

UNIVERSITY OF PRETORIA
FACULTY OF LAW

Impact of the Intestate succession on the interests of women and children

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Declaration

I, Kwena Madinginye, declare that this Dissertation which is hereby submitted for the award of Legumes Magister (LLM) in Private Law (Estates Law) is my original work. It has not been previously submitted for the award of a degree at this or any other tertiary institution. Where works of other people are used, references have been provided.

Signed

.....

KRD Madinginye

15 February 2017

Pretoria,

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Firstly, I would like to thank God almighty for everything that I have and everything that I am. His mercy upon me is unexplainable. The will power he bestowed upon me to push and carry on when things got tough is truly amazing.

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Abstract

The African customary law,¹ relating to the intestate succession has always been known to discriminate against women and specifically female children.

We live in a developing country where the law is used as a tool to develop and transform the lives of the people. Legislation has previously failed to prohibit the discrimination against women and female children and my question is whether the law of our current times has succeeded to protect women and female children against the customary law of intestate succession in South Africa.

The Constitution of South Africa 1996 is the supreme law of the country of South Africa and it provided the legal foundation for the Republic. In my dissertation I will be focusing on section 9 of the Constitution of South Africa 1996 which stipulates the following:

“Everyone is equal before the law and has the right to equal protection and benefit of the law. Being equal before the law means all laws may not unfairly discriminate against anyone. Everyone is entitled to equal rights and freedom. This also means there should be equal representation on legislative bodies (in other words, bodies that make our laws). In this way we can make sure that all the different needs of the people of the country are shown in the laws. The right to 'equal protection before the law' means people have a right to the same opportunities and to have equal access to resources, which would allow them to be equal in the future”.²

The question is whether section 9 of the Constitution is being promoted amongst the African people in South Africa who are still practicing and living according to customary law when it comes to issues of intestate succession.³

Amongst tribes in South Africa, succession to status in customary law is based on the principle of primogeniture⁴. According to that principle the eldest son is the only person

¹ According to sec of 1 of the Recognition of Customary Marriage Act 120 of 1998, customary law is defined to mean “the customs and practice observed among the indigenous African people of South Africa which form part of the culture of those people”.

² Summary of the Constitution of South Africa, no 108 of 1996.

http://ossafrica.com/esst/index.php?title=Summary_of_the_Constitution_of_South_Africa%2C_no._108_of_1996#Section_9:_The_right_to_equality (accessed 28/09/2015).

³ This is the circumstance when someone dies without leaving behind a will.

eligible to succeed the deceased. The women and female children are excluded from succeeding the deceased. This means that the women and female children were excluded purely on the basis of gender.

This dissertation will give a background of how the law previously failed to protect women and female children living according to customary law in South Africa on their rights to intestate succession. It will also show the revolution of our law, in discussing the law that is currently in place to protect women and female children and whether these law and legislation are enough to protect women and female children whom are still living according to the customary law in South Africa. Was the declaration of the male primogeniture principle as unconstitutional and the implementation of the Intestate Succession Act 81 of 1987 along with the Reform of Customary law of Succession and Regulation Matters Act 11 of 2009 enough tools to transform and protect women and female children form discrimination in the intestate succession in customary law?

⁴ The state of being the firstborn child, the right of succession belonging to the firstborn child, especially the feudal rule by which the whole real estate of an intestate passed to the eldest son. See *Bhe v Magistrate of Khayelitsha* 2005 1 SA 580 (CC).

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Chapter 1: Introduction

1.1 Introduction

The law of succession (and inheritance) forms part of private law and generally includes those rules which determine what must be done with a deceased's property (or estate as it is called in the legal term) after his or her death.⁵ The South African law of succession is a dual legal system consisting of two branches, the first branch of law is the common law of succession and the second branch of law is the customary law of succession.⁶

In the common law of succession, inheritance concerns mainly the division of the assets of a deceased among his or her heirs. The division of property can take place in terms of the provision of a will (or testament) known as testate inheritance or according to the rules of common law where no will exists namely statutory intestate inheritance.⁷

Customary law of succession the (focus in this dissertation) was previously based on the principle of male primogeniture which was declared unconstitutional by the Constitutional Court of South Africa.⁸

The case *Bhe v Magistrate Khayelitsha* (Commission for Gender Equality as Amicus Curiae; *Shibi v Sithole* and *South African Human Rights Commission v President of the Republic of South Africa*,⁹ has far reaching implication for the existing customary succession and inheritance law. The Constitutional Court heard these three cases concurrently,¹⁰ since they were all concerned with the customary law of intestate succession.

In the *Bhe* case, Ms Bhe applied on behalf of her two minor female children for an order declaring the rule of male primogeniture unconstitutional in order to enable her two minor female children to inherit from their father's intestate estate. In terms of the rules of primogeniture, the property had to devolve on the father of the deceased. The father

⁵ Rautenbach & Bekker *Introduction to Legal Pluralism in South Africa* (2010)173.

⁶ *Ibid.*

⁷ See Oliver *et al* (1989) 435; the common law of inheritance has been codified by the Intestate Succession Act 81 of 1953. See also Rautenbach and Du Plesis "Law of succession" in Joubert, Faris and Church *LAWSA* vol 32 (2009) paras 204-229.

⁸ *Bhe and others v Khayelitsha Magistrate* (CCT 49/03) 2004 ZACC 17;2005 (1) SA 580 (CC);2005 (1) BCLR 1 (CC) 15 October 2001 (Hereafter *Bhe-case*).

⁹ *Ibid.*

¹⁰ The Constitutional Court of South Africa is the highest court with regards to Constitutional matters.

indicates that he intended to sell the property of the deceased in order to pay the funeral expenses incurred as a result of the deceased death.¹¹

In the second case, Ms Shibi approached the court for a similar order after being barred from inheriting her deceased brother's intestate estate. The deceased was unmarried and had no dependents. In terms of the rule of primogeniture her two male cousins shared the estate of the deceased.¹²

The third case is an application for direct access to the Constitutional court brought jointly by the South African Human Rights Commission and the Women's Legal Centre Trust,¹³ who established the Women's Legal Centre to conduct public interest litigation to advance the rights of women.¹⁴ Both organizations brought the application for direct access in their own interest, on behalf of someone else, as well as in the public interest,¹⁵ of women and female children in general.¹⁶

The Constitutional court distinguished two main issues namely: the constitutional validity of section 23 of the Black Administration Act,¹⁷ and the constitutionality of the rule of primogeniture.¹⁸ The court found that section 23 of the Black Administration Act contravened section 9(3), 10 and 28 of the Constitution and that the discrimination was not justifiable in terms section 36 of the Constitution.¹⁹ The court then evaluated the constitutionality of the rule of male primogeniture, which forms the basis of the customary law of succession and inheritance. From the onset the court recognized that

¹¹ 186 *Bhe*-case.

¹² 186 *Bhe*-case.

¹³ The South Africa Human Right Commission is a State institution established in terms of sec of 181(1)(b) read with sec of 184, 185, 186 of the Constitution.

¹⁴ The Women's Legal Centre Trust is a non-governmental organization which was established to "advance women's rights by conducting constitutional litigation and advocacy on gender issues". The particulars of the Women's Legal Center Trust can be found at (<http://www.wlce.co.za>).

¹⁵ In terms of sec of 38 (a) and (b) of the Constitution of South Africa 1966.

¹⁶ Rautenbach & Bekker 186-187.

¹⁷ Act 38 of 1927.

¹⁸ Section of 23(a)(i) of the Black Administration Act (hereinafter BAA) stipulates that a family head could not dispose of movable property belonging to him and allotted by him or accruing under customary marriages or to any house such property devolves in terms of customary law.

¹⁹ Section of 9(3) stipulates that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, color, sexual orientation, age, disabilities, religion, conscience, belief, culture, language and birth.

Section of 10 stipulates that everyone has inherent dignity and the right to have their dignity respected and protected. Section of 28 of the children's rights.

the context in which the rule of primogeniture operated had changes and stated as follows:²⁰

“Modern urban communities and families are structured and organized differently and no longer purely along traditional lines. The customary law rules of succession simply determine succession to the deceased estate without the accompanying social implications which they traditionally had. Nuclear families have largely replaced traditional extended families. The heirs do not necessarily live together with the whole extended family which would include the spouse of the deceased as well as other dependents and descendants. He often simply acquires the status without assuming or even being in a position to assume any of the deceased’s responsibilities”.

The decision made by the constitution court was a solution to the related parties who sought it. It was up to the legislature to bring customary law in line with the Constitution and the changing circumstances within the society. Merely declaring the principle of primogeniture unconstitutional was not enough to bring about the desired change and relief to the people, specifically women and female children living according to the customary law of intestate succession.²¹

The Court emphasized that the basis of the constitutional challenge to the rule of primogeniture is that it precludes a widow from inheritance as an intestate heir from her deceased husband, a daughter from inheriting from her deceased father, a young son from inheriting from his deceased father and an extra-marital child from inheriting from his natural deceased father.²² This exclusion is based firstly on gender and thus a violation of equality;²³ secondly, are an infringement of women’s right to dignity,²⁴ and thirdly are against the rights of children.²⁵ According to the Court, the customary heir’s duty to support cannot serve as justification for the limitation that the rule of

²⁰ Para 80 of the *Bhe-case*.

²¹ 187 *Bhe-case*.

²² *Ibid*.

²³ Section of 9(3) of the Constitution.

²⁴ Section of 10 of the Constitution.

²⁵ The limitation that the rule imposed had to be reasonable and justifiable in an open and democratic society based on the values of equality, human dignity and freedom. See para 95-97 of the *Bhe- case*.

primogeniture, in its current application to customary law of succession, is unconstitutional and invalid.²⁶

Women and female children were previously not seen as worthy to inherit. Intestate succession according to customary law excluded women and female children completely on the basis of gender.

“The relief gained in the above mentioned cases was a temporary relief and the legislature was expected to create legislation that would create a more permanent relief for issues based on intestate succession for people living under customary law”.²⁷

1.2 The origin of women’s oppression

Before the *Bhe* case the African customary law relating to intestate succession,²⁸ has always been known to discriminate against women and female children.²⁹

In terms of the Black Administration Act discrimination against women and female children was allowed and it explicitly did not allow women and female children to inherit on an equal basis with males. Equality was never promoted amongst the indigenous African people who lived according to customary law.³⁰

“Despite being one of the most obvious questions to ask of any societal phenomenon, the question of the origin of women’s oppression is one which is rarely tackled seriously. It is of the utmost importance that we understand where this oppression comes from, as on this basis the link between class society and oppression of women becomes clear.³¹ Women’s oppression is one of many forms of oppression – including racism, homophobia, and sexism – that is created out of a society based upon the class exploitation of the many for the profits of the few. With this understanding we can also develop ideas of how to

²⁶ Rautenbach & Bekker 187.

