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FACULTY OF LAW

**Reform of customary law of succession with specific reference to
gender equality**

A research paper submitted in partial fulfilment of the requirements for the LLM Degree
in Constitutional and Administrative Law, University of Pretoria, South Africa

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Declaration

I, Nozizwe Aletta Magagula, declare that this Dissertation which is hereby submitted for the award of Legumes Magister (LLM) in Constitutional and Administrative Law under the topic, **Reform of customary law of succession with specific reference to gender equality**, is my own work. It has not been previously submitted for the award of a degree at this or any other tertiary institution. All the sources I have used or quoted have been indicated and acknowledged by means of complete references.

Signed

.....

NA Magagula

April 2019

Pretoria

South Africa

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Abstract

The traditional customary law is concerned with the preservation and continuation of the family name and unity within the household, with the successor succeeding to both the status of the family head and inheritance. One of the principles that forms part of the DNA of the traditional customary law of succession, is the patriarchal rule of male primogeniture, which roots for the eldest sons as successors. This rule became part of the statutory law such as the Black Administration Act. Women and younger girls were thereby explicitly disregarded in the issues of intestate succession. This rule was declared invalid and unconstitutional by the Constitutional Court in *Bhe v Magistrate, Khayelitsha* as it is in conflict with the provisions of the Constitution. The Court constructed its decision around the fact that the primogeniture rule precluded widows from inheriting intestate from their deceased husbands' estates, daughters, younger male children as well as extra-marital children from inheriting from their deceased fathers' estates. The Court then gave the legislature the mandate of enacting legislation that will align the traditional customary law with the Constitution.

It is then that the Reform of Customary Law of Succession and Related Matters Act (hereinafter RCLSA) was introduced, so as to deal with certain aspects that the Intestate Succession Act failed to attend to. Whether or not the RCLSA is legislation that specifically deals with the living African customary law of intestate succession and protects the rights of women and female children is the main objective of this research.

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CHAPTER 1: INTRODUCTION

1.1 Background

The **law of succession** is a branch of private law which governs what is to happen to a person's estate or eligible assets after his or her death.¹ 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.

In the common law of succession, inheritance concerns the division of assets of a deceased among his or her heirs as well as assists in identifying who such heirs are.² The division of property can take place in terms of the provisions of a will namely, testate succession or according to the rules of law which determine who a person's heirs or beneficiaries are and their respective shares where no will exists namely, intestate succession.³

This brings me to customary law of succession. The topic at hand warrants the need to define customary law, which forms the basis for the discussion. Customary law in South Africa is defined as "the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those people".⁴ The term "custom" refers to the traditions, practices, moral or ethical codes and rules for living that are adhered to by members of the community. The customs of an African community are well known by every member of the community as they are passed down from generation to generation by the older members of the group to the younger ones.⁵ The customs are passed down by means of emblems, legends, songs and poems. Therefore, the earliest sources of this

¹ Himonga (*et al*) *Post-Apartheid and Living Law Perspectives* (2014) 159. The definitions of testate and intestate succession, mentioned above, are also included in pages 158-159.

² Rautenbach, Du Plessis and Venter "Law of succession and inheritance" in Bekker, Rautenbach and Goolam *Introduction to legal pluralism in South Africa* (2006) 93.

³ See further the Intestate Succession Act 81 of 1987 at s 1(4)(b) which provides as follows: "**intestate estate**' includes any part of an estate which does not devolve by virtue of a will or in respect of which s 23 of the Black Administration Act 38 of 1927, does not apply;" S 23 of the Black Administration Act will be dealt with in detail below.

⁴ S 1 of the Recognition of Customary Marriages Act 120 of 1998.

⁵ Moodley *The customary law of succession* (2012) Unpublished LLD thesis UNISA 7.

particular law are difficult to trace due to the fact that they are not codified. African customary law is essentially an unwritten law and the terms “customs” and “customary law” are often interchangeable. It is common cause that the particular customary law, must be living customary law,⁶ that is, the law that is applied by indigenous people. As opposed to official customary law, which is the customary law that is found in legislation and precedents set by our courts. The difference between these two concepts needs to be kept in mind throughout this paper.

The traditional customary law of succession is concerned with the preservation and continuation of the family name and unity within the household,⁷ with the successor succeeding to both the status and inheritance of the deceased person. The successor is also responsible for maintaining the duties and obligations of the deceased. That is, the successor has to ensure that everyone for whom the deceased was liable, is maintained. Also, should the debts of the deceased exceed the estate of the deceased, the successor will also be liable for the settlement thereof.⁸ The customary law of succession makes a distinction between succession and inheritance. Inheritance relates to the acquisition of the deceased person’s property and eligible assets or part thereof. On the other hand, succession in customary law relates to the acquisition of the status of the deceased. The successor acquires the rights, duties and obligations of the person he or she succeeds.⁹ This enabled the successor to divide property between family members.

The customary law was guided by the patriarchal principle of male primogeniture which implied that women and girls could never succeed to status of the deceased head of the family as succession is by males through males. This rule became part of statutory law such as the Black Administration Act¹⁰ (hereafter BAA). In terms of the provisions in this Act, the discrimination against women and female children was allowed and the Act explicitly precluded women and female children to inherit on equal

⁶ This law is often in conflict with the official customary law that is applied by the State courts or entrenched in legislation. The Constitutional Court increasingly takes cognisance of living customary law. See *Bhe v Magistrate, Khayelitsha and Others* (Commission for Gender Equality as Amicus Curiae); *Shibi v Sithole and Others*; *South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) BCLR 1 (CC).

⁷ See Himonga (*et al*) 159 for the definition of the customary law of succession.

⁸ Himonga (*et al*) 159.

⁹ Himonga (*et al*) 164.

¹⁰ Black Administration Act 38 of 1927 (hereinafter referred to as the BAA).

footing with males. Women and female children could not inherit in terms of the said legislation as well as the male primogeniture rule. This is how gender inequality continued to thrive. However, this rule was declared unconstitutional by the Constitutional Court in *Bhe v Magistrate, Khayelitsha*¹¹ (hereafter *Bhe* case). The Court highlighted the fact that the context in which the male primogeniture rule is applied has changed drastically and should be interrogated.¹² The Court therefore, constructed its decision around the fact that the primogeniture rule precluded widows from inheriting intestate from their deceased husbands' estates, daughters, younger male children as well as extra-marital children from inheriting from their deceased fathers' estates.¹³ These exclusions cannot hold as they are in conflict with provisions of the Constitution. They violate section 9(3) which opposes gender discrimination and guarantees the right to equality, section 10 which guarantees the inherent right to dignity,¹⁴ as well as section 28 which deals with children's rights.¹⁵ For these reasons, the Court ruled that the current application of traditional customary law was invalid and unconstitutional.

1.2 Problem statement

The present constitutional order was introduced in 1994 when the interim Constitution¹⁶ entered into force. Three years after that, the 1996 Constitution¹⁷ came into effect. Section 2 of the Constitution provides that "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations

¹¹ *Bhe and Others v Magistrate, Khayelitsha and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC).

¹² The Court stated the following: "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 dependants and descendants. He often simply acquires the status without assuming or even being in a position to assume any of the deceased's responsibilities". *Ibid* at para 80.

¹³ *Ibid* 187.

¹⁴ S 10 of the Constitution provides that: "Everyone has inherent dignity and the right to have their dignity respected and protected".

