ See South African Law Commission, *supra* note 2, at 12.

¹⁷ Church, *supra* note 3, at 295-296.

¹⁸ See Kaganas and Murray, *supra* note 9, at 423.

¹⁹ Church and Edwards, *supra* note 2, at 1261. See also South African Law Commission, *supra* note 2, at 7; The South African Law Commission notes that "customary laws of succession, at least in their traditional form, bear the imprint of a pre-colonial society. Patriarchy and an extended family structure were two of the most distinctive features of this social order. Patriarchy implied that all significant rights and powers were held by senior males. And, for purposes of succession, men were the medium through which a family's bloodline was traced. Women were not more than transient members of the patriline." *Ibid.*, at 1;

²⁰ Armstrong *et al.*, *supra* note 4, at 343.

III. Inheritance under African indigenous law

Although indigenous law, in its original form, recognizes the rights of individuals, the system is by nature communal rather than individualistic.²¹ Marriage is not a contract between two individuals; it is an agreement between two families.²² The contract between the families includes agreement on what is to be paid by the groom's family to the bride's family in terms of bridewealth.²³ Both families must consent to the marriage and the bride must at least acquiesce.²⁴ Procreation is one of the primary functions of an indigenous marriage, which is potentially polygynous.²⁵

Except where this has been changed by legislation, a wife married in terms of indigenous law has limited *locus standi in judicio* and limited capacity to own property.²⁶ As interpreted by colonial courts and statutes, a woman is under the legal guardianship of her father until marriage, when her husband becomes her guardian. She remains a perpetual minor in the eyes of the law.²⁷

Zimbabwe became one of the first countries to change this situation when it enacted the Legal Age of Majority Act in 1982, which gave African women majority status upon attaining 18 years of age.²⁸ A similar provision is contained in Section 9 of South Africa's Recognition of Customary Marriages Act, 120 of 1998. As Armstrong *et al* put it, "property relations are usually closely related to power relations".²⁹ What a

²¹ See Church and Edwards, *supra* note 2, at 1252; Reyntjens, "Protecting human rights in sub-Saharan Africa: specific problems and challenges", *SA Public Law*, Vol. 7, No 1 (1992), 40, at 41.

²² See Sinclair, *supra* note 12, at 240, fn 95.

²³ See *Ibid.* at 240. Bridewealth, called by various names, including lobola, is an institution which has strong social support, but is increasingly being challenged by African women themselves, as well as criticized from outside because of its impact on women's rights and gender equality. Discussion of lobola is however outside the scope of this paper. For more information, please refer to Armstrong *et al.*, *supra* note 4, at 338-339.

²⁴ See Church and Edwards, *supra* note 2, at 1260; Myburgh, *Papers on Indigenous Law in Southern Africa* (1985), at 85.

²⁵ See Church and Edwards, *supra* note 2, at 1260.

²⁶ The same would apply to an unmarried man, who is also under the guardianship of the head of the family. The difference is that a man becomes a major for all intents and purposes upon marriage or upon the death of the family head if he is the eldest son. See Myburgh, *supra* note 24, at 81.

²⁷ See Stewart and Armstrong (eds), *The Legal Situation of Women in Southern Africa*, (1990), at 170; Armstrong *et al.*, *supra* note 4, at 342.

²⁸ See Stewart and Armstrong (eds), *supra* note 27, at 169. See also *Magaya v Magaya*, *supra* note 1, and the discussion of it below.

²⁹ See Armstrong *et al.*, *supra* note 4, at 342.

married woman earns becomes the property of her house³⁰ and is subject to the control of her husband.³¹

Death of the husband does not automatically dissolve a marriage contracted in terms of indigenous law. Traditionally the family of the deceased would appoint a levirate consort, usually the brother of the deceased, to continue the marriage in his place. The wife could not be compelled to accept the arrangement, but very often did, as it was usually in her and her children's best interests to remain in the husband's family.³² This practice has almost died out (in Southern Africa, at least). The support that it had or still has from women is based to a large measure on economic necessity, a necessity that would not exist if the widow had the right to inherit from her deceased husband.

Succession in terms of indigenous law³³ is usually governed by the principle of male primogeniture, meaning that upon the death of the head of a family, his eldest son (or in the absence of a son, his father, grandfather or brother) steps into his shoes.³⁴ The original concept of inheritance in terms of indigenous law is that the heir succeeds to a position *and* property, not to the latter alone.³⁵ He takes over the deceased's duties as the head of the household and must administer the property for the benefit of the family, in consultation with the family.³⁶

³⁰ Section 35 of the Black Administration Act, 38 of 1927, defines a house as "the family and property, rights and status, which commence with, attach to, and arise out of, the customary union of each Black woman" See Sinclair, *supra* note 12, at 247.

³¹ See *Ibid.*, at 248

³² See Armstrong *et al.*, *supra* note 4, at 348-9; Myburgh, *supra* note 24, at 87.

³³ Regulation 2(c)-(e) in terms of the Black Administration Act provides for the application of customary rules of succession to intestate estates of those married in terms of customary law, unless an application is made to the Minister to declare its application inequitable. For more on this see South African Law Commission, *supra* note 2, at 14-16; see also Maithufi, "The Constitutionality of the Rule of Primogeniture in Customary Law of Intestate Succession - *Mthembu v Letsela* 1997 2 SA 935 (sic) (T)", *THRHR* Vol. 61 No 1, February 1998, 142, at 143.

³⁴ See *Mthembu v Letsela* (2000), *supra* note 1, at 876B; South African Law Commission, *supra* note 2, at 2-3; see also *Ibid.* at 20-24.

³⁵ Although the South African Law Commission distinguishes between the terms "inheritance" (of property) and "succession" (to status), I have used these terms interchangeably. See South African Law Commission, *supra* note 2, at 1.

³⁶ See Church and Edwards, *supra* note 2, at 1259; Sinclair, *supra* note 12, at 212-213 and 260; Armstrong *et al.*, *supra* note 4, at 325-326. Maithufi makes the point that succession to the status of the patriarch "is not necessarily nor inevitably accompanied by the inheritance of property", but that the latter is decided at a family meeting some weeks after the burial. It does not seem to be common that the wife inherits the homestead, and "[s]uccession to the status of the deceased... remains the right of the eldest son of the deceased's family." Maithufi, *supra* note 33, at 147. See also *Mthembu v Letsela*

As we have seen, though, traditional practices were distorted during their translation into fixed rules. Unfortunately Western concepts of ownership and property rights were superimposed on the practice of the heir inheriting duties as well as rights and property, resulting in a situation where the accompanying duty is not always accepted or fulfilled.³⁷ And even where the argument that duties are also inherited has been used in courts, it has been used to the detriment of women, without a real analysis of whether or how these are executed in reality, as will be shown in the discussion of the *Mthembu* and *Magaya* cases.

IV. Detrimental effect of the rule of male primogeniture on women and their children

The rule of male primogeniture can and does cause severe hardship for women married under indigenous law. Denied ownership of sufficient assets to support them or their children, they are economically largely dependent on their husbands; this despite the fact that they usually contribute substantially to the growth of the family estate.³⁸

Like all societies, African society is continually evolving and changing. It is very different nowadays from the colonial days when indigenous rules were codified.³⁹ Although there is still strong adherence to indigenous law, this is changing, particularly in urban areas. The prevalence of migrant labour as a result of economic necessity (and in South Africa the apartheid system), the transformation to a money economy from a subsistence economy,⁴⁰ the growing trend of urbanisation, as well as economic globalisation, have resulted in a process of social change, impacting on traditional cultural values and the traditional extended family.⁴¹ Dlamini notes that this

(2000), *supra* note 1, where Mpati AJA discusses the concept of male primogeniture and states that "[w]omen generally do not inherit in customary law".

³⁷ See South African Law Commission, *supra* note 2, at 32.

³⁸ See Sinclair, *supra* note 12, at 213.

³⁹ See Church and Edwards, *supra* note 2, at 1253; Van der Meide, *supra* note 7, at 104.

⁴⁰ Dlamini, *supra* note 7, at 6; see also the South African Law Commission, *supra* note 2, at 1-2.

⁴¹ See Dlamini, *supra* note 7, at 5-6; Sinclair, *supra* note 12, at 239, fn 94; South African Law Commission, *supra* note 2, at 3-4.

social change “implies fundamental alterations in the social structure or culture of people.”⁴²

The emphasis on individuality in the modern state has also had an impact on the communal nature of indigenous law,⁴³ resulting in personal well-being and wealth of heirs often trumping the well-being and wealth of family members (who are sometimes related only through marriage, not blood). These changes cannot be ignored in the application of indigenous law.⁴⁴ “If law has to remain relevant to the lives of the people it purports to govern, it has to reflect these realities. Failure on the part of the law to do this will render it of no consequence to the people and consequently irrelevant to their lives.”⁴⁵

In addition to these changes, one of the most marked changes on the African continent in the past decade has been the increasing impact of armed conflict on civilians – in particular women and children.⁴⁶ Vast swathes of Africa are currently in the grip of armed conflict or its aftermath, affecting the lives of millions.⁴⁷ Approximately 80% of the world's refugees or internally displaced persons are women and children.⁴⁸ Women's lack of rights to inherit and own property directly impacts on their ability to survive (including protecting themselves against HIV/AIDS⁴⁹) and support their children during and after armed conflict. In Rwanda, to take an extreme example, so many men were killed during the genocide, or have been imprisoned in its aftermath.

