

# Negotiating Property Rights in Southern Africa through the Novel *Magora Panyama*: A Legal Perspective

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## Summary

In Africa, debates on the question of property rights have tended to be carried out in learned law journals and in legal courts. This narrowing of the sites where contestations over property rights are fought over has then tended to overshadow other potential sites where issues of property rights are debated. In southern Africa, creative writers have been at the forefront of using their art composed in African indigenous languages to depict the conflicts that arise in the traditional and modern legal systems. Fiction has tended to provide a moral compass using characters whose actions undergird certain social forces representing ideas behind certain laws that govern the negotiation of property rights. Fiction has also used its images to suggest acceptable legal principles, rules and regulations that can be emulated when Africans negotiate property rights among themselves. The aim of this article is to use the novel *Magora Panyama* (1999) [*Vultures on the Carcasses*] to demonstrate how the author depicts (1) the handling of property rights from the perspective of the unwritten moral and traditional African customary law, (2) the understanding of property rights in the modern law/courts brought by colonialism, (3) the contestation of these two dual legal forms for the battle of the African souls. The article argues that the author of the novel adopts a moderate ideological stance that recognises some aspects of traditional customary law as important and rejects other aspects viewed as extreme. The author also adopts the most positive attributes of modern law.

## Opsomming

In Afrika is daar 'n neiging dat debatte oor die kwessie van eiendomsregte in regs-vaktydskrifte en -howe plaasvind. Hierdie vernouing van plekke waar geskille oor eiendomsreg uitbakei word, oorskadu dan ander moontlike plekke waar kwessies oor eiendomsreg gedebatteer word. In Suid-Afrika was kreatiewe skrywers in die voorste geledere van diégene wat hul kuns (wat in inheemse Afrikatale geskryf is) gebruik het om die konflik wat uit tradisionele en moderne regstelsels voortvloei, uit te beeld. Fiksie was geneig om 'n morele kompas te verskaf deur karakters uit te beeld wie se dae sekere sosiale magte ondersteun het wat idees agter sekere regte verteenwoordig het en onderhandelings oor eiendomsreg beheer het. Die beeld in fiksie is ook gebruik om aanvaarbare regsbeginsele, -reëls en -regulasies voor te stel wat Afrikane kon volg wanneer hulle eiendomsreg onderling beding het. Die doel met hierdie artikel is om die roman *Magora Panyama* [*Vultures on the Carcasses*] (1999) te gebruik om aan te toon hoe die skrywer die volgende uitbeeld:

(1) die hantering van eiendomsreg vanuit die perspektief van die ongeskrewe morele en tradisionele gewoontereg van Afrika, (2) die begrip van eiendomsreg in die moderne reg/howe wat deur kolonialisme ingevoer is en (3) die stryd tussen hierdie twee regsforme in die stryd vir die siele van Afrikane. In die artikel word daar aangevoer dat die skrywer van die roman 'n gematigde ideologiese standpunt inneem, wat sommige aspekte van tradisionele gewoontereg as belangrik erken en ander aspekte wat as radikaal beskou word, verwerp. Die skrywer aanvaar ook die positiefste kenmerke van die moderne reg.

## **Introduction: Women's Property Rights in the Context of African Customary Law**

Customary laws of inheritance discriminate against female beneficiaries. Some are accorded rights of inheritance and some are not. In most African countries, the laws relating to marital property and inheritance rights remain discriminatory against women as they are not entitled to inherit property at the death of the husband or the dissolution of the marriage. In countries such as Zimbabwe, Lesotho and Swaziland to name but a few, married women are seen as legal minors who cannot enter into contracts without the consent of their husbands. This article highlights the property rights of married women and reveals the challenges they face upon the death of their spouses. It also deals with how fiction in African languages drawn from Zimbabwe in the form of the genre of the African novel manifests efforts at reforming women's property rights brought by legislation and constitutions in southern Africa. Although some examples of actual cases are drawn from South Africa, the article is an analysis of the depiction of the contestations carried out over control of property rights between women and the relatives of deceased male spouses.

The status of a woman under customary law has, through the ages, been a cause for grave concern. In some areas in the world, it has passed the stage of sympathetic concern and has entered an era of aggressive feminism (Oputa 1990). Customary law rules governing the ownership, control and reallocation of matrimonial property developed and were shaped by feudal relations of production under which men dominated women (Armstrong & Ncube 1987: 10). In terms of African customary law, women do not have the right to own and inherit property, and they are excluded from inheriting property from males through the customary law principle of "male primogeniture". As far as this principle is concerned, upon death of the husband, the eldest son, in the alternative the eldest male descendent of the eldest son, inherits from the head of the family. Should the eldest son be predeceased without male descendent, the second son becomes the heir and so it continues. If the head of the family dies without male descendents, other male family members of the deceased would inherit (Rautenbach, du Plessis & Pienaar 2006: 100; Stewart & Armstrong 1990). Women (wives and daughters) are under this principle generally excluded from inheriting from

the estate of the head of the family . Hence in most African countries, a married woman does not own property during marriage. In some communities, even the property that she acquired before the marriage, except personal goods, belongs to the husband who is entitled to retain all of it at the dissolution of the marriage (Mertus 1995: 135; Schmidt 1992). During the existence of the marriage, the property is under the sole control of the husband and the woman can only use such property with the consent of the husband. Thus, under customary law all meaningful property is owned and controlled by the husband. Women are often, if not always, reduced to propertyless dependents who have to submit to the will of the husband in order to survive (Armstrong & Ncube 1987: 11).

