AN ANALYSIS OF THE IMPACT OF THE RIGHT TO EQUALITY ON THE SOUTH AFRICAN CUSTOMARY LAW AND LEGISLATION

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A dissertation submitted to the School of Law, Department of Public Law at the University of Venda, in fulfillment of the requirements for the degree of Magister Legum (LLM)

2011

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DECLARATION

I, Jonathan Rapudi hereby declare that the dissertation for the degree of Magister Legum (LLM) at the University of Venda hereby submitted by me has not previously been submitted for a degree at this or any other university, and that all reference material contained therein has been duly acknowledged.

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ABSTRACT

South Africa is a country in transition from a society based on inequality to one that is based on equality. The achievement of equality is one of the fundamental goals that South Africans have fashioned for themselves in the current Constitution[1] that has an entrenched Bill of Rights. The constitutional order is committed to the transformation of the entire South African society from a grossly unequal society to one in which there is equality between men and women and people of all races. Equality is embodied as a value and a fundamental human right in the Constitution.

The aim of the study is to establish as to what impact the Constitution has on customary law and legislation that conflict with the right to equality as enshrined in its Bill of Rights. In order to achieve the aim, primary data was collected from key informants and the available literature. Upon analysis of the data, the researcher concluded the study with a finding that the Constitution has an overriding effect on customary law and legislation that conflict with the right to equality in South Africa. This is because the Constitution is the supreme law in the country as a whole and any law that is repugnant to it is invalid.

[1] **The Constitution of the Republic of South Africa**, 1996.

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DEDICATION

I dedicate this dissertation to my late mother, Mavhungu Tshisepe Tshikusese Rapudi and father, Makwarela Johannes Rapudi. Wherever they are, may their souls rest in peace and they are always in my mind.

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ACKNOWLEDGEMENTS

- I hereby acknowledge the following:
- Advocate H.J.Choma who supervised the study tirelessly with dedication, commitment and encouragement;
- Advocate L.R. Maluleke who co-supervised the study. His insistence on perfection cannot be over-emphasized. It would have been difficult to follow scientific research steps in compiling the dissertation without his participation and support;
- My wife, Olga Fulufhelo Rapudi, for all her support when carrying the research that led to completion and submission of the dissertation;
- My daughter, Munaka Rapudi, and my son, Khathutshelo Rapudi whose computer literacy was indispensible for ensuring the typing and correction of typographical errors of the dissertation from its proposal stage to its final phase;
- My colleagues at work Mr. A. W. Mudau; Mr. N.A Mudau; Mrs.M.M. Lebese, Mr. A.L. Ramavhala; Mr. T.S. Ndou; and Mrs. H. Kellerman, for their contributions, support, and availing relevant material for the study when compiling the dissertation;
- My sister, Tshimangadzo Rapudi, for always encouraging me to finalize the dissertation;
- My grandson, Tsietsi Mukhola, for always praying for me and reminding me that I should not forget about God as the provider of everything;
- Thimoniwi Nemanashi and Dan Mathabi, for being so supportive; and
- My friend, Dr. S. Ramaite, for his academic contribution to the dissertation.

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CHAPTER 1
INTRODUCTION

1.1. BACKGROUND TO THE STUDY

South Africa is a country in transition. It is a transition from a society based on inequality to one that is based on equality. The transition was introduced by the Interim Constitution, which was designed to introduce a new order in which there is equality between men and women and people of all races so that all citizens should be able to enjoy and exercise their fundamental rights and freedoms. The commitment to the transformation of the society was affirmed and reinforced in 1997, when the 1996 South African Constitution (hereinafter **sometimes** referred to as the Constitution) came into force.[1]

The Preamble to the Constitution recognises the injustices that South Africa experienced in the past and it makes a commitment to establish a society based on democratic values, social justice and fundamental human rights. The envisaged society is to be built on the foundation of the values entrenched in the very first provision of the Constitution. The values include human dignity, the achievement of equality and the advancement of human rights and freedoms.[2]

The achievement of equality is one of the fundamental goals that South Africans have fashioned for themselves in the Constitution. The constitutional order is committed to the transformation of the entire South African society from a grossly

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[1] **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourismand Others** [2004] ZACC 15; 2004 (4) SA 490 **(CC);** 2004 (7) BCLR 687 **(CC)** at paras 73-4.

[2] **Ibid.** at paras 73-4.

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unequal society to one in which there is equality between men and women and people of all races[3]. Equality is embodied as a value in the Constitution[4]. As a constitutional value, equality is an important normative guideline that has to be considered in the interpretation and limitation of human rights that are enshrined in the Bill of Rights of the Constitution. Moreover, equality is in itself a fundamental human right the Bill of Rights of the Constitution. Against the background of the importance of equality in South Africa, study seeks is to determine how the Constitution impacts upon customary law and legislation that conflict with the right to equality as enshrined in its Bill of Rights.

1.2. PROBLEM STATEMENT

There are so many problems and questions that remain unresolved and unanswered regarding the Constitution. Most of the questions are not answered because of difficulties encountered when interpreting the Constitution. The questions remain unanswered despite the existence of various approaches that are used to interpret the Constitution.

Chapter two of the Constitution provides for an entrenched Bill of Rights. Section 7(1) of the Constitution stipulates that the Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom. Equality is further expressed as a

[3] **Bato Star Fishing (Pty) Ltd above note 1. Expressed as**
[4] Section 39 (1)(a) of the **Constitution of the Republic of South Africa**, 1996.

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fundamental human right in section 9(1) of the Constitution which stipulates that everyone is equal before the law and has the right to equal protection and benefit of the law.

Section 2 of the Constitution[5] makes it clear that this Constitution is the supreme law of the Republic of South Africa and any law inconsistent with it is invalid. Does the excerpt, 'any law' mean, for example, that foreign law that is inconsistent with the right to equality in the Bill of Rights of the Constitution is invalid? There is also a huge possibility of a situation where customary law is inconsistent with the right to equality in the Bill of Rights of the Constitution. Does the excerpt, 'any law' mean, for example, that customary law that is inconsistent with the right to equality in the Bill of Rights of the Constitution is invalid? Furthermore it is possible that a situation may arise in which legislation whether it is original legislation or delegated legislation conflicts with the right to equality in the Bill of Rights of the Constitution. In that regard the question that would arise is whether the excerpt, 'any law' mean, for example, that such original legislation or delegated legislation that is inconsistent with the right to equality in the Bill of Rights of the Constitution is invalid?

The questions alluded to above are sources of all kinds of problems that arise when interpreting the Constitution. The problems cannot be meaningfully answered without proper research. The present study is aimed at resolving these problems in order to eliminate any confusion that may arise when the Constitution is interpreted.

[5]**The Constitution of the Republic of South Africa**, 1996.

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1.3. IMPORTANCE AND RELEVANCE OF THE STUDY

The importance of the current research is to be found in the fact that it is dealing with the Constitution which remains the fundamental law of the entire Republic of South Africa. Its significance also lies in the fact that it is relevant to the study of Constitutional Law and it will add to the literature for study or reference in the aforesaid field of study. The current research is also important because it definitely adds to the literature for study or serve as reference material in the following areas of learning:

- Human Rights Law in so far as it deals with the right to equality; and
- The dynamics of customary law and legislation that conflict with the right to equality as enshrined in the Bill of Rights of the Constitution.

1.4. BROAD AIM

The aim of the study is to establish as to what impact the 1996 South African Constitution has on customary law and legislation that conflict with the right to equality as enshrined in its Bill of Rights. In determining the impact that the 1996 South African Constitution has on customary law and legislation that conflict with the right to equality as enshrined in its Bill of Rights, solutions and answers will be furnished that remained unresolved and unanswered regarding the interpretation of the Constitution.

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1.5. SPECIFIC OBJECTIVES

The specific objectives of the study are the following:

- To identify and discuss case law that deals with conflict of customary law with the right to equality as enshrined in the Bill of Rights of the 1996 South African Constitution;
- To identify and discuss case law that deals with conflict of legislation with the right to equality as enshrined in the Bill of Rights of the 1996 South African Constitution;
- To find out what the outcomes are, where there is judicial adjudication of legal disputes involving conflict of customary law with the right to equality as enshrined in the Bill of Rights of the 1996 South African Constitution; and
- To find out what the outcomes are, where there is judicial adjudication of legal disputes involving conflict of legislation with the right to equality as enshrined in the Bill of Rights of the 1996 South African Constitution.

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1.6. RESEARCH QUESTIONS AND PROPOSITION

The study has the primary question and secondary questions that are laid down below.

1.6.1. Primary Question

The primary question of the study is the following:

- What impact does the 1996 South African Constitution have on customary law and legislation that conflict with the right to equality as enshrined in its Bill of Right?

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1.6.2. Secondary Questions

The study has four secondary questions that can be expressed as follows:

- Is there case law that deals with conflict of customary law with the right to equality as enshrined in the Bill of Rights of the 1996 South African Constitution?
- Is there case law that deals with conflict of legislation with the right to equality as enshrined in the Bill of Rights of the 1996 South African Constitution?
- What are the outcomes of judicial adjudication of legal disputes involving conflict of customary law with the right to equality as enshrined in the Bill of Rights of the 1996 South African Constitution?
- What are the outcomes of judicial adjudication of legal disputes involving conflict of legislation with the right to equality as enshrined in the Bill of Rights of the 1996 South African Constitution?

1.6.3. Proposition

The study is conducted to test the validity or otherwise of the following proposition:

- The South African Constitution has an overriding impact on customary law and legislation that conflict with the right to equality as enshrined in its Bill of Rights.

1.6.4. Research Methodology

It is important to present the research methodology that was used to carry out the study. In this regard, key aspects that will be dealt including an explanation of their purposes are the following:

- Research design;
- Population and sampling methods;

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- Data collection techniques;
- Data analysis techniques; and
- Ethical issues.

1.6.4.1. Research Design

The study is a qualitative type of research carried out through case study as a research design. It is an exploratory case study that has the aim of determining the impact that the supremacy of the current South African Constitution has on customary and common law principles that conflict with the right to equality within its Bill of Rights.

1.6.4.2. Population and Sampling Methods

A target population is a set of elements that the researcher focuses upon and from which the results are obtained by testing the sample for generalization.[6] Data was collected from key informants. Key informants are persons who have deeper knowledge and insight about the issues under investigation. Ten advocates of the High Court of South Africa and five academic lawyers were consulted to serve as key informants in the study since they know more about the impact of South African law on various aspects of life in the country. The advocates and academic lawyers are collectively referred to as lawyers as per the conceptual definition clause in chapter one of the study. The key informants provided the primary data to supplement the secondary data that was collected when conducting the study.

[6]Bless, C. and Higson–Smith, C. (1995). **Fundamentals of Research Methods: An African Perspective, Second Edition**, at 87.

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1.6.4.3. Data Collection

Both primary data and secondary data were collected when conducting the study. It is important to discuss the techniques that were used to collect the data as aforesaid.

1.6.4.3.1. Primary and Secondary Data Collection Techniques

1.6.4.3.1.1. In-depth interview

The researcher collected primary data from the key informants after they consented to participate in the study. Oral face-to-face interviews were personally conducted by the researcher. The responses of the key informants to various questions of the study were recorded on the interview guide which the researcher has been carrying.

1.6.4.3.1.2. Documentary Study

The researcher also collected secondary data when carrying out the study. Documentary study was the technique that was used to obtain data from secondary sources such as law reports; journal articles and books. According to Bailey, document study enables the researcher to collect data on matters or subjects that are physically not accessible,[7] such as the current South African Constitution, customary law, and the common law.

1.6.4.4. Methods of Data Analysis

Data analysis consists of examining, categorising, tabulating, or otherwise combining the evidence to address the initial propositions of the study.[8] Data analysis is a

[7] Bailey, K.D. (1987). **Methods of Social Research ,Fourth Edition**, at 291.
[8] Yin, R. (1994)**Case Study Research, Second Edition**, at 102.

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process of evaluating or assessing evidence. A data analyst interprets data with the aim to resolve the research problem.

1.6.4.4.1. Data Analysis: Strategies and Techniques

Strategies and techniques for the analysis of case study evidence have not been well defined in the past. Thus, the analysis of case study evidence is the most difficult aspect of doing case studies. Therefore, the best preparation for conducting the analysis of case study evidence is to have a general analytical strategy because if the general analytical strategy is absent, the entire case study is likely to be in jeopardy. Explanation building is the technique that was used to analyze the data. Data collected from key informants was analyzed, displayed and simplified by means of tables as in the next chapter of the study.

1.6.4.5. Ethical Principles

1.6.4.5.1. Informed Consent

In conducting the study the researcher observed a number of ethical principles. The first principle that was observed is that of informed consent. In observing the ethical principle of informed consent the researcher provided the key informants who served as respondents in the study with the opportunity to choose what shall or shall not happen to them. As Diener and Crandall[9] noted, informed consent is the procedure in which individuals choose whether to participate in an investigation after being informed of facts that would be likely to influence their decision. According to

[9]Diener, E. and Crandall, R. (1978).**Ethics in Social and Behavioral Research**, at 34.

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Frankfort-Nachmias and Nachmias,[10] the idea of informed consent derives from both cultural values and legal considerations. It is rote d in the high value that is attached to freedom and self-determination.

The researcher observed the principle of informed consent because its importance is unquestioned. The four elements of informed consent were observed in carrying out the study. It is important to discuss the four elements of informed consent that were observed as follows:

- **Competence**: Competence as an element of informed consent is based on the view that the decision to participate in the research process as a respondent must be made by a responsible and mature person;
- **Full Information**: In order to comply with the element of full information the researcher disclosed all aspects of the study to enable the prospective key informants to make decisions whether or not to participate. The researcher also communicated the following six basic elements of information in order for the consent to be reasonably informed. As Frankfort-Nachmias and Nachmias[11] noted, the six basic elements of information concerned were the following: A fair explanation of the procedures to be followed and their purposes; A description of the attendant discomforts and risks reasonably to be expected; A description of the benefits reasonably to be expected; A disclosure of appropriate alternative procedures that might be advantageous to the

[10]Frankfort-Nachmias, C. and Nachmias, D (1996).**Research Methods in the Social Sciences, Fifth Edition** at 82.
[11]Frankfort-Nachmias, C. and Nachmias, D (1996) (Above note 46) at 45.

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participant; An offer to answer any inquiries concerning the procedures; and An instruction that the person is free to withdraw consent and to discontinue participation in the project at any time without prejudice to them;

- **Comprehension**: Comprehension as an element of informed consent refers to the degree of understanding that the participant has about the nature, purpose and implications and impact of the research he is expected to consent to participate in[12]; and
- **Voluntariness**: Voluntariness as an element of informed consent requires that no one should be forced/coercedto participate in the research process.[13] This element of informed consent requires conditions free of coercion and undue influence.[14]All key informants participated in the study voluntarily.