⁴² Dlamini, *supra* note 7, at 5

⁴³ See Church and Edwards, *supra* note 2, at 1252; See Myburgh, *supra* note 24, at 77-78, who mentions the impact of legislation on separating the individual from the group.

⁴⁴ The South African Law Commission notes that one of its major concerns is “to ensure that the customary law of succession can cater effectively for all family forms, ancient, modern and emerging.” South African Law Commission, *supra* note 2 at 4.

⁴⁵ Dlamini, *supra* note 7, at 6. Van der Meide also emphasises this point, when he says that “customary law must be adjusted to meet the needs of modern African society before there can be a restoration of a system of law based on traditional indigenous law, which can assume a position of integrity within South African jurisprudence.” My agreement with Van der Meide is qualified, though - I don't share his call for a return to pre-colonial indigenous law, because of its patriarchal nature. Van der Meide, *supra* note 7, at 101, 104.

⁴⁶ See for example Graca Machel, *Impact of Armed Conflict on Children - Selected Highlights*, New York (1996).

⁴⁷ For example, Angola, the Democratic Republic of the Congo, Rwanda, Burundi, Uganda, Ethiopia, Eritrea, Somalia, Sudan, Sierra Leone, Liberia. These conflicts also impact on countries without conflict, due to influx of refugees or rebel groups.

⁴⁸ See Machel, *supra* note 46 at 32.

⁴⁹ Gough, “Husband-hiring hastens the spread of Aids in Rwanda”, *The Guardian*, 8 February 2000.

that men make up only about 20% of the population in some areas.⁵⁰ Hundreds of thousands of women were killed too, however, resulting in an estimated 60 000 households headed by children, 80% of them headed by girls.⁵¹ Women and girls find themselves responsible for caring for their children, siblings, or the children of relatives, while being denied access to their husbands' or parents' property and land. In many other countries, although on a lesser scale, the problem is the same – many women and girls become heads of households without the right to own property or inherit it from their deceased husbands and fathers, and as a result their ability to support their families is severely impeded.

Even where there is a male heir, in times of peace or war, the situation can be grim for women. They become dependent on someone who may or may not be interested in supporting them and their children. As Armstrong *et al* point out, “[m]uch will depend on [a widow's] relationship with the heir or anyone else who assumes the deceased’s role as household head.”⁵² If the heir does not fulfill his fiduciary duties, the woman can be left destitute if she does not have some other means of providing for her children, for example through working for wages. Her powerlessness makes her vulnerable to abuse by the heir or others in the extended family. All these problems are exacerbated if she is not a blood relation of the heir (for example if he is the son of another wife of the deceased). Without the means to escape this situation, a woman can remain trapped by poverty and violence.

Not only have people's lives changed, but the principles of customary law as practised have also developed pragmatically, diverging from the "official version" to be more fair to widows and dependant children.⁵³ The official law should be brought into line with this, in particular as it has usually been given precedence over the more flexible rules practiced in reality when there has been a dispute and judicial intervention has been sought.⁵⁴

⁵⁰ *Ibid.*

⁵¹ See UNICEF Rwanda 1999 Annual Report (internal document, can provide relevant extract on request).

⁵² Armstrong *et al.*, *supra* note 4, at 353.

⁵³ For a discussion of this aspect, see the South African Law Commission, *supra* note 2 at 24-31.

⁵⁴ South African Law Commission, *supra* note 2, at 25-26.

V. Application of the rule of male primogeniture by the courts

Courts in both South Africa and Zimbabwe have in recent years pronounced themselves on the rule of male primogeniture. They did so as the result of challenges by widows that the rule violates their constitutionally guaranteed right to equality. In both cases, *Mthembu v Letsela*⁵⁵ in South Africa, and *Magaya v Magaya*⁵⁶ in Zimbabwe, the rule was upheld.

The facts of the *Mthembu* case briefly were that the applicant alleged that she had been the customary law wife of the deceased, who had died intestate. At the time of his death, the deceased was the holder of the leasehold title of a house in Vosloorus, Boksburg, in which the deceased, the applicant, their daughter, as well as the parents and the sister (and her children) of the deceased lived. The first respondent was the father of the deceased, who claimed that, as the deceased had no sons, he was entitled to inherit the house in terms of the rule of male primogeniture. The applicant challenged the system of intestate succession in terms of indigenous law on the ground that it was discriminatory and therefore violated South Africa's interim Constitution, Act 200 of 1993, in force at the time. She argued that in modern urban society the rule of male primogeniture has been stripped of its redeeming features, namely the duty of maintenance, which the heir also inherits, and that the heir "simply acquires the assets of the deceased's estate without assuming any of the responsibilities." Her argument was that the rule is "grossly discriminatory against African women, and children who are not the eldest child."⁵⁷

In terms of the interim Constitution, Le Roux, J defined the question the court had to answer as "whether this rule of succession *unfairly* discriminates between persons on the grounds of sex or gender".⁵⁸ The court decided that if one "accepts the duty to provide sustenance, maintenance and shelter as a necessary corollary of the system of primogeniture" it was "difficult to equate this form of differentiation between men and women with the concept of 'unfair discrimination' as used in s8 of the

⁵⁵ *Mthembu v Letsela* (1997), *supra* note 1.

⁵⁶ *Magaya v Magaya*, *supra* note 1.

⁵⁷ *Mthembu v Letsela* (1997), *supra* note 1, at 941C.

⁵⁸ *Ibid.*, at 945E.

Constitution.”⁵⁹ In addition the court found that the rule of male primogeniture was not contrary to public policy or natural justice.⁶⁰

In response to an argument that the rule offends human dignity, a right protected in Section 10 of the interim Constitution, the court concluded that, in “its proper setting in a tribal community there can be no question that the succession rule preserves rather than offends the dignity of the persons affected. It is only in a case where the rule is applied in an urban community that there is a possible argument in this direction.”⁶¹ The court, however, did not go into this last issue, as in its view, there was a factual dispute which had to be resolved.⁶² It accordingly referred the matter for oral hearing on the factual dispute.

Because of this qualification by the court, Maithufi is of the view that the court's decision "should not be read as express authority for the view that the rule of customary law of succession, namely primogeniture, does not unfairly discriminate between persons on the ground of sex or gender in terms of our Constitution."⁶³ Maithufi is right, but in my view the weight the court accorded to the duty of support and protection shows that it was clinging to an unrealistic vision of African society, ignoring rapid urbanisation and the (unfortunate) disintegration of extended family networks and loyalties. The court approached the matter from the perspective that the duty of support is in reality still the norm, and its absence an aberration, without examining whether this is the case in actual fact. In commenting on the judgment, the South African Law Commission notes that it is "true that in theory, customary law does not leave widows destitute, but we know that in reality, they frequently suffer neglect and lack of support. The law is not achieving its objectives, in part because the social basis for the official version has changed...."⁶⁴ The South African Law

⁵⁹ *Ibid.*, at 945H.

⁶⁰ *Ibid.*, at 946A. The court was here referring to the so called “repugnancy clause” contained in the Law of Evidence Amendment Act 45 of 1988, in terms of which rules of indigenous law are invalid where they are declared to be contrary to public policy or natural justice. In this regard, see Church, *supra* note 3, at 294

⁶¹ *Mihembu v Letsela* (1997), *supra* note 1, at 947C. It should perhaps be noted that Vosloorus can be described as an urban community.

⁶² The first respondent denied that the applicant was married to the deceased in terms of indigenous law. This is the type of situation that the Recognition of Customary Marriages Act, which requires registration of all customary marriages, was designed to rectify.

⁶³ Maithufi, *supra* note 33, at 146.

⁶⁴ South African Law Commission, *supra* note 2, at 32.

Commission makes the point that the duty of support is a personal right, requiring the widow to preserve a good working relationship with the heir, and adds that in modern societies, "a person's material security is more effectively guaranteed by *real* rights, namely rights that the holder can assert against the world."⁶⁵ This is particularly pertinent considering that the duty of support only persists as long as the widow remains living with the heir, which is often unrealistic considering crowded conditions in cities and the likelihood of a less than amicable relationship between the widow and the heir.⁶⁶

It is respectfully submitted that the court failed to analyse the nature of the rights and duties inherited critically and thoroughly. It also failed to promote either the spirit, purport and objects of the Bill of Rights, as it was obliged to do in terms of Section 35(3) of the interim Constitution (which is substantially similar to Section 39(2) of the final Constitution, Act 100 of 1996) when developing the common or customary law, or the values that underlie an open and democratic society based on human dignity, equality and freedom, which Section 35 (1) (substantially similar to Section 39(1)(a) in final Constitution) obliged it to do when interpreting the Bill of Rights. It may be true that, as Maithufi states, "[t]his decision indicates in no uncertain terms that in the interpretation of any law, that is, the common law as well as customary law, the courts have to take into account the values that underlie our Constitution."⁶⁷ However, it is my respectful opinion that the court did not truly weigh the impact of the rule against the spirit, purport and objects of the Bill of Rights and international human rights instruments, nor does its decision promote the values of equality, dignity or freedom.

