

# 1 Is Customary Law a Hindrance to Womens Rights in Democratic 2 South Africa?

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## 7 **Abstract**

8 The constant clash between customary law and women's rights continues to bedevil the  
9 desired development and protection of women's rights in Africa. African women suffer  
10 injustices through restrictions imposed on them in the application of certain customary laws.  
11 Customary laws pertaining to marriage, property and succession are amongst the most  
12 restrictive and unjust in African customary law. Marriage laws that allow polygamy for  
13 example would be an impediment to principles of equality and would even pose health risks  
14 with the prevalence of HIV/AIDS, while customary laws that govern succession in many parts  
15 would discriminate unfairly between male and female heirs. This dissertation was prompted by  
16 issues raised in cases such as Bhe and Shilubana decided in the Constitutional Court of South  
17 Africa. In these landmark decisions, the Constitutional Court dealt with the development of  
18 customary law so as to align it with the spirit and purport of the Constitution, which is the  
19 supreme law in South Africa. The decisions of the above mentioned cases are of particular  
20 import to the essay because not only do they seek to advance women's rights, they also  
21 recognise customary law as a cardinal source of law in South Africa. By so doing customary  
22 law is accorded its proper place in the South African legal context. The essay focuses on South  
23 Africa and the development of women's rights against recognition and continued practice of  
24 customary law. A comparison between the recognition of customary law and development of  
25 women's rights in other jurisdictions, particularly Ghana, Zambia and Zimbabwe and that of  
26 South Africa will be made. In as much as South Africa is more progressive in terms of the  
27 Constitution, the question still remains whether customary law and certain customary law  
28 practices do not undermine or circumvent the ideals of the Constitution.

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30 *Index terms—*

## 31 **1 I. Introduction**

32 African Customary law as a source of law has been in existence since time immemorial. It is the law of the natives  
33 of any particular area, which has from generation to generation been passed on not as written law, but through  
34 oral tradition and practice. It finds its expression in the day to day cultural practices, rituals and traditions of  
35 a people. 1 This essay seeks to explore the extent to which customary law conflicts with the development of  
36 women's rights in democratic South Africa and whether such conflict is a hindrance to such rights. The relevance  
37 of customary law is also put to question in a system of legal pluralism, where there are many different sources of  
38 the law and expressions of the law.

## 39 **2 II. Context**

40 My own definition of a customary law would be;

### 3 III. PURPOSE OF THE STUDY

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41 A traditional, common rule or practice that has become an intrinsic part of the accepted and expected norm or  
42 conduct in a society that it is treated as a legal requirement and contravention of which will result in retribution.

43 Although customary law as per definition is still alive and plays an important role in the lives of many South  
44 Africans, there are certain rules or practices that are not in line with the Constitution. 2 In the Bhe case 3 Judge  
45 Langa remarked:

46 The exclusion of women from inheritance on the grounds of gender is a clear violation of Section 9 (3) of the  
47 Constitution. The principle of primogeniture also violates the right of women to human dignity as guaranteed  
48 in Section 10 of the Constitution as, in one sense, it implies that women are not fit or competent to own and  
49 administer property. Some of the practices therefore put women in a subordinate position compared to men and  
50 are in conflict with ideals of the Constitution such as equality and dignity. This conflict erodes the Constitutional  
51 base of such practices.

52 This essay was greatly influenced by the minority judgement of the Bhe case. Allusion is made to the fact that  
53 even though the judgement is a landmark decision, there is still room to improve women's position in democratic  
54 South Africa and in Africa as a whole. The minority judgement scrutinises African jurisprudence and provides  
55 an insight into how women's rights would develop further if customary law were to be developed in line with  
56 fundamental human rights. 4 The right to equality is enshrined in the Constitution as one of the founding values.  
57 Statutory instruments have even been enacted to safeguard this core value and the right to equality is further  
58 protected in the Promotion of Equality and Prevention of Unfair Discrimination Act 6 . This shows that equality  
59 is a fundamental value enshrined in the Constitution. The weight placed on the principle of equality is further  
60 enunciated in the Constitutional Court decision of Fraser v Children's Court, Pretoria North and Others 7 where  
61 Mohammed DP opines, "There can be no doubt that the guarantee of equality lies at the very heart of the  
62 Constitution. It permeates and defines the very ethos upon which the Constitution is premised."

63 Against such a backdrop, recent developments in the field of customary law of marriage, in particular the  
64 taking of a sixth wife (fourth concurrent) by the President of the Republic of South Africa, Jacob Zuma have  
65 sparked debates on human rights of equality versus culture and customary law. The debates are not only limited  
66 to customary law of marriage, but include property rights and the right to inheritance as well. It is imperative  
67 in light of the recent debates, to measure the democratic rights of women against customary practices that seem  
68 to undermine those rights. South Africa is an example of a country that has managed to move progressively  
69 towards gender justice and gender equality albeit piecemeal. It is a country that preaches equal opportunities,  
70 equal employment, equal access to resources and an equal power to influence decisions in society and communal  
71 development. In as much as there are still customs that may be seen as derogatory towards women, unfairly  
72 discriminate against women or do not promote the spirit of equality, by and large there have been great strides  
73 made in the development of women's rights since 1994.

74 The study will look at the development of women's rights in democratic South Africa and how the customary  
75 law has been adapted to safeguard such rights. The South African position will be juxtaposed with that of  
76 other African countries, such as Ghana and Zimbabwe, in a comparative analysis to show South Africa's position  
77 relative to other African countries.

### 78 3 III. Purpose of the Study

79 In this study, the researcher seeks to demonstrate conflict of laws in a legal pluralistic system. On the one hand,  
80 there is the Constitution, written law which is supreme and purports values of human dignity and equality; on  
81 the other hand there is customary law, unwritten, living law that has been in practice for many years. The  
82 question the researcher will attempt to address is whether or not customary law poses a threat to the rights  
83 enshrined in the Constitution. Should this be the case, to what extent are Constitutionally enshrined rights  
84 threatened? The researcher will also attempt to look at whether customary law can be developed and aligned  
85 with the Constitution or whether it is regressive and should become abrogated.

86 The major task for the researcher will be to convince the reader that customary law does not pose a threat to  
87 women's rights, because it can be developed to align with the core values in the Constitution. Development in  
88 case law over the years will be used to substantiate the notion that the South African legal system is progressive  
89 and more than one two systems of law can co-exist in harmony.

90 The study also seeks to come up with further recommendations on how to harmonise customary law with the  
91 Constitution, which is the supreme law. The researcher will use a comparison between South Africa and other  
92 jurisdictions, mainly Zimbabwe. This comparison will be important for the following reasons:

93 1) Both countries are members of the African Union and have ratified the Banjul Charter 8 . Both countries  
94 have also pledged to develop the continent as a model of African culture and heritage. 2) Both countries have a  
95 legal pluralistic system, where they have more than one system of law. The systems are the Common Law, which  
96 is codified and Customary Law, which is the traditions and customs of the indigenous people. 3) Both countries  
97 are Constitutional democracies, having undergone a period of upheaval during colonialism. 4) Both countries are  
98 signatories to various International human rights instruments, thereby pledging their allegiance to the fight for  
99 development of human and women's rights.

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## 100 4 IV. Methodology

101 To make sure that a thorough investigation and research has been conducted, the researcher will make use of  
102 various different resources:

103 a) Primary Sources

104 The primary sources will include *inter alia*, the various Constitutions of concerned countries, the pieces of  
105 legislation that were enacted with the view of furthering or safeguarding the concerned issues and the most  
106 relevant case law covering women's rights and the development of customary law.

## 107 5 b) Secondary Sources

108 The secondary sources will include literature on legal pluralism and customary law such as books and journal  
109 articles published in the various law journals

## 110 6 V. Literature Review

111 The Parliament and Judiciary in South Africa are the main vehicles of the development of women's rights.  
112 Parliament encourages women's rights development through the enactment of legislation whose very core is aimed  
113 at promoting the values of equality, human dignity and women's rights. The Judiciary assists the development  
114 of women's rights through landmark decisions that have advanced women's rights and alleviated the position  
115 of women in democratic South Africa. It is imperative to expatiate how the various pieces of legislation have  
116 contributed to the development of women's rights.

117 For example, the enactment of The Recognition of Customary Marriages Act 9 provided a major stepping stone  
118 for the development of women's rights by stipulating that the modalities that govern customary marriages be  
119 placed on an equal footing with those providing for marriage under the Common Law. 10 The Traditional  
120 Leadership and Governance Framework Act 11 provides for equal treatment of women when it comes to  
121 community involvement and leadership. 12 These provisions are in line with the equality provision in the Bill of  
122 Rights and the charge lies on the state to create instruments through which such values may be realised.

