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Legal pluralism in South Africa: Integrating customary and common laws in finding justice for victims of gender-based violence

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ABSTRACT

South Africa recognises a system of legal pluralism where customary law exists alongside national legislation, creating complex tensions, especially regarding women's rights. Customary law often subordinates women's rights to those of men, raising concerns given the South African Constitution's commitment to gender equality and justice. This study investigates how legal pluralism can address injustices faced by women experiencing Gender based violence (GBV). Using a qualitative systematic literature review, it explores how various factors intersect violating women's rights. To understand the complex dynamics of GBV within legal pluralism, particularly concerning customary law, the study employs the ecological model. This model illustrates how different factors contribute to women's rights violations. The findings show that customary laws, rooted in patriarchal traditions, often restrict women's rights and exacerbate GBV. Addressing these issues calls for significant reform. A promising reform approach is adopting the 'Ubuntu' philosophy, emphasising community, interconnectedness, and mutual respect. This principle can serve as a foundation for meaningful legal change in the context of legal pluralism. Furthermore, aligning customary law with national law on women's rights and South Africa's constitutional mandates is crucial. Such alignment will protect women's rights and create a legal environment based on fairness and inclusion.

KEY TERMS: customary law, gender-based violence, legal pluralism, national law, South Africa, Ubuntu

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INTRODUCTION

The advancement of the rule of law and the promotion of human rights for all South Africans through the framework of legal pluralism are foundational principles enshrined in the South African Constitution. Traditional legal anthropology conceptualises legal pluralism as a framework characterised by the coexistence of distinct legal orders, each functioning as a separate entity within the same political landscape. Legal pluralism emphasises the adaptability of law in response to societal dynamics by allowing the coexistence of multiple legal orders within a social group that may not conform to a singular legal framework. South Africa, like many other African nations, operates under a system of legal pluralism, where customary or tribal law exists alongside public or national law. These separate legal systems originate from culturally distinctive customs and practices, resulting in a complex yet often contentious relationship between them. The coexistence of these legal frameworks sometimes leads to conflicts, especially as traditional legal practices can occasionally undermine the principles protected in national law. The consequences of these conflicts can be particularly severe for women, as in many contexts, women's rights, especially under traditional law, are often subordinate to those of men. This complex situation raises important questions, especially considering that the South African Constitution explicitly promotes gender equality and guarantees the rights of all citizens to justice and protection from discrimination. This research aims to explore how legal pluralism can be utilised to more effectively address the various injustices faced by women who are victims of Gender based violence (GBV) as they seek justice. The study's objectives include an analysis of the impact of customary law on GBV cases by investigating how traditional practices and norms may contribute to the prevalence of GBV. Furthermore, the research examines potential reforms to customary law that could strengthen the legal framework surrounding cases of GBV, ultimately ensuring a more equitable and just response for victims seeking justice. Through this investigation, the study aims to emphasise the need for multifaceted legal strategies that respect cultural contexts while advocating for women's rights and safety. To present the objectives of this study in a logical format, the study begins by providing a concise historical overview of legal pluralism in South Africa. It then reviews the current legislative framework addressing GBV, analysing key laws and policies aimed at combating this issue. The study also examines the prevalence of GBV in rural South African communities, highlighting the unique challenges faced in these areas. Furthermore, it introduces the Ecological Model as its theoretical framework, which offers a comprehensive perspective on the complex factors underlying GBV. A brief overview of the research methodology follows which the results of the study are presented before concluding. This study significantly advances the discussion on GBV in South Africa by critically exploring how legal pluralism, particularly the combination of customary and common law, can promote justice for victims of GBV.

BRIEF HISTORICAL CONTEXT OF LEGAL PLURALISM IN SOUTH AFRICA

Legal pluralism in South Africa originates from its diverse cultural and historical context, shaped by colonialism and apartheid. This legal system includes state law, based on Roman Dutch and English common law, as well as customary and religious laws, such as those of Muslim and Hindu communities.