²⁷ Rautenbach & Bekker 186.

²⁸ “Customary law” in turn is defined as “the customary and usage traditionally observed among the indigenous African people of South Africa and which forms part if the culture of those people”. See sec 1 of the Reform of Customary Law of Succession and Regulation of related matters Act 11 of 2009 (thereafter RCLSA).

²⁹ Isabel “The Customary law of Intestate Succession” www.peacepalacelibrary.n/ebooks/files/38258273X.pdf (accessed 21/10/2015).

³⁰ Ibid.

³¹ Rachel Gibbs and Claire Martin “Women’s oppression: where it comes from and how to fight it” 09-09-2013 <http://www.marxist.com/struggle-against-womens-oppression-where-from.htm> (accessed 13/06/2016).

fight women's oppression. Clearly this involves fighting for every reform and raising the question of women's rights; but the basis of women's oppression also points to its place in the class struggle for socialism."³²

As documented in Engels' *Origin of the Family*,³³ the oppression and degradation of women is not ever present throughout the history of human beings. It is true that even in the first beginnings of humanity – a period referred to as 'primitive communism', as undeveloped conditions meant that tribes had to work together in order to just meet their basic needs, as there was no surplus to profit from – the work of men and women was split according to sex. For biological reasons women were required to look after children and hence their role in food production was based around gathering close to the home while men hunted further afield. However, despite the split in work, women were not viewed as inferior to men and their status was aided by the fact that families were traced through the mother line, since without marriage and fidelity as a social norm it was impossible to be certain of a child's father.³⁴

The Neolithic revolution brought tools and the domesticity of animals which, for the first time in human history, allowed for not just basic needs to be met, but also for the creation of a surplus. The creation of surplus saw the beginnings of class society, as it was now possible for some men to sell their surplus for profit, creating distinctions between rich and poor. As some began to amass wealth they also bought slaves and paid other men to work on their land; here we see the first example of worker/landowner.³⁵

This process led to women being seen as inferior to men in society, as it was only men who could make profit. The system of inheritance came about as people obtained more wealth. This also contributed to the status of men and as a result families were being traced through the male line, which necessitated the enforcement of female fidelity. This was the beginning of female oppression, which began as a result of class in society and

³² *Ibid.*

³³ Engels "Der Ursprung der Familie des Privateigentums and des Staate" First edition 1884 (accessed 13/06/2016).

³⁴ See Gibbs and Martin.

³⁵ *Ibid.*

it has grown into the system of capitalism and the oppression of women has become more complex.

1.3 Conclusion

The solutions put in place against the discrimination of women and female children specifically those who are living under the laws of customary law are a few. The first one is the declaration of the principle of male primogeniture unconstitutional. This finding of the court had far-reaching implications for the existing customary law of intestate succession and it was necessary to give an order which could provide interim relief until the South African legislature is able to provide a lasting solution.

The second one, as such, the court ordered that estate that would previously have devolved according to the customary law of intestate succession must now devolve according to the rules of intestate succession provided for in the Intestate Succession Act,³⁶ which applies to the intestate estate of the rest of the South African population.

The problem is that the marriage of the Intestate Succession Act,³⁷ to the customary law of succession was not a successful one because the Act fails to answer questions that needed to be answered. It has failed to address the issues most important to the people living under customary law. The Intestate Succession Act did not take into consideration that "African customary law is a community-based system of law"³⁸ and the fact that an African traditional family may consist of more than one nuclear family due to polygamous,³⁹ nature of African customary marriage. Further it does not take into account that amongst most African people succession to status in African customary law is based on the principle of male primogeniture.⁴⁰

This shows that the legislature has failed to create legislation that is specific to the African customary law concerning issues of intestate succession. This means that the African people who practice customary law have not been equally represented on the

³⁶ Act 81 of 1987 This Act regulates intestate succession to estate other than those that use to be regulated in terms of customary law.

³⁷ Act 81 of 1987.

³⁸ Wicomb and Smith "Customary communities as people and their customary tenure as 'culture': what we can do with Endorois decision" 2011 *African Human Rights Law Journal* 427.

³⁹ Polygamous refers to the situation whereby a man can be married to more than one woman at the same time.

⁴⁰ The state of being the firstborn child, the right of succession belonging to the firstborn child, especially the feudal rule by which the whole real estate of an intestate passed to the eldest son.

legislative body. The legislative body has failed to make sure that all the different needs of people of the country are shown in the law of intestate succession. The legislative body has just taken an Act that is applicable to a certain group of people that have totally different needs and made it applicable to people living in terms of customary law. As a result of this, the law is still failing to protect women and female children who practice and are living according to customary law when issues relating to intestate succession are concerned.

The Reform of Customary law of Succession and Regulated Matters Act,⁴¹ which has been introduced to address certain aspects that the Intestate Succession Act, has failed to address. This Act does not have an identity of its own as it mostly reflects and refers back to the Intestate Succession Act. This Act does not necessarily bring the much needed solutions; rather it brings about possible cracks for example, the introduction of freedom of testation in section 4 of the Act, a concept fairly peculiar to the customary law of succession. There are no statutory limitations that would prevent a testator living under the customary law system to revive the rule of male primogeniture through his will.

The research question is whether the current legislation concerning the issues of intestate succession specifically relating to people living and practicing the customary law is sufficient to protect and promote the rights of women and female children. The research aim is to determine whether our law has evolved sufficiently to promote and protect the rights of women and female children who are to this day still living and practicing customary law.

⁴¹ Act 11 of 2009.

Chapter 2: The position of Intestate Succession before the Black Administration Act.

2.1 History

Colonialism had an impact on the existence and development of law in South Africa.⁴² Modern South African law consist of different laws from different countries mostly made up of Roman-Dutch law, English common law and indigenous laws, referred to as customary law.⁴³ Even though customary law was the origin of inhabitants of his country, there has never been equality between the transplanted laws and the indigenous laws.⁴⁴ The colonisers initially ignored customary law and then they tolerated it and eventually recognised it. The Constitution of the Republic of South Africa, 1996, finally brought customary law on par with the common law of South Africa by affording it constitutional recognition. Customary law of succession is one area of customary law which has received considerable amount of attention because of its characteristics such as the rule of male primogeniture.

The Dutch government was confronted with the existence of indigenous people on Cape soil whose customs and usage were totally different from those it was accustomed to, there is no evidence that any account was taken of these customs.⁴⁵ It was only the second British occupation, in 1806, that customary law received some form of recognition.⁴⁶ The British confirmed Roman-Dutch law as the basic law of the land and followed a policy of non-interference with the customs and usages were not repugnant to public policy and the principle of natural justice.⁴⁷ During this time the various territories,⁴⁸ regulated the application of customary law by means of their own legislation.⁴⁹ In 1927, the various colonial laws were finally consolidated in the

⁴² Rautenbach "South African common and Customary Law of Intestate Succession: A question of harmonisation, integration or abolition" <http://www.ejcl.org/121/art121-20.pdf> (accessed 14/06/2016).

⁴³ *African human rights law journal* (open access journal on human rights in Africa (Published since 2001) (accessed 14/06/2016).

⁴⁴ *Bhe-case*.

⁴⁵ Van Niekerk *Legal Pluralism, in Introduction to legal pluralism in South Africa* (2010) 6-7.

⁴⁶ Under the 1806 Treaty of Capitulation, whereby the Netherlands ceded the Cape to Britain. See Bennett *The Conflict of Laws, in Introduction to Legal Pluralism in South Africa* (2010).

⁴⁷ According to Allott *New Essays in African Law* (1970) 12-13, customary law in Africa was recognised because of the following reasons: fear of discontent amongst the local communities, the idea that the English law was too advanced for the local communities, treaties with traditional leaders and economic reasons. See also Olivier *et al Indigenous Law* (1995) par 192.

⁴⁸ For example, the British Colonies (former Cape and Natal), the Boer Republics (former Transvaal and Orange Free State) and various indigenous Kingdoms (*inter alia*, the Zulu and Basuto).

⁴⁹ For a discussion of the earlier position of customary law in South Africa, see *inter alia*, Whitfield *South African Native Law* (1948) 1-39; Van Niekerk (2002) 7-8 and Kleyn and Viljoen *Beginner's Guide for Law Students* (2002) 47 *et seq*.

controversial Black Administration Act which provides for the management of indigenous affairs.⁵⁰

2.2 Traditional Customary Law of Succession

According to Smith; “African customary law is a community-based system of law”.⁵¹ The family is therefore the most important social construct in African society. The traditional African family may consist of more than one nuclear family due to the polygamous nature of African customary marriages.⁵² This means that a traditional African family would usually comprise a husband, and his wife or wives and their children. Each customary marriage creates a separate household and several households together produce a family group, which is controlled by a family head (the common husband). The family is also the most important institution in matters of intestate succession, as it is they who are responsible for the appointment and sometimes even the choosing of the intestate successor.

The rules of succession in terms of customs to a deceased who had only one wife are the same for all systems of customary law in South Africa. The guiding principle is always primogeniture in the male line. If the deceased had no descendants the whole range of male ascendants would be considered in order of ‘seniority’.

2.3 The principle of male primogeniture

Amongst most tribes in Africa, succession to status in African customary law is based on the principle of male primogeniture.⁵³ This principle may be expressed as follows:

“On the death of the deceased, his estate devolves on his eldest son or his eldest son’s eldest male descendant.”⁵⁴ If the eldest son has died leaving no male

⁵⁰38 of 1927 (hereafter referred to as the BAA). The Act has been severely criticised by the judiciary. See, Sachs J’s condemnation of the Act in *Moseneke v The Master* 2001 (2) SA 18 (CC) paras [20-21]; *Bhe*.

⁵¹ Smith “Customary communities as ‘peoples’ and their customary tenure as ‘culture’: What we can do with the *Endorois* decision” (2011) *African Human Rights Law Journal* 427.

⁵² Kerr “The customary law of immovable property and of succession” 1990 99. See *Nzimande v Nzimande* [2005] 1 All SA 608 (W) at 631 E.

⁵³

⁵⁴ See *Mgoza v Mgoza* 1967 (2) SA 436 (A) at 440D-E and *Matambo v Matambo* 1969 (3) SA 717 at 719A-B. Omotola “Primogeniture and illegitimacy in African customary law: The battle for survival of culture” 2004-2005 *Indiana International and Comparative Law Review* 116.

issue, the next son, or his eldest male descendent inherits, and so on through the sons respectively.”⁵⁵

The effect of the rule of primogeniture means that African customary law does not permit women or female children to inherit property or to succeed to positions of authority. Even if there is a female who was in a position to inherit she would be excluded purely on the basis of gender.