123 In a bid to further protect the values enshrined in the Bill of Rights, particularly the right to equality; the  
124 legislature has also enacted the Promotion of Equality and Prevention of Unfair Discrimination Act. ??3 The  
125 Act prohibits religious, cultural or traditional customs and practices that undermine the principle of equality.  
126 It provides for many grounds on which not to discriminate on, with gender being one of them, thereby putting  
127 women on an equal footing with men. 14 As alluded to above, the development of women's rights has not only  
128 been championed through 9 Act 120 of 1998. 10 In terms of Section 6 of the Recognition of Customary Marriages  
129 Act, a customary law wife has equal status and capacity to that of a wife in a civil marriage, including the  
130 capacity to acquire property and to enter into contract independently. 11 Act 41 of 2003. 12 Section 2 (3) of  
131 the Act provides, "A traditional community must transform and adopt customary law and customs relevant to  
132 the application of this Act so as to comply with the relevant principles contained in the Bill of Rights in the  
133 Constitution, in particular by; (a) preventing unfair discrimination; (b) promoting equality and (c) seeking to  
134 progressively advance gender representation in the succession of traditional leadership positions." 13 Act 4 of  
135 2000. 14 Section 8 of the Act provides, "Subject to Section 6, no person may unfairly discriminate against any  
136 person on the ground of gender..." legislation alone, but through landmark decisions of the Constitutional Court  
137 and the various divisions of the High Courts that have been handed down in the recent past.

138 The landmark and colossal decision of the Constitutional Court in *Bhe v Magistrate Khayeltsha; Shibi v*  
139 *Sithole; South African Human Rights Commission v President of the Republic of South Africa* 15 declared the  
140 principle of primogeniture unconstitutional. The court emphasized the need to move away from inequalities and  
141 prejudices of the past, including the disqualification from inheritance of an illegitimate child, or where lobolo for  
142 the wife had not fully been paid. Such circumstances could no longer preclude offspring of a deceased man from  
143 inheriting from the estate of their late father. 16 The progressive thinking of the judiciary was also reflected in  
144 the decision in *Mabena v Letsoalo* 17

145 where the court developed the customary law with regards to lobolo negotiations, particularly the ascension  
146 to the position of family head by a woman where the male head was not available. In this case, a woman was  
147 allowed to negotiate and accept lobolo, a duty previously regarded to be that of the male family head.

148 Another landmark decision with regards to the development of customary law was that of *Shilubana v*  
149 *Nwamitwa* 18 where a woman was allowed to take over the traditional position of Chief, traditionally reserved  
150 for male members of the family. The decision in Shilubana is of particular import to the paper because not only  
151 did it ensure the realisation of the Constitutional right to equality, it also cemented recognition of traditional  
152 leaders and their autonomy as envisaged by Section 211 of the Constitution. 19 The decisions of courts of  
153 foreign jurisdictions are also considered on a comparative basis. In this regard, the decision of the High Court of  
154 Zimbabwe in *Chawanda v Zimnat Insurance Co. Ltd* 20 is worth mention. In the decision, the court confirmed  
155 the recognition of an unregistered customary marriage concluded in terms of customary law, where a wife 15 2005  
156 (1) BCLR 1 (CC). The cases dealt with the same issue of prohibited inheritance by women because of the rule  
157 of primogeniture. The rule was derived from customary law of patriarchy, where male children were considered  
158 the rightful heirs to their father's inheritance. 16 On page 49 of the judgement, Judge Langa remarks, "the  
159 exclusion of women from heirship and consequently from being able to inherit property was in keeping with a

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160 system dominated by a deeply embedded patriarchy which reserved for women a position of subservience and  
161 subordination and in which they were regarded as perpetual minors under the tutelage of the father, husbands  
162 or the head of the extended family.” claimed loss of support as a result of the wrongful killing of her husband.

163 Lastly, it is worth noting that the development of women’s rights and the protection thereof has been  
164 greatly advocated for and advanced by Regional and International Organisations that seek to promote peace  
165 and development in Africa.

166 For example, the African Union (formerly Organisation of African Unity) came together and enacted the  
167 Banjul Charter 21 which seeks to, ”Promote and protect human and people’s rights and freedoms taking into  
168 account the importance traditionally attached to these rights and freedoms in Africa.” ??2 Chapter 1 of the  
169 Charter, in particular articles 2 and 3 speak to the very ideals of equality and fairness enshrined in the South  
170 African Constitution. 23

## 171 7 VI. Recognition of Customary Law

172 Customary law, as alluded to in the introduction, has been in existence since time immemorial. It is the unwritten  
173 law which consists traditions and practices adhered to on a day to day basis by a certain demographic, particularly  
174 the natives of an area. South Africa’s legal system is pluralistic in nature, where more than one system of law is  
175 accepted as binding. Customary law in South Africa is not only recognised because of its day to day practice,  
176 but has been issued with a Constitutional basis.

177 Section 15 of the Constitution provides for the enablement of the enactment of legislation recognising and  
178 protecting customary law. 24 The encouragement to provide instruments of realising different beliefs and opinions  
179 presupposes the recognition of such freedoms. The recognition of a system of customary law is further evidenced  
180 by Sections 30 and 31 respectively of the Constitution which provide for the right to language and culture and  
181 cultural, religious and linguistic communities. ??5 Such recognition ensures that customary law is an intrinsic  
182 separate part of the South African legal system as it is granted a Constitutional basis.

183 Customary law has been confirmed through enactment of legislation that refers specifically to customary law.  
184 For example Section 11 (1) of the Black 21 African [Banjul] Charter on Human and People’s Rights, adopted  
185 June 27, 1981, OAU. ??2 As per preamble. 23 Article 2: ”Every Individual shall be entitled to the enjoyment of  
186 the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such  
187 as race, ethnic group, colour, sex, religion, political or any other opinion, national and social origin, fortune,  
188 birth or other status.” Article 3: ”1. Every individual shall be equal before the law. 2. Every individual shall be  
189 entitled to equal protection of the law.” 24 Section 15 (3) (a) Act 108 of 1996. ??5 Section 30 provides for right  
190 to Language and Culture; Section 31 provides for the right to Cultural religious and linguistic communities.

## 191 8 Administration

192 Act 26 provides, ”Notwithstanding provisions of any other law, it shall be the discretion of the courts of native  
193 commissioners in all suits...to decide such questions according to the native law applying to such customs, except  
194 insofar as it shall be repealed or modified.” The section alludes to the existence of customs and customary,  
195 indigenous law that is to be applied in disputes arising from that jurisdiction.

196 Section 1 (1) of the Law of Evidence Amendment Act 27 provides for the recognition of customary law as a  
197 separate legal system. Thus, ”Any court may take judicial notice of indigenous law insofar as it can be ascertained  
198 readily and with sufficient certainty, with the proviso that such law shall not be opposed to the principles of public  
199 policy and natural justice.” The referral to indigenous law is to the law of indigenous peoples, which is also known  
200 as customary law. It can therefore be argued that when the Act speaks of judicial notice, it is to be taken of a  
201 system that is already in place and recognised as law.

202 The Recognition of Customary Marriages Act 28 is also another piece of legislation that places beyond any  
203 shadow of doubt the fact that customary law is a separate legal system that is recognised as a source of law  
204 in South Africa. In terms of Section 1, ”A customary marriage is a marriage concluded in accordance with  
205 customary law” and according to Section 2 (1) of the Act, ”A marriage which is a valid marriage at customary  
206 law and existing at the commencement of this Act is for all purposes recognised as a marriage” (own emphasis).  
207 The reference to a different system of law, customary law, is proof that the legislator accepts customary law as  
208 a valid system of law that is recognised in South Africa.

209 The existence of customary law and its importance has also been affirmed in a number of judicial precedents.  
210 In *Mthembu v Letsela* the High Court confirmed that, ”Customary law has been accepted by the framers of the  
211 Constitution as a separate legal and cultural system which may be freely chosen by persons desiring to do so.”  
212 29 The recognition of customary law as a separate legal system by the Constitution is of important because the  
213 Constitution is the supreme law and every other law is subordinate to it. It reaffirms the position of customary  
214 law in South Africa as an independent system of law as it is granted a Constitutional basis.

215 The recognition of customary law in the South African legal realm was also confirmed in the decision of *Van*  
216 *Breda v Jacobs* 30 law. It was decided that to qualify as a customary law, ”A practice must be certain, uniformly  
217 observed for a long period of time and be reasonable.” 31 Through the test in *Van Breda*, customary law was  
218 properly defined and thus by necessary implication recognised.

219 The position of customary law in South Africa was expatiated in the judgement of Alexkor ltd and Another  
220 v Richtersveld Community and Others 32 where the importance of customary law was brought to light, thus;

221 Customary law must be recognised as an integral part of our law and an independent source of norms within  
222 the legal system. It is a body of law by which millions of South Africans regulate their lives and must be treated  
223 accordingly.

