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Between Tradition and Modernity: When Culture Trumps Women's Rights

Since apartheid officially came to an end with the first democratic elections in 1994, great strides have been made in South Africa to ensure a better access of women to political responsibilities, to promote economic equality and improve education for women. A new constitution was adopted in December 1996. Internationally acclaimed as one of the most progressive constitutions in the world, it clearly states that every citizen is equally protected by law and that "to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken" (RSA, *Constitution*, Chapter 2). It also provides for a Commission for gender equality "to promote the substantive improvement" of women's lives. According to the *United Nations Development Program's 2013 Human Development Report*, South Africa ranks among the top ten countries with the highest number of women elected in their national parliaments. Women account indeed for 42% of MPs and hold 14 of the 34 posts in the current cabinet, including foreign affairs, defence and home affairs. Equal representation is a constant preoccupation in the various South African institutions. In the World Economic Forum's latest World Gender Gap Report published in 2013, South Africa is ranked 17th out of 136 countries surveyed. In business, women have 28% of jobs in senior management, compared with 24% in Europe and 18% in North America. More than half of university undergraduates and almost the same proportion of academic staff are female. Not all, though, benefit equally from these evolutions; rural women remain among the poorest and most marginalized of South Africans and the current political context does not bode well for their rights. The fight for gender equality is therefore far from over. It can even be said to be raging more fiercely than ever.

The following article will focus essentially on the unresolved contradictions between a constitutional right to gender equality and the recognition of traditional customs and values and more specifically of customary law. However, before exploring the legislative and judicial battles that are being waged today in South Africa around the issue of gender equality, one cannot but recall that, despite the undeniable improvements aforementioned, the daily reality often hardly reflects the equality of rights enshrined in the Constitution.

Women's rights are indeed effectively undermined by a number of factors among which violence and poverty.

Violence against women in South Africa is so extended that it can be said to effectively limit women's rights. There are over 60,000 rapes reported to the police every year and some experts believe those only represent the tip of the iceberg as between 80% and 90% of all rapes would go unreported. According to a study released by the South African Medical Research Council, the femicide rate, though on the decrease, remains very high at 12.9 women per 100,000 people[6] and those crimes often remain unpunished. Andy Kawa, a South African businesswoman who, after being gang raped in 2010, founded Kwanele, an organization bent on breaking the conspiracy of silence, captured the South African paradox well: "We are the envy of the world with our constitution and bill of rights, but the justice system is just not there" (*The Star*, 11 February 2013). In other words, there is often a huge discrepancy between a theoretical equality of rights and its effective implementation. Besides the gruesome statistics on violence and rapes in the country, other problems arise when considering the issue of women's rights, a major one being the economic inequity and high levels of poverty among South African women, especially those living in rural areas. As stated in a document from the Office on the Status of Women:

> The systematic and socially-engineered location of women in rural areas, and the underdevelopment of infrastructure in these areas, has been directly responsible for the poor conditions under which the majority of South Africa's rural communities live. Apartheid laws, coupled with repressive customs and traditions, disempowered women in ways that will take generations to reverse (Office on the Status of Women, iii).

Legislation has been established to empower women and alleviate poverty. However, two major obstacles stand in the way of a better economic equity and a decrease in the levels of poverty. One is due to the lack of delivery and implementation of the legislation passed. Another has to do with the contradictory priorities of the government: protecting women's rights but also acknowledging indigenous customs and values…

[6] To put this figure in perspective, the femicide rate in the United States in 2010 was of 4.2 women per 100,000.

The Traditional Courts Bill

Since the end of apartheid, there has been a clear political will to recognize the role and importance of traditional customs in the making of the South African society. From the inauguration in April 1997 of the National House of Traditional Leaders meant to "act as a custodian of cultures, customs and traditions" and "influence government policy and legislation especially in so far as it affects the institution and traditional communities" to the passing of a number of major pieces of legislation which we will scrutinize in this article such as the Traditional Governance and Leadership Framework Act (2003), the Communal Land Rights Act (2004) or the debate around the Traditional Courts Bill, tribal values and customs have been a major focus of interest. But this new legislation entrenching the role of traditional leaders has, as we will see, direct consequences on the lives of millions of women living in those rural communities.

