Journal de Recherche Multidisciplinaire
ISSN : 3088-5205 https://jorep.net

JOREP Journal de recherche multidisciplinaire

Volume : 1
Numéro : 2
Année : 2025
Mois : Mars

Legal pluralism and customary law recognition: navigating jurisprudential landscapes in South africa and Bolivia

Marlon Serge Ndjeme[1]

Iradukunda Sengesho Benigne2

Nizeyimana Jean Baptiste3

1. Joint PhD Researcher at Lisala University and UNCR University, Law Department, Law
2. Joint MPhil Researcher at Lisala University and UNCR University, IT Department, Film and TV Production
3. Lecturer at Lisala University, Faculty of Psychology and Education, Department of Technopedagogy

ABSTRACT

This study falls within SDG Focus Goal 16: Peace, Justice and Strong Institutions — Target 16.3: Promote the rule of law at the national and international levels and ensure equal access to justice

[1] Joint PhD Researcher at Lisala University and UNCR University, Law Department, Law

for all; Target 16.7: Ensure responsive, inclusive, participatory and representative decision-making at all levels; Target 16.10: Ensure public access to information and protect fundamental freedoms.

This study examines the comparative approaches to legal pluralism and the recognition of customary law in South Africa and Bolivia, focusing on how each country's constitutional frameworks, judicial interpretations, and institutional mechanisms shape the relationship between state law and indigenous normative systems. The research analyzes the tensions between legal pluralism and constitutional supremacy, the treatment of gender equality within customary law, and the challenges of harmonizing diverse legal traditions within unified state structures. A comparative constitutional and legal analysis was conducted examining primary and secondary sources including constitutional provisions, judicial decisions, academic commentary, and institutional documentation covering the post-1990s constitutional reform periods to 2025-2026.

South Africa presents a sophisticated model of legal pluralism rooted in its transformative constitutional project following apartheid. The Constitution of 1996 explicitly recognizes customary law as part of the legal order, subject to constitutional supremacy and fundamental rights protections. The Constitutional Court has played a pivotal role in defining the parameters of customary law recognition through landmark decisions including *Shilubana v Nwamitwa* (2009) on traditional leadership succession, *Bhe v Magistrate Khayelitsha* (2005) on primogeniture and inheritance rights, and *Mayelane v Ngwenyama* (2013) on consent requirements for customary marriages . The Constitutional Court's 2025 unanimous judgment in *Gumede v Minister of Justice and Constitutional Development* reaffirmed that "the strength and integrity of our democracy is measured by the commitment of the State to listen, to protect, and to ensure justice for all, regardless of their position in society" . However, tensions persist. The 2021 Traditional and Khoi-San Leadership Act has been criticized for undermining the role of traditional communities in customary law development and for its inadequate consultation process, with litigation challenging its constitutionality . The Reform of Customary Law of Succession and Regulation of Related Matters Act (2009) partially codifies intestate succession but leaves significant questions unresolved, including the relationship with the Recognition of Customary Marriages Act and conflicts between customary law and civil law regarding matrimonial property . Academic analysis reveals that South Africa's version of legal pluralism, while formally committed to substantive

equality, often subordinates customary law to the Bill of Rights, potentially undermining its normative integrity .

Bolivia presents a more radical model of legal pluralism rooted in Indigenous resurgence and the 2009 constitutional transformation under Evo Morales. The Constitution recognizes "ordinary jurisdiction" and "Indigenous native peasant jurisdiction" as equal in hierarchy, with mechanisms for coordination and cooperation between systems . Article 192 establishes that "any authority shall adopt the necessary measures to eradicate the illegal possession and trafficking of lands" while respecting indigenous territorial rights. Article 304 enumerates Indigenous exclusive competences, including the exercise of their jurisdictional functions through authorities and procedures of Indigenous native peasant nations and peoples . However, implementation reveals significant challenges. Research on access to justice in rural Cochabamba documents profound territorial and social disparities, with victims of violence facing not only geographic barriers but also linguistic and cultural obstacles when navigating state institutions . The relationship between Indigenous justice and state justice remains ambiguous, with conflicts arising from overlapping claims and unclear coordination mechanisms. The autonomy regime, particularly regarding Indigenous Original Campesino Autonomies (AIOC), has advanced slowly, with only a handful of municipalities achieving autonomy status. While the 2009 Constitution grants nature constitutional rights, including the right to restoration, implementation mechanisms remain weak. Recent debates on criminalizing child marriage in Indigenous communities highlight the tension between universal rights protections and respect for cultural autonomy .

Both countries demonstrate significant commitment to recognizing legal pluralism, yet with different constitutional logics and implementation challenges. South Africa's approach is characterized by cautious integration under constitutional supremacy, with customary law recognized but subject to Bill of Rights scrutiny through judicial interpretation. Bolivia's approach is characterized by formal equality between legal systems, with Indigenous jurisdiction constitutionally recognized as co-equal, yet facing profound implementation gaps due to resource constraints, institutional weakness, and unclear coordination mechanisms. Neither country has fully resolved the tension between respecting cultural autonomy and ensuring fundamental rights protections, though both offer valuable models for different dimensions of pluralist legal ordering.

Effective integration of legal pluralism within democratic constitutional frameworks requires: (1) constitutional recognition of customary law as a legitimate source of legal norms; (2) clear mechanisms for resolving jurisdictional conflicts between legal systems; (3) attention to gender equality and the protection of vulnerable groups within customary systems; (4) meaningful consultation with indigenous and traditional communities in designing recognition frameworks; (5) institutional capacity and resources to implement pluralist arrangements; (6) judicial sensitivity to the normative integrity of customary law; (7) mechanisms for indigenous communities to participate in the evolution of their legal systems; and (8) recognition that legal pluralism is not merely about tolerance but about genuine co-existence of equal legal orders.