It was governed by the principle of primogeniture that even prevailed in polygamous marriages. The rules were plain, straightforward and part and parcel of their system of family law, catering among others for the status and wellbeing of all members of an extended family. Each family home was a separate establishment. Movable property acquired by the husband accrued to, or was allotted, by him to the different houses. The eldest son of each house succeeded to the property of that house whereupon he was responsible for the widow and children. The system also covered land so that on the death of the family head it accrued to the benefit of his dependents. This is not merely an idyllic sketch of primitive African life. To this day Africans put a high premium on family solidarity and ancestor veneration. According to Mbiti:⁵⁶

“When a man gets married, he is not alone; neither does his wife belong to him alone. The children belong to the corporate body of kinsmen, even if they bear only their father’s name. Whatever happens to the individual happens to the whole group, and whatever happens to the whole group happens to the individual. The individual can only say: ‘I am, because we are, and since we are, therefore I am’.

Today there are still such family homes - many indeed, especially in rural areas,⁵⁷ where a family head - male or female plays an indispensable role in caring for all the inmates. The family home (household) has no monetary value worth distributing among heirs. It may consist of a single house or a cluster of houses occupied by the family.

⁵⁵ *Sonti v Sonti* 1929 NAC (C&O) 23 at 24.

⁵⁶ *African Religions and Philosophy* (1969) 108-109.

⁵⁷ Sibanda “The birth of a new order and unitary land administration system in communal areas of South Africa” (unpublished paper) (Feb 2006) par 2.1 states that there are 3,550,402 households who occupy communal land.

2.4 Polygamy

It is well known that African people practice polygamy. Polygamy is a collective term used to describe the phenomenon of entering into a marriage with more than one spouse simultaneously. Anthropologists distinguish between two forms of polygamy viz polygyny and polyandry.⁵⁸ Polygyny refers to the form of marriage in which a man is married to more than one woman at the same time. Although polygamous marriages are no longer common, it must be noted that the African customary marriage is still a potentially polygamous one. Polyandry refers to a form of marriage in which a woman is married to more than one man at the same time. Polyandry is uncommon amongst the indigenous African people.

2.5 Family head

The family head was responsible for all members of his family group and he also controlled its property. The property of the family group comprised of a general (family), house or personal property. General property is: “property which has not been allotted to any house, or which does not accrue automatically to a house”.⁵⁹ House property may be defined as: “the property which accrues to a specific house, consisting of a wife and her children, and has to be used for the benefit of that house”.⁶⁰ Personal property on the other hand may be described as: “the property belonging to a person who has acquired it, although it may be under the control of the family head”.⁶¹ The death of the family head therefore had significant consequences for the family group and its property. Rules and laws of succession were thus contrived in order to alleviate the burdens associated with death; to maintain the family’s honor and to safeguard the material interests of the deceased’s descendants.

Traditionally, the family head held the most power within the family group.⁶² This did not mean that he could act capriciously; but was supposed to confer with the other members of the family group when making important decisions.⁶³ He was solely

⁵⁸ Vorster “Kinship” in Myburgh (ed) *Anthropology for Southern Africa* (1981) 94.

⁵⁹ Maithufi “The law of property” in Bekker, Labuschagne and Vorster *Introduction to legal pluralism in South Africa Part 1 Customary law* (2002) 54.

⁶⁰ Ibid.

⁶¹ Maithufi. (page)

⁶² Whitfield *South African Native Law* (1929) 33.

⁶³ See Bekker *Seymour’s customary law in southern Africa* (1989) 70.

responsible for the support and maintenance of the entire family group. He was liable for their debts, for any fines imposed on them, or damages awarded against them.⁶⁴

Members of the family group could only take legal action against other people if they were assisted and represented by the family head; and could also only be sued through him. The family head “is entitled to respect and obedience from the other members of his group, keeps them in order, and must be consulted by them in all their more important undertakings”.

2.6 Factors Affecting the Orders of Succession

2.6.1 Gender

Traditionally, the sex of a person played a definitive role in the determination of a person’s status.⁶⁵ Women were considered as perpetual minors and either fell under the guardianship of their fathers (if they were unmarried or single), or husbands (if they were married), or his successor (if they were widows).⁶⁶ Only male persons were eligible to succeed to positions of status. A woman was incapable of succeeding to the position of family head or to general or house property, on the sole basis of the fact that she was female.

2.6.2 Family rank

Due to the polygamous nature of the customary marriage, African customary law distinguishes between “family rank” and “house rank”. Family rank refers to the status of family members within the family group.⁶⁷ In customary law, males held a higher rank than their female counterparts. A person’s rank was ultimately determined by the principle of primogeniture. On the basis of that principle, oldest sons always had a higher rank than younger brothers and all sisters. This meant that females were always subjected to the authority of males and males alone were allowed to become family

⁶⁴ Schapera *A handbook of Tswana law and custom* (1970) 50.

⁶⁵ See generally Schapera 37-38.

⁶⁶ Olivier, Olivier (jnr) and Olivier *Die privaatreë van die Suid-Afrikaanse Bantoetaal-sprekendes* (1981) 5.

⁶⁷ Sansom “Traditional rulers and their realms” in Hammond-Tooke *The Bantu-speaking peoples of Southern Africa* (1974) 262.

heads.⁶⁸ In the extended family group however, the rank of a child was determined by the rank of their father within his family of origin.⁶⁹

2.6.3 House rank

House rank simply refers to the hierarchy of the various houses that constitute a family group.⁷⁰ In a polygamous marriage, each marriage creates a separate family or household with the husband as the common spouse to all the families.⁷¹ Each household or separate family has a particular rank. The rank of a household is determined by either of the following factors: (a) when the house came into existence, therefore when the man married the women; or (b) the descent group of the main or great wife.

The coming into existence of a house meant the following amongst the indigenous African peoples, the wife married first is known as the “main wife” or the “great wife”.⁷² The rank of the children born in a specific household is thus solely dependent upon the rank of their mother’s house or house rank. In other words, the rank of the children born to the main or great wife (irrespective of age) will be higher than the rank of all the other children born to the ancillary wives. That means that the house rank of the main or great wife and her children will be higher than that of the other spouses and their children in the other houses. The descendant group of the main or great wife, with regards to this factor, the order in which the wives are married is not crucial for the ranking.⁷³ The only requirement here is that the main wife must come from a particular descent group, and does not necessarily have to be the wife whom the man marries first.⁷⁴ This means that the children’s rank within the household will once again be determined by their mother’s house rank.

2.7 General and special succession

Due to the polygamous nature of customary law, succession in South African customary law may be further subdivided into general succession and special succession. The fact

⁶⁸ Bennett *Human Rights and African Customary Law* 335.

⁶⁹ *Ibid.*

⁷⁰ Whitfield 34.

⁷¹ Schapera 15.

⁷² Bekker (1989) 126. See also *Mahlaba v Mahlaba* (1924) NPD 372 at 373.

⁷³ Seymour Bantu law in South Africa (1970) 122.

⁷⁴ *Ibid.*

that African customary law differentiates between general and special succession also means that it makes provision for specific general successors and house successors.⁷⁵

General succession may be defined as succession to the entire household and the property of the general estate. This means that for this type of succession, the general successor would therefore succeed to all the property belonging to the family group as a whole, and to the property belonging to the household to which he belongs (here the distinction between family rank and house rank is particularly relevant). Special succession may be defined as succession in a specific house and succession to its house property. This means that for this type of succession, the house successor would only succeed to the property belonging to the household to which he belongs (here again, the distinction between family rank and house rank is particularly relevant).⁷⁶

Women and female children have been excluded from inheriting purely on the basis of gender and they could not inherit under general or special succession. This rule of male primogeniture is unconstitutional as it contradicts section 9 of the Constitution that promotes equality between people and it discourages discrimination. I will elaborate on the unconstitutionality of the male primogeniture principle in the following chapter.

⁷⁵ Bapedi Morato mamone v Commission on traditional leaders' dispute and claim and others (CCT 67/14) 2014 ZACC 36; 2015 (3) BCLR 268 (CC) (15 December 2014).

⁷⁶ Ibid.

Chapter 3: Declaration of unconstitutionality of customary rule of male primogeniture

3.1 Introduction

In an effort to show the evolution of the intestate succession customary law rules, one must look at the history of the Black Administration Act, the case laws and the current legislation as it now stands.

3.2 Black Administration Act

As seen above in 1927, the various colonial laws were finally consolidated in the controversial Black Administration Act.⁷⁷ This provides for the management of indigenous affairs. The classification of the category of persons, subject to the provisions of the Act, is solely based on a person's race. Within this context, the Act equates race with culture and it is doubtful whether the Act could resist the scrutiny of the Bill of Rights contained in the Constitution much longer.⁷⁸ The Act made provision for the recognition of customary law but also contributed to the transforming of customary law into a "fixed code of law" which is not subject to change.⁷⁹ Customary law is based on customs and usages and, as a result, it should develop and evolve as the needs of indigenous communities change. In South Africa, however, the application of customary law by the courts resulted over the years in a systematic codification of the customs and usages of the indigenous people. The Constitution makes provision for the interpretation and development of customary law in line with the spirit, purport and objects of the Bill of Rights by the courts.⁸⁰ In the past, the courts were cautious to develop customary law. They argued that such developments should take place by

⁷⁷ 38 of 1927 (hereafter referred to as BAA). As indicated above the Act has been severely criticised by the judiciary. See, for example, Sachs J's condemnation of the Act in *Moseneke v The Master* 2001 (2) SA 18 (CC) paras [20-21]; *Bhe* par [6].

⁷⁸ Section 211(3) of the Constitution provides for the application of customary law when that law is applicable and subject to the Constitution and other legislation that specifically deals with customary law. The Law of Evidence Amendment Act 45 of 1988 is one such Act that provides for the application of customary law by the courts, provided that such law can be ascertained readily and with sufficient certainty and that it is not against public policy. See Rautenbach "Some Comments on the Status of Customary Law in Relation to the Bill of Rights" 2003 *Stell LR* 107-114 for a discussion of the status of customary law in South Africa.