Initially presented to the National Assembly in March 2008, the Traditional Courts Bill (TCB) was meant to remedy the problems with the traditional courts. Traditional courts form an important part of the informal justice system of South Africa. They hear disputes ranging from petty rows between neighbours to more serious criminal offences. They thus provide dispute resolution and justice, both accessibly and economically, to nearly 17 million South Africans living within the boundaries of former homelands. However, though many function effectively, the lack of centralization and accountability also allows for corruption and dysfunctionality of some courts and a great variability between the practices of the various customary courts. The objective of the TCB was to bring them in line with the Constitution, as well as facilitate their cooperation with the State courts. It aimed at recognizing the traditional justice system and its values, at providing "for the structure and functioning of traditional courts in line with constitutional imperatives and values" and at enhancing "customary law and the customs of communities observing a system of customary law" (TCB 2). The Bill was also seen as a means to restore the pride of rural people in their customs and values. However, it immediately stirred controversy. First, the very way the bill had been drafted was harshly criticized. Though, for political reasons, traditional leaders at national and provincial level had been consulted, with the National House of Traditional Leaders[7] playing the prime role of consultant in the drafting of the

[7] Established following the *National House of Traditional Leaders Act* in 2009, the National House of Traditional Leaders (NHTL) is composed of 23 delegates from the Provincial Houses of Traditional Leaders of South Africa. It was set up to represent traditional leaders and their communities and advance their

Policy Framework and the Bill, no public consultations were held in rural areas which meant that women and children that form the majority in most rural constituencies had no say in the process.

Beyond this formal problem – the lack of public consultation especially of those potentially most affected, rural women – more substantive criticisms were made. One of the main criticisms against the Bill was that it gave major powers to the traditional leaders to punish people living within the boundaries of the former homelands as defined by the *1951 Bantu Authorities Act.*[8] Considering the Bill grants civil and criminal jurisdiction to traditional courts (section 5 (2)) and that it bars people appearing before the traditional courts from being represented by lawyers, it gives far-reaching powers to traditional leaders acting as presiding officers. For example, the traditional leaders would have the right to order "some form of service without remuneration for the benefit of the community." This provision, as Sindiso Mnisi Weeks, a researcher in the Law, Race and Gender Research Unit at UCT, underlined, would most probably play against women who already bear the brunt of manual labour in rural areas and who could be required by the traditional leader to work for free even without being a party to the dispute settled by the court (*Weeks* 7).

The Bill was also criticized for not containing provisions to ensure that women form part of the courts or to protect women's right to participate actively in the deliberations of the courts. Historically, women have been allowed to play a very small, if any, part in the customary courts' proceedings. For many organizations fighting for gender equality such as the Sonke Gender Justice Network, it was clear that the Bill would not help remedy the inequalities in traditional courts but would rather entrench the problems encountered by rural women in their access to justice and weaken existing indigenous accountability mechanisms instead of reinforcing them. Thus, many feared that some traditional leaders might severely abuse the power given to them, a fear fuelled by high-profile cases such as that of King Dalindyebo recently charged with arson, culpable homicide and kidnapping (*Mail and Guardian:* 18 July 2013).

Finally, in the absence of clear control mechanisms, some foresaw a discrepancy between the letter of the law and its application. To take a specific example, in the section of the Traditional Courts Bill that details the proce-

aspirations at national level.

[8] Act which allowed for the creation of homelands initially run by the Native Affairs Department, but with the promise of future self-government. The *Bantu Authorities Act* also established a three-tier system of government (tribal, regional and territorial authorities).

dures of traditional courts (section 9), it is clearly stated that: "A party to proceedings before a traditional court 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." But, as Sindiso Mnisi Weeks underlined in a documentary entitled *Traditional Courts Bill: A Silent Coup*, the bill is flawed because though it formally stipulates gender equality, in reality, a man represented by a woman is virtually unheard of in a traditional court case whereas the reverse is all too common. In other words, in the absence of any real control, customary courts will remain fundamentally patriarchal institutions… It is to be noted also that the Bill does not allow for opting-out. Consequently, people who would not want their case to be heard in a customary court could not turn instead to a Magistrate's court. The potential impact especially on rural women is easy to foresee…