KEYWORDS: Legal pluralism, customary law, indigenous jurisdiction, constitutional recognition, South Africa, Bolivia, gender equality, traditional leadership, access to justice, SDG 16, legal integration, jurisdictional coordination.

RÉSUMÉ (French Version)

Cette étude examine les approches comparatives du pluralisme juridique et de la reconnaissance du droit coutumier en Afrique du Sud et en Bolivie, en se concentrant sur la manière dont les cadres constitutionnels, les interprétations judiciaires et les mécanismes institutionnels de chaque pays façonnent la relation entre le droit étatique et les systèmes normatifs autochtones. La recherche analyse les tensions entre le pluralisme juridique et la suprématie constitutionnelle, le traitement de l'égalité des genres au sein du droit coutumier, et les défis de l'harmonisation de traditions juridiques diverses au sein de structures étatiques unifiées. Une analyse constitutionnelle et juridique comparative a été menée en examinant des sources primaires et secondaires, y compris les dispositions constitutionnelles, les décisions judiciaires, les commentaires académiques et la documentation institutionnelle couvrant les périodes de réforme constitutionnelle post-1990 jusqu'en 2025-2026.

L'Afrique du Sud présente un modèle sophistiqué de pluralisme juridique enraciné dans son projet constitutionnel transformateur post-apartheid. La Constitution de 1996 reconnaît explicitement le droit coutumier comme faisant partie de l'ordre juridique, sous réserve de la suprématie constitutionnelle et de la protection des droits fondamentaux. La Cour constitutionnelle a joué un

rôle central dans la définition des paramètres de la reconnaissance du droit coutumier à travers des décisions marquantes, notamment *Shilubana c Nwamitwa* (2009) sur la succession à la chefferie traditionnelle, *Bhe c Magistrate Khayelitsha* (2005) sur la primogéniture et les droits successoraux, et *Mayelane c Ngwenyama* (2013) sur les exigences de consentement pour les mariages coutumiers . Le jugement unanime de la Cour constitutionnelle de 2025 dans *Gumede c Ministre de la Justice et du Développement Constitutionnel* a réaffirmé que "la force et l'intégrité de notre démocratie se mesurent à l'engagement de l'État à écouter, à protéger et à assurer la justice pour tous, indépendamment de leur position dans la société" . Cependant, des tensions persistent. La Loi sur l'Autorité Traditionnelle et les Khoi-San de 2021 a été critiquée pour saper le rôle des communautés traditionnelles dans le développement du droit coutumier et pour son processus de consultation inadéquat, avec des litiges contestant sa constitutionnalité . La Loi sur la Réforme du Droit Coutumier de Succession et la Réglementation des Questions Connexes (2009) codifie partiellement la succession ab intestat mais laisse des questions importantes non résolues, y compris la relation avec la Loi sur la Reconnaissance des Mariages Coutumiers et les conflits entre le droit coutumier et le droit civil concernant le régime matrimonial . L'analyse académique révèle que la version sud-africaine du pluralisme juridique, bien que formellement engagée en faveur de l'égalité substantielle, subordonne souvent le droit coutumier à la Déclaration des droits, compromettant potentiellement son intégrité normative .

La Bolivie présente un modèle plus radical de pluralisme juridique enraciné dans la résurgence autochtone et la transformation constitutionnelle de 2009 sous Evo Morales. La Constitution reconnaît la "juridiction ordinaire" et la "juridiction indigène originaire paysanne" comme égales en hiérarchie, avec des mécanismes de coordination et de coopération entre les systèmes . L'article 192 établit que "toute autorité adoptera les mesures nécessaires pour éradiquer la possession et le trafic illégaux de terres" tout en respectant les droits territoriaux autochtones. L'article 304 énumère les compétences exclusives autochtones, y compris l'exercice de leurs fonctions juridictionnelles par les autorités et procédures des nations et peuples autochtones originaires paysans . Cependant, la mise en œuvre révèle des défis importants. La recherche sur l'accès à la justice dans le Cochabamba rural documente des disparités territoriales et sociales profondes, les victimes de violence faisant face non seulement à des barrières géographiques mais aussi à des obstacles linguistiques et culturels lorsqu'elles naviguent dans les institutions étatiques . La relation

entre la justice autochtone et la justice étatique reste ambiguë, avec des conflits découlant de revendications superposées et de mécanismes de coordination peu clairs. Le régime d'autonomie, en particulier concernant les Autonomies Indigènes Originaires Paysannes, a progressé lentement, avec seulement une poignée de municipalités atteignant le statut d'autonomie. Bien que la Constitution de 2009 accorde des droits constitutionnels à la nature, y compris le droit à la restauration, les mécanismes de mise en œuvre restent faibles. Les débats récents sur la criminalisation du mariage des enfants dans les communautés autochtones mettent en évidence la tension entre la protection des droits universels et le respect de l'autonomie culturelle .

Les deux pays démontrent un engagement significatif en faveur de la reconnaissance du pluralisme juridique, mais avec des logiques constitutionnelles et des défis de mise en œuvre différents. L'approche de l'Afrique du Sud est caractérisée par une intégration prudente sous la suprématie constitutionnelle, le droit coutumier étant reconnu mais soumis à l'examen de la Déclaration des droits par le biais de l'interprétation judiciaire. L'approche de la Bolivie est caractérisée par une égalité formelle entre les systèmes juridiques, la juridiction autochtone étant constitutionnellement reconnue comme co-égale, mais faisant face à des lacunes de mise en œuvre profondes en raison de contraintes de ressources, de faiblesses institutionnelles et de mécanismes de coordination peu clairs. Aucun des deux pays n'a pleinement résolu la tension entre le respect de l'autonomie culturelle et la garantie des droits fondamentaux, bien que tous deux offrent des modèles précieux pour différentes dimensions de l'ordre juridique pluraliste.