224 The quotation speaks to the recognition and importance of customary law. It is not just another system of  
225 law, but a system of law which millions of South Africans adhere to. It is therefore duly recognised as a separate  
226 legal system that is granted independence insofar as it is consistent with the ideals of the Constitution.

227 In Amod v Multilateral Motor Vehicle Accident Fund 33 the recognition of customary law and the diverse  
228 legal pluralism of the South African system was evidenced. A marriage concluded in terms of Muslim rites was  
229 recognised to be a valid marriage in South Africa. This is because it was concluded according to Muslim customary  
230 law, which is envisaged by Section 2 (1) of the Recognition of Customary Marriages Act. The recognition of a  
231 marriage concluded in terms of Islamic law is the highest point of recognition of different customs and customary  
232 laws. One can therefore see that through legislation and judicial precedent, customary law is legally recognised  
233 as a separate legal system of law in South Africa.

## 234 **9 VII. Women's Rights and Conflict with Customary Law**

235 The development of gender rights and gender justice is a recent development that saw recognition start in  
236 International instruments such as the United Nations and has been trickling down into national legislation of  
237 the various countries that ratify Conventions and Treaties that govern human and women's rights. A regional  
238 example would be the Banjul Charter on human and people's rights 34 which advocates equality, equal treatment  
239 and equal opportunities for all, ideals enshrined in the South African Constitution. 31 Reasonableness is to be  
240 measured through compliance of the custom with the Constitution. 32 2003 (12) BCLR 1301 (CC). 33 1999 (4)  
241 SA 1319 (SCA). 34 African [Banjul] Charter on Human and People's Rights, adopted June 27 1981.

242 In as much as efforts are being made to advance women's rights and attempt to achieve gender justice, there  
243 has been a constant battle between customary law and the actualization of women's rights. In the context of  
244 customary law, women are affected adversely by some of the customary practices and rules perpetuating gender  
245 inequality. Some of the practices not only violate women's rights but human rights as well as provided for in the  
246 Bill of Rights. 35 These practices are usually consequences of marriage under customary law, customary law of  
247 property and customary law of inheritance. I will look at the practices that pose a threat not only to women's  
248 rights but human rights at large. The discussion will be divided into two categories, viz (a) Customary law of  
249 marriage and (b) Customary law of property and inheritance. I will also focus on the rights that are potentially  
250 infringed by such practices. a) Customary law of marriage i. Lobolo

251 According to Section 1 of the Recognition of Customary Marriages Act 36 lobolo means:

252 The property in cash or kind, whether known as lobolo, bogadi, bohali, xuma, lumalo, thaka, ikhazi, magadi,  
253 emabheka or by any other name, which a prospective husband or the head of his family undertakes to give to  
254 the head of the prospective wife's family in consideration of a customary marriage.

255 It is one of the key essentials of a customary marriage and must be paid before a customary marriage can  
256 be deemed to be concluded. According to Section 3 (1) (b) of the Recognition Act 37 , which provides for the  
257 requirements of a valid customary marriage, it provides that, "The marriage must be negotiated and entered into  
258 or celebrated in accordance with customary law." Prof. I.P Maithu argues that lobolo is a silent requirement in  
259 customary marriages. 38 Although not expressly required, it is inconceivable that a customary marriage can be  
260 concluded without a negotiation of the lobolo as it is one of the customs envisaged by Section 3.

261 However, a couple of concerns pertaining to women's rights arise with the negotiation and payment of lobolo,  
262 thereby causing the friction between customary law and women's rights. Firstly, there is a school of thought that  
263 propounds that payment of lobolo infringes on a woman's right to dignity as envisaged by the Bill of Rights. 39  
264 This school of thought argues that in paying lobolo, a husband or prospective husband is 35 Section 2 of the  
265 Constitution Act 108 of 1996. 36 Act 120 of 1998 (also referred to as the Recognition Act). 37 Ibid. 38 buying  
266 his prospective wife, which may lead to him objectifying her in the marriage and thereby depriving her of her  
267 Constitutional right to dignity. Secondly, the payment of lobolo may also be seen as infringing on the Equality  
268 clause. 40 The argument is that because a husband pays for the wife, the wife is then forced into subordination  
269 and subservience as she is likened to any other object that the husband pays for or buys, going against the ethos  
270 of equality. Lastly, payment of lobolo means that the bride is paid for, and a divorce is not usually granted  
271 unless the bride's family can repay the amount. This may lead to a bride being stuck in an unhappy and abusive  
272 marriage simply because her family have no means of paying back the lobolo.

273 ii. Polygamy

274 Polygamy is the practice or custom of having more than one wife or husband at the same time. It can be  
275 divided into polygyny and polyandry. Polygyny is the practice where one man may marry more than one wife,  
276 while polyandry is the practice where one woman may marry more than one husband. In terms of South African  
277 customary law, the only recognised form of polygamy is polygyny, a woman is therefore not allowed to have more  
278 than one husband, although marriages between women are sometimes recognised at customary law. 41 Polygamy  
279 is given recognition and effect in the Recognition Act. ??2 Reference to polygamous marriages is made in Section  
280 2 (3), "If a person is a spouse in more than one customary marriage, all valid customary marriages entered into

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281 before the commencement of this Act are for all purposes recognised as marriages" and Section 2 (4), "If a person  
282 is a spouse in more than one customary marriage, all such marriages entered into after commencement of this  
283 Act, which comply with the provisions of this Act, are for all purposes recognised as marriages." Such reference  
284 is confirmation of the existing customary law practice of polygamy.

285 However, questions have been raised whether the principle of polygamy is in line with the values enshrined  
286 in the Constitution. Arguments have been advanced that the principle of polygamy goes against guaranteed  
287 rights in the Bill of Rights. There is a clash between the right to equality as provided for in Section 9 of the  
288 Constitution and the principle of polygamy. The practice of polygyny brings into question the right to equality,  
289 where men are allowed to marry more than one woman, but women are not allowed to marry more than one man.  
290 This system puts women at a disadvantage as they are not treated equally and not granted equal opportunities  
291 as men. This also goes against Article 2 of Chapter 1 of the Banjul Charter, to which South Africa is 40 a  
292 signatory and provides, "1. Every individual shall be equal before the law. 2. Every individual shall be entitled  
293 to equal protection of the law." ??3 Another argument that can be advanced against the customary practice of  
294 polygamy is that it weakens the women's emotional and financial positions. Emotionally, the women have to  
295 share a husband, who might not be emotionally available when the woman needs him. The husband's attention  
296 is divided amongst the number of women and the lack thereof when needed might lead to clinical depression.  
297 The financial position of the women is also weakened because of the subordinate relationship that exists.

298 The women, in being answerable to their husbands, are also accountable when it comes to earnings and  
299 produce. They have to declare whatever they make and in some cases hand it over to the head of the house  
300 for distribution due to them being regarded as perpetual minors as provided for in the Black Administration  
301 Act and the Transkei Marriages Act. ??4 This severely weakens the position of the woman in that she is not  
302 independent enough to manage her own fiscal affairs. The weaker emotional and financial position of the woman  
303 in a polygamous relationship points back to equality, or the lack thereof. It can thus be argued that polygamy  
304 goes against the principle of equality as provided for by the constitution.

305 Polygamy poses a serious health risk with the advent of HIV/AIDS. In the global fight against the HIV/AIDS  
306 pandemic, the main message that is being preached is that of faithfulness to one sexual partner. The argument  
307 goes, in a polygamous marriage, where the husband has more than one sexual partner thereby increasing the risk  
308 of infecting all his wives if he is infected. From this perspective, polygamy counters the fight against HIV/AIDS.  
309 Another angle that may be used is that polygamy encourages promiscuity. The man can go around sleeping  
310 with women that are not his wives in the knowledge that he can always make the woman his official wife. This  
311 argument is therefore in support of the proposition that polygamy may be a vehicle in spreading HIV/AIDS.  
312 Judging from the above arguments against polygamy, it can be concluded that the traditional practice of polygamy  
313 suppresses women's right to equality and fair treatment. It encourages patriarchy and ensures that women remain  
314 subordinate to their husbands.

### 315       iii. Ukuthwala

316       In the customary law of marriage, the custom of ukuthwala was prevalent amongst the Nguni communities.  
317       According to Bekker and Koyana in De Global Journal of Human Social Science- ( C )

318       Jure 45 , the intending groom, together with a friend or two would waylay the intended bride in or around  
319       her home, quite often late in the day and forcibly take her to the groom's home. Sometimes, the girl would be  
320       caught unaware, although in many instances it would be according to an agreement between her parents and the  
321       parents of the groom. On the same day, those who had effected the thwala custom were required to report to  
322       the girl's home that her parents need not be worried as their child was safe and no harm would come to her.

