

Article

Conflicting Priorities? Issues of Gender Equality in South Africa's Customary Law

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Abstract

What does the right to gender equality entail and how does it affect the role of customary law regarding gender relations in South Africa? This article presents an in-depth analysis of the remedies that international human rights treaties provide for both the right to culture, with which the 'right to customary law' is often associated, and the right to gender equality. Furthermore, the current and proposed status of customary law, as being part of the State law system, is discussed in great detail, giving particular notice to the controversial Traditional Courts Bill. The analysis finds that all but two of the treaties fail to provide clear insight as to the manner in which supposed conflict between the right to culture and the right to gender equality is to be dealt with. Only the Convention to Eliminate All Forms of Discrimination Against Women (CEDAW) and the Maputo Protocol require States Parties, albeit still in general terms, to commit themselves to modify the social and cultural patterns based on the idea of inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. Given the number of objections that have been made against the Traditional Courts Bill, it is questionable whether South Africa can be said to 'commit itself' when such a Bill is passed.

Introduction

For centuries, the citizens of what is now known as the Republic of South Africa have been governed by what is commonly referred to as customary law, or 'traditional law'¹. A variation of indigenous legal orders has found its way to not only govern the lives of their people, in clan or tribe, but also to a place of constitutional recognition within the official national legal system. As a result, the once-rigid line strictly separating customary and State law has faded significantly. Nevertheless, tensions between customary law and human rights norms, both domestically incorporated in the Bill of Rights of the Constitution and internationally protected by the United Nations and the Organisation of African Unity, continue to exist.

Gender equality, in particular, has been a topic of great concern: failure to adhere thereto would mean the impairment of practicing one's human rights as a whole, with one sex being more deserving of practicing their rights than the other. The question of right or wrong

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¹ C. Rautenbach, J.C Bekker & N.M.I Goolam, *Introduction to Legal Pluralism*, Durban: LexisNexis Butterworths 2010 (3rd edition), p. 3. The law that was originally applicable in South Africa and the only legal system other than the Western system which, to a limited extent, is officially recognised. Often the term 'traditional law' is used, yet I prefer to utilise the term 'customary law' for its usage in the South African Constitution. In light thereof, I shall only make use of the term 'customary law', unless provided otherwise. Customary law, as such, refers to perhaps the most local forms of law and should not be mistaken with customary international law.

becomes entangled in a web consisting not only of different levels of law - domestic and international - yet also of different types of law – customary law and the law of the State. The fact that customary law has been given a place within the State legal system has blurred the line of distinction and has made the web more complicated than before. Key, however, is the question concerning the extent to which customary law is to be given recognition. The common legal answer refers to its equal position to State law: both are measured against the Bill of Rights, such that in case of tension the latter ought to prevail and serves as a tool for amendments. After all, the Constitution is the supreme law of the Republic.² Furthermore, the universality principle that guards human rights internationally has continuously been emphasised. As noted at the 1993 Final Declaration of the World Conference of Human Rights,

“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.”³

While the statement that human rights are universal is a powerful one, the manner in which these rights are articulated in practice, while maintaining their status as ‘indivisible’, ‘interdependent’ and ‘interrelated’, is unclear. How do human rights fit into a situation in which there is a supposed conflict of priorities? Could one even recognise customary law if these so-called *universal* human rights would change customary law inherently?

Considering its history of racial and cultural inequality, discussions on cultural diversity remain a sensitive topic in South Africa. This is even more pronouncedly the case due to the fact that the spirit of solidarity, an African ethical philosophy known as ‘Ubuntu’, played a significant role in the transition from apartheid to democracy.⁴ African values have been placed on a pedestal; they are held in high regard and are to be respected. Issues of gender inequality, in specific, however, remain a great concern. The recent reintroduction of the Traditional Courts Bill,⁵ which aims to further align customary courts with the Constitution, is feared by many to enhance the already existing suppression of rural women.⁶ If this would indeed be the Bill’s actual effect, this raises questions about the role of cultural and traditional practices with regard to gender equality. This article thus focuses on the following research question:

What does the human right to gender equality entail and how does this affect the role of customary law regarding gender relations in South Africa?

² Art. 2, The Constitution of the Republic of South Africa, 1996. “Supremacy of Constitution. This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”. Hereafter: Constitution.

³ Vienna Declaration and Programme of Action, United Nations General Assembly, UN Doc. A/CONF.157/23, 12 July, 1993, para. 5.

⁴ B. E. Winks, ‘A Covenant of Compassion: African Humanism and the Rights of Solidarity in the African Charter on Human and Peoples’ Rights’, *African Human Rights Law Journal* 2011-11, pp. 447-464.

⁵ Traditional Courts Bill [B1-2012]. The Bill was first introduced in 2008 – Traditional Courts Bill [B1-2008] – yet, after having received a considerable number of objections, was rejected. In January 2012, the Bill was reintroduced without a single change made to its content. In chapter III ‘Customary Law: Its Current and Proposed Status’ this will be explained in further detail.

⁶ *Idem.*, Preamble. See also Submission by the Joint Monitoring Committee on Improvement of the Quality of Life and the Status of Women to the Portfolio Committee on Justice and Constitutional Development on the Traditional Courts Bill [B15-2008], 17 September 2008; Kwazulu Natal Rural Women’s Movement, ‘Submission to Portfolio Committee on Justice and Constitutional Development, Traditional Court’s Bill 15 of 2008’, available at <http://www.lrg.uct.ac.za/research/focus/tcb/>.

In order to give answers to this question, first the concept of customary law in rural South Africa will be discussed. This will be followed by a consideration of the legislative instruments that govern the current position of customary law in the State law framework. Central to this article will be the discussion on how the Traditional Courts Bill differs from legislation currently governing traditional courts and customary law. Thirdly, I will conduct an in-depth analysis of the above-mentioned treaties that South Africa has ratified, with specific regard to the manner in which they deal with issues of gender (in)equality and culture and tradition. Due to its specific regard for African norms and values, particular attention will be given to the Banjul Charter. This will be followed by a summary of the dispute regarding the Bill's presumed and actual effects as a basis for a final discussion on the extent to which the Traditional Courts Bill may be regarded as a legislative reform in violation of South Africa's international obligations. This discussion will include a brief, normative note on how customary law is to be dealt with in relation to 'universal' human rights obligations.

I. Customary Law in South Africa

In the era before the colonial settlers had reached the Cape of Good Hope, South Africa was inhabited by a diversity of tribes and clans, each governed by its own customary rule. Since then, much has changed. The diversity of tribes, clans and communities still exists, yet unlike before, they now fall under the rule of the State. A question of importance is what this has meant not only for the position of customary law in South Africa's legal system, a topic that I will return to later, but also for the definition of customary law: what do we understand by 'customary law' and how does this understanding relate to its role within the South African legal system?

When considering the meaning of customary law, it immediately becomes apparent that no single definition exists. Whereas Hamnett describes customary law as "a set of norms which the actors of a social situation abstract from practice and which they invest with binding authority",⁷ Bennett speaks of customary law as "[deriving] from social practices that the community concerned accepts as obligatory".⁸ As if this is not confusing enough, South Africa's jurisprudence too has made a habit of using the term 'customary law' interchangeably with the term 'indigenous law'. The 1988 Law of Evidence Amendment Act,⁹ for example, utilises the term 'indigenous law', which it defines as "the law or custom as applied by the Black tribes in the Republic". The Recognition of Customary Marriages Act,¹⁰ adopted ten years later, however, refers to 'customary law' as meaning "the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples".

The fact that no definite meaning can be attributed to either term is arguably the result of two issues. Firstly, for a long time, customary law was seen through a common law lens:¹¹ "Customary rules were grouped into common-law categories, such as marriage, succession, and property, and common-law concepts were freely used to describe customary institutions. At the same time the devices of precedent, codification and restatement were used to impose Western requirements of certainty and stability".¹² This failure to interpret customary law in

⁷ I. Hamnett, *Chieftainship and Legitimacy*, 1977, qtd. in Rautenbach, Bekker & Goolam 2010, supra note 1, p. 17.

⁸ J. Bennett, *Customary Law in South Africa*, 2004, qtd. in Rautenbach, Bekker & Goolam 2010, supra note 1, p. 17.

⁹ Law of Evidence Amendment Act 45 of 1988, s 1(4).

¹⁰ Recognition of Customary Marriages Act 120 of 1988, s 1(ii).

¹¹ *Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC) para. 51

¹² T.W. Bennett, *Human Rights and African Customary Law under the South African Constitution*, Juta & Co Ltd. 1997, p. 63.

its own setting, has, in part, led to the fossilisation and codification of customary law.¹³ This has gone contrary to what has often been said to be the very nature of customary law, namely, that it is inherently flexible, a facet that the Constitutional Court of South Africa has even regarded as ‘constructive’.¹⁴ This constitutes the second issue that has led to the diversification of definition. Since customary law is inherently flexible, the official legal instruments that exist with regard to the application and inclusion of customary law represent a ‘fossilised’ version of customary law, biased due to its codification through a Western, common law lens.