¹⁵ S 28(2) provides that "a child's best interests are of paramount importance in every matter concerning the child".

¹⁶ Interim Constitution of the Republic of South Africa, 1993.

¹⁷ The Constitution of the Republic of South Africa, 1996.

imposed by it must be fulfilled”. This means that the Constitution is the highest law of the land and takes precedence over any law that is in conflict with it. Our Constitution also celebrates the diversity of our nation and aims to put measures in place that protect and promote equality.¹⁸ One of the ways in terms of which this is sought to be achieved is by the provision stated in section 211(3) of the Constitution. This section provides that customary law must be applied whenever it is applicable, subject to the limitation(s) brought about by the Constitution and/or any legislation that specifically deals with that law.

Provisions of the Constitution that are contrary to the discrimination of women and children are as follows: Section 9(1) guarantees equality of treatment before the law. Sections 9(3) and (4) spells out instances where unfair discrimination is prohibited. Section 10 specifies that everyone has inherent dignity and the right to have their dignity respected and protected. And finally, section 28 of the Constitution champions the protection of children’s rights. These provisions highlight the need to develop customary law provisions that are discriminatory, so as to align them with the provisions of the Constitution.¹⁹

Examples of customary law that are often cited as practised that may be found to be in conflict with the above rights include *lobolo*, polygamy, *ukuthwala* as well as succession to traditional status or office. Among these principles, a principle that underlies African customary law of succession is the rule of male primogeniture. According to this rule, the eldest son of the family head is the only person eligible to succeed the deceased, failing him, the eldest son’s eldest male descendant.²⁰ If the eldest son dies without leaving a male issue, the next son, or his eldest male

¹⁸ S 9 of the Constitution provides that:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken...

¹⁹ See s 39(2) of the Constitution, which requires that all legislation, common law and customary law be interpreted and developed according to the spirit, purport and objects of the Bill of Rights.

²⁰ See *Mthembu v Letsela* 2000(3) SA 867 (SCA) para 18: Where the eldest son has predeceased the family head *without* leaving male issue the second son becomes heir, if he be dead leaving no male issue the third son succeeds and so on through the sons of the family head. Where the family head dies leaving no male issue, his father succeeds. See further Rautenbach and Bekker *Introduction to Legal Pluralism* (2014) 4th ed 175.

descendant inherits.²¹ The order of succession considered the principles of succession through death, primogeniture and succession by males in the male line.²²

This meant that women, girls, younger siblings as well as extra-marital children are excluded from succeeding to positions of importance (family head) or permitted to inherit property purely on the basis of their gender, legitimacy status or birth. This notion endorsed male domination while leading to gross discrimination against women and children. The basis of this was that women were deemed to be minors who were under the care and authority of their fathers before they got married, and thereafter, they were deemed to be under the upkeep of their husbands, or alternatively, their husbands' successors.²³ Only male persons were eligible to succeed to positions of status. These practices are now deemed to be in conflict with the new constitutional order of South Africa as the Constitution makes provision for the development of customary law in order for those particular customs to be in line with Constitution.²⁴

Declaring the male primogeniture rule invalid and unconstitutional was the first step done by the Court in the *Bhe* case. The Court further stated that estates that would previously have been devolved according to the customary law of intestate succession, would be governed by the provisions of the Intestate Succession Act.²⁵ The Intestate Succession Act was already applicable to the intestate estate of the rest of the South African population who were under common law. This Act, however, does not make provisions for the fact that "African customary law is a community-based system of law"²⁶ and that an African traditional family may consist of more than one nuclear family due to the polygamous nature of the customary law. It was up to the legislature to align the traditional customary law of intestate succession with the precepts of the Constitution.

The Intestate Succession Act was designed to cater to a specific group of people whose needs were entirely dissimilar from those of traditional African communities.

²¹ *Sonti v Sonti* 1929 NAC (C&O) 23 at 24.

²² Rautenbach and Bekker 173.

²³ *Ibid* 29.

²⁴ See s 211 of the Constitution.

²⁵ Act 81 of 1987.

²⁶ 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.

It is then that the Reform of Customary Law of Succession and Related Matters Act²⁷ (hereafter RCLSA) was introduced, so as to deal with certain aspects that the Intestate Succession Act failed to attend to. Whether or not the RCLSA is legislation that specifically deals with the living African customary law of intestate succession and protects the rights of women and female children, is the main question in this research paper and will be elaborated on below.

To this end, this research will critically evaluate whether the current legislation does enough to protect and promote the equality rights of women and female children who are living under customary law. This will be followed by a suggestion regarding what can be done to further the application of the current legislation, thereby ensuring education regarding the provisions of the RCLSA,

1.3 Aim of the study

The ultimate aim of this research paper is to critically evaluate the current legislation concerning the issue of intestate succession specifically relating to people living and practicing the customary law and whether it is sufficient to protect the rights of women and female children. The shortcomings in the current legislation will be identified and recommendations will be made.

1.4 Outline of the study

In the second chapter, I will look at the nature and characteristics of the traditional customary law of succession, which was centred around the principle of male primogeniture and what that meant for especially women and female children. I will highlight how this principle (male primogeniture) perpetuated discrimination and inequality. This principle was “customary” and therefore deemed acceptable.

This will be followed by a discussion of the way in which the traditional customary law of succession was developed and recognised as law. In this chapter, the historic development of customary law and recognition thereof will be traced as well as the due recognition given to customary law. I will also outline sections in the Constitution

²⁷ Act 11 of 2009.

that promote the alignment of the traditional customary law of intestate succession with provisions enshrined in the Constitution. One of those sections is the equality clause in section 9. Equality is one of the core values expressed in the Constitution.²⁸ The right to such equality ought to be interpreted in light of the Constitution. Due to the apartheid background of South Africa, the enforcement, as well as realisation of the right to equality, is paramount. The new constitutional order focuses on remedying the errors of the past and demonstrate that a bridge can be built, that will amalgamate a society that was once divided. Section 9 of the Constitution encompasses the first substantive right in the Constitution.

Moreover, this chapter will show how the Constitutional Court in *Bhe and Others v Magistrate, Khayelitsha and Others*, placed the traditional customary law of succession in line with the Constitution by developing it in terms of section 211 of the Constitution. One of the ways in terms of which this is sought to be achieved is by the provision stated in section 211(3) of the Constitution. This section provides that “customary law must be applied whenever it is applicable, subject to the limitation(s) brought about by the Constitution and/or any legislation that specifically deals with that law”. In addition to the above, I will then highlight the changes brought on by the case, where the Constitutional Court heard three cases simultaneously since they all dealt with issues of the customary law of intestate succession. In the first case, Ms. Bhe applied on behalf of her minor daughters for an order that declared the principle of male primogeniture inconsistent with the Constitution, so as to enable her daughters to inherit intestate from their father’s estate. In the second case, Ms. Shibi also applied for an order invalidating the rule of male primogeniture after she was barred from inheriting from her deceased brother’s intestate estate. The deceased was not married and did not have dependents. In the third case, the South African Human Rights Commission, and the Women’s Legal Centre Trust brought an application for direct access to the Constitutional Court. This application was in order to conduct public interest litigation to advocate for and advance the rights of women.

²⁸ S 1(a) of the Constitution provides that “The Republic of South Africa is one, sovereign, democratic state founded on the following values (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.” S 7(1) of the Constitution further states that: “This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values human dignity, equality and freedom”.

