

## TRIBUTE TO JUSTICE RUTH BADER GINSBURG

YVONNE MOKGORO<sup>1</sup>

It is indeed a great pleasure to pay a special tribute to a global trailblazer who has had a profound impact on the legal thinking of many scholars and jurists around the world—men and women alike. The visit of Justice Ginsburg to the Constitutional Court of South Africa in 2006, when she delivered her speech entitled “The Value of a Comparative Perspective in Constitutional Adjudication,”<sup>2</sup> will always be fondly remembered. It was quite refreshing and indeed many at the time marvelled at a United States Supreme Court Justice advocating the use of comparative law to enhance the quality of constitutional adjudication globally. In that speech, she cited with admiration Section 39 of the Constitution of South Africa, which enjoins the judiciary to apply international law and foreign law, and provides that: “When interpreting the Bill of Rights, a court must consider international law; and may consider foreign law.”<sup>3</sup> Justice Ginsburg noted that other modern constitutions such as that of Spain and India have similar provisions. The importance of the comparative perspective in the legal interpretive process has not escaped Justice Ginsburg and it is in that regard too that we honour her. The incredible journey which she has travelled has not just been American or South African, nor have her battles for women’s equal rights been confined to certain territories. They have been global. It is that oneness in her advocacy that should be cherished and saluted.

### Constitutional Protection and Women’s Rights in South Africa: Culture and Religion

The Economist reported that the latest Mo Ibrahim Index on African governance ranks South Africa fourth out of fifty-three African countries for its record on women’s rights protection.<sup>4</sup> In the World Economic Forum’s “gender gap index,” South Africa

1 Formerly Justice of the Constitutional Court of South Africa. Presently Justice in the Office of the Chief Justice: South Africa.

2 Justice Ruth Bader Ginsburg, Remarks to the Constitutional Court of South Africa: “A decent Respect to the Opinions of [Human]kind”: The Value of a Comparative Perspective in Constitutional Adjudication” (Feb. 7, 2006), transcript available at [http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp\\_02-07b-06.html](http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_02-07b-06.html)).

3 S. AFR. CONST., 1996.

4 *Women in South Africa: Walking Several Paces Behind*, THE ECONOMIST, Oct. 7, 2010, <http://www.economist.com/node/17204625>; see also MO IBRAHIM FOUND., SOUTH AFRICA’S RECENT PERFORMANCE IN THE

ranks an impressive 6th out of 134 countries in the world.<sup>5</sup> In the “gender empowerment measure” of the United Nations Development Programme, it also does well, being placed 26th out of 182 countries,<sup>6</sup> but in the United Nations’ “gender-related development index,” it is ranked a poor 129th in the world, again out of 182 countries.<sup>7</sup> That wide discrepancy is not only because the various bodies measure different aspects of women’s development, but also because the picture of women in South Africa is so mixed.<sup>8</sup>

The same research notes that in the “founding provisions” of South Africa’s Constitution, “non-sexism” is given equal billing with “non-racialism.” To promote women’s rights in what had been a predominantly patriarchal society, South Africa has brought in a slew of laws over the past eighteen years which, amongst other things, legalize abortion, give women equal rights in marriage, crack down on domestic violence, criminalize sexual harassment at work, prohibit all gender discrimination, and provide women with particular consideration for affirmative action in education, employment, and membership of decision-making bodies. South African courts have lately also dealt strongly with rape and other types of gender-related crimes. As matters stand, the Department for Women, Children and Persons with Disabilities has indicated that the Gender Equality Bill is being prepared, promoting gender equality in society, creating empowering programs for people with disabilities and promoting the well-being of children.<sup>9</sup>

Indeed South Africa has one of the world’s most impressive legal arsenals for protecting women’s rights, but the wide gap between principle and practice often remains a challenge. In some areas, of women’s participation particularly in politics, South Africa is doing fairly well. Women hold over forty percent of parliamentary seats, the

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IBRAHIM INDEX OF AFRICAN GOVERNANCE, <http://www.moibrahimfoundation.org/south-africa/> (last visited Jan. 25, 2013).

5 RICARDO HAUSMANN, LAURA D. TYSON & SAADIA ZAHIDI, WORLD ECON. FORUM, THE GLOBAL GENDER GAP REPORT, 2009, at 8 tbl.3a (2009), available at <https://members.weforum.org/pdf/gendergap/report2009.pdf>.