1.6.4.5.2. Avoiding Harm to Informants

According to Goddard and Melville,[15] this includes having due regard for their privacy, respecting informants as individuals and not subjecting them to unnecessary research. In order to avoid harming people, the researcher must guard against both physical and psychological harm. People (informants) have a right to privacy; the researcher must keep collected data confidential. This implies that subject(s) should not be identifiable to anyone reading the report. Most importantly, the researcher

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[12]www.hhs.gov/ohrp/human.

[13]Babbie, E. (2007). **The Practice of Social Research**, at 62.
[14]Above note 47.
[15]Goddard, W. and Melville, S. (2005). **Research Methodology, An Introduction, Second Edition**, at 49.

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must remember that the subjects (informants) are individual human beings, and treat them with respect.

1.6.4.5.3. Intellectual Honesty

Apart from considering the ethics of the research topics and of the research methods used, a researcher is expected to be ethically correct in a number of other ways. Foremost on this list is that the researcher must be honest. He must be honest about the methods, honest about the results and honest about who did the work. Plagiarism is the unacknowledged use of the work of someone else where the researcher claims credit for work that he/she has not done. Careful referencing should be made to ensure that plagiarism does not occur.[16]

1.6.4.5.4. Confidentiality and Anonymity

The researcher complied with the ethical guidelines of confidentiality and anonymity when carrying out the study. According to Boynton[17], the principles of confidentiality and anonymity mean that the participants (informants) who participate in the research need to be reassured that what they reveal will be treated as "private" (confidentiality) and that they will not be identified through the research (anonymity). This may mean changing people's names in qualitative research, using identification numbers in quantitative studies, or finding other ways of keeping participants' details private.

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[16]Ibid at 110.
[17]Boynton,P.M. (2005).**The Research Companion ,A Practical Guide for the Social and Health Sciences**, at 101

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1.6.4.6. Limitations of the Research Methodology

The methodology used in the study has limitations. It is not ethical for any researcher not to state the limitations of the research methodology that he uses. The limitation of the research methodology of the study is found in the fact that case study was used as a research design of the study. The main limitation of case study as a research design of qualitative research is that its findings cannot be applied or generalized to other situations.

1.7. LIMITATIONS OF THE STUDY

The inability of researchers to clearly present the limitations of their research project usually compromises the objectivity of such projects. The current study is a research project that focuses on the relationship between the South African Constitution and the concomitant customary law and legislation applicable in the country in instances where the right to equality is violated by the latter examples of law sources. The study is, therefore, confined to the South African legal system and not to that of any other country. This makes the research project to be a case study and all limitations or weaknesses that are peculiar to case studies are, therefore, also applicable to the current study.

The main limitation of case studies is that the findings in one case study cannot be generalized to other environments. Babbie[18] supports this view when stating that the limitation of attention to a particular instance of something is the essential

[18] Babbie (Above note 13) at 298.

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characteristic of the case study. In this regard, Holloway[19] adds the following significant points of view:

- Case study research is used mainly to investigate cases which are tied to a specific situation and locality, and hence this type of inquiry is even less readily generalisable than other qualitative research;
- Generalisability or external validity in research exists when the findings of a study can be applied to other settings and cases or to a whole population, that is, when the findings are true beyond the focus of the work in hand; and
- Qualitative researchers do not usually claim generalisability of findings because they produce only a slice of the social situation rather than the whole; indeed they state that the concept of generalisability might be irrelevant if they examine a single case or a unique phenomenon.

1.8 STRUCTURE OF THE DISSERTATION

The dissertation consists of five chapters. **Chapter one** represents the efforts of the researcher to identify, define and elucidate fundamental issues that are central to the study. Issues covered in chapter one include the following: problem statement, research questions, propositions, including the limitations of the study. Under **chapter two** of the dissertation, tentative solutions to some of the problems identified in chapter one are provided. This is achieved by way of reviewing the literature related to central issues/questions, which the research project intended to address/investigate. **Chapter three** provides details on the methodology that was

[19] Holloway, I (1997) **Basic Concepts for Qualitative Research**, at 70 et. seq.

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used to carry out the research project. Techniques that were used to collect data on the key and subsidiary questions of the research project are among the issues covered in this chapter. **Chapter four** is dealing with the analysis of data that was collected regarding the questions that the study aimed to answer. In this chapter, self-explanatory tables are laid down to display the data that was gathered to answer questions raised in the study. The chapter is also dealing with the interpretation and discussion of the results/findings of the research conducted. **Chapter five** contains conclusions regarding the main issues that the research project investigated. The reasons making particular conclusions are also given in this chapter. It ends with a set of recommendations and a final remark/summary that entails final remarks.

1.9. SUMMARY

In this chapter, consideration has been given to the problem statement which prompted the current research. In order to achieve the aim of the study which is to establish as to what impact the 1996 South African Constitution has on customary law and legislation that conflict with the right to equality as enshrined in its Bill of Rights, attention was given in this chapter to, *inter alia*, the following aspects:

- The primary and secondary questions of the study;
- The proposition; and
- Research methodology.

The specific and detailed information regarding the methodology that was used to carry out the study as provided in this chapter covered the following aspects:

- Research design;

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- Population and sampling methods;
- Primary and secondary data collection techniques;
- Methods of data analysis;
- Ethical principles; and
- Limitations of the research methodology.

The research methodology was followed by a discussion of the limitations of the study itself in which the shortcomings of case study research are dealt with. The discussion on limitations of case study research is followed by an outline of the structure of the dissertation.

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CHAPTER 2
LITERATURE REVIEW

2.1 INTRODUCTION

Research invariably involves the use of the books; pamphlets; periodicals; and other documentary materials in libraries. This applies to studies based on original data gathered in a field study as well as those based entirely upon documentary sources. The documentary source materials have to be consulted for the necessary background knowledge of the problem to be investigated. The use of such documentary data sources in research is known as literature review.

Flick[20] is of the view that literature in qualitative research helps the researcher to answer questions such as the following:

- What is already known about this issue in particular or the area in general?
- What theories are used and discussed in the area?
- What concepts are used?
- What are the theories or methodological debates or controversies in this field?
- What has not been studied yet?

It follows that literature review shares with the reader the results of other studies that are closely related to the study being reported. The literature that is reviewed in this chapter seeks to put into comprehensive perspective, the key issues regarding the right to equality under different legal contexts.

[20] Flick, U. (2006) An Introduction to Qualitative Research, at 59.

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THE RIGHT TO EQUALITY IN THE CONTEXT OF THE INTERNATIONAL, AFRICAN AND SOUTH AFRICAN LEGAL FRAMEWORK

It is important to explore the extent to which the right to equality is protected in the context of international law, the African legal framework, and the South Africa legal system. This should be done for the following reasons:

- To provide a comprehensive overview of the nature and extent of the right to equality under different legal regimes; and
- To lay a basis for a possible candid investigation of the impact of the South African Constitution on customary and legislation that conflict with the right to equality IN South Africa upon which to base the necessary law reforms if need be.

2.3. THE RIGHT TO EQUALITY: AN INTERNATIONAL LAW PERSPECTIVE

Under international law, there are some legal instruments that protect the right to equality. The international legal instruments **include** the Universal declaration of Human rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) as discussed below. It should be noted that other international legal instruments that will be discussed are the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Convention on the Political Rights of Women (CPRW).

2.3.1. The Universal Declaration of Human Rights (UDHR)

The Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable right of all members of the human family and constitutes an obligation for all members of the international

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community[21]. Article 7 of the Universal Declaration of Human Rights (UDHR) stipulates that all people are equal before the law and are entitled without any discrimination to equal protection of the law and that all persons are entitled to equal protection against any discrimination in violation of the UDHR and against any incitement to such discrimination[22]. The article embodies several interdependent ideas whose common theme is equality before the law. There are at least four aspects of this underlying theme which need more detailed discussion.

2.3.1.1. 'All are equal before the law'

The excerpt, 'All are equal before the law' means that every single legal subject (whether human being or a commercial company, a trade union or sports club, a police officer or cabinet minister, and so on) is subordinate to the law. According to Robertson,[23] the idea became established in most of the developed world only about 200 years ago, and many of the political struggles and revolutions in Europe in the 1880s were concerned with making the government, at least in theory, subject to the law. The provision that no one should be above the law is an idea which is also often expressed in the principle that the law rules, 'rule of law', rather than the rule of human beings. The provision also means that every legal subject has equal weight in the eyes of the law. One can see that the Declaration of the Rights of Man and of the Citizen of 1789, which was an important symbol of the French Revolution, demands that the law 'should be the same for all, whether it protects or punishes'. In other words, the law must treat rich and poor, man and woman, black and white, Jew and

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[21]Patel, E.M. and Watters, C. (1994).**Human Rights, Fundamental Instruments and Documents**, at 31.
[22]Robertson, M. (ed.) 1991).**Human Rights for South Africans**, at 52.
[23] Ibid at 54

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Hindu, president and private individual equally. The achievement of the rule of law idea as a basic requirement of modern government is a considerable triumph for ordinary people. However, many practical steps are needed before it can be said that true legal equality exists because inequality of resources (such as wealth and education) in every life is usually not overcome by equal treatment in the eyes of the law. What is certain, however, is that the law itself must not create inequality by treating similar groups or classes of people in different ways. At this point it is important to note that in our legal system there is a distinction between the common law and statute law. The common law is a body of legal rules which has acquired the status of law through customary use by the people, or by judicial approval in a court of law. Statute law consists of legal rules made by the various law-makers in a particular country, such as central, provincial, and local government bodies. Statute law usually overrides common law when their rules conflict.

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2.3.1.2. '... and are entitled without any discrimination to equal protection of the law'

This part of Article 7 of the UDHR means that the law must protect all people equally. The most famous use of the words 'equal protection of the law' occurs in the Fourteenth Amendment of the United States Constitution (part of the Bill of Rights), which was enacted in 1868 after the American Civil War and the abolition of slavery. Similar provisions occur in the Indian Constitution and in the Canadian Bill of Rights. There has been much argument about the meaning of 'equal protection of the law'. It seems that what is unacceptable here is not the classification of people by law on

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reasonable grounds of distinction (such as that those who earn less should pay less tax, which may discriminate against the wealthy), but rather 'class legislation'. This class of law makes certain rules applicable only to people of a particular race, ethnic group, religion, or gender, etc. The distinctions between people must be based on intelligible features and must be rational. In other words, even though the law will on occasion differentiate between people or even groups of people, all persons subject to such law must be treated alike under like circumstances. Therefore, what is intended here is equality in the application of the laws which exist[24].

2.3.1.3. '... equal protection against any discrimination in violation of this declaration ...'

This aspect of Article 7 further emphasizes equality in seeking and obtaining a remedy to overcome discrimination. In other words, it constitutes a right not to be discriminated against on any grounds mentioned in the UDHR, particularly those in article 2, and this right must be equally available to all those who suffer discrimination. Not only do people have this right in a negative sense, in that they can complain (through the law) against any violation of this right, it is arguable that the state (and possible all individuals within it) has a duty to take steps to prevent discrimination from occurring (by outlawing it), and also to improve the position of those who have been victims of discrimination. This is often known as 'affirmative action'. It involves special steps to discriminate in favour of certain groups of people

[24] Roberston (Above note 22) at 54-55.

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because of previous disadvantages they have suffered. This sort of discrimination is not normally regarded as violation of the UDHR.[25]

2.3.1.4. '... equal protection against any incitement to such discrimination'

This aspect of Article 7 obviously contemplates a duty on the state authorities to prohibit by law any call or action which is intended or will have the effect of discriminating against people in ways which violate the rights protected in the UDHR. This step in itself amounts to a restriction on the rights to freedom of opinion and expression (Article 19) and to freedom of peaceful assembly (article 20), which clearly shows that few rights are unlimited in effect.

In concluding the discussion of the Universal Declaration of Human Rights (UDHR) as an instrument that protects the right to equality, it is important to deal with overall rationale for its adoption. The following serve as some of the elements of the rationale for the adoption of the UDHR:

- Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,
- Recognition of the fact that disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

[25]Robertson (Above note 22) at 54.

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- Realization of the essential fact that, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,
- Realization of the fact that it is essential to promote the development of friendly relations between nations,
- Noting that the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom, and
- Noting that Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms[26].

2.3.2. International Covenant on Civil and Political Rights (ICCPR)

The International Covenant on Civil and Political Rights (ICCPR) was adopted and opened for signature, ratification and accession by the United Nations General Assembly in terms of Resolution 2200A(XI) of 16 December 1966. The ICCPR entered into force on 23 March 1976.

It is important to **lay down the clauses** of the ICCPR that have an impact on the right to equality, **followed by analysis of its significance and contribution to the theme for discussion** as well as the **personal views of**

[26]Patel, E.M. and Watters, C. (1994) (Above note 21) at 11-12.

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the researcher in relation thereto. Important clauses of the ICCPR that have an impact on the right to equality are the following:

- Article 2: Each State Party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status;
- Article 3: The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant;
- Article 14: All persons shall be equal before the courts and tribunals;
- Article 26: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, religion, political or other opinion, national or social origin, property, birth or other status.[27]

In the light of the above, the significance of the ICCPR lies in the fact that it imposes a duty on State Parties that are signatories thereto to uphold the right to equality and expressly also outlaws discrimination. Thus, in making provision for the right to equality in section 9 of the Constitution, South Africa was keeping

[27]Patel, E.M. and Watters, C. (1994) (Above note) at 22-30.

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abreast with the requisites of international human rights law as provided for in the ICCPR. This means that South Africa cannot be held to be a delinquent state in so far as the international human rights jurisprudence is concerned. It is against this background that the current study seeks to find out what the consequences are in the event customary law principles and legislation conflict with the right to equality as enshrined in the Bill of Rights of the South African Constitution.

Having outlined, *inter alia*, the significance of the ICCPR and in concluding the discussion on the ICCPR as an international legal instrument that protects the right to equality, it is important to indicate that its adoption was prompted by the following:

- Consideration of the fact that in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world;
- Recognition of the fact that these rights derive from the inherent dignity of the human person;
- Recognition of the fact that in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby

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everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights;

- Consideration of the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms; and
- Realization of the fact that the individual, having duties to other individuals and to the community to which he belongs is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant.[28]

2.3.3. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is an international legal instrument that protects the right to equality to which women are entitled. The CEDAW was opened for signature in 1979 and it then came into force in 1981. Over 170 states have ratified or acceded to the Convention..[29] It is important to **lay down the clauses** of the ICCPR that have an impact on the right to equality, **followed by analysis of its significance and contribution to the theme for discussion** as well as the **personal views of the researcher** in relation thereto.

For the purpose of the CEDAW, discrimination means any distinction made on the basis of sex which 'has the effect or purpose of impairing or nullifying the recognition,

[28]Patel, E.M. and Watters, C. (1994) (Above note 5) at 21-22.

[29]Dugard, J. (2005). **International Law, A South African Perspective, Third Edition**, at 324-325.