Finally, chapter 4 of the paper will examine some of the changes brought about by the Reform of Customary law of Succession and Regulated Matters Act²⁹ (hereafter referred to as RCLSA) to the application of the customary law of succession, specifically, intestate succession. Prior to the enactment of this legislation, the devolution and administration of the intestate estates of customary law were regulated by the Court's decision in the *Bhe* case. The Court instructed the legislature to enact legislation relating to customary law, while ruling that, until the legislature does that, the estates would be administered in terms of the Intestate Succession Act. The RCLSA however, sought to make changes including but not limited to the following: The meaning of 'descendant'³⁰ was extended to include dependants, a woman other than the spouse, but who was also part of the union for the sole purpose of providing children for the spouse's house (such a woman was regarded as a descendant);³¹ a woman who married another woman under customary law for the purpose of providing children for the deceased's house was also regarded as a descendant.³² The term 'spouse' now include a partner in a customary marriage that is recognised in terms of section 2 of the Recognition of Customary Marriages Act.³³

The most important modification is that the estate or part of the estate of any person who is subject to customary law and who dies intestate is to devolve in accordance with the Intestate Succession Act.³⁴ Where the deceased is survived by a spouse as well as a descendant, such a spouse is entitled to a **child's portion** of the intestate estate or so much as does not exceed in value the amount fixed by Minister, whichever is greater.

A conclusion and recommendations will follow in Chapter 5. Based on the case law, legislation and literature mentioned in this paper, I aim to add to the ongoing academic discourse relating to the possibility or impossibility of developing practices of the customary law of succession without, annihilating or diluting customary law completely. And to try and answer the following questions: whether the RCLSA addresses equality? If it does, why is the traditional customary law still practised?

²⁹ Act 11 of 2009.

³⁰ S 1.

³¹ S 2(2)(b).

³² S 2(2)(c).

³³ S 1.

³⁴ S 2(1).

1.5 Methodology

The methodology that will be used for this legal research is a desktop methodology, wherein I will research and analyse the law relating to the present topic. It will not include interviews or generating numerical data.

The approach that will be used will be a combination of a historical approach, where I will look at the impact and effect of the new constitutional order on the customary law of intestate succession. In order to determine what the RCLSA has on the customary law of succession, the customary law must first be placed in its historical context. Secondly, this study attempts to determine whether the old and current legislation regulating the customary law of intestate succession have been effective, and if so, to what extent.

In addition to the use of a historical approach, a comparative approach will be utilised. The research will be comparing and analysing legislation that was used to deal with customary law of intestate succession matters prior to the promulgation of the RCLSA, as well as the relief brought about by the RCLSA. The paper will also be comparing law of succession and customary law of succession.

CHAPTER 2: NATURE AND CHARACTERISTICS OF THE TRADITIONAL CUSTOMARY LAW OF SUCCESSION

2.1 Introduction

In this chapter, I will look at the characteristics of the traditional customary law of succession as it was practiced prior to the constitutional changes that were affected by the promulgation of the Constitution itself. What should be borne in mind in this chapter is what was stated by Himonga (*et al*)³⁵ as follows:

“...much of what state courts presented and applied as customary law was different from the customary practices that governed African people’s relationships in their day-to-day lives. It should be stressed that while African societies and their legal systems were neither static nor ‘pure’, colonialism with its capitalist economy, urbanisation and the consequent social changes accelerated much of the process of the ‘invention’ of customary law.”

What Himonga was trying to bring to our attention with the above-mentioned quotation, is the fact the customary law cases that were brought to the attention of our courts, was not necessarily the customary law that was practiced. That is, ‘official customary law’ is different from ‘living customary law’. The two concepts will be elucidated below.

2.2 Traditional customary law definition

As mentioned previously, customary law is defined by the Recognition of Customary Marriages Act³⁶ as “...customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples”. The term “customary law” includes various customs and practices of the indigenous African people of South Africa, which are largely uncodified, even though there are enough common features within the different cultural practices of the

³⁵ Himonga (*et al*) 25.

³⁶ S 1 of RCMA.

different customs of the people.³⁷ What is important is that there are enough similarities within the different culture in order for them to be discussed together, especially when it comes to marriages and succession.

Customary law has also been divided by various authors into official customary law and living customary law. The former is defined as the law that is applied by the courts and other institutions. These include but are not limited to the Natal Code of Zulu Law³⁸ and the KwaZulu Act on the Code of Zulu Law³⁹. This system rarely represents the customary law of the people it is supposed to represent.⁴⁰ The latter was defined by Himonga (*et al*), who said it involves customary practices that are not codified yet adhered to people on a daily basis.⁴¹ This means that the custom should have relatively widespread practice in order for it to be regarded as living customary law. It is for this reason that the living customary law is referred to as ‘...the original customs and usages in constant development’.⁴² The Constitutional Court in *Shilubana v Nwamitwa*⁴³ said that customary law is “adaptive by its very nature and by definition, change is intrinsic to and can be invigorating of customary law”.⁴⁴ Also, the minority judgment in the *Bhe* case said living customary law is a “dynamic system of law which is continually evolving to meet the changing circumstances of the community in which

³⁷ See further Rautenbach and Bekker 18-24. They are of the view that the s 1 definition of customary law is “void of meaning, unless one knows (a) what the relevant customs and usages are; (b) who the indigenous people are; and (c) what their culture is.”

³⁸ Proc R151 of 1987.

³⁹ KwaZulu Act 16 of 1985.

⁴⁰ See Himonga (*et al*) 33-34 where the author reiterated the fact that living customary law and official customary law continue to co-exist. According to the authors, official customary was nothing but an official code for the governance of Africans by the colonial state and capital. They continued to highlight the following factors that they identified to have contributed to the emergence of official customary law:

1. The treatment by the state courts of customary law as a fact that had to be proved in every case, as well as the inevitable use of oral methods of proving living customary law in the courts;
2. The ignorance of the officials of state courts about the content and nature of customary law;
3. The use of precedent and academic literature as sources of customary law
4. The codification of customary law
5. The quest for legal certainty in the norms of customary law as sources of law
6. The use of the repugnancy clause which had the effect of changing existing customary law to suit official requirements.

⁴¹ See Himonga (*et al*) 27.

⁴² Himonga (*et al*) 27. See further Bekker and Rautenbach ‘Nature and sphere of application of African customary law in South Africa’ in Rautenbach, Bekker and Goolam *Introduction to Legal Pluralism* (2010) 3rd ed 15-43.

⁴³ (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC) (4 June 2008).

⁴⁴ *Ibid* at para 54.

it operates”.⁴⁵ So, not only is living customary law adaptive but it will continue to evolve so as to maintain compatibility with our Constitution.⁴⁶

2.3 General characteristics of traditional customary law

Before one can expand on the principles of the traditional customary law of succession, one needs to outline the characteristics of traditional customary law in general. These are the blueprint of traditional customary law as it was practised.

These were well enunciated by Moodley⁴⁷ in her LLD thesis. It is a known fact that customary law was generally unwritten. This was evidenced by the fact that the proceedings of tribal courts were conducted orally and thereafter conveyed verbally from generation to generation. And this resulted in the majority of the community having a basic understanding of the laws and rules that were prevalent in that particular community.

