

---

# CUSTOMARY LAWS IN INDIA AND SOUTH AFRICA – A CRITIQUE

---

Advocate Bhumika Batra, LLM, Amity University

## ABSTRACT

Customary law occupies a complex and often contested space within plural legal systems. Both India and South Africa demonstrate deep tensions between traditional community norms and the constitutional promise of equality, dignity, and human rights. This doctrinal paper critically analyses the nature, scope, and evolution of customary law in these two jurisdictions through statutory frameworks, constitutional provisions, and landmark judicial pronouncements. In India, customary law survives in tribal, personal, and local community contexts, governed by proof requirements of continuity, reasonableness, and non-repugnancy under the Constitution. In South Africa, the Constitution of 1996 explicitly recognises customary law as an independent legal system subject to the Bill of Rights, and subsequent legislation—such as the *Recognition of Customary Marriages Act* (1998) and the *Reform of Customary Law of Succession Act* (2009)—has restructured it in line with constitutional equality. Using cases like *Laxmibai v. Bhagwanthbuva* (India) and *Bhe v. Magistrate, Khayelitsha* (South Africa), this research contrasts the judicial treatment of gender equality, living-law theory, and constitutional supremacy. Comparative critique highlights convergences in judicial sensitivity to human rights and divergences in statutory codification and community autonomy. The paper concludes that while both systems reflect pluralism, South Africa's constitutional codification offers stronger reconciliation between custom and rights. India's approach remains fragmented and case-driven, often reliant on judicial discretion. The study calls for a balanced reform model that preserves community traditions but ensures equality, human dignity, and procedural justice within modern constitutional democracies.

**Keywords:** Customary Laws, Constitutionalism, Bill of Rights, Equality and Justice, Pluralism.

## Introduction

Customary law, the repository of lived traditions and community practices, remains an indispensable yet controversial element in post-colonial legal systems.<sup>1</sup> It represents a people's moral code and social fabric—often transmitted orally and embedded within communal structures. The challenge for modern states lies in balancing respect for indigenous customs with adherence to constitutional guarantees of equality and justice. Both India and South Africa exemplify legal pluralism: they recognise multiple normative systems—statutory, religious, and customary—that coexist and occasionally conflict.<sup>2</sup> Yet, their constitutional approaches differ fundamentally. India's Constitution is silent on customary law *per se*, though it indirectly acknowledges its operation through the Fifth and Sixth Schedules governing tribal areas and by recognising personal laws. South Africa's Constitution, in contrast, explicitly mandates recognition and application of customary law subject to the Bill of Rights (Section 211).<sup>3</sup> The significance of this comparative study lies in analysing how each country negotiates the interface between custom, constitutionalism, and reform. Through doctrinal analysis of statutes, case law, and constitutional provisions, this paper argues that while both systems struggle with gender equality and normative coherence, South Africa's model of "living customary law" offers a more structured framework.<sup>4</sup>

## Legal Framework: India

Customary law in India predates the colonial and constitutional order. It evolved as the principal source of regulation within communities—tribal, clan-based, caste-based or regional—long before codified law existed. Even today, customs shape marriage, inheritance, adoption, and local dispute resolution, particularly among Scheduled Tribes and rural communities.

Under Indian jurisprudence, a *custom* becomes legally enforceable only if it satisfies certain conditions: (1) antiquity; (2) continuity and uniform observance; (3) reasonableness; (4)

---

<sup>1</sup> Danne, A. P. (2004). Customary and Indigenous law in transitional post-conflict states: A South Sudanese case study. *Monash University Law Review*, 30(2), 199-228.

<sup>2</sup> Mukaddam, F. (2024). Contextualising Legal Pluralism. In *Muslim Women between Community and Individual Rights: Legal Pluralism and Marriage in South Africa* (pp. 23-43). Cham: Springer Nature Switzerland.

<sup>3</sup> Rautenbach, C. (2003). Some comments on the status of customary law in relation to the Bill of Rights. *Stellenbosch Law Review*, 14(1), 107-114.

