

GENDER EQUALITY UNDER CUSTOMARY LAW: AN ANALYTICAL STUDY ON THE DEVELOPMENTS OF WOMEN'S RIGHTS UNDER CUSTOMARY LAW

Research submitted in partial fulfilment of the requirements for
the Master's degree at the University of Venda.

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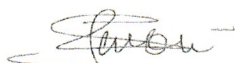
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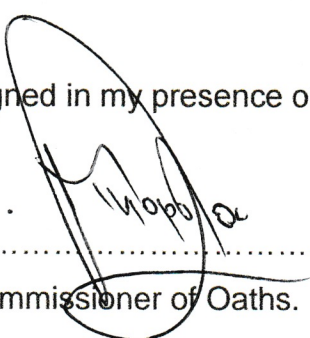
DECLARATION

I **Simon Promise Mabuza** hereby declare that this research project titled **Gender Equality Under customary law: An explanatory study on the developments of women's rights under customary law** is my original work and has not been submitted for any degree at this or any other university or institution of higher learning. This mini-dissertation does not contain other person's writing unless specifically acknowledged and referenced accordingly.

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Signed in my presence on this **22** day of **November** 2024.


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Dedication

This work is wholeheartedly dedicated to my sons, Musa and Lwazi Mabuza. May this thesis not only make you proud but also inspire you to pursue greatness in your own lives.

To my beloved mother and late father, whose love, guidance, and sacrifices shaped me into the person I am today—this achievement is as much yours as it is mine.

A special thank you to my sister, Zandile Mabuza, for her boundless emotional support, unwavering inspiration, and immense help—she has always believed in me and lifted my spirit in times of struggle.

To my best friend, Mr. Simphiwe Mkhathshwa, whose brotherhood and constant support have been invaluable throughout this journey.

Lastly, I dedicate this work to all my beloved friends and family, whose names may not be mentioned, but whose love and encouragement have been a constant source of strength. This achievement is a reflection of the collective support of those who have been by my side.

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Abstract

African traditional customs have historically been criticized for perpetuating practices that undermine women's rights. Rights to equality, human dignity, and bodily and psychological integrity have been suppressed under many Indigenous customs. Historically, customary law systems were structured in ways that disadvantaged women, particularly in areas such as marriage, inheritance, and traditional authority. Patriarchal norms entrenched in customary law before the democratic era afforded men significant privileges over women, especially in leadership roles within society and the family. Consequently, many customary law norms remain at odds with human rights principles that promote gender equality. Although South Africa has made significant strides in reforming customary law to align with constitutional principles and ensure gender equality, women living in traditional communities still face systemic barriers to justice. Many of these challenges stem from limited access to legal recourse and continued reliance on traditional leaders to interpret and enforce customary norms. While constitutional rights theoretically apply to all citizens, women in rural areas often experience these rights as inaccessible or ineffective due to entrenched traditional practices. This study examines the progress made by South Africa's judiciary and government in addressing the historical injustices of customary law. It evaluates the effectiveness of constitutional protections and judicial interventions in safeguarding women's rights under customary systems. Finally, this paper argues for the need to strengthen oversight of traditional communities and integrate government institutions into areas governed by customary law. These measures aim to enhance awareness and enforcement of women's rights, ensuring their full realisation in practice.

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CHAPTER 1: BACKGROUND OF THE STUDY

1.1 Introduction

This chapter explores the evolving landscape of South African customary law, particularly in relation to the protection and promotion of women's rights. Since the implementation of the current Constitution¹, there have been significant reforms aimed at addressing the inherent patriarchal structures that have historically shaped these legal systems. Patriarchy has perpetuated a gendered imbalance, often marginalising women's rights in favour of prevailing norms that favour men. This research seeks to critically examine these changes, exploring both the progress made and the challenges that remain in achieving true gender equality within the framework of customary law.

By analysing legal reforms, case studies, and contemporary practices, this chapter aims to illuminate the ongoing struggle for women's rights in South Africa, providing a comprehensive understanding of the intersection between law, culture, and gender in a rapidly transforming society. The Constitution¹ requires courts to develop and reform customary law to ensure that it is in line with its values and the spirit of human rights, and in this case, the promotion of gender equality between men and women.² The development and reform of customary law to align with the values of the Constitution and the promotion of gender equality. was first introduced in the Republic of South Africa Interim Constitution.³

The Republic of South Africa Constitution¹ guarantees everyone the right to equality⁴. This right, in detail, provides that everyone is equal before the law and has the right to equal protection and benefit of the law.⁵ The State and everyone living within it is prohibited from unfairly discriminating against anyone on grounds including, among other things, gender.⁶ This means that no gender must be given more consideration than the one between males and females; both genders should be treated equally before the law.

¹ The Constitution of the Republic of South Africa, 1996. Adopted on 8 May 1996, amended on 11 October 1996, and commenced on 4 February 1997.

² Section 39(2), The Constitution of the Republic of South Africa, 1996. Act 108 of 1996.

³ Interim Constitution of the Republic of South Africa, 1993 (Act 200 of 1993).

⁴ Adopted on 8 May 1996, amended on 11 October 1996, and commenced on 4 February 1997.

⁵ Section 9 (2) The Constitution of the Republic of South Africa, 1996.

⁶ Section 9 (3) The Constitution of the Republic of South Africa, 1996. Act 108 of 1996.

Women living under customary law have suffered severe discrimination against their rights due to harmful traditional customs still practised among communities.⁷

Makonese⁸, expanded on this by saying that:

It is trite that customary law has a disproportionate discriminatory impact on women compared to men. This is because customary law promotes patriarchal practices that give more privileges to men than women.⁸

It is not denied that constitutional recognition and protection of the customary law system are embodied in sections 30 and 31 of the Constitution. In addition to that, the provision of section 39(3) of the Constitution,¹ recognises customary law and is worded clearly as follows:

The Bill of Rights does not deny the existence of any other rights or freedoms recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

Also, in the case of *Bhe v Khayelitsha Magistrate*⁹, Langa DCJ 'as then he was' stressed the importance of the constitutional protection of customary law values and principles, where amplified that "... quite clearly the Constitution itself envisages a place for customary law in our legal system". This confirms the current status that customary law operates within the auspices of the Bill of Rights and bears no ultra-vires power.

It has been proven and observed in case laws that most Indigenous customs had failed to comply with the constitutional test; an example will be the matter between *Shibi v Sithole and Others*,¹⁰ where the courts ruled that patriarchy is against gender equality and thus amounts to unfair discrimination against women. Other traditional customs include but are not limited to *ukuthwala*, *ukungena*, etc. Therefore, it is transparent from similar customs that women's rights are often breached to the detriment of all women living under the umbrella where such traditions are practised.

⁷ Evadne Grant, 'Human rights, cultural diversity and customary law in South Africa Article in Journal of African Law' (2006) University of the West of England, Bristol. Available at <<https://www.researchgate.net/publication/232026088>> accessed 16 January 2022.

⁸ Mekanatsa Makonese Customary Law and its Implications on the Enjoyment of Human Rights by Women in Southern Africa: A Focus on Botswana, Lesotho and South Africa . © SADC Lawyers' Association, 2016.

⁹ *Bhe and Others v Magistrate, Khayelitsha and Others* 2005 (1) BCLR 1 (CC). Constitutional Court of South Africa.

¹⁰ *Shibi v Sithole and Others* 2005 (1) SA 580 (CC).

In dealing with the right of women to inherit, the following Constitutional Court cases, namely *Bhe v Magistrate*⁹, *Shibi v Sithole* and *South African Human Rights Commission v President of the Republic of South Africa*,¹¹ had addressed and remedied the discrimination that existed against women. The Constitutional Court had, in a nutshell, ruled consistently that “the principle of male primogeniture, applied in the customary law of succession applicable in South Africa, offended the right to equality”.⁴

Although the above customs have already been addressed by the Constitutional Court to accommodate women's rights, there's still a plethora of other customary practices that exist to the detriment of women as far as the right to equality is concerned.

The current status relating to tribal leadership raises a red flag that suggests that women are still being discriminated against when it comes to possession of power as far as traditional leadership is concerned. The ongoing case of *Mphephu v Mphephu-Ramabulana & others*,¹² which is about the question of who the leader of the Vhavenda tribe is, sets the volume up in that it proves and confirms the injustices suffered by women in traditional leadership. The challenges women face living under traditional customs are not something of the past but rather something still observed today. It is not fair on constitutional grounds that women are the ones who go in and out of courts to fight for their constitutional rights (e.g., the right to equality¹), which traditional customs have breached.

South Africa has committed to protecting women's rights under customary law by promoting gender equality through international human rights by ratifying various international and regional human rights instruments. These include the International Covenant on Civil and Political Rights, 1966 (ICCPR);¹³ the Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW);¹⁴ the International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (CERD),¹⁵ and

¹¹ *SA Human Rights Commission v President of the Republic of South Africa and another* [2005] 1 SA 580, [2005] 1 BCLR (CC).

¹² *Mphephu v Mphephu-Ramabulana and Others* 2019. (948/17) ZASCA 58. Supreme Court of Appeal of South Africa, judgment delivered on 30 May 2019.

¹³ International Covenant on Civil and Political Rights, 999 UNTS 171. Ratified by South Africa on 10 March 1999.

¹⁴ Convention on the Elimination of All Forms of Discrimination against Women, 1979, 1249 UNTS 13. Ratified by South Africa on 14 January 1996.

¹⁵ Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195. Ratified by South Africa on 9 January 1999.

the UN Convention on the Rights of the Child, 1989 (CRC).¹⁶ It is also a party to the African (Banjul) Charter on Human and Peoples' Rights, 1981;¹⁷ The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003; and the African Charter on the Rights and Welfare of the Child, 1990.¹⁸ These international instruments will broadly be discussed in Chapter 3.

The court in *Carmichele's* case¹⁹, elaborated on how the Constitution can develop the common law to protect and promote women's rights. Although the facts of this case may be irrelevant to this study, it still bears relevance because it addresses the importance of developing common law using the Constitution; in this way, women's rights will not be invaded since the Constitution will shape all traditional customs.

The Constitutional Court, in its remarks, stressed as follows:

South Africa has a duty under international law to prohibit all gender-based discrimination that has effect or purpose on impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violations of those rights.²⁰

1.2 Problem statement

Customary law, traditionally rooted in patriarchal practices, has long conferred greater power and recognition upon men than women, reflecting societal structures where authority and decision-making were predominantly male domains. This systemic bias is evident in the historical legal frameworks that governed customary law, such as the Black Administration Act of 1927, which codified and institutionalised discriminatory practices against women. These legal instruments entrenched gender inequality by formalising male dominance in areas such as marriage, inheritance, and governance within traditional communities. Customary law practices often relegated women to positions of subordination, viewing them as perpetual minors under the authority of their fathers, husbands, or male relatives, with little to no autonomy in critical matters affecting their lives.

¹⁶ Convention on the Rights of the Child, 1989, 1577 UNTS 3. Ratified by South Africa on 16 July, 1995.

¹⁷ African Charter on Human and Peoples' Rights, 1981, OAU Doc. CAB/LEG/67/3 Rev. 5. Ratified by South Africa on 9 July, 1996.

¹⁸ OAU Doc. CAB/LEG/24.9/49 (1990). Ratified by South Africa on 7 January, 2000.

¹⁹ *Carmichele v Minister of Safety and Security* [2001] 10 BCLR 995 (CC).

²⁰ *Carmichele v Minister of Safety and Security*. 2001 (4) SA 938 (CC); [2001] 10 BCLR 995 (CC). Constitutional Court of South Africa.

The advent of South Africa's current Constitution,²¹ marked a transformative shift in the legal landscape. Rooted in the principles of equality, freedom, and human dignity, the Constitution explicitly recognises customary law as part of the country's legal framework. Still, it subjects it to the overarching values enshrined in the Bill of Rights. This constitutional alignment created an imperative for customary law to evolve, fostering a steady rise in efforts to eradicate gender discrimination within its domain. The tension between preserving cultural heritage and upholding constitutional values has catalysed significant judicial and legislative interventions aimed at dismantling patriarchal practices.

Several landmark judicial challenges have been instrumental in addressing gender inequality under customary law. The Constitutional Court has played a pivotal role in scrutinising discriminatory practices, setting transformative precedents that align customary law with constitutional principles. For example, in *Bhe v. Magistrate Khayelitsha*²², the Court struck down the customary rule of primogeniture, which excluded women and girls from inheriting property. This decision not only dismantled a cornerstone of patriarchal customary practices but also affirmed the constitutional rights of women to equality and dignity. Similarly, in *Shilubana v. Nwamitwa*²³, the Court upheld the right of a woman to be appointed as a traditional leader, reinforcing the principle that customary practices must adapt to reflect societal advancements and gender equality.

Legislative reforms have complemented these judicial interventions, providing a statutory framework for promoting gender equality within customary law. The Recognition of Customary Marriages Act (RCMA) of 1998 is a prime example, ensuring that women in customary marriages enjoy equal rights to property, decision-making, and legal recourse. The Reform of Customary Law of Succession and Regulation of Related Matters Act²⁴ further advanced these efforts by addressing gender disparities in inheritance and granting women and children equal rights to family property. These legislative measures signify a commitment to balancing respect for cultural traditions with the constitutional mandate for equality.

²¹ The Constitution of the Republic of South Africa, 1996.

²² *Bhe and Others v Magistrate, Khayelitsha and Others* 2005 (1) BCLR 1 (CC).

²³ *Shilubana and Others v Nwamitwa* 2008 (9) BCLR 914 (CC)

²⁴ Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

Despite these advancements, challenges remain in eradicating patriarchal practices under customary law. Resistance from traditional leaders and communities, rooted in deeply ingrained cultural norms, continues to impede progress. Educational initiatives and advocacy campaigns are essential to fostering awareness and acceptance of reforms, particularly in rural areas where customary practices remain prevalent. Additionally, empowering women to participate in community governance and decision-making processes is vital for achieving sustainable change.

While the patriarchal foundation of customary law poses significant challenges, the combined efforts of judicial rulings, legislative reforms, and advocacy initiatives have spurred meaningful progress in promoting gender equality. The ongoing transformation of customary law reflects a broader societal shift towards reconciling cultural preservation with the principles of equality, dignity, and human rights.

Moreover, the results have been commendable in approving the emancipation of women under customary law. Therefore, explaining, analysing, and exploring how these reforms have improved and emancipated women under customary law is necessary to see whether gender equality is becoming a reality under traditional law.

1.3 Research Questions.

This study raises the following central question about protecting women's rights under customary law in South Africa.

- 1.3.1 How has gender equality in customary law been enforced and strengthened to ensure that customary law conforms with constitutional objectives for non-discrimination based on gender?
- 1.3.2 How have constitutional principles and judicial developments influenced the transformation of the customary law of succession in South Africa, particularly with regard to the recognition and protection of women's inheritance rights within traditional communities??

1.4 Aims and Objectives

The study aims to investigate the evolution of women's rights under customary law in South Africa, focusing on understanding its historical context, current status, and ongoing challenges. The research seeks to evaluate the role of legal frameworks and judicial interventions in promoting gender equality within customary law practices.

The objectives of this study are aimed at the following: -

- a. To analyse the nature and relevance of customary law in the South African legal framework
- b. To analyse the historical background of gender discrimination under customary law.
- c. To analyse the roles of legislation and the judiciary in the promotion and protection of women's rights under customary law
- d. To analyse the progression of customary succession law in South Africa in the context of constitutional commitments to gender equality
- e. To report on the current state of gender equality under customary law.
- f. To report on the shortcomings currently faced by women living under customary law.

1.5 Significance of the study

This study holds substantial significance within the field of legal scholarship, particularly in the evolving discourse on the interface between customary law and constitutional imperatives in South Africa. By interrogating the extent to which reforms—both judicial and legislative—have advanced the status of women under customary law, the research addresses a critical gap in understanding how deeply entrenched patriarchal norms are being dismantled through legal mechanisms.

The study contributes to the development of jurisprudence by offering a nuanced analysis of how courts have interpreted and applied constitutional principles such as equality, dignity, and non-discrimination to customary practices. In doing so, it sheds light on the judiciary's role in reconciling cultural traditions with the transformative vision of the Constitution. This is particularly important in a pluralistic legal system where customary law continues to govern the lives of a substantial segment of the population, especially in rural and traditional communities.

Moreover, the research is timely and relevant in light of ongoing debates surrounding legal pluralism, gender justice, and the decolonisation of law. It facilitates a critical engagement with the evolving nature of customary law, not as a static relic of the past, but as a living legal system capable of adaptation and reform. By analysing key legal developments and the practical outcomes of these reforms, the study offers valuable insights for policymakers, legal practitioners, and scholars seeking to advance substantive gender equality within customary frameworks.

The study also serves a practical purpose by highlighting the persistent barriers faced by women in accessing justice within traditional systems. It thus provides an empirical and theoretical foundation for further legal reform, community education, and advocacy efforts aimed at promoting inclusive and equitable customary governance.

Ultimately, this research affirms the Constitution's transformative mandate and contributes to the broader project of social justice by evaluating whether the legal recognition of women's rights under customary law has translated into tangible improvements in their lived realities.

1.6 Research Methodology

This study is conducted using a doctrinal approach. A doctrinal approach focuses on intensive research in that it involves the collection and analysis of non-numerical data such as, among other things, texts, opinions, or experiences.²⁵ Primary sources include the Constitution of the Republic of South Africa Act⁹, with particular reference to its supremacy²⁶ and the right to culture²⁷, gender equality⁴, recognition of customary law²⁸, and the limitation clause²⁸. The Recognition of Customary Marriage Act¹⁷, the Black Administration Act²⁹, and The Reform to the Customary Law of Succession Act³⁰. Also,

²⁵ Bhandari, P. (2024, September 05). What Is Qualitative Research? | Methods & Examples. Scribbr. Retrieved October 27, 2024, from <https://www.scribbr.com/methodology/qualitative-research/> (Accessed on 1 October 2021)

²⁶ Section 2 The Constitution of the Republic of South Africa, 1996.

²⁷ Secs 30 and 31 The Constitution of the Republic of South Africa, 1996.

²⁸ Section 39 The Constitution of the Republic of South Africa, 1996.

²⁹ Black Administration Act 38 of 1927.

³⁰ Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

case law decided on the realisation of women's rights under customary law, and international agreements will frequently be consulted in gathering information.

The research also incorporates international and regional instruments, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)³¹ and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)³², among others. These instruments are utilised to frame South Africa's international legal obligations regarding gender equality and the transformation of discriminatory customary practices.

Secondary sources such as textbooks, journal articles, the internet, published newspapers, and unpublished material will also be relied upon and analysed to gather information. These secondary sources are no less critical when discussing how South Africa has come to address toxic traditional customs and preferences for both the supremacy of the Constitution and the rule of law.