Secondly, the practices and moral or ethical codes within the community were adhered to by all members of that community.⁴⁸ This meant that the practices had to be known by all members of the community in order for them to be obeyed. Part of the reason the practices were strictly adhered to was because of the fear of being punished by those in authority, or even more terrifying, the fear of being chastised by the ancestors.⁴⁹ The continued application and endorsement of these practices by the community will result in the practices developing into what is termed customary law. That is why oftentimes the terms customs and customary law are interchangeable.

The traditional African family is potentially polygamous in nature. Polygamy is the general term for marriages with more than one spouse simultaneously. Polygamy is divided into two, polygyny and polyandry. The former relates to the customary marriage of one man to more than one wife. While the latter relates to the customary

⁴⁵ Para 153.

⁴⁶ This was echoed by the court in *Alexkor Ltd and Another v Richtersveld Community and Others* 2004(5) SA 460 (CC) para 53. Himonga (et al) 31 elaborates the evolving nature of living customary law as follows: “The evolving characteristic of customary law means that its rules change in an unregulated manner with new rules emerging and old norms ceasing to be observed. The changes may be gradual, rapid or instant, depending on, for example, the pace of social, economic or political change in society”.

⁴⁷ Moodley *The customary law of succession* 6.

⁴⁸ *Ibid* 7. See further Gluckman *Order and rebellion in tribal Africa* (1963) 198.

⁴⁹ See further Pospisil *Anthropology of law: A comparative theory* (1971) 169-170.

marriage of one wife with more than one husband. In South Africa, the former is more popular than the latter.⁵⁰ From the aforementioned we can deduce that the traditional African family may consist of more than one nuclear family. Each customary marriage creates a separate household and several households together produce a family group, which is controlled by the family head. The family property was also classed into three categories, and they are general (family), house and personal property.⁵¹ General property is property that was not assigned to any house or which does not accrue to any particular house. House property relates to property that accrues to a particular house and is solely for the benefit and betterment of that house. Personal property, however, relates to the property of a person, even though it is possible for that property to be subject to the control of the family head.

Based on the above, one can clearly see that the death of the family head had consequences for the entire family group and their property. It was for this reason that stringent intestate succession rules had to be put in place so as to assuage the burden surrounding the death of a family head. With regards to the authority held by the family head, it is important to note that when coming to imperative decisions affecting the family group, he had to confer with the family members before making any decision.⁵² As will be evidenced below, this resulted in the enactment of various legislative provisions including, *inter alia*, the BAA.

Finally, the customary law is considered as an illustration of community values. That means, as the law changes, so do the values of that community.

2.4 General principles of traditional customary law of succession

Pursuant to the passing of the deceased, the family would observe a mourning period of up to one year. Thereafter, a family meeting will be held wherein the distribution of the deceased's estate among the heirs as well as beneficiaries would be determined.⁵³ The principal heir, as well as his paternal uncles, would be the ones tasked with the

⁵⁰ Voster "Kinship" in Myburgh (ed) *Anthropology for Southern Africa* (1981) 94-95.

⁵¹ For a further discussion on the properties see Maithufi "The law of property" in Bekker (et al) *Introduction to legal pluralism in South African Part 1 Customary Law* (2002) 54.

⁵² Moodley *The customary law of succession* 6.

⁵³ Himonga (*et al*) 165.

supervision of the division of the said estate.⁵⁴ What should be borne in mind here, is the fact that in African societies the families are not always nuclear. This means that the family may contain the husband, wife or wives and the children. Therefore, every customary marriage entered into by the husband, would be regarded as a separate household. The different households then formed what is called a family group. The family group was led and controlled by the family head, who responsible for all members of the family group, who is the mutual husband.

General principles relating to the law of succession in terms of common law are concerned with the division of the assets of the deceased among his or her heirs. The traditional customary law of succession, however, is not only concerned with the inheritance of property but also succession to the status of the deceased.⁵⁵ The purpose of succession in terms of customary law was not only the division of property but also the continuation of status positions. The successor steps into the shoes of the deceased. The successor takes possession of the assets of the deceased and also succeeds to the liabilities of the deceased, even if the said liabilities exceed the assets of the deceased.⁵⁶ The successor will then have the authority to distribute the assets of the deceased.

The general principles of the customary law of succession are as follows:⁵⁷ Succession can only occur upon the death of the family head. The successor succeeds to both the status of the deceased, as well as control over the assets and liabilities of the deceased. Succession is two-fold, there is general succession which relates to succession to the general status of the deceased as well as succession to the position of family head, called special succession.⁵⁸ The family head was responsible for the support and maintenance of the entire family group. This meant that he was liable even for their debts.

⁵⁴ For a further discussion regarding the topic see Himonga (*et al*) 165-166.

⁵⁵ Himonga (*et al*) 173.

⁵⁶ For a detailed explanation of the process refer to Himonga (*et al*) 173-174.

⁵⁷ Rautenbach, du Plessis and Venter "Law of Succession and Inheritance" in Bekker, Rautenbach and Goolam (eds) *Introduction to Legal Pluralism in South Africa* (2006) 94-95.

⁵⁸ This will be discussed further in paragraph 2.5.3 of this dissertation.

In addition, in South Africa, succession to status in terms of traditional customary law was based on the principle of male primogeniture,⁵⁹ which was also alluded to above in the general principles. This principle is expressed as follows:

“On the death of a Native, his estate devolves on his eldest son or his eldest son’s eldest male descendant. If the eldest son has died leaving no male issue, the next son, or his eldest male descendant inherits, and so on through the sons respectively.”⁶⁰

The effect of this rule meant that females were not permitted to inherit property or to succeed to positions of authority. They were described as “minors” under the “guardianship” of their husbands or fathers and were said to be under their husbands’ marital power.⁶¹ The order of succession took into account the principles of succession through death, primogeniture and succession by males in the male line.

2.5 Order of succession to the family head⁶²

Succession under customary law was a system of primogeniture which as explained previously, placed an emphasis on succession through the male lineage and provided for succession by males through males. This system of primogeniture was rooted in the foundation that promoted the perpetuation and propagation of the family bloodline and the principle of collective responsibility within the family group.

In accordance with the system of primogeniture, the ideal candidate for heirship was thus the eldest son of the deceased, failing him, the next eldest male descendant in rank and whilst preference was given to the descendants of the deceased over his ascendants and collateral relatives, a woman could not under any circumstance be appointed as an heir.

⁵⁹ Himonga (*et al*) 162 also stated the following: “Male primogeniture implies succession by males through males only in respect of the acquisition of positions of status.”

⁶⁰ *Matambo v Matambo* 1969 (3) SA 717 (A) at 719A-B.

⁶¹ See Rautenbach and Bekker 106.

⁶² See further Rautenbach and Bekker 18-24.

2.5.1 Succession in a monogamous household

In monogamous families the eldest son of the family head is his heir, failing him the eldest son's eldest male descendant. Where the eldest son has predeceased the family head without leaving male issue the second son becomes heir; if he be dead leaving no male issue the third son succeeds and so on through the sons of the family head. Where the family head dies leaving no male issue, his father will be next in the line of succession.⁶³

This way, all the brothers of the deceased together with their male descendants are considered for succession purposes.⁶⁴

2.5.2 Succession in a polygynous household

In polygynous households, the eldest son from a particular household will succeed. If he dies, his male descendants will be the first ones to be considered.⁶⁵ Failing his male descendants, his younger brothers and their descendants will be considered. In the event that no male descendants are found, a successor will be sought from the next house in the rank.⁶⁶

2.5.3 General succession and special succession

Due to the polygamous nature of customary law, succession in customary law may be further subdivided into general and special succession. General succession is deemed to relate to succession that deals with the control over the household and property of the general estate. This means that the successor will have control over all the property belonging to the family group as well as the property from the household he comes from. Whereas special succession has to do with control over the component houses within the household as well as the property of the house.⁶⁷ This means that

⁶³ See *Bhe* case at para 8. See also Bennett *A Sourcebook of African Customary Law for Southern Africa* (1991) 399-400.