Prior to the colonial period, customary law in South Africa was predominantly oral and transmitted through generations, with significant laws established by monarchs (Ndulo, 2011). However, after the British occupied the Cape in 1806, Roman Dutch law was reaffirmed as the prevailing legal system, while indigenous laws were largely ignored (Seroto, 2015). During the apartheid era, the systematic oppression of Black indigenous populations intensified, extending deeply into their legal frameworks and cultural practices. Customary law, which had governed many aspects of life within these communities, was recognised only under specific legal exceptions, reflecting the apartheid government's approach to cultural segregation (Himonga & Nhlapo, 2015). The enactment of the Bantu Authorities Act 68 of 1951 exemplified this strategy, as it centralised power in the hands of tribal rulers who were tasked with governing their communities (Himonga & Nhlapo, 2015).

With the advent of democracy in 1994, customary law received constitutional recognition as part of legal pluralism. The South African Constitution now permits courts to apply customary law in a manner that is consistent with the Bill of Rights (Constitution of the Republic of South Africa, 1996). Furthermore, customary law can also be applied if it is pertinent, and parties wishing to invoke customary law in court must prove that there is a tribal connection between the parties involved, that a specific system of indigenous law is relevant, and that relevant principles exist (Himonga & Nhlapo, 2015). The primary constitutional support for customary law can be found in Sections 39(2), 30, and 31, which affirm the cultural rights of indigenous communities (Constitution of the Republic of South Africa, 1996).

Existing legislations and the extent of gender-based violence in South Africa

South Africa has established a strong legal framework to combat GBV, including the Domestic Violence Act 116 of 1998 (Government of South Africa, 1998), the Sexual Offences and Related Matters Act 32 of 2007 (Government of South Africa, 2007), and the Prevention and Combating of Trafficking in Persons Act 7 of 2013 (Government of South Africa, 2013). Recent amendments, such as the Criminal Law (Sexual Offences) Amendment Act 13 of 2021 and the Domestic Violence Amendment Act 14 of 2021, aim to enhance protections and penalties related to GBV (Bezuidenhout & Booyens, 2020; Bokwa, 2021).

Despite these efforts, the prevalence of GBV, especially male-perpetrated violence against women, remains alarmingly high. Survivors often face significant challenges, including victim-blaming, inadequate protective measures, and a judicial process that can be lengthy and traumatic. While South Africa has a comprehensive legal approach to GBV, entrenched societal norms and cultural factors continue to drive this crisis (Cameron, 2020).

A recent study by Zungu et al. (2024) reported that in South Africa in the second quarter of 2024, there were 957 women murdered, 1,567 survivors of attempted murder, 14,366 cases of grievous bodily harm, and 10,191 reported rapes. Furthermore, Nkanisa (2020) highlighted that women and girls in rural areas are particularly vulnerable to GBV. This vulnerability is attributed to the normalisation of GBV in rural areas, a lack of adequate support for victims, and the prevailing patriarchal structures. Fakunmoju and Rasool (2018) further emphasised that patriarchy continues to be a significant force, promoting traditional gender roles that normalise GBV and perpetuate power imbalances.

Artz (2018) offers valuable GBV statistics and information about South Africa, based on national sources such as the South African Police Services, various reports, and academic publications. Her findings indicate that one in three young individuals has encountered some form of sexual abuse or exposure by the time they reach 17 years of age, while one in four children has reported experiencing some type of family violence during their lifetime (Artz, 2018). Although specific data for rural areas is lacking, these national trends raise significant concerns, especially considering the widespread acknowledgement of GBV as a pressing issue in South Africa. The country is often referred to as the “rape capital of the world” (Bosilong & Mbecke, 2019).

Research specifically addressing GBV in rural households and communities is still quite limited. Nevertheless, Bosilong & Mbecke (2019) suggest that violence against women tends to be more prevalent in impoverished households. Rural areas typically experience higher poverty rates, and deeply entrenched cultural patriarchal structures may heighten the risks faced by women and girls residing in rural areas. Despite the challenges posed by the lack of comprehensive data and research, it is evident that rural households and communities are not immune to GBV due to many factors, such as patriarchal structures found in those communities.