A married woman under customary law is perceived as an unpaid servant of the husband who works for him, looks after the family, acquires and preserves property for him. Notwithstanding the fact that a rural woman spends her life working hard for the subsistence of the family, at the end of the marriage she leaves the matrimonial home propertyless with no claim to own the husband's property. Similarly, at the death of the husband she does not inherit the husband's property. Elder sons or the husband's brothers inherit the deceased's property with the duty to protect and support the family.

In a rural/urban context, and under customary law, women did not own land because they were perceived as part of the wealth of the community and therefore could be the locus of land rights. For most women, in Africa (Kenya, Malawi, Zimbabwe, and Tanzania), access to land is via a system of vicarious ownership through men. Widowed women cannot inherit land but are allowed to remain on the matrimonial land until death or remarriage. Customary law excludes females from property ownership and therefore offend the principles of equity and natural justice because during their marriage the widow might have worked hard to acquire some of the property. In South Africa, the colonial masters and the apartheid policies entrenched this injustice by means of legislation (Black Administration Act (BAA) of 1927). The next section deals with women proprietary rights under the BAA.

## **Modern Legal Systems under International Human Rights Law**

In 1948, the United Nations adopted the Universal Declarations of Human Rights (UDHR). Article 1 of the UDHR stipulates that "all human beings are born free and equal in dignity and rights". Article 7 provides that "all men and women are entitled without any discrimination, to equal protection by the law". Article 17 further provides that "everyone has the right to own property alone and/or in association with others and no one should be arbitrarily deprived of his property". Thus the UDHR protects women against any discrimination and any arbitrary deprivation of property.

Similarly, the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), which was adopted by the United Nations in 1979, establishes standards of equality between men and women (Stewart & Armstrong 1990). CEDAW provides a framework for developing and applying equality norms to specific conditions in different countries and legal systems. CEDAW states that extensive discrimination against women continues to exist, and it emphasises that such discrimination violates the principle of equality and respect for human dignity (CEDAW: preamble). Article 1 of CEDAW defines discrimination against women as anything that can bring about unequal treatment of men and women while carrying out their livelihood. Article 13 stipulates that women have the right to obtain family benefits. Article 15 specifically states that women have equal rights with men in matters of law related to business contracts. Article 16 empowers women to own and give away their property. State parties to this Convention are obliged to refrain from acts which would defeat the object and purpose of the Convention.

At the regional level, discrimination is prohibited in terms of Article 18(2) of the African Charter for Human and People's Rights which provides for the elimination of every form of discrimination against women and also ensures the protection of the rights of women and children. As a way to address discriminatory customary law, many countries have also sought to entrench human rights norms in national constitutions. The constitutions of many African countries have a section prohibiting discrimination by providing for gender equality. For example, in Zimbabwe women's equality to law was recognised through The Legal Age of Majority ACT (LAMA) of 1982, n (15) (Tsanga 2000; Bentzon, Hellum, Stewart, Ncube & Agersnap 1998).

### **The Birth of the Reform: The Constitution and the Recognition of Customary Marriages Act**

In South Africa, the birth of the Constitution in 1994 brought about key changes. The Constitution provides that everyone is equal before the law. The Constitution further prohibits any unfair discrimination based on any ground including sex and gender (section 9). Men and women are equal before the law.

To give effect to the provisions of section 9 as far as the status of women under customary law was concerned, two pieces of legislation were promulgated. Firstly, the Recognition of Customary Marriages Act (Act 120 of 1998) was passed to amongst other things clarify the status of customary marriages, to specify the requirements for a valid customary marriage, to give equal status and capacity to spouses, and to regulate the proprietary consequences of a customary marriage as well as the dissolution thereof. Section 2(1) of the Recognition of Customary Marriages Act validates cus-

tomary marriages that existed at its commencement. However, the proprietary consequences of marriages entered into before the commencement of the Act are still governed by customary law despite the fact that the proprietary consequences of a customary marriage entered into after the commencement of the Act are governed by the Act (section 7(1)). Thus, all customary marriages entered into before 15 November 2000 are governed by customary law and women married before 15 November 2000 are prohibited from inheriting property as the customary rules still apply to their marriages. All customary marriages entered into after 15 November 2000 are considered as marriage in community of property and as a result women married after 15 November are entitled to share property equally with their husbands on dissolution of the marriage (section 7). This section distinguishes between marriages before and after the commencement of the Act.