⁶⁴ See further Himonga (et al) 175.

⁶⁵ Rautenbach and Du Plessis "Law of succession" in Joubert, Faris and Church (eds) *LAWSA* vol 32 (2009) 206-207.

⁶⁶ See Himonga (et al) 176.

⁶⁷ See further Rautenbach and Bekker 177.

there are as many house successors as there are houses. What should be borne in mind, nevertheless, is that the houses have different ranks.

The significance of the above is that in as much as there was only one deceased, there could be several successors who are determined by the overall structure of the family group. Each successor will then succeed to the property of that particular house and assume control over the members of that house. Therefore, upon the death of the family head, each house “forms a potentially independent unit from which a new household may eventually emerge”.⁶⁸ What should be borne in mind, nevertheless, is that the general successor gains the overall control of all the houses so as to maintain the “original unity of people and property”.⁶⁹

2.6 Summary

In this chapter, we looked at the nature of customary law in general. We identified the main principle that underlies the traditional customary law of succession, was the rule of male primogeniture. And that the sole purpose of customary marriages was the continuation of the family lineage of the husband.

Another important factor is that due to the potentially polygamous nature of customary marriages, there may be more than one successor in a family group. There may only be one general successor, however, the different households can then have household successors respectively who will be in charge of all members and the property within that particular household.

One thing that is clear, is that the principle of male primogeniture ensured that women and young children were excluded and regarded as ‘insignificant’. Moreover, the consistent application of this principle ensured that their position remains minute for the reason that the oldest sons inherited the status of the deceased, all the cattle and other property, while the women and daughters inherited domestic utensils mainly.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

CHAPTER 3: RECOGNITION AND DEVELOPMENT OF CUSTOMARY LAW

3.1 Introduction

This chapter will trace the historical development and recognition of customary law and will examine the due recognition given to customary law under the current constitutional framework. The role of the judiciary in the reformation of the traditional customary law of succession will also be assessed.

3.2 Historical context

Prior to 1993, traditional customary law enjoyed limited recognition and was never wholly accepted as an integral part of the South African legal system. The application and recognition of customary law varied in various provinces. A number of pieces of legislation or laws were then enacted in order to regulate customary law.⁷⁰ The most important of these legislations is the BAA. On 1 September 1927 the BAA was promulgated with the aim of providing better regulate and management of Black affairs. In essence, the purpose of the Act was to provide for the better control and management of Black affairs. This was done by unifying the recognition and application of customary law across different cultures and practices throughout South Africa, under one common legislation.

The BAA regulated the traditional customary law of succession and made determinations relating to the consequences of marriages entered into by black people.⁷¹ The consequence for them was that their marriages were regarded as essentially being out of community of property and of profit or loss. The only way to avoid this was for parties thereto to declare a month prior to their celebration that their intention is for their marriage to be in community of property and of profit and loss.⁷² The general rule was that the law that determined the proprietary consequences of the

⁷⁰ Himonga (*et al*) 167.

⁷¹ See s 22(6).

⁷² See s 22(6).

marriage, also regulated the legal system to be followed upon the dissolution of the marriage and administration of the intestate estate of the parties.⁷³

Section 23 of the Black Administration Act set uniform rules as to when customary and/or common law was to be applied. Section 23(1)-(3) states categories of property or assets that were prohibited from being disseminated by means of a valid will as follows:

- (1) All movable property belonging to a Black and allocated by him or accruing under customary law or custom to any woman with whom he lived in a customary marriage, or to any house, will upon his death devolve and be administered under Black Law and custom.
- (2) All land in a location held in individual tenure upon quitrent conditions by a Black will devolve upon his death upon one male person, to be determined in accordance with tables of succession prescribed under s 23(10) of the Act.
- (3) All other property of whatsoever kind belonging to a Black may be devised by will.

It is the aforementioned BAA that further rubber-stamped the applicability of the principle of male primogeniture, by regulating the inheritance of property by persons living under customary law and provided that the estate of a black male, who died without a valid will, devolved according to the rules contained in Government Notice R200 of 1987.⁷⁴ It is also evident that the BAA did not permit women to inherit on equal footing as men.

⁷³ See the Regulations for the Administration and Distribution of the Estates of Deceased Blacks GN R200 of 1987. See also Himonga (*et al*) 168.

⁷⁴ Government Gazette 10601 of 6 February 1987 (GN R200 of 1987)

2. If a Black dies leaving no valid will, so much of his property, including immovable property, as does not fall within the purview of subsection (1) or subsection (2) of section 23 of the Act (Black Administration Act) shall be distributed in the manner following:

(a) if the deceased was, during his lifetime, ordinarily residential in any territory outside the Republic other than Mozambique, all movable assets in his estate after payment of such claims as may be found to be due shall be forwarded to the officer administering the district or area in which the deceased was ordinarily resident for disposal by him.

(b) if the deceased was at the time of his death, the holder of a letter of exemption issued under the provisions of section 31 of the Act, exempting him from the operation of the Code of Zulu Law, the property shall devolve as if he had been a European.

(c) If the deceased, at the time of his death was-

This also meant that a black person who was married in terms of customary law was prohibited from disposing of property mentioned in section 23(1) and (2) by means of a valid will. The property was to be disposed of in terms of the principle of male primogeniture and the eldest son of the deceased person's closest relative was the one who was entitled to inherit the estate of the deceased.⁷⁵

Section 23(7) also stipulated that the magistrate of the district in which the deceased resided, was better placed to administer the estate of the said deceased, regardless of the type of marriage the deceased had concluded.⁷⁶ This meant that the magistrate was now entrusted with the duty of the Master. The challenge with that was that the courts were applying the BAA when dealing with customary law matters and as alluded to above, the BAA was a vehicle for furthering the application of the male primogeniture rule.

In addition to the above, the conclusion of a civil marriage during the subsistence of a customary marriage, lead to the dissolution of the customary marriage.⁷⁷ The partner of the customary marriage that was dissolved, was regarded as the 'discarded spouse'. This meant that she and her children had no rights whatsoever to the estate of her erstwhile husband.⁷⁸

-
- (i) a partner in a marriage in community of property or under antenuptial contract; or
 - (ii) a widower, widow or divorcee, as the case may be, of a marriage in community of property or under antenuptial contract and was not survived by a partner to a customary union entered into subsequent to the dissolution of such marriage, the property shall devolve as if the deceased had been a European.
 - (d) When any deceased Black is survived by any partner-
 - (i) with whom he had contracted a marriage which, in terms of subsection (6) of section 22 of the Act, had not produced the legal consequences of a marriage in community of property; or
 - (ii) with whom he had entered into a customary union; or
 - (iii) who was at the time of his death living with him as his putative spouse; or by any issue of himself and any such partner, and the circumstances are such as in the opinion of the Minister to render the application of Black law and custom to the devolution of the whole, or some part, of his property inequitable or inappropriate, the Minister may direct that the said property or the said part thereof, as the case may be, shall devolve as if the said Black and the said partner had been lawfully married out of community of property, whether or not such was in fact the case, and as if the Black had been a European.
 - (e) If the deceased does not fall into any of the classes described in paragraphs (a), (b), (c) and (d), the property shall be distributed according to Black law and custom.