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enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights' in any field (article 1). The CEDAW obliges states to ensure that their legal systems guarantee equal rights to all women in all spheres of life. Article 4(2) of the Convention provides that special measures aimed at protecting maternity 'shall not be considered discriminatory'.[30]

In the light of the above, the significance of the CEDAW lies in the fact that it imposes a duty on State Parties that are signatories thereto to ensure that women enjoy the right to equality. According to Dugard[31], the Republic of South Africa ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1995. The Parliament adopted the General Law Fourth Amendment Act 132 of 1993 which removed all traces of legislative discrimination against women so as to enable South Africa to ratify CEDAW. In 1993 South Africa acceded to the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages of 1962.

South Africa was keeping abreast with the requisites of international human rights law as provided for in the CEDAW when it made provision for the right to equality in section 9 of the Constitution. It is against this background that the current study seeks to find out what the consequences are in the event customary law principles and legislation conflict with the right to equality as enshrined in the Bill of Rights of the South African Constitution.

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[30] Dugard, J. (2005). **International Law, A South African Perspective, Third Edition**, at 324-325.
[31] Ibid at 324-325.

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2.3.4. Convention on the Political Rights of Women (CPRW)

The Convention on the Political Rights of Women was adopted for signature, ratification and accession by Resolution 640(V11) of the United Nations General Assembly on 20 December 1952 and entered into force on 7 July 1954. The Convention represents a desire by the contracting state parties to it to implement the principle of equality of rights for men and women contained in the Charter of the United Nations.[32]

It is important to **lay down the clauses** of the CPRW that have an impact on the right to equality, **followed by analysis of its significance and contribution to the theme for discussion** as well as the **personal views of the researcher** in relation thereto. The following provisions of the Convention on the Political Rights of Women deserve to be re-stated:

- Article 1 provides that women shall be entitled to vote in all elections on equal terms with men;
- Article II provides that women shall be eligible for election to all publicly elected bodies, established by national law, on equal terms with men, without any discrimination; and
- Article III states that women shall be entitled to hold public office and to exercise all public functions, established by national law, without discrimination.[33]

In the light of the above, the significance of the CPRW lies in the fact that it

[32]Patel, E.M. and Watters, C. (1994) (Above note 5) at 281.
[33]Patel, E.M. and Watters, C. (1994) (Above note 5) at 281.

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imposes a duty on State Parties that are signatories thereto to uphold the right to equality not discriminating against women. Thus, in making provision for the right to equality in section 9 of the Constitution, South Africa was keeping abreast with the requisites of international human rights law as provided for in the CPRW. This means that South Africa cannot be held to be a delinquent state in so far as the international human rights jurisprudence is concerned. It is against this background that the current study seeks to find out what the consequences are in the event customary law principles and legislation conflict with the right to equality as enshrined in the Bill of Rights of the South African Constitution.

2.4. RIGHT TO EQUALITY IN AFRICA

There are several legal instruments that provide for the protection of the right to equality in the African continent. All people including women and children are entitled to the right to equality in the African continent. Particular legal instruments that provide for the protection of the rights of people, women and children are discussed below.

2.4.1. African Charter on Human and Peoples' Rights

African Charter on Human and Peoples' Rights a lso sometimes called the 'Banjul Charter', was adopted by the Organization of African Unity (OAU) in Nairobi, Kenya, on 27 June 1981 and entered into force on 21 October 1986. The Charter is the pivotal human rights instrument of the OAU which is now called the African Union (AU). The Charter recognizes individual rights as well as

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peoples' rights and duties, and some socio-economic rights, in addition to civil and political rights. The supervisory mechanism created by the Charter is the African Commission on Human and Peoples' Rights, which had its first meeting in 1987. The Commission is now being supplemented with an African Human Rights Court.[34] The Commission's mandate includes the review of periodic state reports on the implementation of the Charter by state parties. The Commission also has the power to review individual and inter-state complaints.[35]

The African Charter on Human and Peoples' Rights protects the right to equality and thereby prohibits discrimination. Article 3 of the Charter states that every individual shall be equal before the law and also that every individual shall be entitled to equal protection of the law. Article 19 of the Charter states that all peoples shall be equal and also that all people shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another. Article 28 of the Charter states that every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

In concluding the discussion of the African Charter on Human and Peoples' Rights (ACHPR) as an instrument that protects the right to equality, it is important to deal with the overall rationale for its adoption followed by an analysis thereof. The following serve as some of the elements of the rationale that African

[34] Heyns C. and Killander, M. (eds.) (2007).Compendium of Human Rights Documents of the African Union, at 29.
[35] **Ibid** at 29.

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states had for adopting the ACHPR:

- Recalling of the Decision 115(XVI) of the Assembly of Heads of State and Government at its sixteenth ordinary session held in Monrovia, Liberia, from 17 to 20 July 1979 on the preparation of 'a preliminary draft on an African Charter on Human and Peoples' Rights providing *inter alia* for the establishment of bodies to promote and protect human and peoples' rights';
- Consideration of the Charter of the Organization of African Unity, which stipulates that 'freedom, equality, justice and dignity are essential objectives for the achievement of the Legitimate aspirations of the African peoples';
- Reaffirmation of the pledge they solemnly made in article 2 of the said Charter to eradicate all forms of colonialism from Africa, to co-ordinate and intensify their co-operation and efforts to achieve a better life for the peoples of Africa and to promote international co-operation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights;
- Taking 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;
- Recognition on the one hand, that fundamental human rights stem from the attributes of human beings, which justifies their international protection and on the other hand, that the reality and respect of peoples' rights should necessarily guarantee human rights;
- Consideration of the fact that the enjoyment of rights and freedom also implies

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the performance of duties on the part of everyone;

- Being convinced that it is henceforth essential to pay particular and full attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights;
- Consciousness of their duty to achieve the total Liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, Zionism, and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, colour, sex, language, religion or political opinion;
- Reaffirmation of their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instruments adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations; and
- Being firmly convinced of their duty to promote and protect human and peoples' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa.[36]

Upon a thorough analysis of the rationale for the adoption of the ACHPR, it becomes clear that the African states who adopted it were motivated by commitment

[36]Patel, E.M. and Watters, C. (1994) (Above note 5) at 141-142.

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to, *inter alia*, the following:

- Promotion and protection of human and peoples' rights;
- Freedom, equality, justice and dignity of the African peoples; and
- Elimination of colonialism, neo-colonialism, apartheid, Zionism, and all forms of discrimination based on race, ethnic group, colour, sex, language, religion or political opinion;

2.4.2. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003/2005)

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003/2005) was adopted in Maputo, Mozambique on 11 July 2003 and entered into force on 25 November 2005. The Protocol was adopted after considering the following:

- Article 2 of the African Charter on Human and Peoples' Rights which enshrines the principle of non-discrimination on the grounds of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status;
- Article 18 of the African Charter on Human and Peoples' Rights that calls on all states parties to eliminate every discrimination against women and to ensure the protection of the rights of women as stipulated in international declarations and conventions;
- Articles 60 and 61 of the African Charter on Human and Peoples' Rights which recognize regional and international human rights instruments and African practices consistent with international norms on human and peoples' rights as

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- being important reference points for the application and interpretation of the African Charter; and
- The fact that women's rights have been recognized and guaranteed in all international human rights instruments, notably the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol, the African Charter on the Rights and Welfare of the Child, and all other international and regional conventions and covenants.[37]

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa protects the right to equality of women and thereby prohibits discrimination against them. Article 2 of the Protocol stipulates that States parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard, States parties shall:

- Include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application;
- Enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women;

[37]Heyns C. and Killander, M. (eds.) (2007) (Above note 17) at 41.

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- Integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life; and
- Support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women.[38]

Upon a careful analysis of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa the following important key points emerge:

- Women have an incontestable right to equality;
- Women must not be discriminated against; and
- State parties to the Protocol are acting unlawfully if they do not ensure that women enjoy the right to equality and are not discriminated against in their areas of jurisdiction.

Other provisions of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa that protect the right to equality of women are as follows:

- States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage (Article 6);
- States Parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage (Article 7);

[38]Heyns C. and Killander, M. (eds.) (2007) (Above note 17) at 49.

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- Women and men are equal before the law and shall have the right to equal protection and benefit of the law (Article 8);
- States Parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures (Article 9);
- States Parties shall take all appropriate measures to eliminate all forms of discrimination against women and guarantee equal opportunity and access in the sphere of education and training (Article 12 (1)(a);
- States Parties shall adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities (Article 13); and
- Women shall have the right to equal access to housing and to acceptable living conditions in a healthy environment (Article 16).[39]

Upon a careful analysis of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa the following important key points emerge once again:

- Women have an incontestable right to equality;
- Women must not be discriminated against; and
- State parties to the Protocol are acting unlawfully if they do not ensure that women enjoy the right to equality and are not discriminated against in their

[39]Heyns C. and Killander, M. (eds.) (2007) (Above note 17) at 50-54.

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areas of jurisdiction.

2.4.3. African Charter on the Rights and Welfare of Child (1990/1999)

The African Charter on the Rights and Welfare of Child (1990/1999) was adopted in Addis Ababa, Ethiopia on 11 July 1990 and entered into force in November 1999. The African Children's Charter is similar to the United Nations' Convention on the Rights of Child.

The African Charter on the Rights and Welfare of Child (1990/1999) was adopted after considering that:

- The situation of most African children remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, and on account of the child's physical and mental immaturity which make the child to need special safeguards and care;
- The child occupies a unique and privileged position in the African society and that for the full harmonious development of his personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding;
- The child, due to the needs of his physical and mental development, requires particular care with regard to health, physical, mental, moral and social development, and requires legal protection in conditions of freedom, dignity and security;
- The virtues of the African states' cultural heritage, historical background and

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the values of the African civilization which should inspire and characterize their reflection on the concept of the rights and welfare of the child; and

- The promotion and full protection of the rights and welfare of the child also implies the performance of duties on the part of everyone.[40]

The African Charter on the Rights and Welfare of Child (1990/1999)protects the right to equality of a child by prohibiting discrimination against them Article 3 of the African Charter on the Rights and Welfare of Child (1990/1999) stipulates that every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his or her parents' or legal guardians' race, ethnic group, colour, sex, language, relation, political or other opinion, national and social origin, fortune, birth or other status.[41]

Upon a careful analysis of the Protocol to the African Charter on the Rights and Welfare of Child the following important key points emerge:

- Children have the same right to equality which are enjoyed by adult men and women;
- Children must not be discriminated against; and
- State parties to the Protocol are acting unlawfully if they do not ensure that children enjoy the right to equality and are not discriminated against in their areas of jurisdiction.

In keeping with the children's rights as contained in the African Charter on

[40]Heyns C. and Killander, M. (eds.) (2007) (Above note 17) at 63.
[41]Ibid at 64.

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the Rights and Welfare of Child, South Africa has encapsulated the children's rights in section 28 of the Constitution.

2.5. RIGHT TO EQUALITY BEFORE 1994 IN SOUTH AFRICA

It will come as no surprise to anyone to be told that the right to equality was not given due consideration and respect before democracy in South Africa. Equal protection and non-discrimination laws were not the characteristics which most people associated with the South African legal system. The situation is not quite as simple as this, however, and it is necessary to take a deeper look at the common law of South Africa. The common law, based primarily on the Roman-Dutch and English legal systems which were imposed on this country by European settler governments, proceeds from the point of view that all people are subject to the law and equal before it. However, the supremacy of law and equality before the law has remained theoretical and has not been put into practice by the courts in South Africa.[42]

It is in the area of South African statute law that the main attack on legal supremacy and equality has occurred. This happened since the earliest colonial times and has been intensified since apartheid became the chief component of government policy in 1948. Much of the groundwork was laid before that date, however. Notable early laws were the Glen Grey Act of the Cape Colony of 1894 and the segregation policy of Shepstone in Natal (both of which acted as building blocks for the system of land dispossession

[42]Robertson (Above note 22) at 54-55.

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and segregation), and the outrageously open racist constitutions and practices of the Republic of the Orange Free State and the ZuidAfrikaanscheRepubliek before 1900.[43]

The Constitution of the Union of South Africa (in 1910) denied the vote to the vast majority of South Africans merely on the ground of race, and discrimination was further entrenched by the industrial laws of the mid 1920s, which favoured white workers, and also the two statutes which set aside the land which eventually became the 'homelands' (the Land Act[44] and the Development Trust and Land Act[45]). The cornerstone of the most widespread, official, and prolonged programme of discrimination was laid in 1950, with the adoption of the Population Registration Act. This Act attempted to 'systematize' racial classification as the basis for the apartheid system. Compulsory classification and inevitable imprecision on the borderlines between 'groups', as defined in the statutes, the Reservation of Separate Amenities Act and the Group Areas Act, facilitated far-reaching race-segregation measures in almost every walk of life. A series of acts of parliament created the detailed structures and mechanisms which both excluded Africans from the urban areas and attempted to channel their political and economic needs to the 'homelands'.[46]

It must certainly also be remembered that the 'security laws' of the 1950s and 1960s often removed all rights of a detained or arrested person, and that these laws were most often used against Blacks. As a result, the statute law of the Republic of South Africa very deliberately and consistently created inequality on the basis of an often

[43] Robertson (Above note 22) at 56.
[44] Act 27 of 1913.
[45] Act 18 of 1936.
[46] Robertson (Above note 22) at 57.

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vague and sometimes arbitrary classification by 'race group'. Poor socio-economic conditions worsened this legislative inequality: the position of Blacks as workers, peasants, or the unemployed was such that, for all practical purposes, the legal process was unavailable to them as a remedy. To make matters worse, most Blacks who found themselves before a court experienced a legal process which was alien and intimidating to them. As regards Blacks in particular, their customary laws were largely disregarded, and many of them had to rely for their understanding of the proceedings on the court interpreter, as they were unfamiliar with both official languages, let alone the peculiar language which all lawyers seem to use.[47]

As far as law enforcement was concerned, the 'protection of the law' in Article 7 of the Universal Declaration of Human Rights was hardly implemented. Policing in Black areas concentrated more on trapping offenders against apartheid regulations than on ordinary crime prevention and investigation. Judicial officers, whether in the supreme or magistrates' courts, showed very little understanding of the harsh injustice of the laws which they enforced.[48]

Although right to equality was not given the desired protection before democracy in the Republic of South Africa, as far back as 1955, the 'Congress of the People' meeting near Johannesburg adopted the **Freedom Charter** which explicitly stipulates that: All people shall be equal before the law ... All laws which discriminate on grounds of race, colour or belief shall be repealed. The preaching and practice of national, race or colour discrimination and contempt shall be a punishable crime. The Freedom Charter, adopted

[47]Robertson (Above note 6) at 58.
[48]Ibid at 58-59.