<sup>4</sup> Huizenga, D. L. (2019). Customary Law and Indigenous Rights in South Africa: From transformative constitutionalism to living law in struggles for rural land rights.

certainty; and (5) non-repugnancy to law or public policy. Courts frequently cite the Privy Council's observation in *Ramalakshmi Ammal v. Sivanantha Perumal Sethuraya* (1872)<sup>5</sup>: "A custom, in order to be valid, must be ancient, certain, and reasonable."

The constitutional framework further disciplines custom. Articles 13, 14, and 15 prohibit practices inconsistent with fundamental rights. Article 25 protects freedom of religion, but subject to public order, morality, and health. Customary laws in the Scheduled Areas are given partial autonomy under Articles 244 and 371A, yet remain under the constitutional umbrella. The Supreme Court in *Madhu Kishwar v. State of Bihar* (1996)<sup>6</sup> upheld tribal inheritance customs only to the extent they did not violate Article 14's equality principle.

Statutorily, various domains preserve or modify customary law:

- The *Hindu Marriage Act, 1955* (Section 29(2)) saves customs permitting polygamy among certain groups.
- The *Indian Succession Act, 1925* recognises tribal and customary exceptions (Sections 3–5).
- The *Panchayats (Extension to Scheduled Areas) Act, 1996* explicitly authorises tribal self-governance in accordance with "customary law, social and religious practices."

Judicial recognition remains case-driven. In *Laxmibai v. Bhagwanthbuva*<sup>7</sup> the Supreme Court reiterated that custom must be proved by clear and unambiguous evidence. Similarly, in *Thakur Gokal Chand v. Parvin Kumari*<sup>8</sup>, it was held that the burden lies on the party invoking custom to prove it by "convincing evidence."

Yet, courts have struck down discriminatory customs. In *C. Masilamani Mudaliar v. Idol of Sri Swaminathaswami Thirukoil*<sup>9</sup>, the Court declared that any custom violating gender equality was void under Articles 14 and 15. In *Shakti Vahini v. Union of India*<sup>10</sup>, the Supreme Court invalidated *khap panchayat* customs sanctioning honour killings, affirming constitutional

---

<sup>5</sup> [1872] UKPC 37

<sup>6</sup> Writ Petition (Civil) No. 5723 of 1982.

<sup>7</sup> Civil Appeal No. 2058 of 2003.

<sup>8</sup> 1952 SCR 825.

<sup>9</sup> 1996 8 SCC 525

<sup>10</sup> 2018 7 SCC 192.

supremacy over social norms.

Tribal customary law remains a special enclave. The *State of Nagaland v. Ratan Singh*<sup>11</sup> recognised the autonomy of Naga customary practices under Article 371A but cautioned that they cannot contravene fundamental rights. Thus, in India, custom exists not as a parallel but as a subordinate legal order—valid only within constitutional boundaries.

### Legal Framework: South Africa

South Africa's constitutional architecture enshrines pluralism. The 1996 Constitution provides explicit recognition to customary law under Sections 30, 31, 39(2), 211 and 212. Section 211(3) mandates that “courts must apply customary law when that law is applicable, subject to the Constitution and any legislation.” This recognition corrects colonial distortions that relegated African customary law to “inferior status.”

The *Recognition of Customary Marriages Act 120 of 1998* (RCMA) formally validated customary marriages, granting them equal legal status with civil marriages. It stipulates requirements of consent, lobola (bride-wealth) negotiation, and registration, while ensuring equality of spouses (Section 6). The *Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009* abolished male primogeniture, aligning customary inheritance with gender equality in Section 9 of the Constitution. Further, the *Traditional and Khoi-San Leadership Act 3 of 2019* integrates traditional governance within constitutional limits. This tripartite framework—constitutional recognition, statutory reform, and judicial review—constitutes South Africa's model of “living customary law.” The Constitutional Court has emphasised that customary law must evolve with the communities that practise it. In *Alexkor Ltd v. Richtersveld Community*<sup>12</sup>, it held that customary law is not fossilised but a dynamic system reflecting the “way of life” of people. Similarly, *Shilubana v. Nwamitwa*<sup>13</sup> upheld a community's decision to allow female succession to chieftaincy, holding that courts must give effect to legitimate development within living customary law.