⁷⁵ Himonga (*et al*) 168-169. See also *Mthembu v Letsela* 1997(2) SA 936 (T), 1998 (2) SA 675 (T), 2000 (3) SA 867 (SCA).

⁷⁶ Himonga (*et al*) 169. This was the position from 1 January 1929 to 2 December 1988. Thereafter, the Matrimonial Property Law Amendment Act 3 of 1998 prohibited parties to a customary law from contracting a civil marriage during the subsistence of the said customary law.

⁷⁷ Himonga (*et al*) 169 in which reference was also made to *Malaza v Mndaweni* 1975 AC (C) 45.

⁷⁸ See further Himonga (*et al*) 169.

This was the position regarding customary marriages until 2 December 1988 when the Marriage and Matrimonial Property Law Amendment Act⁷⁹ came into operation. This Act prohibited persons who had already entered into customary marriages to contract civil marriages as well.

The regulations that were enacted as a result of the aforementioned Act set up the legal system to be followed in the administration of deceased estates in terms of traditional customary law.⁸⁰ The notice gave legislative recognition of male primogeniture rule and also described ways in which the estate of a deceased African had to devolve in the event that the BAA was found not to be applicable. Regulation 2 of the Regulations⁸¹ provided three types of intestate estates, which are: intestate estate that were to devolve and be administered in terms of customary law,⁸² intestate estates that were to devolve and be administered in terms of the common law⁸³ as well as intestate estates whose devolution and administration could specifically be made subject to the common law.⁸⁴

In *Zondi v President of the Republic of South Africa*⁸⁵ regulation 2(d) was declared unconstitutional on the ground that it differentiates between intestate estates of a deceased who was a spouse to a civil marriage out of community of property in terms of the repealed section 22(6) of the BAA and those who are parties to a civil marriage in community of property or a marriage under antenuptial contract for the purposes of succession.

3.3 The constitutional recognition of customary law

It is common cause that before 1994, traditional customary law as a legal system, had minimal recognition. However, pursuant to South Africa emerging as a democratic country in 1994, its (traditional customary law) status changed drastically. Democracy came with changes that included the promulgation of what we now know as the interim

⁷⁹ Act 3 of 1988.

⁸⁰ Himonga (*et al*) 167.

⁸¹ Government Gazette, No. 10601 of 6 February 1987 Department of Justice, No. R. 2006 February 1987 Regulations for The Administration and Distribution of The Estates of Deceased Black.

⁸² Reg 2(d) and (e).

⁸³ Reg 2(b) and (c).

⁸⁴ Reg 2(d). For further discussion on the regulations please refer to Himonga (*et al*) 169-171.

⁸⁵ *Zondi v President of the Republic of South Africa* 2000 (2) SA 49 (N).

Constitution. The interim Constitution had provisions relating to, inter alia, everyone having the right to dignity,⁸⁶ equality⁸⁷ and freedom from racial discrimination.⁸⁸

Thereafter, the 1996 Constitution was enacted. The purpose of the 1996 Constitution was to “introduce a new Constitution for the Republic of South Africa and to provide for matters incidental thereto”.⁸⁹ This Constitution also guaranteed the application and fortification of the traditional customary law. The provisions that ensured this guarantee will be expressed below.

3.3.1 Sections 30 and 31 of the Constitution

Sections 30 of the Constitution provides that

“everyone has the right to use the language and participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights”.

Section 31 provides

“persons belonging to a cultural, religious or linguistic community may not be denied the right to enjoy their culture, practice their religion and use their language and to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.”

The Constitution brought about the positive recognition of customary law in that, people were afforded the right to practice their cultures and customs, without restrictions. I use the term ‘freely’ loosely as, the practice of their culture and customs was subject to the limitations clause. The above sections of the Constitution contain what is termed as the “internal limitation clause” and this is evident in the following words: the rights “may not be exercised in a manner inconsistent with any provision of

⁸⁶ S 10.

⁸⁷ S 8.

⁸⁸ S 8(2).

⁸⁹ Quoted verbatim from the long title of the Constitution, 1996.

the Bill of Rights”. The Constitution Court gave an illustration as to how this internal limitation clause operate in the case of *Christian Education South Africa v Minister of Education*.⁹⁰ The applicant in the case challenged the constitutionality of section 10 of the South African Schools Act⁹¹ which related to the prohibition of corporal punishment in schools. Section 10 provides as follows:

Prohibition of corporal punishment

- (1) No person may administer corporal punishment at a school to a learner.
- (2) Any person who contravenes subsection (1) is guilty of an offence and liable on conviction to a sentence which could be imposed for assault.

The applicant was of the view that this section breached their rights to religious and cultural freedom, due to the fact that chastising a child is an integral part of discipline for Christians. The court a quo said the following:

“to allow corporal punishment to be administered at Applicant’s schools, even if it is done in the exercise of the religious beliefs or culture of those involved, would be to allow the applicant’s members to practice their religion or culture in a manner inconsistent with the Bill of Rights in contravention of section 31(2) of the Constitution.”⁹²

The applicant then appealed to the Constitutional Court, which held that:

“the interest protected by section 31 is not a statistical one-dependent on a counterbalancing of numbers, but a qualitative one based on respect for diversity. Section 31(2) ensures that the concept of rights of members of the communities that associate on the basis of language, culture and religion, cannot be used to shield practices which offend the Bill of Rights.”⁹³

⁹⁰ 2000 (4) SA 757 (CC).

⁹¹ Act 84 of 1996. This Act has been updated to Government Gazette 34620 dated 19 September 2011 whose aim is to provide for a uniform system for the organisation, governance and funding of schools; to amend and repeal certain laws relating to schools; and to provide for matters connected therewith.

⁹² *Christian Education South Africa v Minister of Education* 1999 (4) SA 1092 (SE) at 1108B/C-C/D.

⁹³ *Christian Education* (2000) para 26.

Based on the above, the Court then concluded that section 10 of the South African Schools Act 84 of 1996, limited the rights of parents under sections 15 and 31 of the Constitution.⁹⁴ These limitations, however, could only be justified if they pass the constitutionality tests inherent in section 36 of the Constitution.⁹⁵

Therefore, the parents in the case were not precluded from exercising their religious beliefs, they were merely prohibited from giving their powers of chastising children, to educators “acting in their name on school premises, to fulfil what they regarded as their conscientious and biblically ordained responsibilities for their guidance of their children.”⁹⁶ With section 36(1) in mind, as well as weighing all the surrounding circumstances, “the Court could not find that the generality of the law in question had to be upheld over the appellant’s claim for a constitutionally compelled exemption from the prohibition against the use of corporal punishment in schools”.⁹⁷ In addition to these provisions, section 211 also dealt with the implementation of traditional customary law.

3.3.2 Section 211 of the Constitution

Section 211 provides as follows:

“

- (1) The institution, status and role of traditional leadership, according to customary law, are recognized, subject to the Constitution.
- (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
- (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.”

⁹⁴ *Ibid* para 27.

⁹⁵ *Ibid* para 31.