6 UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT: 2009, 190 (2009), available at [http://hdr.undp.org/en/media/HDR\\_2009\\_EN\\_Complete.pdf](http://hdr.undp.org/en/media/HDR_2009_EN_Complete.pdf).

7 *Id.* at 188.

8 *Women in South Africa*, *supra* note 4.

9 Lulu Xingwana, Minister for Women, Child. & People with Disabilities, Budget Vote 2011/12 Speech: 50/50 Gender Quota Bill To Be Tabled Soon (June 7, 2011), available at <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71656?oid=240084&sn=Detail&pid=71616>.

third-highest proportion in the world,<sup>10</sup> and almost forty-two percent of cabinet posts,<sup>11</sup> including many of those traditionally assigned to their male counterparts, such as defence, agriculture, foreign affairs, mining, science and technology, and home affairs.<sup>12</sup> South Africa has its first female governor of the central bank<sup>13</sup> and its first woman National Police Commissioner.<sup>14</sup> The country's main opposition party is headed by a woman<sup>15</sup> and so is its parliamentary leader.<sup>16</sup> Between 1991 and 2012, the number of female judges has increased from one to sixty-seven.<sup>17</sup> However, only two of the eleven justices in the Constitutional Court and unfortunately only one out of thirteen heads of Provincial Divisions of the Supreme Court are women.<sup>18</sup> We are certainly not where we need to be.<sup>19</sup>

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10 Bathandwa Mbola, *Women in Parliament on the Rise*, SOUTHAFRICA.INFO, May 6, 2009, <http://www.southafrica.info/about/democracy/parlyw-060509.htm#UQIGwErm4RI>; see also INTER-PARLIAMENTARY UNION, WOMEN IN NATIONAL PARLIAMENTS, <http://www.ipu.org/wmn-e/classif.htm> (last visited Jan. 25, 2013) (reporting statistics using data as of October 31, 2012).

11 Bathandwa Mbola, *South Africa: More Women Make Up New Cabinet*, ALLAFRICA, May 10, 2009, <http://allafrica.com/stories/200905100035.html>.

12 See generally THE GOVERNMENT OF SOUTH AFRICA: OVERVIEW – CABINET, [http://www.westerncape.gov.za/your\\_gov/595](http://www.westerncape.gov.za/your_gov/595) (last updated Oct. 4, 2012).

13 *South Africa First Female Central Banker Begins Work*, SOUTH AFRICA: THE GOOD NEWS, Nov. 9, 2009, [http://www.sagoodnews.co.za/general/south\\_africa\\_first\\_female\\_central\\_banker\\_begins\\_work.html](http://www.sagoodnews.co.za/general/south_africa_first_female_central_banker_begins_work.html).

14 David Smith, *South Africa's Corruption-Tainted Police Force Gets First Female Chief*, THE GUARDIAN, June 13, 2012, <http://www.guardian.co.uk/world/2012/jun/13/south-africa-police-female-chief>.

15 Jaco Visser & Franz Wild, *South Africa Opposition Leader Wins Second Term to Challenge ANC*, BLOOMBERG, Nov. 25, 2012, <http://www.bloomberg.com/news/2012-11-25/south-africa-opposition-leader-wins-second-term-to-challenge-anc.html>.

16 Aislinn Laing, *South African Official Opposition Elects Black Woman to Lead It in Parliament*, TELEGRAPH, Oct. 27, 2011, <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/southafrica/8853192/South-African-official-opposition-elects-black-woman-to-lead-it-in-parliament.html>.

17 Kelley Moulton & Yonina Hoffman-Wanderer, *More Women on the Bench Offer a Better Gender Perspective*, MAIL & GUARDIAN, May 31, 2012, <http://mg.co.za/article/2012-05-31-more-women-on-the-bench-offer-a-better-gender-perspective>.

18 Confirmed by the Secretariat of the Judicial Service Commission on Feb. 8, 2012.

19 See Franny Rabkin, *South Africa: Women Need a Foot in the Judiciary Door*, ALLAFRICA, Apr. 28, 2010, <http://allafrica.com/stories/201004280013.html> (noting that as of April 2010 only 49 judges were women out of 216 permanent judges).

## Impact of Constitutional Rights and Case Law on Constitutional Ownership

What follows is a brief look at the constitutional provisions that aim to empower women and the impact of case law in that regard.