The court denied women substantive equality, but instead adhered to a concept of formal equality, which is not what the Constitution guarantees. It is beyond the scope of this paper to critique the court's judgment in terms of the interim Constitution. However, denying women and girls the right to inherit property on equal terms with men and boys, in favour of the right to be maintained by a man, clearly constitutes unfair discrimination. Being dependant on someone else, who holds the power as to how and to what extent you and your children are maintained is no substitute for

⁶⁵ *Ibid.* at 33.

⁶⁶ *Ibid.* at 33 and 39.

⁶⁷ Maithufi, *supra* note 33, at 142.

having the decision-making power yourself. Skewed power relations between men and women are the essence of gender discrimination, which is the very opposite of gender equality, one of the most important values underlying the South African Constitution.

Moreover, Section 35 (1) of the interim Constitution provided that a court, when interpreting the Bill of Rights "shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter...". (The equivalent section in the final Constitution, Section 39(1)(b), stipulates that, [w]hen interpreting the Bill of Rights, a court, tribunal or forum ... must consider international law".) This does not mean that it must apply it, but it must at least take it into consideration. In other words, when a court is examining the impact of the Bill of Rights on the rule of male primogeniture, it must consider relevant principles of international law. It is my contention that the court in *Mthembu v Letsela* failed to fulfil this obligation. The applicable principles of international law will be discussed below.

The *Mthembu* case came before the Appellate Division in May 2000.⁶⁸ Much of this case pertains to matters outside the scope of the present paper, as it was decided on a different basis than the initial case before the High Court (before Le Roux, J), discussed above, and did not decide the validity of the rule of male primogeniture. The factual dispute regarding whether a customary marriage had existed between the applicant (now the appellant) and the deceased had been resolved at the continuance of the High Court case before Mynhardt, J, when it was accepted that the matter should be decided on the basis that there had been no customary marriage.⁶⁹ The case on appeal therefore turned on whether the appellant's daughter, who was accordingly the illegitimate daughter of the deceased, could inherit the house. The court *a quo* (Mynhardt, J) had found that she "was not a victim of gender discrimination because any illegitimate child of the deceased would have been disinherited." Mpati, AJA agrees: "As the court *a quo* held, Tembi, of course, is excluded from inheriting because she is illegitimate. The question of discrimination is not reached in this case

⁶⁸ *Mthembu v Letsela* (2000), *supra* note 1.

⁶⁹ See *Mthembu v Letsela* (1998), *supra* note 1.

... She would be in the same position as, for example, illegitimate male children".⁷⁰ The court is accordingly not called upon to decide the validity of the rule of male primogeniture, but seems to accept it without qualification and warns against dismissing "an African institution without examining its essential purpose and content."⁷¹

The new constitutional dispensation has brought with it new and innovative ways of dealing with old problems, in order to ensure a society in which the full and equal enjoyment of human rights by all is the guiding force. It is disheartening that at the dawn of a new era in South Africa, one in which human rights should be paramount, the courts only superficially examined the way they are impacted by the rule of male primogeniture.

Even more disappointing was the *Magaya* case, which was decided by the Supreme Court of Zimbabwe in 1999. As in the *Mthembu* case, the deceased had died intestate, but in this case leaving two wives. The appellant was the eldest child of the deceased's first wife *and* was female, while the respondent was a male child of the deceased's second wife (the eldest male child declined the heirship). A magistrate awarded the heirship to the respondent, on the basis that the appellant "is a lady (and) therefore cannot be appointed to (her) father's estate when there is a man."⁷² The court quoted Bennett, who states that "an heir inherits not only the deceased's property but also his responsibilities, in particular his duty to support surviving family dependants."⁷³ The court's conclusion is that it is "common and clear" that "under the customary law of succession of the [Ndebele, Shona and Matahoie] tribes males are preferred to females as heirs."⁷⁴

In contrast to the *Mthembu* case, the court here does say that this rule *prima facie* constitutes discrimination against women in terms of the constitutional prohibition of

⁷⁰ *Ibid.*, at 882D. It should be noted that discrimination against an illegitimate child contravenes Article 2 of the Convention on the Rights of the Child (see discussion of this Convention *infra*), as well as Section 9(3) of the final Constitution. A full discussion of this issue is beyond the scope of this paper, but it is my contention that such discrimination is as unacceptable as gender discrimination.

⁷¹ *Mthembu v Letsela* (2000), *supra* note 1, at 885A.

⁷² *Magaya v Magaya*, *supra* note 1, at 2.

⁷³ *Ibid.*, at 3, quoting Bennett, *Human Rights and African Customary Law under the South African Constitution*, at 136. See discussion of this aspect above.

⁷⁴ *Ibid.*, at 3.

discrimination (contained in Section 1 of Zimbabwe's Constitution) and “on account of Zimbabwe’s adherence to gender equality enshrined in international human rights instruments”.⁷⁵ It continues, however, by referring to Section 23(3) of the Zimbabwean Constitution, which it understood to mean that “matters involving succession are exempted from the discrimination provisions.”⁷⁶

The court then finds that the rule of male primogeniture does not violate Zimbabwe's Legal Age of Majority Act, 15 of 1982, as in its opinion, that Act was never intended to give a woman substantive rights, only powers that she formerly lacked.⁷⁷ In essence the conclusion is that women married in terms of customary law were given some limited procedural powers in terms of the Act, but that they do not have full power to make decisions affecting their lives, or their property. This is a blatant violation of the international human rights norms that will be discussed below. A full discussion of the powers given by the Act is beyond the scope of this paper.

The appellant argued that women should not be excluded from being heirs in customary law, because “culture and custom are dynamic and change with changes in society and in particular the fact that urbanisation has made African society less and less partriarchal”. While the court agrees that there is “a need to advance gender equality in all spheres of society”, it immediately raises the *caveat* that “great care must be taken when African customary law is under consideration.” The court bases this on the contention that customary law has long directed the way African people conduct their lives and that it will not readily be abandoned, “especially by those senior males who stand to lose their positions of privilege.”⁷⁸ Perpetuating gender discrimination for fear of offending patriarchal power structures is unacceptable. A violation of fundamental human rights (and the rule of male primogeniture is clearly such a violation) cannot be preserved on the basis of history and the interests of the elite.

⁷⁵ *Ibid.*, at 4.

⁷⁶ *Ibid.*, at 5.

⁷⁷ *Ibid.*, at 13.

⁷⁸ *Magaya v Magaya*, *supra* note 1, at 15.

Although the court gives great weight to indigenous law, it states that its application is "in a way voluntary" and that the court should not interfere with "a person's choice".⁷⁹ Where custom and tradition are concerned, social norms and expectations make the concept of "choice" debatable, especially when one considers the lack of power of women in a patriarchal society and in terms of indigenous law. Moreover, the mere fact that people perhaps choose to be bound by indigenous law as it stands does not remove the court's duty to protect women and girls against any discriminatory provisions it may contain. This argument also disregards the position of daughters, who were not party to any choices made.

The court then states that it is "prudent to pursue a pragmatic and gradual change which would win long term acceptance rather than legal revolution initiated by the courts", adding that the court does not have the capacity to make new law in a complex matter such as inheritance and succession, and that "all the courts can do is to uphold the actual and true intention and purport of African customary law against abuse". The court concludes that matters of reform should be left to the legislature.⁸⁰

I will return to the issue of whether change should be made by the legislature or the judiciary in a situation such as this. Either way, the court cannot abdicate its responsibility as totally as it did in this case. The court does nothing to start the process of "gradual change" it advocates, despite talking of gender equality. Instead it finds every argument it can to retain the *status quo*. In its treatment of the Legal Age of Majority Act, it has in fact retrogressed.

The result of the *Mthembu* and *Magaya* cases is that women remain subject to discriminatory rules that are out of step with modern society. Moreover, the courts have not given women clarity on their right to inherit; declaring it dependant on whether or not, in a specific situation, a duty of support exists.

VI. Violation of International Human Rights norms

⁷⁹ *Ibid.*

⁸⁰ *Magaya v Magaya*, *supra* note 1, at 16.

I have argued that the indigenous law rules relating to inheritance are not only corruptions of the original concepts, codified in such a way that they have lost their adaptability to social change, but also discriminate against women and affect them detrimentally. It is also my contention that these rules are in violation of international human rights norms and obligations. It is particularly important to consider international human rights law in countries that either do not have national bills of rights, or have bills of rights that exclude customary law from their ambit.⁸¹

A. Universality and Indivisibility of Human Rights

All human rights are universal, indivisible, interdependent and interrelated.⁸² The principle of universality is exemplified in Article 1 of the Universal Declaration of Human Rights (UDHR): "All human beings are born free and equal in dignity and rights."⁸³ Because *all* human rights apply to *everyone* without exception, the application of indigenous law does not deprive its subjects of their human rights.