⁹⁶ *Ibid* para 51.

⁹⁷ *Christian Education* (2000) para 52; *Moodley The customary law of succession* 68.

In alignment with section 211(3) of the Constitution, courts no longer have a choice in applying customary law to a particular case. They are now obliged to apply customary law, provided that the law is subject to the Constitution and other applicable legislation.⁹⁸ The effect of this section, is that customary law ought to be raised to the same position as common law (mainly Roman-Dutch law). This is a mammoth development in our law as customary law was previously viewed as being inferior to common law and was, for a long time disregarded or blatantly ignored as a source of South African law.

This section is also harmonised by section 1(1) of the Law of Evidence Amendment Act⁹⁹ that states that: “Any court may take judicial notice of the indigenous law insofar as such law can be ascertained readily”. Nonetheless, the application thereof is not mandatory. If the rule in terms of customary law cannot be readily ascertained, then it ought to be proved through principles which regulate the proof of custom or foreign law.

The most important fact to remember at this point of my discussion is the fact that the Constitution is the supreme law of the land, and any law or conduct that is in conflict with the provisions of the Constitution is invalid. The obligations that are imposed by the Constitution must be fulfilled.¹⁰⁰

3.3.3 The equality clause

Due to the apartheid background of South Africa which was centred around segregation and classing people based on the colour of their skin, the enforcement, as well as realisation of the right to equality, is paramount. Kaganas and Murray are of the view that “when a cultural practice is challenged from within the cultural group itself on the grounds of its failure to comply with the constitutional guarantee of equality, generally speaking, equality should be the determining value”.¹⁰¹ The new constitutional order focuses on remedying the errors of the past and to build a bridge

⁹⁸ Moodley *The customary law of succession* (2012) 61. For a further discussion see Bennet “Re-introducing African customary law to the South African legal system” 2009 *American Journal of Comparative Law* 7-8.

⁹⁹ Law of Evidence Amendment Act 45 of 1988.

¹⁰⁰ S 2.

¹⁰¹ Kaganas and Murray “The contest between culture and gender equality under South Africa’s Interim Constitution” 1994 *Journal of Law and Society* 409.

that will amalgamate a society that was once divided. Section 9 of the Constitution encompasses the first substantive right in the Constitution.

Section 9 provides as follows:

“

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

Based on the above, it goes without saying that practices and traditions that further inequality between men and women, people of different races and cultural backgrounds, young and old people, or status, go against the fundamental values enshrined in the Constitution, which reflects a dominant ideology. Therefore, such practises should actually be frowned upon with the greatest contempt in order to eradicate the past mishaps with regards to inequality. This does not mean, however, that the value of equality should inevitably trump over cultural precepts.¹⁰²

However, the aim of the new constitutional order is the transformation of our society from one that was grossly unequal to one where women, men, children and people of

¹⁰² See Wicomb and Smith 2011 *African Human Rights Law Journal* 425 where the authors say, “We are conscious, however, that the manner in which we have asserted that equality must generally trump culture may sound both too strident and insensitive to the role of culture in people’s lives and the centrality of culture in all decision-making”.

all races are equal, susceptible to the same rules and principles which govern the country. What should be borne in mind is that the rectification of past errors, is not going to occur overnight. It is a gradual process.

The above provisions serve as proof of the fact that the status of traditional customary law and increased tremendously pursuant to the promulgation of the 1996 Constitution. It is common cause, however, that the provisions of the Constitution, although guaranteed, are not absolute. It is for that reason that the limitation clause was introduced.

3.3.4 Restrictions to the above provisions

Although the Constitution grants these rights, it must be borne in mind that the rights are not absolute. They may be restricted by the rights of others as alluded to by section 36 of the Constitution, which prescribes a formula to justify the limitation of the rights in the Bill of Rights.

Section 36 provides as follows:

“

- (1) The rights in the Bill of Rights may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

Section 36 ought to be read together with the internal limitation clause contained in section 30 and 31 of the Constitution, which provide that the exercise of rights ought to occur “in a manner that is not inconsistent with any provision of the Bill of Rights”.

3.4 The role of the judiciary in the development and recognition of customary law of succession

The judiciary plays a vital role in the process of interpreting the customary law and aligning it with the provisions of the Constitution. In this regard, the provisions of the Constitution that will aid the process are sections 211 and 39.

In alignment with section 211(3), courts no longer have a choice in applying customary law to a particular case; they are now obliged to apply customary law, provided that the law is subject to the Constitution and other applicable legislation.

Moreover, section 39 of the Constitution, which is the interpretation clause provides as follows:

“

- (1) When interpreting the Bill of Rights, a court, tribunal or forum –
 - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and
 - (c) may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.”

In conjunction with section 39, section 235 of the Constitution provides as follows:

“The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the notion of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation.”

This section highlights the interdependent nature of individual and group rights. In a sense that, before one can claim an individual right, there is an inherent assumption of the existence of a community.¹⁰³

3.4.1 *Mthembu v Letsela*¹⁰⁴

The case related to the position of women and children in customary intestate succession as well as the rule of male primogeniture. The facts were as follows: Tebalo Watson Letsela (deceased) dies on 13 August 1993. He owned a property in Boksburg, where he lives with the appellant and her two minor daughters, one of whom, Tembi Mthembu, was born of an intimate relationship between the appellant and the deceased. The deceased is survived by his father, the first respondent, mother and three sisters. He died intestate and his parents as well as one of their daughters and her children share the same house on the property with the appellant and her two daughters. The magistrate, Boksburg (second respondent) indicated to the appellant's legal representatives that the deceased's estate was to devolve in terms of Black law and custom. The deceased only paid R 900 of the R 2000 that was agreed upon as lobola for the appellant. The balance was due to be paid thereafter, but the deceased passed on before he could do so.

In terms of the principle of male primogeniture, Tembi was precluded from succeeding to a position of status because she is female since women generally did not inherit in terms of customary law. This position was also emphasised by the fact

¹⁰³ Moodley *The customary law of succession* 64-66; Robinson “The minority and subordinate status of African women under customary law” 1995 *South African Journal on Human Rights* 469. To further enunciate the above, the Court in *Christian Education South Africa v Minister of Education* 1999 (2) SA 83 (CC); 1998 (12) BCLR 1449 (CC) held that: “...the interest protected by section 31 is not a statistical one-dependent on a counterbalancing of numbers, but a qualitative one based on respect for diversity. Section 31(2) ensures that the concept of rights of members of communities that associate on the basis of language, culture and religion, cannot be used to shield practices which offend the Bill of Rights”.