The landmark *Bhe v. Magistrate, Khayelitsha*<sup>14</sup> declared the rule of male primogeniture unconstitutional, replacing it with the *Intestate Succession Act 81 of 1987*. Chief Justice Langa

---

<sup>11</sup> [1966] INSC 68.

<sup>12</sup> 2003 12 BCLR 1301 (CC).

<sup>13</sup> 2008 9 BCLR 914 (CC).

<sup>14</sup> 2005 1 SA 580 (CC).

observed that equality and dignity override discriminatory custom: “African customary law must be consistent with the Constitution; if it conflicts, the Constitution prevails.” Unlike India, therefore, South Africa’s recognition of custom is constitutionalised, not inferential. It embeds pluralism within rights discourse, ensuring that custom and equality coexist under judicial supervision.

### Comparative Analysis

Both India and South Africa are multicultural constitutional democracies attempting to reconcile community autonomy with constitutional supremacy. Yet their approaches differ in structure, scope, and doctrinal clarity.

**1. Constitutional Status** South Africa’s Constitution explicitly recognises customary law as an equal system subject to the Bill of Rights. India’s Constitution is silent; recognition is implicit through schedules and judicial pronouncements. Thus, South Africa integrates custom within the constitutional order, while India subordinates it to fundamental rights.

**2. Proof versus Recognition** Indian courts require strict proof of custom’s existence and reasonableness; South African courts presume existence but test conformity with constitutional norms. Hence, India follows a *burden-of-proof* model; South Africa follows a *constitutional-compatibility* model.

**3. Statutory Codification** South Africa’s RCMA and Reform Acts codify critical areas of family and succession law, ensuring gender equality. India lacks national codification: customary practices vary by region and are often unregulated.

**4. Gender and Equality** Both systems face gender-bias legacies. South Africa’s *Bhe* and *Shilubana* cases reformed inheritance and chieftaincy succession for women. India’s *Madhu Kishwar* and *C. Masilamani Mudaliar* decisions attempted similar reforms but without legislative backing, leading to uneven enforcement.

**5. Nature of Customary Law** South Africa explicitly recognises “living law”—evolving norms of communities. Indian courts treat custom as static unless changed by statute or judicial review.

**6. Conflict Resolution** South Africa’s courts harmonise conflicts by constitutional supremacy.

Indian courts rely on Articles 13 and 14 to strike down unconstitutional customs but often defer to cultural autonomy in tribal areas, creating inconsistencies.

**7. Judicial Attitude** South African judges interpret custom purposively, aligning it with human rights. Indian judges oscillate between cultural relativism and constitutional universalism.

### **Critical Issues and Doctrinal Challenges**

Both India and South Africa inherited deeply patriarchal social structures in which customary laws often reinforced male dominance, lineage-based inheritance, and the exclusion of women from positions of authority.<sup>15</sup> Gender justice, therefore, lies at the heart of the modern struggle to reconcile tradition with constitutionalism in both jurisdictions. In India, despite significant statutory reform through the Hindu Succession (Amendment) Act of 2005 granting daughters equal coparcenary rights, numerous tribal and customary practices continue to deny women inheritance and property ownership. These customs, justified in the name of preserving lineage or protecting communal land, systematically marginalise women and impede economic empowerment. Customs permitting early or child marriage, legitimising dowry, or restricting women's choice in marriage still persist in some regions, showing the distance between law in books and law in practice. The Indian judiciary has occasionally intervened to curb such inequities, but implementation remains sporadic. In contrast, South Africa's constitutional architecture institutionalised gender equality through Section 9 of the Constitution and a series of transformative judicial decisions. The Constitutional Court's rulings in *Bhe v. Magistrate, Khayelitsha*<sup>16</sup> and *Shilubana v. Nwamitwa*<sup>17</sup> are landmark feminist judgments, striking down male primogeniture and endorsing women's right to leadership within customary systems. These cases illustrate how a constitutional order can reform patriarchy without dismantling cultural identity, embodying a progressive synthesis of equality and tradition.