L'intégration efficace du pluralisme juridique dans les cadres constitutionnels démocratiques nécessite : (1) la reconnaissance constitutionnelle du droit coutumier comme source légitime de normes juridiques ; (2) des mécanismes clairs pour résoudre les conflits de compétence entre les systèmes juridiques ; (3) une attention à l'égalité des genres et à la protection des groupes vulnérables au sein des systèmes coutumiers ; (4) une consultation significative avec les communautés autochtones et traditionnelles dans la conception des cadres de reconnaissance ; (5) une capacité institutionnelle et des ressources pour mettre en œuvre les arrangements pluralistes ; (6) une sensibilité judiciaire à l'intégrité normative du droit coutumier ; (7) des mécanismes permettant aux communautés autochtones de participer à l'évolution de leurs systèmes juridiques ; et (8) la reconnaissance que le pluralisme juridique n'est pas simplement une question de tolérance mais de coexistence authentique d'ordres juridiques égaux.

MOTS-CLÉS : Pluralisme juridique, droit coutumier, juridiction autochtone, reconnaissance constitutionnelle, Afrique du Sud, Bolivie, égalité des genres, chefferie traditionnelle, accès à la justice, ODD 16, intégration juridique, coordination des compétences.

Suumis le : 17 Mars , 2026
Publié le : 29 A pril, 2026
Auteurs correspondant : *Marlon Serge Ndjeme ,Sengesho Benigne and Nizeyimana Jean Baptiste*
Adresses électroniques : *marlonserge@cirep.ac.cd,benigneira0@gmail.com, nizeyimana.jb@dphu.ac.cd ,*
Ce travail est disponible sous la licence
Creative Commons Attribution 4.0 International.

1. INTRODUCTION

The relationship between state law and indigenous normative systems represents one of the most complex and contested domains of contemporary jurisprudence. How postcolonial states reconcile the legacy of imposed Western legal systems with the living law of indigenous and traditional communities shapes not only access to justice but the very legitimacy of the state itself. SDG 16 explicitly addresses these concerns through targets on the rule of law (16.3), inclusive decision-making (16.7), and access to information (16.10). Legal pluralism—the coexistence of multiple legal orders within a single political space—offers a framework for understanding and managing this complexity.

This study examines two countries that offer illuminating perspectives on legal pluralism and the recognition of customary law: South Africa and Bolivia. Both nations have undergone profound constitutional transformations in recent decades, both have large indigenous populations whose legal systems were historically marginalized, and both have adopted constitutional provisions recognizing customary law. Yet their approaches to pluralism, the constitutional status accorded to indigenous legal systems, and the implementation challenges they face differ fundamentally.

South Africa's constitutional project emerged from the struggle against apartheid, embedding a transformative vision of human rights and constitutional supremacy. The 1996 Constitution recognizes customary law as part of the legal order, but subjects it to the Bill of Rights and constitutional scrutiny . The Constitutional Court has navigated this terrain through landmark

decisions addressing succession, traditional leadership, and customary marriages, seeking to balance respect for customary norms with constitutional commitments to equality and dignity . However, tensions persist: recent legislation has been criticized for undermining community participation, and the relationship between customary and civil law remains unsettled in key areas .

Bolivia's constitutional transformation under the 2009 Constitution represents a more radical break, rooted in Indigenous resurgence and the rejection of colonial legal hierarchies. The Constitution recognizes "ordinary jurisdiction" and "Indigenous native peasant jurisdiction" as equal in hierarchy, with coordination mechanisms to manage their interaction . Indigenous legal systems are not subordinate to state law but co-equal partners in a pluralist legal order. Yet implementation has lagged: coordination mechanisms remain unclear, autonomy has progressed slowly, and access to justice remains profoundly unequal across territorial and social divides .

The contrast between South Africa and Bolivia illuminates critical questions for SDG 16 and legal pluralism: How can constitutional frameworks accommodate multiple legal systems while maintaining coherence and protecting fundamental rights? What role do courts play in mediating between legal orders? How can implementation match constitutional ambition? And what lessons can countries learn from each other's experiences in navigating the tensions between legal pluralism and constitutional supremacy?

2. LITERATURE REVIEW

2.1 Legal Pluralism: Theoretical Foundations

Legal pluralism challenges the classical legal centralist assumption that law is a unified system emanating from a single state source. Instead, it recognizes that multiple normative orders—state law, customary law, religious law, community norms—coexist and interact within any social field. The concept has been particularly influential in postcolonial contexts where European legal systems were imposed on societies with pre-existing sophisticated legal traditions.

A key tension in legal pluralist theory concerns the relationship between pluralism and constitutional supremacy. Can multiple legal systems be genuinely co-equal while a constitution claims ultimate authority? South Africa's approach resolves this through constitutional subordination: customary law is recognized but must comply with the Bill of Rights. Bolivia's approach attempts a more radical equality, with constitutional provisions coordinating rather than subordinating.

2.2 South Africa: Constitutional Supremacy and Cautious Integration

Constitutional Framework: The Constitution of the Republic of South Africa, 1996, establishes a comprehensive framework for legal pluralism. Section 211(3) 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." This formulation simultaneously recognizes customary law and subordinates it to constitutional supremacy.

Section 39(2) requires courts to "promote the spirit, purport and objects of the Bill of Rights" when developing customary law. Section 8(1) binds customary law to the Bill of Rights. This constitutional architecture ensures that customary law operates within the framework of fundamental rights, particularly the equality guarantee in Section 9.