323       The groom's family then had to indicate how many cattle they were prepared to pay and thus commence  
324       lobolo negotiations. Where ukuthwala took place and there was no offer of marriage it constituted a delict and a  
325       fine of one beast, known as the thwala or bopha, was imposed by custom. The thwalaed girl would be returned  
326       home to her parents and there would be no marriage. It was against custom for a young man who thwalaed a  
327       girl to have intercourse with her. However, it was not and is not always the case where the proper customary  
328       practices or channels were followed.

329       It can be argued that not only is the customary practice of ukuthwala an archaic one; it may also qualify  
330       as a crime of kidnapping. According to ??nyman 2008, 46 "Kidnapping consists in unlawfully and intentionally  
331       depriving a person of his or her freedom of movement and/or if such person is a child, the custodians of their  
332       control over the child." The practice of ukuthwala may be seen to be inconsistent with a number of constitutionally  
333       guaranteed rights.

334       Firstly, ukhutwala violates the right to dignity 47 in that it strips the woman of her honour, if she can just be  
335       abducted without her consent or against her will. Secondly, the custom violates the woman's right to freedom  
336       and security of the person. ??8 Section 12 (2) (a) specifically provides, "Everyone has the right to bodily integrity  
337       and psychological integrity, which includes the right to security in and control over their body." It can be argued  
338       therefore that by abducting someone, one would be restricting control over their body. Thirdly, the custom  
339       violates the woman's right to freedom of movement. ??9 By abducting and holding the girl at the groom's house,  
340       the groom would be infringing on the girl's right to freedom of movement as she will not be allowed to leave the  
341       home. With South Africa being a signatory to a number of international instruments that seek to advance and  
342       protect the rights of women, traditional customs like ukuthwala may be seen as a stumbling block to international  
343       progressiveness. Article 21 of the African Charter on the Rights and Welfare of the Child 50 provides:

344 State parties to the present charter shall take all appropriate measures to eliminate harmful social and cultural  
345 practices affecting the welfare, dignity, normal growth and development of the child in particular those customs  
346 and practices prejudicial to the health or life of the child, and those customs and practices discriminating to the  
347 child on the grounds of sex or other status.

348 The custom of ukuthwala is counter to the provisions of the charter in that it is prejudicial to the welfare  
349 of the girl child who is subjected to it. It can therefore be argued in conclusion that the custom of ukuthwala  
350 is rather regressive when it comes to the recognition, advancement and protection of women's rights in South  
351 Africa. b) Customary law of property and inheritance i. Property

352 Under colonial influence, heads of families who were married males were perceived to be the only persons with  
353 full legal capacity in terms of customary law. Evidence would be Section 11 (3) of the Black Administration  
354 Act 51, which portrayed women as perpetual minors in lacking capacity to own property or manage their own  
355 affairs. This however does not imply that other members of the family did not have rights to property; the rights  
356 of an individual were protected through the family (head), through which they were also acquired. The division  
357 of property was as follows:

358 ii. Family property This was property not allocated to any individual house and does not automatically accrue  
359 to an individual house. This property was controlled by the head of the family (married male). The allocation  
360 of such property was then done by the family head using his discretion.

361 iii. House property This was property that accrued to a specific house consisting of a wife and child (ren) and  
362 used for the benefit of that house. Although used for the benefit of a specific house, the family head remained in  
363 control of the house property and could use his discretion on what the property was to be used for. The property  
364 included earnings of the members of that house and their livestock, which would be put under the curatorship  
365 of the family head.

## 366 10 iv. Personal property

367 This was property which belonged to an individual who had acquired it through his or her own sweat and labour,  
368 but was under the control of the family head. Although the individual who acquired the property had the power  
369 to use and dispose of it, they still had to consult the family head and seek guidance and advice.

370 It can be seen from the above exposition that in every system of property ownership, women had no rights  
371 and were not included. In all the forms of property, effective control lay with the family head, who had to be a  
372 married male. Even the traditional allotment of land was made to male family heads, sidelining women in the  
373 ownership of property and therefore not providing an equal footing in customary marriages.

## 374 11 v. Succession/ Inheritance

375 The law of succession deals with the devolution of the estate of the deceased person, that is, what happens to a  
376 person's estate after his or her death. ??2 It can either be testate or intestate. A person dies testate where he  
377 executed a valid will 53 in which he expresses his last will and testament of his wishes. The devolution of the  
378 state therefore takes place in terms of the stipulations made in the will. A person dies intestate where he or she  
379 did not execute a valid will. ??4 Maithuji 55 argues that in terms of South African law, the estate devolves in  
380 terms of legislation or common law. Where the common law is applicable, the estate devolves in terms of the  
381 Intestate Succession Act 81 of 1987.

382 Succession in customary law is universal and onerous, the heir does not only acquire rights, but also duties  
383 of the deceased, in particular the duty to maintain the surviving dependants. Succession also follows the male  
384 lineage. Heirs are identified by their relationship to the deceased through the male line until all the known male  
385 relatives of the deceased have been exhausted in which case the inheritance devolves on the paramount Chief  
386 of the deceased's tribe. ??6 Only men could take charge of the family head's affairs. The customary law of  
387 succession is based largely on the principle of male primogeniture, which entails that the eldest male child of the  
388 deceased inherits his estate. ??7 It is evident that the customary law of succession is hinged on gender, with the  
389 male heirs having the right to take over the affairs of the deceased. This goes against the guarantee of the right  
390 to equality enshrined in the Constitution. In particular it contravenes ??2 Matshilane Mokotong, The impact  
391 of the Constitution of the Republic of South Africa on certain selected aspects of customary law of succession  
392 (2002) Speculum Juris 63. ??3 In terms of the Wills Act 7 of 1953. ??4 ??7 For detailed discussion on principle  
393 of male primogeniture see Bhe case which declared the practice unconstitutional.

394 Section 8 (d) of the Promotion of Equality and Prevention of Unfair Discrimination Act 58 which provides:  
395 Subject to Section 6, no person may unfairly discriminate any person on the ground of gender, including  
396 any practice, including traditional, customary or religious practice, which impairs the dignity of women and  
397 undermines equality between women and men, including the undermining of the dignity and well being of the  
398 girl child.

399 The custom can therefore be seen as an impediment to the realisation of women's rights as it oppresses women  
400 by treating them as subordinate to men.

401 **12 VIII. Conclusion**

402 It has been my aim in this section of the essay to dissect the various cultural practices that pose a threat to the  
403 development of women's rights. Polygamy for example violates the right to equality provided for in Section 9 of  
404 the Constitution. Ukuthwala violates the right to dignity provided for in Section 10 of the Constitution, the right  
405 to freedom and security of the person provided for in Section 12 and the right to freedom of movement provided  
406 for in Section 21 of the Constitution. The domination of customary law of property and inheritance by males is  
407 greatly disturbing as women do not feature anywhere in the picture. This goes against the principle of equality,  
408 where both women and men are supposed to be afforded equal opportunities and are treated equally.

409 In the next section of the work, I will look at legal reform that has taken place over the years in trying to  
410 alleviate the plight of women in democratic South Africa. I will look at the development that has taken place  
411 in terms of enactment of legislature to protect women's rights and some landmark decisions that have seen the  
412 plight of women get better.

413 **13 IX. The Development of Women's Rights**

414 Since the dawn of the Constitutional era, South Africa has taken some remarkable strides in the direction of  
415 advancing human and women's rights. The progress has greatly been facilitated by one of the most, if not the  
416 most progressive Constitutions in Africa. Chapter 2 of the Constitution includes the Bill of Rights, a blueprint  
417 to the recognition and advancement of human and women's rights. At the core of the Bill of Rights, lies the right  
418 to equality 59 which has played a cardinal role in the progression of women's rights in South Africa. The bulk of  
419 the legal reform that has taken place in post-apartheid South Africa is hinged on the pivot that is the right to  
420 equality. ??8 Act 4 of 2000. 59 Section 9, Act 108 of 1996.

421 It is important to note that not only has the Constitutional epoch sought to advance women's rights at the  
422 possible expense and abrogation of tradition and customary law, but it has also sought to strike a balance  
423 between tradition and the rights of women. An example would be the Recognition of Customary marriages Act  
424 120 of 1998, which performs the dual task of confirming the existence and importance of customary law, while  
425 safeguarding the rights of women from tyrannical customary practices.

426 Section 39 (2) Of the Constitution provides for the balance between customary law and spirit of the Bill of  
427 Rights thus, "When interpreting any legislation, and when developing the common law or customary law, every  
428 court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights." ??0 The same section  
429 makes mention of developing common or customary law, opining that the law is not stagnant. Customary law  
430 can therefore be developed where necessary in order to align itself with the spirit of the Bill of Rights, particularly  
431 women's rights.