The indivisibility and interdependence of rights are also fundamental to international human rights law. All rights have equal status - in the application of one, all others have to be taken into consideration. Although the rule of male primogeniture offends specific individual provisions of international human rights instruments, as we will see, the argument becomes irrefutable when these provisions are read together, as complementing and reinforcing one another.

B. Accountability

The International Covenant on Civil and Political Rights (ICCPR)⁸⁴ has been ratified by 144 countries, including South Africa, Zimbabwe and several others in Africa.⁸⁵ The International Covenant on Economic, Social and Cultural Rights (ICESCR)⁸⁶ has

⁸¹ See South African Law Commission, *supra* note 2, at xiv; see also *supra* note 76.

⁸² Vienna Declaration and Programme of Action, A/CONF.157/23, 12 July 1993, at Part I, par 5. See also Dugard, *International Law - A South African Perspective*, (2000) at 254.

⁸³ Universal Declaration of Human Rights (1948)

⁸⁴ International Covenant on Civil and Political Rights (1966)

⁸⁵ For ICCPR ratification information, see

<http://untreaty.un.org/English/sample/EnglishInternetBible/partI/chapterIV/treaty5.asp> ; see also South African Yearbook of International Law, Vol. 24 (1999), at 427.

⁸⁶ International Covenant on Economic, Social and Cultural Rights (1966).

been ratified by 142 countries,⁸⁷ including Namibia, Nigeria, Rwanda and Zimbabwe, among several other sub-Saharan African states. South Africa has not ratified it, but has signed it, signifying its intention to ratify at some stage.⁸⁸ The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁸⁹ has been ratified by 166 states as of 7 September 2000, including South Africa, Zimbabwe and virtually every other state in sub-Saharan Africa.⁹⁰ The Convention on the Rights of the Child (CRC)⁹¹ has been ratified by all members of the United Nations, except Somalia and the USA.⁹² This means that all states where women live under African indigenous law (with the exception of Somalia) are parties to the CRC.

States voluntarily accept the obligation to implement a treaty when they sign, ratify or accede to it.⁹³ Dugard notes that treaties normally require ratification in addition to signature and that this is normally indicated in the treaties themselves.⁹⁴ This enables states to reconsider their decision and, if necessary, to change their own laws to enable them to fulfil their obligations under the treaty.⁹⁵ For example, South Africa signed CEDAW in 1993, and in the same year passed the General Law Fourth Amendment Act, "which removed all traces of legislative discrimination against women so as to enable South Africa to ratify CEDAW", which it did in 1995.⁹⁶

In some jurisdictions formal approval by the legislature may be required after ratification by the executive before a treaty enters into force as part of domestic legislation. This is the case in South Africa, for example, which requires "an Act of Parliament or other form of 'national legislation', in addition to the resolution of

⁸⁷ For ICESCR ratification information, see <http://untreaty.un.org/English/sample/EnglishInternetBible/partI/chapterIV/treaty4.asp>; see also Dugard, *supra* note 82, at 242.

⁸⁸ See Dugard, *supra supra* note 82, at 242.

⁸⁹ Convention on the Elimination of All Forms of Discrimination against Women (1979).

⁹⁰ See official CEDAW web site at <http://www.un.org/womenwatch/daw/cedaw/states.htm> for ratification information; see also <http://untreaty.un.org/English/sample/EnglishInternetBible/partI/chapterIV/treaty9.asp>.

⁹¹ Convention on the Rights of the Child (1989).

⁹² For ratification information, see the United Nations High Commissioner for Human Rights treaty bodies database at <http://www.unhchr.ch/tbs/doc.nsf>. The United States has signed the CRC, but has yet to ratify it.

⁹³ See Vienna Convention on the Law of Treaties (1980).

⁹⁴ Dugard, *supra supra* note 82 at 330.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.* at 250.

ratification, for the incorporation of treaties into municipal law."⁹⁷ In the period between signature or ratification of a treaty and its entry into force, a state is "obliged to refrain from acts which would defeat the object and purpose of [the] treaty".⁹⁸

Once a treaty has entered into force, the State Party is bound to perform its provisions in good faith⁹⁹ and is accountable for bringing its national laws into line with it and for taking steps to ensure its implementation.¹⁰⁰ What this obligation entails will depend on the terms of the treaty in question. For example, the CRC contains obligations in every article, but also more broadly provides that:

"States Parties shall undertake *all appropriate legislative, administrative and other measures for the implementation of the rights* recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures *to the maximum extent of their available resources* and, where needed, within the framework of international co-operation."¹⁰¹ (My emphasis)

CEDAW provides in article 2 that "States Parties ... agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women...". *Inter alia*, they commit themselves to "take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices, which constitute discrimination against women".¹⁰² Other specific steps listed include "appropriate legislative and other measures", "legal protection of the rights of women on an equal basis with men" and "all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women". Article 3 contains a broad provision relating to

⁹⁷ *Ibid.*, at 56. See also Section 231(2) of the final Constitution. S 231(3) excludes treaties of a "technical, administrative or executive nature". Some jurisdictions distinguish between self-executing treaties, which become part of municipal law without such further legislative action and non-self-executing treaties. See for example the proviso to S231(4) of the South African Constitution. A discussion of this aspect is not necessary for the purposes of this paper.

⁹⁸ Vienna Convention, *supra* note 93, Article 18.

⁹⁹ See *Ibid.*, Article 26 - this is the principle known as "*Pacta sunt servanda*".

¹⁰⁰ See Dugard, *supra* note 82 at 28. See also *ibid.*, at 27.

¹⁰¹ Article 4.

¹⁰² Article 2(g)

measures to "ensure the full development and advancement of women" so as to guarantee their equal enjoyment of human rights.¹⁰³

In ratifying the ICCPR, a State Party undertakes, "[w]here not already provided for by existing legislative or other measures ... to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant."¹⁰⁴ A State Party to the ICESCR undertakes "to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."¹⁰⁵

Therefore, where a State Party gives legal sanction to a practice that violates any of the treaties to which it is a party, or does not take steps (in particular legislative steps) to end the practice, it is violating its international obligations in terms of that treaty.

In order to monitor compliance with treaties by States Parties, Committees consisting of independent experts, also known as treaty bodies, have been set up in terms of the various treaties. States Parties must present regular reports to the Committees on steps taken to implement the relevant treaty. These reports are scrutinised by the relevant Committee, which then issues its own report with comments and recommendations to the State Party on issues that require further action.¹⁰⁶

C. Non-Discrimination

Article 2 of the UDHR guarantees the rights it contains "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

¹⁰³ For a discussion of State Party obligations under CEDAW, see Cook, "State Accountability under the Convention on the Elimination of All forms of Discrimination Against Women", in Cook (ed) *Human Rights of Women* (1995), 228

¹⁰⁴ Article 2

¹⁰⁵ Article 2

¹⁰⁶ The ICCPR is monitored by the Human Rights Committee, the ICESCR by the Committee on Economic, Social and Cultural Rights, CEDAW is monitored by the Committee on the Elimination of Discrimination of Women (the CEDAW Committee) and the Committee on the Rights of the Child (the CRC Committee) monitors implementation of the CRC. See Dugard, *supra* note 82, at 244-250.

In discussing this principle of non-discrimination, Dugard states that "the existence of such a norm derived from custom, general principles of law, and convention is beyond doubt. As far as conventional law is concerned, the affirmation of the principle of non-discrimination on grounds of race and sex contained in article 55 of the United Nations Charter has been confirmed by several international conventions."¹⁰⁷ These include the ICCPR¹⁰⁸, the ICESCR,¹⁰⁹ the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)¹¹⁰, CEDAW¹¹¹ and the CRC.¹¹² Non-discrimination is the very *raison d'être* of CEDAW and CERD. It is also an important principle in relevant regional human rights conventions, namely the African Charter of Human and Peoples' Rights (better known as the Banjul Charter)¹¹³ and the African Charter on the Rights and Welfare of the Child.¹¹⁴ The denial to girls and women of their right to inherit property from their fathers or husbands is clearly a violation of this fundamental international human rights norm of non-discrimination.¹¹⁵

D. Relevant Human Rights Provisions

In addition to the principle of non-discrimination, found in the UDHR and the treaties that followed it, the UDHR and several international and regional human rights treaties contain other provisions of relevance to the right of women and girls to inherit.

1. The Universal Declaration of Human Rights

¹⁰⁷ Dugard, *supra* note 82, at 247.

¹⁰⁸ ICCPR, *supra* note 84, Articles 2 (1), 3 and 26.

¹⁰⁹ ICESCR, *supra* note 86, Article 2(2).

¹¹⁰ International Convention on the Elimination of All Forms of Racial Discrimination (1965).

¹¹¹ CEDAW, *supra* note 89. Article 1 contains a broad definition of discrimination against women, including any distinction, exclusion or restriction on the basis of sex, which impairs the recognition or enjoyment of their human rights by women.