As becomes apparent from the definitions given by Hamnett¹⁵ and Bennett,¹⁶ and also in the above-mentioned Acts, it seems inevitable that customary law is defined in general terms only. Customary law’s role as a ‘living’ instrument and failure to recognise this in an unbiased manner that corresponds to an interpretation of this category of law in its own setting have led to a dichotomy between what is often referred to as ‘official customary law’ and ‘living customary law’. While under Article 211(1) of the Constitution “the institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution”, Article 1(1) of the Law of Evidence Amendment Act provides that “[a]ny court may take judicial notice of the law of a foreign State and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty”. Although the Constitution may thus be interpreted to take notice of both official and living customary law, the fact that the law of Evidence Amendment Act requires the latter to be ascertained ‘readily’ and ‘with sufficient certainty’ inevitably results in a large part of customary law not being recognised: due to the lack of codification, there is simply too little evidence. As a result, the legal system still lags behind contemporary social values, needs and practices.¹⁷

Whereas customary law was marginalised for a long time and, as a result, was “denied [the] opportunity to grow in its own right and to adapt itself to changing circumstances”, legal development does seem to indicate a shift towards a harmonisation of the various legal systems¹⁸ into a new unified law, “within a framework of Western values”.¹⁹ However, South Africa’s legal system still lags behind contemporary social values, needs and practices.²⁰ The meaning attributed to ‘human rights’, as is argued, “is part of the ideological patrimony of Western civilization”.²¹ One may question whether this ‘Western’ conception of rights and freedoms, as included in the Bill of Rights, yet also in the numerous Treaties that South Africa has ratified, corresponds to an African notion of human rights. As argued by Bennett, “an

¹³ *Bhe v Magistrate, Khayelitsha (commission for Gender Equality as Amicus Curiae); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC), para. 43.

¹⁴ *Idem.*, para. 45.

¹⁵ Hamnett 1977, *supra* note 7, p. 17.

¹⁶ Bennett 2004, *supra* note 8, p. 17.

¹⁷ Y. Mokgoro, ‘The Customary Law Question in the South African Constitution’, *Saint Louis University Law Journal* 1997-41, pp. 1281 - 1283. See also S. M. Weeks, ‘The Traditional Courts Bill: Controversy around Process, Substance and Implications’, *SA Crime Quarterly* 2011-35, pp. 3 - 10.

¹⁸ M. Ndulo, ‘African Customary Law, Customs and Women’s Rights’, *Indiana Journal of Global Legal Studies* 2011-18, p. 88. The learned author states in this respect that “[i]t should be appreciated that the use of the term “African customary law” does not indicate that there is a single uniform set of customs prevailing in any given country. Rather, it is used as a blanket description covering many different legal systems.” In addition to the distinction between South Africa’s common law and customary law, there is thus no such thing as a unified customary law system: per tribe or community, the customary law adhered to may, in cases, significantly differ.

¹⁹ Rautenbach, Bekker & Goolam 2010, *supra* note 1, p. 10. Emphasis mine

²⁰ Mokgoro 1997, *supra* note 17, p. 1281. See also Weeks 2011, *supra* note 17, p. 3.

²¹ C. Cerna, ‘Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts’, *Human Rights Quarterly* 1994-16, pp. 740 - 752.

authentic customary law is one which by definition exists outside an official legal regime. If a Bill of Rights can be applied only by authorities under direct State supervision, the parallel, customary system will continue to function in the way that it always has".²² Can actual judicial notice be given to customary law, the Cinderella of South Africa's legal system,²³ if the Constitutional 'repugnancy proviso' contradicts its very nature?

The following section will discuss the Black Administration Act, the current piece of legislation that governs the status of customary law in the Republic, and the Traditional Courts Bill, a Bill currently before parliament that is meant to replace the supposedly outdated BAA. The Traditional Courts Bill has received much critique, however, on the basis that it would not only maintain, but even worsen the position of rural women in the system of customary law.

II. Customary Law in South Africa: Its Current and Proposed Status The Black Administration Act

The piece of legislation that currently regulates traditional courts goes by the name of the Black Administration Act (BAA), also known as the Bantu Act, and dates back as far as 1927.²⁴ The BAA constitutes the first legislative instrument that entrenched State-law pluralism, defined as the coexistence of various officially recognised State laws, for South Africa as a whole.²⁵ By means of uniform recognition and application of customary law, the BAA constituted the Courts of Native Chief, Native Commissioner and of Appeal, both specifically designed to meet the so-called requirements of the psychology, habits and usages of the Bantu.²⁶ Founded on the ideology that the Native needs, as emerged from the tribal state, had to meet those of the more "enlightened" Western civilisation and its legal systems of jurisprudence, this set-up fit the apartheid ideology perfectly.²⁷ As in all Anglophone countries, South Africa's customary law was subject to a Western value system. A 'repugnancy clause' was thus included in the BAA under section 11(1), which stated that:

"Notwithstanding the provisions of any other law, it shall be in the discretion of the Commissioners' Courts in all suits or proceedings between Blacks involving questions of customs followed by Blacks, to decide such questions according to the Black law applying to such customs except insofar as it shall have been repealed or modified: *Provided* that such Black law shall not be opposed to the principles of public policy or natural justice: *Provided further* that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles."²⁸

This section was explicitly drawn up so as to not definitely state that customary law would automatically be accepted as the applicable law. Rather, its recognition was clothed in vague and general terms, a method inherent to the rationale for the repugnancy clause because, as pointed out by Goldin and Gelfand, "[a]ll systems of law, including customary law, are generally consistent with justice and morality as accepted and understood by the people

²² T. W. Bennett, 'The Equality Clause and Customary Law', *South African Journal on Human Rights*, 1994-10, p. 130.

²³ *Idem.*, p. 122.

²⁴ Black Administration Act 38 of 1927. Hereafter: BAA.

²⁵ Rautenbach, Bekker & Goolam 2010, *supra* note 1, pp. 3 - 6.

²⁶ *Idem.*, p. 33.

²⁷ *Idem.*, pp. 33 - 34.

²⁸ Art. 11(1), BAA 1927, *supra* note 24. Emphasis mine. This section no longer is in force.

among whom it was developed and applied".²⁹ This already showed great improvement, however, in comparison to before. For a long time no recognition was given to customary law at all: it was considered to be barbarous, inhuman, animal-like even.³⁰

The introduction of the Interim Constitution of South Africa on the 27th of April 1994 heralded the end of the apartheid era. As a result, many of the provisions of the Black Administration Act became unconstitutional on the basis that they unfairly discriminated on the grounds of race.³¹ This all happened to the dismay of the chiefs, who had made fierce attempts to have culture excluded from the Bill of Rights, as a separate domain shielded from threatening provisions like the equality clause.³² Due to the justiciable Bill of Rights, as included in the Interim Constitution, the validity of customary laws could now be tested against the standards of fundamental human rights. For the first time in South Africa's history, customary law thus became an issue of constitutional importance.³³ Furthermore, these laws were now associated with the right to culture.³⁴ Also the repugnancy clause was repealed: section 2 of the Constitution now states that "[t]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled"³⁵: any customary law inconsistent with the Constitution is automatically invalid. The repugnancy clause was thus no longer a necessity. Ever since 1994, the Act has been subject to numerous amendments and repeals.³⁶ Though it has been subjected to such serious amendments, Articles 12³⁷, 20³⁸, and the Third Schedule³⁹, which deal with the power of 'Black chiefs' in settling certain civil disputes and trying certain offences, are the only articles of the BAA that are still in force.

The Traditional Courts Bill

Although still in force, the few sections of the Black Administration Act that are still left are deemed outdated by many: not only do they not meet the needs of the traditional justice system under the Constitution, even within the existing system as constituted by the BAA, most traditional courts work outside of their parameters.⁴⁰ As a result, between 1998 and 2003, the South African Law Reform Commission put great efforts into consulting and recommending investigation in order to determine a good way to align customary courts with the Constitution. By means of substantive discussions and workshops held in the rural areas and careful consideration of the submissions accordingly made, a report and draft Bill was finally presented.⁴¹ The proposal that they submitted to the Minister of Justice in 2003 was rejected, however, on the basis that its implementation would be too costly: it required the establishment of a new Commission of Court to oversee the practice of traditional courts and

²⁹ B. Goldin & M. Gelfand, qtd by N.S. Peart, (1982) 'Section 11(1) of the Black Administration Act No. 38 of 1927: the Application of the Repugnancy Clause', *Acta Juridica*, 1982-99, pp. 99-116.

³⁰ Rautenbach, Bekker & Goolam 2010, supra note 1, pp. 5 – 6.

³¹ Art. 8(2), Interim Constitution South Africa of 1993. Currently amended to Art. 9(3), Constitution 1996, supra note 2.

³² B. Oomen, *Chiefs in South Africa: Law, Power & Culture in the Post-Apartheid Era*, Palgrave 2005, p. 79.

³³ Bennett 1997, supra note 12, p. 76.

³⁴ Ibid.

³⁵ Art. 2, Constitution 1996, supra note 2.

³⁶ BAA 1927, supra note 24.

³⁷ Idem., Art. 12.

³⁸ Idem., Art. 20.

³⁹ Idem., Third Schedule.

⁴⁰ Sindiso Mnisi Weeks on 702 Talk Radio, 'Talk at Nine with Eusebius McKaiser', 18 July 2012, at <http://www.pod702.co.za/podcast/TalkNine/20120718BESTT@9.mp3>.