432 **14 a) Constitutional protection**

433 The Constitution, being the supreme law has been the fundamental point of reference when it comes to the  
434 championing of women's rights. It provides for equality in an open and democratic society, promoting recognition  
435 and appreciation of women as equals in every aspect. A couple of Sections stand out in the Constitution when it  
436 comes to recognition of women's rights, viz: b) Section 9 -The Equality clause Equality lies at the very heart of the  
437 Bill of Rights. Section 9 (1) of the Constitution echoes the words of Article 2 of Chapter 1 of the Banjul Charter,  
438 "Everyone is equal before the law and has the right to equal protection and benefit of the law." The Constitution  
439 was thus drafted bearing in mind the allegiance owed to International instruments that also champion human  
440 and women's rights. The equality clause has precipitated remarkable legal reform with the most notable result  
441 being the Constitutional Court decision in the Bhe 61 , which declared primogeniture unconstitutional on the  
442 basis of equality. The principle of equality has also led to legal reform in the promulgation of legislature aimed at  
443 promoting and safeguarding the right to equality. 62 c) Section 10 -Right to Dignity Section 10 which provides  
444 for the right to dignity also protects a right that is also protected internationally. ??0 Article 21 of the African  
445 Charter on the Rights and Welfare of the Child seeks to, "...eliminate harmful social and cultural practices  
446 affecting the welfare, dignity, normal growth and development of the child..." ??3 The inclusion of the right to  
447 dignity in the Constitution is therefore in line with the international effort to protect such rights. The right to  
448 dignity has also resulted in some legal reform in Mabuza 64 where the siSwati custom of Ukumekeza 65 was  
449 deemed to be contrary to the spirit of the Constitution as it requires a bride to cry for her to be accepted into a  
450 family, violating her right to dignity.

451 **15 d) Legislation**

452 There have been a number of Acts that have been promulgated that seek to strike a balance between customary  
453 law and the ideals outlined in the Constitution. Some of the Acts have served the purpose of repealing other laws  
454 that were inconsistent with the Constitution and by so doing, develop the customary law and align it with the  
455 values enshrined in the Constitution as envisaged by Section 39 (2) of the Constitution. Some of the legislation  
456 has sought to promote a single fundamental ideal as set out in the Bill of Rights.

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## 457 16 e) The Recognition of Customary Marriages Act 120 of 1998

458 The Recognition Act serves a dual purpose in the conflict between customary law and women's rights. On the  
459 one hand, it recognises customary law as a source of law in South Africa and on the other; it seeks to protect  
460 women from some of the despotic practices and traditions found in customary law.

461 The Recognition Act lays to rest whether the customary practice of polygamy is legal or not when it recognises  
462 customary law as a separate, independent system of law in South Africa. In terms of Section 2 (1) of the Act,  
463 customary marriages are given due recognition, "A marriage which is valid at customary law and existing at the  
464 commencement of this Act is for all purposes recognised as a marriage." ??6 The effect of this section is not only  
465 to give recognition to customary marriages, but to also confirm by implication that customary law as a system  
466 is recognised in South Africa.

467 The Recognition Act not only recognise customary marriages and by implication customary law, it also seeks  
468 to protect women in customary marriages and their rights. Section 6 for example provides for the equal status  
469 and capacity of spouses involved in a customary marriage.

470 A wife in a customary marriage, has on the same basis of equality with her husband and subject to the  
471 matrimonial property system governing their marriage, full status and capacity, including capacity to acquire  
472 assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that  
473 she might have at customary law. ??7 Section 6 gives effect to Section 9 of the Constitution, speaking to the  
474 value of equality and equal status between men and women. This was a major achievement and a huge step  
475 forward in the quest to attain equality for all as it enshrined the concept of equality in more than one document  
476 or piece of legislation.

477 The Act also seeks to strengthen the weakened financial position of women involved in customary marriages  
478 that are polygamous. Usually in such marriages, the husband is the one who controls the finances and the wives  
479 are accountable to him, having to declare and submit their independent earnings to him. However Section 7 of  
480 the Recognition Act provides for a mechanism through which wives in customary marriages can protect their  
481 financial interest. Section 7 (6) provides, "A husband in a customary marriage who wishes to enter into a further  
482 customary marriage with another woman after the commencement of this Act must make an application to the  
483 court to approve a written contract which will regulate the future matrimonial property system of his marriages."  
484 Through this section, the legislator seeks to protect the woman's interest in property, which is a triumph for  
485 women's rights considering past prejudices suffered in terms of property. The legislator even goes further to  
486 provide that the distribution of the property must be equitable ??8 ensuring the same equal opportunities even  
487 when it comes to economic rights.

488 It is evident from the provisions made in the Recognition Act, on one hand, to officially recognise and preserve  
489 customary law and on the other hand to safeguard and advance women's rights. It is also evident that the  
490 intention of the legislator was to strike a balance between the customary law and the impact it has on women's  
491 rights. In the spirit of Section 39 (2) of the Constitution the customary law has been developed so as to align  
492 itself with the values entrenched in the Constitution. The Recognition of Customary Marriages Act has been a  
493 beacon of gender justice and thus a vital piece of legislation when it comes to the protection of women's rights  
494 in South Africa.

## 495 17 f) The Promotion of Equality and Prevention of Unfair 496 Discrimination Act 4 of 2000

497 South Africa is a country that is based on Human dignity, the achievement of Equality and the ??9 Section 6,  
498 Act 120 of 1998. ??8 Section 7 (7) (a) (2), Act 120 of 1998. advancement of Human Rights and freedoms.  
499 ??9 The right to equality is echoed in Section 9 of the Constitution, the equality clause. The drafters of the  
500 Constitution in making equality a fundamental principle kept in line with the international community in the  
501 fight to advance women's rights. The Banjul Charter for example which South Africa ratified is based on the  
502 principle of equality, everyone being equal before the law and having equal protection of the law. ??0 The same  
503 instrument challenges the member states to further the advancement of human and people's rights, "The Member  
504 States of the Organization for African Unity parties to the present Charter shall recognize the rights, duties and  
505 freedoms enshrined in this Chapter and shall undertake to adopt legislative and other measures to give effect to  
506 them." ??1 In seeking to stay true to the cause of instruments such as the Banjul Charter and adopt legislative  
507 and other measures, the South African legislature promulgated the Promotion of Equality and Prevention of  
508 Unfair Discrimination Act 4 of 2000.

509 The Act seeks:  
510 To give effect to Section 9 read with item 23 (1) of Schedule 6 to the Constitution of the Republic of South  
511 Africa, 1996, so as to prevent and prohibit unfair discrimination and harassment; to promote equality and prevent  
512 unfair discrimination; to prevent and prohibit hate speech; and to provide for matters connected therewith. ??2  
513 Section 9 of the Constitution provides, "Equality includes the full and equal enjoyment of all rights and freedoms.  
514 To promote the achievement of equality, legislative and other measures designed to protect or advance persons  
515 or categories of persons, disadvantaged by unfair discrimination may be taken." ??3 The Promotion of Equality  
516 and Prevention of Unfair Discrimination does exactly that; that is promote the achievement of equality, promote

517 the values of nonracialism and non-sexism contained in Section 1 of the Constitution and to prevent unfair  
518 discrimination and protection of human dignity as contemplated in Sections 9 and 10 of the Constitution.

519 The enactment of this Act has provided a much needed pillar for the guarantee and protection of women's  
520 rights in South Africa. Section 8 provides, "Subject to section 6, no person may unfairly discriminate against  
521 any person on the ground of gender ..." 74 This provision guarantees the equal status ??9

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524 of women and men in democratic South Africa. It also provides for equal opportunities, be it in employment or  
525 service delivery, as gender can no longer be used to elevate one and denigrate the other. The equal status afforded  
526 to both men and women was witnessed in the landmark Constitutional Court decisions of Shilubana 75 , where it  
527 was decided that a woman was to assume chieftaincy based on equality and prevention of gender discrimination.  
528 The Bhe case 76 , involved the declaration of the unconstitutionality of the principle of primogeniture due its  
529 contravention of the equality clause and contravention of the prevention of unfair discrimination.

530 It can be concluded therefore that the promulgation of legislation aimed at giving effect to Section 9 of the  
531 Constitution has gone a long way in advancing women's rights against patriarchal customary traditions. The  
532 equal status provided for by the Act ensures that whatever decision is made, whoever is appointed and whoever  
533 is left out will be based on merit and not on gender. It is plausible to argue that in as much as customary law  
534 still forms part of the South African legal potpourri, it has been greatly developed to be consistent with the spirit  
535 and purport of the Constitution. Ideals which seek to promote equality and protect the rights of women through  
536 enactment of legislation such as the Promotion of Equality and Prevention of Unfair Discrimination Act, which  
537 gives effect to such notions.