¹¹² CRC, *supra* note 90. Article 2 prohibits discrimination on the basis of *inter alia* race, sex and ethnic or social origin. These basic principles were defined by the CRC Committee. See UNICEF *Human rights for children and women: How UNICEF helps make them a reality*, 1999, at 8. The fact that the principle of non-discrimination, discussed above, is a basic principle of the CRC means that girls may not be discriminated against in favour of boys, that they should have the same opportunities and enjoy the rights guaranteed in the CRC to the same extent. The rule of male primogeniture is a blatant violation of this principle.

¹¹³ African [Banjul] Charter on Human and Peoples' Rights (1981). It has been ratified by all African countries except Morocco.

¹¹⁴ African Charter on the Rights and Welfare of the Child (1990).

¹¹⁵ It should be noted that in the South African context, discrimination must be "unfair" before it is prohibited in terms of Section 9 of the Bill of Rights.

The UDHR is not a treaty to which States can become parties, but rather a recommendatory resolution of the General Assembly. It has, however, had a profound impact on the development of international human rights, inspiring the International Covenants and subsequent treaties, serving as a model for national bills of rights and as a standard by which to measure the conduct of states. "Consequently it is argued that the Universal Declaration now forms part of customary international law".¹¹⁶ It is "almost universally accepted that membership in the UN entails adherence to its principles."¹¹⁷

In addition to its non-discrimination provisions discussed above, articles of relevance to the issue under discussion include Article 6 (recognition as a person before the law), Article 7 (equal protection of the law), Article 17 (right to own property), Article 22 (social security and economic, social and cultural rights), and Article 25 (standard of living, including housing, social protection of children). One could, without difficulty, make a case that the rule of male primogeniture violates the UDHR. It is more fruitful, however, to turn to the covenants and conventions which built on the UDHR, as there can be no doubt about their binding force on States Parties, who have voluntarily agreed to be bound by them, and as they have detailed provisions that deal more specifically with the issue under discussion.

2. The International Covenant on Economic, Social and Cultural Rights

Due to the economic implications of implementing them, economic, social and cultural rights set out in the ICESCR¹¹⁸ often receive less attention than civil and political rights. They are, however, well recognised in international human rights law. In ratifying the ICESCR, States Parties "undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth" in it.¹¹⁹ The ICESCR guarantees the right to an adequate standard of living, which includes the right to adequate housing. Disputes between widows and heirs often arise in the context of whether the widow will be allowed to remain in the matrimonial home.

¹¹⁶ Dugard, *supra* note 82, at 240-241. See *Ibid.*, at 27-36 for a discussion of customary international law.

¹¹⁷ Human Rights Watch, *Hostile to Democracy* (1999), at 15, fn 3.

¹¹⁸ The ICESCR protects, *inter alia*, the rights to work, social security, health and education.

¹¹⁹ Article 3.

To date, the right to housing is the only right to which the Committee on Economic, Social and Cultural Rights has devoted an entire general comment.¹²⁰ In General Comment 4, the Committee clearly states that the "right to adequate housing applies to everyone...In particular, enjoyment of this right must, in accordance with article 2 (2) of the Covenant, not be subject to any form of discrimination."¹²¹

The committee defines the right to housing as "the right to live somewhere in security, peace and dignity".¹²² The concept of security of tenure is included in the Committee's definition of "adequate housing".¹²³ In its General Comment 7, which deals with forced evictions, the Committee added that women are

"especially vulnerable given the extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership) or rights of access to property or accommodation, and their particular vulnerability to acts of violence and sexual abuse when they are rendered homeless. The non-discrimination provisions of articles 2.2 and 3 of the Covenant impose an additional obligation upon Governments to ensure that, where evictions do occur, appropriate measures are taken to ensure that no form of discrimination is involved."¹²⁴

Accordingly, where the rule of male primogeniture results in the forced eviction of a woman by the heir, or even where it jeopardizes her security of tenure, it is a violation of her right to "adequate housing" under the ICESCR.

3. The Convention on the Elimination of All Forms of Discrimination against Women

The preamble to CEDAW expresses the concern of States Parties that "despite these various instruments extensive discrimination against women continues to exist." It was therefore deemed necessary to adopt a treaty to focus specifically on eliminating the continuing discrimination against women.¹²⁵

¹²⁰ General comment no. 4 (1991), paragraph 7.

¹²¹ *Ibid.*, paragraph 6.

¹²² *Ibid.*

¹²³ *Ibid.*, paragraph 8a

¹²⁴ General Comment 7 (1997), paragraph 10.

¹²⁵ See High Commissioner for Human Rights Fact Sheet 22, at <http://www.unhchr.ch/html/menu6/2/fs22.htm>

In terms of Article 5 of CEDAW, States Parties commit themselves to take all appropriate measures to “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”.¹²⁶ It is clear that women and girls may not be denied their right to inherit property on an equal basis with men and boys due to cultural practices or indigenous law.

The Convention is even more explicit in Article 16(1)(h), which obliges States parties to "ensure, on a basis of equality of men and women ... [t]he same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property...". In commenting on Article 16(1)(h) in its general recommendation 21,¹²⁷ the CEDAW Committee urged States Parties to "include comment on the legal or customary provisions relating to inheritance laws as they affect the status of women " in their reports to the Committee. The Committee continued,

"There are many countries where the law and practice concerning inheritance and property result in serious discrimination against women. As a result of this uneven treatment, women may receive a smaller share of the husband's or father's property at his death than would widowers and sons. In some instances, women are granted limited and controlled rights and receive income only from the deceased's property. Often inheritance rights for widows do not reflect the principles of equal ownership of property acquired during marriage. *Such provisions contravene the Convention and should be abolished.*"¹²⁸ (My emphasis)

This unequivocal statement by the CEDAW Committee removes any remaining doubt that the rule of male primogeniture is a violation of CEDAW. This was reinforced by

¹²⁶ Article 5 (a)

¹²⁷ Committee on the Elimination of Discrimination against Women, General Recommendation 21 (1994), paragraph 34.

¹²⁸ *Ibid.*, par. 35. In this General Recommendation, the Committee also invoked Economic and Social Council Resolution 884 D (XXXIV), in which the Council recommended that States ensure that men and women in the same degree of relationship to a deceased are entitled to equal shares in the estate and to equal rank in the order of succession.

the CEDAW Committee's concluding observations on the report presented to it by South Africa in 1998, when it noted with concern "the continuing recognition of customary and religious laws and their adverse effects on the inheritance and land rights of women and women's rights in family relations. ..."¹²⁹

In 1999, the General Assembly adopted the Optional Protocol to the CEDAW Convention.¹³⁰ It provides for the submission of individual complaints to the CEDAW Committee. These complaints must relate to violations of the individual's rights in terms of CEDAW by a State Party to CEDAW. When the Optional Protocol enters into force, it will give women an avenue of recourse for violations of their human rights that has not existed before. It is possible that a complaint relating to the inheritance rights of women in terms of indigenous law may come before the CEDAW Committee. In such a case the Committee will follow an inquiry procedure and issue recommendations to the State Party, which may be invited after six months to present a report to the Committee on remedial actions taken.¹³¹

4. The Convention on the Rights of the Child

The CRC is the most widely ratified human rights treaty to date.¹³² This gives it unparalleled legitimacy. In addition to the principle of non-discrimination it contains¹³³, it can be argued that the rule of male primogeniture violates two other basic principles of the CRC – the best interests of the child (Article 3) and the right to life, survival and development (Article 6). When a woman is denied the means to support her family or evicted from the family home, the best interests of children are jeopardised, as are their rights to survival and development.

¹²⁹ Committee on the Elimination of Discrimination against Women: Concluding Observations on the report of South Africa (1998), para.117.

¹³⁰ Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999); see also Dugard, *supra* note 82, at 250. An Optional Protocol to a human rights treaty is a treaty in its own right and is open to signature, accession or ratification by countries that are parties to the main treaty.

¹³¹ See Optional Protocol, *supra* note 130.

¹³² See UNICEF, *supra* note 112, at 2; see also Dugard, *supra* note 82, at 250.

¹³³ See note 112, *supra*.

In terms of indigenous law, the children born of a marriage belong to the family of the husband.¹³⁴ Where there is a conflict between a widow and the heir, she may have to leave without her children, a violation of Article 9 of the CRC, which guarantees the right of the child not to be separated from his or her parents against his or her will.¹³⁵ Such a situation may result in a host of violations of the rights of such children, including the above-mentioned Article 3, as well as the child's rights to health (Article 24), adequate standard of living (Article 27), education (Article 28), etc. In considering a potential violation of the rights of a child, all these rights must be considered together as part of one indivisible whole, in accordance with the principle of indivisibility.

E. Regional Human Rights Treaties

African human rights instruments differ from international instruments in that they have been developed against the backdrop of African culture and have, as Dugard says of the Banjul Charter, "a distinctly African character", although "inspired by other human rights conventions."¹³⁶ Two African human rights treaties are relevant to this discussion.