⁴¹ South African Law Commission, Project 90: Customary Law. Report on Traditional Courts and the Judicial Function of Traditional Leaders, 21 January 2003, available at <http://salawreform.justice.gov.za/reports.htm>

ensure their implementation of new norms.⁴² Nevertheless, to the surprise of many, in 2008 a new piece of legislation known as the Traditional Courts Bill⁴³ was drafted by the Department of Justice. For a number of years, the Department of Justice had been seeking an alternative for the BAA. The Traditional Courts Bill⁴⁴ aimed both at bringing the traditional courts in line with the Constitution and at facilitating their cooperation with the State courts. In doing so, it would replace sections 12 and 20 of the infamous BAA,⁴⁵ which state that only upon the Minister's authorisation a Black chief or headman may hear, try and punish civil claims arising from Black law and custom, with legislation suitable to the new post-apartheid democracy and primacy of rights as contained in the Bill of Rights,⁴⁶ such as the rights to equality and dignity⁴⁷. Furthermore, it was meant to give consideration to the customary law lived by many poor, rural South Africans on the ground, only to be modulated by the supremacy of the Constitution.⁴⁸

The Bill, however, was met with great opposition from numerous (rural) civic organisations and the Democratic Alliance. Not only was it said to fail at accomplishing its aim of bringing traditional courts in line with the Constitution, but more significantly, it was said to actually provide recognition of practices that in fact infringe human rights, such as the right to equality and dignity.⁴⁹

When the 2010 Amendment Bill was drafted, the 2008 Traditional Courts Bill was still before the Portfolio Committee on Justice and Constitutional Development. On the basis that it was unlikely that the Traditional Courts Bill would be signed into law by the initial deadline on 30 December 2010, the Amendment Bill extended the date of the application of the provisions of sections 12 and 20 and the Third Schedule of the BAA to 30 December 2012.⁵⁰

The drafters turned out to be right: not only was the Bill not signed before the initial date, in June 2011 the entire Bill was withdrawn. In May 2008, the Justice Portfolio Committee had called for submissions concerning the Bill and had held public hearings. Numerous submissions were made, among which one made by the parliamentary Joint Monitoring Committee on Improvement of the Quality of Life and the Status of Women. The latter had taken account of the numerous complaints that had been raised and, on that basis, made several recommendations to bring the Bill in line with the Constitution. The Traditional Court Bill, it critically argued, "[had to] achieve a balance between the respect for customary law and the upholding of constitutional rights as set out by the Bill of Rights".⁵¹ Essential thereto is that rural women are properly consulted as to whether or not they support the Bill.⁵² At public hearings, organisations representing traditional leaders showed support for the Bill.

⁴² Weeks 2012, *supra* note 40.

⁴³ Traditional Courts Bill [B15-2008].

⁴⁴ *Ibid.*

⁴⁵ Rautenbach, Bekker & Goolam 2010, *supra* note 1, pp. 33 - 34.

⁴⁶ Bill of Rights, Constitution 1996, *supra* note 2.

⁴⁷ Weeks 2011, *supra* note 17, pp. 3 - 10.

⁴⁸ Art. 2, Constitution 1996, *supra* note 2.

⁴⁹ P. Holomisa, 'Balancing Law and Tradition: the TCB and its Relation to African Systems of Justice Administration', *South African Crime Quarterly* 2011-35, p. 17. See also N. Gasa, 'The Traditional Courts Bill: A Silent Coup?', *South African Crime Quarterly* 2011-35, p. 25.

⁵⁰ Section 2(b), Repeal of the Black Administration Act and Amendment of Certain Laws Amendment Bill, Act No. 37 of 2010.

⁵¹ Joint Monitoring Committee on the Improvement of Quality of Life and Status of Women, 'Submission by the Joint Monitoring Committee on the Improvement of Quality of Life and Status of Women to the Portfolio Committee on Justice and Constitutional Development on the Traditional Courts Bill, [B15-2008] (17 September 2008), available at <http://www.lrg.uct.ac.za/research/focus/tcb/>, p. 4.

⁵² *Ibid.*

Most prominent, however, was the great opposition displayed by Congress of South African Trade Unions (COSATU), the Council of Churches, the Commission for Gender Equality and various civil society organisations as well as organisations representing rural women and various rural communities.⁵³ After the hearings, the Bill was withdrawn on what was said to be an administrative matter. There simply was insufficient time to complete the legislative procedures required by section 76 of the Constitution, which calls for a longer and more consultative process when dealing with ordinary Bills affecting provinces.⁵⁴

On the 13th of December of that same year, however, the Department of Justice made its intentions apparent to reintroduce the Bill in the National Council of Provinces (NCOP), resulting in its formal reintroduction on the 26th of January 2012. Remarkably, not a single amendment to the original Bill⁵⁵, as introduced in 2008, had been made. Most rural peoples remain unaware of the existence and the content of the Bill. Once again, the Bill was met with great opposition. Both the opposing and the supporting parties, however, seemed to agree that there was a need to bring customary law in line with the Constitution: this is stated in the preamble of the Bill⁵⁶ and in the submissions⁵⁷ made against it. The dispute, one may say, does not lie in the goal to be reached, but in the manner in which this goal is articulated and the road that leads to it. The dispute thus covers two separate discussions. On the one hand it concerns the presumed effect of the Bill, as set out by its proponents, and the actual effect of the Bill, as deemed to be different from the presumed effect according to its opponents. Whereas the opponents contend that the Bill will centralise power in the traditional leader in a manner than inherently contravenes customary law and, as a result thereof, increases the potential for violation of women's rights, proponents contest this.⁵⁸ On the other hand, even the road towards this goal is littered with issues with regard to level of acceptability: what is deemed acceptable and, importantly, what is not? What are the limits to cultural relativity with regard to the right to gender equality?

The following section will consider the international treaties that South Africa has signed and ratified, the legal obligations that these pose on the State and the limits that thus may be set to cultural practice when in supposed violation of the right to gender equality.

III. Claiming Human Rights in South Africa: International Commitments

In a time in which more and more fields, be it in law, economics or politics, are regulated on an international level, South Africa does not fall behind on international jurisprudence. The right to culture, in specific, cannot but be read against the background of public international law: not only does section 39(1) of the Constitution oblige the courts to 'consider foreign

⁵³ A. Claassens, 'Summary and Analysis of the Traditional Courts Bill B 15-2008', 31 May 2012, available at <http://www.lrg.uct.ac.za/research/focus/tcb/>

⁵⁴ Art. 76, Constitution 1996, supra note 2. See also Claassens 2012, supra note 53.

⁵⁵ Traditional Courts Bill [B15-2008].

⁵⁶ Preamble, Traditional Courts Bill [B15-2008].

⁵⁷ Joint Monitoring Committee 2008, supra note 51. See also J. Williams, Women's Legal Centre, 'Submission to Portfolio Committee on Justice and Constitutional Development: Traditional Courts Bill 2008' (2008) available at <http://www.lrg.uct.ac.za/research/focus/tcb/>; and J. Williams & J. Klusener, Women's Legal Centre, '2012 Submission to the National Council of Provinces: Traditional Court's Bill 2012' (2012) available at <http://www.lrg.uct.ac.za/research/focus/tcb/>

⁵⁸ S. M. Weeks, 'Beyond the Traditional Courts Bill: Regulating Customary Courts in Line with Living Customary Law and the Constitution', *South African Quarterly* 2011-35, pp. 32 - 33; and Weeks 2011, supra note 17, p. 8.

law' when interpreting the Bill of Rights,⁵⁹ it also considers it to be part of the South African legal system.⁶⁰

The Republic is a member of both the United Nations and the African Union and has ratified a substantial number of UN Human Rights Conventions, as well as the African Union's Banjul Charter⁶¹ and Maputo Protocol.⁶² With regard to the question of gender equality in relation to *African* cultural rights, the African Union's Banjul Charter and Maputo Protocol are of particular concern. No less consideration shall be given, however, to the rights, freedoms and possible remedies that are provided by the binding international commitments South Africa has made by means of the ratification of different UN human rights treaties.

Commitments under the United Nations:

When in 1945 the United Nations was founded, South Africa was one of the 50 founding members. However, as a result of the Apartheid regime that had developed in South Africa after World War II, the UN General Assembly decided to suspend South Africa from further participation on 12 November 1974. It was not until South Africa's transition into democracy in 1994 that South Africa was re-admitted to the United Nations. Now, as is stated in the welcome message of the official website of the 'Permanent Mission of South Africa to the United Nations', the UN mission is central to South Africa's foreign policy.⁶³

One of the main purposes of the United Nations, as indicated in Article 1(3), is "to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".⁶⁴ However, only by means of the International Covenant on Civil and Political Rights⁶⁵ (ICCPR) and the International Covenant on Economic, Social and Cultural Rights⁶⁶ (ICESCR), and the Convention on the Elimination of All Forms of Discrimination Against

⁵⁹ See also Art. 231(4), Constitution 1996, supra note 2: "Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament", and Art. 232, Constitution 1996, supra note 2: "Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament"

⁶⁰ Bennett 1997, supra note 12, p. 84.

⁶¹ African (Banjul) Charter on Human and People's Rights on the Rights of Women in Africa, 2003. Hereafter: Banjul Charter.

⁶² Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003. Hereafter: Maputo Protocol. The Maputo Protocol was signed by South Africa on 16 March 2004 and ratified on 17 December 2004

⁶³ Permanent Mission of South Africa to the United Nations, available at <http://www.southafrica-newyork.net/pmun/>

⁶⁴ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at <http://www.unhcr.org/refworld/docid/3ae6b3930.html> [accessed 3 October 2012] Hereafter: UN Charter, Art. 1(3).

⁶⁵ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, 171 Hereafter: ICCPR. As of February 2012, the ICCPR was ratified by South Africa. Hereafter: ICCPR.

⁶⁶ International Covenant on Economic, Social and Cultural Rights, 3 January 1976. Hereafter: ICESCR. South Africa signed the ICESCR in 1994, but ratification is yet to be completed. This does not mean, however, that it has no obligations as to its content: As articulated in Art. 18(a) of the Vienna Convention on the Law of Treaties, "[a] State is obliged to refrain from acts which would defeat the object and purpose of a treaty when (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty".

Women⁶⁷ (CEDAW) has it gained more specificity.

With regard to the Traditional Courts Bill, Article 2(2) of the ICCPR and the similar Article 2(1) of the ICESCR, in particular, are of interest. Both set out that the States must adopt laws, other measures⁶⁸ or take steps⁶⁹ as may be necessary to give effect to the rights recognised in the Covenants. Nevertheless, having considered both articles, it remains unclear when the State Party will have succeeded in adopting laws or measures to give effect to the rights as ensured by the Covenants, or, more specifically, which exact measures ought to be taken.