Furthermore, when discussing the former discriminatory practices under Indigenous customary law, which were declared unconstitutional, works of other authors codified in secondary sources will be frequently consulted to add weight and give meaning to this study.

Therefore, the doctrinal approach is suitable for this study because it provides all the resources needed to realise the purpose/objectives of the study successfully. Hence, the method, sources, and techniques used were preferred to provide insights into the subject's conceptual, historical, and legal issues under inquiry.

³¹ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted 18 December 1979, G.A. Res. 34/180, U.N. Doc. A/RES/34/180.

³² Protocol to the African Charter on Human and Peoples' Rights on Women's Rights in Africa (Maputo Protocol), adopted 11 July 2003, CAB/LEG/66.6, 21 I.L.M. 212., <https://au.int/en/treaties/protocol-rights-women-africa>

1.7 Literature Review

Muna notes that “African courts took a static view of customary law and did little to mitigate its discriminatory operation against women”.³³ However, he further asserts that:

currently, the Judges are increasingly affirming the supremacy of human rights norms and declaring customary discriminatory norms unconstitutional or invalid and inapplicable in modern society. In several jurisdictions, courts are responding to the need for change and are showing an understanding of the existing social and economic conditions.³⁴

In *Shilubana v Nwamitwa*³⁴ Judge Van der Westhuizen asserted that the courts must keep up with the developments occurring in communities by recognising and giving effect to that development that adequately supports the protection of rights, primarily women. Again, in this case, the judge emphasised the necessity to cut customary law down to size to protect women's rights by using the Constitution's values, spirit, and purport as an instrument of change. In this case, the Constitutional Court highlighted that discriminatory practices against women founded on customary law are inconsistent with the values of a constitutional democracy.

The Constitutional Court, in the case of *Bhe*⁹, played a crucial role in enforcing and strengthening constitutional objectives for gender-based non-discrimination. In this case, the Court dealt with the principle of male primogeniture, which gave preference to males when it came to the customary law of succession. The court found the practice of male primogeniture in the customary law of succession unconstitutional and discriminatory to women's right to equality, thus invalidating the rule's applicability.

Madlala³⁵ on the contrary, it is not convincing that the enactment of new laws and the role played by the judiciary thus far are suitable for improving customary law and the rights of women in African communities. The author contends that the recently introduced legal reforms aimed at addressing inequalities in the customary law of succession, particularly to protect human rights and advance the rights of women, have had limited or negligible impact in South Africa.

³³ Muna N.,2011. African Customary Law, Customs, and Women's Rights. *Indiana Journal of Global Legal Studies*: Vol. 18: Iss. 1 , Article 5. Available at: <https://www.repository.law.indiana.edu/ijgls/vol18/iss1/5> [Accessed 16 June 2022], page 10.

³⁴ *Shilubana and Others v Nwamitwa* 2008 (9) BCLR 914 (CC); [2008] ZACC 9. Constitutional Court of South Africa, judgment delivered on 4 June 2008.

³⁵ Madlala, N.,2014. Customary Law of Succession and Gender Equality.LLB. UNISA Available at https://www.academia.edu/11476414/Customary_Law_of_Succession_and_Gender_Equality_in_South_Africa.

These laws, though progressive in intention, have failed to bring about meaningful change in the lived realities of women who remain affected by deeply entrenched discriminatory practices.

A significant factor contributing to this lack of progress is the persistent operation of the customary system, even in the face of laws designed to dismantle its inequalities. Customary norms and practices continue to exert a strong influence, often overshadowing or undermining the effect of statutory laws. Despite legal provisions intended to eliminate gender disparities in inheritance and succession, customary practices frequently remain unchanged, maintaining the status quo of exclusion and discrimination.

This disconnect highlights a broader challenge: the gap between legislative reform and societal implementation. Without effective enforcement mechanisms and widespread social acceptance of the legal changes, the progressive ideals enshrined in these laws struggle to penetrate the cultural and social fabric, leaving women's rights of succession largely theoretical rather than practical.³⁶

Madlala³⁷ goes further to say that 'although the laws and case decisions provide for relief on women in the customary law of succession factors such as lack of education, poverty and ignorance still plays a role in black societies which tend to be barriers of information and transformations of case laws and the constitution. If people disregard the transformation provided by enabling acts and court decisions. Although Madlala's opinion challenges the pace at which customary law is transforming and the shortcomings thereof, the author does acknowledge the role played by the judiciary in transforming the customary law of succession to the benefit of women.

1.8 Layout of chapters

This study will be separated into five chapters.

Chapter 1: Introduction and General Research Proposal

³⁶ Madlala, N., 2014. Customary Law of Succession and Gender Equality.LLB. UNISA, at 7-8. Available at https://www.academia.edu/11476414/Customary_Law_of_Succession_and_Gender_Equality_in_South_Africa.

³⁷ 'as above'.

Chapter 1 lays the groundwork for the entire study, providing the necessary context and framing for the research. It begins by introducing the subject under investigation, outlining the significance of studying gender equality under customary law in the South African context. The chapter situates the research within the broader socio-legal and constitutional landscape, offering readers a clear understanding of the problem statement and its relevance to the country's legal pluralism.

This chapter also sets out the research aims and objectives, delineating what the study seeks to achieve. It presents the research questions that guide the inquiry and discusses the scope of the study, identifying the boundaries within which the investigation is conducted.

The methodology employed in the study is explained in detail, including the research design, data collection techniques, and analytical approaches. This section ensures transparency and rigour in the study's execution, providing readers with insight into how the research findings are derived.

A brief literature review is included to contextualise the study within existing academic discourse. Key works related to customary law, gender equality, and constitutional reforms are reviewed to identify gaps in the literature and demonstrate the novelty of the study. Finally, the chapter outlines the challenges encountered during the research process, such as access to data, cultural sensitivities, or legal complexities, and explains how these difficulties were addressed.

Chapter 2: The Nature and Concept of Customary Law and Its Constitutional Reform in Post-Apartheid South Africa

Chapter 2 delves into the nature and concept of customary law, offering an in-depth exploration of its origins, characteristics, and role within South Africa's legal system. Customary law is examined as a dynamic and evolving system that reflects the traditions, norms, and values of indigenous communities. The chapter discusses how customary law operates in areas such as marriage, succession, governance, and dispute resolution, emphasising its relevance to cultural identity and community cohesion.

The chapter then transitions to the constitutional reforms introduced in the post-apartheid era that significantly impacted customary law. Section 211 of the Constitution, which

recognises customary law as part of the country's legal framework, is analysed in detail. The chapter highlights the constitutional mandate to harmonise customary law with the principles of equality, human dignity, and freedom, ensuring that cultural practices do not infringe on fundamental rights.

Key constitutional provisions and landmark cases, such as *Alexkor Ltd v. Richtersveld Community* (2003)³⁸, are discussed to illustrate the transformative potential of customary law in a democratic South Africa. The chapter also considers the challenges of integrating customary law into the broader legal framework, balancing the preservation of cultural heritage with the imperatives of constitutional supremacy.

Chapter 3: Gender Equality Under Customary Law and International Law Instruments.

Chapter 3 examines the relationship between gender equality under customary law and international legal frameworks. This chapter situates South Africa's efforts to address gender discrimination within the broader context of international human rights law, exploring how global instruments influence and complement domestic reforms.

The chapter begins by discussing key international treaties and conventions that promote gender equality, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the African Charter on Human and Peoples' Rights, particularly its Protocol on the Rights of Women in Africa (the Maputo Protocol). These instruments are analysed for their relevance to customary law and their role in shaping national policies and legal frameworks.

The chapter explores how South Africa's legal system incorporates international law into its domestic context, particularly through the Constitution's provisions on international agreements. It highlights instances where international norms have been invoked in judicial decisions to challenge discriminatory practices under customary law.

Case studies are presented to illustrate the impact of international law on advancing gender equality in areas such as inheritance rights, leadership roles, and access to

³⁸ *Alexkor Ltd and Another v Richtersveld Community and Others*. 2003 (12) BCLR 1301 (CC); [2003] ZACC 18. Constitutional Court of South Africa, judgment delivered on 14 October 2003.

justice. The chapter also considers the limitations of international law in addressing deeply entrenched cultural norms and the need for localised solutions that are culturally sensitive and contextually appropriate.

Chapter 4: Legislative and Judicial Reforms Toward Gender Equality Under Customary Law

Chapter 4 focuses on the legislative and judicial efforts to address gender inequality under customary law. This chapter examines how historical injustices embedded in customary law, particularly those perpetuating patriarchal norms, have been confronted through legal reforms.

The chapter begins by analysing the legislative measures aimed at promoting gender equality, such as the Recognition of Customary Marriages Act (RCMA) of 1998 and the Reform of Customary Law of Succession and Regulation of Related Matters Act. These laws are explored in terms of their objectives, implementation, and impact on traditional practices like marriage and inheritance. The chapter highlights how these reforms seek to align customary law with constitutional values, particularly the rights to equality and dignity.

Judicial interventions are also scrutinised, with a focus on landmark cases such as *Bhe v. Magistrate Khayelitsha* (2005) and *Shilubana v. Nwamitwa* (2008). These cases demonstrate how courts have reinterpreted customary practices to eliminate discrimination and uphold the rights of women. The chapter discusses the role of the judiciary in challenging patriarchal norms and setting precedents that advance gender equality.

Furthermore, the chapter explores the interplay between legislative and judicial reforms, emphasising their collective contribution to transforming customary law into a more equitable system. Challenges in enforcing these reforms, such as resistance from traditional leaders and limited awareness among communities, are also addressed.

Chapter 5: Conclusion and Recommendations

Chapter 5 concludes the study by synthesising the findings from the previous chapters and providing a comprehensive overview of the research. This chapter reflects on the

progress made in addressing gender inequality under customary law while acknowledging the challenges that persist.

The chapter revisits the study's objectives and evaluates the extent to which they have been achieved. It discusses the significance of constitutional recognition of customary law and the transformative potential of legislative and judicial reforms. The chapter also highlights the importance of international legal frameworks in supporting domestic efforts to promote gender equality.

Based on the findings, the chapter offers practical recommendations for further advancing gender equality under customary law. These recommendations include enhancing education and awareness campaigns, empowering women through leadership and community participation, strengthening the enforcement of legal reforms, and fostering dialogue between traditional leaders and policymakers. The chapter emphasises the need for a collaborative and inclusive approach that respects cultural heritage while upholding constitutional values.

Finally, the chapter reflects on the broader implications of the study, considering how South Africa's experiences can inform global efforts to reconcile customary law with human rights principles. By addressing both the achievements and challenges of this transformative process, the chapter underscores the importance of ongoing efforts to build a society that values both cultural diversity and gender equality.

CHAPTER 2: AN OVERVIEW OF THE NATURE AND CONCEPT OF CUSTOMARY LAW AND ITS CONSTITUTIONAL REFORM IN POST-DEMOCRATIC SOUTH AFRICA AS WOMEN'S RIGHTS ARE CONCERNED

2.1 Introduction

This research chapter focuses on the concept and nature of customary law and how the latter has been constitutionally reformed in the post-apartheid era. The chapter will also venture into the constraints on women that were brought about by customary law during the reign of the apartheid regime and how the judicial system of South Africa has constitutionally reformed these constraints.

As a starting point, I contend that the definition of African Customary Law remains a matter of debate, with no single universally accepted definition. However, there exists a shared comprehension of the fundamental principles underlying the discourse, and this topic is explored in a thorough and illuminating manner. Customary law, as defined by the Reform of Customary Law of Succession and Regulation of Related Matters³⁹, refers to the customs and practices observed among the indigenous African people of South Africa, which form part of the culture of those people.³⁹

Similar to the Reform of Customary Law of Succession and Regulation of Related Matters³⁹ Section 1 of the Recognition of Customary Marriages Act⁴⁰, describes customary Law as “customs and usages traditionally observed among the indigenous African people of South Africa and which form part of the culture of those people”.

The Court has made a clear distinction between official customary law and living law in the case of *Bhe*.⁹As per the given context, there are two forms of customary law, which will be discussed in an organised manner below.

2.2 Forms of customary law

According to Woodman⁴¹, the distinction between the two forms of customary law can be attributed to the colonial regime and its approach to recognising customary law for

³⁹ Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

⁴⁰ Recognition of Customary Marriages Act 120 of 1998.

⁴¹ GR Woodman 'Some realism about customary law – The West African experience' (1969) Wisconsin Law Review 128-151.

administrative rather than development purposes; consequently, customary law evolved into different forms⁴¹⁴², namely official and living customary law.

Diala further elaborates that due to the colonial regime, it became necessary to differentiate between official and unofficial customary laws.⁴²

I concur with the views of the authors above to say that during the colonial regime, customary law was not monitored in any way; hence, this led to the abuse of most rights, specifically women's rights, in a sense that most of their rights were grossly violated and not recognised, such as the right to, among other things, inheritance. However, the coming into operation of the Constitution¹, brought about some significant changes, including the introduction of official customary law.

2.2.1 Official Customary Law

Himonga⁴³, in describing official customary law, relied on Woodman's description of official customary law, stating that it is the version of law codified in legislation and recorded in textbooks and court precedents.⁴³

The Court in *Pilane v Pilane*⁴⁴, highlighted the need for customary law to evolve and has used the Constitution as a tool for transformation by stating as follows:

Our history, however, is replete with instances in which customary law was not given the necessary space to evolve but was instead fossilised and "stone-walled" through codification, which distorted its mutable nature and subverted its operation. The Constitution is designed to reverse this trend and to facilitate the preservation and evolution of customary law as a legal system that conforms with its provisions.⁴⁴

Official customary law represents the interests of the state⁴⁵ and forms an integral part of the broader framework of state law.⁴⁶ This codified version of customary law is

⁴² Anthony C Diala, Reform of the customary law of inheritance in Nigeria: Lessons from South Africa, (2014) 14 AHRLJ 637.

⁴³ CN Himonga 'The advancement of African women's rights in the first decade of democracy in South Africa: The reform of the customary law of marriage and succession' (2005) 82 Acta Juridica 83. Available at <https://journals.co.za/doi/abs/10.10520/EJC52664>.

⁴⁴ *Pilane and Another v Pilane and Another*. 2013. (4) BCLR 431 (CC); [2013] ZACC 3. Constitutional Court of South Africa, judgment delivered on 28 February 2013.

⁴⁵ Kuper Anthropology and Anthropologists 99ff. Cf Gluckman in Fortes & Patterson Studies in African Social Anthropology 21ff. Available at https://www.justice.gov.za/salrc/dpapers/dp74_prj90_cstmar_1998.pdf.

⁴⁶ Van Niekerk 2001 CILSA. The term "state law" alludes primarily to common law (i.e. Roman-Dutch law and adopted aspects of English law). The pre-constitutional official customary law may be counted

encapsulated in various formal sources, including statutes, judicial precedents, reports from the South African Law Reform Commission, academic textbooks, university lectures, and other public records.

Ndima critiques this official rendition, asserting that its validity relies heavily on external or alien values rather than remaining rooted in the original cultural context of customary law. Similarly, in the case of *Du Plessis v De Klerk*⁴⁷, Justice Mokgoro underscores this critique, observing that customary law has been systematically sidelined and reduced to a rigid, fossilised collection of norms that are disconnected from their communal origins and practices.⁴⁸ This alienation from its foundational societal roots reflects a profound shift from the dynamic and adaptive nature of living customary law.

Contrary to the above submissions, in challenging the nature of official customary law, Costa⁴⁹, puts it as follows:

“[C]ustomary law is corrupted, inauthentic and lacking authority. It is a foreign imposition, a stranger in Africa.”⁴⁹

2.2.2 Living customary law

Living customary law is “the law actually observed by African communities”.⁵⁰ It is described as “an unwritten law passed on from generation to generation and is part of the culture and tradition of the community”.

This form of customary law is dynamic and adaptive, evolving naturally in response to the changing circumstances and needs of society.⁵¹ Unlike codified law, which often remains static until formally amended, living customary law reflects the organic and continuous development of community norms and practices. However, when such changes intersect

as part of state law as it reflected common law and was required not to be repugnant to public policy and natural justice. These concepts, public policy and natural justice are common law concepts at 480.

⁴⁶ Van Niekerk, G. 2001. “Indigenous Law and the Constitution.” *Comparative and International Law Journal of Southern Africa*, 34(4), pp. 480–496.

⁴⁷ *Du Plessis v De Klerk*. 1996 (5) BCLR 658 (CC); [1996] ZACC 10.

⁴⁸ ‘as above’

⁴⁹ Costa, A. 1998. “The myth of customary law.” *South African Journal on Human Rights*, 14(4), pp. 525–534.

⁵⁰ *Mabena v Letsoalo* 1998. (2) SA 1068 (T). Transvaal Provincial Division, judgment delivered on 3 March 1998.

⁵¹ Koyana, D.S. 1980. *Customary Law in a Changing Society*. Cape Town: Juta & Co., p. 157.

with statutory frameworks or require formal codification, legislative intervention becomes necessary. This dependence on legislative processes underscores the tension between the fluid nature of living customary law and the rigidity of written law, highlighting the complexities of integrating customary practices into formal legal systems.

Ndima, puts it as follows:

When it comes to the pervasive problem of developing African customary law, the judiciary faces the additional challenge of determining the living version of customary law for the community concerned. One of the injustices of the past, which our constitutional interpreters must reject in striving to heal our historical divisions, is the distortion caused to African law by the application of the interpretive technique of repugnancy. This method removed the philosophical underpinnings (which the colonial officials perceived to be in conflict with Western morality) from African customary law.

Furthermore, the Honorable Court, in the case of *Bhe*⁹, also distinguished between official customary law and living customary law. The Court expounded upon the meaning of living customary law, noting that it is an acknowledgement of the customary rules that are adapted to fit changing circumstances.⁹ The primary issue with these adaptations lies in their ad hoc nature and lack of consistency. Despite these shortcomings, magistrates and courts tasked with overseeing the administration of intestate estates persist in applying the formalised version of customary law. This practice often leads to discrepancies and inequities, particularly in light of the significant societal changes that have taken place over time.⁹

Also, in the case of *Pilane and Another v Pilane and Another*⁴⁴, the Constitutional Court affirmed the character of living customary law as a dynamic and evolving legal system, stating that:

the true nature of customary law is as a living body of law, active and dynamic, with an inherent capacity to evolve in keeping with the changing lives of the people whom it governs.

