Critique on Universalism Versus Cultural Relativism Debate, With Special Attention to Customary Law and Constitutionalism In South Africa

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Abstract

I critique the longstanding debate between universalism and cultural relativism, particularly within the frameworks of customary law and constitutionalism in South Africa. As globalisation confronts diverse cultural expressions with prevailing human rights norms, the tensions between universalists, who advocate for universal human rights, and cultural relativists, who assert the primacy of cultural practices, have become increasingly pertinent. I explore the implications of this binary opposition on the interpretation and implementation of South African customary law in relation to the Constitution's Bill of Rights. Through an examination of case law, historical context, and legal frameworks, I argue that such debates often lead to more confusion than clarity, undermining efforts toward the effective co-existence of customary practices and constitutional mandates. The analysis also highlights that the dichotomy of universalism versus cultural relativism offers a more integrated approach that acknowledges the dynamic interplay of culture and law necessary for advancing democracy and human rights. I call for a dialogical framework to be employed in discussions around customary law to suggest pathways that honour constitutional commitments and cultural integrity in South Africa and beyond.

Keywords: Universalism, Cultural Relativism, Dialogical Approach, Customary Law, Constitutionalism.

"*There must be ongoing education to create public awareness about the repercussions and human rights concerns of the harmful cultural practices…, in particular educating, dialoguing and negotiating… (with communities) … on the human rights implications of these cultural practices to preclude future violations.*"[1]

I. Introduction

The debate between universalism and cultural relativism is a complex and multifaceted discourse that has permeated numerous fields, including anthropology, sociology, and law.[2] At its core, universalism posits that human rights are universal and should apply equally to all individuals, irrespective of cultural context. On the contrary, cultural relativism contends that human rights must be understood within the context of specific cultures, suggesting that practices considered as 'rights' in one culture may not have the same interpretation or acceptance

[1] JY Asomah, 'Cultural rights versus human rights: A critical analysis of the *trokosi* practice in Ghana and the role of civil society' (2015) 15 African Human Rights Law Journal 148.

[2] See István Lakatos, 'Thoughts on Universalism versus Cultural Relativism, with Special Attention to Women's Rights' (2018) 1 Pécs Journal of International and European Law 6; Jack Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6 Human Rights Quarterly 414.

in another.[3] This debate takes on a unique dimension in South Africa, given the country's rich tapestry of cultures and its commitment to constitutional democracy.[4] The transition from apartheid to a democratic society in the 1990s ushered in a new constitutional framework that sought to accommodate and recognise customary law alongside universal human rights norms,[5] leading to significant tensions between these sometimes-opposing paradigms.[6]

Understanding the interplay between universalism and cultural relativism within the South African context is crucial for several reasons. First, it addresses ongoing tensions within the legal framework, particularly as they pertain to the application of the Bill of Rights in relation to customary law. Second, this study contributes to the broader discourse on how societies can navigate cultural differences while upholding fundamental human rights. Lastly, it seeks to propose pathways for legal frameworks that honour cultural integrity and constitutional commitments—a necessary exploration given contemporary society's increasing globalization and intercultural interactions.

This paper has three primary objectives. First, to briefly analyse the historical and conceptual underpinnings of universalism and cultural relativism, particularly in the context of South African customary law and constitutionalism. Second, to evaluate landmark cases that exemplify the tensions between these two frameworks in South African law. Lastly, critique the binary debate's limitations

[3] Neri Sybesma-Knol 'The United Nations System for the protection of human rights. What is happening to the principle of universality?' in: André Alen and others (eds), *Liberae Cogitationes. Liber amicorum Marc Bossuyt* (Intersentia 2013) 696.

[4] The Constitution of the Republic of South Africa, 1996, section 30 (right to language and culture), and 31 (right to cultural, religious and linguistic communities) provides for the rights to culture, language, and religion—rights that are instrumental to the practice of customary law. Section 15 (right to freedom of religion, belief, and opinion), 16 (right to freedom of expression), and 18 (right to freedom of association) are also reinforcing for the rights to cultural practices and customary law.