⁷⁹ Hlope J refers to this phenomenon in *Mabuza v Mbatha* 2003 (7) BCLR (C) par [28]. See also *Shibi* par [18]; Bennett "The Compatibility of African Customary Law and Human Rights" 1991 *Acta Juridica* 18-19. The South African courts do not always apply the so-called official or codified laws as referred to in the decisions but are in some instances prepared to apply the customary law as applied by the communities itself - see for example *Kewana v Santam Insurance Co Ltd* 1993 (4) SA 771 (T) and *Mabena v Letsoalo* 1998 (2) SA 1068 (T); see also Du Plessis "Gewoonteregtelike Aanneming en die Eis van die Afhanklike: *Kewana v Santam Insurance Co Ltd*" 1994 *TSAR* 837-843; Maithufi "The Constitution and the Application of Customary Family Law in South Africa" 2002 *De Jure* 207, 212- 218.

⁸⁰ Sec 39(2) of the Constitution.

means of legislation.⁸¹ The purpose of this chapter is to show by way of case law the court's attitude with regards to customary law and, especially, the rules of primogeniture have changed what tools the courts used to ensure that the rule of primogeniture is not applied. It will be shown that all the cases are a clear indication of modern day changes to certain branches of customary law.

3.3 *Bhe v Magistrate, Khayelitsha*⁸²

Initially in *Bhe v Magistrate, Khayelitsha* the applicant and the deceased lived together as husband and wife for a period of 12 years. Two minor children were born out of the relationship and being minors females, were assisted by their mother in the application. The deceased had died without leaving a will. The father of the deceased claimed that he was the intestate heir of the deceased by virtue of the African customary law and, therefore, was entitled to inherit the property of the deceased, which he intended to sell.

It was held that section 23(10)(a),(c) and (e) of the BAA had to be declared unconstitutional and invalid and that regulation 2(e) of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks consequently also was invalid.⁸³ Further, it was held that section 1(4)(b) of the Intestate Succession Act had to be declared unconstitutional and invalid insofar as it excluded from the application of section 1, any estate or part of any estate in respect of which section 23 of the BAA applied.⁸⁴ Until the foregoing defects were corrected by legislature, it had to be declared that the distribution of intestate black estates was governed by section 1 of the Intestate Succession Act.⁸⁵

The only reason why the first two applicants could not inherit from their father's estate was because they were black and female. This *per se* was discrimination on grounds of race and gender. It was *prima facie* unfair and therefore offended against the provisions of sections 9(1) and (3) of the Constitution. The court was thus bound to declare such law unconstitutional and invalid.⁸⁶

⁸¹ See, *Mthembu v Letsela* 2000 (3) SA 867 (SCA); 1998 (2) SA 675 (T); 1997 (2) SA 936 (T); *Bhe- case* par [18]; *Shibi case* par [6].

⁸² *Minister of Health and another 04 (2) SA 544 (C); 2004 (1) BCLR 27 (C).*

⁸³ At 555C/D - D/E.

⁸⁴ At 555E.

⁸⁵ At 555E/F.

⁸⁶ At 554E - F/G.

The court decided that African females, irrespective of age or social status, were entitled to inherit from their parents' intestate estate like any male person.⁸⁷ This did not mean that there might not be instances where differentiation on gender lines may not be justified for purposes of certain rituals, as long as it did not amount to prejudice to any female descendent.⁸⁸ It was ruled, on the basis of the principle of equality (section 9 of the Constitution), that a female may inherit intestate. The rule of primogeniture as sanctioned by regulation 2(e) was found to be unconstitutional.⁸⁹

In the *Bhe* case, Ngwenya J points out that the recognition and application of customary law has been inconsistent and sporadic in spite of the legislative provisions that enable the recognition and application thereof.⁹⁰ What is of particular importance is the courts' attitude towards the development of customary law. Ngwenya J indicated that the development of customary law must take the mode of ownership in urban environment into account.⁹¹ This mode of ownership does not provide for extended family members to participate in any decisions that have to be taken and, therefore, the chances of abuse are far greater than in the instance of communal land.⁹² The court emphasised that the Constitution is the supreme law of South Africa and that all law, including customary law, must be tested against the values enshrined in the Constitution.

Maluleke J in the *Shibi* case followed a similar view. The court held that the Constitution is the supreme law and that all laws or rules that are inconsistent with it are invalid.⁹³ It is commendable that the court deviated from previous decisions of the High Court, which held that it is the responsibility of the legislature to develop customary law and held that an order developing customary succession laws should no longer be delayed in order for the South African Law Commission to complete its investigations.⁹⁴ The court, however, shied away from this obligation by declaring some sections of the Act and its regulations unconstitutional. Undoubtedly the courts are placed in a difficult position. If they declare the particular rule of customary law unconstitutional without

⁸⁷ Schoeman-Malan "Recent developments regarding South African common and customary law of succession" www.saflii.org/za/journals/PER/2007/4.html (accessed 16/06/2015).

⁸⁸ At 55A - B.

⁸⁹ See also par [19] 597 of the Constitution Court case.

⁹⁰ See par [3] of the decision.

⁹¹ Judgment delivered on the 25th of September 2003.

⁹² See par [4] of the decision.

⁹³ See par [16] of the decision.

⁹⁴ There is a discussion of the proposals of the South African Law Commission.

replacing it with something else, a *lacuna* will be created. On the other hand, if they develop customary law and the communities do not accept the development, it will become mere paper law.⁹⁵

3.4 *Mthembu v Letsela*⁹⁶

In *Mthembu v Letsela* the dispute revolved around the constitutionality of the customary law rule of succession which was based on male primogeniture preventing women from inheriting upon intestacy.⁹⁷ The Supreme Court of Appeal refused an application that the court should develop the customary law in terms of the Interim Constitution in a way that would not differentiate between men and women. The judge, however, observed as follows:⁹⁸

“Any development of the rule would be better left to the Legislature after a full process of investigation and consultation, such as is currently being undertaken by the Law Commission.”

3.5 Discussion

The customary law of intestate succession is a branch of customary law and has been a bone of contention since the promulgation of the 1993 Constitution and the 1996 Constitution.⁹⁹ One of the most contentious issues in the succession laws is the principle of male primogeniture.¹⁰⁰ In this case the courts were reluctant to declare the rule unconstitutional. The courts argumentation was based, *inter alia*, on the heir's maintenance duty and the non-applicability of the then 1993 Constitution. It was,

⁹⁵ Pieterse “Killing it Softly: Customary Law in the new Constitutional Order” 2000 *De Jure* 35, 40 argues as follows: “One cannot expect that socio-cultural behavior and everyday practices will immediately cease once an aspect of indigenous law is declared unconstitutional by a court which many still view as a tool of forced Westernisation. Law proves rather inadequate in changing culturally engrained patterns of behavior.”

⁹⁶ 1997 (2) SA 936 (T) and 1998 (2) SA 675 (T) and 2000 (3) SA 867. (SCA).

⁹⁷ In *Nwamitwa v Phillia* 2005 (3) SA 536 (T) the Court, however, stated that a Thonga woman could not succeed, as traditional leader as it was not in accordance with the custom of the specific community. It was found that such practice was not in conflict with the Constitution.

⁹⁸ Par [40].

⁹⁹ It is argued that the rule of primogeniture on which the law of intestate succession is based, is unconstitutional in the light of sec9 (equality clause) of the Constitution. In the current situation, many women fall victim to the application of the rule of primogeniture, especially if a distant family member of the deceased, who does not adhere to his customary law responsibility of maintenance, inherits. For a discussion of other issues, see Rautenbach and Du Plessis “South African Law Commission’s Proposals for Customary Law of Succession: Retrogression or Progression?” 2003 *De Jure* 20 23-31.

¹⁰⁰ The principle of male primogeniture excludes women from inheritance of the family and house property. The principle of primogeniture means that the eldest son or his eldest male descendant in the male lineage succeeds the deceased. If there are no male descendants, the father of the deceased will inherit. The result is that women or men born from the female lineage will not inherit.

however, implied that in an urban setting, the rule may not have application anymore. The outcome of the three *Mthembu* cases was rather disappointing for the rights of women and gender equality. The impression is created that some courts are cautious when it comes to legal rules based on custom. However, gender equality should not be forsaken for the sake of retaining cultural identity if certain cultural rules are detrimental to the rights of women.¹⁰¹

3.6 Declaration of unconstitutionality of customary rule of male primogeniture

The *Bhe* and *Shibi* cases serve as obvious illustrations of the dissatisfaction people experience with the current customary succession laws. The dissatisfaction can largely be attributed to the rule of male primogeniture that excludes females from inheriting from a male.¹⁰² In monogamous traditional families, the eldest son, or failing him, the eldest male descendant of the eldest son inherits from the family head. If the eldest son is predeceased without male issues, the second son becomes heir and so it continues. If the family head dies without male issue, other male family members of the deceased will inherit. Women (wives and daughters) generally do not inherit from the family head. In the *Bhe* case it was submitted on behalf of the applicants that the principle of male primogeniture is unconstitutional because it violates the two daughters' constitutional right to equality.¹⁰³ The court tested the constitutionality of the principle of male primogeniture as found in the customary succession laws. It proceeded to scrutinise the relevant provisions of the BAA (including the regulations) and the Intestate Succession Act.¹⁰⁴ The former Act with its regulations¹⁰⁵ applies to certain Black intestate estates and the latter Act applies to all other intestate estates.¹⁰⁶ In terms of the BAA¹⁰⁷ and its regulations, the customary successions laws (including the principle of male

¹⁰¹ Rauenbach "Modern day impact on Customary law in South Africa" <https://www.researchgate.net/publications> (accessed 18/19/2015).

¹⁰² The principle of male primogeniture means that the eldest son or the eldest male descendant in the male lineage succeeds the deceased. If there are no male descendants, the father will inherit. Women or men born from the female lineage will not inherit.

¹⁰³ Section 9 of the Constitution. It was argued that the principle of primogeniture unfairly discriminates on the grounds of gender and sex, age and birth, origin and birth, legitimate and illegitimate as well as race. See par [6] of the decision.

¹⁰⁴ 81 of 1987.

¹⁰⁵ GN R 200 contained in *Government Gazette* 10601 of 6 February 1987. The relevant rule reads: "2(e) If the deceased does not fall into any of the classes described ... the property shall be distributed according to Black law and custom." The classes excluded are, for example, a deceased who was the holder of a letter of exemption, a deceased who was involved in a civil marriage or if the minister instructed the estate to devolve according to the common law – see rule 2(a)-(d).

¹⁰⁶ In terms of section 1(4)(b) of the Intestate Succession Act the Act does not apply to estates in respect of which section 23 of the Black Administration Act apply.