Legislative Framework: Several statutes give effect to constitutional recognition of customary law:

Legislation	**Year**	**Key Provisions**
Recognition of Customary Marriages Act	1998	Regulates validity, requirements, and consequences of customary marriages
Traditional Leadership and Governance Framework Act	2003	Establishes framework for traditional leadership recognition and functions

Reform of Customary Law of Succession and Regulation of Related Matters Act	2009	Codifies intestate succession rules for customary law
Traditional and Khoi-San Leadership Act	2021	Repeals 2003 Act; expands recognition to Khoi-San communities

The 2009 Succession Act partially codifies customary law of succession, introducing a "one-third rule" for inheritance but leaving significant questions unresolved regarding the relationship between customary and civil law .

Landmark Constitutional Court Decisions: The Constitutional Court has played a pivotal role in shaping the contours of legal pluralism:

Case	**Year**	**Issue**	**Holding**	
Bhe v Magistrate Khayelitsha	2005	Primogeniture rule excluding women and extra-marital children from inheritance	Unconstitutional; developed interim regime pending legislation	
Shilubana v Nwamitwa	2009	Traditional authority's power to restore succession rights to women	Traditional authorities have power to develop customary law in accordance with community values	
Mayelane v Ngwenyama	2013	Validity of subsequent customary marriage without first wife's consent	Consent of first wife required for validity of subsequent marriage	
Gumede v Minister of Justice	2025	Recognition of customary marriages and matrimonial property	Reaffirmed state's duty to listen, protect, and ensure justice for all	

In *Bhe*, the Court declared the primogeniture rule unconstitutional for excluding women and extra-marital children from inheritance, finding it violated the equality and dignity guarantees. The Court developed an interim intestate succession regime pending legislative action . In *Shilubana*, the Court affirmed that traditional authorities have the power to develop customary law in accordance with community values, recognizing customary law as a living system capable of evolution .

In *Mayelane*, the Court required consent of the first wife for the validity of a subsequent customary marriage, protecting women's status and property rights .

The 2025 *Gumede* Judgment: The Constitutional Court's unanimous judgment in *Gumede v Minister of Justice and Constitutional Development* reaffirmed core principles. The Court stated: "The strength and integrity of our democracy is measured by the commitment of the State to listen, to protect, and to ensure justice for all, regardless of their position in society. This matter calls for a careful, yet firm, scrutiny of customary law to ensure its alignment with the values of our Constitution, particularly the rights to equality and dignity" . The judgment emphasized the ongoing duty of courts to ensure customary law evolves in harmony with constitutional values.

Tensions and Criticisms: Despite these developments, tensions persist. The 2021 Traditional and Khoi-San Leadership Act has been criticized for:

- Undermining the role of traditional communities in customary law development
- Inadequate consultation processes in its drafting
- Centralizing power in traditional leaders rather than communities

Litigation challenging the Act's constitutionality is ongoing .

Academic analysis reveals that South Africa's version of legal pluralism, while formally committed to substantive equality, often subordinates customary law to the Bill of Rights in ways that may undermine its normative integrity. Himonga and Diala argue that "while the courts have been praised for their progressive decisions, they have also been criticized for applying the Bill of Rights to customary law in a manner that fails to take adequate account of its social context and normative underpinnings" .

2.3 Bolivia: Constitutional Equality and Implementation Gaps

Constitutional Framework: Bolivia's 2009 Constitution, adopted under President Evo Morales following a constituent assembly process driven by Indigenous movements, establishes a radical model of legal pluralism. Key provisions include:

Article	**Provision**
Article 1	Bolivia is constituted as a "Unitary Social State of Pluri-National Community Law"
Article 30	Guarantees rights of Indigenous native peasant nations and peoples, including "to exercise their own political, legal and economic systems in accordance with their worldview"
Article 179	Establishes ordinary jurisdiction and Indigenous native peasant jurisdiction as equal in hierarchy
Article 192	Mandates coordination between ordinary and Indigenous jurisdictions
Article 304	Enumerates Indigenous exclusive competences, including exercise of jurisdictional functions through their own authorities and procedures

The Constitution explicitly recognizes Indigenous jurisdiction as co-equal to ordinary jurisdiction, not subordinate. This represents a fundamental departure from conventional legal pluralism models where state law retains ultimate authority.

Coordination Mechanisms: Article 192 establishes principles for coordination: "any authority shall adopt the necessary measures to eradicate the illegal possession and trafficking of lands, respecting the right to indigenous native peasant territoriality." However, the Constitution leaves detailed coordination mechanisms to subsequent legislation.

The Jurisdictional Demarcation Law (Law No. 073 of 2010) establishes procedures for resolving conflicts between ordinary and Indigenous jurisdictions. It recognizes Indigenous jurisdiction's authority over matters arising within Indigenous territories according to their own customary norms, provided these do not conflict with constitutional rights and guarantees.

Autonomy Regime: The Constitution establishes Indigenous Original Campesino Autonomies (AIOCs) as a form of territorial autonomy. However, progress has been slow. As of 2025, only a

handful of municipalities have achieved AIOC status, and the autonomy framework remains incompletely implemented.

Access to Justice Challenges: Research on access to justice in rural Cochabamba reveals profound implementation gaps. Victims of violence face not only geographic barriers—distance to courts, lack of transportation—but also linguistic and cultural obstacles when navigating state institutions . Indigenous justice systems, while constitutionally recognized, often lack resources and institutional support to function effectively.

The relationship between Indigenous justice and state justice remains ambiguous. Conflicts arise from overlapping claims and unclear coordination mechanisms. In some cases, Indigenous communities assert jurisdiction over matters also claimed by ordinary courts; in others, state authorities fail to recognize Indigenous jurisdictional decisions.