## 538 19 g) Judicial precedent

539 This essay has mainly been prompted by the colossal decisions in the Constitutional Court of South Africa  
540 which have seen the breaking of customary dogma and greatly advanced women's rights in a democratic  
541 South Africa. I will provide an expose of the most significant cases that have championed the development,  
542 advancement and protection of women's rights. The decisions in the cases were given a Constitutional basis  
543 by the Constitution of the Republic of South Africa, in that they seek to promote the spirit and ideals of the  
544 Constitution. Administration Act, which excluded women and others 77 from succession under customary law.

545 The court struck down the impugned statutory provisions of Section 23 of the Black Administration Act 38 of  
546 1927 and Section 1 (4) (b) of the Intestate Succession Act 81 of 1987, which excluded women from the right to  
547 inherit and were in direct contravention of Sections 9 (equality), 10 (dignity) and 28 (rights of children) of the  
548 Constitution. The Shibi case dealt with a confirmation order of the constitutional invalidity made by the Pretoria  
549 High Court in finding that Section 23 (10) (a), (c) and (e) of the Black Administration Act 78 and regulation 2  
550 (e) of the Regulations for the Administration of Estates of Deceased Blacks unconstitutional and invalid. Section  
551 1 (4) (b) of the Intestate Succession Act 79 was also declared unconstitutional in so far as it excluded estates  
552 regulated under Section 23 of the Black Administration Act.

553 The Bhe case involved an application by a mother on behalf of her two minor daughters in respect of the  
554 deceased estate of their father. The bone of contention before the Constitutional Court was that the customary  
555 law rule of primogeniture and the impugned statutory provisions unfairly discriminated against the children on  
556 the ground of gender by excluding them from inheriting the estate of their deceased father where the estate had  
557 been taken over by the grandfather of the deceased's daughters.

558 The South African Human Rights Commission case involved direct access to the court, a class action on  
559 behalf of all women and children prevented from inheriting by reason of the impugned provisions and the rule  
560 of primogeniture. The court held that the principle of primogeniture, in the form that it has come to be  
561 applied, discriminates unfairly against women and children born out of wedlock and accordingly declared it  
562 unconstitutional and invalid.

563 The court held that although it was supposed to develop customary law and align it with the Constitution as  
564 provided for in Section 39 (2), it was not feasible in this matter to do so. The order of the court was made with  
565 retrospective effect, dating back to the 27 th of April 1994, with completed transfers of ownership insulated.

566 The decision was a major victory for the rights of black women and generally women who were married under  
567 customary law. The declaration of unconstitutionality of the principle of primogeniture confirmed the equal  
568 status of women in democratic South Africa. In line with Section 9 of the Constitution and the Promotion of  
569 Equality Act, the equal status of women in terms of all aspects pertaining to marriage was confirmed. Since  
570 equality is universal in every facet of the marriage, women in customary marriages now enjoy equal succession  
571 rights as those of their counterparts in civil marriages and men. This was a remarkable breakthrough even in  
572 the sphere of the customary law of property, as women can now acquire, own and dispose of their own property  
573 with equal status and rights as men.

574 The decision was also pivotal in advancing the rights of the girl child. A boy and a girl child, regardless of  
575 birth position enjoy equal status and opportunities and they both have equal succession rights in the case of

576 death of their father. This realisation is what was envisaged by the African Charter on the Rights and Welfare  
577 of the Child, when it sought to encourage;

578 "State parties to the present charter to take all appropriate measures to eliminate harmful social and cultural  
579 practices affecting the welfare, dignity, normal growth and development of the child...and those customs and  
580 practices discriminating to the child on the grounds of sex or other status." ??0 The decision has also resulted in  
581 the recognition of the best interest of the child as provided for in Section 28 of the Constitution, where there is no  
582 longer any differentiation between the children born of a recognised marriage and those born out of wedlock. Both  
583 the children have equal inheritance rights, thus realising the morals behind the promulgation of the Promotion  
584 of Equality Act, which advocates equality and non discrimination on any grounds.

585 In concluding the Bhe case, cognisance must be made of the fact that the decision was a major victory not  
586 only for women's rights and the protection thereof, but for the safeguarding of the basic human rights provided  
587 for in Chapter 2 of the Constitution. ??1 The law no longer recognises the concept of "Indlalifa" or universal  
588 heir as this is contrary to the principle of equality. All the heirs have an equal share in a deceased estate now,  
589 regardless of gender or age. Thus the case of Bhe is and will remain the most significant precedent when it comes  
590 to the balance between customary law and the recognition of human and women's rights. The matter concerned  
591 a woman being appointed as a chief, a position that was traditionally seen as one to be held by an elder male  
592 member of the community who shared the same bloodline as the previous chief and which she was previously  
593 deprived of by virtue of gender discrimination. The main issue was whether the community had the authority  
594 to restore a ??0 Article 21, African Charter on the Rights and Welfare of the Child. ??1 The Bill of Rights,  
595 Act 108 of 1996. position of traditional leadership to the house from which it was removed by reason of gender  
596 discrimination even if the discrimination took place prior to the advent of the Constitution, and by so doing  
597 develop their custom so as to promote gender equality in the succession of traditional leaders.

598 The argument advanced was that the Valoyi tribe in appointing Miss Shilubana as chief were acting in  
599 accordance with Section 211 of the Constitution, "A traditional authority that observes a system of customary  
600 law may function according to any applicable legislation and customs, which includes amendments to, or repeal  
601 of, that legislation or those customs." 82 Based on this premise, the Valoyi were acting well within their  
602 constitutional mandate to amend their customs and traditions where they deem necessary and to reflect the  
603 change in circumstances as well.

604 The Valoyi were also acting in accordance with the legislature specifically enacted to govern traditional matters.  
605 The Traditional Leadership and Governance Framework Act states:

606 A traditional community must transform and adapt customary law and customs relevant to the application  
607 of this Act so as to comply with the relevant principles contained in the Bill of Rights in the Constitution, in  
608 particular by - The actions of the Valoyi tribe were in line with all the provisions of the abovementioned section.  
609 They sought to develop their customary law so as to promote gender equality in succession, thereby achieving the  
610 ideals set out in the Bill of Rights. Reference was made to the Bhe case and the principle of equality elucidated  
611 therein, and in passing of judgement, the Bhe case was used as a yardstick so as to prevent deviation from the  
612 principles set out therein.

613 It was held that customary law like any other law is protected by the Constitution and subject to the  
614 Constitution. Customary law must therefore be consistent with the Constitution and must seek to promote the  
615 spirit and ideals entrenched therein. In amending and developing the customary law of succession of traditional  
616 leaders, the community was well within the bounds of Section 211 (2) of the Constitution, thereby making such  
617 amendment constitutional. Finally it was held that because the principle of primogeniture had been declared  
618 unconstitutional, Miss Shilubana and all potential heirs ??2 Section 211 (2), Act 108 of 1996. ??3 Section 2 (3),  
619 Traditional Leadership and Governance Framework Act 41 of 2003.

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622 were therefore eligible for the ascension to the seat if the chieftaincy. The taking of the throne of chieftaincy  
623 by Miss Shilubana was therefore declared to be constitutional and in line with the ideals of gender equality and  
624 non discrimination.

625 The decision in Shilubana is another landmark decision that has safeguarded women's rights in South Africa  
626 and seen the recognition and protection thereof increase. It reiterated the guaranteed rights to equality and non  
627 discrimination that had been confirmed in previous decisions such as Mabena v Letsaolo, where a woman was  
628 allowed to take part in lobolo negotiations and accept lobolo in the absence of a male head of the family. 84 The  
629 Shilubana decision also cemented the right to women's involvement in collective, community decision making  
630 which is a huge step in terms of gender equality. The decision also served the dual purpose of acknowledging the  
631 existence and independence of customary law as a separate legal system by alluding to the fact that customary  
632 law, like any other law is protected and subject to the Constitution. The recognition of customary law and the  
633 advancement of women's rights in the same case, points to the harmonisation of customary law and women's  
634 rights. It is evidence that customary law can be adapted to the changing times and be brought in line with  
635 women's rights and the ideals of the Bill of Rights.