In 1979, the United Nations General Assembly adopted the Convention on the Elimination of All Forms of Discrimination Against Women. Since its ratification on 15 December 1995, it has become one of the most important and influential treaties regarding women's human rights in South Africa. It is thus not surprising that the one and only submission that makes reference to South Africa's obligations under international law, namely the submission made by the Women's Legal Centre in Cape Town, draws first and foremost on the Convention.⁷⁰ Articles 3 and 15 of the CEDAW, it argues, are of particular relevance for issues of gender equality in the Traditional Courts Bill:

Article 3:

"States Parties shall take in all fields, in particular in the political, social, economic and *cultural* fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."⁷¹ [emphasis added, EB]

Article 15:

1. "States Parties shall accord to women equality with men before the law.
2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals."⁷²

The submission also cites Article 14(1) of the CEDAW, which enjoins State Parties to "take into account the particular problems faced by rural women" and "to ensure the application of the provisions of the Convention to women in rural areas".⁷³ Unfortunately, like Articles 2(2)⁷⁴ of the ICCPR and 2(1)⁷⁵ of the ICESCR, Article 3⁷⁶ of the CEDAW provides little

⁶⁷ Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979. Hereafter: CEDAW.

⁶⁸ Art. 2(2), ICCPR 1966, *supra* note 65.

⁶⁹ Art. 2(1), ICCPR 1966, *supra* note 65.

⁷⁰ Williams & Klusener 2012, *supra* note 57. See also Williams 2008, *supra* note 57.

⁷¹ Art. 3, CEDAW 1979, *supra* note 67. Emphasis mine.

⁷² Art. 15, CEDAW 1979, *supra* note 67.

⁷³ Art. 14(a), CEDAW 1979, *supra* note 67.

⁷⁴ Art. 2(2), ICCPR 1966, *supra* note 65.

⁷⁵ Art. 2(1), ICESCR 1976, *supra* note 66.

insight into the manner in which States ought to undertake ‘appropriate’ measures. Even though it does specifically include legislation amongst the appropriate measures, provisions on when and how full development and advancement of women is to be ensured, “for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men” are lacking.⁷⁷ As such, no specification is given with regard to the type of measures or guiding principles as to when such measures would be deemed ‘appropriate’.

Article 15(2)⁷⁸ takes a more specific approach: by emphasising the duty of the State Parties to give women equal rights to conclude contracts and to administer property and to treat them equally to men in all stages of procedure in courts and tribunals, the State is specifically provided with, albeit general, ‘appropriate measures’.⁷⁹ With regard to the issue of gender inequality in rural areas, however, Article 14(1)⁸⁰ is the sole article to ‘take the extra mile’:

“States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.”⁸¹

It specifically draws attention to the fact that the problems faced by rural women and the application of the provisions of the Convention to women in rural areas ought to be taken into account. Article 14(1) stands out from the other provisions in that it seems to imply the need for some sort of different treatment or recognition of the situation of rural women in their ability to enjoy their human rights, as protected by means of the Convention.

In light of the above, it is surprising that in its submission⁸² against the Traditional Courts Bill the Women’s Legal Centre does not draw on Article 5(a) of the CEDAW, which states:

“States Parties shall take *all appropriate measures* (a) [t]o 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 idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”⁸³.

The Traditional Courts Bill, among other reasons, is specifically constituted as to “enhance customary law and the customs of communities observing a system of customary law; and to provide for matters connected therewith”.⁸⁴ It seems no more than logical, then, to draw on provisions that account for the limits as imposed on the exercise of such customs. Article 5, one may argue, outlines a limit to custom.

⁷⁶ Art. 3, CEDAW 1979, *supra* note 67. Emphasis mine.

⁷⁷ *Ibid.*

⁷⁸ Art. 15(2), CEDAW 1979, *supra* note 67.

⁷⁹ *Ibid.*

⁸⁰ Art. 14(1), CEDAW 1979, *supra* note 67.

⁸¹ *Ibid.*

⁸² Williams 2008, *supra* note 57. See also Williams & Klusener 2012, *supra* note 57.

⁸³ Art. 5(a), CEDAW 1979, *supra* note 67. Emphasis mine.

⁸⁴ Preamble, Traditional Courts Bill [B1-2012].

The Traditional Courts Bill, perhaps ironically, finds its basis in the same line of reasoning in the sense that it is constructed with the aim to “provide for the structure and functioning of traditional courts in line with constitutional imperatives and values”.⁸⁵ Article 5 of the CEDAW may be utilised both ways: both in favour of and in opposition to the Traditional Courts Bill. The question is thus one of presumed and actual effect, a topic that will be returned to later.

It may safely be said that the palette of rights and protections of rights offered under the CEDAW extends far beyond that of the Covenants. In particular the emphasis on the need of some sort of safeguard for rural women is worth praising in a context such as that of South Africa. Where it is lacking, however, is that despite the fact that, by means of Article 14(1),⁸⁶ the Convention draws attention to the situation of rural women as needing to be accounted for, and though, by means of Article 5(a),⁸⁷ it implies a limitation to cultural practice, the extent of such limits in the rural context is not elaborated upon much further. While the ICCPR and the CEDAW fail to determine the scope of such safeguard or limitation, however, the African Charter on Human and Peoples’ Rights, known as the Banjul Charter, may provide some insight. Namely, whereas the United Nations is often critiqued on the basis that its principles would reflect Western values,⁸⁸ the Charter was specifically established on the basis of a need for consideration of Africa’s historical tradition and values, thereby specifically taking ethnic minorities into consideration.

Commitments under the African Union:

On the 9th of July 1996, South Africa signed, ratified and deposited the African Charter on Human and Peoples’ Rights, known as the ‘Banjul Charter’,⁸⁹ which was to come into effect three months later.⁹⁰ The Charter was erected under the aegis of the Organisation of African Unity, later known as the African Union, to promote and protect the human rights and basic freedoms on the African continent. As such, the latter differs from declarations such as the Universal Declaration on Human Rights (UDHR), as derived from the United Nations Charter,⁹¹ and the abovementioned Covenants⁹² and Convention⁹³, in that it gives specific consideration to the virtues of the historical tradition and values of African civilisation. These virtues and values, according to the preamble, ought to inspire and characterise the African Member States’ reflection on the concept of human and peoples’ rights.⁹⁴ The apparent need for the inclusion of this statement, one may argue, suggests a different outcome from when these African virtues and values are not specifically taken into account, by means of adhering to a more Universalist perspective. It seems to suggest that if a non-African, Western or Universalist approach were to be taken, the Member States would not be able to achieve the total liberation of Africa, bringing the struggle for dignity and genuine independence to an end. Nor would it be able to eliminate colonialism, neo-colonialism, apartheid and Zionism, or dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, skin colour, sex, language, religion and political

⁸⁵ Ibid.

⁸⁶ Art. 14(1), CEDAW 1979, supra note 67.

⁸⁷ Art. 5(a), CEDAW 1979, supra note 67. Emphasis mine

⁸⁸ Cerna 1994, supra note 21, p. 740.

⁸⁹ The latter name is derived from the location of the head quarter of the African Commission on Human and Peoples’ Rights, namely Banjul, Gambia.

⁹⁰ Art. 64, Banjul Charter 2003, supra note 61.

⁹¹ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at <http://www.unhcr.org/refworld/docid/3ae6b3930.html> [accessed 3 October 2012] Hereafter: UN Charter.

⁹² ICCPR 1966, supra note 65; ICESCR 1976, supra note 66.

⁹³ CEDAW 1979, supra note 67.

⁹⁴ Preamble, Banjul Charter 2003, supra note 61.

opinions.⁹⁵

For the scope of this article, a discussion on the status of the right to culture and the right to gender equality in the Banjul Charter and the attached Maputo Protocol will follow.

The Right to Culture

What distinguishes the Banjul Charter from other treaties such as the United Nations Charter⁹⁶ and the subsequent Covenants⁹⁷ and Conventions⁹⁸ is, as previously noted, the fact that it has been specifically established on the basis of a need for consideration of Africa's historical tradition and values. As given in the preamble, "the African State members of the Organisation of African Unity", parties to the present convention entitled 'African Charter on Human and Peoples' Rights', "[take] into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights"⁹⁹ and "[are] firmly convinced of their duty to promote and protect human and people' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa."¹⁰⁰ These statements, in specific, proclaim the philosophy that underlies the Charter in a manner that force one to question the extent to which an African account of human and peoples' rights differs from other treaties or declarations that are deemed to forward a more 'universal' declaration.

Article 17(1) and (2) of the Banjul Charter states that "every individual may freely take part in the cultural life of his community" and that it is the duty of the State "to [promote] and [protect the] morals and traditional values recognized by the community".¹⁰¹ The latter, one may say, shows great resemblance to Article 27(1) of the UDHR, which states that "[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."¹⁰² Also, Article 22 of the UDHR, which states that "[e]veryone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality",¹⁰³ is comparable to Article 22(1) of the Banjul Charter: "All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind".¹⁰⁴ While the articles may definitely be said to have a largely similar conception,¹⁰⁵ the manner in which both instruments are formulated in terms of their scope and audience illustrates the extent to which they differ dramatically.

The UDHR was drafted in order to elaborate on the terms and clarity of the commitment of the signatory States of the preceding United Nations Charter and, later, the Covenants to

⁹⁵ Preamble, Banjul Charter 2003, supra note 61.

⁹⁶ UN Charter.

⁹⁷ ICCPR 1966, supra note 65; ICESCR 1976, supra note 66.

⁹⁸ CEDAW 1979, supra note 67.

⁹⁹ Preamble, Banjul Charter 2003, supra note 61.

¹⁰⁰ Ibid.