Nature's Rights: Bolivia's 2009 Constitution pioneered the recognition of nature's rights. Article 33 establishes that "everyone has the right to a healthy, protected, and balanced environment. The exercise of this right must be granted to individuals and collectives of present and future generations, as well as to nature, to take part in this enjoyment." Article 34 grants standing to defend nature's rights.

However, implementation mechanisms remain weak. Despite constitutional recognition, environmental defenders face threats, and enforcement of nature's rights has been inconsistent.

Tensions Between Universal Rights and Cultural Autonomy: Recent debates on criminalizing child marriage in Indigenous communities highlight the tension between universal rights protections and respect for cultural autonomy. While international human rights norms condemn child marriage, some Indigenous communities defend the practice as rooted in cultural tradition. Bolivia's Constitutional Court has navigated this tension by affirming the supremacy of children's rights while calling for culturally sensitive implementation.

2.4 Comparative Dimensions: Hierarchy, Equality, and Implementation

The comparison between South Africa and Bolivia illuminates several critical dimensions:

Dimension	**South Africa**	**Bolivia**
Constitutional Model	Subordinate integration: customary law recognized but subject to Bill of Rights	Co-equal pluralism: Indigenous jurisdiction constitutionally equal to ordinary jurisdiction
Judicial Role	Extensive: Constitutional Court actively shapes customary law through rights-based review	Limited: Constitutional Court intervenes less, respecting Indigenous jurisdictional autonomy
Gender Equality	Strong rights-based scrutiny; courts require customary law compliance with equality guarantees	Tensions persist; debates over child marriage and cultural autonomy
Implementation Challenges	Tensions over community participation; unresolved questions in succession and matrimonial property	Profound implementation gaps; limited institutional capacity; slow autonomy progress
Recent Developments	2021 Traditional Leadership Act controversy; 2025 Gumede judgment reaffirming constitutional scrutiny	Slow AIOC progress; ongoing access to justice deficits; nature's rights implementation weak
Key Tension	Balancing constitutional supremacy with customary law integrity	Balancing formal equality with effective implementation

3. RESEARCH QUESTIONS

This study addresses the following research questions:

1. What are the key characteristics of South Africa's approach to legal pluralism, including constitutional recognition, legislative frameworks, and judicial interpretation of customary law?

2. What are the key characteristics of Bolivia's approach to legal pluralism, including constitutional provisions for co-equal Indigenous jurisdiction, autonomy frameworks, and implementation challenges?
3. How do the two countries compare in terms of constitutional models, judicial roles, treatment of gender equality, and implementation effectiveness?
4. What explains the different approaches—South Africa's cautious integration under constitutional supremacy versus Bolivia's radical equality—and what lessons can be drawn for legal pluralism?

4. METHODOLOGY

This study employs a comparative constitutional and legal analysis methodology to examine legal pluralism and customary law recognition in South Africa and Bolivia. The research design integrates secondary analysis of constitutional provisions, judicial decisions, academic commentary, and institutional documentation to develop comprehensive understanding of legal frameworks, implementation dynamics, and ongoing tensions in both countries.

Research Design: The comparative approach is appropriate for examining how different constitutional traditions, political histories, and social contexts shape approaches to legal pluralism. South Africa and Bolivia were selected as cases that offer complementary insights: both have undergone transformative constitutional reforms recognizing customary law, yet their models differ fundamentally.

Data Sources: Primary and secondary sources analyzed include:

- Constitutional provisions from South Africa (1996) and Bolivia (2009)
- Landmark Constitutional Court decisions from South Africa (*Bhe, Shilubana, Mayelane, Gumede*)
- Academic analysis of South African legal pluralism
- Legislation including Traditional and Khoi-San Leadership Act (2021), Reform of Customary Law of Succession Act (2009)
- Research on access to justice in rural Bolivia
- Analysis of Indigenous autonomy and jurisdictional coordination in Bolivia

Analytical Framework: The comparative framework examines four dimensions:

1. **Constitutional Model:** Hierarchy, equality, and relationship between legal systems
2. **Judicial Role:** How courts interpret and apply constitutional provisions
3. **Implementation Reality:** Gaps between constitutional promise and lived experience
4. **Ongoing Tensions:** Unresolved questions and areas of contestation

Time Period: The analysis focuses on post-constitutional reform periods (South Africa post-1996, Bolivia post-2009) to present (2025-2026).

5. RESULTS

5.1 South Africa: Constitutional Supremacy and Judicial Mediation

Constitutional Recognition: Section 211(3) of the 1996 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." This formulation establishes customary law as a legitimate source of legal norms while affirming constitutional supremacy.

Legislative Framework: The Reform of Customary Law of Succession and Regulation of Related Matters Act, 2009 (the "Reform Act") partially codifies customary law of succession. It introduces a "one-third rule" for inheritance but leaves significant questions unresolved regarding the relationship between customary and civil law regarding matrimonial property .

Landmark Decisions:

Case	**Contribution**
Bhe v Magistrate Khayelitsha	Declared primogeniture rule unconstitutional; developed interim regime
Shilubana v Nwamitwa	Affirmed traditional authorities' power to develop customary law

Mayelane v Ngwenyama	Required first wife's consent for subsequent customary marriage
Gumede v Minister of Justice	Reaffirmed duty to ensure customary law aligns with constitutional values

Ongoing Tensions: The Traditional and Khoi-San Leadership Act, 2021, has been criticized for inadequate consultation and for undermining community participation in customary law development . Litigation challenging its constitutionality is pending.

5.2 Bolivia: Constitutional Equality and Implementation Gaps

Constitutional Recognition: The 2009 Constitution establishes Indigenous native peasant jurisdiction as constitutionally equal to ordinary jurisdiction . Article 179 explicitly recognizes both systems as co-equal, requiring coordination rather than subordination.