In the case, the court further explained in the case of *Pilane* to say that living customary law is regarded as the norms that regulate communities in their daily lives; it is also considered as the law that ‘emerges from what people do’ or ‘what people believe they ought to do.’⁹

Bennet describes "Living" African customary law as practised by the people that are applied in various traditional and informal tribunals⁴⁹, as a fluid and dynamic legal system that corresponds and develops in response to the needs of society.⁵⁴

I, at this moment, submit, in concurrence with Costa's⁴⁹, an assertion in his statement that officially recognised customary law has, as a matter of necessity, modified essential facets of living customary law. This alteration was undertaken with the paramount objective of ensuring equity and safeguarding the rights of all individuals, particularly those pertaining to women's rights.

2.3 Characterisation of customary law.

To be aligned with the main topic, this topic will focus on the negative characterisation of customary law and how it has affected women's rights. It is essential to approach discussions about customary law sensitively, recognising that perspectives may vary and negative characterisations may not capture the complexity or diversity within customary legal systems.

However, some critiques or negative characterisations have been expressed about customary law in specific contexts, including:

- (i) **Gender Inequality:** Critics argue that some customary laws perpetuate gender inequality, often discriminating against women and limiting their rights in areas such as inheritance, marriage, and property ownership.

The principle of male primogeniture is a typical example in matters relating to living customary law of succession, as submitted by Venter et al.⁵² Customary law practices have been characterised by the principles of patriarchy, alternatively, male primogeniture, in that the regulations have been regarded as fundamental in the African customary law.⁵³

In a broad sense, the principle of male primogeniture determines that males succeed other males in the family lineage.⁵³ Consequently, females cannot

⁵² Venter, Tia, and Jeanne Nel. "African Customary Law of Intestate Succession and Gender (In)equality." *Journal of South African Law*, vol. 2005, no. 1, 2005 at 89.

⁵³ Supra 2000. "Customary Law and Gender: The Challenges of Modernization." *South African Law Journal*, 117(4), pp. 620–635page 100.

inherit, and those related to the deceased family lineages are generally precluded from the succession.⁵⁴

Also, Albertyn corroborates the above and criticises the principle of male primogeniture, stating that male primogeniture 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 equality under this constitutional order.⁵⁵

However, in a contrasting view, Simons⁵⁶ Finds the principle of male primogeniture to be consistent with the structure and functions of the joint family in the sense that “the general heir, who succeeds to the office and to an estate, must be a male because only a man can be a head of a household in the traditional society.”⁵⁶

- (ii) Lack of Formality: Customary law is sometimes criticised for its informal nature, with some arguing that the absence of codification and written records can lead to inconsistency and uncertainty in legal practices.
- (iii) Limited Protection of Individual Rights: Some critics argue that customary law may not provide adequate protection for individual rights, particularly when it comes to issues like freedom of expression, privacy, and protection against discrimination.
- (iv) Resistance to Change: Customary law is often seen as resistant to change or adaptation, which can be a drawback when societies undergo significant transformations or when there's a need for legal systems to evolve.
- (v) Potential for Abuse: In certain instances, customary law has been criticised for providing a framework that could be exploited by those in positions of power, leading to abuse or unequal application of justice to the detriment of women.

⁵⁴ De Koker "Proving the existence of an African customary marriage" 2001 TSAR 263; Olivier (n 17) 147; Pieterse "The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: final nail in the customary law coffin?" 2000 SALJ 630. This fact is the prime source of critique against the customary rules of succession, in that, it is argued, women are left behind, and are continually subordinated.

⁵⁵ 'Albertyn, C. (2009) "The stubborn persistence of patriarchy"? gender equality and cultural diversity in South Africa', *Constitutional Court Review*, 2(1), pp. 165–208. doi:10.2989/ccr/2009.0005.

⁵⁶ Simons African Women Their Legal Status in South Africa (1968).

The negative characteristics associated with customary law, particularly the principle of male primogeniture, have historically imposed substantial constraints on women, resulting in pervasive discrimination and entrenched gender inequalities. Male primogeniture, which prioritises male heirs in inheritance and succession, has been one of the most prominent features of customary law, particularly in traditional African societies. This principle has not only limited women's access to property and resources but also reinforced patriarchal structures that marginalise women socially, economically, and politically.

The adherence to male primogeniture creates a significant burden for women in multiple ways. In matters of inheritance, women are often excluded from owning or inheriting family property, leaving them economically vulnerable and dependent on male relatives. This exclusion undermines their financial independence and ability to participate in economic activities, perpetuating cycles of poverty and dependence. Widows and daughters, in particular, face significant challenges when male primogeniture is strictly enforced, as they may be dispossessed of family land or assets upon the death of a husband or father.

Socially, male primogeniture perpetuates the idea that women are secondary to men in family structures and community decision-making processes. This diminishes their role in governance and leadership within traditional systems. Women are often excluded from positions of authority and denied the opportunity to influence community decisions, perpetuating a narrative that reinforces their subordinate status.

Addressing these negative consequences requires a multifaceted approach. Reforming customary laws is a crucial first step. This involves amending or abolishing discriminatory practices such as male primogeniture to ensure that women have equal rights to inheritance, property ownership, and succession. Legal reforms, such as the *Bhe v. Magistrate Khayelitsha* (2005) case, where the Constitutional Court of South Africa invalidated the rule of male primogeniture, demonstrate the potential for judicial interventions to dismantle gender discrimination in customary law.

However, legal reforms alone are insufficient. Raising awareness about gender equality within communities is essential to effect lasting change. Education campaigns can help challenge entrenched patriarchal attitudes and highlight the importance of treating women

as equal members of society. Traditional leaders and community influencers should be engaged as allies in these efforts, as their endorsement can lend credibility and encourage acceptance of reforms within their communities.

Advocating for legal changes that recognise and protect women's rights is another critical strategy. Advocacy groups, civil society organisations, and policymakers must collaborate to develop and implement laws that not only protect women's rights but also create mechanisms to ensure their enforcement. This includes providing women with access to legal aid, education on their rights, and platforms to voice their grievances and seek justice.

Shifting societal norms is perhaps the most challenging aspect of addressing the negative characteristics of customary law. It requires dismantling deeply ingrained cultural beliefs and promoting values of fairness and equity. This can be achieved through targeted interventions, such as integrating gender equality education into school curricula, promoting women's leadership in traditional governance structures, and creating safe spaces for women to participate in community decision-making.

Addressing the discriminatory practices associated with male primogeniture requires a comprehensive approach that combines legal reforms, awareness-raising initiatives, and societal transformation. Promoting fair and equitable treatment for women within the context of customary legal systems is essential for achieving gender equality and fostering inclusive communities where women and men can thrive equally.

2.4 Constitutional recognition of customary law

The Constitution of South Africa marks a pivotal moment in the evolution of the continent's legal systems by formally acknowledging African customary law as a legitimate and integral component of the national legal framework. This recognition underscores South Africa's commitment to transformative constitutionalism, a process aimed at dismantling historical injustices and creating a more equitable society. By incorporating customary law into its legal fabric, the Constitution has played a significant role in fostering a multifaceted legal system that respects the country's rich cultural diversity while upholding the principles of equality and human rights.

One of the critical contributions of this constitutional recognition is the preservation of cultural heritage. Customary law reflects the traditions, norms, and values of Indigenous communities, serving as a cornerstone of their identity and social cohesion. By giving customary law formal legal status, the Constitution not only protects these cultural practices from erosion but also affirms the importance of Indigenous knowledge systems in shaping South Africa's future.

In addition to preserving cultural heritage, the recognition of customary law provides a vital foundation for advancing social justice and fairness. Customary law governs critical aspects of life for many South Africans, particularly in rural areas, including marriage, succession, and dispute resolution. Its inclusion in the legal system ensures that the needs and realities of Indigenous communities are considered, fostering a more inclusive approach to justice.

The Constitution acknowledges African customary law in three significant provisions. Section 211 recognises the application of customary law in matters where it is applicable, subject to the Constitution and the Bill of Rights. Section 30 and Section 31 further protect the rights of individuals and communities to practice their culture and language, ensuring that customary law operates within the broader framework of human rights.

This constitutional recognition demonstrates the importance of integrating Indigenous legal systems into national governance structures, balancing cultural preservation with the demands of a modern constitutional democracy.

- (a) The initial transformative aspect was recognising the right to cultural expression, cultural practices, and the freedom of religious association as a means of celebrating diversity in a newly formed hybrid society.

Every person has the right to freedom of conscience, religion, thought, belief, and opinion, which includes the right to hold and manifest any ideology or belief. The State may permit the conduct of religious observances at state or state-aided institutions, provided that such observances follow guidelines set by the appropriate public authorities, are conducted in an impartial manner, and attendance is voluntary and unrestricted. This section does not preclude legislation that recognises diverse forms of marriage or systems of personal and family law, but such recognition must be consistent with the provisions of the Constitution. Furthermore, everyone has the right to use their preferred

language and participate in cultural activities, but such activities must not infringe upon the provisions of the Bill of Rights.

Customary law is a recognised source of law in the Republic of South Africa. Section 211 (1) of the Constitution¹ of South Africa provides that the institution, status, and role of traditional leadership are recognised subject to the constitution. The Constitution additionally provides in section 211(2) that a "traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, including amendments to, or repeal of, that legislation or those customs" and that "courts must apply customary law when that law is applicable, subject to the Constitution and legislation that specifically deals with customary law."¹

In *Bhe v. Magistrate, Khayelitsha*⁹ Justice Langa elaborated further that customary law "is protected [and recognised] by and subject to the Constitution in its own right."

Judge Van Der Westhuizen added in *Shilubana v Nwamitwa*³⁴ that "customary law has a status that requires respect." Similar to the South African Constitutional Court decision in *Alexkor v. Richtersveld Community*⁵⁷, when it held that customary law must be recognised as an "integral part" of the law and "an independent source of norms within the legal system."⁵⁷

2.5 Conclusion

This chapter has delineated the evolution of the customary law concept into two distinct forms: official customary law and living customary law. Official customary law is codified in written scriptures, whereas living customary law comprises rules that, although unwritten, exist and are daily applied by traditional societies. The Constitution, mainly through the equality clause and section 33, has brought about significant transformations in customary law, particularly in the realm of succession. The customary law of succession has undergone changes influenced by both the interim constitution and the 1996 Constitution.

Furthermore, the discussed case laws highlight the pivotal role played by the South African judicial system in addressing the challenges faced by women under customary law, particularly in the context of succession, by eliminating principles such as male

⁵⁷ *Alexkor Ltd and Another v Richtersveld Community and Others*. 2003 (12) BCLR 1301 (CC); [2003] ZACC 18. Constitutional Court of South Africa, judgment delivered on 14 October 2003.

primogeniture in pursuit of gender equality. Despite the existence of constitutional provisions and legislation, such as the Recognition of Customary Marriages Act, aimed at eliminating discriminatory practices within living customary law, challenges persist. There is still considerable work needed to eradicate the injustices faced by Indigenous women living in societies that adhere to traditional customary laws and practices.

CHAPTER 3: GENDER EQUALITY UNDER AFRICAN CUSTOMARY LAW AND INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

3.1 Introduction

Gender equality is a fundamental principle enshrined in international human rights law, yet its realisation within African customary legal systems presents unique challenges and opportunities. This chapter explores the intersectionality of gender equality under African customary law and international human rights instruments, examining legislative frameworks, international conventions, and significant case law shaping women's rights across the African continent.

3.2 Gender Equality within African Customary Law

African customary law is deeply rooted in cultural traditions and community practices, often reflecting patriarchal norms that perpetuate gender disparities.⁵⁸ Within many African societies, customary law governs various aspects of individuals' lives, including marriage, inheritance, and property rights, with implications for women's status and autonomy. For instance, customary practices such as bride price and polygamy may reinforce unequal power dynamics and limit women's agency within marital relationships.

Despite the prevalence of patriarchal customs, African customary law also encompasses diverse legal traditions that recognise women's roles and rights within society. In some communities, customary norms may afford women rights to land ownership, economic participation, and leadership positions within kinship structures. However, the extent to which these rights are upheld varies widely across different cultural contexts, highlighting African customary law's complex and heterogeneous nature.

3.3 Legislation Addressing Gender Equality

Legislative reforms at the national and regional levels have supported efforts to promote gender equality within African customary law. Many African countries have enacted laws and policies to protect women's rights and challenge discriminatory customary practices. For example, the Maputo Protocol⁵⁹, a regional human rights instrument adopted by the

⁵⁸ Mbiti, J. S. (1969). African Religions and Philosophy. Anchor.

⁵⁹ Protocol to the African Charter on Human and Peoples' Rights on Women's Rights in Africa (Maputo Protocol), adopted 11 July 2003, CAB/LEG/66.6, 21 I.L.M. 212.

African Union, explicitly addresses gender equality and women's rights, calling for measures to eliminate harmful practices and ensure women's equal participation in decision-making processes.

Additionally, national legislation in countries such as South Africa, Kenya, and Uganda includes provisions that recognise and protect women's rights within customary law contexts. These legal frameworks seek to reconcile customary practices with constitutional guarantees of equality and non-discrimination, thereby promoting gender-sensitive interpretations of customary norms and fostering more excellent legal protection for women.

3.4 International Human Rights Instruments

International human rights instruments play a pivotal role in promoting gender equality, particularly within the context of African customary law. Customary law, while deeply rooted in the traditions and cultural practices of communities, often perpetuates gender inequalities by limiting women's rights in areas such as inheritance, property ownership, and decision-making.⁶⁰ The intersection of these customary practices with international human rights norms presents both challenges and opportunities for fostering gender equity and the protection of women's rights.

Key instruments, such as the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW)⁶¹, the *African Charter on Human and Peoples' Rights* (Banjul Charter)⁶², and its *Protocol on the Rights of Women in Africa* (Maputo Protocol) (African Union, 2003)⁶³, serve as benchmarks for addressing gender-based discrimination. These frameworks obligate state parties to harmonise their domestic and customary laws with international standards.

Despite progress in some areas, significant gaps remain in implementing and enforcing these rights. Cultural relativism often clashes with universal human rights principles, raising questions about how to balance respect for cultural autonomy with the imperative to uphold gender equality. For example, in *Bhe v. Magistrate, Khayelitsha* ([2004] ZACC

⁶⁰ M. Ndulo, "African Customary Law, Customs, and Women's Rights," *Indiana Journal of Global Legal Studies* 18, no. 1 (2011): 87-120.

⁶¹ United Nations, *Convention on the Elimination of All Forms of Discrimination Against Women* (1979).

⁶² African Union, *African Charter on Human and Peoples' Rights* (1981).

⁶³ African Union, *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (Maputo Protocol, 2003).

17)⁶⁴, the South African Constitutional Court ruled against male primogeniture, a customary law practice that excluded women from inheriting property, demonstrating the potential for constitutional and international human rights norms to reshape discriminatory practices. Similarly, regional efforts in Kenya have shown how customary law can be reformed to align with constitutional guarantees of equality (Ndulo, 2011)⁶⁵. These examples underscore the transformative potential of international human rights instruments when they are effectively integrated into local legal and cultural contexts. These instruments are discussed in detail below.

3.4.1 The Declaration and Convention on All Forms of Discrimination Against Women

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted by the General Assembly on 18 December 1979. CEDAW represents the culmination of over thirty years of efforts by the United Nations Commission on the Status of Women (CSW), which was established in 1946 to advocate for women's rights and monitor their status. CEDAW is significant as it places women at the forefront of human rights concerns and affirms the principle of equality by mandating member states to undertake measures ensuring the entire development and advancement of women.⁶⁶

CEDAW requires member states to submit national reports to the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee), detailing the actions taken to implement its provisions. The Committee monitors member states' implementation of CEDAW and assesses national reports during its annual sessions with state representatives. Additionally, the Committee issues general recommendations to member states on matters related to eliminating discrimination against women as needed.⁶⁶

South Africa signed CEDAW in January 1993 and ratified it without reservations in December 1995. By ratifying CEDAW, South Africa has committed to:

⁶⁴ South African Constitutional Court, *Bhe v. Magistrate, Khayelitsha* (CCT 49/03) [2004] ZACC 17.

⁶⁵ Ndulo (note 91 above).

⁶⁶ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted 18 December 1979, G.A. Res. 34/180, U.N. Doc. A/RES/34/180.

- Incorporating the principle of equality between men and women into its legal system, abolishing discriminatory laws, and enacting legislation prohibiting discrimination against women.
- Establishing tribunals and other public institutions to protect women against discrimination⁶⁷, effectively.⁶⁶
- Ensuring the elimination of all acts of discrimination against women.⁶⁸

CEDAW emphasises that achieving equality between men and women requires ensuring, among other things, that women have equal rights to family benefits and financial credit, that rural women have access to adequate living conditions, participate in development planning, and have access to health care and education, and that women have equal rights with men in matters related to marriage, inheritance, and family relations.⁶⁶

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), ratified by many African countries, obligates state parties to take measures to eliminate discrimination against women in all spheres of life, including customary practices. CEDAW's provisions emphasise the importance of legal reforms, education, and awareness-raising initiatives to promote gender equality and combat stereotypes perpetuating discrimination. **Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW):** CEDAW is a landmark international treaty that prohibits discrimination against women in all areas of life and calls for eliminating gender-based stereotypes and practices. Article 2 of CEDAW mandates that state parties take all appropriate measures to eliminate discrimination against women in law and practice.⁶⁶

3.5 Regional Protocols aimed at protecting and advancing women's rights.

⁶⁷ OP CEDAW Toolkit - Karat. <https://www.karat.org/programmes/womens-human-rights/op-cedaw-toolkit/>

⁶⁸ South Africa. Department of International Relations and Cooperation. (2016). Initial Report of the Republic of South Africa to the Committee on the Elimination of Discrimination against Women. https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/ZAF/INT_CEDAW_1_7665_E.pdf; Can the health effects of widely-held societal norms be evaluated? An analysis of the United Nations convention on the elimination of all forms of discrimination against women (UN-CEDAW) | BMC Public Health | Full Text. <https://bmcpublihealth.biomedcentral.com/articles/10.1186/s12889-019-6607-6>

In Africa, regional protocols aimed at promoting gender equality and protecting and advancing women's rights have been developed primarily by the African Union (AU) and other regional organisations, such as the Southern African Development Community (SADC) and the Economic Community of West African States (ECOWAS). These protocols address a wide range of issues related to women's rights, including political participation, economic empowerment, education, and protection against violence. These protocols are designed to address local and regional challenges while promoting gender equality and the protection of women's rights. Below are some prominent regional protocols that aim to protect and advance women's rights:

3.5.1 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (Maputo Protocol) and the SADC Protocol on Gender and Development (SADC Protocol).

The African Charter Protocol is commonly referred to as the Maputo Protocol because the African Union ratified it in Maputo, Mozambique, on 25 11 July 2003, during its second summit. The Maputo Protocol affirms various essential rights for women, including equal social and political status with men and the right to make decisions about their reproductive health. It officially became effective on 25 November 2005, after receiving the necessary ratifications from member states, including South Africa.