Section 6 of this Act provides that “a wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have in customary law”. This section changes the status of a woman married in customary law and also recognises her right to own and dispose of property and also to enter into contracts. However, the last part of section 6 brings some uncertainty as it is unclear as to what is exactly meant by “in addition to any rights and powers that she might have in customary law” as women married in terms of customary law had no property rights. This uncertainty created by the legislature has been cleared by the courts.

Thus, since the promulgation of the Recognition of Customary Marriages Act, South African courts have pronounced on a number of cases involving the status of a woman in customary marriages and have found that although the Constitution recognises customary law, the customary law principle of primogeniture violates the rights to equality and dignity of women married in customary law.

In *Bhe v Magistrate Khayalitsha* (2004 (2) SA 544 (C)) the Cape High Court had to pronounce on the constitutionality of the principle of male primogeniture. In this case, the deceased, during his lifetime lived with Ms Bhe for a period of 12 years and two minor daughters were born from their relationship. The family occupied property which belonged to the deceased. In terms of customary law of succession, the property of the deceased had to devolve on his father as the wife and the daughter were not entitled to inherit in terms of the principle of male primogeniture. The deceased's father indicated that he intended to sell the deceased's property in order to pay the funeral expenses. Ms Bhe, the surviving spouse, on behalf of her two minor daughters applied to the court for a declaratory order that the rule of male primogeniture in customary law of succession was unconstitutional on the ground that it excluded her two daughters from inheriting their father's estate by virtue of being women and accordingly violated their con-

stitutional right to equality (section 9 of the Constitution: Act 108 of 1996). In this case Ngwenya, J. confirmed the supremacy of the Constitution and held that customary law must also be tested against the values of the Constitution (*Bhe* case, par. 6). The court held that the relevant provisions of the Black Administration Act were unconstitutional and declared that the situation where male heirs are preferred over female heirs is constitutionally unconscionable and is unfair discrimination in terms of section 9 of the Constitution (*Bhe* case, par. 6). Accordingly, the court declared the provisions of section 23(10)(a)(c) and (e) and its regulations unconstitutional and invalid. The court further declared the provisions of section 1(4)(b) of the Intestate Succession Act invalid in so far as it excluded any part of the estate which does not devolve by virtue of section 23 of the Black Administration Act.

In the *Shibi v Sithole* case (unreported judgement (TPD 19 November 2003), which was heard shortly after the *Bhe* case, the applicant who was the deceased's sister, challenged the principle of male primogeniture and approached the court after being barred from inheriting from her deceased brother's intestate estate. The deceased was unmarried and had no dependents. According to the principle of primogeniture, the deceased's male cousins would be joint heirs of the deceased estate. Ms Shibi applied for a declaratory order declaring the customary rule unconstitutional on the ground that it unfairly discriminates against Ms Shibi on the ground of gender and sex (section 9 of the Constitution). The legal question that the court had to deal with was whether Ms Shibi, a woman, was entitled to inherit from her brother's intestate estate. It was argued on behalf of Ms Shibi that the customary rule which would exclude her from inheriting intestate from her deceased brother was unconstitutional because it discriminated unfairly against African women (*Shibi* case, par. 8). The court in the *Shibi* case confirmed the order in the *Bhe* case concerning the unconstitutionality of section 23 of the Black Administration Act and Regulation 2(e) of GN R200 (*Shibi* case, par. 6) and found that African women and descendants who were not firstborns were placed in an extremely vulnerable situation and that their rights to equality and dignity were violated by the continued application of the customary succession laws which endorse the principle of male primogeniture. Accordingly, the two defendants were ordered to reimburse Ms Shibi the amounts they had received from the deceased estate.

The two cases were referred to the Constitutional Court for confirmation (in terms of section 174 of the Constitution, the Constitutional court may confirm an order of constitutional invalidity of Parliament or Provincial legislation made by a High Court or the Supreme Court of Appeal). The two cases were also joined by the South African Human Rights Commission and the Women's Legal Centre Trust who have the *locus standi* to act on behalf of African women and children (case reported as *Bhe v Magistrate Khaye-*