[5] The Recognition of Customary Marriages Act 120 of 1998 defines 'customary law' to mean the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples. In the case of *Alexkor Ltd and Another v. Richtersveld Community and Others* (2003) 12 BCLR 1301, para. 51, the Constitutional Court held that the "Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system. At the same time the Constitution, while giving force to indigenous law, makes it clear that such law is subject to the Constitution and has to be interpreted in the light of its values. Furthermore, like the common law, indigenous law is subject to any legislation, consistent with the Constitution, that specifically deals with it. In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law." See also JA Faris, 'African Customary Law and Common Law in South Africa: Reconciling Contending Legal Systems' (2015) 10 International Journal of African Renaissance Studies - Multi-, Inter- and Transdisciplinary 171.

[6] See the case examples discussed under section VI of this article.

and propose a synthesis that can facilitate a more harmonious relationship between cultural practices and universal human rights.

II. Universalism

Universalism, as a philosophical and political concept, asserts that certain rights are inherent to all human beings by virtue of their humanity.[7] This notion gained significant traction post-World War II, particularly with the adoption of the Universal Declaration of Human Rights (UDHR) in 1948.[8] The UDHR set forth comprehensive articles of rights that transcend cultural boundaries, emphasising the belief that all human beings deserve equal dignity and rights, irrespective of their cultural or social contexts.[9] Understanding universalism within the South African context necessitates considering the implications arising from its legal enactment, particularly in a nation steeped in colonialism and segregation.[10] The constitutional provisions enshrined in the 1996 Constitution reflect a strong commitment to universal human rights.[11] They aim to rectify past injustices and promote equality—principles that are both admirable and challenging in practice.[12]

III. Cultural Relativism

Cultural relativism emerged as a response to universalism, positing that beliefs, practices, and ethical standards can only be understood within their cultural

[7] TE Higgins, 'Anti-Essentialism, Relativism, and Human Rights' (1996) 19 Harvard Women's Law Journal 89.

[8] Universal Declaration of Human Rights, 1948.

[9] See CM Cerna, 'Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts' (1994) 16 Human Rights Quarterly 740.

[10] See NH Msuya, 'Advocating positive traditional culture to eradicate harmful aspects of traditional culture for gender equality in Africa' (2020) 41 *Obiter* 45.

[11] See WSJ Moka-Mubelo, 'Towards a contextual understanding of human rights' (2019) 12 Ethics & Global Politics 40; Ndivhuwo Mabaya, 'SA's Constitution embodies the Universal Declaration of Human Rights' (*News 24*, 10 December 2018) < https://www.news24.com/columnists/guestcolumn/sas-constitution-embodies-the-universal-declaration-of-human-rights-20181210> accessed 20 September 2025.

[12] See Nelly Lukale, 'Harmful Traditional Practices: A Great Barrier to Women's Empowerment' (*Girls* Globe, 24 February 2024) <https://www.girlsglobe.org/2014/02/24/harmful-traditional-practices-a-great-barrier-to-womens-empowerment/> accessed 29 November 2025; Motsami Molefe, 'Personhood and Rights in an African Tradition' (2018) 45 South African Journal of Political Studies 217; Paul Dubinsky, Tracy Higgins, Michel Rosenfeld, Jeremy Waldron and Ruti Teitel, 'What Is a Human Right? Universals and the Challenge of Cultural Relativism' (1999) 11 Pace International Law Review 107; and Faysal Ahmed, 'Universalism Versus Cultural Relativism: Does the Debate Matter for Human Rights' Protection in the 21St Century?' (*SSRN*) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4460861> accessed 18 September 2025.