636 **21 X. Conclusion**

637 The Bhe and Shilubana decisions are in my view the epitome of gender justice and recognition of women's rights.  
638 These cases broke the traditional creed and paved the way for the recognition and advancement of women's  
639 rights. They are the quintessence of the values of equality, dignity and non-discrimination as envisaged by  
640 the Constitution. What is more interesting is that in championing women's rights, the Constitutional Court  
641 does not abrogate customary law, rather in the same cases, reference is made to the existence, independence  
642 and importance of customary law in an open and democratic society. What the court seeks to do is develop  
643 customary law practices that are doctrinaire and bring them in line with the core values of the Constitution  
644 and in so doing, harmonise the advancement of women's rights and customary law. In my view, the court has  
645 managed to achieve the feat of developing customary law yet preserving its very essence to a large extent. In as  
646 much as women's rights have ascended to the top of the agenda of progressive legal discourse, it has not been at  
647 the expense or the attrition of the fundamental customary law. It is this balance that the researcher sought to  
648 expose and has hopefully done. ??4 Mabena v Letsaolo 1998 (2) SA 1068 (T)

649 **22 XI. Foreign Jurisdictions**

650 The fight for the recognition and advancement of women's rights is not only limited to South Africa, it is a global  
651 fight that seeks to see women all around the world treated as equals. To this end, international instruments have  
652 been enacted to help champion the advancement of gender justice. These instruments are binding on member  
653 states that ratify and adopt them. A regional example would be the Banjul Charter, which seeks to promote  
654 and protect human and people's rights, taking into account the principles of fairness, equality, human dignity  
655 and non-discrimination. ??5 In keeping with the spirit of the Charter, all the member states have been in the  
656 process of developing their law, either common or customary, to conform to the values enshrined in the Banjul  
657 Charter. I will look at what a select few countries have done to promote gender justice and women's rights as  
658 provided for by the various international instruments that they are parties to.

659 **23 a) Ghana**

660 The Ghana Intestate Succession Law of 1985 has a reputation that precedes it. It is hailed as the most progressive  
661 inheritance and succession law on the continent. It is for certain the most progressive in West Africa. The reason  
662 for its fame is that it directly challenges the customary tenets of inheritance which militate against women's  
663 rights as they exclude them from inheritance. The drafters of the law have acknowledged the changing times  
664 and lifestyles and seek to develop customary law accordingly. For example, women have been playing a more  
665 significant role in the household economy because of the advancement in education and professional qualifications;  
666 they therefore deserve to receive a share in the inheritance they help to build.

667 The Act provides that a surviving spouse and children inherit the house and household chattels (objects in  
668 regular use in the household). ??6 The residue of the estate then passes to the spouse, children, parents and  
669 other customary heirs in specified fractions. ??7 If the deceased was survived by a spouse and no children, half  
670 the estate goes to the spouse and the other half is divided between the parents and other customary heirs. ??8  
671 To prevent fragmentation of the family unit and to ensure that the beneficiaries receive an economically viable  
672 portion, small estates devolve upon the surviving spouse and children to the exclusion of other relatives. The  
673 Act further criminalises the ??5 African [Banjul] Charter on Human and People's Rights. ??6 Sections 3 and 4  
674 of the Intestate Succession Law of 1985. ??7 In terms of Section 5, the spouse receives 3/16; the children receive  
675 9/16; the parents receive 2/16 and the rest of the customary heirs receive 2/16 of the estate. ??8 Sections 6, 7  
676 and 8 deal with situations where the deceased is not survived by a spouse or by a spouse and children. Ejectment  
677 of a widow and children from a home without a court order. ??9 The effect of this watertight legislation is that  
678 it protects the spouse's right to inherit from her deceased husband, something not commonplace in customary  
679 law of succession. This guaranteed inheritance furthers socio-economic women's rights that were previously not  
680 recognised because of the patriarchal nature of customary law of succession. Beyond advancing women's rights  
681 to inheritance and property, the Act also protects the best interests of the child. In protecting and guaranteeing  
682 the child (ren)'s right to inheritance Ghana keeps in line with the spirit of the Banjul Charter (which Ghana  
683 ratified) of promoting and protecting human and people's rights.

684 **24 b) Zambia**

685 As a member state of the African Union and having ratified the Banjul Charter, Zambia has also been involved  
686 in the fight to recognise, advance and protect human and people's rights as intended by the charter. A piece of  
687 legislation of note in the aim to achieve the goals of the Banjul Charter is the Intestate Succession Act 5 of 1989.  
688 The Act seeks to provide better protection for women's rights to inheritance and property. In terms of the Act,  
689 women are provided with a share in the joint estate, so as to safeguard their economic interests.

690 Where a man dies intestate, the children are entitled to 50% of the estate, the spouse is entitled to 20%,  
691 parents of the deceased are entitled to 20% and the rest of the relatives are entitled to 10% of the estate. In a  
692 bid to further protect the economic interests of women where more than one marriage exists, a 1996 amendment  
693 to the Act was made. ??0 In terms of the amendment, a woman's share of 20% will be divided equally with  
694 any other woman who can prove a marital relationship with the deceased. The Act in specifying specific shares

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695 that are applicable when it comes to the distribution of the estate advances the rights of women in ownership  
696 of property and in inheritance. The provision of an equal distribution of the share of one spouse promotes the  
697 right to equality and non discrimination as everyone has an equal right in the inheritance of the deceased. The  
698 Act also protects the rights of children in safeguarding their property interests by stipulating a bare minimum of  
699 what the children should get in terms of distribution of the deceased's estate.

## 700 **25 c) Zimbabwe**

701 Zimbabwe, which is a member of the African Union and has also ratified the Banjul Charter owes its allegiance  
702 to the fight for democratisation and the promotion and protection of human and people's rights as charged by  
703 the Charter. In the efforts to realise the 89 Section 16 of the Intestate Succession Amendment Law of 1991. ??0  
704 The Intestate Succession Bill of 1996 (21 February 1996).

705 aims and objectives of the Charter, the Administration of Estates Amendment Act 6 of 1997 has played a  
706 major role. The Act seeks to protect the property and inheritance rights of spouses of customary marriages  
707 and the children thereof, where the deceased dies intestate. For purposes of fair and equitable distribution of  
708 the deceased's estate upon the reporting of death, the Master summons the deceased's family and appoints  
709 an executor to draw up a distribution plan. Where the executor and the Master draw up a distribution plan,  
710 cognisance must be taken of the following rules pertaining to intestate succession: (a) If the deceased is survived  
711 by two or more spouses and one or more children, 1/3 of the estate will devolve to the spouses and 2/3 of the  
712 estate will devolve to the child (ren). 91 (b) If the deceased is survived by one spouse and one or more children,  
713 the wife will get ownership in or usufruct over the house and household goods and a share in the residue and the  
714 children will divide the residue in equal shares. 92 (c) If the deceased is survived by a spouse but no children, the  
715 spouse will get ownership of the house or a usufruct and ½ of the residue. The other ½ is to be shared between  
716 the parents and the siblings of the deceased.

717 The provisions of the Act are very significant in the advancement of women's rights. They seek to protect the  
718 spouse's economic interest by guaranteeing a specific portion of inheritance. This may be seen as developing the  
719 customary law of inheritance as women were sidelined and excluded from inheriting. The provisions in the Act  
720 also promote the rights of children as their right to inheritance is also safeguarded through the specific shares  
721 that each group of people is to get. It could also be argued that the provisions of the Act also promote equity, in  
722 as much as the portions provided for are not equal; there is a guarantee however that everyone will get a portion.  
723 This is contrary to the traditional customary law of inheritance where women's and other rights were bedevilled  
724 by the grabbing of inheritance without a system. d) Chawanda v Zimnat Insurance Co. Ltd 1990 (1) SA 1019  
725 (ZH)

726 The decision in Chawanda was a landmark decision with regards to the recognition of customary marriages  
727 and the protection of women's rights who are spouses in customary marriages. The case involved a woman suing  
728 an insurance company (Zimnat Insurance) for compensation for the loss of support because of the death of her  
729 husband who had been killed by a driver ??1 Section 68F (2) (b) of the Administration of Estates Amendment  
730 Act 6 of 1997. ??2 The share is to be determined by the Deceased Estates Succession Act.

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732 insured by the defendant. The woman had been living with the deceased in an unregistered customary union  
733 and the question was whether this constituted a valid marriage in which the spouse would have a claim for  
734 the wrongful causing of death of her husband. It was held that a woman living with a man in an unregistered  
735 customary union has the right to compensation for the loss of support if the man was unlawfully killed. A  
736 customary marriage is a valid marriage and all rights and obligations of a marriage ensue. The woman's right  
737 to compensation was therefore protected as she was deemed to be a lawful spouse. The decision echoed the  
738 sentiments of Kambule v The Master 93 where it was decided that the failure to register a customary marriage  
739 does not invalidate it. The declaration made in the decision that the marriage was a valid marriage regardless  
740 of the nonregistration was a major stride in the advancement of women's rights as the socio-economic right to  
741 compensation for the wrongful killing of one's husband was protected. The case is also of import with regards  
742 to the recognition of customary law. The court declared that a marriage at customary law is a valid marriage;  
743 this goes to prove the recognition of customary law by making reference to its existence and its importance. The  
744 case therefore not only advances and protects the rights of women but also preserves the customary law.