¹⁰⁷ BAA"23(1) All movable property belonging to a Black and allotted by him or accruing under Black law or custom to any woman with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under Black law and custom."

primogeniture) apply to the deceased estate *in casu* and, therefore, the daughters are excluded from inheritance. If the Intestate Succession Act was applied to the deceased estate, the daughters would have been the intestate beneficiaries in equal portions,¹⁰⁸ which is possible under regulation 2(d) of GN R200.¹⁰⁹ What the court in fact did was to find that the exclusion of the two daughters from the operation of the Intestate Succession Act was based on the fact that they were black and female and as a result their exclusion did not pass the test of constitutionality.¹¹⁰ The court found that the relevant provisions of the Black Administration Act and its regulations were unconstitutional.¹¹¹

Finally the court declared, quite unexpectedly, section “23(10)(a)(c) and (e)(sic)”¹¹² of the Black Administration Act and consequently regulation 2(e) to be unconstitutional and invalid.¹¹³ It is not exactly clear what the court intended with this order. For example, does the invalidation of section 23(10)(a) and (e) mean that all regulations made by the Minister are invalid? Surely this could not be the outcome the court intended?

The second order was to declare section 1(4)(b) of the Intestate Succession Act¹¹⁴ as invalid insofar as it excludes any part of an estate which does not devolve by virtue of section 23 of the Black Administration Act.¹¹⁵ The implication of this order is that the estate of the deceased is governed by the Intestate Succession Act with the result that the two daughters are the only beneficiaries of the deceased estate in terms of section 1(1)(b) of the Act.

¹⁰⁸ In terms of sec 1 of the Act, the deceased estate must be shared in equal portions between the descendants of the deceased. The gender of the descendants is irrelevant for the purpose of distribution.

¹⁰⁹ See also see Maithufi “The constitution and application of the African customary law in South Africa” 2002 *De Jure* 219-220.

¹¹⁰ Par [6] of the decision.

¹¹¹ *Ibid.*

¹¹² The court presumably meant to declare sec 23(10)(a)-(c) that empowers the Minister to make certain regulations with regard to Black intestate estates unconstitutional. The relevant subsection reads as follows: “(10) The Governor-General may make regulations not inconsistent with this Act- (a) prescribing the manner in which the estates of deceased Blacks shall be administered and distributed; (b) defining the rights of widows or surviving partners in regard to the use and occupation of the quitrent land of deceased Blacks; (c) dealing with the dispersion of Blacks; (d) (e) prescribing tables of succession in regard to Blacks.”

¹¹³ Par [6] order 1. In *Zondi v President of the Republic of South Africa* 2000 (2) SA 49 (N) the distinction made between the estate of a person who was a partner in a section 22(6) marriage (marriage out of community of property) and the estate of a person who was a partner in a marriage in community of property or under an ante nuptial contract was declared unconstitutional.

¹¹⁴ The section reads as follows: “‘intestate estate’ includes any part of any estate which does not devolve by virtue of a will or in respect of which section 23 of the BAA, 1927 (Act 38 of 1927), does not apply”.

¹¹⁵ Par [6] order 2. Section 23(1) and (2) deals with the exclusion of certain property, namely house property and quitrent land – it surely was not the intention of the legislature to exclude all inheritance falling under section 23, as it would regulate the function of regulations 2(c) and (d) of GN R200 invalid. In par [6] the court discusses the application of regulation 2 with regard to foreigners in that the rule of primogeniture would also apply to them. Regulation 2(a) clearly states that “if the deceased was, during his lifetime, ordinarily resident in any territory outside the Republic other than Mozambique, all movable assets in his estate ... shall be forwarded to the officer administering the district or area in which the deceased was ordinarily resident for disposal by him.”

3.7 Conclusion

The court found that customary law had been distorted in a manner that emphasised its patriarchal features while minimising its communitarian ones.¹¹⁶ The exclusion of women and the notion of male domination were incompatible with the guarantee of equality in the Constitution and the principle of primogeniture violated the right to human dignity.¹¹⁷ The context, in which the rule of male primogeniture, which forms the basis of customary law and inheritance, had changed,¹¹⁸ did not necessarily correspond with an enforceable responsibility to support the family of the deceased. Although it was desirable to leave it to the Legislature to bring customary law in line with the Constitution, the courts had the responsibility to provide relief to parties who sought it.

¹¹⁶ Par [89].

¹¹⁷ See also par [92]-[93].

¹¹⁸ Par [80 and [91].

Chapter 4: Recent legal reform

4.1 Introduction

The Reform of Customary Law of Succession Act (hereafter referred to as the RCLSA), which came into operation on the 20th September 2010 and which introduced a new era into the customary law of intestate succession position as set out in the Bhe case confirmed. The RCLSA is not customary law in the true sense of the word. It is said in the long title that it is a “modification” of the customary law of succession, but section 2(1) emphatically provides that:

“The estate or part of the estate of any person who is subject to customary law and whose estate does not devolve in terms of that person’s will devolve in accordance with the law of intestate succession.”¹¹⁹

The RCLSA makes a few gratuitous concessions, amongst others, that women in ancillary unions may also share in the estate of the deceased man, but that does not create customary law.¹²⁰ The Act not only harmonizes the common and customary law of intestate succession, but also provides for differences depending on a person’s cultural affiliation. The South African Law Reform Commission embarked on a project of legal reform aiming amongst others, at the harmonization of the common and customary law, in this regard, the South African Law Commission published in September 1999 the *Report on the Harmonization of the Common Law and Indigenous Law: Conflicts of Laws* and in 2008, the *Report on the Customary law of Succession*.¹²¹

The customary law of succession and inheritance is complex and differs among the different African groups. The official version of customary law of succession seems to conflict the ideas of succession to status and inheritance of property, while the living customary laws gives ample evidence of distribution of property to individuals. However, the fact that the customary estate has to provide for the well-being and care of all the members still to be born as a result of cultural institution providing for substitution,

¹¹⁹ Own emphasis.

¹²⁰ Rautenbach “South African Common and Customary Law of Intestate Succession: A Question of Harmonisation, Integration or Abolition” www.ejcl.org/121/art_121-20.pdf (accessed on the 01/03/2016).

¹²¹ See also Rautenbach (2001) LLD thesis NWU 279-287; Rautenbach and Du Plessis (2003) *De Jure* 20-30 for a discussion of some of the proposal of the Commission.

should also be accounted for.¹²² Moreover, the general and house successors may be called upon at any time to perform certain rituals, which often include the slaughtering of animals and which have to be bought, on behalf of family members to effect their own and the group's continued well-being. For this reason, division of an estate into equal shares between the beneficiaries may not be regarded as fair and may well jeopardies the harmonization relationship between family members.¹²³

Nevertheless, as a result of the *Bhe* case and the proposal of the South African Law Reform of Customary law of Succession and Regulation of Related Matters Bill¹²⁴ were published in 2008.¹²⁵ The bill was finally transformed into an Act entitled the Reform of Customary Law of Succession and Regulations of Related Matters Act.¹²⁶ The Act commenced on 20 September 2010 and as it now stands, the Act has important implications for the customary law of succession and it is important to consider its provisions.¹²⁷

4.2 The preamble of the Act

The RCLSA was promulgated for the purpose of “transforming the customary law of succession by making provision for the devolution of certain property in terms of the law of intestate succession; to make clear certain matters relating to the law of succession and the law of property in relation to people subject to customary law; and to adapt certain laws in that regard”.¹²⁸

The preamble of the Act makes the following declarations: (a) “under the customary law of succession, a widow in a customary marriage whose husband dies intestate, does not enjoy sufficient protection and benefit; (b) children born out of wedlock, also do not enjoy satisfactory protection under customary law; (c) section 9(3) of the Constitution provides that everyone has the right to equal protection and benefit of the law; (d) due to a change in social circumstances,

¹²² *Bhe-case*.

¹²³ Rautenbach and Du Plessis (2003) *De Jure* 20-30.

¹²⁴ 10-2008.

¹²⁵ See GN 309 of 2008 in GG 30815 of 25 February 2008.

¹²⁶ 11 of 2009.

¹²⁷ This sec relies heavily on the authors expose of the Act in Rautenbach and Du Plesis “Law of succession” in Joubert, Faris and Church (eds) LAWSA vol 32 (2009) par (226)

¹²⁸ See the long title is the Reform of the Customary Law of Succession and Regulation of Related Matters Act 11 of 20

customary law no longer has the capacity to make suitable provision for the welfare of family members; and (e) the Constitutional Court has confirmed that the principle of male primogeniture, as applied in the customary law of succession, cannot be reconciled with the current notions of equality and human dignity as contained in the Bill of Rights”.¹²⁹

The Act provides that the whole or partial estate of any person subject to the application of customary law and who dies intestate after the commencement of the Act must be administered according to the law of intestate succession as governed by the Intestate Succession Act.¹³⁰ When applying the Intestate Succession Act to such a case – (a) if the deceased referred to in section 2(1) of the RCLSA, is survived by a spouse, as well as a successor, “the spouse must inherit a child’s share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Cabinet member responsible for the administration of justice by notice in the *Gazette*, whichever is the greater”,¹³¹ (b) if the deceased had entered into a union (in accordance with the tenets of customary law) with another women for the purpose of procreating children for his wife’s house, that women must be regarded as a descendant of the deceased , if she survives him;¹³² (c) “if the deceased was a women who was married to another woman under customary law for the purpose of providing children for the deceased’s house, that other woman must, if she survives the deceased, be regarded as a descendant of the deceased”.¹³³

4.3 Definitions in the Act

“Customary law” is now defined in the RCLSA as meaning the customs and practices traditionally observed among the indigenous African people of South Africa, which form part of the culture of those people. It is only lately that customary law came to be defined in some laws in South Africa. Just as “common law” or “Roman-Dutch law” was never defined by statute, customary law was also not defined.¹³⁴

¹²⁹ The preamble of the Act.

¹³⁰ 81 of 1987. Section 2(1).

¹³¹ Sec 2(2)(a).

¹³² Sec 2(2)(b).

¹³³ Sec 2(2)(c).

¹³⁴ Bekker *Introduction to legal pluralism in South Africa* (1989) 11-13.

4.3.1 Traditional leaders

In terms of the definition in section 1 of the RCLSA “traditional leader” means a traditional leader as defined in section 1 of the Traditional Leadership and Governance Framework Act.¹³⁵ In section 1 of the latter Act “traditional leader” means any person who, in terms of customary law of the traditional community concerned, holds a traditional leadership position and is recognised in terms of that Act.

Other definitions in the Traditional Leadership Act define the whole range of traditional Leaders, namely:

- (a) Principal traditional leader;
- (b) Regents;
- (c) Senior traditional leader;
- (d) King or queen;
- (e) Headman or headwoman.