Women are protected by the full range of rights guaranteed in the 1996 Constitution. Indeed there is a plethora of themes which have been directly or indirectly impacted by the Courts in the realm of women's rights, namely: (1) violence against women including rape and public violence, sexual harassment, and domestic violence, and (2) family law, including maintenance, child custody, adoption, proprietary rights, customary marriages, succession, and socio-economic rights.<sup>20</sup>

The most profound constitutional protection for women is provided by the equality clause in Section 9, of the Constitution. It provides: "(3) The state may not unfairly discriminate directly or indirectly against anyone on 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."<sup>21</sup> The prohibition of discrimination on the grounds of gender, sex, pregnancy, culture and marital status, in the context of patriarchy and the history of gender power relations in South Africa has particular resource for women's protection and empowerment. The grounds of "sex," which is a biological feature, and of "gender," a social artifact, are both included. This section leaves no doubt that unfair discrimination on both grounds is not permissible.<sup>22</sup>

The impact of case law has been decisive and ringing. Perhaps the leading case reversing decades of gender discrimination in customary law succession to property and neutralizing the age old principle of male primogeniture is that of *Bhe v. Magistrate Khayelitsha & Others* ( hereinafter "*Bhe*").<sup>23</sup> The *Bhe* judgment concerned three related cases where the principle had been similarly invoked and had impacted discriminatorily on the applicants.<sup>24</sup>

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20 See generally MIKATEKO JOYCE MALULEKE & THULI MADONSELA, DEP'T OF JUST. & CONST. DEV, REPUBLIC OF S. AFR., WOMEN AND THE LAW IN SOUTH AFRICA GENDER EQUALITY JURISPRUDENCE IN LANDMARK COURT DECISIONS (2004), available at [http://www.justice.gov.za/docs/other-docs/2009\\_Women\\_law\\_court-decisions.pdf](http://www.justice.gov.za/docs/other-docs/2009_Women_law_court-decisions.pdf).

21 S. AFR. CONST., 1996 § 9.

22 DEP'T JUST. & CONST. DEV., JUSTICE TODAY, Vol. 2/2008, at 6.

23 2005 (1) SA 580 (CC) (S. Afr.).

24 *Id.* at para. 5 (the parties were *Bhe*, the South African Human Rights Commission (SAHRC) and Shibi).

In the first case, the father of the applicants, two young girls (aged nine and two), had died intestate. The mother (the third applicant) brought an action to secure the deceased's property, consisting of a basic four-room matchbox structure for her daughters. Under Section 23 of the Black Administration Act,<sup>25</sup> which takes its cue from the age-old African customary law rule of male primogeniture, the property must devolve upon the eldest surviving male relative, in this case the grandfather.<sup>26</sup> The South African Human Rights Commission (SAHRC) and the Women's Legal Centre Trust brought a class action in the public interest. In all three cases, the Constitutional Court declared the African customary law rule of male primogeniture unconstitutional and struck down the entire legislative framework regulating intestate deceased estates affected by customary law and impacted by male primogeniture.<sup>27</sup> The Court was of the view that Section 23 of the Act was anachronistic, ossified customary law, and violated the rights of people of African descent who are subject to customary law, relative to white people.<sup>28</sup> The Court held that male primogeniture discriminates unfairly against women and girl children on the grounds of race, gender, and birth.<sup>29</sup>

For women in particular, the impact of the judgment was that all deceased estates are to be governed, until further legislation, by the Intestate Succession Act 81 of 1987,<sup>30</sup> which is generally applicable and benefits all widows and children regardless of race, gender, and birth.<sup>31</sup>

The right to benefit from the intestate estate of their spouses for women married by Muslim rites was addressed in the seminal case of *Daniels v. Campbell NO and Others*.<sup>32</sup> In that case, certain provisions of the Maintenance of Surviving Spouses Act<sup>33</sup> and the

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25 Black Administration Act of 1927 § 23 (S. Afr.).

26 *Bhe*, 2005 (1) SA 580 (CC) at paras. 77–78.

27 *Id.* at paras. 91–97.

28 *Id.* at paras. 63, 72, 141.

29 *Id.* at paras. 91–93.

30 Intestate Succession Act 81 of 1987 (S. Afr.).

31 *Id.* (race is not mentioned as a factor of division); *id.* at § 4(f) (equal distribution regardless of gender); *id.* at §§ 2, 4(e) (considered descendants whether born out of wedlock or adopted).

32 2004 (5) SA 331 (CC).