1. The African (Banjul) Charter of Human and Peoples' Rights

In addition to prohibiting discrimination (Article 2), the Banjul Charter guarantees equality before the law (Article 3).¹³⁷ This aspect is reinforced in Article 28, which provides that "every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance."

The Banjul Charter is different from the other instruments that have been discussed – not only is it a regional instrument, but it is focused to a large extent on collective, rather than individual rights. For example Article 18 provides for protection for the

¹³⁴ See for example, *Armstrong et al.*, *supra* note 4, at 348. This is a violation of Article 16 of CEDAW.

¹³⁵ Article 18 is also relevant in this regard – it contains the principle that both parents have common responsibilities for the upbringing of the child.

¹³⁶ Dugard, *supra* note 82, at 261. Dugard states that regional human rights instruments "are likely to be more successful than their universal counterparts because political and cultural homogeneity and shared judicial traditions and institutions within a region provide the basis for confidence in the system, which is necessary for effective implementation." *Ibid.*, at 255.

¹³⁷ Banjul Charter, *supra* note 113; see Dugard, *supra* note 82, at 261.

family, which is “the natural unit and basis of society” and “the custodian of morals and traditional values recognized by the community.” But even within this article, States Parties undertake to “ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.” In other words, the family is only the custodian of morals and traditional values in so far as these do not discriminate against women.¹³⁸ The family that is protected is one in which women and girls enjoy equality with men and boys.

2. The African Charter on the Rights and Welfare of the Child

The other relevant regional human rights instrument is the African Charter on the Rights and Welfare of the Child,¹³⁹ which also contains distinctly African elements, although it was modelled on the CRC. It contains the principles of non-discrimination (Article 3), the best interests of the child (Article 4) and the survival and development of the child (Article 5), recognises the family as the “natural unit and basis of society”, while guaranteeing equality of spouses (Article 18) and protects the child's right not to be separated from his or her parents against his or her will (Article 19). The same arguments regarding the rule of male primogeniture that were discussed above in relation to the CRC and the Banjul Charter apply here.

F. World Conferences

At several World Conferences during the 1990s, states committed themselves to take steps to implement human rights and ensure human development. States are not bound to implement the agreements reached at these world conferences as they are in relation to treaties. The agreements nevertheless have important norm-setting value, and governments are regularly called on to report on progress.

In relation to the rule of male primogeniture, the agreements reached at the 1993 World Conference on Human Rights, held in Vienna in 1993¹⁴⁰ and the 1995 Fourth World Conference on Women, held in Beijing¹⁴¹ are particularly relevant. The

¹³⁸ In this regard, see Armstrong *et al.*, *supra* note 4, at 320-321.

¹³⁹ African Charter on the Rights and Welfare of the Child, *supra* note 114.

¹⁴⁰ Vienna Declaration and Programme of Action, *supra* note 82.

¹⁴¹ See United Nations Department of Information, *Platform for Action and the Beijing Declaration*, (1996).

Beijing Platform for Action, for example, states explicitly that governments must eliminate “the injustice and obstacles in relation to inheritance faced by the girl-child so that all children may enjoy their rights without discrimination, by *inter alia*, enacting, as appropriate, and enforcing legislation that guarantees equal right to succession and ensures equal right to inherit, regardless of the sex of the child.”¹⁴²

VII. Cultural relativism vs. universal application of human rights

An argument like the one I am making is bound to be countered with the assertion that the concept of human rights is foreign to the African legal tradition, which is founded on the concept of human dignity,¹⁴³ or that individual rights are recognised but only as subordinate to communal rights,¹⁴⁴ or that “outsiders” have no business interfering with culture or tradition or dictating what indigenous law should look like. An entire paper, or even a book, can be written on these issues.

It is disingenuous to argue that the arguments for universal application of human rights are impositions from outside, coming from those who do not understand or respect a particular culture. This argument misses the crucial fact that there is already an internal debate on human rights and their relationship to indigenous law rules within African culture.¹⁴⁵ Women subject to indigenous rules have themselves recognized the discrimination they experience and are advocating and lobbying for change, relying on internationally recognised principles of human rights to support their case. The avalanche of protests by women and women's organisations to the *Magaya* case is a clear illustration of the internal debate on this issue.¹⁴⁶

In any event, most states in sub-Saharan Africa have voluntarily undertaken obligations in terms of international human rights treaties, as well as regional treaties that are embedded in African culture. As discussed earlier, these obligations render states accountable in terms of international human rights law. They are in violation of these obligations when they (and this includes the judiciary - a branch of the state)

¹⁴² *Ibid.*, at 148-149, par 274(d).

¹⁴³ See Van der Meide, *supra* note 7, at 104. But see Reyntjens, *supra* note 21, at 47.

¹⁴⁴ See Church and Edwards, *supra* note 2, at 1252, Reyntjens, *supra* note 21, at 41, 47.

¹⁴⁵ See Kaganas and Murray, *supra* note 9, at 424, 426. For an interesting discussion of this issue, see Bronstein, *supra* note 3, at 401-403.

uphold practices and/or laws that violate the principles of the treaties they have agreed to implement, or when they fail to act to bring the law into conformity with the relevant international treaties. This is not a question of whether the elders in a particular community feel that their culture is being attacked. The question is whether States Parties are fulfilling their obligations in terms of international law. If not, they are required to take steps to do so.

International human rights norms do not negate the essence of traditions or indigenous laws, but rather set certain minimum standards and guarantees, which may not be derogated from in practising traditions and implementing rules of indigenous law. In this regard I disagree to some extent with Vahed, who is of the opinion that "it is imperative to note that human rights ... are not entirely universal. These rights should be interpreted in the context of the child's cultural and religious perspectives."¹⁴⁷

Human rights are indeed universal, and although they may be interpreted in the context of culture and religion, they may not be derogated from on this basis. In other words, women cannot be denied substantive equality on the basis of religion or culture, as this would be a violation of international law obligations. Moreover, through agreements reached at World Conferences, states have reinforced - and often expanded on - their international obligations. These agreements are reached through negotiation and are not the imposition of "foreign values" on any culture.

I have argued above that the rule of male primogeniture constitutes discrimination against women and girls - a violation of the human rights of women and girls guaranteed in international human rights treaties to which South Africa, Zimbabwe and other sub-Saharan African countries are party. As such these countries are under an obligation to take active steps to ensure the equal rights of women and girls to inherit. They have several options in doing so, including the adoption of legislation or resolution through the judiciary.

¹⁴⁶ See Njanji, "Zim women fight for lost rights", *Mail and Guardian*, 10 June 1999.

¹⁴⁷ Vahed, "Should the question: 'what is in a child's best interest?' be judged according to the child's own cultural and religious perspectives? The case of the Muslim Child", *The Comparative and International Law Journal of Southern Africa (CILSA)*, Vol. 23. No. 3 (1999), 364, at 368.

VIII. Judicial resolution vs. legislative intervention

The incremental development of the law through judicial precedent is one of the primary ways in which legal principles and rules remain relevant to the societies to which they apply. There are, however, instances where legislation is necessary. It is my contention that the customary law on succession falls into this category, primarily because leaving this issue up to the judiciary in the past has not worked. Decisions such as those in the *Mthembu* and *Magaya* cases have shown that the courts are not always sensitive to the ideological, historical and patriarchal underpinnings of the rule of male primogeniture as it now stands, nor to the distorted nature of "official" customary law.¹⁴⁸ A thorough investigation of these aspects is required if a fair and effective solution is to be found¹⁴⁹ and legislation is more suited to this than judicial resolution, which is dependant on the "right" case coming before the courts. Having to wait for the right case to come to court before indigenous law can be brought into line with international human rights guarantees is contrary to the requirements of treaties for pro-active measures and decisive steps.¹⁵⁰ It is my submission that for States Parties to fulfil their obligations in terms of international law, legislation is the most suitable option.¹⁵¹ It is speedy and ensures that a proper process is followed to bring about a clear result based on a policy decision to adhere to international law. It is also recommended in the treaties themselves, as noted above, and by the treaty bodies. For example, in its concluding observations on the report submitted by South Africa, the CEDAW Committee explicitly recommended that South Africa adopt legislation to ensure equality for women and to address, *inter alia*, unequal inheritance rights.¹⁵²

¹⁴⁸ The South African Law Commission discusses a study done in several sub-Saharan countries that showed that higher courts, "although aware of the fact that customary law operated in two registers (the 'official' and 'living' versions) tended to refer only to the official version of customary law; and they applied this law strictly, without taking account of new social practices." South African Law Commission, *supra* note 2, at 25-26. On the other hand, lower courts, including courts of traditional leaders, were much more flexible. *Ibid.* at 26. The former of course have greater influence on the development of the law than the latter.

¹⁴⁹ See Kaganas and Murray, *supra* note 9, at 424.

¹⁵⁰ See Church, *supra* note 3, at 299.

¹⁵¹ See also Church and Edwards, *supra* note 2, at 1261.

¹⁵² CEDAW Concluding Observations, *supra* note 129, para. 118.