THEORETICAL FRAMEWORK: ECOLOGICAL MODEL

The ecological model, introduced by Heise in 1998, explains the interconnected factors that contribute to GBV. This model highlights that GBV arises from multiple factors across different social levels, suggesting that an individual’s abusive behaviour or their status as a victim of GBV is shaped by interactions within their social environment (Saffitz, 2010). By identifying factors at the individual, relational, community, and societal levels, the ecological model illustrates how these elements together perpetuate violence (Heise, 1998).

Individual level

Individual factors include characteristics from a person’s developmental history that increase the likelihood of becoming a perpetrator or a victim of GBV. Witnessing GBV in childhood and experiencing abuse significantly contribute to this risk. According to Ehrensaft et al. (2003), individuals raised in violent households may internalise behaviours that normalise violence, adopting pro-GBV attitudes. Violence can be learned through observing others and their outcomes, with family being the primary socialisation agent (Bandura, 1973). Historically, violence in the family correlates with intergenerational patterns, as children exposed to such environments may develop more permissive views on GBV (Kernsmith, 2006; Lichter & McCloskey, 2004).

Relationship level

The second level examines close relationships that may increase the risk of perpetrating GBV. The immediate social network, including friends and family, greatly influences an individual’s behaviour. The attitudes and behaviours common within peer groups seem to play a role in encouraging GBV. These behaviours and views on violence are shaped by one relationship, where individuals are first introduced to gender norms and societal perceptions of the value of girls and women (Krug, 2002).

The context in which gender norms and values develop varies, yet gender biases persist. For instance, a demographic health study shows that both men and women see certain situations as justifying violence (Morna & Chingamuka, 2013). This perspective is often reinforced by the belief that women or girls are responsible for the abuse they suffer, and victim-blaming worsens the problem (Bhattacharyya, 2013). Furthermore, the reactions of

first responders, commonly family members or neighbours, to reported abuse influence the victims' perceptions of violence. For instance, if violence is accepted to resolve issues in a relationship, it becomes easier to rationalise or accept GBV (Jewkes, Flood, & Lang, 2015).

Community level

Social norms related to gender and power, which either uphold or reject violence, influence GBV within communities. Each community and society holds distinct social norms; however, the prevailing religious and cultural beliefs shape the community's dominant perspectives. In other words, these beliefs inform the community's understanding of GBV and the justifications for it. Factors at the community level can increase risks, which are rooted in individual experiences and their relationships with social and community settings, such as schools, workplaces, and neighbourhoods. What a community deems as acceptable behaviour can significantly affect efforts to prevent social issues like GBV (Krug, 2002). Heise (1998), Flood and Pease (2009) indicate that most studies on GBV show that social norms in different communities, which validate male dominance, are the primary contributors to GBV. Furthermore, research has demonstrated that higher instances of GBV are prevalent in cultures where masculinity is associated with dominance, a claim to power, rigid gender roles, and where violence is regarded as an acceptable method for settling conflicts (Krug, 2002).

Societal level

According to Plaatjies-Van Huffel (2011), South African society, applying across all racial groups to varying degrees, is traditionally patriarchal. This indicates that men generally hold authority, while women are often regarded as inferior. As a result, patriarchy has been associated with GBV (Reyes, Kelcey, & Varela, 2015).

From the perspective of feminist ideology, patriarchy is defined as a belief system that justifies male dominance in both public and private spheres. Men exercise and share power among themselves in public settings as well as within family structures. Ali and Naylor (2013) argue that in a patriarchal society, men or husbands are expected to be the heads of their families and to lead all decision-making processes. Therefore, GBV can be viewed as an acceptable method of asserting male authority. Studies indicate that individuals who uphold patriarchal values are more likely to accept violence carried out by men, especially by spouses and intimate partners (World Health Organisation, 2017). Patriarchy provides men with values and attitudes that they use to rationalise acts of violence at the societal level.

METHODOLOGY

The study utilised a qualitative systematic literature review methodology, which was particularly well-suited for synthesising existing research on legal pluralism and GBV in South Africa. This approach facilitated a comprehensive analysis of various scholarly sources, providing a structured framework for gathering and analysing the body of knowledge surrounding this complex issue of GBV. By systematically reviewing and interpreting the available literature, the study aimed to create coherent, evidence-based data that highlights the current understanding of legal pluralism in relation to GBV and also identifies gaps in the research that could guide future inquiries in this important area of research. The databases utilised in this review incorporated a variety of academic resources, including Google Scholar, EBSCO Host, and JSTOR.