The RCLSA does not deal with succession to traditional leadership positions. However section 6 deals with “disposition of property held by traditional leader in an official capacity”, as follows:

“Nothing in this Act is to be construed as amending any rule of customary law which regulates the disposal of the property which a traditional leader who has died held in his or her official capacity on behalf of a traditional community referred to in the Traditional Leadership and Governance Framework Act.”¹³⁶

What the drafters had in mind was probably cases where communities acquired land and had it registered in the name of the traditional leader to be held in trust for the community. The land can obviously not devolve in terms of the Intestate Succession Act.¹³⁷ It is now required to be disposed of in terms of the rule of customary law which regulates the disposal of such property. The rule is based on male primogeniture. The property would then have to pass on to the first-born son of the deceased chief’s wife, to

¹³⁵ 41 of 2003.

¹³⁶ 41 of 2003.

¹³⁷ 81 of 1987.

be held in trust for the community. The incongruity, we suggest, should be rectified by statute.

Another matter that is more important is that the RCLSA implies that a traditional leader is just an ordinary person whose property on his death passes to his common-law heirs.¹³⁸ The succession to the office and inheritance of the property are intertwined. The idea is apparently that when a traditional leader dies his successor in title is recognised by the Premier of the province concerned,¹³⁹ but his property must be turned into money and distributed among some common-law heirs, including his wife or wives in terms of the RCLSA.¹⁴⁰ This is unlikely to happen. A traditional leader's family home (homestead, if you wish to call it that) is a socio-political unit.¹⁴¹ That is where his spouses and children live. It is their home. It has no monetary value. This is the place from where he governs his nation. It would be the meeting place of the elders and the seat of the court.

The definition is so wide that even headmen are traditional leaders. There are about 1 640 traditional leaders.¹⁴² When a traditional leader dies, it is often not obvious who is to succeed him. If, for instance, he dies leaving no male offspring his wife may be engaged in an *ukungena* relationship to raise an heir. In such event the inheritance to property and succession to office may be in abeyance for many years - at least until the lineage successor reaches adulthood and is formally accepted by the royal council as successor and installed.

At any given time there are dozens of disputes about appointment, removal and settlement of disputes about traditional leaders.¹⁴³ In that regard a Commission on

¹³⁸ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).

¹³⁹ Ito sec 11 of TLGF Act 41 of 2003.

¹⁴⁰ Bekker and Koyana "The judicial and legislative reform of customary law of succession" www.dejure.up.ac.za/volums/articles (accessed on the 15/12/2015).

¹⁴¹ *Ibid.*

¹⁴² The scope of identifying the persons who hold positions in the ruling hierarchy is illustrated by the fact that according to the Department of Provincial and Local Government Report (undated) 39 there are 1 640 traditional leaders remunerated by the government. In addition, there are a number of headmen who are recognised in terms of custom but who are not accorded statutory recognition.

¹⁴³ *Tongoane v National Minister for Agriculture and Land Affairs* (CCT100/09) [2010] ZACC 10; 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC) (11 May 2010).

Traditional Leadership Disputes and Claims established by sections 21 to 26A of the Traditional Leadership and Governance Framework Act¹⁴⁴ is engaged in resolving disputes.

“Thus it was submitted the Act is not worth a straw in bringing intestate succession to traditional leaders within its ambit. It will be well-nigh impossible for them to comply.”¹⁴⁵

7.3.1 4.3.3 Descendant

“Descendant” is defined as a descendant in terms of the Intestate Succession Act,¹⁴⁶ but who, during the lifetime of the deceased person, was accepted by the deceased person in accordance with customary law as his or her own child.¹⁴⁷

This is an all-embracing provision. It is necessary to express the situation that Africans have an accommodating view in respect of children. They always “belong” to some or another person or family. The children that the legislature had in mind would include the following:¹⁴⁸

- (a) Children of a spinster – they belong to the house to which their mother belongs at her father’s family home, and so to her father or his heir.
- (b) Children of a wife – children born of, or conceived by a wife during the course of her marriage, whether legitimate or adulterine, belong to her house and so to her husband, except those conceived before the marriage. The husband may claim damages for adultery in respect of adulterine children, but that is not a matter of succession.
- (c) Children born of a widow (*ukungena* unions) – the widow of a deceased
- (d)

Persons who may enter into an *ukungena* relationship with one of her husband’s male relatives to raise children. They are legitimate and belong to her house and to her late

¹⁴⁴ 41 of 2003.

¹⁴⁵ Bekker and Koyana “The judicial and legislative reform of customary law of succession” [www.dejure.up.ac.za>volums.articles](http://www.dejure.up.ac.za/volums/articles) (accessed on the 15/12/2015).

¹⁴⁶ 81 of 1987.

¹⁴⁷ Act 11 of 2009.

¹⁴⁸ Bekker and Koyana “The judicial and legislative reform of customary law of succession” [www.dejure.up.ac.za>volums.articles](http://www.dejure.up.ac.za/volums/articles) (accessed on the 15/12/2015).

husband's heir. This poses a problem because the husband on whose behalf they were raised is dead. In the light of the unconstitutionality of the rule of primogeniture the deceased customary law heir has no status. Odd though it might seem, the children would be entitled to inherit from their mother and maybe also from their biological father, the *ukungena* partner. In terms of the Intestate Succession Act a child would be entitled to share in his or her biological father's estate.

An enquiry was recently made and it was said that these *ukungena* relationships still occur. One spokesperson added that in his community the widow may choose a consort. This has all along been done among the Xhosa who frown upon the idea of a woman being taken over by the deceased's brother or any relative; the Xhosa prefer a stranger and if the child is born "on the mat" where the widow used to sleep with the deceased, the child is legitimate and can inherit.¹⁴⁹

- (e) Children of a widow – children born of a woman from her extra-marital intercourse whether while staying at her husband's home or elsewhere, belong to her house. The husband may claim damages for adultery, but that is not an issue of succession.
- (f) Adopted children – children may be adopted in terms of customary law either by a man or a woman. Our courts have in several cases confirmed that such adoptions are valid.¹⁵⁰ As may be expected in the case of Africans, the two families must be involved and the matter must be reported to the traditional leader.
- (g) Seed raisers – to the foregoing we must add seed raisers. It is quite in accordance with custom for a man to marry a seed bearer for either of his two principal wives who¹⁵¹, owing to either death or barrenness, produces no heir. Bekker summarises these marriages as follows:¹⁵²

"In the majority of the Cape Nguni tribes, if the wife of a main house, that is, of the great or right hand house, without having borne a son, has died,

¹⁴⁹ Koyana "Customary Law in a Changing Society" 1980 83-84.

¹⁵⁰ *Kewana v Santam Insurance Company Ltd* 1993 4 SA 771 (Tka); *Metiso v Padongelukkefonds* 2001 13 SA 1142 (T).

¹⁵¹ Brownlee cited in *Yoywana v Yoywana* 1912 3 NAC 301 302.

¹⁵² Brownlee 279.

or been divorced, or has absconded and refused to return, or if it appears that she is barren, the family head may marry a new wife for the purpose of raising seed to the main house; since it is the special function of this woman to bear a heir for the house, she creates no house of her own, but is merely an auxiliary wife of the house into which she has been placed, and all her children belong to that house as if they were the children of the main wife; if the main wife has died or has been divorced, the seed-raiser takes her place in all respects.”

This should pose no problems if these unions are simply regarded as customary marriages. However, the drafters of the RCLSA misunderstood this. In terms of section 2(2)(b) of the RCLSA:

“A woman, other than the spouse of the deceased, with whom he had entered into a union in accordance with customary law for the purpose of providing children for his spouse’s house must, if she survives him, be regarded as a descendant of the deceased.”

Thus the seed raiser becomes a descendant. But section 3(1) provides that:

“For the purposes of this Act, any reference in section 1 of the Intestate Succession Act to a spouse who survived the deceased must be construed as including every spouse and every woman referred to in paragraphs (a), (b) and (c) of section 2(2) of the RCLSA. This means that a seed raiser is a descendant as well as a spouse. The anomaly is surely an oversight. The RCLSA has not yet been amended, but heads of offices of the Masters of the High Courts decided at a meeting during November 2010 that they would interpret the contradiction in the provisions of sections 2(2)(b) and (c) and section 3(1) of the RCLSA as follows:¹⁵³ “The women referred to in these sections are regarded as spouses of the deceased in terms of section 1 of the Intestate Succession Act but not as his descendants.” This conclusion was reached to ensure that the seed-raising women are placed in the best possible position, which, in this case, is being

¹⁵³ Bekker and Koyana “The judicial and legislative reform of customary law of succession” www.dejure.up.ac.za/volums/articles (accessed on the 15/12/2015).

regarded as a spouse instead as a descendant. Evidently depending on the form of the marriage, a spouse shares in the deceased estate before the residue is divided between the remaining descendants.¹⁵⁴ This may be fair, but the Act should surely be amended to make it clear what the legislature had in mind.”

There is another anomaly with regards to the seed raising unions and the application of the Intestate Succession Act in respect of the child bearers being spouses or descendants.¹⁵⁵ In a seed raising union:

- (a) A married man dies (so he is out of the picture);
- (b) His widow (a woman past childbearing age) marries another woman after paying lobola;
- (c) To provide children for her late husband.

But the late husband is dead and his estate would be finalised by the time this type of union is entered into so the female wife (the child bearer) cannot be said to be his descendant nor spouse for purposes of sharing in his estate.

In section 2(2)(c) of the Reform Act the drafters got their lines entangled. It provides that:

“(2) In the application of the Intestate Successions Act –
(c) if the deceased was a woman who was married to another woman under customary law for the purpose of providing children for the deceased’s house, that other woman must, if she survives the deceased, be regarded as a descendant of the deceased.”

Bearing that in mind we return to section 2(2)(c) of the Act. It provides that:

- (a) a deceased woman;
- (b) who was married to another woman under the customary law;

¹⁵⁴ Section 1 Intestate Succession Act 81 of 1987 read with sec 3 RCLSA. See also Rautenbach & Meyer “Lost in Translation: Is a Spouse a Spouse or a Descendant (or both) in Terms of the Reform of Customary Law of Succession and Regulation of Related Matters Act?” 2012 *TSAR* 159. The anomaly is discussed in detail in this article.

¹⁵⁵ There is another anomaly in regard to these seed raising unions and the application of the Intestate Succession Act in respect of the child bearers being spouses or descendants.

- (c) for the purpose of providing children for the deceased's house
- (d) that other woman, if she survives the deceased;
- (e) must be regarded as a descendant of the deceased.