contexts.[13] This theory gained prominence in the early 20th century, particularly through the works of anthropologists like Franz Boas, who argued against ethnocentric views that deemed certain cultures as superior to others.[14] Within the framework of human rights, cultural relativism challenges the universality of rights by advocating for a more nuanced understanding of how cultural practices shape human dignity and freedom.[15] In South Africa, where a multitude of indigenous cultures coexist, cultural relativism poses significant questions regarding the interpretation of the Bill of Rights and the primacy of customary law.[16] These questions come to the fore in discussions about practices like polygamy, traditional leadership, and land use, which often conflict with universally accepted human rights norms.[17]

IV. The intersection of universalism and cultural relativism

The intersection of universalism and cultural relativism is fraught with tension, particularly when human rights norms confront longstanding cultural practices.[18] The South African Constitution recognises customary law as part of the law of the land, which reflects a commitment to cultural diversity and pluralism.[19]

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[13] See MF Brown, 'Cultural Relativism 2.0' (2008) 49 Current Anthropology 363; and OO Táíwò, 'Two themes in Decolonizing Universalism' (2020) 16 Journal of Global Ethics 349.

[14] See GE Idang, 'African culture and values' (2015) 16 Phronimon 97; Michelle Parlevliet, 'Bridging the Divide - Exploring the relationship between human rights and conflict management' (2002) 11 CCR 1; ME Goodhart, 'Origins and Universality in the Human Rights Debates: Cultural Essentialism and the Challenge of Globalization' (2003) 25 Human Rights Quarterly 935; Sylvain Bayalama, 'Universal Human Rights and Cultural Relativism' (1993) 12 Scandinavian Journal of Development Alternatives 132.

[15] See Jaret Kanarek, 'Critiquing Cultural Relativism' (2013) 2 The Intellectual Standard 1; JJ Tilley, 'The Problem for Normative Cultural Relativism' (1998) 11 Ratio Juris 272; Fernand de Varennes, 'The fallacies in the "Universalism versus Cultural relativism" debate in human rights' (2006) 1 Asia-Pacific Journal on Human Rights and the Law 67.

[16] See AO Olaborede and NS Rembe, 'Reflections on the Debate Between Universality of Human Rights and Cultural Relativism in the Context of Child Marriage in Africa' (2018) 32 Speculum Juris Law Journal 93.

[17] See for examples, Nomthandazo Nhlama, 'The changing identity on succession to chieftaincy in the institution of traditional leadership: Mphephu v Mphephu-Ramabulana (948/17) [2019] ZASCA 58' (2020) 23 Potchefstroom Electronic Law Journal 2; Siyabulela Manona and Thembela Kepe, 'The High Court Ruling Against Ingonyama Trust: Implications for South Africa's Land Governance Policy' (2023) 82 African Studies 181.

[18] See Diana Ayton-Shenker, *The Challenge of Human Rights and Cultural Diversity* (United Nations Department of Public Information 1995).

[19] Section 39 of the Constitution provides for the interpretation of the Bill of Rights, and section 39(2) provides that 'when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'. Section 211(3) of the Constitution also mandate that the "courts apply customary law when applicable, subject to the Constitution and any legislation that specifically deals with customary law."

However, it also incorporates the Bill of Rights, urging adherence to universal human rights standards. This dual framework creates fertile ground for conflict. For example, while customary practices, like virginity testing and traditional male circumcision, may be cherished within certain cultural contexts, they could clash with the constitutional principles of human dignity, body autonomy, gender equality, and non-discrimination.[20] The interplay of these two approaches necessitates a deeper examination of how legal interpretations can accommodate both.