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in 1955 by the Congress of the People at Kliptown near Johannesburg, was the first systematic statement in the history of South Africa of the political and constitutional vision of a free, democratic and non-racial South Africa.[49]

In 1988, the participants in the Congress of the African National Congress (ANC) issued the Constitutional Guidelines, which state that:

> "There shall be equal rights for all individuals, irrespective of race, colour, sex or creed. ... The constitution shall include a Bill of Rights based on the Freedom Charter. Such a Bill of Rights shall guarantee the fundamental human rights of all citizens. ... The state and all social institutions shall be under a constitutional duty to take active steps to eradicate speedily, the economic and social inequalities produced by racial discrimination. The advocacy or practice of racism, fascism, nazism or the incitement of ethnic or regional exclusiveness shall be outlawed".[50]

On account of polices based on racism, successive governments in South Africa did not give a pride of place to the right to equality. Discrimination was the order of the day. Even at the time when South Africa became a Republic, the right to equality was not upheld because of the policy of apartheid. In terms of the principle of legislative supremacy, Parliament was supreme and could pass any legislation that it wanted even if such policy sanctioned discrimination. According to Boulle[51], the principle of legislative supremacy entails that there are no geographical or functional areas from

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[49]Robertson (Above note 6) at 223.
[50]Ibid at 59.
[51] Boulle, L.J. (1984). **South Africa and the Consociational Option, A constitutional Analysis**, at 7.

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which parliamentary authority is barred. The corollary of legislative supremacy is the fact that the courts have no testing right over legislation.

2.6. RIGHT TO EQUALITY IN SOUTH AFRICA FROM 1994

The right to equality since democracy in South Africa is stipulated in the constitutions that the country adopted as well as in legislation. The right to equality therefore has constitutional and legal (statutory) foundations in democratic South Africa.

2.6.1. Constitutional Foundations of the Right to Equality

2.6.1.1. Right to Equality under the Constitution of the Republic of South Africa (Act 200, 1993)

In 1994, South Africa became a democratic state in terms of the Constitution of the Republic of South Africa[52] (Act 200, 1993) which was also known as the interim Constitution. The interim Constitution was adopted to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms.

Section 8 of the interim Constitution of South Africa protected the right to equality. It is essential to lay down the provisions of the aforesaid section and subsequently provide an analysis thereof. Section 8 of the interim Constitution of South Africa protected the right to equality in the following terms:

[52] Act 200 of 1993.

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8 (1) Every person shall have the right to equality before the law and to equal protection of the law.

8 (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

8 (3) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms. Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.

- 8 (4) *Prima facie* proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.

When analyzing the content of section 8 of the interim Constitution of South Africa, the following key points emerge:

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- The interim Constitution upheld the right to equality and prohibited unfair discrimination; and
- The interim Constitution allowed discrimination only in so far as such discrimination was fair e.g. the use of affirmative action for the benefit of those who were previously disadvantaged.

2.6.1.2. Right to Equality under the 1996 Constitution of the Republic of South Africa

The interim Constitution of South Africa was finally replaced with the current Constitution of the Republic of South Africa (Act 108. 1996). The current Constitution was drafted in terms of Chapter 5 of the interim Constitution (Act 200 of 1993) and was first adopted by the Constitutional Assembly on 8 May 1996. In terms of a judgment of the Constitutional Court, delivered on 6 September 1996, the text was referred back to the Constitutional Assembly for reconsideration. The text was accordingly amended to comply with the Constitutional Principles contained in Schedule 4 of the interim Constitution. The interim Constitution was signed into law on 10 December 1996. The paramount objective in this process was mainly to ensure that the final Constitution is legitimate, credible and accepted by all South Africans.[53]

To this extent, the process of drafting the Constitution involved many South Africans in the largest public participation programme ever carried out in South Africa. After nearly two years of intensive consultations, political parties represented in the

[53] www.acts.co.za/constitution/constitution.

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Constitutional Assembly negotiated the formulations contained in this text, which are an integration of ideas from ordinary citizens, civil society and political parties represented in and outside of the Constitutional Assembly. This Constitution therefore represents the collective wisdom of the South African people and has been arrived at by general agreement.[54]

The current Constitution of South Africa recognizes the right to equality since according to its preamble every citizen is equally protected by law. The preamble of the Constitution is in essence of the manifesto of South Africa as a democratic state and is an important internal secondary rule that can be used to interpret the Constitution itself. The preamble of the Constitution provides, *inter alia*, that the people of the Republic of South Africa adopted it in order to 'lay the foundations for a democratic and open society in which government is based on the will of the people ... and ... every citizen is **equally protected by law.**'[55].

The current Constitution of South Africa further recognizes the right to equality in terms of section 9 thereof other than in terms of the content of its preamble. Section 9 protects the right to equality which includes the prohibition of discrimination in the following terms:

9 (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

[54] Ibid.
[55] Ibid.

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9 (2) Equality includes the full and equal enjoyment of all rights and freedoms. Topromote 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.

9 (3) The state may not unfairly discriminate directly or indirectly against anyoneon one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

9 (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

9 (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

The content of section 9 of the Constitution as presented above reveals that South Africa is committed to the course of ensuring equality of all people living therein save in those circumstances wherein discrimination may be justified e.g. the adoption of affirmative action to empower the majority of Black people in order to redress the imbalances that were created by the *apartheid* policy (policy of systematic racial discrimination).

2.6.2. Legislative Foundations of the Right to Equality in South Africa

In order to give effect to the right to equality, section 9(4) of the current Constitution demands that the parliament of the Republic of South Africa must enact national

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legislation to prevent or prohibit unfair discrimination. The parliament has complied with the constitutional directive by passing the Promotion of Equality and Prevention of Unfair Discrimination Act (Act 4, 2000).[56]

Section 7 of the Promotion of Equality and Prevention of Unfair Discrimination Act (Act 4, 2000) promotes equality by prohibiting unfair discrimination on ground of race. It prohibits the following forms of unfair discrimination on ground of race:

(a) The dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of any person, including incitement to, or participation in, any form of racial violence;

(b) The engagement in any activity which is intended to promote, or has the effect of promoting, exclusivity, based on race;

(c) the exclusion of persons of a particular race group under any rule or practice that appears to be legitimate but which is actually aimed at maintaining exclusive control by a particular race group;

(d the provision or continued provision of inferior services to any racial group, compared to those of another racial group; and

(e) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons.[57]

[56]Act 4, 2000.
[57]Above note 34.

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Section 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act (Act 4, 2000) promotes equality by prohibiting unfair discrimination on ground of gender. It prohibits the following forms of unfair discrimination on ground of gender:

(a gender-based violence;

(b) female genital mutilation;

(c) the system of preventing women from inheriting family property;

(d) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child;

(e) any policy or conduct that unfairly limits access of women to land rights, finance, and other resources;

(f) discrimination on the ground of pregnancy;

(g) limiting women's access to social services or benefits, such as health, education and social security;

(h) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons; and

(i) systemic inequality of access to opportunities by women as a result of the sexual division of labour.

Section 9 of the Promotion of Equality and Prevention of Unfair Discrimination Act (Act 4, 2000) promotes equality by prohibiting unfair discrimination on ground of disability. It prohibits the following forms of unfair discrimination on ground of disability:

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(a denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society;

(b) contravening the code of practice or regulations of the South African Bureau of Standards that govern environmental accessibility;

(c) failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons.[58]

The Promotion of Equality and Prevention of Unfair Discrimination Act (Act 4, 2000) also imposes a general duty and responsibility on the State and all persons to promote equality (section 24). Section 25(1) of the Act stipulates that the State must, where necessary with the assistance of the relevant constitutional institutions—

(a) develop awareness of fundamental rights in order to promote a climate of understanding, mutual respect and equality;

(b take measures to develop and implement programmes in order to promote equality; and

(c) where necessary or appropriate:

(i) develop action plans to address any unfair discrimination, hate speech or harassment;

(ii) enact further legislation that seeks to promote equality and to establish a legislative framework in line with the objectives of this Act;

[58]Above note 34.

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(iii) develop codes of practice as contemplated in this Act in order to promote equality, and develop guidelines, including codes in respect of reasonable accommodation;

(iv) provide assistance, advice and training on issues of equality;

(v) develop appropriate internal mechanisms to deal with complaints of unfair discrimination, hate speech or harassment; and

(vi) conduct information campaigns to popularize this Act.[59]

Section 25(2) of the Promotion of Equality and Prevention of Unfair Discrimination Act (Act 4, 2000) stipulates that the South African Human Rights Commission and other relevant constitutional institutions may, in addition to any other obligation, in terms of the Constitution or any law, request any other component falling within the definition of the State or any person to supply information on any measures relating to the achievement of equality including, where appropriate, on legislative and executive action and compliance with legislation, codes of practice and programmes. Section 25(3) of the Act stipulates that in addition to the powers and functions of the constitutional institutions these institutions are also competent to:

(a) assist complainants in instituting proceedings in an equality court, particularly complainants who are disadvantaged;

(b) conduct investigations into cases and make recommendations as directed by the court regarding persistent contraventions of this Act or cases of unfair

[5959] Above note 34.

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discrimination, hate speech or harassment referred to them by an equality court; and

(c request from the Department, in the prescribed manner, regular reports regarding the number of cases and the nature and outcome thereof.[60]

The Promotion of Equality and Prevention of Unfair Discrimination Act (Act 4, 2000) has a schedule with an illustrative list of what constitutes unfair practices in certain sectors. The illustrative list of what constitutes unfair practices in certain sectors can be presented as follows:

- **Labour and employment sector:** Creating artificial barriers to equal access to employment opportunities by using certain recruitment and selection procedures; Applying human resource utilisation, development, promotion and retention practices which unfairly discriminate against persons from groups identified by the prohibited grounds; Failing to respect the principle of equal pay for equal work; and Perpetuating disproportionate income differentials deriving from past unfair discrimination.
- **Education sector:** Unfairly excluding learners from educational institutions, including learners with special needs; Unfairly withholding scholarships, bursaries, or any other form of assistance from learners of particular groups identified by the prohibited grounds; and the failure to reasonably and practicably accommodate diversity in education.
- **Health care sector:** Subjecting persons to medical experiments without their informed consent; Unfairly denying or refusing any person access to health

[6060] Above note 34.

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care facilities or failing to make health care facilities accessible to any person; Refusing to provide emergency medical treatment to persons of particular groups identified by one or more of the prohibited grounds; and Refusing to provide reasonable health services to the elderly.

- **Housing, accommodation, land and property:** Arbitrary eviction of persons on one or more of the prohibited grounds; Red-lining on the grounds of race and social status; Unfair discrimination in the provision of housing bonds, loans or financial assistance on the basis of race, gender or other prohibited grounds; and Failing to reasonably accommodate the special needs of the elderly.
- **Insurance services sector:** Unfairly refusing on one or more of the prohibited grounds to provide or to make available an insurance policy to any person; Unfair discrimination in the provision of benefits, facilities and services related to insurance; Unfairly disadvantaging a person or persons, including unfairly and unreasonably refusing to grant services, to persons solely on the basis of HIV/AIDS status.
- **Pensions sector:** Unfairly excluding any person from membership of a retirement fund or from receiving any benefits from the fund on one or more of the prohibited grounds; and Unfairly discriminating against members or beneficiaries of a retirement fund.
- **Partnerships sector:** Determining in an unfair discriminatory manner who should be invited to become a partner in the partnership in

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question; and Imposing unfair and discriminatory terms or conditions under which a person is invited or admitted to become a partner.

- **Professions and bodies:** Imposing conditions that unfairly limit or deny entry into the profession of persons from historically disadvantaged groups; and unfairly limiting or denying members access to benefits or facilities on the basis of a prohibited ground.
- **Provision of goods, services and facilities:** Unfairly refusing or failing to provide the goods or services or to make the facilities available to any person or group of persons on one or more of the prohibited grounds; Imposing terms, conditions or practices that perpetuate the consequences of past unfair discrimination or exclusion regarding access to financial resources; and Unfairly limiting access to contractual opportunities for supplying goods and services.
- **Clubs, sport and associations:** Unfairly refusing to consider a person's application for membership of the association or club on any of the prohibited grounds; Unfairly denying a member access to or limiting a member's access to any benefit provided by the association or club; and Failure to promote diversity in selection of representative teams.[61]

2.6.3. Limitations on the Right to Equality in Democratic South Africa

The right to equality as contained in the Constitution of the Republic of South Africa (Act 108, 1996) is not absolute and therefore can be limited. Section 36 of the

[61]Above note 34.

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Constitution of the Republic of South Africa (Act 108, 1996) provides for the limitation of rights and it can be limited and it can be quoted as follows:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
> *(a)* the nature of the right;
> *(b)* the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> *(e)* less restrictive means to achieve the purpose.
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights".[62]

2.7. SUMMARY

The literature that was reviewed in this chapter has dealt with the key issues regarding the right to equality under different legal contexts. It revealed the extent to which the right to equality is protected in the context of international law, the African legal framework, and the South Africa legal system.

[62]Section 36.**The Constitution of the Republic of South Africa**, 1996.

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CHAPTER 3

PRINCIPLES OF CUSTOMARY LAW AND LEGISLATION THAT CONFLICT WITH THE RIGHT TO EQUALITY UNDER THE SOUTH AFRICAN CONSTITUTION

3.1. INTRODUCTION

The present chapter encapsulates a discussion on principles of the customary law and legislation that conflict with the right to equality as enshrined in the Bill of Rights of the South African Constitution.

3.2. CUSTOMARY LAW PRINCIPLES THAT CONFLICT WITH THE RIGHT TO EQUALITY

There are situations that, *prima facie*, appear to be revealing a conflict between a principle of the customary law and the right to equality as enshrined in the Bill of Rights of the Constitution. The practical example of the conflict is the customary law rule of male primogeniture. The rule of primogeniture applies to the customary law of succession.

The main features of the primogeniture are:

- Only a male who is related to the deceased qualifies as intestate heir;
- Women do not participate in the intestate succession of deceased estates;
- The male heir does not merely succeed to the assets of the deceased since succession is not primarily concerned with the distribution of the estate of the deceased, but with the preservation and perpetuation of the family unit;
- Property is collectively owned and the family head, who is the nominal owner of the property, administers it for the benefit of the family unit as a whole. The

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heir therefore steps into the shoes of the family head and acquires all the rights and becomes subject to all the obligations of the family head;

- The members of the family under the guardianship of the deceased fall under the guardianship of his heir. The heir, in turn, acquires the duty to maintain and support all the members of the family who are assured of his protection and enjoy the benefit of the heir's maintenance and support; and

- The heir inherits the property of the deceased only in the sense that he assumes control and administration of the property subject to his rights and obligations as head of the family unit. The rules of the customary law of succession are consequently mainly concerned with the succession to the position and status of the deceased family head rather than the distribution of his personal assets.[63]

Bekker[64] outlines the order of succession under customary law which is prescribed by the rule of primogeniture in the case of a deceased family head leaving one wife and only legitimate children as follows:

i. The heir of the family head is his eldest son;

ii. When the eldest son has predeceased the family head leaving no male issue, the second son is the heir; and if he, too, has predeceased the family without leaving male issue, the third son is the heir; and so on through all the sons of the family head;

[63] **Shibi v Sithole and Others** CCT 50/03 [2004] ZACC 18 at paras 76-77.
[64] Bekker, J.C. (1989). **Seymour's Customary Law in Southern Africa, Fifth Edition** at 274-275.