A political move to ensure the support of kings, chiefs and other traditional leaders, the Bill keeps rising from the ashes. First introduced in the National Assembly in March 2008, it lapsed – after heated debates – with the elections and the change of government… only to be taken up, unchanged, by the new government in December 2009. The Bill was withdrawn from the National Assembly in June 2011 … and in December of the same year, the Department of Justice publicized its intention to reintroduce the Bill before the National Council of Provinces. Withdrawn in November 2012, it was recently sent back to the provinces for further consultation despite clear opposition from most provinces.

From the onset, opposition to the Bill was strong, coming among others from women's rights groups, the ANC Women's League and even the Department of Women, Children and People with Disabilities[9]. Interesting testimonies also emerged from women living in rural areas. Indeed, the testimony sent to the *Mail and Guardian* by Shirhami Shirinda, a member of a rural royal family in Limpopo is worth reading in that it offers a rare insider's view of the rural women's perception of the traditional courts. "I know many women," she writes: "who do not want to take their cases to traditional courts, preferring social workers and magistrate's courts because of the view that traditional courts are biased in favour of men." A gender bias that they would not be able to shun from if the Bill was passed as they would not be allowed to opt out… One could argue that the sheer amount of controversy around

9 The Minister for Women, Children and People with Disabilities, Lulama Xingwana, thus declared before the select committee on Security and Constitutional Development in September 2012, that the Bill was unconstitutional and if passed in its current form would oppress and discriminate against women and children, particularly those in rural areas falling under the auspices of traditional courts.

the TCB is the sign of a healthy democracy. However, the recent reintroduction of the Bill after its rejection by 9 out of 11 provinces is more ominous a sign for South African rural women's rights as it suggests that they might weigh little in the political bargaining between the ANC and the traditional leaders ahead of the 2014 elections.

Although not as vocal in his defence of the Bill as the Minister for Justice, Jeff Radebe, Jacob Zuma has – indirectly but actively – been supporting the Bill ever since he was elected. In November 2012, at the opening of the House of Traditional Leaders, just after the Bill was withdrawn, Jacob Zuma said: "Let us solve African problems the African way, not the white man's way," "Let us not be influenced by other cultures and try to think the lawyers are going to help us." (Zuma, 46)

Most people assert that even in the unlikely event that the Bill would pass parliamentary muster, it would definitely be rejected by the Constitutional Court. However the political pressure around the Bill raises questions. Indeed, it suggests that the government would be ready to entrench certain inequalities in return for some hypothetical political gains and it leaves a distinct impression that gender equality is always "up for grabs" when other – perhaps more powerful interests – come into play. In that respect, the debate around the practice of virginity testing is yet another ominous sign for women's rights in the rainbow nation.

Virginity Testing

In 2005, the *Children's Bill* was examined by the South African parliament. Among other provisions, it stated that every child had the right "not to be subjected to social, cultural and religious practices […] detrimental to his or her well-being." For the legislative drafters, this included the practice of virginity testing,[10] which was to be prohibited for children under 16 and strictly regulated for children above 16.[11] The provision however did not go

[10] The practice was revived by King Goodwill Zwelithini in 1984. Every year, a reed dance is organized in which only virgins can participate – a virginity vouchsafed by testing. The event gathers thousands of young Zulu maidens and has been attended in the past few years both by the President Jacob Zuma and the then Zwazulu Natal Premier, Zweli Lawrence Mkhize. (He resigned on August 22, 2013 and was succeeded by ANC Chairman, Senzo Mchunu as Acting Premier of the province.)

[11] According to the *2005 Children's Bill*, virginity testing was only to be performed on children older than 16 if the child had given consent to the practice and after proper counseling of the child. The results were not to be disclosed without prior consent of the child. The Bill also provided that any offender would risk a fine and/or an imprisonment not exceeding 10 years.

untested and the passing of the *Children's Bill* by the National Assembly stirred controversy.