## 745 **26 XII. Conclusion**

746 It is evident from the above consulted pieces of legislation and case law that the fight to promote and protect  
747 women's rights is not peculiar to South Africa; it is an ongoing global fight that is being championed by a lot of  
748 other countries as well. It is also evident that in the efforts to realise women's rights, there is a constant clash  
749 with customary law and certain traditions that pose as stumbling blocks to the development and recognition of  
750 women's rights. However the clash is not irreparable as there has been proof of development of the customary  
751 law in the various African countries to strike a balance between customary law and gender justice. It is therefore  
752 possible to preserve customary law and champion women and human rights at the same time.

753 **27 XIII. Concluding Remarks**

754 Each African country has the task of recognising, advancing and protecting women's rights, which they attempt to  
755 do through the Bills of Rights in their respective Constitutions. South Africa is no different from any of the other  
756 African and non-African countries that are involved in the global movement of realising and protecting women  
757 rights. South Africa's Constitution has been hailed as one of the most progressive, if not the most progressive in  
758 Africa, boasting a Bill of Rights that preaches the principles of equality, dignity, nondiscrimination, and provides  
759 for an open and democratic society. However, in the effort to realise such rights and freedoms, there are always  
760 stumbling blocks, and sometimes barriers.

761 The task of this research has been to evaluate whether the recognition of customary law and the practice of  
762 customary law provides a hindrance to the development of women's rights. The findings of the research are that  
763 customary law is not a hindrance to the development of women's rights in South Africa.

764 **28 a) Constitutional Basis of Customary Law**

765 Customary law is given a Constitutional basis through the various sections of the Constitution that seek to  
766 recognise and protect customary law. Section 15 of the Constitution provides for the freedom of religion, belief  
767 and opinion, encouraging the right to practice whatever custom one deems fit. Sections 30 and 31 of the  
768 Constitution provide for the right to language and culture and the right to belong to cultural, religious, and  
769 linguistic communities. Section 39 (2) provides for the developing of customary law, paying cognisance to its  
770 existence and recognition. Chapter 12 of the Constitution provides for traditional leaders, leaders of customary  
771 societies.

772 The same Constitution that provides for the rights to equality, dignity and non-discrimination, advocating  
773 for the advancement of women's rights is the one that provides for the recognition of customary law and its  
774 importance in an open and democratic South Africa. If customary law were a hindrance to the development of  
775 women's rights, the Constitution, being the supreme law would declare it unconstitutional and invalidate it. Yet,  
776 it is the aim of the Constitution to preserve customary law and promote more customary societies. As long as  
777 customary law does not contravene the fundamental principles that underlie the Constitution, it will not be a  
778 hindrance to the development of customary law.

779 **29 b) Legislative Recognition**

780 Not only is customary law recognised and protected by the Constitution, legislation has also been enacted to  
781 guarantee and protect customary law. The most notable piece of legislation is the Recognition of Customary  
782 Marriages Act. The Act seeks to recognise all marriages that were concluded and are concluded according to  
783 customary law as valid marriages and afford them equal standing with civil marriages and in so doing preserve  
784 the traditions and practices provided for by customary law.

785 Another piece of legislation that seeks to preserve customary law is the Traditional Leadership and Governance  
786 Framework Act. The Act's main purpose is to provide for the governance of traditional and cultural communities  
787 in accordance with customary law. My contention is that if customary law were a threat to the development  
788 of women's rights, legislature would not sit and promulgate legislation that seeks to advance customary law  
789 and preserve the different customary traditions. I therefore submit that customary law is not a hindrance to  
790 women's rights in South Africa. c) Judicial Precedent Quite a number of cases have been decided where the bone  
791 of contention was whether customary law was an impediment to the development of women's rights. *Alexkor*  
792 v *Ricthersveld Community* for example provides that customary law must be recognised as an integral part of  
793 South African law, as it is a body of law by which millions of South Africans regulate their lives and must be  
794 treated accordingly. In the case of *Thembisile and Another v Thembisile and Another*, a customary union (union  
795 concluded in terms of customary law) was recognised as a valid union, also being protected by Section 15 of the  
796 Constitution which provides for freedom of conscience, religion, thought and belief.

797 The fact that decisions have been made and continue to be made based on customary law is a clear indication  
798 that customary law is living law that is duly recognised in South Africa. It also points out to the fact that  
799 customary law is consistent with the values entrenched in the Constitution, otherwise it would have been  
800 abrogated. The recognition of customary law by the Constitution, by legislation and by judicial precedent is  
801 all evidence of the fact that it forms an integral part of the South African legal regime. For any law to qualify  
802 for application in the South African system it has to pass a series of tests, in particular it has to be consistent  
803 with the core values enshrined in the Constitution. Customary law has passed all those tests and is applicable  
804 in South Africa; therefore it cannot be a hindrance to women's rights. Some may argue that the Constitutional  
805 Court in cases such as *Bhe and Shilubana* found some customary law practices to be unconstitutional in that they  
806 were inconsistent with the basic principles of the Constitution such as equality and dignity. The argument would  
807 go further to state that since these practices were inconsistent with the Constitution, they were a hindrance to  
808 women's rights. The rebuttal to such an argument would be that one practice does not make law; customary  
809 law as a system of law is a collection of numerous traditions and practices. The fact that one tradition has  
810 contravened certain principles does not mean that customary law as a system has failed. As evidenced in *Bhe*,  
811 the practices or traditions that are inconsistent with the Constitution will be severed, so as to make sure that

812 the customary law that is accepted and practised is in line with the Constitution and therefore does not cause  
813 any hindrance to the development of women's or any other rights.

814 It is my humble submission in summation that customary law as a system does not pose a threat to the  
815 realisation, advancement or protection of women's rights. It is as a system subject to the supreme law, which  
816 means it must be consistent with the values of equality, human dignity and non-discrimination. In being  
817 subordinate to the Constitution, it is submitted that if any practice has become archaic or threatens the realisation  
818 of the rights guaranteed in the Constitution and gender justice, such custom or practice is susceptible to severance  
819 or at least development to align it with the Constitution.

820 Having considered the above argument, it is therefore reasonable to conclude that customary law is not a  
821 hindrance to women's rights in democratic South Africa. I rest my case.

## 822 **30 XIV. Acknowledgement**

823 Firstly, I want to thank God, for the gift of life at no cost, for providing me the opportunity to be at this very  
824 place at this very moment. Without Him, I would be nothing and nowhere.

825 Gratitude goes to my supervisor, Prof. I.P Maithuvi for accepting to supervise me and take me under his wing,  
826 for providing guidance and direction when I would otherwise be lost, for making time to consult with me and  
827 impart knowledge unto me.

828 Lastly, to my parents, I am eternally grateful for providing me the opportunity to be studying what I love; for  
829 the love, support and constant check-ups on progress of my dissertation. I would not have been anything without  
you, thank you. <sup>1 2 3 4 5 6 7 8 9</sup>



Figure 1:

*[Note: 55I.P Maithuvi,]*

Figure 2:

<sup>1</sup>T.W Bennet, Human Rights and African Customary Law under the South African Constitution (1995) 63.

<sup>2</sup>Constitution of Republic of South Africa Act 108 of 1996, supreme law in South Africa.<sup>3</sup> Bhe and Others v Magistrate Khayelitsha and Others; Shibi v Sithole; South African Human Rights Commission v President, Republic of South Africa 2005 (1) BCLR 1 (CC).<sup>4</sup> "The defect in the rule of primogeniture is that it excludes women from being considered for succession to the deceased family head...It needs to be developed so as to bring it in line with our Bill of Rights."

<sup>5</sup>The preamble of the Constitution talks about South Africa as a country where everyone would be treated equally, Section 9 also sets out provisions for equal treatment and non-discrimination, invariably supporting the notion of equality.<sup>6</sup> Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. <sup>7</sup> 1997 (2) SA 261 (CC) para 20 at 272A.

<sup>8</sup>Act 38 of 1927. 27 Act 45 of 1998.<sup>28</sup> Act 120 of 1998.<sup>29</sup> 1997 (2) SA 936 (T) at 944 B-C.<sup>30</sup> 1921 AD 330.

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<sup>6</sup>D.S Koyana and J Bekker, The Indomitable Ukuthwala Custom in De Jure Vol. 1 2007. 46 C.R Snijman, Criminal Law 2008 Lexis Nexis 5 th ed 479. 47 Section 10, Act 108 of 1996. 48 Section 12, Act 108 of 1996. 49 Section 21, Act 108 of 1996.

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<sup>8</sup>Others refers to even male heirs of the same bloodline of the deceased, the rule of primogeniture promoted the oldest male heir of the same bloodline as the deceased, thereby alienating other male heirs. It also refers to children born out of wedlock. Illegitimate children were not considered of the deceased's bloodline for purposes of inheritance and were therefore excluded from inheriting.

<sup>9</sup>Kambule v The Master of the High Court and Others (85) [2007] ZAECHC 2.

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