The Maputo Protocol, as a significant legal framework for the promotion of women's rights in Africa, imposes a duty on member states to take effective legislative and institutional steps to eliminate all forms of discrimination against women. It further instructs states that have not yet done so to enshrine the principle of gender equality in their constitutions and relevant laws, and to ensure that these principles are meaningfully implemented and enforced. Also noteworthy is that the Maputo Protocol requires member states to integrate a gender perspective in their policy decisions, legislation, development plans, programs, and activities.

Notably, inter alia, the following articles of the Maputo protocol aimed at promoting gender equality and protecting and advancing women's rights in Africa.

- a. **Article 4:** Promotes the right to life, integrity, and security of the person, including the elimination of violence against women.
- b. **Article 6:** Promotes the rights related to marriage, including consent, age, and equality in marriage.
- c. **Article 14:** Promotes health and reproductive rights, including access to family planning and the elimination of harmful practices like female genital mutilation.
- d. **Article 15:** Provides for economic and social welfare rights, including the right to work and equal pay.

3.5.2 The Southern African Development Community (SADC Community) Protocol on Gender and Development (SADC Protocol)

The SADC Protocol on Gender and Development was adopted by SADC Community heads of state on 17 August 2008 in Sandton, Gauteng. The SADC Protocol encompasses commitments made in all regional, global and continental instruments for achieving gender equality.⁶⁹ It further enhances these instruments by addressing gaps and setting specific, measurable targets where those did not already exist. Moreover, the SADC Protocol provides member states with a forum for sharing best practices, peer support and review.

The significance of the SADC Protocol is that it houses 28 substantive targets for achieving gender equality by 2015, and this is considered a global first and has placed the SADC Community at the cutting edge of innovative strategies for giving global and continental commitments meaning at a sub-regional level. As a binding legal instrument within the Southern African Development Community (SADC), the SADC Protocol has established a foundation for integrating gender considerations across all other SADC protocols and policy frameworks. In doing so, it has positioned gender equality as a core component in advancing regional integration, sustainable development, and democratic governance.

⁶⁹ Ngubane, S. M. (2021). Feminist approach to Ukuzila custom under the new South African constitutional dispensation. <https://core.ac.uk/download/518009262.pdf>.

The SADC Protocol has clear and comprehensive institutional mechanisms for Monitoring and Evaluation, thereby ensuring accountability by SADC Community member states. Only seven countries have to date ratified and deposited the instrument with the Community Secretariat. Among the central provisions of the SADC Protocol are the obligations placed on member states to ensure gender parity in all spheres of decision-making. It further mandates that both women and men have equal opportunities to access and complete quality education and training at every level. Additionally, the Protocol calls for the full and equal involvement of women in the development and execution of economic policies.

Therefore, the SADC Protocol serves as a vital legal tool within the Southern African Development Community, as it consolidates all prior commitments related to the advancement of gender equality into a single, cohesive sub-regional framework.

Relevant articles aimed at addressing gender equality under the SADC Protocol on Gender and Development are the following:

- **Article 20:** Promotes education and training, aiming to eliminate discrimination and improve access for girls and women.
- **Article 21:** Promotes reproductive and sexual health and rights.
- **Article 22:** Promotes gender-based violence, focusing on prevention and protection measures.
- **Article 25:** Promotes economic empowerment, emphasising equal access to economic opportunities and resources.

Additionally, regional human rights frameworks, including the African Charter on Human and Peoples' Rights and the Maputo Protocol (Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa), strengthen the principles of equality and non-discrimination across African legal systems. These instruments uphold women's rights to equal legal treatment, access to justice, and protection from harmful practices, offering a critical basis for combating gender-based discrimination in customary law contexts.

3.5.3 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)

The Maputo Protocol is a regional human rights instrument specifically addressing women's rights in Africa. It recognises the importance of eliminating discrimination against women. It calls for legal reforms to ensure gender equality, including equal rights in marriage and family matters (Article 6) and equal access to land and natural resources (Article 14).⁷⁰

3.5.4 ECOWAS Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children

The Economic Community of West African States (ECOWAS) adopted this protocol in 2020 to address sexual violence against women and children.⁷¹ Indigenous women in West Africa face compounded vulnerabilities due to intersecting forms of discrimination based on gender, ethnicity, and socio-economic status. These vulnerabilities expose them disproportionately to sexual violence, often exacerbated by entrenched cultural practices, lack of access to justice, and systemic marginalisation. The ECOWAS Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children, adopted in 2020, recognises these unique challenges and emphasises the need for targeted protections for Indigenous women as part of its broader mandate to address sexual violence.

This protocol addresses specific vulnerabilities of Indigenous Women as follows:

i. Intersectional Discrimination

Indigenous women often experience violence rooted in both their gender and their marginalised ethnic identity. The protocol underscores the need for tailored strategies to combat such intersecting forms of discrimination, advocating for inclusive frameworks that address the socio-economic and cultural barriers Indigenous women face (ECOWAS, 2020).⁷²

ii. Protection in Conflict and Displacement Settings

Many Indigenous communities are disproportionately affected by armed conflicts, displacement, and land disputes. These conditions heighten the risk of sexual

⁷⁰ Protocol to the African Charter on Human and Peoples' Rights on Women's Rights in Africa (Maputo Protocol), adopted 11 July 2003, CAB/LEG/66.6, 21 I.L.M. 212., <https://au.int/en/treaties/protocol-rights-women-africa>

⁷¹ ECOWAS Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children," ECOWAS.

⁷² ECOWAS, *Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children* (2020).

violence against Indigenous women. The protocol obligates member states to implement protective measures, such as establishing safe zones, ensuring access to humanitarian assistance, and addressing sexual violence in conflict-related contexts (Ndulo, 2011).⁷³

iii. **Access to Justice and Legal Remedies**

Indigenous women often face significant barriers in accessing justice, including language barriers, geographical isolation, and systemic biases within the judicial system. The protocol explicitly calls for the removal of these barriers by providing free legal aid, culturally appropriate services, and legal proceedings conducted in Indigenous languages where necessary (ECOWAS, 2020).

iv. **Preservation of Cultural Identity**

While combating harmful practices, the protocol encourages member states to engage Indigenous communities in dialogue to promote cultural sensitivity. This approach ensures that efforts to prevent sexual violence do not inadvertently alienate Indigenous women or undermine their cultural identity. Initiatives should aim to reform harmful practices while respecting the positive aspects of Indigenous customs and traditions (African Union, 2003).

The ECOWAS Protocol complements other regional and international instruments focused on the rights of Indigenous women, such as the African Union's *Maputo Protocol* and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Together, these frameworks underscore the importance of empowering Indigenous women to participate in decision-making processes at all levels, including those related to justice and policy development.

3.5.5 African Charter on the Rights and Welfare of the Child (ACRWC)

This charter, adopted by the African Union, includes provisions protecting girl children from discrimination, child marriage, and exploitation.⁷⁴ The charter is primarily aimed at protecting and promoting the rights of children across the continent and is a critical aspect of advancing women's rights and gender equality. However, its provisions also

⁷³ M. Ndulo, "African Customary Law, Customs, and Women's Rights," *Indiana Journal of Global Legal Studies* 18, no. 1 (2011): 87-120.

⁷⁴ African Charter on the Rights and Welfare of the Child, African Union.

significantly contribute to the protection of women's rights by addressing the systemic gendered issues that impact women and girls. The ACRWC acknowledges the interconnectedness of the rights of children, their caregivers (primarily women), and their broader communities, providing a framework that advances gender equality and safeguards women's rights critically.

In protecting women's rights, the Charter focuses on the following:

i. Promoting the Rights of Girl-Children

The ACRWC explicitly condemns gender-based discrimination against children, focusing particularly on harmful practices that disproportionately affect girls, such as early and forced marriages and female genital mutilation (FGM). These practices often have lifelong consequences for women, including limiting their access to education, economic opportunities, and bodily autonomy. Article 21 of the Charter specifically calls on states to eliminate harmful social and cultural practices that affect the dignity and welfare of girls, thereby contributing to broader gender equality (African Union, 1990).⁷⁵

ii. Advancing Women's Socio-Economic Rights Through Child Protection

The ACRWC highlights the importance of children's access to healthcare, education, and social services, which directly impacts women's socio-economic rights. In many African societies, women bear the primary responsibility for caregiving. By advocating for state obligations to provide adequate support for children, the Charter indirectly reduces the socio-economic burden on women. For example, improved access to education for children, especially girls, enhances the prospects of breaking intergenerational cycles of poverty and inequality (African Union, 1990).⁷⁶

iii. Empowering Women Through the Elimination of Child Marriage

Child marriage, a practice that disproportionately affects girls, perpetuates cycles of gender-based violence and poverty. By prohibiting child marriage and ensuring that the minimum age of marriage is 18, the ACRWC directly protects girls from early pregnancies, health risks, and disrupted education. This protection fosters the long-term empowerment

⁷⁵ African Union, *African Charter on the Rights and Welfare of the Child* (1990).

⁷⁶ (same as above).

of women, enabling them to pursue education, careers, and leadership roles (African Union, 1990).⁷⁷

iv. Combatting Sexual Violence and Exploitation

The ACRWC mandates member states to protect children from all forms of sexual abuse and exploitation, including trafficking, child prostitution, and child pornography (Article 27). These protections extend to addressing the broader culture of sexual violence, which affects both girls and women. By tackling such issues at an early stage, the Charter helps to cultivate safer environments for women and ensures stronger legal frameworks for addressing sexual violence (African Union, 1990).

v. Holistic Protection of Women and Children's Rights

The ACRWC complements other African and international human rights instruments, including the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Together, these frameworks establish a holistic approach to human rights, recognising that protecting children's rights strengthens women's rights. For instance, improving maternal healthcare and access to education for girls aligns with the goals of these instruments and contributes to dismantling systemic inequalities (United Nations, 1979⁷⁸; African Union, 2003).⁷⁹

The ACRWC contributes significantly to the protection of women's rights by addressing root causes of gender inequality, particularly those affecting girls. By emphasising education, the abolition of harmful practices, and the eradication of sexual violence, the Charter creates a foundation for long-term gender equity. Its holistic approach to child welfare recognises that empowering girls is essential to safeguarding women's rights and achieving broader human rights goals in Africa.

⁷⁷ (same as above).

⁷⁸ United Nations, *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW, 1979).

⁷⁹ African Union, *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (Maputo Protocol, 2003).

3.6 Case Law and Precedents at the International and local level on the Protection of Women's rights.

Judicial decisions have significantly shaped the interpretation and application of gender equality principles within African customary law. Courts across the continent have issued landmark judgments affirming women's rights and challenging discriminatory practices rooted in customary norms. For example, in the case of *Gender Links and Others v The Government of Botswana*⁸⁰, the High Court of Botswana declared that customary laws discriminating against women in matters of inheritance were unconstitutional, highlighting the judiciary's role in upholding constitutional guarantees of equality.

On October 12, 2012, the High Court of Botswana delivered a landmark judgment in the case of *Mmusi and Others v Ramantele and Others*⁸¹, which significantly advanced women's rights. The Court examined the Ngwaketse customary law rule that restricted inheritance of a family's dwelling house exclusively to the last-born son. This rule effectively excluded women, irrespective of their position in the birth order, from inheriting their parents' primary residence. The Court ultimately ruled that this customary practice was unconstitutional, marking a pivotal moment in the recognition of gender equality within the legal framework of Botswana.⁸²

Similarly, in the case of *Mikirima v Nyaruguru District*⁸³, in Rwanda, the Supreme Court ruled that customary practices denying women equal rights to inherit family property were discriminatory and violated constitutional provisions on gender equality. Such judicial decisions demonstrate the potential of courts to interpret customary law in a manner that upholds human rights standards and promotes gender equality within African legal systems.

In the case of *Bhe and Others v Magistrate, Khayelitsha and Others*⁹, in South Africa, the Constitutional Court held that certain aspects of customary law relating to inheritance were inconsistent with the Constitution's equality provisions and needed to be reformed.

⁸⁰ *Gender Links and Others v The Government of Botswana*, High Court of Botswana, Case No. MAHLB-000392-12 (2012).

⁸¹ *Mmusi and Others v Ramantele and Others*. *Afr. hum. rights law j.* [online]. 2013, vol.13, n.1 [cited 2024-05-05]

⁸² Jonas, Obonye. Gender equality in Botswana: The case of *Mmusi and Others v Ramantele and Others*. *Afr. hum. rights law j.* [online]. 2013, vol.13, n.1 [cited 2024-05-05], pp.01-15. Available from: http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1996-20962013000100011&lng=en&nrm=iso ISSN 1996-2096 .

⁸³ *Mikirima v Nyaruguru District*, Supreme Court of Rwanda, Civil Appeal No. 0081/2019 (2019).

This decision led to legislative reforms aimed at ensuring gender equality in inheritance matters.

Similarly, in the case of *Shilubana and Others v Nwamitwa*⁸⁴, in South Africa, the Constitutional Court recognised the equal rights of women to inherit property under customary law, affirming the principle of gender equality within traditional legal systems. These landmark judgments underscore the judiciary's role in upholding constitutional guarantees of equality and promoting women's rights within African customary law contexts.

In *Agnes Mwikali & 5 Others v. Cabinet Secretary Ministry of Health & 4 Others*⁸⁵, pressed on the provision of Article 14 (Health and reproductive rights) of the Maputo Protocol. In this Kenyan case, several women filed a complaint alleging they had been subjected to forced and coerced sterilisation while seeking treatment for HIV. The court found that these practices violated the women's reproductive rights as protected under the Maputo Protocol. The ruling emphasised that reproductive autonomy and the right to make informed choices about reproductive health must be safeguarded. Consequently, the court held the government and healthcare providers accountable for violating the women's rights.

In the case of *Banda v. The People*⁸⁶, the court touched base with Article 22 (Gender-based violence) of the SADC Protocol on Gender and Development. This Zambian case involved a victim of domestic violence who sought legal protection. The court's decision underscored the necessity of legal measures and protection for victims, consistent with the SADC Protocol on Gender and Development. The court ruled in favour of the victim, emphasising the state's duty to protect individuals from gender-based violence and ensure access to justice.

In the case of *Miriam and Others v. Government of Ghana*⁸⁷, the court canvassed article 5 (Criminalization of sexual violence) of the ECOWAS Protocol on the Prevention and Suppression of Sexual Violence Against Women Against and Children. In this case, the petitioners challenged the Government of Ghana's failure to adequately address sexual

⁸⁴ *Shilubana and Others v Nwamitwa* (CCT 03/07) [2008] ZACC 9

⁸⁵ *Agnes Mwikali & 5 Others v. Cabinet Secretary Ministry of Health & 4 Others* [2020] eKLR

⁸⁶ *Aswell Banda v The People* (Appeal No. 114/2018) [2019] ZMCA 20 (20 February 2019)

⁸⁷ *Africa Legal | Miriam Ali vs The Minister of Home Affairs* <https://www.africa-legal.com/news-detail/citizenship-struggle/>

violence against women and children. The court found that Ghana had not implemented sufficient legal measures to combat sexual violence, violating its obligations under the ECOWAS Protocol. The ruling mandated the state to strengthen its laws and enforcement mechanisms to protect women and children from sexual violence. In *Aircraftwoman*⁸⁸, the ECOWAS Court held Nigeria accountable for the rape of a female employee of the Nigeria Air Force by one of its officials in the ECOWAS Court case.⁸⁸ The ECOWAS Court emphasised that states have a due diligence responsibility to prevent, investigate, and prosecute violence against women, even when the perpetrator is a non-state actor.⁸⁸ In a similar vein, the ECOWAS Court ruled in *Adama Vandi v Sierra Leone* that the state had failed to protect the victim by not investigating, prosecuting, and punishing the rape of women.⁸⁹

The court in this case of *Nubia v. South Sudan*⁹⁰, dealt with article 14 (Right to health; protection against harmful practices) of the African Charter on the Rights and Welfare of the Child. This case addressed the issue of child marriage in South Sudan. The petitioner argued that the marriage of a minor girl violated her rights under the African Charter on the Rights and Welfare of the Child. The court ruled that child marriage constituted a harmful practice that infringed upon the child's rights to health, education, and development. As a result, the court held the state responsible for preventing and prohibiting child marriage.

The ECOWAS Court held in the case of *Mary Sunday v Nigeria*⁹¹, that, unlike previous cases, a state cannot be held accountable for domestic violence. This is because the state or its organs are not involved in the violent act against the woman. The court determined that the violent acts against Mary were strictly private and occurred within the couple's household, which precludes any connection with public authority.⁹¹

3.7 Conclusion

Gender equality under African customary law is a complex and evolving field, shaped by cultural traditions, legal reforms, and international human rights norms. Legislative efforts,

⁸⁸ *Aircraftwoman Beauty Igbozie Uzezi v Federal Republic of Nigeria* Judgment No ECW/CCJ/JUD/11/21 (30 April 2021) (*Aircraftwoman*).

⁸⁹ *Adama Vandi v Sierra Leone* Judgment No ECW/CCJ/JUD/32/22 (18 July 2022) paras 143-144.

⁹⁰ *Nubia v. South Sudan*, Decision No. 1/COM/002/2016, African Committee of Experts on the Rights and Welfare of the Child, 2016

⁹¹ *Mary Sunday v Federal Republic of Nigeria* Judgment No ECW/CCJ/JUD/11/18 (17 May 2018) 5. 232.

international instruments, and judicial precedents play crucial roles in advancing women's rights and challenging discriminatory practices within customary legal systems. By promoting legal reforms, raising awareness of women's rights, and fostering dialogue between customary and formal legal frameworks, African societies can strive towards achieving gender equality and empowering women within their diverse cultural contexts.

The intersection of African customary law and international human rights instruments presents both challenges and opportunities in advancing gender equality across the African continent. While African customary law is deeply intertwined with cultural practices and traditions that can perpetuate gender disparities, there is also potential for these laws to evolve in response to international human rights standards.

The significant progress made in regional and national legislative reforms has laid a foundation for further efforts to reconcile customary practices with principles of equality and non-discrimination. Instruments such as the Maputo Protocol and CEDAW have been crucial in establishing frameworks that protect women's rights and advocate for the elimination of harmful practices.

Moreover, landmark judicial decisions across the continent have demonstrated the power of the judiciary in interpreting customary law in line with constitutional and international standards of gender equality. Courts have played a pivotal role in challenging discriminatory practices and affirming women's rights, thus advancing the cause of gender equality within customary law settings.

Nevertheless, challenges remain in ensuring the consistent implementation of legal protections and reforms at local levels, particularly in rural areas where traditional practices may be deeply entrenched. Continued efforts are required to raise awareness, educate communities, and empower women to assert their rights.