To identify additional pertinent studies, the reference lists of key articles retrieved through specific search terms were examined. The search terms employed in this review were comprehensive and included words such as 'gender-based violence', 'legal pluralism', 'traditional laws', 'customary law', 'contemporary laws', 'national law', 'victims', 'South Africa', 'rural areas', and 'justice'.

Inclusion criteria were established to ensure the reliability of the selected studies, focusing on empirical research written in the English language and published in peer-reviewed journals. Each research paper included in this review underwent a process to evaluate its rigour and overall quality. To maintain high academic standards, the South African Department of Higher Education and Training's accredited journal lists database was utilised, ensuring that all articles selected for data analysis were published in peer-reviewed journals. However, books and book chapters that did not conform to the peer-review criterion were also considered for inclusion, provided they offered significant insights relevant to the study's objectives. The timeframe for the publications included in this study was not restricted, allowing for the inclusion of all relevant articles. This approach was taken to ensure that both historical and contemporary debates surrounding GBV and legal pluralism were represented.

To enhance understanding of the data collected and ensure robust findings, this study's data underwent an in-depth analysis using Braun and Clarke's six stages of reflexive thematic analysis. These stages include familiarisation with the data, generating initial codes, searching for themes, reviewing those themes, defining and naming the themes, and finally, writing the report (Braun & Clarke, 2021). The data coding process was carried out manually. During the coding phase, two key themes emerged from the secondary data, as shown in Table 1.

Themes	Relevant literature
Theme 1: Customary Law, GBV and Ecological Model: Understanding the Clash between Culture and Women's Rights	<ul style="list-style-type: none"> - Al-Khayyat (1990) - Al-Sharmani & Rumminger (2015) - Gadd & Ubeis (2021) - Hegland (1995) - Kheswa & Hoho (2014) - Murhula (2024) - Tsatsi (2023) - Yuval-Davis (1997) - Zubair & Zubair (2017)
Theme 2: Reforming Customary Law to Achieve Justice for Victims of Gender-Based Violence	<ul style="list-style-type: none"> - Chaplin (2006) - Himonga (2017) - Maluleke (2012) - Ndulo (2011)

Table 1: Themes and Relevant Literature

FINDINGS AND DISCUSSION

Customary law, gender-based violence and ecological model: Understanding the clash between culture and women's rights

Yuval-Davis (1997) described individuals as carriers of laws and regulations. Based on this idea, it makes sense to view barriers to justice as situations in people's lives that require them to interpret the law for their daily decisions. This idea closely relates to the concept of legal pluralism, which examines how different sets of rules and beliefs emerge from various societal viewpoints. These sets of rules may be respected and followed in one community, while they might not make sense or could even clash with rules in another community.

The ecological model offers a valuable framework for understanding the various factors that contribute to GBV within a pluralist legal system and for developing effective prevention and intervention strategies. It recognises that GBV is not just an individual problem but rather the result of interactions among individuals, relationships, communities, and societal influences (Murhula, 2024).

At the individual level, women are socialised from a young age to conform to specific cultural norms that delineate what behaviours and roles are deemed acceptable for both girls and boys (Al-Khayyat, 1990). This early education profoundly influences their understanding of justice and individual rights, as it establishes the first individual-level factor affecting their access to justice systems. Within these communities, certain actions and beliefs are upheld as cultural rules, even if they may perpetuate GBV or infringe upon personal rights. Practices such as virginity testing highlight how deeply ingrained cultural norms can dictate acceptable behaviour, often leading women to internalise these values. When these practices are normalised and accepted within societal frameworks, they create significant barriers to seeking justice. At the individual level, women who view these violations as normal may believe that they have no legitimate claim to justice or recourse, thereby entrenching GBV and silencing their voices.