Autonomy Framework: Indigenous Original Campesino Autonomies (AIOCs) are constitutionally recognized, but implementation has been slow. Only a handful of municipalities have achieved autonomy status, and the framework remains incompletely implemented.

Access to Justice Research: Studies in rural Cochabamba document profound territorial and social disparities. Victims of violence face geographic, linguistic, and cultural barriers to accessing both state and Indigenous justice systems .

Nature's Rights: Constitutional recognition of nature's rights (Articles 33-34) remains weakly implemented, with environmental defenders facing threats and enforcement inconsistent.

Jurisdictional Coordination: The Jurisdictional Demarcation Law (2010) establishes procedures for resolving conflicts, but coordination mechanisms remain unclear in practice, leading to ongoing disputes over jurisdictional boundaries.

5.3 Comparative Analysis

Dimension	**South Africa**	**Bolivia**
Constitutional Model	Subordinate integration under constitutional supremacy	Co-equal pluralism with formal hierarchy equality
Judicial Role	Active rights-based scrutiny; courts shape customary law	More limited; constitutional court intervenes less
Gender Equality	Strong scrutiny; equality guarantees enforced	Tensions persist; child marriage debates illustrate conflict
Implementation	Relatively effective but contested; ongoing litigation	Profound gaps; limited institutional capacity
Recent Developments	2021 Act controversy; 2025 *Gumede* judgment	Slow AIOC progress; access to justice deficits
Key Strength	Sophisticated judicial framework; protection of rights	Radical recognition of Indigenous equality
Key Weakness	Potential undermining of customary law integrity	Implementation failure; resource constraints

6. DISCUSSION OF RESULTS

6.1 Two Models of Legal Pluralism

South Africa and Bolivia represent two fundamentally different models of legal pluralism. South Africa's approach is one of cautious integration under constitutional supremacy. Customary law is recognized as a legitimate source of legal norms, but it operates within a framework that ultimately subordinates it to the Constitution and the Bill of Rights. The Constitutional Court plays a central role in mediating this relationship, scrutinizing customary rules for compliance with fundamental rights and, where necessary, declaring them invalid or requiring their development .

Bolivia's approach is one of radical equality. Indigenous jurisdiction is constitutionally recognized as co-equal to ordinary jurisdiction, not subordinate. The Constitution envisions a genuinely

pluralist legal order where Indigenous legal systems operate autonomously, with coordination rather than subordination governing their relationship to state law.

Neither model is inherently superior; each reflects the distinct historical and political contexts from which it emerged. South Africa's constitutional project was shaped by the struggle against apartheid and a deep commitment to human rights as the foundation of the new order. The subordination of customary law to the Bill of Rights reflects this rights-based orientation. Bolivia's constitutional project was driven by Indigenous movements seeking to decolonize the state and overturn centuries of legal subordination. The co-equal recognition of Indigenous jurisdiction reflects this decolonizing ambition.

6.2 The Tension Between Rights and Culture

Both countries grapple with the fundamental tension between universal human rights and respect for cultural autonomy. South Africa's Constitutional Court has navigated this tension through rights-based scrutiny, declaring customary rules that violate equality or dignity unconstitutional while affirming the living nature of customary law capable of internal development . In *Shilubana*, the Court recognized that traditional authorities have the power to develop customary law in accordance with community values, suggesting that rights-based outcomes can be achieved through internal customary processes rather than external imposition.

Bolivia's approach leaves more space for Indigenous jurisdictional autonomy, but this raises its own tensions. Recent debates over criminalizing child marriage in Indigenous communities illustrate the conflict between international human rights norms and cultural tradition. While Bolivia's Constitutional Court has affirmed the supremacy of children's rights, it has also called for culturally sensitive implementation, recognizing that outright prohibition may drive practices underground rather than eliminate them.

The South African experience suggests that meaningful engagement with customary law requires attention to its internal logic and development processes. The Bolivian experience suggests that formal constitutional equality, while necessary, is insufficient without implementation capacity and resources.

6.3 Implementation: The Achilles Heel of Legal Pluralism

Both countries reveal that constitutional recognition, however sophisticated, is insufficient without effective implementation. South Africa's 2021 Traditional and Khoi-San Leadership Act controversy demonstrates that even well-established pluralist frameworks can be undermined by inadequate consultation and poor legislative design . The ongoing litigation challenging the Act's constitutionality reflects the gap between constitutional promise and legislative practice.

Bolivia's implementation gaps are even more profound. Despite constitutional equality, Indigenous jurisdictions lack resources and institutional support. Access to justice research in rural Cochabamba documents that victims of violence face barriers whether they seek state or Indigenous justice . The slow progress of Indigenous autonomy suggests that the political will to implement constitutional pluralism may be waning.

These implementation challenges highlight the need for attention not only to constitutional design but to institutional capacity, resources, and political commitment. Legal pluralism requires not just recognition but active support for Indigenous legal systems to function effectively.

6.4 The Role of Courts

South Africa's experience demonstrates the crucial role courts can play in mediating legal pluralism. The Constitutional Court's decisions have shaped the development of customary law, protecting vulnerable groups while recognizing customary law's living nature . The Court has developed a jurisprudence that balances respect for customary norms with constitutional commitments to equality and dignity.

Bolivia's Constitutional Court has played a more limited role, reflecting the constitutional commitment to Indigenous jurisdictional autonomy. However, this limited role has not been compensated by effective coordination mechanisms or political implementation. The result is a gap between constitutional principle and lived reality.

The comparison suggests that courts can play a constructive role in legal pluralism, but only when their decisions are implemented and when they are complemented by other institutional mechanisms.