*litsha; Shibi v Sithole; South African Human Rights Commission v The President of the Republic of South Africa* 2005 (1) SA 580 (CC)). The legal issue which the Constitutional Court had to deal with was whether or not the provisions of section 23 of the Black Administration Act and the customary law of primogeniture infringed the provisions of sections 9 (equality), 10 (dignity) and 28 (property) of the Constitution (*Bhe* and *Shibi* cases, par. 31). In his judgment, Langa, D.C.J. found that section 23 of the Black Administration Act contravened both sections 9, 10 and 28 of the Constitution in that it is a racist provision which not only distinguishes on the basis of race, colour and ethnic origin but also affects the dignity of the persons involved (*Bhe* and *Shibi* cases pars 60-68). It was pointed out that the purpose of section 23 of the Black Administration Act was not to recognise customary law nor to give effect to South Africa's pluralist society but rather to ensure racial segregation and therefore in the light of its destructive purpose and effect, could not be justified by section 36 of the Constitution in an open and democratic society (*Bhe* and *Shibi* cases, par. 72). Langa, D.C.J. also found that the principle of primogeniture excludes women from inheritance. It was held that the rule is based on patriarchy "which reserved for women a position of subservience and subordination and in which they were regarded as perpetual minors under the tutelage of fathers, husbands and the head of the extended family" (*Bhe* and *Shibi* cases, par. 78).

On the question whether customary law could be developed to ensure the validity of the principle of primogeniture in terms of the Constitution, Langa, D.C.J. held that it was not possible since the rule could not be reconciled with the notions of equality and human dignity as it violates the rights of women and extramarital children (*Bhe* and *Shibi* cases, par. 79). Legal reform within the countries in the Southern African Development Community (SADC) is uneven and the discussions on marital property rights are getting more and more interdisciplinary in ways that implicate African literature as an important site that can give new shape and urgency to those debates through the medium of images and metaphors. In this article, focus is on how the Zimbabwean author Chitsike debates the role of traditional African customary law in relationship to the application of modern law to solving problems that arise in contexts where property rights for spouses are threatened by the greed of relatives who want to benefit from getting the property that they have not worked for.

## Literary Fiction and Zimbabwe's Dual Legal System

As pointed out in the abstract, debates on property rights have tended to take place in courts. However, the Zimbabwean novel, *Magora Panyama*, discusses the same issue but via an artistic medium. This, in itself, poses conceptual challenges in the sense that what the novel depicts are imaginative constructions, recreations and representations of the contestations

within customary law and modern law. The significance of such a creative intervention is that it offers an alternative approach of writing about property rights in Zimbabwe in particular and in southern Africa in general. Literature can afford the reader to understand the perceptions of people about property rights in ways that the legal discourse of the courts might not necessarily be able to achieve in their debates. Literature relies on imaginative reconstructions so that what may not be legally rendered thinkable in the negotiations for property rights could actually be given literary and creative form and existence. Literature's flexible metaphors also allow the author to experiment with different solutions to the problem of contestations over property rights, perhaps more than the cold facts and legal precision that modern courts can allow. Literature and/or novels provide competing models of legal systems preferred by ordinary people. The English poet P.B. Shelly once wrote, raising a point relevant to African literature, when he said that "an artist is the unacknowledged legislator in the world" (Shelly quoted in p'Bitek 1986: 39). p'Bitek argues in support of Shelly's plea to have literature recognised as a kind of moral law that should find expression in African tradition where the artists are acknowledged, admired and feared for their sharp tongues because artists are believed to be the creators of the central ideas around which "other leaders, lawmakers, chiefs, judges, heads of clans and family heads construct and sustain social institutions" (p'Bitek 1986: 39). African-language literatures such as *Magora Panyama* employ different styles to debate the issues of property rights. In the literature, African proverbs are used as indigenous knowledge systems that constitute the legal foundation of indigenous law in which moral standards, beliefs and customs are passed on from one generation to the next.

### **Plot of *Magora Panyama***

*Magora Panyama* (Chitsike 1999) uses an imaginative narrative to show, describe and discuss the question of proprietary consequences of marriage after the death of a male spouse. Issues such as succession, inheritance, proprietary consequences of marriage and the written will of the deceased are debated and discussed as they are understood and (ab)used in the oral traditional African customary legal system as well as in the codified (written) modern constitutional legal system. The author is biased and presents modern law as the ultimate voice of the weak and disadvantaged members of society. Indigenous African customary law is suspiciously viewed as predatory when it is used by ignorant, narrow-minded, cunning and unscrupulous people or "vultures" to dispossess innocent people of their wealth.

In *Magora Panyama*, Tauya is a Shona man legally married to his wife Mary in community of property of both profit and loss. The couple is a middle-class family living in a low-density suburb in the capital city of Harare. Tauya and Mary are entrepreneurs who run a successful business in



the city centre. The wife, Mary, is an educator by profession, who chose to leave her job and help her husband set up and run the business. As the couple is open-minded and educated, Tauya and Mary have taken out marriage-, life-, business-, property- and children's insurance policies. On the other hand Tauya's father, brothers (Toni and Nhamo), and the aunt are strongly grounded in and guided by the traditional culture that believes that when a man dies all the property and belongings are automatically transferred and belong to the relatives of the deceased husband's father, brothers and aunt. The distribution of Tauya's property after his death is depicted in dramatic terms as cold, calculated, carnivorous, resembling the way in which a vulture attacks its prey. The wife and children have no say or share in the inheritance and succession according to the traditional custom. This storyline or plot allows the author to depict (1) the handling of property rights from the perspective of the unwritten moral and traditional African customary law, (2) the understanding of property rights in the modern law/courts brought by colonialism, (3) contestation of these two dual legal forms for the battle of the African souls.

