

THE PENNSYLVANIA STATE UNIVERSITY  
SCHREYER HONORS COLLEGE

SCHOOL OF HUMANITIES AND SOCIAL SCIENCES

THEORY v. PRACTICE  
THE 1996 CONSTITUTION OF SOUTH AFRICA: RECONCILING CONSTITUTIONAL  
JURISDICTION WITH AFRICAN CUSTOMARY LAW

LILLIAN GABRESKI  
SPRING 2016

A thesis  
submitted in partial fulfillment  
of the requirements  
for a baccalaureate degree  
in Political Science  
with honors in Political Science

Reviewed and approved\* by the following:

John King Gamble  
Distinguished Professor of Political Science and International Law  
Thesis Supervisor

Robert Speel  
Associate Professor of Political Science  
Honors Adviser

\* Signatures are on file in the Schreyer Honors College.

## ABSTRACT

In 1994, when the Republic of South Africa discarded the legal structure of apartheid, it sought a new constitution that would solidify those rights to which its people had been denied based on arbitrary classifications of race since the dawn of its colonization. The result was the 1996 Constitution of the Republic of South Africa, one of the most liberal and comprehensive constitutions in its protection of human rights and socio-political freedoms. However, South Africa is a nation of many different ethnicities and backgrounds, who, under colonization and apartheid, generally were given the right to self-government and self-determination. This paper aims to examine the divisiveness between the protection of the right to culture and the South African Bill of Rights, including its protection of universal human rights and equality. I am applying this particularly to issues of gender discrimination within customary legal courts, primarily in regards to three areas of the law: inheritance, traditional leadership, and the rights of female children. In considering several different proposed solutions to rectifying the divide between common law and customary law in the nation of South Africa, I shall identify ways in which the rights of women and children can be reconciled with the right of traditional communities to practice their culture.

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## ACKNOWLEDGEMENTS

I would like to first thank the School of Humanities and Social Sciences at Penn State Behrend for granting me the funding to study and complete research in Cape Town, South Africa during the summer of 2015. The scholarship opportunities I have been afforded at Penn State Behrend are incomparable and have profoundly helped me in my pursuit of study.

I would also like to thank my thesis advisor Dr. John Gamble for his constant support and guidance during my time as an undergraduate student. The opportunities he has helped me to achieve have been instrumental in my acceptance into graduate study and in finding my passions in academia in the greater sense. I would also like to acknowledge Dr. Robert Speel as the second reader of this thesis, and I am gratefully indebted for his constant advice and guidance in determining my direction.

Finally, I want to express my profound gratitude to Dr. Tammie Merino, for being my proofreader, my motivator, and above all else my supportive mother, who has provided me with constant encouragement throughout my undergraduate career and life. This accomplishment would not be possible without you. Thank you.

## **Chapter 1**

### **Introduction**

South Africa is a nation of multi-ethnic origins. These diverse cultures are reflected not only in the nation's tempestuous history, but in the country's 1996 Constitution, which would define its reconciliation with democracy, equality, and multi-faceted human rights. The 1996 South African constitution recognizes 11 official languages, more than most other nations in the world. The differences in these languages depict a history of regional divisions, colonization, and of final reunification.

The 1996 Constitution was the nation's attempt to remedy the ills of the past; in its embrace of human rights and international codes of conduct it remedied the controversial place South Africa stood at on the global stage. However, it also took into account the pluralistic legal system that had developed under apartheid, one in which traditional leaders and the idea of African customary law had developed side by side with the rule of the official English common law courts and statutory law. In this context, 'common law' is used to denote law of non-statutory origin.

African customary law differs significantly from common law systems, in that it is uncodified and made to reflect the changing wills and practices of the traditional communities that live under it. While it may be a foreign concept to those outside of the continent, customary law has a direct and substantial impact on the majority of Africans in dictating personal matters, including inheritance, traditional authority, and marriage: three areas that will be discussed here via case studies. However, most scholars agree that customary law has been distorted from its original purpose and intent, as it has been molded by complicated political and social realities during centuries of colonialism. In this vein, customary law tends to be discriminatory towards

women in that it has inhibited them from inheriting, from exercising traditional authority, and may inhibit, if not encourage, subordination in marital practices and agreements (Ndulo 89).

Professor Muna Ndulo highlights the issues at hand as such:

There is a major debate between human rights activists and traditionalists centered on whether customary norms are compatible with human rights norms contained in international conventions and national bills of rights in national constitutions. While traditionalists argue that, by promoting traditional values, customary law makes a positive contribution to the promotion of human rights, activists argue that certain customary law norms undermine the dignity of women and are used to justify treating women as second class citizens (Ndulo 89).

There is no easy solution to reconciling the importance of customary law with the problematic practices under our high standards of international human rights. Furthermore, the Republic of South Africa has already made substantial progress towards reconciling customary law with international human rights. Not only has South Africa ratified numerous human rights treaties since the end of apartheid, they have recognized the importance of universal human rights in addition to its provisions for customary law. Through several cases heard by the South African Constitutional Court, customary legal codes that may inhibit human rights have been struck down.

The problem however is in what additional measures should be taken. If customary law is to be protected as an essential component of 'the right to culture,' then some resolution needs to be found in order to develop it so that it can be reconciled with the expectations of the

constitution and of advocates of international human rights. Further, the need for progress must be reconciled with traditionalists who argue that measures in customary law that others see as discriminatory are essential and accepted practices that are necessary to maintaining cultural identity. The aim of this paper is first to examine the impacts of the 1996 Constitution and International Law on customary law in South Africa. Secondly, it is to address three different arenas that have featured major constitutional court cases in the area of women's issues in customary law, and to assess the impact these have had on the development of customary law in the country, as well as the different perspectives on whether the decisions were appropriate or not. For the last arena, I shall use a case study of an act of legislation rather than a court decision in order to juxtapose the two different methods of addressing discrepancies between the constitution and customary law. Finally, I shall highlight solutions that have been proposed to rectify the division between the constitution and customary law, and the feasibility of implementing these solutions.

## Chapter 2

### Customary Law and the South African Constitution

#### The History of African Customary Law in South Africa

Before discussing how African Customary law intersects with and departs from the Constitution of the Republic of South Africa, it is imperative to understand the background, development, and relevance of the informal legal system. Customary law, quite literally, involves the use of custom to expand and to develop new laws. While common law courts may make incremental changes based on precedence, they are limited due to *jus dicere non facere*, a tenet which means to declare the law rather than expand it (Bennett 2). Customary law exists where a legal practice is declared rather than constituted, and those abiding by it follow *opinion juris*, or the opinion that the law is just and binding in their culture. The assumption here is that the law is valid because every member of a community participated in its creation, a notion I shall examine later on, as it is often not the case (Bennett 2). All in all, the greatest concern in customary legal systems is to ensure “substantive justice and [to maintain] harmonious relationships with the community” (Bennett 3).

Customary law in South Africa is, essentially, a colonialist construct. Just as British settlers introduced common law to the land, customary law originated as a form of indirect rule used by the colonialists. Recognized customary law in South Africa originated with the Black Administration Act of 1927, which limited the use of customary law to cases where both litigators were black. In these cases, a specific tribunal, the Chiefs’ and Headmen’s Courts and Native Commissioners’ Courts, was given jurisdiction to use customary law, though their

decisions could not oppose the national policies or legal precedents. In 1986, the Native Commissioners' Courts were abolished, and magistrates' courts received the jurisdiction in the aforementioned cases. (Himonga 307).