¹⁰¹ Art. 17(1)(2), Banjul Charter 2003, supra note 61.

¹⁰² Art. 27(1), Universal Declaration on Human Rights, 10 December 1948. Hereafter: UDHR.

¹⁰³ Idem., art. 22..

¹⁰⁴ Art. 22(1), Banjul Charter 2003, supra note 61. It is not unlikely that the latter was inspired by Article 1(1) of the Covenant on Civil and Political Rights, which defines that "[a]ll peoples have the right of self-determination [and that] [b]y virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development". Art. 1(1), ICCPR 1966, supra note 65.

¹⁰⁵ H. Steiner, P. Alston & R. Goodman, *International Human Rights in Context: Law, Politics, Morals*, Oxford University Press 2008 (3rd ed), p. 507.

protect human rights. Much of the criticism that has been directed to the Charter and, hence, the Covenants and the UDHR, may be said to refer to the most important difference with the Banjul Charter: whereas the concept of duty in pre-colonial African societies focuses the individual's obligation to the society, current human rights norms are extremely individualistic.¹⁰⁶ The metaphor of 'Ubuntu', commonly regarded as the African philosophy of life, describes a type of group solidarity in which the fundamental belief is that "a person can only be a person through others".¹⁰⁷ This humanistic regard of others is manifestly anti-individualistic: as noted by Obinna Okere, the "African conception of man is not that of an isolated and abstract individual, but an integral member of a group animated by a spirit of solidarity".¹⁰⁸ As such, the African individual is viewed as a moral being equipped with rights yet also bound by duties, thereby uniting his needs with the needs of others. This conception radically differs from the liberal conception of the individual as "the [S]tate's primary antagonist", in which the instruments of the United Nations are rooted.¹⁰⁹

The Banjul Charter is the first human rights instrument to articulate this notion of duty among individuals and between individuals and the State.¹¹⁰ However the conventional notion of 'duty' has, of course, always existed as the counter-side of individual rights in many human rights instruments, be it implicitly or explicitly, and the Charter is first to define duties that go beyond that.¹¹¹ This becomes apparent in Articles 27 and 29: Article 29(4), for example, contains a direct duty that requires the individual to "preserve and strengthen social and national solidarity, particularly when the latter is threatened", a pre-colonial duty as reflected in many communities today.¹¹² Article 27(2) provides an example of an indirect duty in stating that "[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest"; individual rights and freedoms, as such, are not absolute yet may be limited by their duties to the community. Although less prominent, this too may be observed in Article 29(7): "The individual shall also have the duty (7) [to] preserve and strengthen positive *African cultural values* in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society"¹¹³. More than just giving recognition to cultural values, the Banjul Charter was erected upon the need for recognition of *African* cultural values in a person's relation with other members of society, with the community. It thus seems clear that the Banjul Charter is to be read in a different manner from the UDHR, the United Nations Charter and the Covenants. The question remains, however, what this means for the extent of other human rights. How are terms such as 'harmonious', 'cohesion', 'social and national solidarity', 'positive African cultural values' and 'African unity' to be reconciled with rights such as the right to gender equality?¹¹⁴

Before entering into this topic, it is important to note that whereas the UDHR emphasises dignity and free development of personality to which cultural rights are indispensable,¹¹⁵ both the Banjul Charter¹¹⁶ and the Covenant¹¹⁷ give notice to the right to cultural development.

¹⁰⁶ M. Mutua, 'Human Rights and the African Fingerprint' in Steiner, Alston & Goodman (eds), *International Human Rights in Context: Law, Politics, Morals*, Oxford University Press 2008 (3rd ed.), p. 507.

¹⁰⁷ Y. Mokgoro, 'Ubuntu and the Law in South Africa', *Potchefstroom Electronic Law Journal* 1998-1, p. 2.

¹⁰⁸ Mutua 2008, supra note 106, p. 507.

¹⁰⁹ Idem., p. 508.

¹¹⁰ Idem., pp. 508 - 509.

¹¹¹ Steiner, Alston & Goodman 2008, supra note 105, p. 505.

¹¹² Art. 29(4), Banjul Charter 2003, supra note 61.

¹¹³ Art. 29(7), Banjul Charter 2003, supra note 61.

¹¹⁴ Steiner, Alston & Goodman 2008, supra note 105, p. 507.

¹¹⁵ Art. 27, UDHR 1948, supra note 102.

¹¹⁶ Art. 22(1), Banjul Charter 2003, supra note 61.

¹¹⁷ Art. 1(1), ICCPR 1966, supra note 65.

The latter is paramount to the nature of customary law, commonly defined as being flexible and ever-changing: “[T]rue customary law will be that which recognizes and acknowledges the changes which continually take place”.¹¹⁸ Customary law is and, due to its flexible nature, will remain to be largely uncodified and, as such, often cannot be ascertained “readily” and “with sufficient certainty”, as the Law of Evidence Amendment Act requires.¹¹⁹ Providing the African Commission¹²⁰ and/or Court¹²¹ with the relevant information to consider issues relating to customary law and practice will thus be just as challenging as it is on a national level.

The Right to Gender Equality

The right to gender equality has been incorporated into the Banjul Charter under Article 2, which affirms that “every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.”¹²² What this distinction on the basis of sex entails, however, remains undefined. This is an issue particularly in societies in which the pretext of ‘cultural differences’ alters this right and where opinions differ on whether a certain practice constitutes discrimination on the basis of sex. When is a distinction on the basis of sex unacceptable to such an extent that it must trump the right to culture, and hence, the right to cultural differences? When does the need for recognition of African cultural values reach its limit and require social and/or cultural amendment?

When the Charter requires States to assist families as the “custodians of morals and traditional values”,¹²³ surely it does not mean to incorporate the practices that strictly separate gender roles. According to Makau Matua, this would be a cynical misreading of the Charter: “The reference is to those traditional values which enhanced the dignity of the individual and emphasized the dignity of motherhood and the importance of the female as the central link in the productive chain”.¹²⁴ In requiring member States to “eliminate every discrimination against women”,¹²⁵ it unambiguously requires equal rights for women.¹²⁶

The Maputo Protocol offers some more insight. Discrimination against women, according to Article 1(f), entails “any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life”.¹²⁷ The latter article thus appears to suggest that differential treatment based on sex is unjustified *only* if it compromises or destroys the recognition, enjoyment or exercise of human rights and fundamental freedoms. The issue remains, however, that cultural differences, as previously noted, appear to have a status of alteration, a status that allows for differential interpretation of these other human rights – the reason that the Banjul Charter, as a Charter promoting and protecting *African* human rights, was drawn up. Is there a clash of rights?

¹¹⁸ *Bhe*, supra note 13, para. 86. See also Rautenbach, Bekker & Goolam 2010, supra note 1, p. 20.

¹¹⁹ Art. 1(1), Law of Evidence Amendment Act 1988, supra note 9.

¹²⁰ African Commission on Human and Peoples’ Rights, established under Art. 30, Banjul Charter 2003, supra note 61.

¹²¹ African Court on Human and Peoples’ Rights, established by means of the Protocol to the African Charter on the Establishment of the African Court.

¹²² Art. 2, Banjul Charter 2003, supra note 61. Emphasis mine.

¹²³ *Idem.*, art. 18(2).

¹²⁴ Mutua 2008, supra note 106, p. 510.

¹²⁵ Art. 18(3), Banjul Charter 2003, supra note 61.

¹²⁶ Mutua 2008, supra note 106, p. 510.

¹²⁷ Art. 1(f), Maputo Protocol 2003, supra note 62.

Article 2(2) of the Protocol appears to be the one and only article that gives specific notice to the issue of cultural diversity in relation to gender equality:

“States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men”.¹²⁸

Considering both the Protocol and the Charter, it becomes clear that social and cultural patterns by no means constitute a free pass and that they are subject to the State’s scrutiny, as guided by the rights and freedoms included in the Charter and the national Constitution. The Charter’s right to cultural development is not without limits: (1) “All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind”.¹²⁹ Article 2(2) of the Protocol takes this a step beyond a mere passive right by stating that, actively, “States Parties *shall commit themselves* to modify the social and cultural patterns ... with a view to achieving the elimination of harmful cultural and traditional practices ... which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”.¹³⁰ A question that inevitably arises is: when do States Parties commit themselves to doing so, and, most importantly, when they do not? When are States too lenient with regard to cultural relativity?

The Protocol sheds light on the issue of gender *inequality*, its definition and its reach. Nevertheless, the issue remains that no exact definition of gender equality or inequality exists. This is troublesome, on the one hand, yet open to contextual interpretation on the other, so that there is room to discuss ideas of inferiority and roles considered as stereotyped. Roles considered as stereotyped need not necessarily result from ideas of inferiority. Where a woman is allowed to *choose* whether or not she wants to bring a case before a court and whether or not she wants to be a member of one, one can hardly speak of inferiority. The right to equality, as such, entails the right to choice – the right to equal opportunity. This has great implications for the role of the State and the measures it can and ought to undertake: where stereotyped roles are the product of a woman’s own choice, the role of the Government may, for example, be limited to informing women of alternatives. Where these stereotyped roles are the result of unequal access to alternatives, however, the State cannot but be required to take a firmer stance: it must commit to modifying roles and patterns which are based on the idea of inferiority. Thus, where one measure may be ‘appropriate’ in dealing with stereotypes, a different measure may be appropriate in defying inferiority. It is impossible, it seems, to provide a preliminary definition of the exact point that one can speak of gender inequality: what may appear as unequal treatment to an outsider, need not necessarily be experienced in a similar fashion by those subject to it. The only way to make the right classification is by obtaining knowledge of customs and practice.