There are rare cases of female-female marriage. They are not entered into for the main purpose of providing children for the deceased's (female husband's) house. In such cases: "Often such women are traders, political leaders, or religious leaders who seek the social recognition only husbands get".¹⁵⁶

Oomen¹⁵⁷ shows that all women-to-women marriages may fall within the ambit of the Recognition of Customary Marriages Act.¹⁵⁸ However, she fails to define "marriage". As pointed out all the ancillary unions are not marriages; only those are called "true" women to women marriage.

One would add that if all these unions were marriages the provisions of the Recognition of Customary Marriages Act¹⁵⁹ would apply to them, including patrimonial consequences as well as the rules of succession in terms of the Intestate Succession Act.¹⁶⁰ They would furthermore have to be registered.

4.3.5 Disposal of property allotted or accruing to a woman in a customary marriage

In terms of section 4(1) of the RCLSA such property may be disposed of in terms of a will. There has never been any limitation on anybody's testamentary capacity, except that in terms of section 23(a)(i) of the BAA.¹⁶¹ A family head could not dispose of:

"Movable property belonging to him and allotted by him or accruing under customary law to any woman with whom he lived in a customary marriage, or to any house, such property devolves in terms of customary law. This Act has been repealed."

Moreover, in terms of section 6 of the Recognition of Customary Marriages Act:¹⁶²

¹⁵⁶ See Krige & Comaroff "African Marriage in Southern Africa" 1981 Journal 8.

¹⁵⁷ Oomen "Traditional Woman-to-woman Marriages and the Recognition of Customary Marriages Act" 2000 *THRHR* 274.

¹⁵⁸ 120 of 1998.

¹⁵⁹ *Idem*.

¹⁶⁰ 81 of 1987.

¹⁶¹ 38 of 1927.

¹⁶² 120 of 1998.

“A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law.¹⁶³ Thus there seems to be no reason why an enactment was necessary to enable her to dispose of her own property (assets) by will. More importantly, it is unlikely that a woman would ever make a will to dispose of property allotted to her or accrued to her under customary law. Except in rare cases the property would be a family home property to be used to fulfill the needs of the inmates.”

In terms of section 7(1) and (2) of the Recognition of Customary Marriages Act:¹⁶⁴

“(1) the proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law.

(2) A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage.”

In *Gumede v The President of the Republic of South Africa*¹⁶⁵ section 7(1) was declared unconstitutional as far as it relates to monogamous customary marriages. All monogamous customary marriages entered into before the Act came into operation are, as from 8 December 2008 (the date of the judgment), in community of property and of profit and loss between the spouses. The court order has no bearing on customary marriages which had been terminated by death or by divorce before the date of the judgment. Section 7(2) was also declared unconstitutional insofar as it distinguishes between a customary marriage entered into before and after the commencement of the

¹⁶³ Act 120 of 1998.

¹⁶⁴ Ibid.

¹⁶⁵ 2009 3 SA 1521 (CC).

Act. The words “entered into after the commencement of the Act” were therefore declared unconstitutional. The patrimonial consequences of monogamous customary marriages entered into before and after the commencement of the Act, are now the same.

This means that whatever property allotted to or accrued by the wife become assets in the joint estate of the marriage in community of property. In fact the woman would have acquired the property by virtue of it being allotted to her by her husband. On the one hand one may speculate whether he, no longer being the general heir and by implication the head of the house, may distribute (allocate) property. On the other hand all the assets belonging to the spouses prior to the conclusion of the marriage as well as assets subsequently accumulated fall into the joint estate. This means that a house is a homestead allotted to a woman or something accruing to her, such as an *ubulungu* means to be pulled in the joint estate, so that she could dispose of only her share by will. All this will be preposterous in real life situations.

It must be emphasised that all monogamous customary marriages, except polygynous marriages entered into after September 2008 when the *Gumede* judgment came to apply, are in community of property. Taking all the foregoing into account we daresay that section 4(1) purporting to allow a woman to dispose of property allotted or accruing to her in a customary marriage is meaningless.

4.3.6 Disputes or uncertainty

Section 5 of the Act reads:

“If any dispute or uncertainty arises in connection with -

- (a) the status of or any claim by a person in relation to a person whose estate or part thereof must in terms of this Act, devolve in terms of the Intestate Succession Act;
- (b) the nature or content of any asset in such estate; or

(c) the devolution of family property involved in such estate, the Master may refer the dispute or uncertainty to a magistrate or traditional leader for an enquiry and recommendation.”

Such enquiry may be quite helpful, but it is observed that the heading to this section refers to “dispute or uncertainty” in consequence of the nature of customary law. This can mean that the magistrate or traditional leader may be called upon to enquire into ancillary matters such as the status of children.

Who is the magistrate going to be? It is common knowledge (which may affirm) that magistrates (judges too for that matter) are informed, if at all, about customary law and custom. Magistrates were formerly also district administrators. But they have long ago been ascribed the functions of judicial officers - only that and nothing more. One could assign to them a quasi-judicial enquiry, but to use them as advisors of another official seems misplaced.

The question can be unusual whether there are controls measures are there to protect the interests of disputing parties? Who is the alternative traditional leader going to be? There are 1640 of them at four levels. Traditional leaders normally hear disputes in council and then only in respect of members of their own communities (tribes).

This casual ruling is in my view ill-conceived. It smacks of colonial-apartheid ad hoc enquiries in which an official (mostly a commissioner) would direct what “natives” should do or not do.

There are in fact many and serious disputes about succession.¹⁶⁶ Deals with the large number and vehemence of succession disputes. Who wrote (inter alia) that:

“There was firstly an increase in inheritance disputes and secondly a decrease in the number of first-borns who had been heirs in the traditional manner (i.e. in the manner in which inheritance was customary practice. This increase in inheritance disputes is symptomatic of the heightened conflict which, inevitably occur in any

¹⁶⁶ Brandel-Syrier “First-borns and Younger Sons: Culture Change and Sibling Relations” (1980).

disturbed social system, but also of the growing tensions appearing in an impoverishing rural economy.”

4.4 Conclusion

Higgins et al¹⁶⁷ did extensive field research on the impact of the Recognition of Customary Marriages Act.¹⁶⁸ Their concluding remarks speak volumes. This is what they said about the new marriages:¹⁶⁹

“The South African Constitution is doubtlessly a victory for women in its explicit guarantees of non-discrimination on the basis of gender, sex, pregnancy, and marital status, the right to be free from both public and private violence. And the right to bodily and psychological integrity. Yet, despite the triumph of equality at the constitutional level in South Africa, marriage is often the site of women’s legal, social and sexual subordination, as well as vulnerability to domestic violence and HIV/AIDS, all of which are exacerbated by poverty.”¹⁷⁰

Following the *Bhe* decision, as of May 2006, the case had virtually no impact even on the adjudication of disputes concerning inheritance rights. Although legal services organisations had begun to conduct training sessions for lawyers and magistrates on a limited basis, many estates were still administered informally by family members or traditional leaders in rural and semi-urban communities where knowledge of the *Bhe* decision was virtually nonexistent.¹⁷¹ As a practical matter, this means that a widow’s access to her deceased husband’s home and property depends on the inclinations of the male heir. If that heir is her son, she will likely remain in her home. If the heir is another male relative, she may well be evicted from the property, particularly if she has no children of her own.

¹⁶⁷ Higgins, Fenrich & Tanzer “Gender Equality and Customary Marriage: Bargaining in the Shadow of Post-apartheid Legal-Pluralism” 2007 *Fordham Int LJ* 1651.

¹⁶⁸ 120 of 1998.

¹⁶⁹ Higgins, Fenrich & Tanzer (2007) 1654.

¹⁷⁰ *Ibid* 1696.

¹⁷¹ Bekker and Koyana “The judicial and legislative reform of customary law of succession” www.dejure.up.ac.za/volumes/articles (accessed on the 15/12/2015).

Enquiries have been made in various rural villages confirm that to date there is no evidence of even the slightest change in the status quo.¹⁷² No wonder it is so angered by the Bill that paved the way to the RCLSA, the Congress of Traditional Leaders of South Africa through its Secretary, Adv. Mwelo Nonkonyana, publicly vowed “to fight this immoral law”.¹⁷³

The essence of the matter is that the customary law of succession has been abolished all but in name, but no account was taken of the social and monetary circumstances of the vast number of Africans that will have to live with the new law in years to come.¹⁷⁴ Admittedly in urban areas some women and children will benefit. Even for them it may be a mixed benefit. The observation is that even in urban areas family members are exasperated when they learn that their family homes are no longer family homes, but assets in an estate. From its conversion into money to be distributed among heirs, they will get a mere pittance. The major problem is that formal, common law equality cannot without more ado be replicated in the customary law system.

¹⁷² *Ibid.*

¹⁷³ Daily Dispatch (2009-08-23).

¹⁷⁴ South African law Commission “Report on the Customary Law of Succession” www.justice.gov.za/salrc/reports_... (accessed 16/12/2015).

Chapter 5: Has the law of our time evolved sufficiently to protect women and female children currently living under customary law?

5.1 Introduction

Despite the static image that the law of succession often projects, it is a vibrant area of law that has undergone dramatic changes in recent times and will continue to do so even in the future.¹⁷⁵ These dramatic changes, necessitated by Constitutional demands of equality and human dignity as well as socio-economic and legal realities regarding the devolution of a deceased estate and deceased estate liability for spousal maintenance claims, were predicted shortly after the advent of South Africa's democratic constitutional dispensation.¹⁷⁶ With regards to customary law it becomes even more challenging to give legal shape to the law of inheritance, but the law of succession is at the forefront of Constitutional development.

5.2 Change in legislation

Customary law was initially tolerated by the Colonialists for their own reasons. The first interference with customary law came with the introduction of the Black Administration Act in 1927. Section 23 of the Act allowed the Minister to issue regulations pertaining to marriages and inheritance by way of regulation. In 1987, regulations were promulgated dealing with the application of both the Intestate Succession Act and customary law in the administration of intestate estates.

The application of the regulations created problems when the deceased was either not married in terms of either civil or customary law, or when the customary law marriage or cohabitation of the deceased and his common law wife were not recognised. In many instances where a distant male family member inherits, female descendants find themselves, in the words of Bennett,¹⁷⁷ in a desperate position. In many instances, the Magistrates' literal application of the regulations results in leaving women destitute as the male heir appointed in terms of customary law no longer adheres to his customary duty of maintenance towards the other family members. A society where family members work together and respect and maintain each other, no longer exists in the

¹⁷⁵ Jamneck "The problematic practical application of Sec 1(6) and 1(7) of the Intestate Succession Act under a new dispensation" (accessed 04/03/2016).