Then, in 1988, the Law of Evidence Amendment Act was introduced, which applied the jurisdiction of customary law to any court in the country, and removed the previous requirement that both litigators be black. Instead of parties arguing for their right to appear before customary law courts, all courts needed to take "jurisdictional notice" of the applicability of customary law when considering cases. However, customary law could still not take precedence over national policy, which at this time was dominated by the minority white population under the law of apartheid. (Himonga 308). Furthermore, the main limitation on the courts was set via the "repugnancy" proviso, which forced customary courts to comply with 'national justice' and 'public policy,' or, in other words, to comply with western standards of conduct (Bennett 5). For instance, cases of customary marriage were not given full recognition due to the fear that they might be polygamous, a non-western cultural practice (Bennett 5). Thus, customary law courts became dependent on a Eurocentric mode of oversight, and remained subordinate to white, western interests.

### **Customary Law under the 1996 Constitution**

After a stormy history of codified segregation and a bloody uprising to put an end to white minority rule in South Africa, in 1994 the National Party finally ceded their rule and negotiated the country's first truly democratic elections. The African National Congress rose to power with the election of Nelson Mandela, and in 1994 the Interim Constitution entered into

force in anticipation of the official constitution, which would be ratified two years later. This Interim Constitution immediately elevated the importance of customary law and traditional institutions in the country, but also implemented a sweeping Bill of Rights in the hopes of rectifying the wrongs committed by the apartheid regime. Both of these attributes were prominent in the 1996 Final Constitution.

**Table 1 Traditional Leaders**

<b>Chapter 12 Traditional Leaders</b>	
<b>Recognition</b>	
211.	<ol style="list-style-type: none"> <li>1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.</li> <li>2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.</li> <li>3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law</li> </ol>
<b>Role of traditional leaders</b>	
212.	<ol style="list-style-type: none"> <li>1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities</li> <li>2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law—               <ol style="list-style-type: none"> <li>a) National or provincial legislation may provide for the establishment of houses of traditional leaders; and</li> <li>b) National legislation may establish a council of traditional leaders.</li> </ol> </li> </ol>

Chapter 12 of the 1996 Constitution is dedicated to the issue of traditional leadership; I have included the text in full in Table 1 seen above. Section 211(3) explicitly states that courts *must* apply customary law when applicable. This begs the complex question: when is customary law applicable? There are few definite parameters about its use, so most formal courts rely on precedent when determining whether or not to invoke customary law. Essentially, either the litigants or the court can select to use customary law. The individual may do so if it does not

jeopardize another involved party's rights to a fair trial, and the court may do so after considering many factors including, but not limited to, environment, cultural history of the litigants, and the nature and subject matter of the transaction (Himonga 315).

As these procedures may not violate the Constitution, the question arises of how the Bill of Rights becomes applicable to issues of customary law. One of the most liberal and sweeping in the world, South Africa's Bill of Rights enshrines the rights of equality regardless of "gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth" (Constitution of the Republic of South Africa, 1996). To further complicate matters of customary law, it states that everyone has the right to an environment that "is not harmful to their health or wellbeing," which includes taking measures to prevent pollution, and to secure sustainable development and the use of natural resources (Constitution). Among many other tenets, it protects against child and other unfair labor, and dictates each individual's right to a basic education, adequate housing, health care, sufficient food and water and social security (Constitution). It is not hard to see how cultural attributes under the jurisdiction of customary law might come into conflict with one or more of these enshrined rights.

The Bill of Rights itself notes that customary law is subject to other rights contained therein, as does Section 211(3) note customary law is subject to the Constitution or any national legislation regarding its use (Constitution). However, as Himonga points out, "exactly what will occur where the court finds that it is required to strike down or refer an offending customary law rule is not clear" (317). The issue of the lack of clear precedent in cases where customary law conflicts with established law or policy is a central issue examined here.

### **Initial Reaction to the 1996 Constitution**

The issue of whether or not traditional customary law violated the Bill of Rights was raised almost as soon as the constitution was ratified within South Africa. The argument made by supporters of customary law was that the 'official' law made up of codes and precedents had been polluted by apartheid rule, while customary law remained pure through its ideology of being a 'living' code of law under which subjects were more likely to experience the rights recently enshrined in the Bill of Rights (Bennett 1). When the whole of the public and private laws inherited from the apartheid regime were scrutinized due to the new Bill of Rights, traditional leaders sought to exempt customary law from the process (Bennett 1). They were, of course, unsuccessful, thus the dispute I am analyzing here. The court cases revolving about this decision will be explored at length.

However, we might ask why these matters have yet to be resolved, years after the fact, and instead continue to be prevalent matters of debate between the Constitutional Court, the Customary Courts, and the people under the jurisdiction of them. It is important to remember that Black Africans were excluded from the national legislature until the New Republic was created in 1994. The minority-white ruled central government under apartheid had transferred law-making powers to 'homeland' governments, which were either entirely or semi-independent. (Bennett 3). These legislatures in turn had the job of creating new laws for their people, but their power lay in traditional and fairly conservative chiefs who had no interest in liberalizing policy (Bennett 4). Thus, when the Bill of Rights was introduced and these anticipated reviews began to take place, the written customary laws lapsed far behind the modern social practices of the communities who lived underneath them, who had evolved their lifestyles but had not updated their written legal codes (Bennett 4). As a result, the gap was widened even further between the

codes of customary law and the new Bill of Rights, and the issue of reforming the legislation became much more pronounced and publicly controversial.

For instance, the issue of customary law concerning inheritance (known in South Africa as succession) has been raised due to its inherent discrimination against women. In 1998 the South African Parliament introduced a bill that would allow women to inherit property on equal terms with men. In response, traditional leaders boycotted this bill calling it “Eurocentric” and suggesting it was too drastic in its application to the customary legal system (Tebbe 467). The result was a court order that enforced individual rights over traditional laws, which led to claims that the Constitutional Court was “insufficiently respectful of cultural and religious difference (Tebbe 467).

Professors Chuma Himonga and Craig Bosch note two issues of living customary law that must be addressed in order to find a practical solution, the first being that the flexibility of customary law can lead to a manipulation of rules and laws. This can easily lead to corruption and use of a customary legal framework for personal and/or political gain, as there is little or no precedence in customary law (Himonga 325). The second is that the constantly changing nature of customary law is often a trigger for instability within its own framework. These problems are both evident in the case studies selected, and the solutions to harmonizing customary law with these issues will become apparent in the subsequent discussion. Professor Bennett notes that if Constitutional Courts feel an obligation to take up the task of re-writing these laws via their case rulings, they will need both a principled and consistent approach to determine which social practices should be accepted as customary law, and those that should be rejected as inhumane or unacceptable under the new standard set by the 1996 Constitution and its Bill of Rights (Bennett 4).