6.5 Implications for SDG 16

The findings have important implications for achieving SDG 16 targets:

Target 16.3 (Rule of law and equal access to justice): Legal pluralism, when effectively implemented, can enhance access to justice by making legal systems culturally accessible. South Africa's recognition of customary law allows millions to access justice through familiar institutions. Bolivia's constitutional equality promises similar benefits, but implementation gaps limit realization.

Target 16.7 (Inclusive, participatory decision-making): Both countries' experiences demonstrate the importance of meaningful consultation with indigenous and traditional communities in designing legal frameworks. South Africa's Traditional Leadership Act controversy illustrates the consequences of inadequate participation. Bolivia's constituent assembly process, driven by Indigenous movements, offers a model of inclusive constitution-making.

Target 16.10 (Public access to information): Legal pluralism requires that citizens understand the relationship between multiple legal systems. Both countries face challenges in ensuring that information about legal rights and forums is accessible across linguistic and cultural divides.

Target 16.6 (Effective, accountable, transparent institutions): Implementation of legal pluralism requires institutions with capacity and resources. Bolivia's Indigenous jurisdictions lack both, limiting their effectiveness. South Africa's traditional leadership institutions face questions about accountability and representativeness.

7. CONCLUSION

This comparative analysis of legal pluralism and customary law recognition in South Africa and Bolivia reveals profound insights into the possibilities and challenges of building pluralist legal orders in postcolonial states. The two countries, with their distinct constitutional models and implementation trajectories, illuminate different pathways to recognizing indigenous and traditional legal systems while navigating the tensions between cultural autonomy and fundamental rights.

South Africa's approach exemplifies cautious integration under constitutional supremacy. The 1996 Constitution recognizes customary law as part of the legal order but subjects it to the Bill of Rights and constitutional scrutiny . The Constitutional Court has developed a sophisticated jurisprudence, declaring rules that violate equality or dignity unconstitutional while affirming customary law's living nature and the power of traditional authorities to develop it . Landmark decisions like *Bhe, Shilubana*, and *Mayelane* have shaped the contours of customary law in areas of succession, traditional leadership, and marriage. The 2025 *Gumede* judgment reaffirmed the state's duty to ensure justice for all, regardless of position in society . Yet tensions persist. The 2021 Traditional and Khoi-San Leadership Act has been criticized for inadequate consultation and for undermining community participation, with litigation challenging its constitutionality . Academic analysis suggests that South Africa's version of legal pluralism, while formally committed to substantive equality, may sometimes subordinate customary law in ways that undermine its normative integrity .

Bolivia's approach represents a more radical vision of co-equal legal orders. The 2009 Constitution, born of Indigenous resurgence, recognizes Indigenous native peasant jurisdiction as constitutionally equal to ordinary jurisdiction, with coordination rather than subordination governing their relationship . Articles 179 and 192 establish formal equality, and Article 304 enumerates Indigenous exclusive competences . However, implementation has lagged. Research documents profound access to justice deficits, with victims facing geographic, linguistic, and cultural barriers whether they turn to state or Indigenous institutions . The autonomy regime has progressed slowly, with only a handful of municipalities achieving Indigenous Original Campesino Autonomy status. Nature's rights, constitutionally recognized, remain weakly enforced. Debates over child marriage in Indigenous communities highlight ongoing tensions between universal rights and cultural autonomy.

Several cross-cutting insights emerge from this comparison:

First, constitutional design matters, but implementation matters more. Bolivia's radical constitutional equality has not translated into effective access to justice or robust Indigenous jurisdiction. South Africa's cautious integration has achieved more in practice, though with ongoing contestation.

Second, the tension between rights and culture is unavoidable. Both countries grapple with how to protect vulnerable groups, particularly women and children, within customary systems while respecting cultural autonomy. Courts play a crucial role in mediating this tension.

Third, meaningful consultation is essential. South Africa's Traditional Leadership Act controversy demonstrates that even well-established pluralist frameworks can be undermined by inadequate participation. Bolivia's constituent assembly process, driven by Indigenous movements, offers lessons in inclusive constitution-making.

Fourth, institutional capacity determines outcomes. Legal pluralism requires not just constitutional recognition but resources, training, and support for Indigenous legal systems to function effectively.

Fifth, coordination mechanisms are necessary but difficult. Both countries struggle to manage the relationship between multiple legal orders, with conflicts arising from overlapping claims and unclear jurisdictional boundaries.

Sixth, judicial sensitivity to customary law matters. South Africa's Constitutional Court has developed a jurisprudence that balances respect for customary norms with constitutional commitments, recognizing customary law's living nature while protecting fundamental rights.

Seventh, legal pluralism is an ongoing project, not a settled achievement. Both countries continue to grapple with unresolved questions, demonstrating that the recognition of multiple legal orders requires continuous negotiation and adaptation.

For South Africa, priorities emerging from this analysis include:

1. Resolve the constitutionality challenge to the Traditional and Khoi-San Leadership Act through litigation or legislative amendment, ensuring meaningful community participation in customary law development.
2. Clarify remaining ambiguities in the relationship between customary and civil law regarding matrimonial property and succession.
3. Strengthen mechanisms for traditional communities to participate in the evolution of their legal systems.
4. Ensure that constitutional scrutiny of customary law is sensitive to its normative integrity and social context.

For Bolivia, priorities include:

1. Accelerate implementation of Indigenous Original Campesino Autonomies, providing resources and institutional support for effective self-governance.
2. Develop clearer coordination mechanisms between ordinary and Indigenous jurisdictions to resolve jurisdictional conflicts.
3. Address access to justice deficits through investment in infrastructure, translation services, and culturally appropriate legal aid.
4. Strengthen enforcement of nature's rights, protecting environmental defenders and ensuring constitutional provisions translate into practice.
5. Navigate tensions between universal rights and cultural autonomy through culturally sensitive implementation rather than outright prohibition.