33 Maintenance of Surviving Spouses Act 27 of 1990 (S. Afr.).

Intestate Succession Act<sup>34</sup> were declared unconstitutional for their failure to recognize as “spouses” persons married according to Muslim rites and thus permit spouses in Muslim marriages to benefit from each other’s deceased estate, ensuring that widows receive at least a child’s share of their deceased husbands’ estates.<sup>35</sup>

It is important to note that the question before the Court was not whether a Muslim marriage is lawful under the Marriage Act.<sup>36</sup> Muslim marriages had not yet gained recognition in South African law.<sup>37</sup> The Court held that people married according to Muslim rites were “spouses” for the purpose of inheritance or claims from an intestate estate.<sup>38</sup>

The applicant, Mrs. Daniels had married her husband according to Muslim rites in 1977. When her husband died intestate in 1994, the house in which they lived was transferred into the deceased estate. The applicant could not inherit from the family estate as she was not recognised as a “surviving spouse” as required by legislation. She approached the High Court, which interpreted that the notion of a “spouse” only applies to people married according to South African marriage law and excluded people married according to Muslim rites. This interpretation the Court found, violated the applicant’s rights to practice her religious and cultural beliefs, and ordered that the word “spouse” be read into the relevant legislation, thus bringing the necessary relief for women married in terms of Muslim rites.

However, on appeal to the Constitutional Court,<sup>39</sup> the Court unanimously held that the word “spouse” must include parties to a Muslim marriage and it was not necessary to read the word “spouse” into the legislation. The objective of the legislation was to protect widows and there was therefore no reason why the equitable principles underlying the statutes should not apply equally to all widows, including Muslim widows.

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34 Intestate Succession Act 81 of 1987 (S. Afr.).

35 *Daniels*, 2004 (5) SA 331 (CC) at para. 23.

36 *Id.* at para. 26.

37 *Id.* at para. 27. *But see* DEP’T JUST. & CONST. DEV., PUBLICATION OF MUSLIM MARRIAGES BILL, , available at [http://www.justice.gov.za/legislation/bills/2010\\_muslim-marriages-bill.pdf](http://www.justice.gov.za/legislation/bills/2010_muslim-marriages-bill.pdf) (last visited Jan. 25, 2013).

38 *Daniels*, 2004 (5) SA 331 (CC) at paras. 37, 57.

39 The Appellant took the case on appeal on the basis that the exclusion of spouses in polygynous Muslim Marriage from the Intestate succession violated section 9(3) of the Constitution and therefore constitutes unfair discrimination.

Another poignant case is *Jaftha v. Schoeman and Others* (hereinafter "*Jaftha*"), *Van Rooyen v. Stoltz and Others*.<sup>40</sup> The case was brought by two poverty-stricken women who were indebted to local traders for relatively negligible sums of money (about US\$27 and US\$35 respectively) and who had been charged significant interest on the principal debt as they had fallen behind on their repayments. This led to a default judgment against them resulting in the sale and execution of their houses, the only property they ever owned, which were basic structures obtained through a small government grant.<sup>41</sup> The applicants argued that legislation permitting the sale in execution of people's homes due to non-payment of trifling debts removed their security of tenure and violated their right of access to adequate housing as provided for in Section 26 of the Constitution.<sup>42</sup> According to the relevant legislation,<sup>43</sup> if the debtor failed to appear before the court, the creditor could obtain default judgment. The judgment then enabled the creditor to obtain an execution warrant, allowing a sale of the property. The execution of the warrant did not require judicial oversight once the default judgment was entered.

The Court was sensitive to the fact that if a beneficiary of a state housing subsidy lost ownership of their homes in this manner, they would be unable to obtain other state-subsidised housing and would have no suitable alternative accommodation. The Court also recognized that the right of access to adequate housing also placed negative obligations on the state not to interfere unjustifiably with any person's existing right of access to adequate housing. Thus the right not only protected actual occupation of the house, but also protected security of tenure. This would therefore amount to a deprivation of that security infringed on the right protected under Section 26. The Court, albeit implicitly, found that the negative obligation under Section 26 placed a duty on everyone, and not only on organs of the state. The Court ordered that sales in execution could only take place with judicial oversight and listed factors that may be considered in the oversight circumstances, e.g., the amount of the debt, attempts made to pay off the debt and the financial position of the parties.