V. Overview of south African constitutionalism

The evolution of South African constitutionalism is intricately linked to the country's tumultuous history.[21] The transition from apartheid to democracy culminated in the adoption of the 1996 Constitution, which is often hailed as one of the most progressive in the world.[22] It is characterized by its commitment to human dignity, equality, and freedom, reflecting both universalist aspirations and

[20] In the submission (Harmful Social and Cultural Practices – Virginity Testing?) to the Select Committee on Social Services in the Provincial Legislature (NCOP), the South African Human Rights Commission (SAHRC) held that our past enjoins us to "strive to protect our indigenous cultural practices. These were the subject of domination and subjugation during the colonial and Apartheid years. In our new constitutional dispensation, we need to strive to seek to give recognition to cultural practices within our constitutional parameters. Culture, however, is not static, but dynamic. We therefore need to question many of our cultural practices and interrogate in a constructive manner the extent to which they conform with the constitution." The Commission for Gender Equality (CGE) once issued a report (Investigative Report into the 'Investigative Report into the 'Maiden Bursary Scheme Maiden Bursary Scheme Maiden Bursary Scheme' by the UThukela District Municipality) in which it was held that "the 'Maiden Bursary' Scheme amounts to a gender discriminatory practice against the girls as it creates an additional burden on them to shoulder the responsibility of refraining from sexual activity, without imposing the same burden of responsibility on boys through a similar Bursary Scheme." See also Hlako Choma and Tshegofatso Kgarabjang, 'The constitutionality of ukuhlola: a South African cultural practice' (2019) 9 Journal of Politics, Economics and Society 2; KG Behrens, 'Traditional male circumcision: Balancing cultural rights and the prevention of serious, avoidable harm' (2014) 104 South African Medical Journal 15; DN Koffman, 'Is cultural male circumcision compatible with international children's rights?' (2018) 26 De Rebus; Nicholas Mgedeza, 'How does the law protect initiates and their rite of passage?' (2016) 21 De Rebus.

[21] See Eric Kibet and Charles Fombad, 'Transformative constitutionalism and the adjudication of constitutional rights in Africa' (2017) 17 African Human Rights Law Journal 340; Serges Djoyou Kamga, 'The Right to Development: The Missing Link in the South African Constitutional Order After 30 Years of Democracy' (2025) 41 Southern African Public Law; MB Ramose, 'The Evolution of Constitutionalism in Conqueror South Africa. Was Jan Smuts Right? An Ubu-Ntu Response' (2024) 25 Phronimon 1; Penelope Andrews and Stephen Ellmann 'Introduction: Towards Understanding South African Constitutionalism' (2001) 1076 Articles & Chapters 1.

[22] See JMF Fernós, 'South Africa's Forward-Looking Constitutional Revolution and the Role of Courts in Achieving Substantive Constitutional Goals' (2019) 53 Rev. Jur. U. Interamericana de P.R. 531.

recognition of South Africa's diverse cultural heritage.[23] The Constitution's preamble emphasises national unity in diversity, setting the tone for a legal framework that must navigate the complexities of various cultural practices while adhering to international human rights standards. Importantly, Section 2 of the Constitution validates the Constitution's supremacy, asserting that any customary law inconsistent with it is null and void.

1. The Role of Customary Law in the South African Legal System

Customary law occupies a unique position within the South African legal framework.[24] It is recognized under Section 211 of the Constitution, which mandates that customary law must be applied where it is consistent with the Constitution.[25] This provision acknowledges the existence of customary law and establishes parameters for its application, ensuring that it does not infringe on the rights entrenched in the Bill of Rights.[26] Despite this constitutional recognition, the application of customary law often faces challenges, particularly concerning gender equality and individual rights.[27] Many customary practices, such as those related to inheritance, marriage, traditional leadership, and informal land administration, may conflict with the rights guaranteed under the Constitution, creating legal dilemmas that require careful navigation.[28]

2. The Bill of Rights: Bridging Universalism and Custom (or not?)

The Bill of Rights, enshrined in Chapter 2 of the Constitution, serves as a pivotal point of convergence between universal human rights and customary law.[29] It guarantees fundamental rights such as equality, dignity, and freedom while simultaneously recognizing the importance of cultural practices. This dual com-

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[23] See sections 9, 10 and 12 of the Constitution.

[24] See CA Maimela and NL Morudu, 'Cherishing customary law: the disparity between legislative and judicial interpretation of customary marriages in South Africa' (2024) 45 Obiter 400.