Looking ahead, collaboration between governments, civil society, and international organisations will be essential to sustain momentum toward achieving gender equality. By building on the legal frameworks and precedents established thus far, African nations can further advance women's rights and work toward a future where gender equality is fully realised across the continent.

CHAPTER 4: AN ANALYSIS OF THE LEGISLATIVE AND JUDICIAL REFORM TOWARDS GENDER EQUALITY UNDER CUSTOMARY LAW OF SUCCESSION

4.1 Introduction

This chapter explores the interplay between legislative reforms and judicial decisions in shaping gender rights and roles in matters of inheritance under customary legal systems. In many traditional African societies, inheritance practices have historically been governed by customary law, often reflecting patriarchal norms that prioritise male heirs and marginalise women. These norms have been challenged in recent years through transformative legal frameworks and landmark court rulings, which aim to align customary practices with constitutional principles of equality, dignity, and non-discrimination.

The analysis begins by contextualising the historical backdrop of inheritance laws under customary systems, highlighting the entrenched patriarchal practices that excluded women from inheriting property. These practices were codified and institutionalised during colonial and apartheid eras, reinforcing gender inequality. Women, particularly widows and daughters, faced systemic discrimination, as they were often denied access to family assets, leaving them economically vulnerable and socially marginalised. This chapter examines how these historical injustices have been addressed through legislative and judicial interventions.

Legislative reforms have played a crucial role in redefining the legal framework governing inheritance within customary law. Acts such as the Reform of Customary Law of Succession and Regulation of Related Matters Act were introduced to abolish discriminatory practices such as male primogeniture, which excluded women from inheriting family property. These laws aim to create an equitable inheritance system that upholds the constitutional mandate for gender equality. The chapter evaluates the effectiveness of these legislative measures, considering their implementation and the challenges faced in ensuring compliance, particularly in rural areas where customary practices remain deeply entrenched.

Judicial decisions have further propelled the transformation of inheritance laws under customary legal systems. South Africa's Constitutional Court has been at the forefront of interpreting and applying these reforms in a manner that promotes gender equality.

Landmark cases such as *Bhe v. Magistrate Khayelitsha (2005)* have set significant legal precedents. In this case, the Constitutional Court invalidated the customary rule of male primogeniture, declaring it inconsistent with the Constitution. This ruling not only affirmed women's rights to inherit but also underscored the principle that customary law must evolve to align with constitutional values. The chapter delves into this and other pivotal cases to illustrate how judicial interpretations have reshaped inheritance practices within customary systems.

The chapter also examines the broader implications of these reforms on societal norms and gender dynamics. While legislative and judicial interventions have been instrumental in promoting gender equality, their implementation often faces resistance due to deeply ingrained cultural beliefs and patriarchal attitudes. Many traditional communities view these reforms as an imposition on their cultural autonomy, creating tension between the preservation of cultural identity and the pursuit of gender equality. The chapter explores strategies for reconciling these tensions, such as engaging traditional leaders, raising awareness, and fostering dialogue between communities and policymakers.

Finally, this chapter situates the discussion within the broader context of South Africa's commitment to transformative constitutionalism. The analysis underscores the importance of balancing respect for cultural heritage with the imperative to uphold human rights. By examining the legislative and judicial reforms aimed at achieving gender equality in inheritance matters, this chapter contributes to a deeper understanding of how customary legal systems can adapt to modern constitutional values while addressing historical injustices.

The chapter sets the stage for a critical analysis of the progress made and the challenges that remain in achieving gender equality under customary law. It emphasises the need for continued efforts to ensure that legal reforms translate into meaningful change for women, particularly in the context of inheritance rights. This chapter serves as a foundation for exploring the intersection of customary law, gender rights, and constitutional mandates in subsequent sections of the study.

3.1.1 Legislative reforms in this context involve changes made to statutory laws governing inheritance and succession rights. These reforms may include

amendments to existing laws or the enactment of entirely new legislation.

Reforms may focus on aspects such as,

- (i) Equal distribution of inheritance between male and female heirs.
- (ii) Recognition of women's rights to inherit property and assets on an equal basis with male relatives.
- (iii) Prohibition of discriminatory practices that favour male heirs over female heirs.
- (iv) Legislative reforms are typically initiated by government bodies, often in response to advocacy efforts by women's rights groups, international organisations, and civil society.⁹²

3.1.2 Judicial reforms pertain to changes in courts' interpretation and application of laws, particularly regarding customary practices related to inheritance. Courts play a crucial role in interpreting laws to ensure gender equality in inheritance rights. They may issue landmark judgments that set precedents for future cases. Judicial reforms may involve:

- (i) Ensuring that courts apply statutory laws promoting gender equality in inheritance cases.
- (ii) Challenging discriminatory customary practices through legal proceedings.
- (iii) Upholding the rights of women to inherit property and assets in accordance with statutory laws, even if contrary to customary norms.⁹³

4.2 Customary Law of Succession

Understanding the concept of customary law of succession is essential for comprehending the dynamics of inheritance and property distribution within traditional communities. Succession, as a private law, governs the transmission of a deceased person's estate or assets to their heirs. It is a crucial aspect of societal continuity, ensuring

⁹² United Nations Development Programme (UNDP). (2018). *Gender Equality in Law: Unpacking Key Policy Areas*. Retrieved from: <https://www.undp.org/content/undp/en/home/librarypage/womens-empowerment/gender-equality-in-law--unpacking-key-policy-areas.html>

⁹³ Center for International Private Enterprise (CIPE). (2017). *Judicial Reform and Gender Equality: A Human Rights Approach to Development*. Retrieved from: <https://www.cipe.org/sites/default/files/publication-docs/Judicial%20Reform%20and%20Gender%20Equality.pdf>.

that familial and communal relationships are maintained even after the death of an individual. In South Africa, succession law operates within a dual legal framework, divided into the common law of succession and the customary law of succession. The focus here is on customary law of succession, which reflects the cultural traditions and values of indigenous communities.

4.2.1 Succession: Testate and Intestate

Succession is generally categorized into two forms: testate and intestate succession. Testate succession occurs when a person dies leaving a valid will that specifies how their estate should be distributed. This approach allows the deceased to exercise autonomy over their property, providing clarity and minimizing disputes among heirs. Intestate succession, on the other hand, applies when an individual dies without leaving a will. In such cases, the law provides a default framework for determining the distribution of assets, often prioritizing close family members.

Customary law of succession, as part of the broader dual legal system in South Africa, primarily governs intestate succession within traditional communities. Under this system, the principles of inheritance are deeply rooted in cultural norms, with specific emphasis on preserving familial lineage, social harmony, and community stability. However, these principles have historically been shaped by patriarchal values, resulting in significant gender disparities.

4.2.2 Historical Context of Customary Law of Succession

Customary law of succession in South Africa originates in pre-colonial societies, where unwritten norms and traditions governed inheritance practices. These practices were designed to ensure the continuation of the family unit, often prioritising male heirs to maintain the patrilineal lineage. Male primogeniture—the principle that the eldest male descendant inherits the estate—was a dominant feature of customary succession. This principle reflected the deeply patriarchal nature of traditional African societies, where men were regarded as the custodians of family property, and women were largely excluded from inheritance.

During the colonial and apartheid eras, customary law was codified and distorted to suit the interests of the colonial administration. This codification entrenched male dominance

and undermined the flexibility of traditional practices, which had previously allowed for some level of negotiation and adaptation. Customary law was often administered in ways that reinforced patriarchal norms, marginalising women and denying them access to property and economic resources. More on this context will be discussed below in 3.4.1.

4.2.3 Customary Law of Succession in the Post-Apartheid Era

The advent of South Africa's democratic Constitution in 1996¹ marked a turning point for customary law of succession. The Constitution enshrines the principles of equality, dignity, and non-discrimination, creating a legal imperative to reform customary practices that perpetuate gender inequality. Section 211¹ of the Constitution recognizes customary law as a legitimate part of South Africa's legal system, subject to the provisions of the Bill of Rights. This recognition has spurred significant changes in the application and interpretation of customary law of succession.

4.2.4 Judicial Interventions in Customary Law of Succession

Judicial interventions have been pivotal in transforming customary law of succession to align with constitutional principles. Landmark cases such as *Bhe v. Magistrate Khayelitsha* (2005)⁹ have challenged the discriminatory aspects of customary inheritance practices, particularly male primogeniture. In the *Bhe* case, the Constitutional Court declared the customary rule of male primogeniture inconsistent with the Constitution, emphasizing that it violated the rights to equality and dignity. The Court ruled that women and children, regardless of gender, must be allowed to inherit property under intestate succession.

This judgment not only invalidated a cornerstone of patriarchal customary law but also set a precedent for future cases. It underscored the principle that customary law must evolve to reflect the values of a democratic society. The *Bhe* case also highlighted the importance of balancing cultural preservation with the constitutional mandate to promote gender equality.

4.2.5 Legislative Reforms in Customary Law of Succession

In addition to judicial interventions, legislative reforms have played a critical role in addressing gender disparities in customary law of succession. The Reform of Customary

Law of Succession and Regulation of Related Matters Act was enacted to abolish discriminatory practices and create a more equitable framework for inheritance. This Act ensures that women and children are granted equal rights to inherit property, regardless of their gender or marital status.

The Recognition of Customary Marriages Act⁹⁴ also contributes to the reform of customary law by granting women in customary marriages equal rights to property and inheritance. These legislative measures reflect South Africa's commitment to transformative constitutionalism, demonstrating the potential for legal reforms to promote social justice and equality.

4.2.6 Challenges in Implementing Reforms of Customary Law of Succession

Despite the progress made through judicial and legislative reforms, challenges remain in ensuring the effective implementation of these changes. One significant barrier is the resistance from traditional leaders and communities who view these reforms as an erosion of cultural identity. Customary law is deeply intertwined with cultural and communal practices, and any attempts to reform it are often met with scepticism and opposition.

Additionally, the lack of awareness about legal reforms among women, particularly in rural areas, limits their ability to assert their rights. Many women are unaware of the constitutional protections and legislative measures that guarantee their inheritance rights. This gap underscores the need for targeted education and advocacy efforts to empower women and raise awareness about their legal entitlements.

4.3 The Role of Customary Law of Succession in Modern South Africa

Customary law of succession remains a vital component of South Africa's legal system, reflecting the country's rich cultural diversity and heritage. However, its application must be reconciled with the constitutional principles of equality and non-discrimination. This requires a dynamic and adaptive approach that respects cultural traditions while addressing the historical injustices that have marginalised women.

⁹⁴ The Recognition of Customary Marriages Act 120 of 1998.

Traditional leaders have a crucial role to play in this process. By embracing the principles of equality and promoting inclusive practices, traditional authorities can help bridge the gap between customary law and constitutional values. Collaborative efforts between traditional leaders, policymakers, and civil society organisations are essential for creating a more equitable inheritance system.

Above all, the customary law of succession in South Africa is at a crossroads, caught between the demands of cultural preservation and the imperatives of constitutional equality. While significant progress has been made in reforming discriminatory practices, challenges remain in ensuring that these reforms translate into meaningful change for women. Judicial and legislative interventions have laid the foundation for a more equitable system, but their success depends on sustained efforts to address resistance, raise awareness, and promote inclusive practices.

In understanding the concept of customary law of succession, it becomes evident that achieving gender equality requires a multifaceted approach. By combining legal reforms with community engagement and education, South Africa can build a legal framework that upholds the values of its Constitution while respecting the cultural diversity of its people. When interpreted in accordance with contemporary constitutional values, customary law of succession can function as an instrument for promoting social justice and empowerment. It can help guarantee equitable access to property and resources for all persons, irrespective of their gender.

4.4 Common law of succession

The common law of succession is a legal principle governing the distribution of deceased individuals' assets among their heirs.⁹⁵ When a person passes away, their assets are divided according to the provisions outlined in their will, a process known as testate succession.⁹⁵ However, if the deceased did not have a will, the distribution of their assets is determined by legal rules that identify the rightful heirs and allocate their respective shares.⁹⁵ This process, known as intestate succession, involves a detailed legal procedure to ascertain the beneficiaries and their entitlements to the estate.⁹⁵

⁹⁵ Rautenbach, Du Plessis and Venter "Law of succession and inheritance" in Bekker, Rautenbach and Goolam Introduction to legal pluralism in South Africa (2006) at 93.

4.4.1 Customary law of succession

To gain a comprehensive understanding of the customary law of succession, it's imperative to delve into its definition. Customary law encompasses a rich tapestry of customs, rituals, and traditions meticulously preserved and practised by the diverse Indigenous African peoples of South Africa. These customs and traditions are deeply rooted in the various communities' cultural, social, and historical fabric, reflecting their unique identities and values.⁴⁰ One academic mentioned that these traditions are transmitted orally from generation to generation, utilising symbols, myths, music, and literature.⁹⁶ African customary law is primarily based on practised traditions and is not codified in written form. "customs" and "customary law" are frequently used interchangeably to refer to the traditional practices and norms observed within indigenous African communities. As discussed in Chapter 2 above, it is crucial to distinguish between living customary law, which represents the ongoing practices and customs followed by Indigenous people, and official customary law, which is recognised and enforced through legislative statutes and judicial precedents within the legal system.

In traditional customary law, succession focuses on maintaining the family name and ensuring unity within the household.⁴³ The successor not only inherits the status and possessions of the deceased but also assumes the responsibility of upholding the duties and obligations of the deceased. In cases where the deceased's debts surpass their estate, the successor is also tasked with settling those debts.⁹⁶

4.5 Examining the Impact of Legal Reforms on Indigenous Women's Inheritance Rights in South Africa

In the preceding chapter, the exclusion of women from the benefits conferred by customary law, attributable to the principle of male primogeniture, was extensively discussed. The principle of male primogeniture, historically entrenched, has been eradicated in contemporary South African legal practice. This significant evolution stems from a series of legislative reforms and pivotal judicial rulings, which are elaborated upon in the subsequent sections.

⁹⁶ Magagula, N.A. (2019). Reform of customary law of succession with specific reference to gender equality. Research paper submitted in partial fulfilment of the requirements for the LLM Degree in Constitutional and Administrative Law, University of Pretoria, South Africa at 7.

In an academic discourse, one researcher elaborating upon the seminal contributions of Bekker and Van der Merwe⁹⁷, articulates that the establishment of the new democracy in 1994 significantly redefined the landscape of customary law in South Africa.⁹⁸ This era inaugurated its constitutional acknowledgement as a legitimate and parallel legal system to common law, thereby reinvigorating its role and application within the South African legal framework.⁹⁸ This pivotal shift contrasted starkly with the preceding period dominated by the apartheid regime, characterised by its institutionalisation of systemic discrimination that permeated the fabric of South African society. This historical juncture thus represents a critical evolution in the recognition and integration of customary law, reflecting broader socio-political transformations towards inclusivity and legal pluralism.⁹⁸

4.6 Examining the Impact of Judicial and Legislative Reforms on Customary Laws of Inheritance and Succession for Indigenous Women in South Africa.

Legislative and judicial decisions play a crucial role in shaping the social, economic, and political landscape. In South Africa, the efforts to reform customary laws of inheritance and succession to empower Indigenous women have been both extensive and impactful. Let's delve into the measures taken and their implications.

4.6.1 Legislative reform of African customary law on succession

In the exploration of inheritance practices within African societies, historically, a pivotal guiding principle has been that of male primogeniture. This custom, as delineated by Bennett, entails the succession of a deceased family head's property to the eldest son, who, in turn, assumes responsibility for the widow and offspring.⁹⁹ Such practices not only shaped the societal structure but were also formally supported by legal frameworks, notably section 23 of the Black Administration Act, repealed in 2006.¹⁰⁰

The constitutional scrutiny of male primogeniture, particularly in the context of succession rights, culminated in a landmark judgment in the case of *Bhe v The Magistrate, Khayelitsha; Shibi v Sithole and Others; South African Human Rights Commission v*

⁹⁷ Bekker and Van der Merwe 2009 De Jure 239-248.

⁹⁸ Ntlama, N. (2019). 'B.Juris, LLB, (University of Fort Hare), Certificate in Comparative Human Rights, LLM: Public Law, (University of Stellenbosch), LLD (University of South Africa). Associate Professor, Department of Public, Constitutional & International Law, College of Law: UNISA. Email: ntlamn@unisa.ac.za.'

⁹⁹ Bennett, T. W. (2004). Customary Law in South Africa. Juta & Co., Cape Town, 337.

¹⁰⁰ Rautenbach C 'Lost in Translation: Is a spouse or descendant (or both) in terms of the Reform of Customary law of succession and Regulation of Related Matters Act'. (2012) TSAR 150.

*President of the Republic of South Africa*⁹ (hereafter referred to as the Bhe case). This ruling declared the custom unconstitutional, marking a significant shift in legal principles governing succession and inheritance laws in South Africa.

Despite this legal advancement, the persistence of male primogeniture in rural communities highlights a complex interplay between legal reforms and societal norms.¹⁰¹ The Bhe case underscores a critical discourse on the efficacy of legal interventions in transforming entrenched cultural practices. This dichotomy is particularly evident in most rural villages where there remains "no evidence of even the slightest change in the status quo despite the constitutional invalidation of male primogeniture."¹⁰¹

4.6.1.1 Influence of the South African Law Reform Commission, courts and Legislature to change customary law of Succession

It is evident that in the 1990s, the practices of the customary law of succession needed to be revised by the authorities of the day. The South African Law Reform Commission (hereinafter referred to as the SALRC) released a paper that challenged the existing customary law rules of succession.¹⁰² Shortly afterwards, the Customary Law of Succession Amendment Bill 1998 was introduced to Parliament, which extended the common law principles of succession to the customary law of succession. Traditional leaders criticised the Eurocentric principles included in the draft bill and the need for more consultation in drafting the bill.⁸ The draft bill was withdrawn, but the South African Law Reform Commission published a discussion paper and a final report, ultimately leading to the draft bill for the Customary Law of Succession Amendment.

The content of the draft bill was confused as it introduced definitions such as "descendant" and "will" and abrogated the whole of the customary law of intestate succession for a transformed portrayal of the common law.¹⁰³ According to Rautenbach, even the Portfolio Committee on Justice and Constitutional Development expressed concern about the hasty way this legislation had been drafted.⁸

The *Bhe* case put further pressure on the South African Law Reform Commission and the legislature as it confirmed the anxieties of the South African Law Reform Commission

¹⁰¹ Bekker JC and Koyana DS op cit note 2 at 584.

¹⁰² South African Law Reform Commission *Harmonisation of the Common Law and the Indigenous Law, Draft Issue Paper on Succession* Issue Paper 12, Project 108 (1998).