### **The Narrative of Traditional African Patriarchy and Customary Law and Negotiating Property Rights in *Magora Panyama***

In *Magora Panyama*, the main proponent of the ideology of traditional and African customary law is Mr Maraire, Tauya's father. Mr Maraire follows the traditional patriarchal script that holds in contempt women who cannot bear children (Chitsike 1999: 12).<sup>1</sup> In the novel, he advises his other sons Toni and Nhamo to take over and sleep with Mary, who is Tauya's wife, because Mr Maraire believes that his son cannot give him a grandson (p. 14). The violation of women's sexual rights is implied in the novel when Mr Maraire advises Tauya to let his brothers sleep with his wife (p. 15). Mr Maraire also believes that as a father, he has total control over the lives of his sons and their material possessions. He says that should Tauya divorce Mary because they do not yet have a child, he, Mr Maraire would take control of Tauya's property and distribute it to his family according to his wish and the power vested in him by the pervasive sense of being a father: "*Ini sababa Ndinotora zvoise ndozogova ini sababa*" [As the father/head of the family, I will take the property and share it out among my family] (p. 17). He also threatens Tauya's wife should she resist being sent away because of the alleged crime in traditional law of failing to have children. (Women are viewed as child-bearing machines.) Mr Maraire also thinks he has the power to command his daughter-in-law to obey him without questioning his authority. In his view, "*Muroora haamboti pwe ipapo.*

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1. Subsequent references to *Magora Panyama* are indicated by page number(s) only.

*Nditimupa kana kusamupa*” [The daughter-in-law will be silenced and she will be content with the little portion of her property that Mr Maraire chooses to give her] (p. 17).

In the story, when Tauya is murdered by city thugs, the vulture-like tendencies in the home of Mr Maraire, which is governed by traditional rights and norms of customary law, manifest in ugly scenes. For example, even before Tauya is buried, Mr Maraire, his two sons, Nhamo and Toni cooperate with their aunt to connive to deprive and dispossess Mary of the house, money in the bank, motor car and the shop that Tauya has left. Mr Maraire’s family members disregard the fact that Mary has contributed significantly in creating the wealth that they want to rob from her and her children. In traditional customary law women’s rights to property are severely compromised (Tsanga 2000; Bentzon et al. 1998). In *Magora Panyama*, this subversion of women’s rights to enjoy access to the property that they have worked for with their husbands is depicted through the fiendish and vile actions of Mr Maraire’s family at Tauya’s burial. Acting in a fashion that reminds one of how vultures swoop on their prey, Mr Maraire’s family share Tauya’s property without even consulting Mary. The irony in the story is that the aunt, who is Mr Maraire’s sister – and a woman just like Mary – is the one who is used by the male patriarchs to rob Mary of her property. It is the aunt who suggests that Mr Maraire should get the shop and all the money that Tauya created in his life. The aunt says, “*Topa baba vako chitoro nemari yekubhengi*” [We shall give Mr Maraire the shop and the money in the bank] (p. 53). Toni is promised the car and also to inherit Mary as a wife; the aunt also is directed to decide who among the Maraire family gets what from Mary and her children, when she says, “*Iwe Toni zvauri kuda motakari, ko iye Mary haudi kumugara nhaka here, tete vakadaro vachinyemwerera zvavo*” [“You, Toni, since you want to take the car, you should also consider taking Mary as your wife,” said the Aunt, smiling] (p. 53). Nhamo, another of Tauya’s brothers, claims that he also wants the motor car (p. 56). At the end, Mr Maraire nearly succeeds in getting the money from the bank (p. 58) when he forces Mary to hand over Tauya’s bank book. Mr Maraire also threatens to take the house that Mary and his two children are living in (p. 59), leaving them with the prospect of being homeless. The author comments that the traditional customary law is depraved; it is used in a way that causes the male patriarchs not to consider the welfare of Mary and her children. This vulnerability of women, such as of Mary and her children, is conveyed using the metaphors of the vultures in describing the morally reprehensible behaviours of Mr Maraire’s family: “*Vanhu ava vanenge magora ari panyama anozosiya mhuka yachena kuti mbu-u namagodo tunyama twose twadyiwa neshiri idzi*” [These people resemble the vultures on an animal carcass that they can clean of all the meat, leaving the bones] (p. 52).