[25] Section 211(1) of the Constitution provides that "the institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution."

[26] Section 211(3) of the Constitution provides that "the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."

[27] For examples, *Mphephu-Ramabulana and Another v Mphephu and Others* (2022) 1 BCLR 20 and *Council for the Advancement of the South African Constitution and Others v Ingonyama Trust and Others* (2022) 1 SA 251.

[28] For further discussions on the challenges often faced by traditional communities in South Africa, see WB Zondo, 'The South African Traditional Communities and Women for Rural Democracy and Land Rights: Traditional Governance and Land Administration' (2025) 8 African Journal on Land Policy and Geospatial Sciences 214.

[29] See Felix Dube, 'The South African Constitution as an instrument of doing what is just, right and fair' (2020) 54 *In die Skriflig/In Luce Verbi* 1.

mitment raises critical questions regarding how these rights can co-exist without negating one another. The interpretation of the Bill of Rights by South African courts has significant implications for the future of customary law.[30] Courts must balance the respect for cultural diversity with the necessity of upholding universal human rights, often leading to contentious legal battles.[31] The legal landscape reveals ongoing tensions as courts grapple with cases where cultural practices diverge from constitutional mandates.

VI. Landmark cases concerning customary law and the constitution

South Africa's courts have played a crucial role in shaping the interface between customary law and constitutionalism through landmark cases. These cases illuminate the ongoing legal struggles involved in reconciling culturally entrenched practices with the constitutional framework that enshrines human rights.

1. Case Example 1: (Bhe v. Khayelitsha Magistrate Court)

In *Bhe v. Khayelitsha Magistrate Court*,[32] the Constitutional Court grappled with the validity of customary law inheritance practices that discriminated against women and children born outside marriage.[33] The case centered on the application of male primogeniture, which allotted inheritance rights exclusively to male heirs in the customary law context.[34] The case challenged the validity of section 23 of the Black Administration Act, along with related regulations, which established a separate and unequal legal framework for black estate administration.[35] The Court held that these laws perpetuated racial inequalities and were incompatible with the Constitution, which obliges courts to develop and interpret customary law in accordance with constitutional rights. The Court held that the customary law rule violated the right to equality enshrined in Section 9 of the Constitution.[36] It emphasised that cultural practices must evolve to align with

[30] See Mtsweni Lindiwe and Maimela Charles, 'The role and effect of the Constitution in customary law of succession' (2023) 56 De Jure Law Journal 687.

[31] See the case examples discussed in section (VI) below.

[32] *Bhe v. Khayelitsha Magistrate Court* (2005) 1 SA 580.

[33] See Sindiso Mnisi Weeks, *The Interface between Living Customary Law(s) of Succession and South African State Law* (OUP 2010).

[34] See Chuma Himonga, 'Reflection on Bhe v Magistrate Khayelitsha: In honour of Emeritus Justice Ngcobo of the Constitutional Court of South Africa' (2017) 32 Southern African Public Law 1; Kgopotso Maunatlala, 'Effects of the eradication of the rule of male primogeniture on the customary law of succession' (2023) 56 De Jure Law Journal 386.

[35] Black Administration Act, 38 of 1927.

[36] See Likhapha Mbatha, 'Reforming the Customary Law of Succession' (2002) 18 SA Journal on Human Rights 259; Chuma Himonga and Elena Moore, *Reform of Customary Law of Marriage, Divorce and Succession in South Africa: Living Customary Law and Social Realties* (Juta 2015).

contemporary equality and human rights understandings.[37] *Bhe* underscored the tension inherent in upholding both customary law and constitutional principles, ultimately setting a precedent for the adaptability of customary law within the constitutional framework.