¹⁰³ Pieterse M "Killing it softly: Customary Law in the new constitutional order" (2000) *De Jure* 49.

that the customary law of succession has to be brought in line with Constitutional values of equity. The decision of *Bhe* had a direct effect on the enactment of the Succession Act and Regulation of Related Matters Act (Hereinafter referred to as the SARRMA) in 2009.

The shortcomings in the drafting of the Succession Act and Regulation of Related Matters Act are evident as the Succession Act and Regulation of Related Matters Act must be read with the Intestate Succession Act¹⁰⁴, which, in essence, abolishes the customary law of succession by applying this act to all deceased estates that formerly had to devolve in terms of customary law⁸The Succession Act and Regulation of Related Matters Act abolishes essential principles of the customary law of succession by applying common law principles to all deceased estates, which formerly had to devolve into customary law.⁸

4.6.2 Judicial Intervention into Customary Law of Succession

In principle, Indigenous (customary) law views the family unit in a more expansive sense,¹⁰⁵, incorporating cultural practices that uphold the principle of male primogeniture, where inheritance is traditionally reserved for the firstborn male. As a result, the firstborn son traditionally holds a position of priority within the family. However, the Constitutional Court determined that many of the distinctions between common law and customary law were unconstitutional. In response, the legislature repealed outdated laws and enacted new legislation to address these issues.¹⁰⁶

4.6.2.1 Intestate customary law of succession: Discussion on judicial precedent

(a) *Mthembu v Letsela*

In the this case, the central matter was the constitutionality of the customary law rule of succession, which was grounded in male primogeniture and effectively barred women from inheriting property in the absence of a will.¹⁰⁷ The Supreme Court of Appeal dismissed the request to develop customary law in accordance with the provisions of the

¹⁰⁴ Intestate Succession Act 81 of 1987.

¹⁰⁵ De Waal, M.J., and Schoeman-Malan, M.C. 2008. Law of Succession. 4th ed. Cape Town: Juta & Co., p. 32.

¹⁰⁶ De Waal, M.J., and Schoeman-Malan, M.C. 2008. Law of Succession. 4th ed. Cape Town: Juta & Co., p. 32.

¹⁰⁷ *Nwamitwa v Phillia*. 2005. (3) SA 536 (T). Transvaal Provincial Division, judgment delivered on 5 August 2005

Interim Constitution,¹⁰⁸ The application sought to ensure that customary law would be applied in a manner that does not distinguish between men and women. However, the judge remarked as follows at paragraph [40]:

“Any development of the rule would be better left to the Legislature after a whole process of investigation and consultation, such as is currently being undertaken by the Law Commission”.

(b) ***Zondi v President of the Republic of South Africa***¹⁰⁹

In this case, the deceased, who was married and had two children born out of wedlock, passed away without a will in 1995. The marriage, as defined under Section 22(6) of the now-repealed Black Administration Act (BAA), was not a marriage in community of property.¹¹⁰ As a result, his estate was subject to administration under Regulation 2¹¹¹, this meant that the estate was administered according to customary law. Regulation 2 made a distinction between the rules of succession applicable to various types of marriages. Under this regulation, the deceased's brother was designated as the heir, while the illegitimate children were excluded from inheritance. The applicant requested a declaration that Regulation 2 was unconstitutional.

The court ruled that Regulation 2 was unconstitutional insofar as it created a distinction for intestate succession purposes between the estate of an African individual married under Section 22(6) (i.e., a marriage out of community of property) and the estate of an African married either in community of property or under an ante-nuptial contract.¹¹² In issuing the order, the court determined that the regulations created a distinction for intestate succession based on the type of marriage, differentiating between marriages concluded out of community of property, those governed by an antenuptial contract, and those entered into in community of property.

The court stated that the constitutional ban on unfair discrimination, outlined in Section 9, is a fundamental principle central to the Constitution.¹¹³ The court also determined that Regulation 2 was inconsistent with the equality provisions enshrined in the Constitution.

¹⁰⁸ Interim Constitution of the Republic of South Africa Act 200 of 1993.

¹⁰⁹ *Zondi v President of the Republic of South Africa* 2000 (2) SA 49 (N).

¹¹⁰ *Moseneke v The Master*. 2001 (2) SA 18 (CC). Constitutional Court of South Africa.

¹¹¹ South African Law Reform Commission 2004. Customary Law of Succession. Discussion Paper 93, Project 90, Pretoria: Government Printer, paragraph 3.2.17.

¹¹² Amendment Act on Marriages Act 3 of 1988. Republic of South Africa. Section 1(e). Pretoria: Government Printer.

¹¹³ *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC). Constitutional Court of South Africa.

It observed that while both legitimate and illegitimate children of a deceased African individual married under an ante-nuptial contract or in community of property were entitled to inherit, the illegitimate children of individuals in a similar marital status as the deceased were unfairly excluded. The court found this disparity to be highly discriminatory and declared that it should be invalidated, ensuring that all illegitimate children would have equal inheritance rights.¹¹⁴

(c) ***Moseneke v The Master***¹¹⁵

In *Moseneke v The Master*, the deceased, a retired individual, passed away intestate, leaving behind an estate comprising immovable property, motor vehicles, shares, unit trusts, and insurance policies. His surviving family included his wife and four sons.¹¹⁶ “The estate was submitted to the Master of the High Court in accordance with the Administration Act. However, under the Black Administration Act (BAA), the Master’s office lacked the authority to oversee the administration of intestate estates of black individuals, despite having jurisdiction over all other intestate estates. As a result, the Master referred the estate to the magistrate in Pretoria for administration in terms of the BAA”.¹¹⁷

Although the matter in *Moseneke v The Master* did not directly pertain to the law of succession, the Women’s Legal Centre Trust was granted permission to intervene as *amicus curiae* and to present both written and oral arguments. They submitted that, in the context of intestate succession involving deceased African individuals, the intersection of race, gender, and cultural norms resulted in both direct and indirect discrimination against African women. The court expressed concern that individuals continued to be classified racially as “blacks” rather than simply as persons, finding such differentiation incompatible with the goal of building a non-racial society. It made clear its reluctance to uphold

¹¹⁴ Council of Europe. 1975. European Convention on the Legal Status of Children Born Out of Wedlock Strasbourg: Council of Europe. Available at: <https://rm.coe.int/168007ff1b> [Accessed 21 November 2024].

¹¹⁵ *Moseneke v The Master* 2001. (2) SA 18 (CC); [2000] ZACC 30. Constitutional Court of South Africa, judgment delivered on 13 December 2000.

¹¹⁶ ‘same as above’

¹¹⁷ ‘same as above’

legislative provisions that create racial distinctions and expressed empathy for the challenges faced by African women in this legal framework.¹¹⁸

(d) ***Bhe v Magistrate, Khayelitsha***¹¹⁹

Initially, in *Bhe v Magistrate, Khayelitsha*, the applicant and the deceased lived together as husband and wife for 12 years. Two minor daughters were born from the relationship, and as they were underage, their mother acted on their behalf in initiating the application. The deceased had passed away intestate. Relying on African customary law, the deceased's father asserted that he was the rightful heir and thus entitled to inherit and dispose of the deceased's property. The court ultimately found that sections 23(10)(a), (c), and (e) of the Black Administration Act (BAA) were unconstitutional and invalid.¹²⁰ As a result, regulation 2(e) of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks was also declared invalid.¹²¹

In addition, the court held that section 1(4)(b) of the Intestate Succession Act¹²² was unconstitutional and invalid, as it excluded from the operation of section 1 any estate, or part thereof, to which section 23 of the Black Administration Act applied. The court declared that, until the relevant legislature amended the identified constitutional flaws, the distribution of intestate estates of black individuals must be governed by section 1 of the Intestate Succession Act¹²³.

The sole reason the first two applicants were denied inheritance from their father's estate was due to their race and gender.¹²⁴ This constituted direct discrimination based on race and gender, which was inherently unjust and violated the equality provisions outlined in sections 9(1) and (3) of the Constitution. As a result, the court was obligated to declare the law unconstitutional and invalid.¹²⁵

The court affirmed that African women, regardless of their age or social rank, were entitled to inherit from their parents' estate under intestate succession, just as male heirs would. It also noted that while gender-based distinctions could be permissible in certain cultural

¹¹⁸ 'same as above'

¹¹⁹ *Bhe and Others v Magistrate, Khayelitsha and Others* 2005 (1) SA 580 (CC) para 95.

¹²⁰ 'Same as above'.

¹²¹ 'same as above'.

¹²² Intestate Succession Act 81 of 1987

¹²³ 'same as above'.

¹²⁴ *Bhe and Others v Magistrate, Khayelitsha and Others* 2005 (1) SA 580 (CC) para 95.

¹²⁵ *Bhe and Others v Magistrate, Khayelitsha and Others* 2005 (1) SA 580 (CC) para 95.

or ritual contexts, these should not lead to any form of discrimination or harm to female descendants.¹²⁶

Relying on the constitutional right to equality enshrined in section 9 of the Constitution, the court determined that women are entitled to inherit under intestate succession. It further held that the rule of male primogeniture, as endorsed by regulation 2(e), was inconsistent with the Constitution and therefore invalid.¹²⁷

(e) ***Shibi v Sithole***¹²⁸

In this case, the deceased died intestate, leaving no children, parents, or grandparents. His next of kin on the male line were two cousins. Although his sister was still alive, she was barred from inheriting under customary succession rules. As a result, she approached the court requesting a declaration that she be recognised as the sole beneficiary of her brother's estate.¹²⁹

4.7 Constitutional Recognition of Customary Law of Succession

The coming into operation of the Constitution has caused immense changes in the customary law of succession to benefit indigenous women whom customary laws of succession have suppressed.

4.7.1 Constitutional Court Decisions on Customary Laws of Succession

The landmark Constitutional Court decision on the customary law of succession of *Bhe v Magistrate, Khayelitsha* (Commission for Gender Equality as Amicus Curiae) *Shibi v Sithole*, and *SA Human Rights Commissioner v President of RSA*⁹, the case examined the constitutional legitimacy of section 23 of the Black Administration Act (BAA) and scrutinised the validity of the primogeniture principle as applied under customary succession law. The core issue revolved around whether the rule of primogeniture infringed upon constitutional rights, particularly in relation to the protection and recognition of the rights of women and children within the framework of customary inheritance practices.

¹²⁶ 'same as above'.

¹²⁷ *Bhe and Others v Magistrate, Khayelitsha and Others* 2005 (1) SA 580 (CC) para 95.

¹²⁸ *Shibi v Sithole and Others* 2005 (1) SA 580 (CC).

¹²⁹ 'same as above'

The court determined that the legitimacy of customary law rules and principles is subject to their conformity with the Constitution, especially the fundamental rights outlined in the Bill of Rights.¹³⁰ The court held that Section 23 was fundamentally at odds with constitutional principles, as it entrenched racial differentiation and perpetuated inequality. It was found to infringe the rights to equality and human dignity protected under sections 9 and 10 of the Constitution, due to its discriminatory treatment of individuals based on race, ethnicity, and colour.¹³¹

While the primary challenge focused on section 23(10) and the associated regulations, it became evident that the entirety of section 23, when interpreted alongside its rules, created a framework for intestate succession that was explicitly race-based. Such a system, differentiating on the basis of skin colour, was indefensible under constitutional scrutiny. A separate issue before the court was the constitutionality of the primogeniture rule.

In delivering the judgment, Deputy Chief Justice Langa encapsulated the criticism levelled against customary law in the following manner:

The basis of the constitutional challenge to the official customary law of succession is that the rule of primogeniture precludes (a) widows from inheriting as the intestate heirs of their late husbands, (b) daughters from inheriting from their parents; (c) younger sons from inheriting from their parents, and (d) extra-marital children from inheriting from their fathers.¹³⁰

The court recognised that the application of customary law had been altered over time, with a disproportionate focus on its patriarchal elements and a neglect of its original communal values.¹³² It held that denying women inheritance rights and reinforcing male dominance conflicted with the constitutional right to equality. Furthermore, the principle of male primogeniture was found to undermine the right to human dignity.¹³³ The traditional justification for this rule—namely, that the male heir would assume responsibility for the family—no longer reflected modern societal realities or legal obligations.¹³⁴ While legislative reform was preferred to align customary law with

¹³⁰ *Minister for Welfare and Population Development v Fitzpatrick and Others*. 2000 (3) SA 422 (CC); [2000] ZACC 6.

¹³¹ *Minister for Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC); [2000] ZACC 6.

¹³² 'same as above'

¹³³ 'same as above'

¹³⁴ 'same as above'

constitutional standards, the judiciary was nonetheless obligated to intervene and provide effective remedies in cases brought before it.¹³⁵

4.7.2 Constitutional Recognition of customary law and Powers of the Judiciary to reform customary law

With the enactment of the 1996 Constitution,¹ customary law was formally acknowledged as an integral component of the South African legal system, enjoying the same status as common law. This recognition affirms its legitimacy within the country's transformed constitutional framework.⁹⁸ The post-1994 legal landscape affirms the validity of South Africa's diverse legal sources, all of which operate under the overarching authority of the Constitution and within a system that upholds judicial independence.¹³⁶

The courts have been constitutionally endowed with the power to develop the common and customary law under certain circumstances, though it has yet to be done consistently. Section 8(3) of the Constitution – notice the absence of customary law – stipulates:

When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court – (a), to give effect to the right in the Bill, must apply or, if necessary, develop the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is by section 36(1).¹³⁶

In addition, the interpretation clause, section 39(2), includes customary law and reads:

When interpreting any legislation and developing the common or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

Section 173 confirms the "inherent power" of the higher courts to develop the common law they had in terms of the common law, but customary law is not mentioned. It stipulates:

"The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their process and develop the common law, considering the interests of justice".

¹³⁵ 'same as above'

¹³⁶ *Minister for Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC); [2000] ZACC 6.

4.8 Challenges and obstacles observed in the reform of Customary Laws of Succession

The reform of customary laws of succession remains fraught with numerous challenges despite judicial and legislative interventions aimed at achieving gender equality. These obstacles are deeply entrenched in cultural, social, institutional, and economic systems, creating significant barriers to the effective implementation of gender-equitable inheritance practices. Below is an expanded analysis of the key challenges observed.

4.8.1 Resistance from Traditional and Patriarchal Societies

A significant challenge to the reform of customary laws of succession is the resistance from traditional and patriarchal societies. In many communities, male inheritance rights are deeply rooted in cultural beliefs and practices that prioritise men as the primary custodians of family property. These norms view property inheritance as a male prerogative essential for maintaining familial lineage and societal stability.

The principle of male primogeniture, which designates the eldest son as the rightful heir, remains widely accepted in traditional settings. Many traditional leaders and community members perceive reforms aimed at promoting gender equality as a direct threat to their cultural identity and autonomy. This resistance often stems from the belief that introducing gender-equitable inheritance practices undermines long-standing traditions and disrupts established familial hierarchies.¹³⁷

Traditional leaders play a pivotal role in shaping community perceptions and often act as gatekeepers of customary practices.¹³⁸ Their reluctance to embrace reforms hinders progress, especially in rural areas where their authority supersedes statutory laws.¹³⁹ Furthermore, societal pressure and fear of ostracism deter women from asserting their inheritance rights, perpetuating the status quo.¹⁴⁰

¹³⁷ Mpinganjira M, *Reform of Customary Law of Succession: A Critique of the Customary Succession Bill, 2018* (2020) available at <https://www.researchgate.net/publication/343113938> accessed 16 April 2025.

¹³⁸ Nhlapo T, *African Customary Law in South Africa: The Role of the Traditional Courts* (1995) 112–115.

¹³⁹ South African Law Reform Commission, *Report on Customary Law of Succession* (Project 90) (2004) 6–10.

¹⁴⁰ *Bhe and Others v Magistrate, Khayelitsha and Others* 2005 (1) SA 580 (CC) para 95.

4.8.2 Limited Awareness and Understanding of Legal Rights Among Women

A pervasive lack of awareness among women regarding their legal rights presents another critical obstacle to reform. Many women, particularly those in rural and marginalised communities, are unaware of the statutory protections and constitutional guarantees that grant them inheritance rights.

This knowledge gap stems from multiple factors, including low levels of education, limited access to legal information, and inadequate outreach efforts by government institutions and civil society organisations. Women in such contexts often rely on traditional leaders or male relatives for guidance, who may prioritise customary norms over legal rights.

The lack of understanding extends to practical issues such as navigating the legal system, filing claims, and accessing legal aid services. Without this knowledge, women are less likely to challenge discriminatory practices or seek redress in courts, further entrenching gender inequality in inheritance matters.

4.8.3 Inadequate Implementation and Enforcement of Laws

Even with progressive laws in place, the lack of effective implementation and enforcement undermines their potential impact. Legal reforms that promote gender equality in inheritance are often poorly enforced, particularly in rural areas where customary practices dominate.¹⁴¹

Resource constraints are a major barrier to implementation. Legal aid services, which are critical for supporting women in asserting their rights, are often underfunded or inaccessible in remote regions.¹⁴² The absence of trained personnel, such as judges, lawyers, and traditional court officials, contributes to inconsistent enforcement of gender-equitable laws.¹⁴³

¹⁴¹ Africa Portal, *Women's Rights in South Africa: An Analysis of Inheritance Laws and Practices under Customary Law* (2021) <https://africaportal.org/publication/womens-access-to-land-in-the-former-bantustans-constitutional-conflict-customary-law-democratisation-and-the-role-of-the-state/> accessed 16 April 2025.

¹⁴² South African Law Reform Commission, *Report on Customary Law of Succession* (Project 90) (2004) 23–26.

¹⁴³ Claassens A and Smythe D, *Marriage, Land and Custom: Essays on Law and Social Change in South Africa* (Juta 2013) 151–153.

Institutional inefficiencies also pose significant challenges. Bureaucratic delays in processing inheritance claims discourage women from pursuing legal remedies. Corruption within institutions tasked with administering these laws further undermines their effectiveness, with officials often favouring male heirs due to personal biases or financial incentives.¹⁴⁴

The dual legal system in South Africa, where customary and statutory laws coexist, exacerbates these issues. In many cases, customary law is applied informally, bypassing statutory provisions that mandate gender equality. This inconsistency creates confusion and leaves women vulnerable to exploitation.

4.8.4 Cultural and Social Norms Sustaining Gender-Based Discrimination

Cultural and social norms remain a formidable barrier to reforming customary laws of succession. These norms, deeply ingrained in many societies, prioritise male authority and perpetuate the idea that property ownership is a male privilege.

In many communities, the concept of "family honour" is tied to male control over assets, and any deviation from this tradition is viewed as a challenge to societal values. Women who attempt to assert their inheritance rights may face stigma, ostracism, or familial conflict, discouraging them from pursuing their claims.