## Chapter 3

### The Influence of International Law

International law intersects with the issues of customary African law in the Republic of South Africa in two significant ways. The first is via the widespread international human rights norms that South Africa has included in the 1996 Constitution and the second is under the “the right to culture” umbrella, which embraces a number of international instruments that provide for the right of individuals to freedom of cultural belonging. For the sake of clarity I have separated these two areas of international law into separate sections below.

#### International Human Rights

When the UN General Assembly adopted the Universal Declaration of Human Rights in 1948, it became the first comprehensive framework for international human rights. In short, it stated that “everyone is entitled to all the rights and freedoms set forth in [the] Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (Universal Declaration of Human Rights, Article 2). When it came to voting, South Africa abstained, due to the ruling National Party’s policy of apartheid, which clearly violated the Declaration (UNESCO).

The writers of the 1996 Constitution of South Africa sought to rectify the former government’s rejection of international law, in particular to the arena of human rights. In the Bill of Rights, Section 39 (1) states that a court, tribunal or forum *must* consider international law when interpreting the Bill of Rights (Constitution). Furthermore, the Constitution dedicates an

entire section of Chapter 14 (General Provisions) to the matter of international law. This section provides means for international law approved by the National government to automatically become law within the Republic (231 (4)). It goes so far as to say “customary international law is the law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament” (Constitution). Finally, the Constitution notes that when interpreting any act of legislation, the court must prefer a reasonable interpretation that is consistent with international law to any that may be inconsistent (233). In summation, the 1996 Constitution places an obligation on the judiciary to consider international law in virtually every case. The country makes a deliberate commitment to follow customary law and thus enforcing the treaties to which they are party.

However, despite these facts there remains significant controversy regarding whether international human rights should have universal application on the continent of Africa as a whole and, to a certain extent, in the Republic of South Africa. This contention is due to a resistance to western thought, culture, and law, or “westernization” and the fight to protect cultural values that had been greatly diminished during the era of colonialism (Grant 2). This has been resolved in South Africa as a result of the clear language of the 1996 Constitution, which embraces the idea that human rights are universal, as well as the country’s commitment to ratifying numerous treaties regarding international human rights (Grant 3). These specific instruments will be discussed in the case studies that follow.

Despite the 1996 Constitution, which renders the argument favoring customary legal autonomy irrelevant since it makes it subservient to common law and national legislation, the divisiveness between traditionalists and activists continues as an element of South African legal disagreements. This divide is also highlighted in the case studies I note regarding women.

However, these cultural discrepancies have also not been ignored by international law, they are,

perhaps paradoxically, recognized in the same Vienna Declaration of 1993 that takes a universalist stance on international human rights (UN General Assembly *Vienna Declaration*).

### **International Cultural Rights**

In addition to a number of treaty provisions that discuss a right to cultural freedom of association, the two major frameworks on human rights discussed above both make reference to the right to culture. Despite the Vienna Declaration's assertion of universal human rights, it also says that it is "the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms" (Vienna Declaration para. 5). Furthermore, the Universal Declaration of Human Rights contains language protecting the free development of personality and free participation in cultural life (Grant 4). One prominent example of another treaty that provides for cultural rights is the International Covenant on Civil and Political Rights, signed in 1966. Article 27 of the treaty specifically dictates that in states where minorities are present, individuals and communities belonging to the minority must be given the right to practice and profess their culture, religion, and/or language (Grant 5).

But the question of what constitutes "culture" has been debated at length. Evadné Grant notes two different definitions: the first being that concluded by the delegates to the 1982 World Conference on Cultural Policies which included "the full range of creative activity associated with the arts and sciences," sports, and "the distinctive and specific features and the ways of thinking and organizing their lives of every individual and every community" (Grant 5). The second is that of T.W. Bennett, who in relation to international law describes culture as "a

people's entire store of knowledge and artifacts, especially the languages, systems of belief, and laws, that give social groups their unique characters" (Grant 5).

The protections and limitations placed on customary law and international law having already been discussed at length, the South African constitution also places similar constraints on the right to culture. Section 30 of the Bill of Rights relates to "Language and Culture," and Section 31 regards "Cultural, religion and linguistic communities." While both sections ensure each individual's right to language, participation in cultural life, religion, and association in civil society, each also cautions that these rights may not be exercised "in a manner inconsistent with any provision of the Bill of Rights" (Constitution).

The subjugation of customary law (as noted previously) and cultural rights to the Bill of Rights was harshly disputed during negotiations of the 1993 Interim Constitution (Grant 7). In solidarity, the Congress of Traditional Leaders of South Africa fought to prevent customary law and traditional practices being subjugated to the constitution. They argued that subjugating these practices to the Bill of Rights would be an imposition of Western values and would diminish the significance of tradition and culture (Grant 8). These groups championing customary law and traditional leadership in turn faced resistance from women's organizations that had long borne the brunt of customary legal decisions. Under customary law and traditional authority women had little right to autonomy. Many were not allowed to own (or inherit) property, and eternally remained under the 'guardianship' of a patriarchal relation, usually either a husband or father (Grant 8). These facts lead many to conclude that customary law is discriminatory to women and other groups in their traditional societies.

The Bill of Rights, as a whole, places emphasis on the idea of equality. As customary law and traditional leadership clearly are subject to the constitution, this has led to the

conclusion that equality takes precedence over culture in cases of controversy. The limitations of customary law in regards to the right to culture have been explored in two distinct ways, judicial and legislative (Grant 9). These different methods will be explored at length as they relate to the issues facing women under the customary legal system and the conflicts with the constitution and, in a broader sense, with international human rights law.

## Chapter 4

### Women and Inheritance

The anticipated challenges to customary law in the Constitutional Court have been tempered by few legislative reforms that address the most flagrant oppressions women face under customary law. At the turn of the 21<sup>st</sup> century, the South African Law Reform Commission completed a series of studies that addressed the necessary changes that must take place in order for customary law to be consistent with the new constitution. While these measures may seem straight forward, it often is difficult to get legislative proposals through Parliament, which is made up of a number of members representing traditional cultures and groups of people. For example, when answering criticism about the practice of *Ukuthwala*, Nkosi Mandla Mandela, a member of the South African Parliament and the grandson of Nelson Mandela, stated “culture has no age. Age is something we learn today because of our Westernisation” (van der Westhuizen). The relevance of these remarks will be addressed further in chapter 6.

Section 23 of the Black Administration Act of 1927 governs the customary legal framework regarding inheritance in South Africa. This Act states that Africans who had not married in civil law or been granted an exemption to the law would follow the central principle of male primogeniture in determining who would inherit property and land (Grant 10). Male primogeniture states that only a male relative may inherit, which means the nearest male descendant through the male line will become heir (Grant 10). In 1998 Parliament introduced a bill that would allow women and men to be considered on equal terms in terms of the inheritance of property; however, traditional leaders were quick to protest the “Eurocentric” approach as

they felt it infringed upon the criticality of laws of succession in customary law (Tebbe 467).

Thus, the matter was dismissed in Parliament and left for the courts to determine its authenticity.