One ought to have knowledge of local customs and practice in order to enforce the theory. For this reason, the submissions against the Traditional Courts Bill are of great importance. This Bill could constitute a problem for the State if indeed the practices of traditional courts

¹²⁸ *Idem.*, art. 2(2).

¹²⁹ Art. 22(1), Banjul Charter 2003, *supra* note 61. Emphasis mine

¹³⁰ Art. 2(2), Maputo Protocol 2003, *supra* note 62. Emphasis mine

are inconsistent with the South African Constitution and the treaties South Africa has ratified, and if the Traditional Courts Bill indeed keeps these practices intact or even worsens them. As noted, the Protocol explicitly requires that States *shall commit themselves* to modifying such cultural patterns as are supposedly reflected in the practices of traditional courts.¹³¹ In addition, the CEDAW sets out that “States Parties shall take all appropriate measures (a) [t]o *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 idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”.¹³² One can hardly deem the implementation of a Bill that upholds unequal social and cultural practices a way for the State of honouring its commitment to modify such patterns. The question remains, however, whether the Traditional Courts Bill can indeed be deemed reinforce gender inequality.

In the following section, several of the submissions made against the Bill will serve as a basis for a discussion on whether the Bill could be considered to contravene South Africa’s international legal obligations.

IV. The Traditional Courts Bill: a Violation of International Obligations?

The major engine for law reform in South Africa, as was recalled in the case of *Carmichele v. Minister of Safety*,¹³³ should not be the judiciary, but the legislature.¹³⁴ The proposed Traditional Courts Bill is an example of such legislative law reform. By means of Parliamentary approval, the Bill aims at bringing the Traditional Courts, and hence customary law, in line with the Constitution. Whereas currently traditional courts still exercise their jurisdiction in a manner that is largely separate from that of the State courts, chances are that this will now change.

CEDAW and the Maputo Protocol, in specific, have rather clearly formulated the need for the commitment of a State to modifying social and cultural practices that are based on the idea of the inferiority or superiority of either of the sexes.¹³⁵ Considering the sheer number of objections that have been made against it, one could wonder whether the Traditional Courts Bill does not contravene these articles. Although the Bill was never specifically meant to eliminate inferiority of the female sex, the preamble does specifically state its intention “to provide for the structure and functioning of traditional courts in line with constitutional imperatives and values”.¹³⁶ These constitutional imperatives and values primarily include the Bill of Rights, which includes the right to equality and thereby prohibits the State and everyone else to discriminate directly or indirectly against anyone on the grounds of sex.¹³⁷ Secondly, although the values as incorporated in the Bill of Rights to a large extent correspond to those incorporated in the instruments of the United Nations and the African Union, be it in more limited wording, as a result of its ratification the State cannot but acknowledge its commitments under international law. Can the Traditional Courts Bill be seen as a contravention of the State’s obligation to commit itself to modifying the social and cultural patterns based on the idea of the inferiority or the superiority of either of the sexes?¹³⁸ In order to answer this question, it is essential to consider the Bill’s presumed effect, as stated in its preamble, and its actual effect, which is claimed to be different by the

¹³¹ *Idem.*, art. 2(2).

¹³² Art. 5(a), CEDAW 1979, *supra* note 67. Emphasis mine.

¹³³ *Carmichele v. Minister of Safety & Sec.* 2001 (4) SA 938 (CC) para. 36.

¹³⁴ *Ibid.*

¹³⁵ Art. 5(a), CEDAW 1979, *supra* note 67 & Art. 2(2), Maputo Protocol 2003, *supra* note 62 .

¹³⁶ Preamble, Traditional Courts Bill [B1-2012].

¹³⁷ Art. 9(3) and (4), Constitution 1996, *supra* note 2.

¹³⁸ Art. 2(2), Maputo Protocol 2003, *supra* note 62 . Emphasis mine

submissions that were made against it.

Traditional Courts Bill: The Dichotomy of Presumed and Actual Effect

The Traditional Courts Bill is aimed at affirming the role of traditional leadership by promoting social cohesion, enhancing access to justice by means of a speedier, less formal and less expensive means to dispute resolution, and promoting and preserving traditions that promote nation-building, as long as these are in line with the Constitution.¹³⁹ Generally, all those that made submissions against the Bill comprehend and agree with these objectives. Nevertheless, they argue that the Bill has serious shortcomings that hinder the delivery of fair justice to women.¹⁴⁰ Although some are more extreme in their opposition than others, a number of key issues can be distinguished: (i) inadequate consultation with ordinary members of the public, (ii) the recognition and constitution of customary courts consisting of the senior traditional leader only, (iii) the courts' jurisdiction, legal representation and the limited possibility for appeal or review, (iv) the inability to opt out of the court's jurisdiction, and (v) the limitation on rights and security of women.¹⁴¹

Inadequate Consultation

When the Traditional Courts Bill was initially drafted in the course of 2008, the consultation process was limited to traditional leaders at the national and provincial levels. The national House of Traditional Leaders, in particular, had a principal role in the drafting process of the Bill and the Policy Framework.¹⁴² Consequently, when in May 2008 the Bill was introduced in Parliament, rural people and, in particular, civil society organisations protested loudly: the rural public, those people whom the Bill was deemed to affect the most, had been given no voice.¹⁴³ When the option to make submissions against the Bill was made available again many were not informed.¹⁴⁴ Not only did this raise questions with regard to the accuracy of the Bill in reflecting living customary law, it also violated the legal obligation that necessitates account of provincial interests and public participation in law-making, as discussed by the Constitutional Court in the case of *Tongoane*.¹⁴⁵ Most importantly, however, by only consulting the predominantly male traditional leaders, women were almost entirely excluded from the consultation: alarming, since, as discussed below, women face particular problems in customary courts and are thus most likely to be affected by the Bill.¹⁴⁶

It seems obvious that those people that are most likely to experience the consequences of the Bill should be the first to be consulted. The failure to do so, one may think, could not have been but an accidental mistake. Yet the contrary seems to be true: the South African Law Reform Commission (SALRC) had made an earlier attempt at drafting a Bill to amend the

¹³⁹ Art. 2(b), Traditional Courts Bill,

¹⁴⁰ Joint Monitoring Committee 2008, supra note 51, p. 1.

¹⁴¹ Weeks 2011, supra note 17, pp. 5 - 8.

¹⁴² *Idem.*, p. 5.

¹⁴³ *Ibid.* See also Williams 2008, supra note 57; Joint Monitoring Committee 2008, supra note 51.

¹⁴⁴ Williams 2008, supra note 57.

¹⁴⁵ Weeks 2011, supra note 17, p. 5. See also: *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* (CCT100/09) [2010] ZACC 10; 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC) (11 May 2010) para. 66, in which it was stated that: "[The procedural safeguards of Article 75 of the Bill] are designed to give more weight to the voices of the provinces in legislation substantially affecting them. But they are more than just procedural safeguards; they are fundamental to the role of the NCOP in ensuring "that provincial interests are taken into account in the national sphere of government", and for "providing a national forum for public consideration of issues affecting the provinces."

¹⁴⁶ *Ibid.*

current legislation regulating customary courts. The report they presented relied on research and a large number of consultations with rural people 'living' customary law.¹⁴⁷ Contrary to what the lack of submissions by rural people to the current Traditional Courts Bill seems to indicate, they showed active interest in the subject matter of the SALRC Bill.¹⁴⁸ The SALRC Bill was rejected, however, on grounds that to this day remain unclear. Despite the consultations being on record, the drafters of the Traditional Courts Bill seem to have completely ignored them and drafted what appears to be an entirely new Bill that provides for particularly weak protection of women.¹⁴⁹

The Senior Traditional Leader as Customary Court

Central to customary law, as previously noted, is a notion of group solidarity that equips the moral individual with rights, yet also with duties.¹⁵⁰ African culture, Nomboniso Gasa notes, ought to be understood as a fluid pattern of social relations and communal existence.¹⁵¹ The same goes for the African systems of justice: whereas Western systems of justice typically centralise power within the presiding officer, African justice systems are based on a layered authority of widespread community participation.¹⁵² "[I]ndividual rights and responsibilities are the cornerstone of the community existence", and it is through the interaction with other people that these are enriched and affirmed.¹⁵³ The Bill, however, centralises power in traditional leaders.

The notion of a presiding officer that takes on the role of judge as the single-decision maker, as in Western court systems, is one alien to the system of customary courts.¹⁵⁴ It is the community, consisting of people of different positions, that holds the responsibility of guarding knowledge, practice and custom, and, most importantly, of guarding customary law.¹⁵⁵ Customary courts thus consist of community forums in which all mature members of the community, be it male or female, can participate and deliberate on the case before them by way of examining and cross-examining the litigants and witnesses.¹⁵⁶ The proceedings are characterised by their open and democratic nature.¹⁵⁷

The disputes that traditional leaders tend to hear, together with a council of prominent heads and all adult community members, are only those that have failed to be reconciled in the previous forums of family elders, the clan leaders, and the headmen.¹⁵⁸ The court of the traditional leaders is thus one of final resort. By centralising the jurisdiction of the court in a single actor, the traditional leader, other participants are excluded from the court.¹⁵⁹ This goes contrary to the nature of customary courts, which is characterised by extensive community involvement.¹⁶⁰ Contrary to Mancotywa's argument that "over and above everything else our traditional leaders continue to be custodians of our rich and diverse cultural heritage", people of different ranks and stature are custodians and repositories of knowledge.¹⁶¹ By concentrating and centralising power, the knowledge and 'wisdom' of

¹⁴⁷ Weeks 2011, supra note 58, p. 32.

¹⁴⁸ Williams 2008, supra note 57, para. 6.

¹⁴⁹ Weeks 2011, supra note 17, p. 6.

¹⁵⁰ Mutua 2008, supra note 106, p. 508.