2. Case Example 2: (Shilubana v. Nwamitwa)

In *Shilubana and Others v Nwamitwa*,[38] the Constitutional Court dealt with the issues of succession around the chieftaincy of the Valoyi community. Ms Shilubana, the daughter of the deceased *Hosi*, was opposed by Mr Nwamitwa, a male relative asserting his right based on the existing tradition of male primogeniture.[39] The court, in response to these arguments, simply focused its judgment on the decision of the traditional authority to appoint Ms Shilubana as the successor to the Valoyi throne. The court underscored that customary law must evolve and reflect the present democratic and constitutional framework of South Africa.[40] The court stated that, while section 39(2) of the Constitution obliges courts to develop customary law in accordance with the Bill of Rights, such development should be undertaken judiciously and sensitively, in an incremental manner.[41] The court also held that the traditional authority's decision to appoint Ms Shilubana as *Hosi* signified an important development in their customs.[42] Thus, it was held that the Valoyi authorities intended to bring an important aspect of their customs and traditions into line with the values and rights of the Constitution.[43]

This case further exemplifies the judicial struggle to balance customary practices and constitutional values.[44] The Constitutional Court, in this instance, recognised that referred customs must be assessed not solely on their historical foundations but considering constitutional principles.[45] It affirmed that customary law is not

[37] See Sindiso Mnisi Weeks, 'Customary Succession and the Development of Customary Law: The Bhe Legacy' (2015) Acta Juridica 215.

[38] *Shilubana v. Nwamitwa* (2009) 2 SA 66.

[39] ibid, para. 3.

[40] ibid, para. 68.

[41] ibid, para. 74.

[42] ibid, para. 91.

[43] See sections 1(c), 2, 30, 31, 39(2), and 211(3) of the Constitution.

[44] See Devina N. Perumal, 'Harmonising, cultural and equality rights under customary law - some reflections on Shilubana & Others v Nwamitwa 2009 (2) SA 66 (CC)' (2010) 24 Agenda: Empowering Women for Gender Equity 101; MB Ndulo, 'Legal Pluralism, Customary Law and Women's Rights' (2017) 32 Southern African Public Law 1; MJ Maluleke ,'Culture, tradition, custom, law and gender equality' (2012) 15 Potchefstroom Electronic Law Journal 2.

[45] See Drucilla Cornell, 'The significance of the living customary law for an understanding of law: does custom allow for a woman to be Hosi?' (2009) 2 Constitutional Court Review 395; Obeng Mireku, 'Customary law and the promotion of gender equality: An appraisal of the Shilubana decision' (2010) 10 African Human Rights Law Journal 515.

static; it can and must adapt to contemporary moral and ethical standards, particularly with respect to gender equality.[46] This case illustrated the Court's role in reshaping customary practices to align with universal values while respecting cultural heritage. [47]

VII. The role of the constitutional court in balancing interests

In considering cases like *Bhe* and *Shilubana*, the Constitutional Court has emerged as a critical arbitrator of the tensions between universalism and cultural relativism. The Court's rulings have illustrated a willingness to challenge archaic cultural norms that infringe upon constitutional rights. Through its judgments, the Constitutional Court has reaffirmed the Constitution's supremacy and demonstrated a nuanced understanding of how to harmonise cultural practices with evolving notions of justice and equality.

VIII. Critique of the universalism vs. cultural relativism debate

The contemporary discourse on universalism versus cultural relativism often manifests as a binary opposition, portraying cultures as monolithic entities in irreconcilable conflict.[48] This approach tends to oversimplify the complexities inherent to cultural practices and human rights.[49] Importantly, this binary framing negates the substantial intra-cultural variations that exist, often leading to harmful stereotypes and legal interpretations.[50] Furthermore, the historical context

[46] See B Mmusinyane, 'The Role of Traditional Authorities in Developing Customary Laws in Accordance with the Constitution: Shilubana and Others v Nwamitwa 2008 (9) BCLR 914 (CC)' (2017) 12 Potchefstroom Electronic Law Journal 135; ES Nwauche, 'Distinction without Difference: The Constitutional Protection of Customary Law and Cultural, Linguistic and Religious Communities - A Comment on Shilubana and Others v. Nwamitwa' (2009) 41 Journal of Legal Pluralism and Unofficial Law 67.