For the international community, the lessons are clear: legal pluralism offers a framework for reconciling the legacy of colonial legal imposition with the living law of indigenous and traditional communities. South Africa's cautious integration and Bolivia's radical equality both offer valuable insights, but neither provides a complete template. Effective pluralism requires constitutional recognition, meaningful participation, institutional capacity, and ongoing attention to the protection of vulnerable groups.

The ultimate measure of success for SDG 16 is not the sophistication of constitutional provisions but whether all people, regardless of their cultural identity, have access to justice, participate in

decisions affecting them, and live under the rule of law. South Africa and Bolivia, in their different ways, are both working toward these goals.

8. LIMITS OF THE STUDY

This study has several limitations that should be acknowledged. First, the comparative analysis relies primarily on secondary sources rather than primary empirical research. Direct observation of customary law processes in both countries, interviews with traditional leaders, community members, judges, and legal practitioners, and participatory research would provide valuable additional perspectives and ground-truth the findings from published literature. Second, data availability and comparability vary between countries. South Africa benefits from extensive documentation through Constitutional Court decisions, academic commentary, and legislative analysis. Bolivia's legal framework is documented through constitutional provisions and academic research, but implementation data is less systematically available. Third, the study focuses on constitutional and legal frameworks, with less attention to the lived experience of communities navigating multiple legal systems. Fourth, the voice of indigenous and traditional community members is mediated through research reports rather than captured directly. Future research should prioritize participatory methodologies that center community perspectives. Fifth, the study does not comprehensively address the political economy dimensions—the interests, power relations, and structural forces that shape legal pluralism in both countries. Understanding why implementation lags in Bolivia or why certain legislation proves controversial in South Africa requires deeper political economy analysis. Sixth, the transferability analysis is necessarily speculative. While principles can be identified, actual transfer of legal pluralism approaches depends on countless contextual factors including legal traditions, political dynamics, and social structures that cannot be fully anticipated. Despite these limitations, the comparative analysis provides valuable insights into legal pluralism and customary law recognition, with implications for both countries and for broader efforts to achieve SDG 16.

9. ACKNOWLEDGMENTS

The author acknowledges the invaluable contributions of legal scholars, judges, and institutions whose work forms the foundation of this analysis. The Constitutional Court of South Africa for landmark decisions including *Gumede v Minister of Justice and Constitutional Development* . Thandabantu Nhlapo for commentary on African customary law . Chuma Himonga and Diala for critical analysis of South African legal pluralism . The Constituent Assembly of Bolivia for the transformative 2009 Constitution . Research institutions documenting access to justice challenges in rural Bolivia . The broader community of legal scholars and practitioners working to build pluralist legal orders that respect cultural diversity while protecting fundamental rights.

10. AUTHOR CONTRIBUTIONS

The author conceived the study, designed the research methodology, conducted the literature review and document analysis, synthesized findings across countries, and drafted the complete manuscript. The author takes full responsibility for the accuracy of information presented and interpretations offered.

11. COMPETING INTERESTS

The author declares that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential competing interest. No funding was received from organizations with interests in legal pluralism, customary law, or related sectors.

12. AUTHORS' CONTRIBUTIONS

As sole author, I performed all roles including conceptualization, methodology development, investigation, formal analysis, writing, review, editing, and project administration.

13. FUNDING INFORMATION

This research received no specific grant from any funding agency in the public, commercial, or not-for-profit sectors.

14. DATA AVAILABILITY

All sources analyzed in this study are publicly available documents, including constitutional provisions, judicial decisions, academic articles, and institutional reports. Primary sources are cited in the bibliography and accessible through the referenced publications and organizations.

15. DISCLAIMER

The views expressed in this article are solely those of the author and do not necessarily reflect the views of any institution or organization with which the author may be affiliated. The analysis is provided for scholarly purposes and should not be construed as legal advice or policy guidance. Legal pluralism frameworks, customary law developments, and judicial interpretations are subject to change, and readers should consult current sources for specific information about South Africa, Bolivia, and legal pluralism.

16. BIBLIOGRAPHY

1. Constitutional Court of South Africa. (2025). Gumede v Minister of Justice and Constitutional Development. https://collections.concourt.org.za/handle/20.500.12144/39284
2. Himonga, C., & Diala, A. C. (2025). African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives. Oxford University Press Southern Africa.
3. Constitutional Court of South Africa. (2005). Bhe v Magistrate Khayelitsha. SAFLII. https://www.saflii.org/za/cases/ZACC/2004/17.html
4. Constitutional Court of South Africa. (2009). Shilubana v Nwamitwa. SAFLII. https://www.saflii.org/za/cases/ZACC/2008/9.html
5. Constitutional Court of South Africa. (2013). Mayelane v Ngwenyama. SAFLII. https://www.saflii.org/za/cases/ZACC/2013/14.html

6. Plurinational Constitutional Court of Bolivia. (n.d.). Constitutional Provisions. https://tcpbolivia.bo/tcp/sites/default/files/images/pdf/normativa/archivos/constitutioningles.pdf
7. The African Times. (2023). Legal battles over South Africa's Traditional and Khoi-San Leadership Act. https://africantimes.news/2023/legal-battles-over-south-africas-traditional-and-khoi-san-leadership-act/
8. Nhlapo, T. (2025). African Customary Law. https://www.thandabantunhlapo.com/african-customary-law
9. Rights and Democracy. (2013). Bolivia's Indigenous justice system faces challenges. https://www.rightsanddemocracy.org/bolivia-indigenous-justice-system-faces-challenges/