However, the broader dilemma persists: to what extent can constitutional review coexist with cultural self-determination? Indian tribal communities frequently argue that judicial or legislative intervention dilutes their distinct social identity and autonomy. They perceive external reforms as impositions from an alien normative order that fails to appreciate local

---

<sup>15</sup> Das Gupta, M. (2010). Family systems, political systems and asia's 'missing girls' the construction of son preference and its unravelling. *Asian Population Studies*, 6(2), 123-152.

<sup>16</sup> Sibanda, S., & Mosaka, T. B. (2015). *Bhe v Magistrate, Khayelitsha*: a cultural conundrum, Fanonian alienation and an elusive constitutional oneness. *Acta Juridica*, 2015(1), 256-280.

<sup>17</sup> *Ibid*.

values and socio-economic realities. South African jurisprudence offers a model for balancing this tension through the concept of “living customary law,” which recognises the right of communities to evolve their traditions internally while remaining subject to constitutional scrutiny. This approach affirms that cultural evolution is not antithetical to constitutionalism; rather, it is its necessary expression in diverse societies.

A further challenge arises from evidentiary requirements. India’s insistence that parties must strictly prove custom—its antiquity, continuity, and reasonableness—creates procedural hurdles and unpredictability. South African courts presume the existence of customary norms but test them for constitutional compatibility. Codification might reduce uncertainty in India, yet it risks freezing evolving practices and eroding community agency. The tension between flexibility and uniformity is mirrored in conflict-of-laws situations where multiple normative systems overlap. Under the PESA Act, tribal panchayats are empowered to govern according to custom, but conflicts with general criminal or constitutional law persist. Similarly, South Africa’s Traditional Courts Bill seeks to integrate traditional courts under constitutional oversight, though critics warn that gender bias could endure within patriarchal leadership structures. Codification, therefore, must remain adaptive, participatory, and periodically reviewable to maintain legitimacy.

### **Comparative Jurisprudential Evaluation**

The theoretical foundations of customary law in South Africa and India reveal contrasting trajectories of constitutional development.<sup>18</sup> South Africa’s legal pluralism is deeply rooted in the philosophy of “transformative constitutionalism,” a doctrine articulated by Karl Klare and adopted by the Constitutional Court as a commitment to using law as an instrument of social change. Under this vision, the Constitution is not merely a constraint on power but a living charter that continuously reshapes social relations. Customary law, therefore, is not viewed as an archaic remnant of pre-colonial life but as an evolving partner within the constitutional project of transformation. It must adapt to reflect the democratic values of equality, dignity, and freedom enshrined in the Bill of Rights. By contrast, India’s pluralism is largely pragmatic—emerging from the historical reality of its cultural, religious, and ethnic diversity rather than from an articulated constitutional theory. Indian jurisprudence tends to approach

---

<sup>18</sup> Davis, D. M., & Klare, K. (2010). Transformative constitutionalism and the common and customary law. *South African Journal on Human Rights*, 26(3), 403-509.

customary law as a legacy that must be reconciled, restricted, or harmonised with statutory and constitutional law rather than as a coequal system of norms. Consequently, while South Africa's courts see customary law as a living organism, India's judiciary often treats it as an exception to general law, validated only if proven and not inconsistent with constitutional morality.