[47] See MT Chauke, 'The Role of Women in Traditional Leadership with Special Reference to the Valoyi Tribe' (2015) 13 Studies of Tribes and Tribals 34; JC Bekker and CC Boonzaaier, 'Succession of women to traditional leadership: is the judgment in *Shilubana v Nwamitwa* based on sound legal principles?' (2009) 41 Comparative and International Law Journal of Southern Africa 449.

[48] See JW Neuliep and JC McCroskey, 'The development of a U.S. and generalized ethnocentrism scale' (1997) 14 Communication Research Reports 385; and Boris Bizumic and John Duckitt, 'What is and is not ethnocentrism? A conceptual analysis and political implications' (2012) 33 Political Psychology 887.

[49] See Adam Etinson, 'Some Myths about Ethnocentrism' (2017) 96 Australasian Journal of Philosophy 209; PW Taylor, 'The Ethnocentric Fallacy' (1963) 47 The Monist 563; MS Merry, 'Patriotism, History and the Legitimate Aims of American Education' (2009) 41 Educational Philosophy and Theory 378; and Boris Bizumic, 'Who Coined the Concept of Ethnocentrism? A Brief Report' (2014) 2 Journal of Social and Political Psychology 3.

[50] See Welshman Ncube, *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa* (Ashgate/Dartmouth 1998); Eva Brems, 'Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse' (1997) 19 Human Rights Quarterly 145.

of colonialism and power dynamics complicates this debate.[51] Many indigenous cultural practices have been framed as 'backward' due to colonial narratives that undermined their legitimacy.[52] In South Africa, this historical backdrop continues to influence the perceptions of customary law in juxtaposition with universal human rights.[53]

The limitations of the universalism versus cultural relativism debate are evident in South Africa, where rigid categorisations often fail to account for the dynamic nature of cultural practices and legal interpretations.[54] Instead of fostering constructive dialogue, the binary approach results in a stalemate.[55] Advocates for universalism dismiss cultural practices without engaging in meaningful dialogue, while proponents of cultural relativism may resist necessary reforms that align with human rights principles. Such dichotomy risks perpetuating injustices within cultural practices, particularly against marginalised groups, including women and children.[56] As such, unyielding adherence to either perspective can inhibit progress toward a more equitable legal framework that duly considers both constitutional commitments and cultural integrity.

Given the limitations of the binary debate, there is a pressing need to develop a new framework that transcends the polarised views of universalism and cultural relativism. This framework should emphasise the potential for integration, recognising that cultures are not static but rather evolving entities that can accommodate change. A synthesis approach advocates for acknowledging and respecting cultural practices while simultaneously ensuring adherence to univer-

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[51] See Ann Elizabeth Mayer, *Islam and Human: Tradition and Politics* (5th edn, Routledge 2013); Henry Steiner and Philip Alston, *International Human Rights in Context: Law Politics Morals* (Oxford University Press 2000); Frans Viljoen, *International Human Rights Law in Africa* (Oxford University Press 2012) 8; Michael Freeman, *Politics in the Developing World* (3rd edn, Oxford University Press 2005).

[52] See Raimundo Pannikar, 'Is the Notion of Human Rights a Western Concept?' in Henry Steiner and Philip Alston (eds), *International Human Rights in Context: Law Politics Morals* (Oxford University Press 2000).

[53] See Rein Müllerson, *Human Rights Diplomacy* (Routledge 1997) 84-85; Gayatri Patel, *How 'Universal' is the United Nations' Universal Periodic Review Process? An Examination from a Cultural Relativist Perspective* (University of Leicester 2015) 59.

[54] See Gayatri Patel, 'How 'Universal' Is the United Nations' Universal Periodic Review Process? An Examination of the Discussion Held on Poligamy' (2017)18 Human Rights Review 1.