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iii. If the son, who, had he lived, would have been the heir under paragraph (ii), predeceased the family head leaving male issue, the eldest living of such issue is the heir; provided that if any such grandson predeceases the family head leaving male issue, such issue takes precedence over a young grandson and his issue. This simple rule of primogeniture may possibly be expressed more intelligibly by saying that if any male, who but for his death would have succeeded to the family head, leaves male issue or their descendants, then such issue or their descendants, in order of primogeniture, are preferred to any other male relative of the family head;

iv. When the family head has died without male issue, or has outlived all his sons and their male descendants, his father succeeds;

v. When the family head's father has predeceased him, the eldest brother of the family head, or one of his descendants, succeeds upon the principle stated in paragraph (iii);

vi. Upon failure of the eldest brother or his descendants, the next brother and his descendents are then exhausted, and so on through all the brothers of the family head and their descendents;

vii. In default of any of the above, the family head's grandfather is the heir.

viii. If the family head's grandfather has predeceased him, one of the family head's father's brothers (that is, one of the family head's paternal uncles) or one of the male descendants of one of them, takes in order of priority as shown in paragraphs (iii), (v) and (vi), is the heir;

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ix. Failing the paternal grandfather or his sons or their descendants, the great-grandfather and his sons and their descendants must be looked to in the same order of preference; and

x. And so on until all the known male relatives of the family head have been exhausted, in which case the inheritance devolves upon the paramount Chief of the family head's tribe, who assumes the office of guardian of the female wards of the deceased.

Bennett[65] outlines the order of succession under customary law which is prescribed by the rule of primogeniture in the case of a deceased family heads who had polygamous households as follows:

- In polygamous households, each wife establishes a separate house when she married, and the rule of succession in the case of a deceased family head leaving one wife is modified to take into account the interests of the different houses;
- A system of polygamy has been classified as simple or complex. According to the simple system, the heir is the oldest son of the first married wife, or, if he is already dead, his eldest son. If he has no male descendants, the first wife's second son is heir, or, failing him, his son. Failing any sons or their male descendants in the first house, the next in order of succession is the eldest son of the second married wife and his male descendants, and so on;

[65] Bennett, T.W. (1995) **Human Rights and African Customary Law**, at 338-341.

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- With the Pedi people, the ranking of the houses depends on time of marriage. The first wife is the senior wife; the second is subordinate to her, and so on. The eldest son of the first wife succeeds to the status of the deceased, together with the property in the great house and any unallocated family property. The oldest son in each of the other houses inherited the livestock in the house. Conversely, if the great house has no heir, it is inherited by the eldest son of the next senior house, and so on. A principle of ultimogeniture is also a player here: the youngest son of each house inherits domestic items in the house;
- Under Tswana law, the order of houses is also determined by the date of marriage, and the rules of succession are similar to those of the Pedi people. The eldest son of the first wife is the general heir. He in fact inherits all the property in the house and any other unallocated family property. Otherwise, the eldest son of each house is heir to that house;
- In Lesotho, the order of the house is established by the time at which the marriage took place. The eldest son of the first wife succeeds to the status of the deceased. He inherits both the family property and the senior house. Thereafter, the eldest son in each house inherits house property;
- Under Venda law, the wives are ranked as follows. The senior wife is the woman for whom the deceased's father paid lobola, and, in the normal courses of events, she would be the deceased's first wife. The second, and junior, wife would be a maternal uncle's daughter, i.e., a cross-cousin. The third wife would be the woman for whom *lobola*(dowry)was paid from the

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lobola received for the daughter of the first wife. From then on, rank is decided according to the times of marriage. The order of succession is much the same as with the Pedi and Tswana people since the eldest son of the first wife is senior heir, and the eldest son of each house inherits the property in that house;

- With Xhosa people, a homestead is generally divided into two sections: a great and right-hand side. If there are only two wives, and therefore two houses, the eldest son of each becomes heir to that house. But, if one house has no male issue, the eldest son of the other inherits both. If the head of the family married a third wife, she would be affiliated (as *qadi* or support) to the greater house. The fourth wife would at all material time be attached to the right-hand house, the fifth wife to the great house, and so on. While the houses are normally ranked according to the time of the marriage, their position can be varied by a public declaration when the wedding takes place. If one of the houses has no heir, it is inherited by the most senior heir of the section of the homestead to which it was attached. In other words, the heir to a *qadi* of the great house side would be the eldest son of the great house. Conversely, however, if the great house has no heir, it is inherited by the heir of the *qadi*. Where none of the houses in one section of the homestead has any heirs, the most senior heir of the other houses in one section inherits them;

- A Zulu homestead may be divided into three sections: a great house (*indlunkulu*), a right-hand house or support *(qadi)* and a left-hand house (*inkhohlwa*). As with the Xhosa, junior houses are affiliated to one of the senior

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houses, and rank of the houses may be fixed by public declaration at the time of the wedding. The order of succession is as follows: if there are no sons in the *qadi* or any of its affiliation junior houses, recourse is had to the *indlunkulu*, and vice versa. Where the *indlunkulu* and its junior houses have no heir, this section is inherited by the heir of the *indlunkulu*. If there is no heir in either the *indlunkulu* or the *qadi*, the heir of the *inkhohlwa* becomes the heir for both sections;

- The Swazi system of succession allows considerable flexibility in choosing an heir. After the death of a family head, a meeting of the family is convened at which the senior wife is chosen. She then plays a key role in settling the estate, and it is her eldest son who becomes the main heir. If the senior wife produces no heir, the deceased's first born son could be placed in her house. In order of importance, the considerations determining selection of the senior wife are: the woman's descent from the royal family, the mode of her marriage, whether she had the same clan name as the deceased's mother, and (for commoners) the time of marriage. More generally, the woman's character, as well as that of her sons, is taken into account. The other houses are each headed by their own heirs, who inherit the house property; and
- For all systems of customary law, if there are no male descendants in a polygamous household, the order of succession follows the rules outlined above for a monogamous marriage. In other words, succession passes to the deceased's father or, failing him, to the deceased's brother and their descendants in order of seniority.

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As already indicated in the foregoing part of the discussion under this sub-heading, there are situations that, *prima facie*, appear to be revealing a conflict between a principle of the customary law and the right to equality as enshrined in the Bill of Rights of the Constitution. The relevant example is the principle of male primogeniture that is part of the customary law of succession. An empirical investigation to obtain primary data to corroborate or controvert the *prima facie* case of a conflict of the customary law rule of male primogeniture with the right to equality as enshrined in the Bill of Rights of the Constitution., is essential (see chapter four of the study.

3.3. LEGISLATION THAT CONFLICT WITH THE RIGHT TO EQUALITY

3.3.1. REGULATION 30(2) TO THE SOUTH AFRICAN POLICE SERVICE ACT 68 OF 1995

Regulation 30(2) to the South African Police Act[66] is a typical example of a legislative prescript that conflicts with the right to equality as enshrined in the Bill of Rights of the both the 1994 and 1996 Constitution of South Africa. The case of **Langemaat v Minister of Safety and Security and Others**[67] can be discussed to illustrate the conflict between Regulation 30(2) to the South African Police Act (legislation) and the right to equality in Constitution of democratic South Africa. The case had to do with the right of same-sex union couples to support each other and not to be discriminated against on the grounds of their sexual orientation.

In Langemaat's case, the applicant was an adult female member of the South

[66] Act 68 of 1995.
[67] 1998 (3) SA 312 (T).

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African Police Services (SAPS) with a working experience of 15 years and who held the rank of a captain. Since June 1986 the applicant lived together with Beverly Ann Myburgh as lesbians and could not enter into a marriage. Despite this they owned a house, operated joint finances, were financially co-dependent, made joint decisions and have named each other as beneficiaries in their respective policies. It is for this reason that Justice Roux who delivered judgment on the matter concluded that the relationship between the applicant and Miss Myburgh was an abiding and serious one.[68]

The applicant applied to register Miss Myburgh as her dependent under the medical scheme known as POLMED to which she belonged as a member of the SAPS. The chairman of POLMED who is the third respondent refused the applicant's formal request to register Miss Myburgh as a dependent on the following grounds:

- Regulation 30(2) to the South African Police Service Act 68 of 1995 did not include a party to a same sex-union in its definition of a dependent; and also
- Rule 4.2 of those that informed the operation of POLMED did not make provision for partners of same-sex unions in its definition of a dependent.[69]

Averring that the provisions of both Regulation 30(2) and Rule 4.2 referred to above were in conflict with section 9(3) of the Constitution of the Republic of South Africa Act 108 of 1996, the applicant sought an order in the Transvaal Provincial Division to the following effect:

[68] Above note 61.
[69] **Ibid.**

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- Declaring the provisions of both Regulation 30(2) and Rule 4.2 invalid;
- Setting aside the third respondent's decision to refuse the application for the registration of Miss Myburgh as a dependent of the applicant; and
- Directing the third respondent to register Miss Myburg as a dependent of the applicant.[70]

After consideration of the evidence *in toto*, the court per Justice Roux held as follows:

1. That the State had to be held responsible for the creation of POLMED and particularly its rules which, by definition, excluded a great number of persons who were *de facto* dependents of its members: this was discrimination; not only were dependents discriminated against but also members of the SAPS who would have to find financial means elsewhere to pay for medical care of excluded dependants;
2. Further, that parties to a same-sex union that existed for many years in a common home, surely owe a duty of support, in all senses, to each other. This was because even the Roman law sense of equity and decency obliged a man to maintain his freed slaves;
3. That the third respondent's objection based on section 36 of the Constitution (Act 108 of 1996) had to be rejected: there was no merit in the contention that thee would be flood of applications from unmarried persons, whether hetero- or homosexual, to register their mates (partners) as dependants;
4. That applicant had a *prima facie* right to register Miss Myburgh as her dependent; and

[70] Above note 61.

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5. Further that it was the function of the third respondent to decide the issue whether Miss Myburgh should be registered as a dependent and the Court could not make that decision for him. Only after he had made the decision would a Court be entitled to review it and either agree or disagree with him. The court directed the third respondent the applicant's request to register Miss Myburgh as her dependent without the complication of a definition of what a dependent is.[71]

3.3.2. SECTION 20A OF THE SEXUAL OFFENSES ACT 23 OF 1957 AND THE INCLUSION OF SODOMY AS AN ITEM IN SCHEDULE 1 TO THE CRIMINAL PROCEDURE ACT 51 OF 1977

Punishment of the practice of sodomy is discrimination against gays on the grounds of their sexual orientation and it amounts to violation of the current South African Constitution in so far as the right to equality of gays is concerned. The case of **National Coalition for Gay and Lesbian Equality and Another (NCGLE) v Minister of Justice and Others**[72] be discussed to illustrate the conflict between section 20A of the Sexual Offenses Act[73] and schedule 1 of the Criminal Procedure Act[74] with the right to equality in the Constitution.

In the case of the NCGLE, the Witwatersrand High Court had earlier granted an order declaring unconstitutional and invalid (a) the common law offence of sodomy; (b) the common law offense of commission of an unnatural sexual act to the extent that it criminalises acts committed by a man or between men which, if committed by a woman or between women or between a man and a woman, would not constitute

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[71] Above note 61.
[72] 1999 (1) SA 6 CC.
[73] Act 23 of 1957
[74] Act 51 of 1977.

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and offence; (c) Section 20A of the Sexual Offenses Act[75]; (d) the inclusion of sodomy as an item in Schedule 1 to the Criminal Procedure Act[76]; (e) the inclusion of sodomy as an item in a Schedule to the Security Officers Act 92 of 1987. Constitutional Court was called upon to entertain an application for confirmation in terms of section 172(2)(a) of the Constitution[77] of the Republic of South Africa of 1996 of the order of the Witwatersrand High Court in so far as it declared provisions of Acts of Parliament invalid.[78]

The Constitutional Court (per Ackerman J, the other members of the Court concurring) confirmed the order of the Witwatersrand High Court and its judgment unfolded as follows:

1. Held, as to the common law offence of sodomy that although the constitutionality of the common law offence of sodomy was not directly before the Constitutional Court, a finding of constitutional invalidity of the offence was an indispensable and unavoidable step in concluding that the impugned provisions of the Criminal Procedure Act and The Security Officers Act were constitutionally invalid.
2. Held, further, that the criminalisation of sodomy constituted discrimination on the ground of sexual orientation listed in section 9(3) of the Constitution and that it had to be presumed, in terms of section 9(5), that the differentiation constituted unfair discrimination unless it was established that that the discrimination was fair.

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[75] Act 23 of 1957.
[76] Act 51 of 1977.
[77] **Constitution of the Republic of South Africa**, 1996.
[78] Above note 66.

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3. Held, further, that the criminalisation of sodomy infringed the right to dignity enshrined in section 10 of the Constitution.
4. Held, further, that the criminalisation of sodomy infringed the right to privacy in section 14 of the Constitution. The Court stated that privacy recognized that we all have a right to a sphere of private intimacy and autonomy which allowed us to establish and nurture human relationships without interference from the outside community.
5. Held, further, as to whether the limitation of rights could be justified in terms of section 36 of the Constitution, that the criminalisation of sodomy in private between consenting males was a severe limitation of a gay man's right to equality in relation to sexual orientation, because it hit at one of the ways in which gays gave expression to their sexual orientation. It was at the same time a severe limitation of the gay man's right to freedom. The harm caused could and often did affect a gay man's ability to achieve self-identification and self-fulfillment. The harm also radiated out into society generally and gave rise to a wide variety of other discriminations, which collectively unfairly prevented a fair distribution of social goods and services and the award of social opportunities for gays.
6. Held, further, that the limitation of the rights of gays served no valid or legitimate purpose except the enforcement of the private moral views of a section of the community, which were based to a large extent on nothing more than prejudice. There was therefore no justification for the limitation of rights of gays.

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7. Held, further, that an analysis of the jurisprudence of other open and democratic societies based on human dignity, equality and freedom on balance supported the conclusion that the criminalisation of sodomy was unjustifiable.
8. Held, further, that the existence of the common law offence of sodomy was not dictated by the objective of punishing male rape but the perceived need to criminalise a particular form of gay sexual expression.
9. Held, accordingly, that the common law offence of sodomy was inconsistent with the 1996 Constitution of South Africa and invalid.[79]

3.3.3. SECTIONS 17(A), 17(C) AND 20(1) OF THE CHILD CARE ACT 74 OF 1998 AND SECTION 1(2) OF THE GUARDIANSHIP ACT[80]

Legislative restriction or exclusion of same-sex partners in a lesbian relationship to jointly adopt children is discrimination on grounds of sexual orientation and it is an unconstitutional practice that violates the right to equality contained in the Constitution of South Africa. In this regard, the landmark case is that of **Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as *Amicus Curiae*)**.[81]

In Du Toit's case cited above, the applicants being partners in a long-standing lesbian relationship wanted to adopt two children jointly. They could not do so because legislation confined the right to adopt children jointly to married couples. Consequently, the second applicant alone became the adoptive apparent. Some years later the applicants brought an application in the Pretoria High Court challenging the

[79] Above note 66.
[80] Act 192 of 1993
[81] 2003 (2) SA 198 (CC).