The judicial methods in both countries mirror these philosophical orientations. South African courts employ a contextual and participatory interpretive approach, often engaging with community leaders and local practices to ascertain the current state of "living law." The *Shilubana v. Nwamitwa* case epitomises this participatory jurisprudence, where the Constitutional Court upheld the community's own reform recognising a woman's right to traditional leadership. Indian courts, on the other hand, rely heavily on textual and evidentiary interpretation, focusing on statutory hierarchy and proof of custom. The decision in *Madhu Kishwar v. State of Bihar*<sup>19</sup> demonstrates the judiciary's cautious reluctance to overturn patriarchal customs without legislative backing.<sup>20</sup>

Institutionally, South Africa's traditional leadership structures are integrated and regulated within the Constitution, ensuring accountability and compliance with the Bill of Rights. In India, panchayats and tribal councils function under state supervision but often escape systematic constitutional review. Sections 9 and 10 of South Africa's Constitution empower courts to strike down discriminatory customs, while India relies on Articles 14 and 21, supplemented by judicial activism in the absence of legislative reform. Globally, South Africa's model has inspired African nations like Botswana, Namibia, and Lesotho in advancing gender equality within customary systems, whereas India's experience continues to shape Asian debates on reconciling personal law with constitutional rights and secularism.

## Recommendations

Meaningful reform of customary law in India requires a multi-dimensional approach that combines constitutional recognition, institutional development, and cultural sensitivity. First, India should consider explicit constitutional integration of customary law, similar to South Africa's model, ensuring that its validity and scope are clearly defined but always subject to

---

<sup>19</sup> (1996) 5 SCC 125.

<sup>20</sup> Kolabhai, R. L. (2024). Laws of Motion and Motions of Laws: Towards a Transformative Law-and-Political-Economy Framework for Customary Law in South Africa.

fundamental rights. Such recognition would end existing ambiguities and reinforce the balance between community autonomy and constitutional supremacy. Second, a comprehensive codification framework could be developed through the creation of a National Customary Law Commission tasked with documenting and standardising major tribal customs through participatory consultations. Codification must, however, remain dynamic—reviewed and updated periodically to reflect social change. Third, gender-sensitive reforms are essential: India should enact legislation similar to South Africa’s Recognition of Customary Marriages Act and Reform of Customary Succession Act to secure women’s equality in marriage, inheritance, and property rights. Equally important is judicial capacity-building—training judges and appointing assessors familiar with community practices to ensure accurate adjudication. Evidence laws should also evolve toward a “presumption of practice” model that simplifies proof of well-established customs. Finally, traditional councils must be made institutionally accountable through mandatory female representation and compliance with due process, while sustained Indo–South African judicial exchanges could enrich both nations’ reform agendas by sharing insights on living law jurisprudence.

## **Conclusion**

Customary law today occupies a pivotal space between heritage and human rights, between the wisdom of collective traditions and the imperatives of constitutional democracy. Once marginalised by colonial codification and dismissed as primitive or informal, it now demands recognition as a legitimate and evolving source of law. Both India and South Africa exemplify the complex challenge of reconciling pluralism with constitutionalism. South Africa’s framework—marked by explicit constitutional recognition, statutory reform, and a vibrant jurisprudence of “living customary law”—offers a coherent model where custom and fundamental rights coexist under the discipline of equality and dignity. India’s model, while rich in cultural diversity, remains fragmented and dependent on judicial interpretation and proof of practice rather than systematic legislative reform. The absence of a comprehensive policy often results in inconsistency and vulnerability to patriarchal or exclusionary customs.

The future of customary law in both societies lies not in its abolition but in its constitutionalisation—embedding it within a framework that promotes justice, gender equality, and participatory reform. Sustainable legitimacy will require dynamic codification, community involvement, and ongoing judicial vigilance to ensure alignment with constitutional morality.

Ultimately, customary law is not a relic of the past but a living dialogue between identity and justice. Its endurance in plural democracies like India and South Africa will rest on its ability to evolve—reflecting not only ancestral wisdom but also the universal principles of equality, dignity, and human freedom that define modern constitutional orders.