Section 66 of Magistrates' Courts Act has still not been amended to provide for judicial oversight when the movables of the debtor are not sufficient to cover the debt. However, the courts have proceeded to follow up on the *Jaftha* decision as in the recent

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40 2005 (2) SA 140 (CC).

41 *Id.* at paras. 4–5.

42 S. AFR. CONST., 1996 § 26.

43 Magistrates' Courts Act 32 of 1944 §§ 66(1)(a), 67 (S. Afr.).

case of *Mkhize v. Umvoti Municipality and Others*,<sup>44</sup> which accepted the principles in *Jaftha* but distinguished it on the facts, as the applicant had alternative housing.

Given the glaring economic impact on women left by patriarchy, we can only celebrate these small steps towards women's empowerment for self-actualisation. The fact that the offending legislation has still not been amended is, however, cause for concern. The universal symbolism of these cases cannot be ignored and hopefully they will prove to be a poignant victory for many poverty-stricken women and their families, including women-headed households.

When it comes to customary law and its impact on women in the South African constitutional democracy, the country comes from a legacy of traditional leadership deeply embedded in patriarchy, where the principle of male primogeniture determines power, authority, and benefits in all facets of life. The affinity for traditional leadership based on male primogeniture, where traditional authority would devolve from father to firstborn son, continues to prevail in many African societies, often with dire consequences for women's rights and empowerment. In that regard, there is, however, a heartening story for women to come out of the South African courts.

In the matter of *Shilubana and Others v. Nwamitwa*,<sup>45</sup> this tradition of male primogeniture became problematic for the Valoyi traditional community in South Africa when, in 1968, their traditional leader died without a male heir. It was inconceivable at the time that traditional leadership would be inherited by a woman and so the brother of the deceased was appointed. But after South Africa adopted a Constitution with a Bill of Rights in 1994, guaranteeing gender equality, the Valoyi traditional authorities and royal family decided that it was only right and proper to restore the throne to its original bloodline, thus appointing the deceased traditional leader's daughter, being the eldest issue, as the new traditional leader.<sup>46</sup>

When the then current traditional leader died,<sup>47</sup> his eldest son challenged the appointment of the woman arguing that royal authorities did not have the power and

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44 [2011] ZASCA 184; 2012 (1) SA 1 (SCA) (S. Afr.)

45 2009 (2) SA 66 (CC) at para. 3 (S. Afr.)

46 See Karin Brulliard, *South African Court Rules for Female Chief in Tribal Succession Case*, WASH. POST, June 1, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/31/AR2009053102237.html>.

47 *Shilubana*, 2009 (2) SA 66 (CC) at para. 3.



authority to alter this age-old customary law tradition.<sup>48</sup>

The Constitutional Court, agreeing with the respondent (woman) traditional leader, held that the dynamism of society and its customs would have ensured that she inherits the position from her father even though she was a woman.<sup>49</sup> The Court held that the High Court and the Supreme Court of Appeal failed to acknowledge the power of the traditional authorities to develop customary law in terms of the constitution and as the constitution requires under Section 211(2).<sup>50</sup>

The Court concluded that the traditional authorities do have authority to develop their own customary law in line with the Constitution and confirmed the devolution of traditional leadership upon the king's daughter.<sup>51</sup>

### Conclusion and the way forward

The constitutional framework and related case law discussed above and their impact on women's rights are by no means exhaustive. They are only indicative of the incredible legacy that advocates for gender equality and women's rights like Justice Ruth Bader Ginsburg have achieved against so many odds. Certainly the travails of the courts in South Africa have not been particularly feminist in outlook but have developed a consciousness for the protection of human dignity in all its manifestations, in particular as affecting the most vulnerable, including women. The question that generally arises and often incites debate is to what extent these constitutional and other gains in the case law translate into meaningful change in the everyday lives of women, their families and therefore society as a whole, considering that the biggest challenge still remains outside of the courts. The counter question which often follows is whether courts have a mandate to bring about social change or to resolve disputes in particular cases. A provocative question indeed! As we leave this forum today and as we engage in matters of the world including the adjudication of cases as judicial officers, we must consider the lingering imbalances of gender power relations in most societies and the continued feminisation of poverty and other disadvantages that still make women and their children the world's most vulnerable.

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48 Brulliard, *supra* note 46.

49 *Shilubana*, 2009 (2) SA 66 (CC) at paras. 75, 78–86.

50 *Id.* at para. 85.

51 *Id.* at para. 86.