At the relationship and community levels, families often impose compulsory behaviours on girls and women, which can directly violate their rights (Gadd & Ubeis, 2021). One notable expectation is the traditional submissiveness mandated of women, a role deeply embedded in various cultural norms that can severely restrict their access to justice in customary courts (Gadd & Ubeis, 2021). A specific example is the issue of polygamy, which fosters an environment where women must submit to their husbands, regardless of their personal autonomy or well-being. This expectation violates their fundamental rights and significantly contributes to GBV, as in a polygamous marriage, a woman must always be compliant with her husband to accommodate more than one wife, regardless of the circumstances. Such beliefs have been internalised and accepted across many traditional families, especially in rural areas. The legal recognition of polygamous marriages reinforces cultural practices that require women to be submissive. This can lead to real-life experiences that reflect both societal and legal support for such practices. As a result, this endorsement may discourage women who are in polygamous unions and who are victims of GBV from seeking justice in customary courts.

At the societal level, one must understand that in South Africa, rural communities are traditionally patriarchal,

meaning that familial structures often grant men significant authority. Within this patriarchal framework, families can enforce compulsory rules that give fathers the power to control their children and spouses, deciding their futures based on various norms. In many cases, these societal norms are so entrenched that women face discouragement from utilising the state legal system to advocate for their rights. They may also experience pressure to adhere to customary laws, fearing social exclusion if they do not (Al-Sharmani & Rumminger, 2015). Consequently, many women, despite their desire for their rights to be recognised, may feel unable or unwilling to assert these rights in ways that could alienate them from their families and communities (Hegland, 1995).

For instance, the customary practice of 'ukuthwala' has come under scrutiny for violating women's rights. In the case of *Jezile v S and Others WCC*, the court outlined specific conditions that must be met for the practice to qualify as legitimate 'ukuthwala' (Tsatsi, 2023). These conditions include: both parties must give consent; sexual intercourse is prohibited during this period; the woman must be of marriageable age; the man's father must be informed of the woman's presence in his home and of his son's intention to marry her; and the man's family must send an invitation to the woman's family to initiate marriage negotiations (Tsatsi, 2023). While the practice can be carried out in an organised manner, it can also happen in circumstances where the woman is completely unaware of the arrangement (Kheswa & Hoho, 2014). This lack of transparency has often been justified by the belief that the woman belongs to her father, which is why she is not informed about the plans. If a woman refuses to comply, she may face social exclusion and the loss of family support (Zubair & Zubair, 2017). Consequently, many women are reluctant to report such GBV incidents due to the fear of social stigma.

Reforming customary law to achieve justice for victims of gender-based violence

Judges van der Westhuizen, who served on South Africa's Constitutional Court from 2004 to 2016, outlined a comprehensive framework for reforming customary law, emphasising four pivotal considerations crucial for defining a customary norm (Ndulo, 2011). Firstly, he underscored the significance of honouring and preserving the rich traditions and cultural practices of the community. This respect for local customs is vital, as it promotes a sense of identity and continuity among community members. Secondly, he highlighted the potential distortions that colonial influences may have introduced into historical records and traditional practices. These historical inaccuracies could have led to the misrepresentation of certain customary norms, thus necessitating a critical examination of the sources and interpretations of these laws. Thirdly, he emphasised the importance of communities not only preserving their customs but also adapting and evolving their customary norms in response to contemporary challenges. As societies experience changes due to globalisation and shifting social dynamics, the ability to modify these norms becomes essential for relevance and practicality. Finally, Judge van der Westhuizen emphasised that customary law functions similarly to other legal systems in its role of regulating people's lives and behaviour (Ndulo, 2011). Therefore, to successfully reform customary law and eliminate discriminatory practices against women, a comprehensive strategy is essential. This plan must confront longstanding cultural traditions and beliefs that uphold gender inequality and fuel GBV.

However, Judge Ngcobo, who served as Chief Justice from 2009 to 2011 and was a member of South Africa's Constitutional Court from 1999 until 2011, emphasises the critical importance of approaching the reform of customary law with careful consideration to its unique cultural and contextual foundations (Himonga, 2017). He warns against the tendency to interpret customary concepts through the lens of common law or foreign legal principles, highlighting the inherent risks involved in such an approach (Himonga, 2017). The application of common law ideas to African customary law can lead to significant misinterpretations and misunderstandings, as legal norms within African frameworks evolve within specific societal contexts. These norms are shaped by rich cultural beliefs, practices, and historical experiences that respond to the distinct circumstances of the communities they govern. Thus, an accurate understanding of African customary law necessitates engagement with its original context, rather than a superficial application of externally derived legal concepts.