The inequity and oppressive nature of customary law is further dramatised in the text when Mr Maraire's own family members begin to fight among themselves over Mary and Tauya's property. It is indicated that the aunt who represents who in the novel is co-opted to represent traditional patriarchy is the one who connives with Toni and Nhamo. A hilarious moment in the novel that underlines the sadistic nature of African customary law is captured when Toni and Nhamo clash over who should take the car and the house. The two brothers almost kill each other over property that does not belong to them. In the fight that ensues Nhamo is left unconscious, with a gushing wound on his forehead after Toni has hit him with a brick (p. 60). The suffering that Mary goes through at the hands of her in-laws is used in the novel to demonstrate the insensitivity of traditional customary law that robs men and women of their property. In the novel, the extended family is, therefore, depicted as predatory. Schmidt (1992) argues that in both the colonial and postcolonial Zimbabwean context women have had very few rights and that these few rights to property are constantly undermined by an unreformed legal system that gives rural and urban patriarchy uncontrolled powers over women. In other words, the novel foregrounds the gendered dimensions of the contestations over property rights. The author condemns the traditional customary law used by men to abuse women. The author deliberately undermines the authoritarian and unconstitutional narrative of traditional power vested in customary law. In order to further negotiate power relations regarding access to property rights, through artistic narrative, the author introduces in the novel the narrative that views modern law as more protective of and accountable to the welfare of women and the children of the deceased males.

### **The Narrative of Modern Law and Negotiation of Property Rights in *Magora Panyama***

In *Magora Panyama*, modern law is represented by the police. These official agents enforce the laws, rule and regulations that govern modern social conduct. In the novel, it is the police who inform Mary of her husband's death (p. 3). Later in the novel, modern law and how it protects women's property rights is the subject of discussion between Tauya and his friend Zingizi. Through Zingizi, the author of *Magora Panyama* introduces a modern consciousness governed by modern law in which men and women can protect their property from errant relatives by taking out insurance policies (pp. 47-48) in their family name only, drawing up a will and staying in a legally wedded marital relationship (p. 47). Soro, one of Tauya's friends who asks what can be done to protect their property is in fact representing authorial voice when he poses the question: "*Zvino toita seiko kuti hama dzemurume kana mukadzi dzirege kutora zvinhu zvadzisina kushandira?*" [So what can we do to deter a man or woman's relative from

coming to the family of the deceased to take by force the property, that he/she has not worked for?]) (p. 48). This question seemingly is also directed to the reader.

In the novel, Zingizi provides an answer to Soro's question when he goes further to convince Tauya and his other friends to write their legal wills before they die, stating how they want their property used. Zingizi is the moral conscience embodied in the modern law that states clearly that women and their rights to property ought to be protected from infringement by relatives. Zingizi also influences his friends to follow their own way of writing a will and keeping it with lawyers in the form of trusteeship (p. 50). It is the author of *Magora Panyama's* way of further undermining the traditional narrative of customary law to allow Zingizi to easily persuade and convince his friends to secure their properties using modern law. We read in the novel that after Zingizi's advice to his friends, they agree with him and secure their property against any possible future violation by errant relatives: "*Dzimba dzakaiswa mumazita amadzimai navarume vavo zvokuti kana paita tsaona yorufu vose vaizosara vaine dzimba dzokugara*" [Houses were registered in the names of wives and husbands so that in the event of death of any one spouse, the other would have somewhere to live without problems] (p. 50).

One of the major stylistic devices used in *Magora Panyama* is the author's creative ability to withhold information only letting it out at certain dramatic moments when that information is revealed in such a way that it changes the direction of the story and its plot. In the novel, the fact that Tauya has written a will and secured his property with the lawyers only becomes known to the Maraire family when they are fighting and have finished distributing Tauya's wealth amongst themselves. It is a major blow to both the family of Mr Maraire and to the narrative of traditional customary law that just at the moment when they [vultures] are celebrating how they have dispossessed Mary of her property, the lawyers who keep Tauya's will announce that anybody from the Maraire family who takes Mary's property will be arrested by the police. The narrative of modern law that protects individual property rights is strengthened, prevails and reigns supreme at the moment when the lawyers from "Mafunda and Partners" (p. 64) advise Mr Maraire not to take property that he has not worked for because the long arm of the law will catch up with him: "*Baba hazvinzarwo kwete. Muwiri mune zvakanyatsotaurwa. Zvakare munosungwa nomutemo kana mukatora zvinhu izvi muchisimba*" [Old man, this is not the way to do it. This will is a detailed written account of how this property will be handled. Besides, you will be arrested and arraigned by the modern courts/law if you insist on using force to take this property from its rightful owners] (p. 64).