### **The Case of *Bhe***

Three cases laid the foundation for the dismissal of Section 23 of the Black Administration Act. First in *Bhe*, which was the first case in which the constitutional court was forced to answer the question of compatibility between customary law and the right to equality. The case of *Bhe* began when Ms. Bhe's partner of 12 years passed away, leaving only his wife by customary law and two daughters residing on the property they shared. This property was a kind of temporary shelter on land that had been attained via state housing subsidies. Ms. Bhe had contributed to the property financially via purchasing building materials and putting money into the collective household account. Thus, when her partner passed away, Ms. Bhe inhabited the property, which had on it the informal shelter and the building supplies she had purchased (Grant 10).

As section 23 of the Black Administration Act dictates, the father of Ms. Bhe's partner inherited the estate based on customary legal doctrine. He intended to sell the land to pay for funeral costs for his son, which would leave Ms. Bhe and her children homeless (Grant 10). So, Ms. Bhe appealed to the Cape High Court challenging the legal doctrine, which in turn appointed Ms. Bhe's daughters as the proper heirs of the estate. The case of *Shibi* is a similar example to that of *Bhe*, in that when Ms. Shibi's brother, unmarried and childless, died, a cousin inherited his estate due to her preclusion based on the Black Administration Act (Grant 11).

When the South African Human Rights Commission and the Women's Legal Centre Trust brought a public interest application before the court, the Chief Justice ruled that it be heard in conjunction with *Bhe* and *Shibi* (Grant 11). The Human Rights Commission was established by the constitution, with the purpose of promoting and protecting human rights and making amends where they have been infringed upon. The Women's Legal Centre Trust is a NGO that focuses on women's rights in particular (Grant 11). Their application was broader than both *Bhe* and *Shibi* in that it argued the entirety of section 23 of the Black Administration Act was unconstitutional based on three separate provisions in the South African Constitution. These are based on the right to equality, protected in section 9, the right to human dignity, protected in section 10, and the rights of children, protected in section 28. (Grant 11) It also stated that not only was male primogeniture discriminatory and unconstitutional, but applying customary law based on race was equally in violation of equality and human dignity (Grant 11). The court agreed on all counts, ruling that section 23 of the Black Administration Act was unconstitutional based on all of these violations (Grant 11).

### **Lasting Effect on Customary Law**

After the ruling that both section 23 and male primogeniture were unconstitutional, the Court struggled with its right under section 172 of the Constitution to "make any order that is just and equitable" (Grant 12). Three options were considered: that the court could leave the legislature to take action, that it could replace customary law in such cases with the Intestate Succession Act as a broad measure, or that it could develop customary law consistent with the Constitution (Grant 12).

The majority ultimately wanted to allow the legislature to lead the way in reforming the customary law; however, in the interim the court ruled that the Intestate Succession Act would be applied to future cases of inheritance. The Intestate Succession Act states that if the deceased is survived by a spouse and descendants, they each receive shares of the estate. In all other cases, inheritance passes to the closest descendants or blood relatives, regardless of gender.

The case of *Bhe* is an illustration of one way to align constitutional and customary law, by striking down the latter in order to ensure it does not conflict with national ordinances. However, it does not answer the question of how to rebuild customary law after a gap has been left in the wake of a court decision against it. At this point in time, no formal change has been made to the decision that the Intestate Succession Act would replace the Black Administration Act until a new customary law was made regarding inheritance, and so in customary legal cases the common law is still referenced as the answer (Grant 19). This, I would argue, suggests that the court system is perhaps not the most effective means for resolving disputes between constitutional and customary law. Tebbe explains the issue:

“Courts have an important role to play in ensuring that progressive constitutional commitments to equality and dignity are ultimately enforced—as I emphatically believe they must be. Yet widespread and lasting acceptance of egalitarian values may best be achieved not through imposition by unelected judges but instead through democratic advocacy and local deliberation” (Tebbe 469).

Tebbe believes that had the conversation been allowed to continue in Parliament rather than being shut down by disagreements, it could have produced “a tolerably egalitarian result with less risk of injury to a feeling of equal citizenship among traditionalists, less harm to the legitimacy of the court, and less destabilization of African constitutionalism more generally”

(470). This is an important viewpoint to take into consideration, especially in seeking a resolution that allows for the continuation of a dual legal system without simply pasting the common law onto divisive customary legal matters.

Furthermore, the case of *Bhe* depicts a major issue of how to implement international human rights into multi-faceted communities, especially those with traditional values, in the modern world. It also raises the issue of equality in South Africa, and how the equality of peoples must be addressed in determining how to handle cultural practices that conflict with the constitution's extensive human right protections. While customary law and the right to culture are both enshrined in the South African Constitution, the problem lays in reconciling those with international law and the South African Constitution.

Tebbe sums up the case by stating that *Bhe* could be considered a prioritization of the individual's right to equality over traditional South African customary law (484). Grant recognizes that the case of *Bhe* represents the difficulties of reconciling these issues, but also the possibilities imbedded in cases such as these. Thus, while the conclusion is that it *is* possible to ensure both equality and culture, the solutions will be neither easy nor consistent across all issue areas. In a way, the case of *Bhe* and the issue surrounding women and inheritance contribute to both explaining the problems inherent in the process of implementing new customary legal principles, easy as it might seem, and the urgency of finding a way to advance customary law in line with the constitution. I shall examine some of the creative solutions that have been put forth thus far soon, as well as what still remains.

## Chapter 5 Women and Leadership under Customary Law

I have already discussed the issue of how disputes between customary law and common law or the constitution may be rectified. We now move to the question of whether the judiciary or legislature should resolve disputes at all, or if they should be resolved within the community in question. Professors Bekker and Boonzaaier argue that these disputes should be resolved through an evolutionary process rather than via the former methods, and they use the issue of the succession of women to *traditional leadership* positions to highlight the idea that these changes can take place within the existing customary legal framework (Bekker 449). Furthermore, Drucilla Cornell argues in her examination of the case that the idea the customary law is “premodern and inevitably patriarchal,” itself is completely mischaracterized, an idea Bekker expands upon (Cornell 91). The issue at hand is one of living vs. established customary law, and what problems these different shades of the law pose to western understanding.

### Terminology and Living Customary Law

I want to briefly note the importance of Cornell’s point of the problematic use of the terms *chief* and *tradition* or *traditional leadership* to characterize this case. *Chief* often is considered a pejorative word as it is associated with Western notions of leadership and what constitutes leadership of a tribe. *Traditional leadership* is problematic because it assumes in using the preface *traditional* that the leadership is separate from a modern form of leadership in government, which is not the case. Thus, I will be using the word *hosi* rather than chief, as it is specifically applicable in the case of the Valoyi, and will use *traditional leadership* for clarity of

the argument, though we must still identify the misconceptions in doing so before we begin (Cornell 92).

Secondly, it is important to explain the idea of living customary law. Cornell states that “the living customary law has a different notion of living law and thus of custom than the one that dominates, certainly in English and American notions of the common law” (Cornell 92). The basic distinction is that customary law does not dictate that the accepted governing rule of the land be codified as does established law. So, while a common law court may look at customary law and see that the written code dictates a certain procedure or set of norms, the society living under that customary law may have developed by using an entirely different procedure for settling disputes.