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constitutional validity of sections 17(a), 17(c) and 20(1) of the Child Care Act[82] and section 1(2) of the Guardianship Act[83]. The provisions of the two Acts were challenged on the grounds that they violate the applicants' rights to equality and dignity and do not give paramount to the best interest of the child as required by section 28(2) of the Constitution of South Africa.[84] The High Court found per Kgomo J that the provisions of the Child Care Act and the Guardianship Act violated the Constitution and ordered the reading in of certain words into the impugned provisions so as to allow for joint adoption and guardianship of children by same-sex life partners. The applicants proceeded to seek confirmation of the order of the High Court by the Constitutional Court.[85] The Constitutional Court (per Skweyiya AJ with other judges concurring) accordingly confirmed the order of the High Court.[86]

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3.3.4. REGULATIONS AND THE FORMS ANNEXED TO THE CHILDREN'S STATUS ACT 82 OF 1987

Regulations and the forms annexed to the Children's Status Act[87] are examples of legislation that conflicts with the right to equality which is enshrined in the Bill of Rights of the Constitution. This can be discussed with reference to the case of **J & B v Director General: Department of Home Affairs, Minister of Home Affairs and President of the Republic of South Africa**.[88] In this case the two applicants have been partners in a same-sex life partnership. In August 2001 the second applicant gave birth to twins, a girl and a boy. They were conceived by artificial insemination

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[82] Act 74 of 1998.
[83] Act 192 of 1993.
[84] Constitution of the Republic of South Africa, 1996.
[85] Above note 75 at 201.
[86] Ibid at 214-215.
[87] Act 82 of 1987.
[88] CCT 46/02.

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and the male sperm was obtained from an anonymous donor. The female ova were obtained from the first applicant. In order to protect the identity of the twins, the applicants were referred to as "J" and "B" in the case.

Both applicants in the case of **J & B** wished that they be registered and recognized as parents of the twins but regulations and the forms annexed to the Children's Status Act[89] 82 of 1987 made provision for the registration of only one male and one female parent. There was no legal impediment with registration of the second applicant, as the "birth mother". When the first applicant was unsuccessful in her attempt to be registered as a parent of the children, the applicants approached the Durban High Court for an order requiring the first respondent (the Director General in the department of Home Affairs) to issue both of the applicants birth certificates in respect of each of the children and to register their births reflecting the second applicant as their mother and the first applicant as their parent. The High Court granted the order as prayed for and the applicants approached the Constitutional Court for confirmation of it. The Constitutional Court confirmed the order on the reasoning that the regulations mage under the Children's Act were discriminating against parties to a same sex relationship on the basis of their sexual orientation and that such discrimination was unfair and unconstitutional.[90]

3.4. SUMMARY

The discussion in this chapter has given consideration to the key issue of the principles of the customary law and legislation that conflict with the right to equality

[89] Act 82 of 1987
[90] Above note 78 at 2-19.

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as enshrined in the Bill of Rights of the South African Constitution. The rule of male primogeniture was given specific focus as being an example of a customary law principle that, *prima facie*, conflicts with the right to equality as enshrined in the Bill of Rights of the Constitution. An empirical investigation to obtain primary data to corroborate or controvert the *prima facie* case of a conflict of the customary law rule of male primogeniture with the right to equality as enshrined in the Bill of Rights of the Constitution., is essential (see chapter four of the study.

In the discussion of the legislation that conflict with the right to equality as enshrined in the Bill of Rights of the South African Constitution, the following pieces of legislation were given attention:

- Regulation 30(2) to the South African Police Act[91];
- Section 20A of the Sexual Offenses Act[92] and schedule 1 of the Criminal Procedure Act[93]; including
- Sections 17(a), 17(c) and 20(1) of the Child Care Act[94] and section 1(2) of the Guardianship Act[95]; and
- Regulations and the forms annexed to the Children's Status Act.[96]

Judicial precedents on legislation that conflicts with the right to equality as enshrined in the Bill of Rights of the South African Constitution indicate that such legislation is null and void. This is because the judiciary has authority to declare legislation in valid

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[91] Above note 60.
[92] Act 23 of 1957.
[93] Act 51 of 1977.
[94] Act 74 of 1998.
[95] Act 192 of 1993.
[96] Act 82 of 1987.

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that is in conflict with right to equality enshrined in the Bill of Rights of the South African Constitution. Authority for this view is section 2 of the Constitution which stipulates that any law [including legislation] that is inconsistent with it is invalid. An empirical investigation to obtain primary data to corroborate or controvert the findings obtained from a literary study of judicial precedents on legislation that conflicts with the right to equality as enshrined in the Bill of Rights of the South African Constitution, is still before final conclusions can be made. The content of chapter four is of particular importance in this regard.

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CHAPTER 4

DATA PRESENTATION, INTERPRETATION AND DISCUSSION

4.1. INTRODUCTION

The analysis of data consists of examining, categorizing, tabulating, or otherwise combining the evidence to address the initial propositions of the study. Primary data gathered from key informants is displayed by means of Table ABC.

As indicated in chapter one of the study primary data was collected from fifteen key (15) informants who are lawyers to supplement the secondary data that was collected when conducting the study. The aim of the current chapter is to present and analyze the primary dada that was gathered from key informants as displayed by means of Table ABC. The chapter will show how, pursuant the content of Table ABC, each key informants answered the question as to whether there is case law that deals with conflict between the right to equality as enshrined in the South African Constitution and a principle of the customary law and/or legislation applicable in the country. The discussion in the present chapter will also present the content of each case law in the event where a particular key informant provided a citation of case law that confirms his/her view that case law that deals with conflict between the right to equality as enshrined in the South African Constitution and a principle of the customary law and/or legislation applicable in the country.

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4.2. TABLE ABC: VIEWS OF LAWYERS ON WHETHER THERE IS CASE LAW THAT DEALS WITH CONFLICT OF CUSTOMARY LAW AND/OR LEGISLATION APPLICABLE TO SOUTH AFRICA WITH THE RIGHT TO EQUALITY AS ENSHRINED IN THE 1996 CONSTITUTION.

QUESTION: Is there case law that deals with conflict between the right to equality as enshrined in the South African Constitution and a principle of the customary law and/or legislation applicable in the country. Answer **YES OR NO** and if **YES** please provide the citation of the case/s.

LAWYERS
1st Informant. YES. **Mthembu v Letsela and Another** 1998 (2) SA 675 (T) and **Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as *Amicus Curiae*)** 2003 (2) SA 198 (CC).
2nd Informant. YES. **Bhe v Magistrate, Khayelitsha** 2005 (1) BCLR 1 (CC).
3rd Informant. YES. **Hassam v Jacobs NO and Others**2009 (11) BCLR 1148 (CC).
4th Informant. YES. **Bhe v Magistrate, Khayelitsha** 2005 (1) SA 580 (CC).
5th Informant. YES.**Shilubana and Others v Nwamitwa** 2005 (1) SA 580 (CC).
6th Respondent. YES. **Bhe v Magistrate, Khayelitsha** 2005 (1) SA 580 (CC) and **Mthembu v Letsela and Another** 1998 (2) SA 675 (T)
7thInformant. YES.**Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as *Amicus Curiae*)** 2003 (2) SA 198 (CC).
8th Informant. YES.**Shilubana and Others v Nwamitwa** (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC).
9th Informant. YES.**Shibi v Sithole and Others** (CCT 50/03, CCT 69/03, CCT 49/03) [2004] ZACC 18; 2005 (1) SA 580 (CC).
10th Informant. YES. **Hassam v Jacobs NO and Others** 2009 (11) BCLR 1148 (CC).
11th Informant. YES. **Satchwell v President of the Republic of South Africa and Another** 2003 (4) SA 266 (CC) and **Bhe v Magistrate, Khayelitsha** 2005 (1) SA 580 (CC).
12th Informant. YES. **Bhe v Magistrate, Khayelitsha** 2005 (1) SA 580 (CC) and **Nkabinde v SA Motor & General Insurance Co Ltd** 1961 (1) SA 302 (N).
13th Informant. YES. **Shibi v Sithole and Others** (CCT 50/03, CCT 69/03, CCT 49/03) [2004] ZACC 18; 2005 (1) SA 580 (CC).
14th Informant. YES. **Shilubana and Others v Nwamitwa** 2005 (1) SA 580 (CC) and **Satchwell v President of the Republic of South Africa and Another** CCT 45/0.
15th Informant. YES. **Shibi v Sithole and Others** (CCT 50/03, CCT 69/03, CCT 49/03) [2004] ZACC 18; 2005 (1) SA 580 (CC).

Total Affirmative Answers	FREQUENCY	PERCENTAGE
15	15	100%
Total Negative Answers	**FREQUENCY**	**PERCENTAGE**
0	0	0%

4.3. INTERPRETATION OF DATA

The data as displayed in Tables ABC must be interpreted to show its implications and meaning. Table ABC displays the responses of key informants to the question whether there is case law that deals with conflict of customary law or legislation applicable in South Africa with the right t equality as enshrined in the 1996 Constitution of the country. The key informants were require to give the citation of relevant cases whenever they were of the view that there is case law tha deals with the conflict as aforesaid.

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Data as displayed in Table ABC clearly shows that all key informants were of the view that there is case law that deals with conflict of customary law and/or legislation applicable in South Africa with the right to equality as enshrined in the Constitution of the country. This means that 100% of the k informants were of the view that case law is available that deals with the conflict as aforesaid. This also means that the key informants did not speculate or just rely on their own views in stating that there is case law that deals with conflict of customary law and/or legislation with the right to equali as enshrined in the Bill of Rights of the Constitution of the country. This is due to the fact that all ke informants provided the citation of case law to be consulted to confirm their assertions.

In terms of data under Table ABC, the key informants cited the following judicial precedents to substantiate their views that case law is available that deals with conflict of customary law and/or legislation with the right to equality as enshrined in the Bill of Rights of the Constitution.

- **Bhe v Magistrate, Khayelitsha**[97];
- **Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)**[98];
- **Hassam v Jacobs NO and Others**[99];
- **Mthembu v Letsela and Another**[100];
- **Satchwell v President of the Republic of South Africa and Another**[101];
- **Shibi v Sithole and Others**[102]; and

[97] 2005 (1) BCLR 1 (CC).

[98] 2003 (2) SA 675 (CC).
[99] 2009 (11) BCLR 1148 (CC).

[100] 1998 (2) SA 675 (T).
[101] 2003 (4) SA 266 (CC).
[102] CCT 50/03, CCT 69/03, CCT 49/03[2004] ZACC 18.

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- **Shilubana and Others v Nwamitwa.**[103]

4.4. DISCUSSION OF THE FINDINGS (DATA)

The facts of each case and the legal questions in the case law cited under Tables ABC must be carefully analyzed and discussed to determine whether indeed they represent judicial precedents that deal with conflict between customary law and/or legislation applicable in South Africa and the right to equality as enshrined in the 1996 Constitution of the country. The decisions of the courts in each case and the reasons for judgments will be reserved to inform the conclusions to be made in the final chapter of the study.

4.4.1. Case law on Conflict between Customary Law and Legislation with the Right to Equality in the 1996 Constitution of South Africa

Upon analyzing the cases cited by the key informants under Table ABC, it became clear to the researcher that case law is indeed available that deals with conflict between customary law and legislation applicable in South Africa with the right to equality as enshrined in the 1996 Constitution. The relevant cases in this regard are the following:

- **Bhe v Magistrate, Khayelitsha**[104];
- **Shilubana and Others v Nwamitwa**[105]; and
- **Shibi v Sithole and Others**[106].

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[103] 2005 (1) SA 580 (CC).
[104] 2005 (1) SA 580 (CC).
[105] CCT 03/07) [2008] ZACC 9.
[106] CCT 50/03, CCT 69/03, [2004] 2005 (1) SA 580 (CC).

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The above list of cases supplements that of case law discussed under chapter three (3) of the study.

The first key informant under Table ABC in this chapter cited the case of **Mthembu v Letsela and Another**[107] as one that deals with conflict between customary law applicable in South Africa with the right to equality as enshrined in the 1996 Constitution. The case indeed deals with an alleged conflict between customary law and legislation applicable in South Africa with the right to equality, but not with the right to equality in the context of the 1996 Constitution. It is therefore important to discuss the issues involved in this case before considering the others that are listed above.

Mthembu's case involved a challenge to the constitutional validity of the customary law rule of primogeniture and of section 23 of the Black Administration Act[108]. The appellants brought an application in the High Court for an order, declaring the customary law rule of primogeniture and regulation 2(e) of the Black Administration Act[109] to be invalid on the grounds that they gratuitously discriminate against women, children who are not the eldest and extra-marital children in a manner that offends the equality guarantee under section 8 of the interim Constitution. The High Court dismissed the application, holding that neither the rule nor the regulation was inconsistent with the equality protection under the interim Constitution. On appeal, the Supreme Court of Appeal was invited to set aside the order of the High Court and to develop, as required by section 35(3) of the interim Constitution, the rule of

[107] 1998 (2) SA 675 (T).
[108] Act 38, 1927.
[109] Op. cit.

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primogeniture in order to allow all descendants to participate in intestacy. The Supreme Court of Appeal declined to decide the constitutional challenge or to develop the rule on the ground that the interim Constitution does not operate retroactively. It reasoned that the rights of the heir in the estate had vested on the death of the deceased, which was on 13 August 1993 and before the interim Constitution took effect[110].

4.4.1.1. Cases of Bhe v Magistrate, Khayelitsha[111] and Shibi v Sithole and Others[112]

As in Mthembus' case discussed above, the cases of **Bhe** and **Shibi** also dealt with conflict between customary law and legislation applicable in South Africa with the right to equality as enshrined in the 1996 Constitution. This means that the key informants are vindicated in their views which they have expressed under Table ABC

that case law exists that is dealing the conflict as aforesaid. This because, in the Constitutional Court judgment[113] delivered by Deputy Chief Justice Langa, the applicants in both cases of Bhe and Shibi launched an attack on section 23 of the Black Administration Act[114] and the customary law of succession rule of primogeniture on the basis that they were unconstitutional since they violate, *inter alia*, the right to equality by promoting discrimination.