[55] See Abdullahi Ahmed An-Na'im, 'Problems of Universal Cultural Legitimacy for Human Rights' in Abdullahi Ahmed An-Na'im and Francis Deng (eds), *Human Rights in Africa: Cross-Cultural Perspectives* (Brookings Insitution Press 1990); Naomi Nkealah '(West) African feminisms and their challenges' (2016) 32 Journal of Literary Studies 61; Obioma Nnaemeka, 'Nego-Feminism: Theorizing, Practicing, and Pruning Africa's Way' (2004) 29 Signs 357; Deirde Byrne, 'Decolonial African feminism for white allies' (2020) 21 Journal of International Women's Studies 37.

[56] See ER Hogemann, 'Human Rights Beyond Dichotomy Between Cultural Universalism and Relativism' (2020) 14 The Age of Human Rights Journal 19.

sal human rights obligations. Such an approach fosters dialogue and collaboration among various stakeholders—including governmental bodies, traditional leaders, and civil society organizations—toward creating a more cohesive legal framework.

IX. Integrating customary law within constitutionalism

In envisioning a way forward, the integration of customary law within the constitutional framework must be pursued with a commitment to both cultural recognition and universal human rights standards. This involves developing legal mechanisms that validate cultural practices that align with human rights while providing recourse for individuals whose rights may be infringed upon by detrimental customs. In practice, this might take the form of legislative reforms addressing specific cultural practices that contravene constitutional guarantees and robust educational initiatives to foster understanding of both cultural heritage and universal human rights.

Establishing mechanisms for recognising and integrating cultural practices into human rights frameworks is essential to facilitating a synthesis approach. For instance, community-based dialogue forums can serve as platforms for interrogating and redefining cultural norms, taking into account evolving human rights standards. Collaboration between traditional authorities and human rights advocates can also yield innovative solutions that preserve cultural integrity while promoting equality. This collaborative model underscores the potential for coexistence and mutual respect between constitutional imperatives and cultural values.

Finally, the call for contextual human rights applications reflects the recognition that universal human rights should not be interpreted in a monolithic manner. Instead, human rights frameworks must be adaptable to account for cultural values while safeguarding individual rights. This necessitates a more sophisticated understanding of rights that considers the socio-cultural context without compromising their universality.

X. Conclusion

In conclusion, the enduring debate between universalism and cultural relativism within the South African legal landscape underscores the complexities inherent in reconciling cultural diversity with constitutional imperatives. While the principles of universal human rights provide a crucial foundation for safeguarding individual dignity and equality, their application must be sensitive to the socio-cultural realities and historical contexts that shape customary law practices. The cases examined reveal a progressive judiciary committed to evolving customary norms in line with constitutional values, yet the binary framing of the debate

often hampers meaningful progress by oversimplifying cultural dynamics and perpetuating stereotypes.

Moving beyond this dichotomy necessitates embracing a dialogical and integrative approach, one that fosters continuous engagement among all stakeholders, including traditional leaders, communities, legal practitioners, and human rights advocates. Such a framework recognises that cultures are not static but dynamic entities capable of reform and adaptation, allowing customary practices to be validated when aligned with constitutional rights while challenging those that infringe upon fundamental freedoms. Effective legal reform, therefore, must be complemented by educational initiatives and community dialogues that promote mutual understanding and respect, ensuring that customary law can coexist harmoniously within South Africa's constitutional democracy.

Ultimately, the path forward lies in cultivating a nuanced, context-sensitive jurisprudence that upholds the universality of human rights without dismissing the importance of cultural identity. This synthesis not only advances social justice and equality but also affirms the nation's commitment to a genuinely inclusive and pluralistic society, one that recognises the legitimacy of diverse cultural expressions while steadfastly safeguarding the rights of all individuals. Such an approach promises a more coherent and sustainable legal framework capable of navigating the delicate balance between tradition and modernity, fostering a democratic ethos rooted in respect, dialogue, and constitutional integrity.