For instance, Bekker notes that succession disputes have a long history in traditional leadership in the southern African region. Disputes might lead to entire community divisions or break-ups, and could be brought on by attempts to usurp power by outsiders or the widows of traditional leaders, the ranking of wives, biological fatherhood, witchcraft, the list goes on (Bekker 450). None of these happenings is presented within the customary laws of succession as being normal occurrences, and thus this suggests that customary law is not the *only* source of determining succession and settling disputes. Customary law in this case is inherently flexible, quite unlike its common law cousin. A western view of this process would place customary law as the primary method of settlement and customary rule as the secondary. The idea of the practices “habitually followed by the people” are placed second, while these might be equally if not more important in the case of developing customary law than the written legal doctrine itself (Bekker 451). In order to understand this we must transcend our understanding of law as a western construct and begin to view it in alternative ways.

### **The *Shilubana* case**

The case of *Shilubana* highlights the issue surrounding female succession in traditional leadership and how it intersects with the South African Constitution. It centers on the Valoyi community in the northernmost province of the country, Limpopo; and, the parties of Mr. Nwamitwa, the son of Hosi Malanthini Richard, and Ms. Shilubana, the daughter of Hosi Fofozwa Nwamitwa. When Hosi Fofozwa Nwamitwa died in 1968, he left no male heirs. Succession, similarly to inheritance, was understood to pass to the eldest son of the Hosi, and because Hosi Fofozwa had no sons, his younger brother Richard took on the title. However, in 1996 the Valoyi royal family met to confer the position on Ms. Shilubana, who chose not to replace Hosi Richard and asked that he remain in power for an unspecified amount of time. In response, the following year Hosi Richard officially recognized Ms. Shilubana as his heir. (Cornell 93). Upon his death, the Provincial Executive Council approved Ms. Shilubana as Hosi and an inauguration was scheduled. However, Mr. Nwamitwa took the dispute to the High Court of Pretoria to contest the inauguration, stating his right to become hosi. According to customary law, the High Court and the Supreme Court of Appeals both favored Mr. Nwamitwa's request, and stated that even if *living* customary law permitted women to become hosi, Mr. Nwamitwa had the right via established customary law to ascend to the position. Essentially, the court questioned whether or not the practice of allowing a female to take on the position of chief had actually replaced the prior custom (Cornell 94).

How was the position possible when the Constitution clearly prohibits gender discrimination? Cornell explains the decision as follows:

The reason why Hosi Richard had a successor was that he was appointed in 1968 and the customary law at that time held a right to succession as belonging to the

eldest son. The problem was not one of gender but of lineage, since the appointment of Ms. Shilubana shifted the lineage of the chief to another line. Since gender discrimination was not the central issue, there was no constitutional question (95).

In opposition to this decision, Ms. Shilubana appealed to the Constitutional Court. The Constitutional Court in turn ruled that the High Court and Supreme Court of Appeal failed to acknowledge that traditional authorities had the power to develop customary law in order to eliminate gender discrimination in the succession process. Traditional authorities had a right to develop their customary law under the Constitution (Bekker 454).

In the previous chapter I discussed the decision under *Bhe* that the customary rule of male primogeniture was unconstitutional as it was gender-based discrimination. However, Bekker argues that male primogeniture is *not* in fact a form of gender-based discrimination, but a means for the continued existence and welfare of a community. Women were excluded from succeeding as leaders because they had an expectation to marry, which meant leadership might be transferred to a different family (their husband's) altogether (Bekker 458). The point here is that what might seem to be clearly discriminatory from an outside perspective might have deeply practical roots to the community living under the law. Thus, Bekker concludes that "succession to traditional leadership must be viewed in terms of customary law *and* practice...the choice is to be made by the followers' of customary law – not a learned peroration about discrimination and inequality" (459). As the Valoyi Royal Family met and conferred the position of hosi on Ms. Shilubana, there should have been no contention via an outside process (Bekker 459).

### **Lasting Effect on Customary Law**

In the case of *Shilubana*, Judge Van Der Westhuizen provided measures for identifying the content of a customary norm in order to reform customary law. These included the traditions of the community, the distortion of records due to colonialism, the necessity of allowing communities to develop their own customary legal norms, and the idea that customary law does in fact regulate the lives of the people under it. Thus, he argued that the community is the best actor to develop customary law, as they are the ones who best understand the current living customary law of their society. He concluded that the “need for flexibility and the imperative to facilitate development must be balanced against the value of legal certainty, respect for vested rights, and the protection of constitutional rights” (Ndulo 116).

It is important to note that traditional authorities do not have the power to legislate—the constitution only bestows this power on the national, provincial, and local governments. Furthermore, the current structure does not allow room to consider the idea of granting traditional authorities legislative power, as it would be in direct conflict with the other branches of the system; there are approximately 800 traditional authorities (Bekker 460). In this case, some argue that, while the rules of succession of the Valoyi community could adapt to fit the expectations of the Constitution, they could result in claims to leadership by other women that might be problematic to communal structures. In this regard, the judge in the Constitutional Court did not offer a solution in the case of *Shilubana*, he simply made the assertion that since men and women should be equal, they should have equal chance for succession, and concluded by stating that “these future decisions are not before the court, and nothing further need to be said about them” (Bekker 462). Thus, while Judge Van Der Westhuizen stated the importance of the community developing customary law to fit the standard under the new constitution, the

court also sidestepped responsibility for the future disagreements in traditional communities.

Similar to some of the issues noted in *Bhe*, this highlights the importance of dismantling customary law without a suitable replacement. In the case of succession, a gap was left for communities to develop acceptable rules for succession.

## Chapter 6 Women, Marriage, and the Rights of the Child

The intersection of children's rights with African customary law is fascinating in that it illustrates how common law decisions may widen and deepen—rather than limit—customary law. This is depicted via measures that take customary norms and modern issues into account in regards to parental rights, responsibilities, surrogacy, and autonomy of the child (Songca 351). Court decisions and legislative actions have used collective solidarity and extended family when deciding to use customary legal codes (Songca 354). However, the concept that children have rights is at its core liberal and western, enshrined in the Children's Act of 2005. Thus, there has been considerable debate regarding measures that protect children under the law but that many traditionalists find to be Eurocentric or western in nature. One prominent example of the issue young women face is the practice of *ukuthwala*, otherwise known as 'forced marriage,' or 'bride kidnapping,' and the effect this has had on the debate surrounding customary law and the South African legislature and constitution. This chapter integrates the importance of legislative action in customary law decisions, as up to this point all of the case studies have focused on common law court decisions, via the case studies of the practice of *ukuthwala* and The Children's Act.

### *Ukuthwala*

*Ukuthwala*, as a cultural construct, has been stretched in many different directions as far as its meaning and implications. It is primarily a practice of some Xhosa people, the direct translation of the word becoming "to bear" or "to carry" in English. In its purest form, *ukuthwala* serves as a type of elopement as a precursor to engagement, whereby a young man will kidnap a woman and take her back to his village, generally with the consent and understanding of both the

woman and her parents (Thornberry). Thus, *ukuthwala* is not a marriage or agreement practice in itself, but a culturally-legitimate practice that aims to open the doors for negotiating a customary marriage between the man and the woman's family (Mwambene 3-4). In culturally legitimate cases of *ukuthwala*, the young woman often pretends to be unwilling in the kidnapping as a part of cultural expectation, though she usually is as complicit in planning the act of kidnapping as the man (Mwambene 4). Once the woman is taken to the man's village, the families of the young man and women begin to negotiate for *lobolo* (a bride price or dowry), and if the young woman or her family have any complaints or hesitations regarding the arrangements she is returned home, and at the price of the man's family who initiated the act (Mwambene 4).