Although the Maraire family complain about the authority of modern law that has superceded their power derived from a fragmented and iniquitous concept of justice in customary law, it is clear that *Magora Panyama*

achieves two important things; firstly, the novel dramatises how modern law can be used to protect vulnerable members of society such as Mary and her children from the gluttony of Tauya's family. Secondly, the novel uses the dramatic conflict between customary law and modern law in order to conscientise the readers about the necessity to secure property legally and with recourse to modern courts. These creative achievements are acknowledged in the novel, right in the last paragraph of the book when the authorial voice indicates the triumph of modern law over obscurantist and vindictive justice in customary law. The author writes: "*Magora panyama iyi akawana iri mhuka mhenyu yakamirira kuona zvaanoita. Ose akabhururuka pasina kana chaadya kusiya kwamagupa chete. Hawo tendere mudenga kutswaga mhuka yakanyatsofa kuti fatata*" [Vultures on this meat found a live animal that they could not eat. All the vultures flew away without having eaten anything and they began to fly around in the skies looking for an animal that is actually dead] (p. 70). The metaphor of "*magora*" throughout the novel represents the Maraire family and the traditional customary law that they believe in. "*Mhuka*" represents the vulnerable family members such as Mary and her children. A live animal or "*Mhuka*" also represents the robustness of modern law and courts that in the view of the author are better equipped to protect women and men from losing their property to rapacious relatives. In short, *Magora Panyama* privileges modern law and undermines customary law. The novel also implies a rejection of customary law and vests the capacity to reform marital law and the law on property rights in southern Africa in modern law whose principles are depicted as elaborate, precise and more democratic.

### **A Critique of the Representation of the Clash between the Two Legal Systems in *Magora Panyama***

*Magora Panyama* derives its narrative power from its focus on the theme of contestation of property rights, indicating a marked departure from African-language literature in which the themes explored are sometimes unimaginatively depicted as colonialism, decolonisation and independence. The author of *Magora Panyama* effects a thematic innovation and shows that the sometimes abstract ideas and concepts represented in the discourse on law in Africa can be a fit subject for literature just as the theme on betrayal of Africans by their leaders at independence (Achebe 1997). In fact, *Magora Panyama* depicts how Africans are "betrayed" by their so-called beliefs in some obscurantist cultural and legal practices such as those promoted in customary traditional law. In his handling of the theme of contestations for power over property rights in the family or domestic sphere, the author of *Magora Panyama* reveals the contradictions within the narrative of traditional authority invested in African tradition and customary rights. Its extreme views and predatory images have been exposed to ridicule, and the

author clearly calls for legal reform of this system of law to give it a “human” face. In customary law, women’s roles are actively compromised; they endure verbal abuse and are prevented from having access to resources they have worked for all their lives (Schmidt 1992).

And yet, despite having revealed the negative aspects of traditional customary property rights, the novel also ends or resolves part of the conflict it has been narrativising by recognising the significance of maintaining some aspects of this traditional unwritten law. In the novel, part of Tauya’s property is handed to his father, and this gesture suggests a rejection of the extreme view that traditional custom is negative through and through. By giving away property to some of the relatives such as the father, mother and brothers, the author opts for a moderate solution. In legal terms what is implied is that one needs to see a balance or reject negative misconceptions of African customary law and preserve the positive and socially fair and acceptable views on what is law through the eyes of both African men and women. Family should be recognised as part of the community which promotes shared similar values, space and resources. If this uneasy interpretation of the novel suggests that the author is almost “backtracking”, one could also argue that the author opts for a watered-down, less powerful and more caring understanding of the role the extended family could play within the larger matrix of the debate on property rights. In other words, the vulture-like tendencies in traditional customary law have been expunged; those humans who take advantage of culture and manipulate it to allow them to have access to the wealth left after the death of a spouse have been in for severe criticism.

The author of *Magora Panyama* clearly embraces modern law that unambiguously protects the remaining spouse and the children from suffering the fate of having all their wealth taken away from them by “*magor*” or vultures on the death of their loved one. In the novel, the dignity of the remaining female spouse is asserted and her legal status as equal to men creatively reinstated. This is done through the way in which the novel intimates that before he died, Tauya had secured the protection of his wealth he had created with his wife in the form of insurance policies and the written will, a legally binding document that is not contestable once pronounced and ratified by a competent court of modern law. Since Tauya and his wife were married in community of property (COP), the “insurance policy” on his family wealth and the will are deployed in the novel as representing the metonymic power of modern law and the guarantees it provides to those that are so named under its protection. The will enabled Tauya to protect his property. This shows that modern law is capable of protecting the individual from the rapacity of individual, family, group or community greed.

Although modern law that respects the will of the deceased has been allowed to prevail in *Magora Panyama*, there is also a suggestion from the novel that an inflexible application or recognition of modern law could in

some contexts alienate the people who are being protected from the community, especially if it is perceived in the extended family that the death of a relative has resulted in undue enrichment of the remaining spouse. The novel attempts to balance this by allowing the reader to know that those properties given to Tauya's father by Tauya's wife, were given out of her own wish. The novel implies that there was no undue force exerted on Tauya's wife to part with some of her wealth. That is why we see the distribution of Tauya's property to his father and brothers by the "artist" at the end through the use of a legal instrument, the will. The invocation of the written will in the novel confirms that the writer embraces the arrival of the modern legal system in southern Africa, which allows a person to distribute part of the family wealth to relatives according to his/her wishes.