Courts themselves are not eager to "make" law.¹⁵³ As we have seen above, the court in the *Magaya* case was of the view that this was a matter for the legislature.¹⁵⁴ Both Mynhardt, J and Mpati, AJA in deciding the *Mthembu* cases were also of the opinion that legislation was required to reform the customary law of succession. Mpati, AJA observed that "[a]ny development of the rule would be better left to the legislature after a full process of investigation and consultation...".¹⁵⁵ Mynhardt, J had recommended that the same process be followed as was at the time being followed in reforming the customary law of marriage, which resulted in the adoption of the Recognition of Customary Marriages Act.¹⁵⁶

In other African countries, for example Malawi, Kenya, Ghana and Zambia, the customary law of succession has been revised by legislation.¹⁵⁷ Zimbabwe also has legislation on intestate succession, but this is unsatisfactory as it does not apply to all customary marriages. The potential for law reform in Zimbabwe is less likely in the light of the ongoing political turmoil. By contrast, the after-effects of the genocide in Rwanda (described above) has resulted in the adoption, in 1999, of a law regulating matrimonial property regimes and granting equal inheritance rights to women and girls.¹⁵⁸

The option of legislation is sometimes criticized on the basis that it is too rigid and restrictive.¹⁵⁹ But this overlooks the fact that the courts have tended to be rigid and restrictive in their interpretation of "official" customary law.¹⁶⁰ Ideal legislation would lay down certain minimum requirements, conditions and guarantees for women and

¹⁵³ See for example Freedman, "Islamic Marriages, the Duty of Support and the Application of the Bill of Rights - *Amod v Multilateral Motor Vehicle Accident Fund* 1997 12 BCLR 1716 (D)", *Tydskrif vir Hedendaagse Romeins Hollandse Reg (THRHR)*, Vol. 61 (1998), 532, who discusses the approach of the High Court to Section 39(2) of the final Constitution, which requires courts, when interpreting any legislation, and when developing the common law or customary law to promote the spirit, purport and objects of the Bill of Rights. The court found that it did not have a general power to develop the common law to do so. I agree with Freedman, who is of the view that this reading of the Constitution is "overly cautious". See *Ibid.* at 535.

¹⁵⁴ See note 79, *supra*.

¹⁵⁵ See South African Law Commission, *supra* note 2, at xiii.

¹⁵⁶ *Ibid.* The adoption of the Recognition of Customary Marriages Act (which does not touch on inheritance rights) shows that it is possible to intervene legislatively in the area of indigenous law, even if the decision is not to adopt a uniform code.

¹⁵⁷ See South African Law Commission, *supra* note 2, at 34

¹⁵⁸ Law No. 22/99 of 12/11/1999 To Supplement Book I Of The Civil Code And To Institute Part Five Regarding Matrimonial. Regimes, Liberalities And Successions.

¹⁵⁹ See Armstrong *et al.*, *supra* note 4, at 323; Vahed, *supra* note 147, at 373-374.

¹⁶⁰ See note 148, *supra*.

girls, without making the same error as was made in codifying customary law into inflexible rules. Such legislation could retain the spirit and true nature of indigenous law, not the currently codified distortion of it, while guaranteeing certain minimum rights to women and girls that may not be abrogated from on the basis of "culture". Of course such legislation would be open to interpretation by the courts, but they would now be interpreting rules that conform to international human rights guarantees of equality for women and girls, rules that have been enacted subsequent to a wide-ranging process of consultation and research to ensure that they correspond to reality and not to out-dated views of a society based on patriarchal power structures and a subsistence economy.

It may also be argued that, in several sub-Saharan African countries, there are constitutions in place that guarantee the equal rights of girls and women, and that further development of the law should be left up to the courts who are called upon to interpret the constitution. However, as I have submitted, the courts' attempts at applying the South African Bill of Rights to the rule of male primogeniture has not been satisfactory. In other countries, such as Botswana, Zambia and Zimbabwe, customary law is shielded from the application of their Bills of Rights by their Constitutions.¹⁶¹

In 1998, the Amendment of Customary Law of Succession Bill, 109 of 1998, was introduced into the South African Parliament. The Bill aimed to extend the application of the general law of succession as embodied in the Intestate Succession Act, 81 of 1987 to all persons, with the necessary amendments made, and to make the provisions of the Administration of Estates Act, 66 of 1965 applicable. It also provided that the provisions of Section 23 of the Black Administration Act would become redundant on enactment of the Bill. Thus, if there is not a will then a wife in a customary marriage would be entitled to inherit *ab intestato* in the same way as would a woman married by civil rites in terms of the Intestate Succession Act. This would mean, for example, that if the husband died and there were no children, the widow would inherit her husband's estate in the same way as a widow married by civil rites would.

¹⁶¹ See note 81, *supra*

However, due to hostile reaction from traditional leaders, a decision was taken not to proceed with the Bill and the investigation into the customary law of succession was referred back to the SALC as a matter of urgency.¹⁶² As a result of this, and also triggered by the *Mthembu* cases, the SALC has prepared a Discussion Paper, in which it recommends reforming the customary law of succession by legislation, with a suggested draft Bill annexed.

The draft Bill suggested by the SALC differs from the 1998 Bill mainly in that it excludes from its provisions succession to the office of traditional leader, and no longer refers to the Administration of Estates Act. It also makes the Intestate Succession Act applicable to customary marriages, with minor amendments, such as the recognition of polygynous unions. The approach of both the 1998 Bill and the draft Bill suggested by the SALC would completely change the current system of inheritance in terms of indigenous law. Primarily the aim and effect is to ensure equality for girls and women, and this is to be welcomed. It is however likely that the new draft Bill will also be criticised, because it retains nothing of indigenous law beyond recognising polygynous marriages. Its effect is to remove the discretion of the extended family in deciding matters of succession and inheritance (within the context of male primogeniture). In this regard it presents a departure from a dualist legal system, which the SALC professes to want to maintain.¹⁶³ The SALC does not explain why it omitted the provision regarding the Administration of Estates Act, but it may well be that this was to provide some flexibility in distribution. One hopes that this would not undercut the equality guarantees. It remains to be seen what the eventual legislation will look like. The South African Law Commission is currently considering responses to its Discussion Paper.

IX. Legitimacy of legislation

The first prerequisite for ensuring the legitimacy of legislation guaranteeing women equal rights to inheritance, is to involve women in the drafting of the legislation, and

¹⁶² South African Law Commission, *supra* note 2, at x-xi.

¹⁶³ South African Law Commission, *supra* note 2, at xv and 13.

in particular African women.¹⁶⁴ Firstly, as Reyntjens puts it, "[t]hese rules provide a material, sexual, economic and moral dominance, which most men would only reluctantly abandon."¹⁶⁵ The presence of women is therefore needed to make sure that the issue of women's inheritance rights is placed on the agenda and is treated seriously. Secondly, the involvement of African women will ensure that the legislation drafted ensures equality, while remaining sensitive to the values of African culture. This is of crucial importance.¹⁶⁶ Thirdly, the fact that women, in particular women from within the culture, are involved in drafting such legislation, will effectively counter the argument that the law is a foreign imposition and will lend it greater legitimacy. Finally, women have deeply engaged in this issue, on personal and professional levels and have much to contribute to the process of drafting legislation. One of the reasons for the lack of legitimacy of the Constitutional Commission in Zimbabwe was that women were not adequately represented on it.¹⁶⁷

Even this is not enough, however. It is unrealistic to think that legislation, however legitimate the drafting process, will have an impact at the grassroots level by itself, in particular in a context where those with power stand to lose some of their power as a result of it. A process of community level awareness-raising, in particular in communities where there is still strong adherence to indigenous law, must accompany the legislation. It should be incorporated into existing and new programmes for legal literacy, education and empowerment for women and girls.¹⁶⁸ At the same time, awareness-raising must be done among men and community leaders, to make them aware of the fact that the current rules and practice discriminate against women and violate their human rights.

Legislation is necessary, not only to fulfill obligations of international human rights, but also to accommodate social changes that have taken place. However, there is still resistance to such change from those who feel threatened by it, or who have convinced others that their culture is threatened by it. Implementing legislation and

¹⁶⁴ In this regard the process followed by the South African Law Commission is commendable - not only are its legislative proposals on the customary law of succession open for comments from anyone, but it has also appointed an African woman to research the issue.

¹⁶⁵ Reyntjens, *supra* note 21, at 48.

¹⁶⁶ See Kaganas and Murray, *supra* note 9, at 428.

¹⁶⁷ See Moyo, "Women left out of Zimbabwean constitution process", *Mail and Guardian*, 8 July 1999.