¹⁵¹ Gasa 2011, supra note 49, p. 23.

¹⁵² Holomisa 2011, supra note 49, p. 18.

¹⁵³ Ibid.

¹⁵⁴ Weeks 2011, supra note 58, pp. 32 - 33.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.. See also Holomisa 2011, supra note 49, p. 18.

¹⁵⁷ Idem., p. 19.

¹⁵⁸ Weeks 2011, supra note 17, p. 6.

¹⁵⁹ Week 2011s, supra note 58, p. 33.

¹⁶⁰ Idem., p. 34.

¹⁶¹ Gasa 2011, supra note 49, p. 25.

single individuals, the roles of family elders, clan leaders and headmen, which are all critical in dispute resolution, are displaced.¹⁶² Many consider the efforts to alter these practices, by appointing a single presiding officer and ignoring the significant roles of the lower courts, as imposing Western values on African societies.¹⁶³ Accordingly, pressing this would undermine the notion that many hold of the entire functioning of customary law: a system of dispute resolution through community involvement.

Jurisdiction and Possibility of Appeal and Review

The Traditional Courts Bill grants traditional courts the jurisdiction to try both civil¹⁶⁴ and criminal matters.¹⁶⁵ Civil matters, however, do not include constitutional matters, questions of nullity, divorce and separation, custody and guardianship of children, wills and property of a certain amount or category.¹⁶⁶ Also the courts' criminal jurisdiction is limited to theft, malicious injury to property, regular assault and *crimen injuria* of a value yet to be specified.¹⁶⁷ Severe crimes, such as murder and rape, are thus excluded from the traditional courts' jurisdiction.

The powers of sanction that are attributed to the traditional leaders, however, Sindiso Mnisi Weeks argues, are far-reaching.¹⁶⁸ Article 10(2)(g), for example, states that in a criminal case the traditional court may issue "an order that one of the parties to the dispute, both parties or any other person performs some form of service without remuneration for the benefit of the community under the supervision or control of a specified person or group of persons identified by the traditional court".¹⁶⁹ From this provision it appears that any person may be ordered to perform 'free labour', even when not a party to the dispute. This burden, she argues, is most likely to fall on women and children, who form the majority of the rural population.¹⁷⁰

Such a form of punishment is particularly alarming in light of the fact that the Bill prohibits representation by a legal representative, suiting the nature of traditional courts.¹⁷¹ Furthermore, filing an appeal to magistrates' courts, which do allow for legal representation, is significantly limited: "A party to a civil or criminal dispute in a traditional court may, in the prescribed manner and period, appeal to the magistrate's court having jurisdiction against an order of a traditional court, as contemplated in section 10(2)(a), (b), (h) or (i), as well as section 10(2)(k), to the extent that the order in terms of section 10(2)(k) relates to an order contemplated in section 10(2)(a), (b), (h) or (i)". This means that many sanctions, under which the above-mentioned 'free labour' sanction, are not appealable.¹⁷² Much room is thus left for abuse of power.

Inability to opt out

Like the BAA, the Bill allocates jurisdiction of the traditional courts on the basis of the former apartheid homeland boundaries, so that one is confined to the authority of a particular traditional leader on the basis of one's location.¹⁷³ Where the latter becomes problematic,

¹⁶² *Ibid.*

¹⁶³ Ndulo 2011, *supra* note 18, p. 91.

¹⁶⁴ Art. 5(1), Traditional Courts Bill [B1-2012].

¹⁶⁵ Art. 6, Traditional Courts Bill [B1-2012].

¹⁶⁶ Art. 5(2), Traditional Courts Bill [B1-2012].

¹⁶⁷ Schedule, Traditional Courts Bill [B1-2012].

¹⁶⁸ Weeks 2011, *supra* note 17, p. 6.

¹⁶⁹ Art. 10(2)(g), Traditional Courts Bill [B1-2012]

¹⁷⁰ Weeks 2011, *supra* note 17, p. 7.

¹⁷¹ *Idem.*, p. 6.

¹⁷² *Idem.*, p. 7.

¹⁷³ *Ibid.*

however, is the fact that the Bill outlaws the possibility of opting out:

“[A]ny person who ... (c) having received a notice to attend court proceedings, without sufficient cause fails to attend at the time and place specified in the notice, or fails to remain in attendance until the conclusion of the proceedings in question or until excused from further attendance by the presiding officer, is guilty of an offence and liable on conviction to a fine”.¹⁷⁴

The latter contravenes the consensual character of customary law.¹⁷⁵ Furthermore, in combination with the inability to file an appeal, one is confined to some of the far-reaching powers of the traditional leader. Whereas under the BAA opting out was still an option, under the Traditional Courts Bill rural people will be confined to and at the mercies of their traditional leaders and their seeming ability to abuse their powers.¹⁷⁶

Women and Customary Courts

The Traditional Courts Bill makes no specific mention of gender equality per se. Rather, it refers to more general principles of ‘human dignity’ and ‘human rights and freedoms’.¹⁷⁷ Nevertheless, in its guiding principles the Bill gives notice to the need to embrace the values enshrined in the Constitution, including the right to human dignity, the achievement of equality and, finally, non-racialism and non-sexism.¹⁷⁸ Furthermore, it lists the need to promote access to justice for all persons.¹⁷⁹ The Bill fails to specify, however, how these principles should be achieved and maintained.¹⁸⁰ Hence, the question as to how the right to customary law, by means of the right to culture, ought to be balanced with the right to gender equality, is not addressed.

Even though customary law and its practice differ among customary courts, a number of issues that deprive women from equal participation and access to justice reappear throughout the submissions and articles. Women, for example, often cannot appear before or address customary courts without being represented by a male relative.¹⁸¹ Although the Bill provides that “[a] party to proceedings before a traditional courts may be represented by his or her wife or husband, family member, neighbour or member of the community, in accordance with customary law and custom”,¹⁸² in practice it is unheard of that women represent men in customary courts.¹⁸³ The equality as set out in the Bill is thus one of mere formality, one that does not correspond to practice, which is marked by substantive inequality.¹⁸⁴ Furthermore, many of the issues that women commonly struggle with are not specifically provided for.¹⁸⁵ Violence against women, and domestic violence in particular, is often regarded as a ‘private matter’, not to be discussed within the walls of the court. The onus to address these issues and ensure equal participation of women lies with the traditional leader.¹⁸⁶ As a result of the fact that legal representation is not allowed and that the filing of an appeal is deeply complex,

¹⁷⁴ Art. 20(c), Traditional Courts Bill [B1-2012].

¹⁷⁵ Weeks 2011, supra note 17, p. 7.

¹⁷⁶ Ibid.

¹⁷⁷ Preamble, Traditional Courts Bill [B1-2012].

¹⁷⁸ Art. 3(a)(i), (ii) and (iii), Traditional Courts Bill [B1-2012].

¹⁷⁹ Art. 3(b), Traditional Courts Bill [B1-2012].

¹⁸⁰ Joint Monitoring Committee 2008, supra note 51, p. 1.

¹⁸¹ Weeks 2011, supra note 17, p. 8.

¹⁸² Art. 9(3)(b), Traditional Courts Bill [B1-2012].

¹⁸³ Weeks 2011, supra note 17, p. 8.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

the Bill fails to provide access to justice for women.¹⁸⁷ Furthermore, as a result of the fact that traditional leaders are predominantly male, under the Traditional Courts Bill women are unlikely to have a role in dispute resolution and, hence, in the development of customary law at all.¹⁸⁸

As has been repeatedly emphasised by the Constitutional Court, “customary law is by its nature a constantly evolving system. Under pre-democratic colonial and apartheid regimes, this development was frustrated and customary law stagnated. This stagnation should not continue and the free development by communities of their own laws to meet the needs of a rapidly changing society must be respected and facilitated”.¹⁸⁹ According to Holomisa, traditional leadership and practice had done precisely that. Traditional leadership, he argues, “has over time evolved to the extent that women enjoy the right to participate fully in matters of governance, and are eligible to be elected or appointed to leadership positions”.¹⁹⁰ The numerous submissions made against the Bill, however, argue otherwise. It may very well be the case that in numerous communities traditional leadership is not sexist or undemocratic. The fact that the Bill does not provide for a safeguard, however, in the case that these problems do occur, or have the potential of occurring, is alarming. Furthermore, the Traditional Courts Bill might stagnate progressive courts that have developed equal participation rights for women. Due to the fact that the Bill does not require them to meet these standards, they might no longer feel the need to do so.

V. Discussion & Conclusion

Despite the fact that customary law exists as a part of - and in relation to - the larger system of South African State law, little guidance is provided as to the manner in which customary law ought to be dealt with. Significant is the debate on the extent to which customary law adheres to the Constitution and its Bill of Rights. The right to gender equality in particular has led to heated discussions. Customary law is said to be inherently patriarchal; it fails to respect the rights of women.¹⁹¹ This raises questions as to the extent to which types of customary law, commonly considered to be protected by the right to culture, may pose limits to the right to gender equality in situations in which the two priorities appear to conflict. This article thus discussed the question: *What does the human right to gender equality entail and how does this affect the role of customary law regarding gender relations in South Africa?*

The answer seems to lie in Article 2(2) of the Maputo Protocol which states that “States Parties *shall commit themselves* to modify the social and cultural patterns...with a view to achieving the elimination of harmful cultural and traditional practices...which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”.¹⁹² The right to culture, and hence the ‘right to customary law’, it appears, cannot escape Constitutional repugnancy: South Africa, having both signed and ratified the Maputo Protocol, ought to commit itself to modifying social and cultural patterns.

The Traditional Courts Bill is one attempt of the government to bring customary law in line with the Constitution and, hence, to subject it to the Bill of Rights, which includes the right to gender equality.¹⁹³ Although the Bill does call for non-sexism, it provides no remedies.¹⁹⁴

¹⁸⁷ Gasa 2011, supra note 49, p. 28.