Within the standard process of *ukuthwala*, there are boundaries put in place in order to ensure that no undesirable consequences result from the practice. As the primary goal of *ukuthwala* is to incite marriage negotiations, if the man who kidnaps the young woman: does not offer marriage, is deemed unacceptable by the woman's family, seduces the young woman before marriage, or causes pregnancy due to seduction thenceforth, the woman's family receives a number of penalties paid by the man (Mwambene 4-5).

Finally, there are cultural benefits inherent in the practice of *ukuthwala* when it is practiced legitimately. It could be viewed through the same lens that many westerners view the practice of elopement, in that it may force consent from a woman's father should he refuse otherwise, avoids the necessity of a full wedding, hides the 'immorality' of a woman's pregnancy, and puts off the payment of *lobolo* in cases where the bride's family may be strained for money (Mwambene 5). Thus, in at least some cases *ukuthwala* is a part of the right to culture, which both the constitution and international law protect as an individual right. However, there

are many cases where the use of *ukuthwala* is just a veil for more problematic activity that clearly violates norms of human rights.

Mwambene notes that there are three predominant forms of *ukuthwala* that are currently practiced in South Africa. The first is the former case, whereby a young woman has consented to the act of *ukuthwala* and is likely involved in her own “abduction.” The second is more problematic, and occurs when a young woman’s family consents to *ukuthwala* while she does not. It causes problems when reviewed under the western definition of consent, which would center on the desires of the young woman rather than her family, though it still retains some cultural legitimacy in the arena in which it is practiced. Finally, the most questionable and abusive form of *ukuthwala* occurs when the young woman has not consented to her abduction, nor has her family. (Mwambene 7). These are the cases in which problems such as older men marrying much younger women, rape, violence, and even in some cases similar to indentured servitude occur.

South African courts have explicitly stated that *ukuthwala* must not be used as an excuse to conceal cases where a woman is forced into marriage by her family, nor can cases of forced kidnapping be justified by invoking cultural practice. However, decisions have also been made that justify crimes of kidnapping if there is reason to believe the kidnapper thought a woman’s parents gave their permissions (Mwambene 6). Cases like these are problematic since they ignore a woman’s right to consent in cases of marriage. Furthermore, in cases where a young woman has allegedly given her permission, they lead to the question of whether she is being pressured by her parents, the man’s parents, or both parties.

So, the question becomes one of balancing cases whereby a woman’s human rights are obviously violated based on ideologies of bodily integrity, freedom and security, the prohibition

of slavery, and more, and those that are both legitimate and central to the South African people's right to practice their own culture. There are several points by which *ukuthwala* is contrary to principles of universal human rights law, the first being in regards to equality for women. The South African Constitution and many human rights treaties prohibit discrimination based on gender (Mwambene 8). Not only does *ukuthwala* clearly violate women's right to equality in cases of marriage or kidnapping against a woman's will, it also raises the point that only women are subject to *ukuthwala*. Thus, while *ukuthwala* may be culturally legitimate in many cases, it is still not an inherently equal practice since it is practiced only by men and subjects only women. However, since *ukuthwala* is not a form of customary marriage and only a precursor to it, it is hard to justify an outright ban on the practice from a gender equality standpoint. If outlawing *ukuthwala* based only on the principle of gender was proposed, western expectations of the man proposing to the woman could face an argument to be outlawed as well.

However, in the cases where the woman's consent to the practice and her forthcoming marriage are less clear, violations of human rights law become more apparent. The Universal Declaration of Human Rights asserts that men and women have equal rights before, during, and after the dissolution of marriage (Universal Declaration of Human Rights). Furthermore, the Convention on the Elimination of All Forms of Discrimination Against Women states that men and women must have equal rights in marriage, and that marriage shall be entered into only with the "free and full consent" of both parties (CEDAW article 16). Thus, in any case where a young woman does not consent to *ukuthwala*, the practice clearly is a violation of international law. The problem, however, is determining when a case is legitimate and congruent with the right to culture and when it is not.

### The Children's Act

Mwambene uses the example of The Children's Act to depict how legislation can fall short when describing and sanctioning traditional practices. I argue that this would necessitate a broader application of customary law in its place. The Children's Act of 2005 came into force in 2010, and essentially states that a child's best interests must be of utmost importance in any cases concerning their protection (The Children's Act 28 of 2005). The legislation is interesting in that it introduces an inherently western notion that children have rights and should grow up in a nuclear familial setting. However, this conflicts with the upbringing of children in many traditional units in the country, and so the legislation is forced to find ways to be both considerate of culture and firm on enforcement.

Mwambene emphasizes that the Children's Act is "consciously sensitive to culture" (Mwambene 15). She notes in particular section 12, which regulates the customary practices of male circumcision and virginity testing, and prohibits female genital mutilation (Mwambene 16). While *ukuthwala* is not specifically mentioned in the act, the act's statements are still applicable to the practice, and could become more important in the future. For instance, section 12 states that every child has the right not to be subjected to practices detrimental to their wellbeing, which raises the question of whether *ukuthwala* is inherently discriminatory to female children (Mwambene 17). Just as Mwambene notes situations where the practice could be harmful for a young woman's autonomy, she also specifically notes a section that dictates a child's right to participation in any matter concerning that child, and asserts, "the practice of *ukuthwala* is an expression of the child's choice and constitutes an indirect expression of her views" (Mwambene 16). Thus, it seems that the Children's Act could be used either to permit or restrict the practice of *ukuthwala*.

The section of The Children's Act that mostly directly intertwines with the practice of *ukuthwala* is 12(2)a, which prohibits forced marriage, especially forbidding it in children below the minimum age set by law (Mwambene 17). This area of the law has been especially disputed, as customary legal systems set the minimum age for marriage much lower than that of 18 years as decreed by the Recognition of Customary Marriages Act (Mwambene 18). Thus, the act seems counterintuitive, as the Children's Act lowered the age of majority from 21 to 18 (Children's Act). In this case, it seems irreconcilable that *ukuthwala* can be recognized as a legitimate practice in women under the age of 18 due to common law and legislation. While there is cultural legitimacy to *ukuthwala*, I believe in these cases customary law courts must either push to re-establish a minimum age of marriage for traditional communities, or accept and enforce the minimum age requirement in cases of *ukuthwala*.

### **Lasting Effect on Customary Law**

*Ukuthwala* is an example of a practice that eludes clear language and jurisdiction under both customary and common law, and thus, requires a broadening of the customary legal system to adequately address the issues involved. While cases of forced marriage obviously violate the constitution and international human rights based on their violation of the freedom and security of the person, the best interests of the child, and the equality of women, these cases remain prevalent in traditional practice. To simply ban all cases of *ukuthwala* would violate the right of culture, but we have also noted that the constitution and the Bill of Rights take precedent over this right. There is no doubt that there is both danger to women and children in some cases

of *ukuthwala*, and inherent cultural value in other cases. How does one reconcile these variations of the practice in order to protect women and children's safety and their right to culture?