For the supporters of this practice, such prohibition amounted to a violation of their cultural rights. King Zwelithini was thus quoted as saying that he would "rather be thrown in jail than allow the tradition he revived 21 years ago to be abolished." Those denouncing the practice of virginity testing were first taken aback as they had little foreseen the opposition the Bill would face. In its submission to the parliamentary select committee on social services entitled *Harmful Social and Cultural Practices: Virginity Testing*, the South African Human Rights Commission thus underlined that it had not initially felt the need to express its views on virginity testing before Parliament but that considering the heated debates and disagreements around the passing of the *Children's Bill*, the SAHRC had felt compelled to voice its concern about "the potential invasion and violation of guaranteed constitutional rights of the young women who are tested." For the SAHRC as for the Commission for Gender Equality, the argument according to which virginity testing was a means to promote good morals and decrease sexual activity prior to marriage, thereby slowing the propagation of HIV and AIDS, could not stand as it placed too high a premium on the sexuality of the girls without saying anything on that of the boys. Furthermore, the fact that girls who were tested and declared virgins were then delivered a certificate at a public ceremony could lead to a further stigmatization of those victims of rape, incest or sexual abuse. In a country that has one of the highest rates of rape in the world with 65,000 rapes or sexual assaults reported for 2011 to 2012 (127.6 per 100,000 inhabitants), the question around the status of victims in such ceremonies is far from being marginal indeed.

Parliament was thus faced with a very real conflict between recognizing and giving effect to cultural practices versus ensuring that the *Children's Bill* is not in conflict with the Constitution as the supreme law of the land. Of course, one cannot but agree with this journalist reacting to the dispute around virginity testing in the Zulu culture:

> Strangely, when it comes to issues of gender equity, gay rights and children's rights, hiding behind culture and tradition becomes a very convenient and popular tactic for sexist conservative African patriarchs. (Ngonyama, 10)

Invoking culture to justify some practices might indeed be considered as a convenient way to disregard women's constitutional rights. However, saying this does not solve the problem of striking a balance between respecting

all cultures and ensuring gender equality. In the specific case of virginity testing, the Bill was passed and testing is now forbidden for any girl under sixteen and must be done with the girls' consent above that age. Yet, many disregard those obligations and defy the ban. The decade-long dispute is far from over as the recent skirmish between the Zulu royal family and the ANC Women's League president, Angie Motshekga, suggests. After a statement in which the league president drew a parallel between the practice of virginity testing and that of forced marriage (Ukuthwala) and called for the ANC to take a clear stand against those practices, the Zulu royal family reacted strongly stressing that the practice was an integral part of the Zulu culture. Nomagugu Ngobese, the president of the Nomkhubulwane Cultural Institution, which leads the virginity testing in the province, was quoted as saying: "If they don't want us to practise our culture they must give us a land (out of South Africa) where we can freely practise our culture without their interference" (*IOL News*: 13 October 2013), underlining the underlying political tensions around the issue of cultural rights.

The South African Constitutional Court's Dilemma

An added level of complexity when considering the South African situation comes from the fact that the fight is not simply one of customary rights versus a constitutional right to gender equality. In fact, both rights – right to culture and right to an equal treatment – are enshrined in the Constitution. As a matter of fact, chapter 2 of the *1996 Constitution* recognizes equal rights to each and every South African citizen. Meanwhile, it also states that:

> Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community to enjoy their culture, practise their religion and use their language.

Furthermore, the Constitution makes provision for the recognition of traditional leaders by setting up six Provincial Houses of Traditional Leaders[12]. As a result, the Constitution protects potentially conflicting rights and institutions. Attempts have been made to better adapt customs to democratic principles such as gender equality and devise a coherent legal framework that would both respect customary law and empower women. This is how the *Traditional Governance and Leadership Framework Act* passed in December

[12] These Houses are in Eastern Cape, Free State, KwaZulu-Natal, Mpumalanga, Limpopo and North West. A National House of Traditional Leaders was added in 1997.