These cultural norms are often internalised by women themselves, who may believe that asserting their rights would disrupt family unity or violate cultural expectations. This internalisation reinforces the cycle of discrimination and compliance with patriarchal practices.¹⁴⁵

Religious beliefs also play a role in sustaining these norms. In some communities, religious teachings are interpreted in ways that justify male dominance in inheritance matters, creating additional barriers to achieving gender equality.¹⁴⁶

¹⁴⁴ Himonga C and Bosch C, 'The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning?' (2000) 117 SALJ 306, 320.

¹⁴⁵ Himonga C and Nhlapo T, *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (Oxford University Press 2014) 213.

¹⁴⁶ South African Law Reform Commission, *Issue Paper 31: Review of Aspects of the Law of Succession* (Project 100D, 2003) 9.

4.8.5 Economic Dependence and Vulnerability of Women

Economic dependence on male family members further exacerbates the challenges faced by women in asserting their inheritance rights. In many traditional societies, women are economically reliant on their fathers, husbands, or brothers, making it difficult for them to challenge discriminatory practices.

This dependence often leaves women without the financial resources necessary to pursue legal claims or secure independent livelihoods. Widows, in particular, are vulnerable to being disinherited, as they may lack the means to contest decisions made by male relatives or community leaders.

The economic vulnerability of women is especially pronounced in rural areas, where access to employment opportunities and financial resources is limited. Without economic independence, women are less likely to assert their inheritance rights or challenge patriarchal norms that exclude them from property ownership.

4.8.6 Inconsistent Application of Customary and Statutory Laws

The coexistence of customary and statutory laws in South Africa's dual legal system often results in inconsistent application of inheritance rights. Customary law, which operates informally and is deeply rooted in cultural practices, frequently conflicts with statutory laws designed to promote gender equality.

In many rural areas, traditional leaders and community courts prioritise customary practices over statutory provisions, even when these practices contravene constitutional principles.¹⁴⁷ This inconsistency creates confusion and undermines the effectiveness of legal reforms, leaving women in a precarious position where their rights are not uniformly protected.¹⁴⁸

¹⁴⁷ O Mireku, 'The Constitutionality of Customary Law Rules in South Africa' (2019) *African Human Rights Law Journal* <https://www.ahrlj.up.ac.za/mireku-o> accessed 16 April 2025.

¹⁴⁸ M van Niekerk, 'Women and Inheritance in South African Law: A Legal Overview of the Coexistence of Customary and Statutory Systems' (2020) *De Jure Law Journal* <https://www.saflii.org/za/journals/DEJURE/2020/3.html> accessed 16 March 2024.

Efforts to harmonise customary and statutory laws face significant resistance from traditional authorities and community members who view statutory laws as an imposition on their cultural autonomy.

4.8.7 Lack of Political Will and Commitment

The lack of political will and commitment to enforcing gender-equal inheritance laws poses a significant challenge. While legislative reforms have been enacted, their implementation often lacks the necessary support from government institutions.

Political leaders may be reluctant to prioritise gender equality in inheritance matters due to fear of alienating traditional leaders and communities who wield significant influence. This lack of commitment translates into inadequate funding for legal aid services, limited monitoring of compliance, and insufficient enforcement mechanisms, all of which undermine the effectiveness of reforms.

4.8.8 Corruption and Bureaucratic Inefficiencies

Corruption and bureaucratic inefficiencies within institutions tasked with administering inheritance laws further impede progress. Corrupt officials may prioritize male heirs in exchange for bribes or personal favours, perpetuating discriminatory practices.

Bureaucratic delays in processing inheritance claims discourage women from seeking legal remedies, as the process can be time-consuming, costly, and emotionally taxing. These inefficiencies undermine trust in the legal system and create additional barriers for women attempting to assert their rights.

4.8.9 Social Pressure and Family Dynamics

Social pressure and complex family dynamics also contribute to the challenges faced by women in inheritance matters. In many cases, women are discouraged from asserting their rights due to fear of disrupting family relationships or being ostracized by their communities.

Family members may pressure women to relinquish their claims to property in favour of male relatives, arguing that such actions preserve family harmony and honour. This

pressure is particularly strong in cases where women depend on their families for financial or emotional support.

The pursuit of gender equality in the customary law of succession is a complex endeavour fraught with multifaceted challenges. Addressing these issues requires not only the reform of existing laws but also a concerted effort to shift cultural perceptions, enhance legal literacy among women, and bolster the enforcement of equitable inheritance rights. Overcoming these challenges requires sustained efforts by governments, civil society organisations, and the international community to promote awareness, provide legal support to women, and strengthen institutions responsible for enforcing gender-equal inheritance laws.¹⁴⁹ Only through a comprehensive approach that encompasses legal, social, and educational dimensions can meaningful progress be made toward achieving true gender equality in this critical area.

4.9 Conclusion

Undeniably, reform of customary law of succession has developed immensely through the legislature and judiciary, dating back to the previous apartheid era, where the constitution enjoyed supremacy. These decisions have paved the way towards gender equality, where both men and women share equal rights. The constitution currently enforces that customary law, in general, must be in line with constitutional values, especially of dignity and equality, which has been a theme that the courts have alluded frequently in the customary law jurisprudence developed in the new South Africa, such as the case of *Mabena v Letsealo*.¹⁵⁰

Although customary law is acknowledged and protected under the Constitution, its application is subject to constitutional principles. The prevailing state of customary succession and inheritance law remains deficient and unsatisfactory due to the absence of comprehensive legislative reform. As a result, many black South Africans may favour a choice of law provision that allows them to opt for a legal framework more aligned with constitutional rights and contemporary values. Even though the courts and the South African Law Reform Commission had considered reforming the customary law of

¹⁴⁹Human Rights Watch. (2018). *World Report 2018: Rights Trends in Women's Rights*. Retrieved from: <https://www.hrw.org/world-report/2018/country-chapters/womens-rights>

¹⁵⁰ *Mabena v Letsoalo* 1998 (2) SA 1068 (T).

succession and inheritance, the situation remains the same: Indigenous women are being victimised by customary laws in societies where these laws are still applicable.

Various research showed that enacting new laws does not improve the succession rights of people, particularly women, in African societies.¹⁵¹ Onuoha's argument of certainty and unification should be evaluated against the actual practices in Indigenous communities. A better strategy would be to influence the present customary law of succession through living customary law rather than enforce legislation that does not reflect customary law. One would conclude that the RCLSA is such a piece of legislation as it is unfamiliar in terms of content and application to the practices of living customary law.

Regardless of the above, the customary law of succession remains imperfect due to the following setbacks described by Moodley:

- (a) The laws are inadequate because people are generally ignorant of the new laws affecting the customary law of intestate succession due to illiteracy, inaccessibility to legal resources or a failure by community leaders to communicate new developments.
- (b) The laws fail to accept that the customary laws pertaining to intestate succession may vary from tribal community to tribal community.
- (c) African customary law is a community-based system of law where rights are exercised through or shared by the community at large. Constitutions, however, focus on individual rights – a concept foreign to African customary law.
- (d) When transforming the customary laws of intestate succession, the legislatures have habitually replaced customary law with common law. That is problematic as common law does not precisely reflect the true nature of the living customary law or its practices.¹⁵¹

¹⁵¹ | Moodley 'The Customary Law of Intestate Succession', University of South Africa, 2012 note 9 at 275.

CHAPTER 5: CONCLUSION, FINDINGS AND RECOMMENDATIONS

5.1 Introduction

As South Africa grapples with the critical challenge of reconciling customary law with constitutional mandates for gender equality, the journey toward achieving equitable rights for women reveals a nuanced landscape characterised by significant obstacles and emerging opportunities. This research rigorously examined the intricate interplay between traditional practices and contemporary legal principles, guided by the central question: How has gender equality in customary law been enforced and strengthened to ensure that customary law conforms with constitutional objectives for non-discrimination based on gender? It also highlights notable advancements achieved in recent years while simultaneously revealing the persistent barriers that women encounter within customary frameworks.

5.2 An overview of findings

5.2.1 Nature and Relevance of Customary Law within South Africa's Legal Framework

i. Constitutional Recognition

Customary law is constitutionally recognised in South Africa under Section 211 of the Constitution, establishing its legitimacy as part of a pluralistic legal system. This recognition reflects the country's commitment to honouring its diverse cultural heritage while advancing human rights. Customary law is acknowledged on an equal footing with statutory and common law, subject to its alignment with the principles of the Bill of Rights. This dual mandate ensures that cultural practices are preserved without infringing on constitutional values such as equality, human dignity, and non-discrimination.

The courts are required to apply customary law in cases where it is applicable, provided it meets constitutional standards. The Constitutional Court has underscored the necessity for this alignment, noting that customary law must evolve to harmonise with constitutional

imperatives. For instance, in *Alexkor Ltd v. Richtersveld Community* (2003)¹⁵², the Court emphasised that customary law is a dynamic system capable of adapting to societal changes and legal requirements. This adaptability is essential for ensuring that the coexistence of customary law with the Bill of Rights fosters both cultural preservation and social transformation.

ii. Customary Law Jurisdictional Application

Customary law predominantly governs personal and familial matters, such as marriage, succession, and traditional governance. These areas hold significant relevance in traditional communities where cultural identity and societal norms remain closely tied to customary practices. For example, the Recognition of Customary Marriages Act (RCMA) of 1998 legally acknowledges customary marriages, provided they meet specific requirements. This legal recognition seeks to protect the rights of individuals, particularly women, within these unions while preserving traditional marital practices.

Succession is another critical area governed by customary law, often reflecting communal values and familial responsibilities. However, its application has been a source of contention, particularly when it conflicts with constitutional guarantees of gender equality. Traditionally, succession in many customary systems favoured male heirs, creating barriers to women's inheritance rights. Such practices have undergone judicial scrutiny, resulting in significant legal reforms to ensure compliance with constitutional standards.

iii. Adaptability Requirement

Customary law's adaptability has been highlighted in numerous court judgments as a vital characteristic enabling it to align with constitutional imperatives. The Constitutional Court has emphasised that customary law is not a static system but an evolving one that must be interpreted in a manner consistent with the values of equality, dignity, and human rights. For instance, in *Shilubana v. Nwamitwa* (2008), the Court upheld the ability of traditional communities to adapt customary practices to reflect changing societal norms, including the inclusion of women in leadership roles.

¹⁵² *Alexkor Ltd and Another v Richtersveld Community and Others*. (note 30 above).

Such jurisprudence illustrates the transformative potential of customary law when interpreted through a constitutional lens. It also underscores the importance of promoting gender equality and dismantling discriminatory practices while respecting cultural diversity.

5.2.2 Historical Background of Gender Discrimination under Customary Law

i. Patriarchal Codification

Historically, customary law in South Africa was deeply entrenched in patriarchal structures, often relegating women to subordinate roles within society. Women were treated as perpetual minors under the authority of male relatives, with limited legal autonomy. Their rights to property ownership, inheritance, and decision-making were constrained by traditional norms prioritising male dominance.

Marriage practices further exemplified this inequality, as women were often regarded as dependents with no independent legal status. Bridewealth (lobola) transactions, while culturally significant, reinforced the perception of women as property rather than autonomous individuals. These patriarchal norms marginalised women, restricting their participation in social, economic, and political spheres.

ii. Colonial Distortion

The colonial and apartheid regimes compounded gender inequality under customary law by codifying traditional practices in ways that reinforced male dominance. Customary law, as administered during this period, was often a distorted version of indigenous practices, stripped of their original flexibility and communal focus.

For example, colonial authorities codified primogeniture in succession, legally excluding women from inheriting family property. This codification entrenched discriminatory practices and institutionalised gender inequality. Cases such as *Bhe v. Magistrate Khayelitsha* (2005) highlight the enduring impact of these colonial distortions, where the Constitutional Court declared the customary law rule of primogeniture inconsistent with the Constitution. This judgment marked a significant step in dismantling systemic gender discrimination within customary inheritance practices.

iii. Socio-Legal Marginalization

Under customary law, women were historically excluded from their communities' leadership roles and decision-making processes. Traditional governance structures, dominated by male chiefs and elders, often overlooked the contributions and voices of women. This exclusion perpetuated their marginalisation, limiting their access to justice, education, and economic opportunities.

The socio-legal marginalisation of women extended to their inability to challenge unfair practices effectively. Customary courts, often inaccessible or biased against women, compounded their vulnerability. Consequently, women faced systemic barriers in seeking legal redress for grievances, further entrenching their subordinate status.

5.2.3 Evolution of Gender Equality within Customary Law

Judicial Interventions

The transformation of customary law to promote gender equality has been driven significantly by judicial interventions. Landmark cases such as *Bhe v. Magistrate Khayelitsha* (2005) and *Shilubana v. Nwamitwa* (2008)⁹ have challenged and redefined discriminatory practices, affirming women's rights to inheritance, leadership, and equal participation in community affairs. These rulings underscore the judiciary's role in harmonizing customary law with constitutional values.

Legislative Reforms

Legislative measures such as the Recognition of Customary Marriages Act (RCMA) and the Reform of Customary Law of Succession and Regulation of Related Matters Act have played a pivotal role in advancing gender equality. The RCMA, for instance, ensures that women in customary marriages have equal rights to property and decision-making within their unions. Such reforms demonstrate the state's commitment to addressing historical inequalities while preserving cultural practices.

Community-Led Change

Beyond judicial and legislative interventions, community-led initiatives have contributed to the evolution of gender equality under customary law. Traditional leaders, advocacy groups, and civil society organizations have worked collaboratively to reinterpret and

modernize customary practices. These efforts have empowered women to assert their rights while fostering inclusive governance structures.

5.2.4 Current Challenges in Achieving Gender Equality

Resistance to Change

Despite progress, resistance to gender equality reforms persists within some traditional communities. Deeply ingrained cultural norms and patriarchal attitudes continue to hinder the full realisation of women's rights. Resistance often stems from fears of cultural erosion or misinterpretation of reforms as external impositions.

Limited Awareness

A lack of awareness about constitutional rights and legal reforms further compounds the challenges. Women in rural areas, where customary law is most prevalent, often remain unaware of their rights or the mechanisms available to enforce them. This gap underscores the need for targeted education and advocacy efforts to bridge the divide between law and practice.

Resource Constraints

The effective implementation of reforms is often hampered by resource constraints, particularly in underdeveloped regions. Customary courts and legal aid services are frequently underfunded, limiting their capacity to address gender discrimination comprehensively. Strengthening institutional support is crucial for ensuring that reforms translate into tangible benefits for women.

5.2.5 Pathways to Strengthen Gender Equality Under Customary Law

Education and Advocacy

Education and advocacy are vital tools for promoting gender equality within customary law. Awareness campaigns targeting both men and women can challenge patriarchal norms and foster acceptance of constitutional principles. Engaging traditional leaders as allies in these efforts is particularly important, given their influence within communities.

Judicial Oversight and Reform

Continued judicial oversight is essential for ensuring that customary practices align with

constitutional values. Courts must remain vigilant in addressing discriminatory practices and setting precedents that affirm gender equality. Additionally, reforms that enhance the accessibility and efficiency of customary courts can empower women to seek justice more effectively.

Community Empowerment

Empowering communities to take ownership of reforms is critical for achieving sustainable change. Collaborative initiatives that involve traditional leaders, civil society, and government agencies can create inclusive governance structures that reflect both cultural values and gender equality.

Integration with National Frameworks

Integrating customary law reforms with broader national frameworks can enhance their impact. Aligning customary practices with statutory protections and international human rights standards ensures consistency and coherence within the legal system.

5.2.6 Reflection on Summary of Findings

Customary law remains a vital component of South Africa's legal system, reflecting its people's cultural diversity and heritage. However, its historical alignment with patriarchal norms has perpetuated gender discrimination. Judicial interventions, legislative reforms, and community-led initiatives have catalysed significant progress, affirming women's rights and promoting inclusivity. Despite these advancements, persistent challenges highlight the need for continued efforts to harmonise customary law with constitutional principles, fostering a society where cultural identity and gender equality coexist harmoniously.

a. Reflection on Critical Findings

i. Alignment of Customary Practices with Constitutional Principles and Gender Equality.

Undeniably, the recent developments in South Africa reflect a significant transformation in the approach toward mitigating gender inequalities within the framework of customary law, as evidenced by the discussions presented in prior chapters. However, despite substantial progress in aligning elements of customary law with the foundational tenets

of the South African Constitution—namely, dignity¹⁵³, equality, and freedom¹⁵³—the enduring influence of entrenched patriarchal structures and discriminatory customs persists on the ground (in our Indigenous communities) as a significant impediment. These factors not only impact legal outcomes but also shape societal attitudes that perpetuate gender inequality, as evidenced by various studies that identify the correlational relationship between customary practices and the marginalisation of women.¹

Findings from this study underscore the pressing need for sustained legal reform that directly addresses these deeply rooted issues. This encompasses the revision of outdated legal provisions and the effective implementation of new laws. Furthermore, comprehensive educational initiatives are critical to raising awareness about gender rights and fostering a culture of equality within both customary and broader societal contexts.¹⁵⁴ Active engagement from all sectors of society—including government, civil society, and local communities—is imperative to propel these reforms forward.

Persistent challenges that necessitate immediate and concerted attention are identified in synthesising key insights derived from the research. Also, proposed actionable recommendations aimed at empowering women and promoting gender equality within traditional communities. These recommendations may encompass advocacy programs, awareness campaigns, and collaborative partnerships with local leaders to reshape attitudes toward gender roles. Through a dedicated and unified effort, South Africa has the potential to bridge the divide between legal frameworks and the lived experiences of women, ensuring that their rights are not merely acknowledged but fully actualised. This comprehensive approach is essential for fostering a society where every woman can thrive and contribute meaningfully, free from discrimination and inequality.

In concluding this examination of the interplay between customary law and constitutional gender equality in South Africa, reflecting on this research's key findings and implications is vital. Throughout the analysis, we have explored the significant strides in aligning traditional practices with contemporary legal principles. However, we have also identified enduring challenges that impede the realisation of these rights for women, particularly in areas where customary law dominates. This conclusion aims to synthesise the research

¹⁵³ Sec 12 of the Constitution, 1996.

¹⁵⁴ Khan, A., & Sutherland, B. (2020). *Education as a Tool for Gender Equality in South Africa*. Journal of Gender Studies.

insights, underscore the importance of continued efforts toward legal reform, and highlight pathways for empowering women in the pursuit of justice and equality.