¹⁷⁶ Du Toit "The Constitutional family in the law of succession" <https://repository.uwc.ac.za/handle> (accessed on the 15/09/2015).

¹⁷⁷ Bennett *Human Rights and African Customary Law* (1995) 126.

urban areas and sometimes even in the rural areas.¹⁷⁸ The rule of primogeniture is based on the premise that the heir succeeds into the place of the deceased *qua* all his responsibilities and duties. If the current society does not reflect the values that customary law is based on, should a rule be allowed to continue or should provision for differentiation be made? If the maintenance rule is no longer applied in customary law, then the application of the regulations no longer has a place in South African law – the law should reflect reality.

The main aim of the courts in *Bhe* and *Shibi* was to ensure that the female family members (in this instance two daughters and a sister) could inherit. This was achieved by declaring certain sections of the Black Administration Act and certain regulations unconstitutional. The courts were, however, still reluctant to declare the rule of primogeniture directly unconstitutional. Although one might differ from the argumentation of the court in this regard, the outcome of the two decisions resulted in a just and equitable decision for the parties before the court.¹⁷⁹

The South African Law Commission proposed legislation in this regard some time ago. Nothing has happened since. To address the plight of many women and other heirs, it may be necessary to expedite the law reform in this regard; otherwise the courts will continue declaring the Acts and regulations unconstitutional without any real effect. The sooner magistrates and other administrators of deceased estates have certainty as to how to apply their minds to customary law estates, the sooner the effect of the Constitution may be realised in the lives of the people who need it most.¹⁸⁰

5.3 Concluding remarks

The decision in *Bhe v The Magistrate, Khayelitsha*¹⁸¹ marked a positive turning point in customary law reforms in South Africa. It not only hastened these reforms, but it also shaped public debate and constitutional challenges of customary law's compatibility with the South African Bill of Rights.¹⁸² South Africa practises a mixed legal system,

¹⁷⁸ Bennett *Human Rights and African Customary Law* 6.

¹⁷⁹ International Journal of the Humanities Volume 2, Number 1 Article: HC04-0079-2004.

¹⁸⁰ *Ibid.*

¹⁸¹ *Bhe & Others v Magistrate, Khayelitsha, & Others* (Commission for Gender Equality as amicus curiae); *Shibi v Sithole & Others*; South African Human Rights Commission & Another v President of the Republic of South Africa & Another [2004] ZACC 17; 2005 (1) SA 580 (CC) (Bhe).

¹⁸² The *Bhe* case and law reform in South Africa are discussed in part 3 of the article.

comprising of indigenous law and laws inherited from the Dutch and the British as previously mentioned. Its customary law reforms were mainly prompted by the historical injustices occasioned by colonial rule and apartheid, during which customary law was not taken seriously.¹⁸³ Sections 30, 31 and 185 of the 1996 Constitution provide for the right to culture and cultural life, upon which customary law is founded. Section 211(3) states:

‘The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.’
Furthermore, section 39(2), the second limb of the Constitution’s interpretation clause, outlines the duty of courts ‘when developing the common law or customary law’.

Law reform in South Africa, primarily, is the duty of the South African Law Reform Commission (SALRC).¹⁸⁴ However, the courts, the Ministry of Rural Development and Land Reform¹⁸⁵ and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities¹⁸⁶ also engage in activities related to customary law reforms. For example, the Commission on Restitution of Land Rights works closely with parliament and civil society groups to reverse the legacy of the 1913 Natives Land Act.¹⁸⁷ Although most of the SALRC’s successes in reforming the customary law of succession came after the end of apartheid in 1994, it had done significant work before that period. For example, it was instrumental in the promulgation of the Intestate Succession Act 81 of 1987. This Act codified the common law of intestate succession and the customary law of succession applicable to black South Africans living in rural areas. The SALRC also played a role in the enactment of the Law of Succession Amendment Act 43 of 1992, which made fundamental changes to the Intestate Succession Act of 1987 and the Wills Act of 1953. Since the end of apartheid and the adoption of new Constitutions in 1994 and 1996 respectively, the SALRC’s work has accelerated. It investigated the intersection of inheritance with customary

¹⁸³TW Bennett ‘Legal pluralism and the family in South Africa: Lessons from customary law reform’ (2011) 25 *Emory International Law Review* 1029-1035.

¹⁸⁴ South African Law Reform Commission Act 19 of 1973.

¹⁸⁵ The Ministry’s website is <http://www.dla.gov.za/>.

¹⁸⁶ Sec 185 South African Constitution.

¹⁸⁷ See Commission on Restitution of Land Rights Annual Report 2013/2014.

marriages,¹⁸⁸ which led to the adoption of the Recognition of Customary Marriages Act.¹⁸⁹ Furthermore, it investigated the possible harmonisation of the common law of succession and the customary law of succession with values in the Constitution's Bill of Rights.¹⁹⁰ In order to examine issues arising from this harmonisation, it launched Project 90 and called for public debate.¹⁹¹ Oral and written submissions were made by individuals, the judiciary, traditional leaders, the Ministry of Justice, civil society, community-based organisations and the academia. Such was the massive interest it generated that parliament introduced a Customary Law of Succession Amendment Bill to extend the general common law of succession to all South Africans. Following opposition from traditional leaders, the Bill was withdrawn and the matter was referred for public debate to the SALRC. In recognising the tension between constitutional values and the changing social realities of the male primogeniture rule, the SALRC considered two key issues:

- (a) Should the customary law of succession be abolished in favour of a single legal regime that would eliminate any sense of racial discrimination and promote national unity?
- (b) Should the customary law of succession be retained with little modifications but made compatible with the Constitution?

The SALRC unanimously found that, in order not to contravene constitutional values, the customary law of succession must not prejudice widows, daughters and younger male children. In April 2004, it published its report, attaching a draft Bill on reforming the customary law of succession.¹⁹² The Bill, later revised, sought to provide for the devolution of certain property in line with the customary law of intestate succession; the disposition of house property by will; the protection of property rights in customary marriages; an amendment of the Intestate Succession Act to protect the rights of younger male children; and an amendment of the Maintenance of Surviving Spouses

¹⁸⁸ SALRC Report on Customary Law of Succession (2004); SALRC Report on Customary Marriages (1998).

¹⁸⁹ Recognition of Customary Marriages Act 120 of 1998, adopted 15 November 2000.

¹⁹⁰ SALRC Harmonisation of the common law and indigenous law (1999); SALRC Report on Customary Law of Succession (2004).

¹⁹¹ SALRC Report: Customary Law: Succession Discussion (2000); SALRC Report: Customary Law: Administration of Estates (2001).

¹⁹² SALRC Report on Customary Law of Succession (2004).

Act of 1990 to enable wives in customary marriages to make claims for maintenance. On 21 April 2009, parliament approved these findings by passing the RCLSA.¹⁹³

The passing of the RCLSA reveals how South African courts complement the SALRC in reforming the customary law of succession. In two cases¹⁹⁴ the Cape High Court and the Pretoria High Court declared as unconstitutional provisions of the BAA and section 1(4) of the Intestate Succession Act, which relate to the male primogeniture rule. In the *Bhe* case, two minor children born from an extra-marital union had failed to qualify as heirs in the intestate estate of their deceased father under the system of intestate succession created by section 23 of the Black Administration Act and its regulations. According to these provisions, the estate was to be distributed according to 'black law and custom'. For similar reasons, in the *Shibi* case, Ms Shibi was prevented from inheriting the estate of her deceased brother. When these two cases were brought to the South African Constitutional Court for confirmation of the orders of the High Court, they were consolidated with a third application. This application was brought jointly by the South African Human Rights Commission and the Women's Legal Centre Trust, seeking to invalidate section 23 of the Black Administration Act or, alternatively, portions of it.¹⁹⁵ The Constitutional Court found that, due to socio-economic changes, heirs often do not reside with the entire extended family and succession of the heir to the assets of the deceased does not necessarily correspond in practice with an enforceable responsibility to provide support and maintenance to the family and dependents of the deceased.

It struck down section 23 of the BAA and section 1(4)(b) of the Intestate Succession Act 81 of 1987 for infringing the rights to equality and human dignity. It declared *inter alia*:¹⁹⁶

The rule of male primogeniture as it applies in customary law to the inheritance of property is declared to be inconsistent with the Constitution and invalid to the

¹⁹³ Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

¹⁹⁴ *Bhe & Others v The Magistrate, Khayelitsha & Others* 2004 (2) SA 544 (C) and *Shibi v Sithole and Minister for Justice and Constitutional Development* Case 7292/01, 19 November 2003 (unreported).

¹⁹⁵ The portions are secs 23(1), (2) & (6). The Commission for Gender Equality acted as *amicus curiae* in the matter.

¹⁹⁶ *Bhe* para 136. The majority judgment was delivered by the then Deputy Chief Justice, Langa DCJ. Chaskalson CJ (as he then was), Madala J, Mokgoro J, Moseneke J, O'Regan J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J concurred in the judgment of Langa DCJ.

extent that it excludes or hinders women and extra-marital children from inheriting property.

The majority judgment's restriction of the unconstitutionality of the male primogeniture rule to inheritance marked its departure from the minority judgment. Delivered by Ngcobo J, the minority judgment opted to develop customary law by simply removing the reference to 'a male' in the impugned legislation so as to allow women to succeed to the intestate estate of deceased persons. Ngcobo J based his reasoning on the courts' duty to develop customary law in line with the Bill of Rights.¹⁹⁷

The importance of the *Bhe* decision is two-fold: The first is the impetus it gave to law reform in South Africa as, following the judgment, parliament passed the RCLSA. The second is the insight it gives into the unsuitability of the male primogeniture rule in modern conditions. Quoting the views of the SALRC, the Constitutional Court observed as follows:¹⁹⁸

The application of the customary law rules of succession in circumstances vastly different from their traditional setting caused much hardship. Widows were often kept on at the deceased's homestead on sufferance or simply evicted. They then faced the prospect of having to rear their children with no support from the deceased husband's family.

South Africa's reforms recognise that social circumstances have so changed that the customary law of succession no longer provides adequately for widows, female children, younger male children and children born out of wedlock.

¹⁹⁷ *Bhe* (n 1 above) paras 222 & 239. Ngcobo J's approach was based on the foundational value of human dignity (ubuntu), and favoured the status of women in other areas, such as succession to traditional leadership.

¹⁹⁸ *Bhe* (n 1 above) paras 82 & 83.

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VI. List of Abbreviations

BAA	Black Administration Act
RCLSA	Reform of Customary Law of Succession Act
Par	paragraph(s)
S	section(s)
SALC	South African Law Commission

SALRC South African Law Reform Commission

Subs subsection(s)