2003 stipulated that a third of all traditional councils must be women, a step towards a better representation of the 60% of women that compose South Africa's rural population. However, resistance on the ground is such that it often leads to internecine feuds and tragedies. In 2007, Nowinase Ngubenani, the chieftainess of Mthonjana village, a rural hamlet in Transkei, was shot dead and burned in her hut by four men, appointed as assassins by the villagers who did not want to be ruled by a woman. Her daughter took over as chieftainess but now lives far from the village for fear of being killed, a sign that tensions are far from alleviated (*Time*: 7 June 2010).

Apart from those high-profile cases, the Supreme Court of South Africa regularly has to rule on cases dealing with culture and equality. We are going to focus here on two recent cases. The first one is the case of *Elizabeth Gumede vs. the President of RSA* (2008).

Elizabeth Gumede entered into a customary marriage in 1968. She was the first and remained the only wife of her husband. In January 2003 her husband decided to divorce. Elizabeth Gumede had not worked during the marriage, but had maintained the family household as well as the four children. During the course of the marriage, the family had acquired two pieces of immovable property amounting to approximately R40,000 each. The *1998 Recognition of Customary Marriages Act* provides that customary marriages concluded after the commencement of that Act, that is 15 November 2000, are automatically in community of property. The Act, however, does not provide for this property regime to apply to customary marriages concluded before 2000, and those marriages were subsequently still governed by customary law - which meant that the husband had total control over all family property and that the wife was left with nothing in case of divorce. The Supreme Court reached a unanimous decision in favour of Ms Gumede arguing that it was a clear case of unfair gender discrimination.

The second case I want to examine is that of *Ms Shilubana vs. Nwamitwa* (2008). In 1968 Ms Shilubana's father, Fofoza Nwamitwa, Hosi of the Valoyi community (Limpopo Province) died without a male heir. Because customary law at the time did not permit a woman to become Hosi, Ms Shilubana did not succeed him although she was his eldest child. Hosi Fofoza was instead succeeded by her brother, Richard. During 1996 and 1997 the traditional authorities of the Valoyi community passed resolutions deciding that Ms Shilubana would succeed Hosi Richard, since according to the new constitution, women were equal to men. Her succession was approved by the provincial government. However, following the death of Hosi Richard in 2001, his eldest son challenged Ms Shilubana's succession, claiming that

the tribal authorities had acted unlawfully and that he was entitled to succeed his father. He subsequently turned to the Pretoria High Court to be declared the rightful successor of his father and the Pretoria High Court ruled in his favour. However, the Supreme Court overturned this decision and ruled in favour of Ms Shilubana, allowing her to become the new Hosi of the Valoyi community. Interestingly though, the Supreme Court did not justify its decision by evoking the principle of gender equality. The court's reasoning was rather to empower the traditional authorities with the ability to develop their customary law in line with the constitution. The ruling was important in that it served to demonstrate that institutions established by communal norms could exist and function on the basis of equality, which is one of the hallmarks of a liberal constitution. But it did not really tackle the issue of unfair discrimination as such.

A more recent case that has not been setteld yet, that of Princess NomaXhosa Sigcawu of the AmaGcaleka kingdom, will require a clearer stand on the part of the Supreme Court on that question. Indeed, like Ms Shilubana, Princess NomaXhosa Sigcawu is challenging the custom according to which only males can rule. She claims that she should have been the rightful heir to the throne after the death of King Xolilizwe Sigcawu in 2006. Indeed she argues that Xolilizwe only became monarch because she, the eldest child of the former King Zwelidumile Sigcawu, was a baby when her father died. Xolilizwe, a male child from the extended family of the King was installed as monarch instead of her. NomaXhosa's expectation was that on the demise of Xolilizwe, she would take over the reign. But King Xolilizwe's son ascended the throne instead. A major difference with the case of Ms Shilubana though is that Princess NomaXhosa Sigcawu is not supported by the traditional authorities of her village, who do not wish to change their practices and allow for gender equality in royal succession. The court will thus have to take a clear stand against unfair discrimination or for the respect of traditional customs, which might prove thorny.

Considering those cases, one cannot but wonder about the nature of the relation between customary values and gender equality. It indeed appears that constitutional measures taken to attain gender equality for all South African citizens are often rendered impractical by the existence of a parallel traditional justice system, also mandated by the Constitution. Though it was originally believed that traditional authorities would over time transform to adapt tribal mores and values to the requirements of the *Bill of Rights*, the reality is that, at best, evolutions are sketchy and that most traditional leaders show little willingness to comply with the requirements of gender equality.