¹⁶⁸ See Church, *supra* note 3, at 300.

gaining acceptance for it will therefore be a gradual process, one which, as Reyntjens¹⁶⁹ puts it, "lies in the hands of women themselves."¹⁷⁰

X. Conclusion

"The time has come to remove elements of age and gender discrimination from the law and to provide the deceased's immediate family with more secure rights."¹⁷¹ There are fears that such changes will result in the destruction of African culture. This so-called conflict between culture and equality is greatly exaggerated.¹⁷² It overlooks the fact that culture is "remarkably resilient"¹⁷³ - cultures are continually changing and nevertheless manage to survive. Historically many of these changes have taken place as a result of interaction with other cultures.¹⁷⁴ Indeed, changing inheritance laws to ensure equality of women will merely bring them into step with changes that have already taken place in African society. As we have already seen, "the 'lived' customary law is very different from the formal recorded rules. Under the stewardship of Parliament, the formal rules can be changed to reflect the reality."¹⁷⁵

In any event, this argument really comes down to defending such discrimination as being "our culture". This is not enough of a basis for violating women's right to equality. "Protection of cultural rights becomes meaningless if it simply degenerates into a synonym for conservatism".¹⁷⁶ A culture should not need to subjugate half of its members - women and girls - in order to survive. Such characteristics have resulted in a loss of legitimacy for indigenous law. Eliminating discrimination will restore this legitimacy and, as a result, ensure greater adherence to its fundamental and unique tenets.

¹⁶⁹ Reyntjens, *supra* note 21, at 48.

¹⁷⁰ See also, Bronstein, *supra* note 3, at 407, who states that "...women should be given the power to determine their own futures".

¹⁷¹ South African Law Commission, *supra* note 2, at 39.

¹⁷² See for example, Kaganas and Murray, *supra* note 9, at 425.

¹⁷³ Bronstein, *supra* note 3, at 399.

¹⁷⁴ See *Ibid.*, at 394.

¹⁷⁵ Kaganas and Murray, *supra* note 9, at 427.

¹⁷⁶ Bronstein, *supra* note 3, at 397.

BIBLIOGRAPHY

Academic articles and books

Armstrong *et al.*, "Uncovering reality: Excavating women's rights in African family law", *International Journal of Law and the Family* 7 (1993), 314

Bronstein, "Reconceptualizing the customary law debate in South Africa", *South African Journal of Human Rights*, Vol. 14 (1998), 388

Church, "Constitutional equality and the position of women in a multi-cultural society", *Constitutional and International Law Journal of South Africa (CILSA)*, Vol. XXVIII (1995), 289

Church and Edwards, "Introduction to Indigenous Law and the Comparative Method", in Hosten *et al.*, *Introduction to South African Law and Legal Theory* (1995), 1248

Cook, "State Accountability under the Convention on the Elimination of All forms of Discrimination Against Women", in Cook (ed.) *Human Rights of Women* (1995), 228

Costa, "The Myth of Customary Law", *South African Journal of Human Rights* Vol. 14 (1998), 525

Dlamini, "The future of African customary law" in Sanders (ed.), *The Internal Conflict of Laws in South Africa* (1990), 1

Dugard, *International Law - A South African Perspective*, (2000)

Freedman, "Islamic Marriages, the Duty of Support and the Application of the Bill of Rights - *Amod v Multilateral Motor Vehicle Accident Fund* 1997 12 BCLR 1716 (D)", *Tydskrif vir Hedendaagse Romeins Hollandse Reg (THRHR)* Vol. 61 (1998), 532

Kaganas and Murray, "The Contest between Culture and Gender Equality under South Africa's Interim Constitution", *Journal of Law and Society* Volume 21, Number 4, (1994), 409

Maithufi, "The Constitutionality of the Rule of Primogeniture in Customary Law of Intestate Succession - *Mthembu v Letsela* 1997 2 SA 935 (sic) (T)", *Tydskrif vir Hedendaagse Romeins Hollandse Reg (THRHR)* Vol. 61 No 1, (1998), 142

Myburgh, *Papers on Indigenous Law*, (1985)

Reyntjens, "Protecting human rights in sub-Saharan Africa: specific problems and challenges", *SA Public Law*, Vol. 7 No 1 (1992), 40

Sinclair, "Pluralism in South African Marriage Laws: Race, Culture and Religion", in *The Law of Marriage*, Vol. 1 (1996), 207

South African Yearbook of International Law, Vol. 24 (1999)

Stewart and Armstrong (eds.), *The Legal Situation of Women in Southern Africa*, (1990)

Vahed, "Should the question: 'what is in a child's best interest?' be judged according to the child's own cultural and religious perspectives? The case of the Muslim Child", *The Comparative and International Law Journal of Southern Africa (CILSA)* Vol. 23, No. 3 (1999), 364

Van der Meide, "Gender Equality vs. Right to Culture", *The South African Law Journal*, Volume 116, Part I (1999), 100

Treaties

African [Banjul] Charter on Human and Peoples' Rights (1981)

African Charter on the Rights and Welfare of the Child (1990)

Convention on the Elimination of All Forms of Discrimination against Women (1979)

Convention on the Rights of the Child (1989)

International Convention on the Elimination of All Forms of Racial Discrimination (1965)

International Covenant on Civil and Political Rights (1966)

International Covenant on Economic, Social and Cultural Rights (1966)

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999)

Universal Declaration of Human Rights (1948)

Vienna Convention on the Law of Treaties (1980)

United Nations Documents

Committee on Economic, Social And Cultural Rights, General Comment 4 (1991)

Committee on Economic, Social And Cultural Rights, General Comment 7 (1997)

Committee on the Elimination of Discrimination against Women: Concluding Observations on the report of South Africa (1998)

Committee on the Elimination of Discrimination against Women, General Recommendation 21 (1994)

Platform for Action and the Beijing Declaration, United Nations Department of Information (1996)

Vienna Declaration and Programme of Action (1993)

Newspaper articles

Susan Njanji, "Zim women fight for lost rights, Mail and Guardian", 10 June 1999

Matilda Moyo, "Women left out of Zimbabwean constitution process", Mail and Guardian, 8 July 1999

David Gough, "Husband-hiring hastens the spread of Aids in Rwanda", The Guardian, 8 February, 2000

Miscellaneous

Machel, *Impact of Armed Conflict on Children - Selected Highlights*, New York (1996)

Human Rights Watch, *Hostile to Democracy* (1999)

South African Law Commission, "Customary Law", Discussion Paper 93, Project 90, (2000)

UNICEF, *Human rights for children and women: How UNICEF helps make them a reality* (1999)

Internet resources

<http://www.un.org/womenwatch/daw/cedaw/states.htm>

<http://www.unhchr.ch/tbs/doc.nsf>

<http://untreaty.un.org/English/sample/EnglishInternetBible/partI/chapterIV/treaty4.asp>

<http://untreaty.un.org/English/sample/EnglishInternetBible/partI/chapterIV/treaty5.asp>

<http://untreaty.un.org/English/sample/EnglishInternetBible/partI/chapterIV/treaty9.asp>

<http://www.unhchr.ch/html/menu6/2/fs22.htm>

TABLE OF CASES

South Africa

	Page
<i>Mthembu v Letsela</i> 1997 (2) SA 936 (T)	1, 10-13
<i>Mthembu v Letsela</i> 1998 (2) SA 675 (T)	1, 13, 31
<i>Mthembu v Letsela</i> 2000 (3) SA 867 (SCA)	1, 6, 7, 13, 14, 31

Zimbabwe

	Page
<i>Venia Magaya v Nakayi Shoniwa Magaya</i> , Supreme Court Civil Appeal No 635/92, unreported	1, 10, 14-16, 28, 31

TABLE OF STATUTES

Statutes

Rwanda

No	Year	Short Title	Page
22	1999	Matrimonial. Regimes, Liberalities and Successions	31

South Africa

No	Year	Short Title	Page
38	1927	Black Administration Act	6, 32
66	1965	Administration of Estates Act	32, 33
81	1987	Intestate Succession Act	33
45	1988	Law of Evidence Amendment Act	11
200	1993	Constitution of the Republic of South Africa	10-13
108	1996	Constitution of the Republic of South Africa	12, 13, 19, 31
120	1998	Recognition of Customary Marriages Act	5,31

Zimbabwe

No	Year	Short Title	Page
15	1982	Legal Age of Majority Act	5,15,16

Bills

South Africa

No	Year	Short Title	Page
109	1998	Amendment of Customary Law of Succession Bill	32, 33

LIST OF ABBREVIATIONS

Banjul Charter: African Charter on Human and Peoples' Rights

CEDAW: Convention on the Elimination of All Forms of Discrimination against Women

CEDAW Committee: Committee on the Elimination of All Forms of Discrimination against Women

CERD: International Convention on the Elimination of All Forms of Racial Discrimination

CRC: Convention on the Rights of the Child

CRC Committee: Committee on the Rights of the Child

Ed.: Editor

Eds: Editors

Et al.: *Et alia* (above)

Ibid.: *Ibidem* (same source as previous reference)

ICCPR: International Covenant on Civil and Political Rights

ICESCR: International Covenant on Economic, Social and Cultural Rights

Mthembu v Letsela (1997): *Mthembu v Letsela*, 1997 (2) SA 936 (T)

Mthembu v Letsela (1998): *Mthembu v Letsela*, 1998 (2) SA 675 (T)

Mthembu v Letsela (2000): *Mthembu v Letsela and another*, 2000 (3) SA 867 (SCA)

Par.: Paragraph

SALC: South African Law Commission

Vol.: Volume