Mwambene makes a persuasive point in the following conclusion on the practice of *ukuthwala*: "that current legal terminology, such as that used in the [Children's] Act, is not sufficiently nuanced to describe and regulate it" (22). While she does not develop it fully, in my opinion, this makes a strong argument for proponents of living customary law, which rests on the presumption that the courts should interpret cultural practices as they exist rather than based on a textual interpretation of the law. While Mwambene says that the South African law should recognize *ukuthwala* in its culturally legitimate cases, that is where the woman consents and is complicit in her kidnapping and elopement. I would go farther and suggest that the South African common law system should both strictly persecute cases of abduction or forced marriage, but allow the customary legal system to operate on a parallel basis in overseeing the process.

Should the process of *ukuthwala* be overseen only by legislation and the common law court, it would probably be eradicated completely, in which case there may be no way to find cases of forced abduction and cooperative kidnappings. However, expanding the breadth of customary law in these cases can align practices more closely with the expectations of the constitution. After all, Mwambene notes that "child participation and recognition of the evolving capacities of the child are a basic tenet of the Act, and recognizing the role of the girl as an actor in her own interests via *ukuthwala*, thus promotes a fundamental principle of the Act" (27). Thus, the need for autonomy of children asserted in The Children's Act, and the need for equality for young women asserted in both constitutional and international law, are better reconciled with actual behavior. If the court can protect the rights of the people by involving them more directly in the laws which govern them, a fundamental idea behind customary law,

then the laws can become more effective. The result will be a more elective and legitimate legal system for the 21<sup>st</sup> century federal system of the Republic of South Africa.

## Chapter 7

### Solutions to Reconciliation

#### I. Unifying Customary and Common Law

Evadné Grant outlines three options proposed by the court in *Bhe* as solutions to the initial problem of reconciling customary law with the constitution and with common law. The first solution is to “interpose common law in those areas of customary law incompatible with the Constitution” (Grant 18). This was the majority decision in the case of *Bhe*, applying the Intestate Succession Act as an intermediate measure, though the overall effect would be to completely abolish customary laws of succession and replace them with common law regulations. However, Grant notes that this solution, while seeming the most efficient in terms of finances and time and the most ensuring of equality, can be problematic for African societies. For instance, since common law is fundamentally a western notion, the idea of replacing customary law with common law at its base only takes into account the Western nuclear family. Contrary to this, traditional African society is made up of extended families, which are fundamentally different from this Western norm. Thus, while simply replacing customary law with common law may seem to be the easiest approach, it often becomes the most problematic (Grant 18).

The second solution was outlined via the dissenting opinion in *Bhe*: to develop customary law in accord with the South African Constitution. The South African Constitution is already clearly set up to accept and encourage legal dualism in its sections relating to customary legal

doctrine, and both systems are declared to be of equal importance. Grant argues that this approach is the most compatible with the South African constitution.

However, that is not to say that there are not problems with the approach. Primarily, the court ruled that customary law in and of itself is tainted, since it was fossilized in a time of gender discrimination rather than modernizing accordingly, which suggests that customary law must be developed into organic adaptive law. However, it is impossible to imagine that customary law could not be tainted by the difficulties and oppression of colonization and apartheid in the country, and thus it becomes more difficult to separate culture and identity, and to identify to what degree people practice traditional lifestyles. Grant states that “the development of customary law is, therefore, a difficult and sensitive task, which requires both time and resources. It is little wonder that the Constitutional Court shied away from this undertaking in *Bhe*” (Grant 19).

Another problem Grant notes is that customary law is based on social practice, not written doctrine, and thus becomes difficult to legislate or dictate a set of social norms. Dictating and developing customary law inherently embodies the risk of imposing rules on a people who may be at a different stage of cultural practice or development. It also may force cultures to abandon practices that are vital to their identity rather than addressing how these practices might be made more congruent with common law and the South African constitution (Clark 19). Thus, it is imperative that the courts and legislatures remain flexible in their efforts to mold customary law to be consistent with the constitution.

The third solution Grant outlines is a unification of common and customary law. Obviously, this would make the law much more comprehensive since one single legal code would apply equally to all the people of South Africa, thus abandoning the issues of whether

common or customary law should be held as superior and to whom. However, this would be an immense undertaking. It would also open the wounds of the divisive voices of the minorities who are not satisfied with a comprehensive solution.

Grant's conclusion is not in line with any of the above proposals, but rather an acknowledgement of the fact that it might be too soon to attempt any dramatic revolutionary action when it comes to customary law in the country. He notes that the wounds of apartheid are too fresh, and that "over time, as development is normalized and the system of customary law is strengthened, unification will be, and will be seen to be, less threatening" (22). I do not believe that it is consistent with the goals of either the constitution or traditional communities to eliminate the dual legal system in South Africa. Just as the United States continues to use tribal courts in making decisions for Native American communities, countries should have a measure to accommodate communities who choose to continue to practice age old traditions in a way that protects equality while protecting cultural rights. Thus, while bringing customary law into line with constitutional and international law must be the ultimate goal, it must be approached carefully, recognizing a still fragile legal system still showing signs of enormous albeit very positive change.

## **II. Reconciling "Official" and "Living" Customary Law**

A recurring theme throughout this analysis has been the problematic divide between "official" and "living" customary law. I have noted that customary law is inherently not based on a written legal code like common or civil law, and many communities reject the laws written during the era of colonization and subjugation to European laws. Tebbe notes that "Judges often

still adhere to the official version, a practice that can cause significant hardship to women and children, even when the community's own mores are evolving toward greater equality" (489). Thus, we must understand that it is common law that is hindering the progress and even in some instances contributing to discrimination against people in traditional societies.

Tebbe notes in particular two areas where official customary law is deficient, in considering women's increasing economic independence and the increased prevalence of a nuclear family structure as opposed to an extended one (489). While official codified customary law might appear to be behind the times, it may be better adapted to contemporary culture than many give it credit for. Activists and traditionalists play up the patriarchal or Eurocentric elements in equal measure in order to advance their argument. In order for genuine progress to be made in protecting both the breadth of customary law and the constitution's protection of equality and human rights, this division needs to be acknowledged and bridged. Work needs to be done with each individual community, concentrating on its needs and not obsessing on problem areas. Above all, the ultimate goal—the safety and equality of women and children—must be attained.

### **III. Addressing Gender Discrimination in Customary Law**

On the note of "living" vs. "official" customary law, many traditionalists argue that the idea that customary law is discriminatory against women is misguided, and fails to account for the cultural purposes for certain legal codes involving leadership, marriage, and succession. However, there is no question that many of the norms of customary law are in fact detrimental to women, and these must be addressed in order for the law to be truly inclusive of all members of

the community. The idea that women's rights is a Western idea aimed at further colonizing traditional African communities must be discarded in favor of an African-centered movement for women's equality. The people of traditional communities understandably were resistant to further change, especially at the hands of white westerners, when their histories have been marred by colonial domination. However, this does not excuse the fact that the concept of universal human rights must be accepted *universally* in order to reach its goals. Ndulo describes this process as emphasizing the idea that human rights are not foreign to the continent of Africa. She notes that there must be a strategic movement that addresses the fact that women's rights are a relevant issue in African society, and furthermore, that African society has always embraced human rights, even if it seems alien to the international, and often western sponsored, human rights accord of the present day (Ndulo 118).