While in both judgments (*Gumede vs. President of RSA* and *Shilubana & Others vs. Nwamitwa*), the South African Constitutional Court recognized women's equal status within customary law and the communities that it regulates, it remained very cautious and vague as to the balance between customary and constitutional rights and as to how to reconcile a plural legal system with the concept of democracy. As stated in the unanimous Gumede judgement:

> At one level, the case underlines the stubborn persistence of patriarchy and conversely, the vulnerability of many women during and upon termination of a customary marriage. At another level, the case poses intricate questions about the relative space occupied by pluralist legal systems under the umbrella of one supreme law, which lays down a common normative platform. (Gumede 2)

Finding the right balance between applying the principle of gender equality effectively and acknowledging the importance of traditional customs and values in the fabric of the South African society often proves difficult. A case in point in that respect is that of polygamy.

Polygamy: Unofficially Official

Although polygamy and civil recognition of polygamous marriages are illegal in South Africa, the *1998 Recognition of Customary Marriages Act* provides a legal framework for polygamous unions - that are customary especially in the Zulu and Tsonga culture. The current president Jacob Zuma is himself an open polygamist, currently married to four women. The 1998 Act affords a generous amount of benefits to those unions, ranging from inheritance rights to child custody. Granted, the Act requires that both spouses consent "to be married to each other under customary law." It also states that, to contract a new marriage, a man needs to put it in writing to the court and all his co-wives must agree to it. Furthermore, some argue that the Act, by limiting the number of out-of-wedlock relationships, offers legal and financial protection to women. However, apart from the fact that such an act involves a difference in treatment between some South Africans who could enter a polygamous union (*i.e.* indigenous African people according to the Act) and others who could not, the principle of polygamy itself jars with the idea of gender equity. Indeed, a man has the right to marry several women while a woman cannot have several husbands… Thus, by recognizing a traditional

custom, polygamy, the legislators entrench gender inequality instead of fighting it…

Conclusion

On 9 August 1956, the newly formed Federation of South African Women (FSAW)[13] organized a mass demonstration to protest against the pass system for women and the unfairness of the apartheid legislative apparatus. More than 20,000 women of all races marched to Pretoria to present a petition to the Prime Minister of the day, J.G Strijdom, claiming their right to move freely and most significantly, claiming rights to citizenship in their own country. Over sixty years have passed since that march and the context is widely different from what it was then. There is no denying that the political and social condition of women has improved dramatically, especially in urban areas. Yet, the fight for women's rights is ongoing. While gender equality is a value enshrined in the South African constitution, not only is it far from being a reality as the numerous abuses against women and the economic inequality between men and women would suggest but the principle itself is being questioned by traditionalist and conservative groups. The country's strong patriarchal heritage means that many, especially in rural areas, resent seeing women empowered. This cultural opposition to an effective gender equality is nothing new. What is new, however, is the growing ambiguity of the government's position on the question, especially since the election of Jacob Zuma as president in May 2009. An open polygamist and a staunch supporter of tribal customs, the South African president is indeed often said to pander to tribal leaders' demands at the expense of women's rights…

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13 The association was launched on 17 April 1954 in Johannesburg as the first attempt to establish a broad-based multiracial women's organization. According to its constitution, the objectives of the Federation were to bring the women of South Africa together to secure full equality of opportunity for all women, regardless of race, colour or creed and to remove social, legal and economic disabilities.

14 Cécile PERROT holds a thesis entitled "Post-apartheid higher education in South Africa (1994-2004): a successful transformation?" and is currently working as an assistant professor of English at the Université de Rennes 1. She takes an interest in various aspects of South African life and she has published many articles on the South African education system as well as on the issue of national identity and reconciliation. With Michel Prum and Thierry Vircoulon, she co-edited a book entitled *L'Afrique du Sud à l'heure de Jacob Zuma : La fin de la nation arc-en-ciel ?* (L'Harmattan: 2009).

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