Building on Judge Ngcobo's idea, it is crucial to incorporate the African philosophy of 'Ubuntu' when reforming customary law in South Africa. 'Ubuntu', an African philosophy that emphasises interconnectedness, community, and humaneness, and its core principles of respect, compassion, and reconciliation (Chaplin, 2006), must be applied to shape a more holistic and humane approach to justice for women and girls who are victims of GBV, especially in customary courts. 'Ubuntu' entails treating each other fairly and caring for each other's well-being, as well as having a mutual support spirit (Chaplin, 2006).

Ubuntu's principles are deeply rooted in African values and cultures. However, they can be challenged or undermined by some customary law practices that sustain GBV. For instance, ignoring or failing to punish perpetrators of forced marriages and of the traditional practice of 'ukuthwala' directly conflicts with Ubuntu's core values, which emphasise informed consent and the inherent dignity of all individuals (Maluleke, 2012). However, despite these contradictions, there exists an opportunity to leverage the community-oriented aspects of 'Ubuntu' to actively combat GBV within the context of customary law. By developing a culture of solidarity and cooperation, communities can engage in meaningful dialogues that challenge harmful practices while promoting more equitable gender relations. This community-based approach can facilitate grassroots initiatives that align

with Ubuntu's core values, empowering individuals to advocate for legal reforms that better protect and deliver justice for women affected by GBV.

Reforming the customary law based on the Ubuntu philosophy and the ecological model can both address GBV in South Africa. Ubuntu emphasises the importance of community and interconnectedness, while the ecological model analyses the various layers of influence on violence, ranging from individual factors to broader cultural norms. Integrating these approaches means utilising Ubuntu's community-based principles to enhance the support system across societal, institutional, and interpersonal levels. This integration can lead to more comprehensive and culturally relevant solutions when it comes to issues of GBV in South Africa.

IMPLICATIONS FOR SOCIAL WORK PRACTICES

Social workers can integrate the 'Ubuntu' philosophy with the ecological model to effectively combat GBV in South Africa. By embracing Ubuntu, they can promote community interconnectedness and shared responsibility in addressing GBV issues. Simultaneously, the ecological model provides a comprehensive framework for understanding and tackling GBV by examining the various interconnected factors influencing individuals at multiple levels. By recognising the interaction between these factors, social workers can develop interventions that are both holistic and targeted. The combination of 'Ubuntu' philosophy and the ecological model can promote the development of strong community-based prevention and support networks. At the micro level, social workers can facilitate dialogues and workshops that empower individuals and families to create safe environments and uphold values of respect and responsibility. At the macro level, they can advocate for policy reforms and community programmes rooted in the Ubuntu philosophy and ecological model that address systemic issues contributing to GBV.

CONCLUSION

Legal pluralism refers to the coexistence of multiple legal systems within a single society, often resulting in conflicts between customary and national laws. Customary law, deeply rooted in community traditions and cultural norms, usually derives from patriarchal structures that emphasise male authority. This can significantly restrict women's rights and exacerbate issues like GBV. To explore the complex dynamics of GBV within legal pluralism, particularly in relation to customary law, this study employed the ecological model. This model illustrated how various factors intersect to contribute to the violation of women's rights and GBV. It provided a detailed view of the complex relationship between gender, cultural practices, and the customary legal system, highlighting how systemic issues sustain inequality and discrimination. Addressing these urgent challenges requires substantive reform of customary law. A promising approach is adopting the 'Ubuntu' philosophy, which emphasises community, interconnectedness, and mutual respect. This principle can serve as a strong foundation for meaningful legal change. Furthermore, harmonising customary law with national law in terms of women's rights and with South Africa's constitutional mandates is crucial. This alignment will safeguard women's rights and create a legal environment grounded in fairness and inclusivity.

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