In both cases of **Bhe** and **Shibi**, the basis of the constitutional challenge to the official customary law of succession is that the rule of primogeniture precludes:

- Widows from inheriting as the intestate heirs of their late husbands;

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[110] **Shibi v Sithole and Others** CCT 50/03 at para 119.
[111] 2005 (1) SA 580 (CC).
[112] **CCT 50/03, CCT 69/03, [2004] 2005 (1) SA 580 (CC)**

[113] **Shibi v Sithole and Others** CCT 50/03 [2004] ZACC 18 at paras 3 and 74.
[114] **Act 38 of 1927**.

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- Daughters from inheriting from their parents;
- Younger sons from inheriting from their parents; and
- Extra-marital children from inheriting from their fathers. It was contended that these exclusions constitute unfair discrimination on the basis of gender and birth and are part of a scheme underpinned by male domination[115].

The **facts;** the **issues** (legal questions); **decisions** of the courts and their **reasons for judgment** (*ratio decidendi*) in the case of **Bhe** were as follows:

- Ms Bhe sought an order from the Constitutional Court to have her two minor daughters, Nonkululeko Bhe and Anelisa Bhe, declared as being the sole heirs of the deceased estate of their father, Vuyo Elius Mgolombane. The estate was registered at Khayelitsha Magistrates' Court under reference no 7/1/2-484/2002;
- From 1990 the deceased, Vuyo Elius Mgolombane, had a relationship with Ms Bhe and they lived together. He was a carpenter and she a domestic worker. They were poor and lived in a temporary informal shelter in Khayelitsha, Cape Town. The deceased subsequently obtained state housing subsidies which he used to purchase the property on which they lived as well as building materials in order to build a house. He however died before the house could be built. Until his death, the youngest of the two minor children lived with him and Ms Bhe in the temporary informal shelter. Nonkululeko was staying temporarily at the home of the deceased's father. The deceased supported Ms Bhe and the two children and they were dependent on him. The estate comprised the

[115] **Shibi v Sithole and Others** CCT 50/03 [2004] ZACC 18 at para 88.

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temporary informal shelter and the property on which it stood, and miscellaneous items of movable property that Ms Bhe and the deceased had acquired jointly over the years, including building materials for the house they intended to build;

- After the death of the deceased, his father was appointed representative and sole heir of the deceased estate by the Magistrate in accordance with section 23 of the Act[116] and its regulations. In the meantime, the relationship between Ms Bhe and the father of the deceased deteriorated to the point of acrimony after the death of the deceased;

- The father of deceased was so appointed because, on the one hand, under the system of intestate succession flowing from provisions of section 23 and the regulations, in particular regulation 2(e) of the Act, the two minor children of the deceased did not qualify to be the heirs in the intestate estate of their deceased father. On the other hand, the two minor children did not qualify to be the heirs in the intestate estate of their deceased father because of the rule of primogeniture[117]. This state of affairs prompted Ms Bhe to launch an attack on the section 23 of the Act and its related regulations as well as the rule of primogeniture;

[116] **Black Administration Act** 38 of 1927.
[117] **Shibi v Sithole and Others** CCT 50/03 [2004] ZACC 18 at para

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- The Constitutional Court declared Section 23 of the Black Administration Act[118] (the Act) to be inconsistent with the Constitution and invalid. The rule of male primogeniture as it applies in customary law to the inheritance of property was also declared to be inconsistent with the Constitution and invalid to the extent that it excludes or hinders women and extra-marital children from inheriting property. As a result, the Constitutional Court's order declared Nonkululeko Bhe and Anelisa Bhe as being the sole heirs of the deceased estate of their late father, Vuyo Elius Mgolombane.[119]

  - The Constitutional Court declared Section 23 of the Act invalid because it was specifically crafted to fit in with notions of separation and exclusion of Africans from the people of "European" descent. Proponents of the policy of apartheid were able, with comparative ease, to build on the provisions of the Act and to perfect a system of racial division and oppression that caused untold suffering to millions of South Africans;

  - Construed in the light of its history and context, section 23 of the Act and its regulations are manifestly discriminatory and in breach of section 9(3) of the Constitution. The discrimination they perpetuate touches a raw nerve in most South Africans. It is a relic of the racist and painful past; and

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[118] Act 38 of 1927.
[119] **Shibi v Sithole and Others** CCT 50/03 [2004] ZACC 18 at paras 2-4.

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- The serious violation by the provisions of section 23 of the rights to **equality** and human dignity cannot be justified in the new constitutional order. Section 23 must accordingly be struck down.[120]

The rule of male primogeniture as it applies in customary law to the inheritance of property was also declared to be inconsistent with the Constitution and invalid in the cases of **Bhe** because:

- The rule of male primogeniture by its exclusion of women from inheritance on the grounds of gender is a clear violation of section 9(3) of the Constitution. It is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order. The principle also violates the right of women to human dignity;

- The rule of male primogeniture, to the extent that it prevents all female children and significantly curtails the rights of male extra-marital children from inheriting, discriminates against them too. In denying female and extra-marital children the ability and the opportunity to inherit from their deceased fathers, the application of the principle of primogeniture is also in violation of section 9(3) of the Constitution; and

[120]Ibid. at paras 61, 64 and 73.

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- The primogeniture rule as applied to the customary law of succession cannot be reconciled with the current notions of **equality** and human dignity as contained in the Bill of Rights.[121]

The **facts;** the **issues** (legal questions); **decisions** of the courts and their **reasons for judgment** (*ratio decidendi*) in the case of **Shibi** were as follows:

- Ms Shibi Charlotte sought an order from the Constitutional Court for confirmation of the order of the Pretoria High Court which declared her the sole heir of her brother's deceased estate;

- The applicant's brother, Daniel Solomon Sithole (the deceased), died intestate in Pretoria in 1995. The deceased was not married nor was he a partner to a customary union. He had no children and, when he died, was not survived by a parent or grandparent. His nearest male relatives were his two cousins Mantabeni Sithole and Jerry Sithole, the first and second respondents respectively;

- Since the deceased was an African, his intestate estate fell to be administered under the provisions of section 23(10) of the Act[122]. The Magistrate of Wonderboom then decided to institute an inquiry in terms of the provisions of regulation 3(2) in order to determine the person or persons entitled to succeed to the property of the deceased. She did not complete the inquiry, however, deciding to await the conclusion of a case which was then before the Pretoria High

[121] **Shibi v Sithole and Others** CCT 50/03 [2004] ZACC 18 at para 105.
[122][122] Black Administration Act 38 of 1927.

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Court and which was later reported as *Mthembu v Letsela and Another*. This High Court case concerned a challenge to the constitutional validity of the customary law rule of primogeniture and of section 23 of the Act as already discussed;

- When the application in *Mthembu's case* was dismissed by the High Court, however, the Magistrate abandoned the inquiry and, without further notice to Ms Shibi, appointed MantabeniSithole as representative of the deceased estate;

- The appointment of Mr Sithole was not a happy one. There were complaints by his relatives, including his mother, that he was misappropriating the estate funds. The appointment was withdrawn by the Magistrate who then appointed an attorney, Mr Nkuna, to administer the estate and to distribute the assets according to customary law. In terms of the liquidation and distribution account the remaining asset in the deceased estate, an amount of R11,468.02, was awarded to Mr Jerry Sithole, the second respondent, as the only heir to the estate. The estate was wound up and finalised and Mr Nkuna was duly discharged as its representative;

- In terms of the system flowing from the provisions of section 23 of the Act and the regulations framed under it, in particular regulation 2(e), the estate of the deceased fell to be distributed according to custom. Ms Shibi was, in terms of that system (primogeniture), precluded from being the heir to the intestate estate of her deceased brother;

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- In the High Court Ms Shibi challenged the decision of the Magistrate and the manner in which the estate had been administered. She sought an order declaring her to be the sole heir in the estate of the deceased. She also claimed damages and other related relief against the first and second respondents as well as against the Minister; and

- The High Court set aside the decision of the Magistrate and declared Ms Shibi to be the sole heir. It then issued an order similar to that given by the Cape High Court in Bhe's case, and, in addition, awarded damages against the deceased's two cousins, that is, first and second respondents in this case. This state of affairs prompted Ms Shibi to seek a confirmatory order of the Pretoria High Court by the Constitutional Court.[123]

- The Constitutional Court declared Section 23 of the Black Administration Act[124] (the Act) to be inconsistent with the Constitution and invalid. The rule of male primogeniture as it applies in customary law to the inheritance of property was also declared to be inconsistent with the Constitution and invalid to the extent that it excludes or hinders women and extra-marital children from inheriting property. As a result, the Constitutional Court's order declared Charlotte Shibi as the sole heir of the deceased estate of her late brother, Daniel Solomon Sithole.[125]

  - The Constitutional Court declared Section 23 of the Act invalid because the section is part of an Act which was specifically crafted to fit in with notions of

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[123] Shibi (Above note 58) at paras 21-28.
[124] Act 38 of 1927.
[125] **Shibi v Sithole and Others** CCT 50/03 [2004] ZACC 18 at paras 2-4.

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separation and exclusion of Africans from the people of "European" descent. Proponents of the policy of apartheid were able, with comparative ease, to build on the provisions of the Act and to perfect a system of racial division and oppression that caused untold suffering to millions of South Africans;

- Construed in the light of its history and context, section 23 of the Act and its regulations are manifestly discriminatory and in breach of section 9(3) of the Constitution. The discrimination they perpetuate touches a raw nerve in most South Africans. It is a relic of the racist and painful past; and

- The serious violation by the provisions of section 23 of the rights to equality and human dignity cannot be justified in the new constitutional order. Section 23 must accordingly be struck down.[126]

- As in the case of Bhe, the Constitutional Court in Shibi's case declared the rule of male primogeniture as it applies in customary law to the inheritance of property to be inconsistent with the Constitution and invalid because: the rule of male primogeniture by its exclusion of women from inheritance on the grounds of gender is a clear violation of section 9(3) of the Constitution. It is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order. The principle also violates the right of women to human

[126]Ibid. at paras 61, 64 and 73.

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dignity; the rule of male primogeniture, to the extent that it prevents all female children and significantly curtails the rights of male extra-marital children from inheriting, discriminates against them too. In denying female and extra-marital children the ability and the opportunity to inherit from their deceased fathers, the application of the principle of primogeniture is also in violation of section 9(3) of the Constitution; and the primogeniture rule as applied to the customary law of succession cannot be reconciled with the current notions of equality and human dignity as contained in the Bill of Rights.[127]

Given the discussion made above, it is obvious that the key informants were correct to say that there is case law that deals with conflict between customary law and legislation applicable in the Republic of South Africa with the right to equality as enshrined in the 1996 Constitution. There is the case of **Shilubana and Others v Nwamitwa**[128]. The lattercase was cited by the eight key informant under Table ABC in this chapter. The case deserves to be discussed under its own heading from those discussed above. This is so because Shilubana's case deals with conflict between customary law and the right to equality under the 1996 Constitution and not with conflict between both legislation and the customary law with the aforesaid right.

[127] **Shibi v Sithole and Others** CCT 50/03 [2004] ZACC 18 at para 105.
[128] CCT 03/07) [2008] ZACC 9).

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4.4.1.2. Conflict between Customary Law with the Right to Equality in the 1996 Constitution of South Africa: The Case of Shilubana and Others versus Nwamitwa[129]

In the case of **Shilubana and Others v Nwamitwa**[130] (Shilubana's case), the facts and issues relevant to the conflict between customary law and the right to equality as enshrined in the 1996 Constitution of South Africa were as follows:

- On 4 June 2008, the Constitutional Court of South Africa handed down the decision in the case of Shilubana which, arose out of a succession dispute, following the death in 2001 of the chief of the Valoyi community in Limpopo. The eldest son of the deceased chief disputed a decision that the Royal Family adopted in December 1996 to end male primogeniture and confer chieftainship to the eldest daughter of the deceased's brother (and predecessor in title) of the then reigning chief;

- On 22 December 1996, in an effort to develop customary law in accordance with the South African constitutional right to equality and eradicate the gender discrimination that the principle of **male primogeniture** maintained, the Royal Family of the Valoyi unanimously resolved to confer chieftainship, in the next succession, on Ms Shilubana, daughter of Hosi (Chief) Fofoza who died in 1968 and was succeeded by his brother Hosi Richard;

- On 5 August 1997, the Royal Council confirmed its decision and later that day, a meeting of the Valoyi tribe resolved that in accordance with the usages and

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[129] CCT 03/07) [2008] ZACC 9.
[130] Ibid.

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customs of the tribe MsShilubana would be appointed Hosi. HosiRichrad died in 2001;

- In September 2002, Hosi Richard's eldest son, Mr. Nwamitwa, instituted proceedings in the Pretoria High Court seeking a declaration that he, and not MsShilubana, is heir to the chieftainship of the Valoyi and thus entitled to succeed his father. Subsequently, an inauguration ceremony scheduled for MsShilubana by the provincial Department of Local Government and Housing for 29 November 2002 was interdicted by Mr. Nwamitwa. Both the High Court and the Supreme Court of Appeal found in favour of Mr. Nwamitwa, because the process of pronouncing MsShilubana heir to the chieftainship was contrary to customary law. This means that both the High Court and the Supreme Court of Appeal endorsed the following submissions of Mr. Nwanitwa:

> "...any discrimination that may exist in **male primogeniture** relating to succession is "very fair", since allowing Ms Shilubana to succeed as Hosi would result in the next Hosi not being fathered by a Hosi, which would lead to confusion and chaos in the community. Any discrimination against Ms Shilubana would not be unconstitutional, being based on a reason that is acceptable, fair, reasonable and justifiable";[131] and

- It is against the ruling of the Supreme Court of Appeal that Ms Shilubana appealed to the Constitutional Court.

There are judicial precedents that were cited by the key informants under Table ABC in this chapter that are to be discussed under their own separate and distinct heading.

[131] **Shilubana and Others v Nwamitwa** at paras 1-7.

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This is because the judicial precedents concerned deal with conflict between legislation and the right to equality under the 1996 South African Constitution and not with conflict between both legislation and the customary law with the aforesaid right.

4.4.1.3. Case law on Conflict between Legislation with the Right to Equality in the 1996 Constitution of South Africa

The key informants are vindicated in their views as expressed under Table ABC to the effect that case law exists that is dealing with conflict between legislation and the right to equality under the 1996 South African Constitution. The first case of relevance for discussion is that of **Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as *Amicus Curiae*)**.[132] This case was cited by the first and seventh key informants under Table ABC in this chapter.

In Du Toit's case the applicants, being partners in a long-standing lesbian relationship, wanted to adopt two children jointly. They, however, could not do so because legislation confined the right to adopt children jointly to married couples. Consequently, the second applicant alone became the adoptive parent. Some years later the applicants brought an application in the Pretoria High Court challenging the constitutional validity of sections 17(a), 17(c) and 20(1) of the Child Care Act[133] 74 of 1998 and section 1(2) of the Guardianship Act[134] 192 of 1993. The provisions of the two Acts were challenged on the grounds that they violate the applicants' rights to

[132] 2008 (2) SA 198 (CC)..
[133] Act 74 of 1998.
[134] Act 192 of 1993.