The research highlights progress in integrating constitutional mandates for gender equality into customary practices. Legal reforms and judicial decisions have begun challenging discriminatory customs, promoting a more equitable framework for women's rights. The study advocates for a dual approach: firstly, systematic and ongoing monitoring of traditional communities to ensure that the application of customary law does not infringe upon women's rights. This approach necessitates active engagement with these communities to foster a deeper understanding and respect for gender equality principles. Secondly, the study emphasises the crucial role of government institutions within these territories in empowering women. By providing education and resources, these institutions can significantly contribute to informing women of their rights, equipping them to challenge and seek redress against injustices. This potential for change is a powerful tool in fighting for gender equality.

Ultimately, a concerted effort from all sectors of society—including policymakers, legal professionals, human rights advocates, and organisations involved in gender equality and customary law—is necessary to bridge the gap between legal frameworks that promote gender equality and the lived realities of women under customary law. This entails legal and institutional reforms and a cultural shift towards valuing and respecting women's rights as fundamental human rights.

ii. Enduring Challenges in Customary Law

The study has illuminated women's persistent challenges under African customary law, particularly in South Africa, in Chapters 3 and 4 above. Despite constitutional guarantees and judicial reforms aimed at promoting gender equality, many customary practices continue to infringe upon women's rights to equality, human dignity, and bodily and psychological integrity.⁹⁹ The patriarchal nature of traditional customs remains a significant barrier to women's empowerment, especially in areas such as marriage, inheritance, and leadership.**Error! Bookmark not defined.**

Although South Africa has made strides in addressing these issues through legal reforms and judicial decisions, the practical realisation of women's rights under customary law

remains problematic, primarily due to limited access to justice and the entrenched power of traditional authorities. Judicial interventions, such as those in the cases of *Bhe v. Magistrate Khayelitsha* and *Shibi v. Sithole*, have been pivotal in addressing gender biases in succession laws. Yet, many other customary practices continue to disadvantage women. The interplay between constitutional law and customary law remains complex. While the Constitution recognises the validity of customary law, it must operate within the framework of human rights norms. This dual recognition necessitates continuous efforts to reform customary practices that contravene constitutional principles. The case of *Mphephu v. Mphephu-Ramabulana* underscores the ongoing struggle for gender equality in traditional leadership roles, reflecting broader societal challenges in achieving gender parity.

iii. Patriarchal Structures and Their Impact

The study found that the patriarchal nature of traditional customs significantly hinders women's empowerment. Although patriarchy was clearly ruled to be unconstitutional in the case of *Bhe*, elements of patriarchy are still observed in rural areas. Cultural norms dictate women's roles, limiting their participation in decision-making processes and reinforcing gender inequalities, which is crucial to understanding the current state of gender equality.

iv. Access to Justice and Traditional Authority Power

Limited access to justice poses a significant challenge for women in customary settings. The entrenched power of traditional authorities often obstructs women from seeking legal recourse, perpetuating cycles of inequality and injustice.

v. The Necessity of Legal Reform

a. Gaps Between Constitutional Provisions and Lived Realities

One of the study's objectives was to report on the shortcomings currently faced by women living under customary law. The study found that there exists a gap between Constitutional rights and lived realities. The South African Constitution mandates gender equality, yet the persistence of discriminatory customs illustrates the disconnect between

legal frameworks and actual practices.⁹⁹ Addressing these gaps is essential for the practical realisation of women's rights.

b. Ongoing Judicial Interventions

Judicial cases, such as *Bhe v. Magistrate Khayelitsha* and *Shibi v. Sithole*⁹, have been pivotal in promoting and protecting women's rights under customary law.

While the landmark case *Bhe v. Magistrate Khayelitsha*⁹ addressed male primogeniture in inheritance under customary law, there have been significant developments and ongoing cases that continue to shape women's rights under customary law in South Africa. Some notable examples include:

- i. *Shilubana v. Nwamitwa*¹⁵⁵ This case was pivotal in allowing a woman to succeed as a tribal chief, challenging traditional male primogeniture in chieftaincy. It affirmed the evolving nature of customary law in alignment with constitutional principles.
- ii. *LS v RL*¹⁵⁶: where the Court ruled that the bridal transfer “custom is unlawful as it unfairly and unjustly discriminates against the gender of the applicant as a woman and denies her the constitutional right of dignity and equality ‘because only women, after consenting to enter into a customary law marriage are subject to this unequal treatment by the custom of handing over.’” I align with Khumalo’s¹⁵⁷ contention that this judgment underscores the principle that African customary law, as recognised under the South African legal framework, is inherently adaptable and responsive to societal evolution. It reaffirms that the non-fulfilment of the bridal transfer custom does not, per se, nullify the validity of a customary marriage, thereby promoting a contextual and progressive interpretation consistent with the constitutional mandate to respect and develop customary law.
- iii. *Embrace Project NPC v Minister of Justice (2024)*: This ongoing case challenges gender inequalities embedded in traditional justice systems. It questions the lack

¹⁵⁵ *Shilubana and Others v. Nwamitwa* 2008 (9) BCLR 914 (CC); [2008] ZACC 9 Available at: https://scielo.org.za/scielo.php?script=sci_arttext&pid=S1996-20962010000200010 (Accessed on 14th of November 2024)

¹⁵⁶ *LS v RL* [2018] ZAGPJHC 613; [2019] 1 All SA 569 (GJ); 2019 (4) SA 50 (GJ).

¹⁵⁷ Petrus Khumalo: 2020: Does lobolo constitute a customary marriage. Available at: <https://www.golegal.co.za/customary-marriage-lobolo/> (Accessed on the 14th of November 2024).

of protections for women facing discrimination under customary practices, including inheritance and access to leadership roles.¹⁵⁸

- iv. National Council on Gender-Based Violence and Femicide (2024): Established to address systemic gender-based violence, this initiative aims to coordinate efforts to combat gender inequalities entrenched in both societal and customary frameworks. Although not judicial, its mandate includes influencing legislation and practices that may intersect with customary law.¹⁵⁹
- v. *KS v AM and Another (2023)*¹⁶⁰ : This case scrutinises the impact of lobola (bride price) on women's autonomy and the perpetuation of harmful patriarchal norms. The outcome is expected to have broader implications for the regulation of customary marriages.
- vi. Virginitv Testing and the Children's Act¹⁶¹: The regulation of virginitv testing under the Children's Act highlights the tension between cultural practices and gender equality. While permitted under strict guidelines, debates continue over its infringement on dignitv and equality.

These examples reflect ongoing judicial and legislative efforts to balance respect for customary practices with constitutional protections for gender equality. Further advocacy and strategic litigation remain critical to addressing gaps and ensuring that women's rights under customary law evolve in alignment with broader human rights standards.

¹⁵⁸ *Embrace Project NPC v. Minister of Justice (2024)* Available at: <https://powerlaw.africa/2024/06/03/national-council-gbv-femicide-act/> (Accessed on 14th of November 2024).

¹⁵⁹ National Council on Gender-Based Violence and Femicide (2024) Available at: <https://powerlaw.africa/2024/06/03/national-council-gbv-femicide-act/> (Accessed on the 14th of November 2024).

¹⁶⁰ *KS v AM and Another (2021/28121)* (ongoing). Available at: <https://gcbsa.co.za/law-journals/2023/december/p%2066%20-%2070.pdf> (Accessed on the 14th of November 2024).

¹⁶¹ Children's Act 38 of 2005. Available at: <https://gcbsa.co.za/law-journals/2023/december/p%2066%20-%2070.pdf> (Accessed on the 15th of November 2024)

c. Empowering Women through Education and Resources on gender equality and customary law.

The study also found that there's a crucial need to educate women living in customary communities who still observe customary practices regarding their rights. These women often lack adequate awareness of their legal and human rights, leaving them vulnerable to social and cultural practices that may infringe upon their entitlements or conflict with constitutional principles.¹⁶² Women living under customary law can be empowered by emphasising the critical role of legal literacy in promoting their understanding of rights and entitlements. Additionally, the active involvement of government institutions is essential in advancing gender equality. This paper explores the interplay between legal education and institutional support in addressing the challenges faced by women in customary law communities, as discussed in the sections that follow.

i. Importance of Legal Literacy

Educating women about their rights under both constitutional and customary law is crucial. Legal literacy programs can empower women to understand and assert their rights effectively.

ii. Role of Government Institutions

Government initiatives within traditional communities are essential for raising awareness and providing resources to advance gender equality and protect women's rights. These bodies work to balance respect for cultural traditions with the constitutional commitment to equality. Below is a concise overview of key institutions, their roles, and initiatives:

- **Commission for Gender Equality (CGE)**

The CGE investigates gender discrimination and educates communities about constitutional rights. Its collaboration with traditional leaders aims to reform practices like male primogeniture and child marriages.¹⁶³

- **Department of Justice and Constitutional Development (DOJCD)**

DOJCD oversees laws like the Recognition of Customary Marriages Act (RCMA), ensuring fair treatment for women. It also trains traditional leaders on aligning

¹⁶² Albertyn, Goldblatt & Roederer, 2001; Mwambene, 2010.

¹⁶³ Commission for Gender Equality. Reports and activities are accessible at: <https://www.cge.org.za/> (Accessed on the 14th of November 2024).

customary practices with constitutional mandates.¹⁶⁴

- **Traditional Leadership Structures**

Under the Traditional Leadership and Governance Framework Act¹⁶⁵, traditional councils are key in promoting women's leadership roles and mediating disputes involving customary law.

- **National Council on Gender-Based Violence and Femicide (NCGBVF)**

This council combats systemic gender-based violence, focusing on harmful traditional practices like forced marriages and virginity testing.¹⁶⁶

- **South African Human Rights Commission (SAHRC)**

SAHRC monitors and investigates human rights violations related to customary law, producing reports and policy recommendations to protect women's rights.¹⁶⁷

- **Legal Aid South Africa**

Provides free legal representation for women in disputes involving customary practices, including inheritance and marriage.¹⁶⁸

- **Women Empowerment and Gender Equality Bill**

The draft bill ensures government accountability in promoting gender equality, including through reforms in traditional communities.¹⁶⁹

These institutions can serve as platforms for education and support, helping women navigate their rights and seek justice.

¹⁶⁴ DOJCD initiatives available at: <https://www.justice.gov.za/> (Accessed on the 14th of November 2024).

¹⁶⁵ Traditional Leadership and Governance Framework Act 41 of 2003.

¹⁶⁶ Frameworks and actions outlined at [NCGBVF](https://gbvf.org.za/), Available at <https://gbvf.org.za/> (Accessed on the 14th of November 2024).

¹⁶⁷ SAHRC reports are available at [SAHRC](https://www.sahrc.org.za/) - <https://www.sahrc.org.za/> (Accessed on the 14th of November 2024).

¹⁶⁸ Legal Aid resources at [Legal Aid South Africa](https://www.legalaid.co.za/) Available at <https://www.legalaid.co.za/> (Accessed on the 14th of November 2024).

¹⁶⁹ Department of Women, Youth, and Persons with Disabilities initiatives at [DWYPD](https://www.women.gov.za/). Available at <https://www.women.gov.za/> (Accessed on the 14th of November 2024).

5.3 Recommendations for future action.

In light of the findings elucidated within this study, it is imperative to translate these insights into actionable legal strategies to enhance outcomes concerning the rights of African women under customary law. This section endeavours to present targeted recommendations derived from the comprehensive analysis and discussions conducted throughout this research. By addressing the primary challenges identified and leveraging the strengths of existing legal frameworks and practices, these recommendations aim to provide pragmatic solutions for implementation. Such measures are intended to advance legal reform and promote sustainable progress toward the realisation and protection of women's rights within the context of customary law.

The recommendations are as follows:

5.3.1 Strengthening Monitoring Mechanisms: Traditional communities should be regularly monitored to ensure compliance with constitutional mandates regarding gender equality.³⁴ Government agencies, in collaboration with civil society organisations, should conduct frequent audits of customary practices and provide oversight to prevent rights violations.⁴⁰ State actors such as the Department of Justice and Constitutional Development, Commission for Gender Equality, Chapter 9 institutions, and Civil Society Organisations (CSOs) should regularly monitor traditional communities, which is essential to ensure compliance with constitutional mandates regarding gender equality. These bodies should conduct routine audits and establish oversight frameworks to prevent rights violations and hold traditional authorities accountable.

5.3.2 Enhancing Legal Awareness and Education: Establishing government institutions within traditional lands is crucial to educating women about their rights under both constitutional and customary law.¹⁷⁰ Legal literacy programs should be implemented to empower women with knowledge about

¹⁷⁰ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) (p. 948).

their legal entitlements and recourse mechanisms.¹⁷¹ Create mobile legal aid units to reach remote areas where women may have limited access to legal assistance. Responsible actors include the Department of Women, Youth and Persons with Disabilities, Department of Justice, Legal Aid South Africa, and NGOs. These institutions should implement legal literacy programs targeting women in rural communities, including the deployment of mobile legal aid units to educate them on their rights under both constitutional and customary law.

5.3.3 Improving Access to Justice: Facilitating easier access to judicial remedies for women in traditional communities is essential.¹⁷² This can be achieved by providing mobile courts, legal aid services, and culturally sensitive legal support to address grievances related to customary law violations.¹⁷³ Responsible actors such as the Department of Justice and Constitutional Development, Legal Aid SA, and the Judiciary may improve access to judicial remedies through mobile courts, culturally sensitive legal aid services, and simplified procedures that are accessible to rural women who face customary law violations.

5.3.4 Engaging Traditional Leaders: Traditional leaders, as key influencers in their communities, play a crucial role in the enforcement and reform of customary practices. By engaging in training on human rights, they can contribute to a more inclusive approach to customary law that respects women's rights.¹⁴⁹ Engaging them in dialogue and training about human rights and gender equality can foster a more inclusive approach to customary law that respects women's rights.¹⁴⁹ Responsible actors such as the Department of Cooperative Governance and Traditional Affairs (COGTA), National and Provincial Houses of Traditional Leaders, and the

¹⁷¹ Claassens, A., & Smythe, D. (2013). Customary Law and Democracy in South Africa: Critical Perspectives on Debates Concerning Rural Women and Law Reform. *Constitutional Court Review*, 6, 355-377 (p. 360).

¹⁷² Commission for Gender Equality. (2019). *Annual Report 2018/19* (p. 18).

¹⁷³ Department of Justice and Constitutional Development. (2020). *Report on the Implementation of Gender-Based Violence Policies in Rural Areas* (p. 27).

Human Rights Commission should ensure that traditional leaders receive human rights training and be actively engaged in dialogue on gender equality to promote inclusive interpretation and enforcement of customary law.

5.3.5 International Collaboration and Support: International bodies and donor organisations should continue to support initiatives aimed at reforming discriminatory customary practices.¹⁷⁴ This includes funding for local NGOs, technical assistance for legislative reforms, and capacity-building programs for local communities.¹⁷⁵ Responsible actors: Department of International Relations and Cooperation (DIRCO); UN Women; donor agencies; international NGOs - Strengthen partnerships with international bodies to support local reform initiatives, fund legal empowerment projects, and offer technical assistance for aligning customary practices with international gender equality standards.

5.3.6 Policy and Legislative Reforms: Continued legislative reforms are necessary to eradicate discriminatory practices.⁹⁹ This includes updating existing laws and introducing new policies that specifically address gaps in the protection of women's rights under customary law.⁴³ Responsible actors: Parliament; South African Law Reform Commission (SALRC); Department of Justice; Gender Equality Portfolio Committees.

Parliament and policy-making institutions must introduce and amend legislation to close gaps in the protection of women's rights under customary law, ensuring consistency with constitutional principles.

5.3.7 Promotion of Gender-Sensitive Interpretation of Customary Law: Encouraging courts to adopt a gender-sensitive interpretation of customary law means promoting the application and adaptation of traditional legal

¹⁷⁴ African Union. (2003). Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (p. 15).

¹⁷⁵ Economic Justice Network. (2020). Empowering Women in Rural Economies: Strategies and Success Stories (p. 45).

principles to acknowledge and address gender inequalities and biases. This can help bridge the gap between constitutional ideals and customary practices, thereby enhancing women's rights.⁹ Judicial training on gender issues and human rights can enhance this approach.¹⁰ Responsible actors such as the Judiciary, South African Judicial Education Institute (SAJEI), law schools, and legal scholars. Judicial officers must be encouraged and trained to adopt gender-sensitive interpretations of customary law that reconcile tradition with constitutional rights, particularly in rural and community courts.

5.3.8 Commitment to Gender Equality: Role of Legal and Human Rights

Organisations: Legal and human rights organisations are pivotal in advocating for women's rights. Their expertise is crucial in shaping reforms and promoting awareness. A collective commitment from all sectors of society—including policymakers, community leaders, and advocates—is essential to achieving gender equality. Everyone has a role to play in fostering an environment where women's rights are respected and upheld. Responsible actors such as the Legal Resources Centre, Centre for Human Rights, Lawyers for Human Rights, and Gender advocacy NGOs. These organisations must continue advocacy, litigation, and awareness campaigns aimed at protecting and advancing women's rights under customary law.

5.3.9 Integration of International Norms: Integrating international human rights norms into domestic law can strengthen protections for women.⁹⁹ South Africa's commitment to international treaties such as CEDAW, ICCPR, and the Maputo Protocol should be reflected in its domestic legal framework.¹⁷⁶ Responsible Actors such as the *Department of Justice; Department of International Relations; Parliament* should ensure that Domestic legal frameworks reflect South Africa's obligations under

¹⁷⁶ Diala, A. C. (2014). Reform of the Customary Law of Inheritance: Lessons from South Africa. *Journal of African Law*, 58(2), 249-270 (p. 260).

international instruments such as CEDAW, the ICCPR, and the Maputo Protocol, ensuring full incorporation into national policy and legislation.

5.3.10 Awareness Campaigns: Launch national and local awareness campaigns to shift societal attitudes towards gender equality and the importance of upholding women's rights under customary law. Utilise various media platforms, including social media, radio, and community theatre, to reach a broad audience. Responsible actors such as the Department of Communications; GCIS; traditional leaders; media organisations; CSOs - Launch targeted national and local campaigns using radio, community theatre, social media, and local languages to challenge patriarchal norms and promote gender equality in inheritance and succession.

5.3.11 Research and Data Collection: Conduct ongoing research and data collection to identify areas where women's rights are most at risk within traditional communities. Use this data to inform policy decisions and targeted interventions aimed at improving the status of women under customary law. Responsible Actors such as Statistics South Africa, universities, the Commission for Gender Equality, and SALRC should conduct ongoing empirical research to identify areas where women's rights are most vulnerable under customary law, informing evidence-based interventions and future policy development.

By implementing these recommendations, South Africa can make significant strides towards ensuring that women's rights are fully realised and protected within traditional communities, thereby achieving greater gender equality across the nation. The role of legal and human rights organisations, policymakers, and researchers is crucial in this process. Their expertise and dedication are integral to the success of these initiatives, and their commitment to gender equality is greatly valued.

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