If this resolution of the clash between traditional customary law and modern law in the novel tended to leave a bitter taste in the mouth of the reader, it is possible that the author could be suggesting that even modern law could encourage vulture-like tendencies if an inflexible observance of the letter of modern law does not leave any room for the extended family to benefit from the wealth of a deceased relative. Whether or not these ways that the novel uses to resolve the clash between traditional customary law and modern law are satisfactory to the reader, in fictional terms, this novel has rejected adoption of the extreme forms of justice implied in unreformed traditional or colonially derived modes of modern law.

*Magora Panyama* negotiates the theme of property rights by deliberately settling on a moderate perspective in which, although modern law has more assertive powers, these powers to protect property rights have also been humanised. The novel's rejection of a "total" either traditional law or modern law scenario is also perhaps in keeping with yet another level of negotiation implied in discussing the theme of property rights in the artistic medium whose protocols of representing that debate rest on the use of unstable signifiers of images, metaphors as opposed to the use of the genre of cold, calculative discourse of courtroom law. Considered in this way, the literary genre is also negotiating with the legal discourses that in other contexts are represented as absolute and not admitting linguistic ambiguities. The novel insists that despite the fact that modern law emphasises precision of detail, life itself is not a straightforward narrative.

The novel eventually suggests that artists not only interpret law through images and metaphors; they can make law and this is a point that echoes Shelly's observation that in many situations the contributions of artists to property law reform is not always acknowledged. But by discussing property law through images and metaphors *Magora Panyama* has forced readers to acknowledge the power of the artists in the creation of fair property rights law in southern Africa. African-language literatures are dynamic and not static in the themes that they handle.

## Conclusion

Some rights are inalienable as they attach to the human person and form an essential part of his or her humanhood (Oputa 1990). To deny any human being such rights will be at best to distort his or her humanhood and at the worst to destroy that which is most essential to us as human beings – our humanity (Oputa 1990). Women's right to property is a human right and is recognised in various international as well as regional human rights instruments. In complying with international rights and obligations, an increasing number of countries have now recognised women's equality rights in their constitutions. However, there are countries such as Zimbabwe, Zambia, Malawi, Lesotho and Kenya where discrimination in customary law matters such as inheritance is still permitted (Benschop 2004: 3). Thus under customary law of succession, males are preferred over females as heirs. The said rule which prefers males over females constitutes *prima facie* discrimination against women.

To curb the harsh effect of some of the customary law rules, the courts should apply the principles of natural justice where injustice would otherwise result. Lawyers should be equipped to grapple with the conflict between customary law and human rights, especially the right to equality before the law. The law relating to inheritance involves every individual in the community at large and therefore requires some transformation. Women should also be politically active and get properly represented in legislative assemblies where the laws governing their lives are made. Accordingly, equal protection of the law for both males and females is required in countries where women's rights to inheritance and equality are still ignored, so that whatever law protects and advances, men should also afford equal and similar protection and advancement to women.

But the task to reform law cannot be left in the hands of legal experts only. African-language literatures have a role to play in terms of exposing the evils in the laws that compromise women's access to property rights. In the novel *Magora Panyama*, customary law is depicted as being used and manipulated by Tauya's relatives in order to rob Mary of her property. This traditional narrative is subverted by the introduction in the novel of a narrative of modern law which is shown as more protective of rights to property of spouses whose partners have died. The novel achieves several things, the most important accomplishment being the illustration of how modern law can be used to protect vulnerable members of society such as Mary and her children from the gluttony of others. Secondly, the novel uses the dramatic conflict between customary law and modern law in order to conscientise the readers about the necessity to legally secure property and to make recourse to modern courts when their property rights are threatened. These creative achievements are acknowledged in the novel, right in the last



paragraph of the book when the authorial voice indicates the triumph of modern law over obscurantist and vindictive justice in customary law.

However, the reader sometimes feels that the author is also bending towards recognition of the importance of customary law, especially when it is intimated that Mary feels obliged to give away some of her property to the Maraire family. This narrative with its ideological inconsistency in the authorial voice tends to confuse if not leave a bitter taste in the reader's mouth. It has been argued that maybe the novel aims to balance customary law with modern law. In other words, the novel's rejection of a "total" disregard of the "importance of customary law" in African culture, is also perhaps, in keeping with yet another level of artistic negotiation implied in discussing the theme of property rights in the creative and artistic medium whose protocols of representing that debate rest on the use of unstable signifiers of images, metaphors, as opposed to the use of the genre of cold, calculative discourse of courtroom law. Considered in this way the literary genre is also negotiating with the legal discourses that in other contexts are represented as absolute and not admitting of any linguistic ambiguities. The novel insists that despite the fact that modern law emphasises precision of detail, life itself is not a straightforward narrative.

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