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equality and dignity and do not attach value to the best interest of the child as required by section 28(2) of the 1996 Constitution of South Africa.

The case of **Satchwell v President of the Republic of South Africa and Another**[135]is also confirming the view of key informants that case law exists that deals with conflict between legislation and the right to equality as enshrined in the Bill of rights of the 1996 South African Constitution. In this case, the applicant launched an attack against legislation that confers certain benefits upon the spouses of judges but not on the permanent same-sex life partners of judges. The basis of the application was that such legislation violates the right to equality by discriminating on the grounds of sexual orientation. The impugned legislation were sections 8 and 9 of the Judges' Remuneration and Conditions of Employment Act[136] (the 1989 Act) and regulations 9(2)(b) and 9(3)(a) promulgated in government Notice R839 of 6 June 1995 under the 1989 Act.

Another case of relevance to conflict between legislation and the right to equality under the 1996 South African Constitution is that of **Hassam v Jacobs NO and Others.**[137]This case was cited by the third key informant under Table ABC in this chapter. The applicant, Mrs. Fatima Gabie Hassam, was a party to a polygamous Muslim marriage. Her husband (the deceased) died intestate. She unsuccessfully lodged claims with the executor of the deceased's estate. The executor refused her claims on the basis that polygamous Muslim marriages are not legally recognized. She

[135]CCT 45/01.

[136]Act 88 of 1989

[137]2009 (11) BCLR 1148 (CC).

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applied to the High Court challenging the validity of certain provisions of the Intestate Succession Act[138] (the Act) and the Maintenance of Surviving Spouses Act[139] (the MSSA) on the grounds that they unfairly exclude widows in polygamous Muslim marriages from protections provided for in those statutes by excluding them from the concepts of "spouse" and "survivor". By excluding her from the definition of "spouse" because she was party to a polygamous union, the applicant contended that the Act unfairly limits her right to equality before the law and religious freedom.[140]

4.5. SUMMARY

Data that was presented in this chapter reveals that there is case law that deals with conflict of customary law and legislation with the right to equality in the Constitution. Various cases were dealt with against the background of their facts; issues; decisions of the courts; and their reasons for judgment. The discussion of the case law was backed by personal inputs of the researcher. Cases that were discussed in the chapter include those of Bhe; Shilubana; Hassam and Satchwell. The judgment in the various cases that were discussed show clearly that customary law and legislation that conflict with the right to equality in the Constitution are *ipso facto* and *ipso jure* unconstitutional and invalid.

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[138]Act 81 of 1987.
[139]Act 27 of 1990.
[140]Ibid. at paras 1-5.

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CHAPTER 5
CONCLUSION AND RECOMMENDATIONS

5.1. INTRODUCTION

As stated in chapter one of the study, the research that is carried out with the aim of determining how the 1996 South African Constitution impacts upon customary law and legislation that conflict with the right to equality as enshrined in its Bill of Rights. The present chapter is designed to realize the aim as aforesaid. The conclusion on the impact of the Constitution impacts on customary law and legislation that conflict with the right to equality as enshrined in its Bill of Rights is, to a great extent, guided by the judgment and reasons for judgment of the courts in case law as presented under Table ABC (see chapter 4 of the study).

5.2. CONCLUSIONS RELATING TO THE IMPACT OF THE 1996 SOUTH AFRICAN CONSTITUTION ON CUSTOMARY LAW AND LEGISLATION THAT CONFLICT WITH THE RIGHT TO EQUALITY AS ENSHRINED IN ITS BILL OF RIGHTS

It is important to firstly conclude on how the 1996 South African Constitution impacts upon customary law and legislation that is conflicting with the right to equality as enshrined in its Bill of Rights. This will be followed by a separate heading under which a conclusion will be made on how the 1996 South African Constitution impacts upon legislation that is conflicting with the right to equality as enshrined in its Bill of Rights.

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5.2.1. Impact of the 1996 South African Constitution on Customary Law and Legislation that is Conflicting with the Right to Equality as enshrined in its Bill of Rights

The 1996 South African Constitution has an overriding impact (effect) over customary law and legislation that is in conflict with the right to equality as enshrined in its Bill of Rights. The reason for this **conclusion** is found in the recitation of section 2 of the Constitution contained in chapter one of the study which can further be regurgitated as follows: "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"[141].

The Constitutional Court judgments delivered in case law cited under Table ABC in chapter four of the study also confirm that the Constitution does have the overriding impact to the degree of reducing to nullity any law that is inconsistent with it.

The overriding impact (effect) of the 1996 South African Constitution is not limited to empowering the superior courts to nullify customary law and legislation that is in conflict with the right to equality as enshrined in its Bill of Rights. In the case of **Shibi v Sithole and Others**, Deputy Chief Justice Langa stated that the court has powers, namely, of:

- Striking down the impugned provisions and leave it to the legislature to deal with the gap that would result as it sees fit;

- Suspending the declaration of invalidity of the impugned provisions for a specified period;

[141]Secion 2, **The Constitution of the Republic of South Africa**, 1996.

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- Developing the customary law rules of in accordance with the "spirit, purport and objects of the Bill of Rights",[142] or
- Replacing the impugned provisions.

It was in accordance with the overriding effect of the 1996 South African Constitution that the Constitutional Court allowed the development of customary law in Shilubana's case to allow a woman (Ms Shilubana) instead of a man (Mr. Nwamitwa) to can also be appointed as *Hosi* (Chief) for Valoyi community. The facts of the case were presented in detail in chapter four of the study. The judgment and its reasons as delivered by the Constitutional Court were as follows:

- It is important to respect the right of communities that observe systems of customary law to develop their law. The right of communities under section 211(2) of the Constitution includes the right of traditional authorities to amend and repeal their own customs. As has been repeatedly emphasised by this and other courts, 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;
- When the Royal Family confirmed the appointment of Ms Shilubana as *Hosi*, its members noted that, in view of the new democratic dispensation under

[142]Section 39(2) of **The Constitution of the Republic of South Africa**, 1996.

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the Constitution, it is permissible for a female child to become a Hosi since she is also equal to a male child.[143] In deciding as they did, the Valoyi authorities restored the chieftainship to a woman who would have been appointed *Hosi* in 1968, were it not for the fact that she is a woman;

- A community must be empowered to act on its own so as to bring its customs into line with the norms and values enshrined in the Constitution. Any other result would be contrary to section 211(2) of the Constitution and would be disrespectful of the close bonds between a customary community, its leaders and its laws;

- Mr Nwamitwa is not a *Hosi*. At most, he has an expectation to be appointed *Hosi* and his expectation cannot override the decision of the traditional authorities to adapt their customs in accordance with the values and rights of our democracy as embodied in the Constitution; and

- The actions of a traditional authority cannot be illegitimate just because they involve a departure from past practice.[144]

5.2.2. Impact of the 1996 South African Constitution on Legislation that is Conflicting with the Right to Equality as enshrined in its Bill of Rights

There is merit in repeating the conclusion that the 1996 South African Constitution has an overriding impact (effect) over legislation that is in conflict with the right to

[143] **Shilubana and Others v Nwamitwa**CCT 03/07) [2008] ZACC 9 at par 67.
[144] **Ibid** at paras 45-86.

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equality as enshrined in its Bill of Rights. This is because the Constitution is the supreme law in the land. It for this reason that in several cases, the Constitutional Court declared legislation invalid or ordered the reading in of certain words into legislation that was found to be in conflict with the right to equality as enshrined in the Bill of Rights of the Constitution. The relevant judgments of the cases as presented under Table ABC of chapter four of the study are as follows:

- In **Du Toit's** case, the Constitutional Court (per Skweyiya AJ) with other judges concurring) confirmed the order of the Pretoria High Court which held that provisions of the Child Care Act and the Guardianship Act which were challenged, *inter alia*, on the ground that they violate the applicants' rights to equality, were in breach of the Constitution. The Constitutional Court also confirmed the High Court's order for the reading in of certain words into the impugned provisions so as to allow for joint adoption and guardianship of children by same-sex life partners;[145]
- In the case of **Satchwell v President of the Republic of South Africa and Another**,[146] the Constitutional Court confirmed the order of the High Court which held that legislation that confers certain benefits upon the spouses of judges but not on the permanent same-sex life partners of judges, amounts to discrimination on the grounds of sexual orientation and it is constitutionally invalid.

[145] **Du Toit**(Above note 6) at paras 214-215.
[146] CCT 45/01.

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In the case of **Hassam**, the Constitutional Court confirmed the order of the Cape High Court that the Intestate Succession Act[147] and the Maintenance of Surviving Spouses Act[148] unfairly exclude widows in polygamous Muslim marriages from protections provided for in those statutes by excluding them from the concepts of "spouse" and "survivor". The Constitutional Court further declared that:

- Section1 of the Intestate Succession Act[149] is inconsistent with the Constitution and invalid to the extent that it does not include more than one spouse in a polygamous Muslim marriage in the protection it affords to "a spouse"; and

- Section 1 of the Intestate Succession Act[150] must be read as though the words "or spouses" appear after the word "spouse" wherever it appears in section 1 of the Intestate Succession Act.

In **Hassam's case**, the Constitutional Court's judgment further proceeded as follows:

- The exclusion of spouses in polygamous Muslim marriages does not pass constitutional muster. The rights to equality before the law and to equal protection of the law are foundational. The Constitution, as the jurisprudence of the Court demonstrates, prohibits the breach of equality not by mere fact of difference but rather by that of

[147] Act 81 of 1987.
[148] Act 27 of 1990.
[149] Act 81 of 1987.
[150] Ibid.

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discrimination. This nuance is of importance so that the concept of equality is not trivialised or reduced to a simple matter of difference;

- The Marriage Act differentiates between widows in polygamous Muslim marriages like the applicant, on the one hand and widows who were married in terms of the Act, widows in monogamous Muslim marriages and widows in polygamous customary marriages on the other. The differentiation amounts to discrimination on listed ground in section 9 of the Constitution. Muslim marriages, whether polygamous or not, were deprived of legal recognition for reasons which do not withstand constitutional scrutiny today;
- The effect of the failure to afford the benefits of the Marriage Act to widows of polygamous Muslim marriages will generally cause widows significant and material disadvantage of the sort which is the express purpose of the equality provision of the Constitution. Since the denial of benefits affects only widows in polygamous marriages concluded pursuant to Muslim rites and not widowers (because Muslim personal law does not permit women to have more than one husband), the discrimination also has a gendered aspect. The distinction between spouses in polygamous Muslim marriages and those in monogamous Muslim marriages unfairly discriminates between the two groups; and
- By discriminating against women in polygamous Muslim marriages on the grounds of religion, gender and marital status, the Marriage Act

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clearly reinforces a pattern of stereotyping and patriarchal practices that relegate women in these marriages to being unworthy of protection. By so discriminating against those women, the provisions in the Act conflict with the principle of gender equality which the Constitution strives to achieve. That cannot, and ought not, be countenanced in a society based on democratic values, social justice and fundamental human rights; because the constitutional goal of achieving substantive equality will not be fulfilled.

5.3. RECOMMENDATIONS

The South African High Courts, the Supreme Court of Appeal, and the Constitutional Court must sustain their role of guaranteeing the overriding effect of the Constitution on customary law and legislation that conflict with the right to equality. This is because this will be consistent with a growing trend nullifying legislation that is found to be conflicting with the right to equality in other countries such as the following:

- Nigeria: Indigenous law of succession in Nigeria varies from one ethnic group to another. Within the Igbo community, succession is based on the principle of male primogeniture. However, in the case of **Mojekwu v Mojekwu**,[151] the Igbo succession rule was challenged on the ground that it discriminated against females. The court of appeal held that the rule of male primogeniture was

[151] No citation provided (See **Hassam v Jacobs NO and Others**, note 82 above).

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unconstitutional and contrary to democratic values. Justice Tobi accordingly held that for a custom or customary law to discriminate against a particular sex is to say the least an affront on the Almighty God Himself;

- Tanzania: three systems of law govern succession in Tanzania, namely, the Indian Succession Act 1865, Islamic law and indigenous law. Although daughters are entitled to inherit family land, unlike men, they may not dispose of the land. This rule came under challenge inthe case of **Ibernados Ephraim v Holaria d/o Pastory and GervaziKeizilege,**[152] inthe High Court of Civil Appeal 70/89. The High Court found that this rule is discriminatory and inconsistent with article 13(4) of the Constitution of Tanzania which forbids discrimination against any person; and

- Ghana: in the case of **Akrofi v Akrofi,**[153] the younger brother of the deceased was appointed heir to the deceased estate. The family property consisted of, amongst other things, three farms. The appointment followed a custom in terms of which women were not allowed to succeed to their deceased fathers' estates. A daughter of the deceased challenged the appointment, claiming

[152] Ibid.
[153] No citation provided (See **Hassam v Jacobs NO and Others**, note 82 above).

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that she was entitled to succeed her father. The High Court issued a declarator to the effect that the daughter was within the range of persons entitled to succeed to her father's estate. The court did not find that custom which excludes women was in existence, but the court nevertheless stated that if there be such a custom whereby a person is discriminated against solely upon the ground of sex, that custom has outlived its usefulness and is not in conformity with public policy.

5.4. SUMMARY

The discussion in this chapter has revealed the conclusion and main recommendation of the study. The conclusion is that the 1996 South African Constitution has an overriding impact (effect) over customary law and legislation that is in conflict with the right to equality as enshrined in its Bill of Rights. The conclusion is found in the recitation of section 2 of the Constitution contained in chapter one of the study which is to the effect that the Constitution of South Africa is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

The overriding impact (effect) of the 1996 South African Constitution is not limited to empowering the superior courts to nullify customary law and legislation that is in conflict with the right to equality as enshrined in its Bill of Rights. The court has additional powers which include but not limited to suspending the declaration of invalidity of the

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impugned provisions for a specified period and developing the customary law rules of in accordance

with the spirit, purport and objects of the Bill of Rights.

The main recommendation of the study is that the South African High Courts, the Supreme Court of Appeal, and the Constitutional Court must sustain their role of guaranteeing the overriding effect of the Constitution on customary law and legislation that conflict with the right to equality.

5.5. OVERVIEW OF ENTIRE STUDY

The aim of the study is to establish as to what impact the Constitution has on customary law and legislation that conflict with the right to equality as enshrined in its Bill of Rights. The achievement of equality is one of the fundamental goals that South Africans have fashioned for themselves in the current Constitution[154] that contains an entrenched Bill of Rights. Equality is embodied as a value and a fundamental human right in the Constitution. In order to achieve the aim, primary data was collected from key informants and the available literature. Upon analysis of the data, the researcher concluded the study with a finding that the Constitution has an overriding effect on customary law and legislation that conflict with the right to equality in South Africa. This is because the Constitution is the supreme law in the country as a whole and any law that is repugnant to it is effectively invalid.

[154] The Constitution of the Republic of South Africa, 1996.

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