¹⁸⁸ Weeks 2011, supra note 17, p. 6.

¹⁸⁹ *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC), para. 45.

¹⁹⁰ Holomisa 2011, supra note 49, p. 18.

¹⁹¹ Weeks 2011, supra note 17, p. 5. See also Holomisa 2011, supra note 49, pp. 17 - 22.

¹⁹² Art. 2(2), Maputo Protocol 2003, supra note 62. Emphasis mine.

¹⁹³ Preamble, Traditional Courts Bill [B1-2012]. See also Holomisa 2011, supra note 49, p. 17.; Gasa 2011, supra note 49, p. 25.

And whereas it seeks to affirm the role of traditional leadership by promoting social cohesion, enhancing access to justice by means of a speedier, less formal and less expensive means to dispute resolution, and promoting and preserving traditions that promote nation-building,¹⁹⁵ it fails to specify how these principles ought to be achieved and maintained.¹⁹⁶ Hence, the question as to how the right to customary law, by means of the right to culture, ought to be balanced with the right to gender equality is not addressed.

In considering the numerous submissions that have been made against the Traditional Courts Bill,¹⁹⁷ one may wonder whether South Africa has committed itself to modifying social cultural patterns or whether the Bill acts to the contrary. Accordingly, the Bill fails to give sufficient recognition to the several layers of customary courts and the significant role that the community plays in dispute resolution.¹⁹⁸ Rather, it centralises jurisdiction within one person only: the senior traditional leader.¹⁹⁹ A significant number of powers that the often-male traditional leader possesses have a limited possibility for appeal and review.²⁰⁰ Furthermore, it is impossible to opt out of the court's jurisdiction.²⁰¹ This is particularly alarming for women, who are often not allowed to voice their problems unless represented by a male relative and, when their problems are heard, these are commonly regarded as 'private matters', not to be discussed within the court.²⁰² Moreover, their chances of becoming a member of a council or even a traditional leader are highly limited.²⁰³ If indeed it were the case that the Traditional Courts Bill not only maintains but even enhances these practices, this would pose significant issues in terms of South Africa's commitment as a State Party to the Maputo Protocol – a Protocol that, like the Banjul Charter, was specifically drawn up on the basis of a need to account for *African* values.²⁰⁴

This need to account for African values, or rather, the obligation that rests on the signatory States to take into consideration the virtues of their historical tradition and the values of African civilisation, which should inspire and characterise their reflection on the concept of human rights, does not take away the fact that the Banjul Charter may be said to be a very Western product. To a large extent it shows great resemblance to the instruments of the United Nations, reflecting human rights which, in a particularist light, may be said to be 'Western', rather than universal – as is the claim central to the human rights credo.²⁰⁵ The meaning attributed to 'human rights', as is argued, "is part of the ideological patrimony of Western civilization".²⁰⁶ Cultural relativism, as such, asserts that "each culture nurtures its own values and ways of being and doing; is understandable and must be understood within its own terms; and should not be morally assessed by a culture external to it", even when this is

¹⁹⁴ Art. 3(a)(i), (ii) and (iii), Traditional Courts Bill [B1-2012] See also Joint Monitoring Committee 2008, supra note 51, p. 1.

¹⁹⁵ Art. 2(b), Traditional Courts Bill [B1-2012].

¹⁹⁶ Joint Monitoring Committee 2008, supra note 51, p. 1.

¹⁹⁷ Ibid.; Williams 2008, supra note 57; Williams & Klusener 2012, supra note 57; Kwazulu Natal Rural Women's Movement, 'Submission to Portfolio Committee on Justice and Constitutional Development, Traditional Court's Bill 15 of 2008', available at <http://www.lrg.uct.ac.za/research/focus/tcb/>

¹⁹⁸ Gasá 2011, supra note 49, p. 25.; Weeks 2011, supra note 58, pp. 32 - 33.

¹⁹⁹ Weeks 2011, supra note 58, pp. 32 - 33.; Weeks 2011, supra note 17, p. 8.

²⁰⁰ Gasá 2011, supra note 49, p. 28.

²⁰¹ Art. 20(c), Traditional Courts Bill [B1-2012] See also Weeks 2011, supra note 17, p. 7.

²⁰² Weeks 2011, supra note 17, p. 8.

²⁰³ Idem., p. 6.

²⁰⁴ Preamble, Maputo Protocol 2003, supra note 62; Preamble, Banjul Charter 2003, supra note 61.

²⁰⁵ M. Dembour, *Who Believes in Human Rights? Reflections on the European Convention*, Cambridge: University Press 2006, p. 155. See supra page 27 for a discussion on the similarities between the instruments of the African Union and the United Nations

²⁰⁶ Cerna 1994, supra note 21, p. 740.

on the authority of human rights.²⁰⁷ Although concern for the particular is important, such a cultural relativist notion fails to call attention to the notion that culture as such can be oppressive.²⁰⁸ When a culture is abusive, which customary law is sometimes claimed to be due to its failure to respect women's rights,²⁰⁹ cultural relativists appear to consent to renouncement from the common rule, "to inaction when action is required".²¹⁰ Nevertheless, it is very important that cultural relativism 'holds at bay' the propensity of universalism to lean towards arrogance, forcing it to question what seems certain instead of merely claiming to know what is best.²¹¹

Such questioning is essential in considering provisions such as article 2(2) of the Maputo Protocol. There is no way of being able to judge when a State Party 'commits itself' to modifying social and cultural patterns when there is no notion of whether or not the cultural and traditional practices are "harmful" and "based on the idea of the inferiority or superiority of either of the sexes or on stereotypes roles of men and women".²¹² As such, the article exemplifies a balance between accounting for the particular, in terms of cultural and traditional practices, without losing sight of the 'universal' common rule that calls for the right to gender equality. Inevitably, this results in a broad formulation of the rule. Problematic, on the one hand, in that it provides no final procedural guidelines as to how and when certain matters are to be dealt with. On the other hand, however, this constitutes its very strength in that it allows for the evolving particularities of customary law to be given notice to.²¹³

As becomes evident from the submissions²¹⁴ made against the Traditional Courts Bill and the writings of Nomboniso Gasa²¹⁵ and Sindso Mnisi Weeks,²¹⁶ amongst others, customary law has developed significantly so as to encompass the right to gender equality. Rather than it just being a universal, 'Western' right, the right to gender equality, they argue, is an African value as well. The customary law that was once codified in the Black Administration Act does not resemble the practice as is observed now: not only because it was then wrongly codified through a common law lens, but also because customary law has evolved.²¹⁷ Accounting for customary law, and cultural practices generally, necessitates a constant dialogue. The strength of customary law, as the Constitutional Court noted, lies within its very nature of being inherently flexible: its ability to adapt to new circumstances, new times, and new or developed values.²¹⁸ Attempts to codify customary law has only led to its fossilisation.²¹⁹ This same strength is one that should be strived for in the protection of human rights: a constant dialogue between the universal and the particular, the principles and the practices and customs.

²⁰⁷ Dembour 2006, supra note 205, p. 155.

²⁰⁸ Idem., p. 163.

²⁰⁹ Week 2011, supra note 17, p.5. See also Holomisa 2011, supra note 49, pp. 17 - 22.

²¹⁰ Dembour 2006, supra note 205, p. 163.

²¹¹ Idem., p. 165.

²¹² Art. 2(2), Maputo Protocol 2003, supra note 62. Emphasis mine.

²¹³ *Shilubana*, supra note 189, para. 45.

²¹⁴ Joint Monitoring Committee 2008, supra note 51, p. 1; Williams 2008, supra note 57; Williams & Klusener 2012, supra note 57; Kwazulu Natal Rural Women's Movement, 'Submission to Portfolio Committee on Justice and Constitutional Development, Traditional Court's Bill 15 of 2008', available at: <http://www.lrg.uct.ac.za/research/focus/tcb/>

²¹⁵ Gasa 2011, supra note 49, pp. 23 - 29.

²¹⁶ Weeks 2011, supra note 17, pp. 3 - 10.; Weeks 2011, supra note 58, pp. 31 - 40.

²¹⁷ *Alexkor Ltd*, supra note 11, para. 51.

²¹⁸ Idem., para. 45.

²¹⁹ *Bhe*, supra note 13, para. 43.

While the Bill provides that a presiding officer must ensure that women are afforded full and equal participation in the proceedings alongside men,²²⁰ this supposedly will not correspond to actual practice.²²¹ In order to ensure that the Bill goes beyond theory, it is of the utmost importance to develop a thorough understanding of what happens at a grass-roots level in order to understand the Bill's implications: to converse with the particular.

Is there a clash of rights? Perhaps not, if only because the dichotomy between the right to culture and the right to gender equality is replaced by a large grey area that is filled with questions of boundaries and limitations and questions of presumed and actual effect. It is within these areas that the need for enquiry into practical implications is the most pressing. Whether or not the Bill truly violates the right to gender equality is a question that cannot be answered in absolute terms. The extensive research that was conducted for the SALRC Bill, supplemented by the various submissions made against the Traditional Courts Bill, indicates disagreement with regard to the proposed and actual effect of such a Bill. The fact that this disagreement is based on the existence of certain practices and, as a result thereof, on the possibility of worsening the current situation, calls for further enquiry. After all, disputed facts have never been a good basis for policy, in particular when it concerns the potential violations of human rights.

²²⁰ Art. 9(2)(a)(i), Traditional Courts Bill [B1-2012].

²²¹ Art. 3(a)(i), (ii) and (iii) and (b), Traditional Courts Bill [B1-2012]. See also Joint Monitoring Committee 2008, *supra* note 51, p. 1.