This will necessitate improvements over the current court system, which leaves unresolved issues in the wake of its decisions regarding constitutionality. It will require communication with the communities in question in order to agree upon changes in customary law that both empower women and end discriminatory practices, and that do not also disregard the traditions of the people involved. Activists and judiciaries are correct in their assertion that the communities directly impacted by customary law must lead its changes. These communities also should be given resources and guidance by the common law courts or legislatures in their countries so that they might implement realistic, practical, and helpful legislation that will benefit the people involved. Simply replacing their laws with common law codes or leaving blanks in the written code for years in cases that must be used to determine precedent and the building of customary law is extremely problematic. Leaving customary law to develop without

deadlines, focus, or goals is dangerous to the people, including women and children, who rely on customary law for protection in their communities.

Education is of the utmost importance in this regard. Women need equal access, in terms of both education and finance, to courts so that they can tackle discriminatory practices. All people should be educated about the 1996 Constitution and the Bill of Rights, and more broadly about the idea of universal human rights as a whole. In this way perhaps the ultimate goal of the equality of all peoples can be borne in mind, rather than obsessing on the immediate problem of assimilating traditional Africans into Western society.

## Chapter 8

### Conclusion

Professor Tebbe described the issue of gender within customary law:

“South Africa’s debate over customary succession reflects that global tension between constitutional democracy and contemporary traditionalism. When lifeworlds revolve around rules and practices that are perceived to contravene key democratic values—such as gender equality—they challenge Western political thinking at its core. In response, some democrats are tempted to use state power to enforce their commitment to individual rights. Protecting rights in that way appears to them a matter of justice rather than might...yet commentators have warned that thoroughgoing extension of that approach would eliminate much of what makes customary law distinctive in the view of many citizens” (493).

The crux of Grant’s summary is the unification of common and customary law systems in South Africa. From the Western perspective, a system that comes into conflict with national legislation, especially the constitution, is problematic in that it automatically must threaten individual rights to equality. However, I would propose that the existence of a dual legal system in South Africa, approached correctly, may be more valuable in protecting individual rights as it allows people to establish their own systems of living rather than being forced into the larger national norm. In this way, larger units may be able to learn from smaller systems, rather than the other way around.

It seems clear that Parliament must become more involved in the process of aligning customary law with the constitution, and this argument could be made more than ever with the

prevalence of people from and representing traditional societies within the legislative body. The court system is not designed to legislate or to create new laws, and thus while they may help in identifying areas in which change needs to occur in the customary law system, the judiciary alone cannot implement the change customary law needs.

It is also imperative that the people who feel threatened under customary law be given voice to both understand and change the system. If women in these communities are empowered via education, they may promote gender equality from inside their communities. Gender equality is associated almost exclusively with western culture, and for communities that have not yet embraced gender equality, the process must be organic and grassroots. The most valuable solution lays in allowing the community to see the value and history in equality and human rights without exerting the perspective upon them forcefully.

The central focus of my thesis is not to answer the question of how customary law can be aligned with the values of both the constitution and international human rights law. Numerous academics, researchers, and policy makers have struggled to find this solution, and it is complex and illusive. My purpose is to facilitate a meaningful discussion that is essential to advance the best interests of both activists and traditionalists. The core of my argument is that the promotion of community based activism and discussions can lead to new policies and laws that protect cultural traditions and the new universal standards of human rights. For centuries the people of South Africa have been subjected to colonial powers and domination. It is time for South Africa to construct its own destiny. It must weave a complex new social fabric one that reconciles constitutional law and customary law creating a modern egalitarian society. One would hope the Republic of South Arica could create a better version of modernity perhaps even teaching the British and Dutch a thing or two.

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**Academic Vita of Lillian Gabreski**  
[lilliegabreski@gmail.com](mailto:lilliegabreski@gmail.com)

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<b>EDUCATION</b>	Penn State Erie, The Behrend College	May 2016
	Bachelor of Arts in Political Science Minor in History Minor in Women's Studies	<i>Schreyer Honors Scholar</i>
	University of Cape Town, South Africa	<i>Study Abroad, Summer 2015</i>
	Ryerson University, Toronto, ON Canada	<i>Study Abroad, Summer 2014</i>

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**RESEARCH/RELATED EXPERIENCE**

**Schreyer Honors Thesis, Theory v. Practice** 2016  
Penn State Behrend; Erie, PA  
Received full research grant to study at the University of Cape Town and conduct research

**Honors Course in Comparative Politics, Teaching Assistant** Fall 2015  
Penn State Behrend; Erie, PA  
Taught two weeks of classes on South African socio-political structure

**Treaty Database/International Law Survey** 2012 - 2015  
Penn State Behrend; Erie, PA  
Conducted independent research with Distinguished Professor of Political Science, John Gamble

**Leslie Danks Burke for United States Congress, Intern** Summer 2012  
Jamestown, NY  
Served on the campaign staff for attorney Danks Burke during her primary race for the 23rd Congressional District of New York; gained skills in VoteBuilder software, campaigning, and communicating with constituents

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**WORK EXPERIENCE**

**Learning Resource Center, Penn State Behrend, Tutor; Erie, PA** Sept. 2013 - present

- Tutor domestic and international (ESL) students in writing, political science, and history
- Provided in-class composition support for three first-year writing courses

**Penn State Behrend Honors Program, Student Assistant; Erie, PA** Sept. 2012 - present

- Coordinate informational sessions for honors students; represent program at Open Houses and New Student Orientation

**Chautauqua Institution;** Chautauqua, NY

**Boys' and Girls' Club, Assistant Counselor**

Summers 2012 & 2013

- Planned activities for children (aged 7–15) to help them develop athletically, musically, artistically, and socially

**Chautauqua Book Store, Clerk**

Summer 2011

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## **LEADERSHIP EXPERIENCE**

**Penn State Behrend; Erie, PA**

Model African Union

2015 – 2016

- Head Delegate for group representing Madagascar
- Attending Conference at Howard University

Student Integrity and Conduct Board Member

2015 - 2016

College Democrats, President (2013 - 2015)

2012 - 2016

- Hosted & Organized Western Regional Conference (2014)

Alpha Sigma Alpha National Sorority, Chapter President (2015)

2013 - 2016

- Personal Highest GPA in chapter (2012 – 2016)
- Outstanding Sorority/Fraternity Chapter (2015)
- National Recognition as Seek Chapter (2015)

Student Activity Fee Committee

2014 - 2016

- Reviewed grant proposals and voted on allocations of ~\$400,000

PanHellenic Council

2014 - 2016

- Vice President of Service and Programming (2014)
- Vice President of Recruitment (2015)

Pi Sigma Alpha National Political Science Honors Society, Secretary (2015)

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## **SELECT HONORS**

**Penn State Behrend; Erie, PA**

Academic Excellence Scholarship

PNC Leadership Scholarship

Chancellor's Scholar Award

President's Freshman Award

Phi Kappa Phi National Honors Society

David Love Memorial Scholarship

Pi Sigma Alpha National Political Science Honors Society

Gerard L. Bayles Memorial Scholarship