¹⁰⁴ 1997 (2) SA 936 (T) and 2000 (3) SA 867 (SCA).

that the successor was obliged to support and maintain the deceased's family and not banish them from their home. It was argued that the rule of primogeniture is grossly discriminatory against all black women and girls over and above all black children who are not the eldest children. In contrast to this view, Le Roux J succinctly stated that the fact that the successor provides sustenance, maintenance and shelter to the family, trumps on the suggestion that the principle of primogeniture is unconstitutional. He also stated that "even if this rule was prima facie discriminatory on the grounds of sex and gender and the presumption contained in section 8(4) of the interim Constitution comes into operation, this presumption has been refuted by the concomitant duty of support".¹⁰⁵

The learned judge consequently ruled that the male primogeniture rule was not in conflict with the fundamental rights contained in chapter 3 of the interim Constitution and that the injunction contained in section 33(3) could be implemented. Meaning, the chapter was to be construed in a manner that did not negate the rights expressed by the rule.¹⁰⁶

Therefore, the court in *Mthembu v Letsela* erred by concluding that but for the fact that Tembi was female, she would have succeeded by means of intestate succession at customary law, since the new constitutional dispensation is founded on the substantive value of equality, as enunciated in the 1996 Constitution.¹⁰⁷ This meant that the court was presented with an opportunity to develop the traditional customary law of succession in order to bring it in line with the values and principles embodied in the Constitution,¹⁰⁸ but failed to do so. The Supreme Court of Appeal made mention of the fact that if it were to invalidate the principle of male primogeniture, it would summarily dismiss an African institution without first examining its essential purpose and content. It is astounding to see that even the Supreme Court of Appeal upheld such a decision and did not seek to rectify the error of unfair discrimination. The judge,

¹⁰⁵ *Mthembu v Letsela and Another* 1997 (2) SA 936 (T), the court of first instance para 11.

¹⁰⁶ *Ibid* para 12. S 33(3) of the interim Constitution provided as follows: "The entrenchment of the rights in this chapter [chapter 3] shall not be construed as denying the existence of any other rights or freedoms recognised or conferred by common law, customary law or legislation to the extent that they are not inconsistent with this chapter."

¹⁰⁷ Para 14.

¹⁰⁸ *Fraser v Children's Court, Pretoria North and Others* 1997(2) SA 261 (CC) para 20.

however, observed as follows: any development of the rule would be better left to the legislature, after a full process of investigation and consultation.¹⁰⁹

3.4.2 *Bhe v Magistrate, Khayelitsha and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another*

The Constitutional Court heard three cases synchronously since they all dealt with issues of the customary law of intestate succession. I will firstly look at the decision of the court *a quo*, which will be followed by the Constitutional Court's decision in paragraph 3.4.2.3 below.

3.4.2.1 The *Bhe* case

3.4.2.1.1 Facts of the case

In the first case, Ms. Bhe (the third applicant) and the deceased lived as husband and wife for twelve years. They had two girls aged nine and two respectively. During the subsistence of their marriage they managed to buy immovable property, with the aid of the state housing subsidy. They all resided on the said property. The deceased then passed away without building a house on the property, as he had intended to. But third applicant and her daughters continued to reside on the property. The deceased's father argued that in terms of African customary law, he was the rightful intestate succession heir of the immovable property. He (the father of the deceased) therefore, wanted to sell the property in order to carry the funeral costs. It is then that the third applicants acquired an urgent interdict prohibiting him from selling the property pending the outcome of their urgent application. Their mother applied on behalf of her minor daughters for an order that declared the principle of male primogeniture inconsistent with the Constitution, so as to enable her daughters to inherit intestate from their father's estate.

¹⁰⁹ *Mthembu v Letsela* 2000 (3) SA 867 (SCA) para 40.

3.4.2.1.2 The decision

The court *a quo* explained that in terms of the customary law of succession, family members could only own property through the family head. The court concisely stated that in order to determine the legitimacy of their claim of the applicants, they needed to find out whether lobolo was paid. The third applicant said lobolo was not paid, while the second respondent (the father of the deceased) said lobolo was paid, thereby making him the guardian and custodian of the grandchildren. Basing their decision on the judgment of the court in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,¹¹⁰ the court *a quo* found the first two applicants to be legitimate.

This was followed by an analysis of the constitutionality of the male primogeniture rule. In doing so, the court looked at sections 2 and 9 of the Constitution because any law ought to be tested alongside the values enshrined in the Constitution, as well as various decisions by the courts regarding the same or similar matters. The court then concluded that “the Black Administration Act was not a code of African customary law but was a piece of legislation which was based on racial inequality.”¹¹¹ The court however stayed clear of modifying the traditional customary law in order to align it with the values of the Constitution and reverted responsibility to the legislature.¹¹² The court eventually decided that the two applicants should inherit from the deceased’s estate equally. The court 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 of the Administration and Distribution of the Estates of Deceased Blacks consequently also was invalid.¹¹³ 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.¹¹⁴ Until the foregoing defects were corrected by the legislature, it had to be declared that the distribution of intestate black estates was governed by section 1 of the Intestate Succession Act.

¹¹⁰ 1984 (3) SA 623 (A).

¹¹¹ At 552.

¹¹² At 554.

¹¹³ At 555.

¹¹⁴ At 555.

The only reason why they 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 930 of the Constitution. The court was thus bound to declare such law unconstitutional and invalid.¹¹⁵ The court concluded that African females, irrespective of their age or social status, could inherit from the intestate estate of their parents, in the same manner that any male person would. This precludes instances where differentiation on gender lines is necessary for ritual purposes, provided that such differentiation does not prejudice any female descendant.¹¹⁶

3.4.2.2 The *Shibi* case

3.4.2.2.1 The facts of the case

In the second case, Ms. Shibi also applied for an order invalidating the rule of male primogeniture after she was barred from inheriting from her deceased brother's intestate estate. The deceased was not married and did not have any dependants. This meant that his estate would devolve in terms of section 23(10) of the BAA and according to this Act, only the male cousins would inherit the deceased's estate. The first respondent was made the executor of that estate. However, because he chose to squander the estate, an attorney was then appointed as executor, who then appointed the second respondent as the sole heir of the estate. The sister of the deceased opposed the decision of the magistrate's court to appoint male cousins only as heirs of the estate. She wanted the court to recognise her as the sole heir to the estate and to award her compensation from the first and second respondent as well as the Minister. The court then confirmed her as the sole heir and also awarded her the compensation from the two respondents. It is then that both cases were brought before the Constitutional Court (hereinafter referred to as Court).

¹¹⁵ At 554.

¹¹⁶ At 55A-B.

3.4.2.3 Both cases before the Constitutional Court

The reason the cases came to the Court was so as to confirm the decisions made by the Cape High Court and the Pretoria High Court respectively. It is also here where the South African Human Rights Commission (SAHRC)¹¹⁷ and the Women's Legal Centre Trust brought an application for direct access to the Constitutional Court in order to conduct public interest litigation to advocate for and advance the rights of women. All these cases were heard jointly.

The Court looked at what was stated in the *Alexkor Ltd v Richtersveld Community*¹¹⁸ with regards to bearing in mind the historical aspects when dealing with issues of traditional customary law. The Court said

“Although a number of textbooks exist and there is a considerable body of precedent, courts today have to bear in mind the extent to which indigenous law in the pre-democratic period was influenced by the political, administrative and judicial context in which it was applied.”

The Court also went further to state that

“...caution must be exercised when dealing with textbooks and old authorities [as sources of customary law] because of the tendency to view indigenous law through the prism of legal conceptions that are foreign to it”.

The Court provided that, under our new constitutional order, it is no longer possible for a male person to be granted preference as it amounts to discrimination.¹¹⁹ It held that

¹¹⁷ This is a ch 9 institution established in terms of the Constitution, with the following functions:”

- (1) (a) promoting respect for human rights and a culture of human rights;
(b) promoting the protection, development and attainment of human rights; and
(c) monitoring and assessing the observance of human rights in the Republic.
- (2) The Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power –
 - (a) to investigate and to report on the observance of human rights;
 - (b) to take steps to secure appropriate redress where human rights have been violated;
 - (c) to carry out research; and
 - (d) educate (sections 184(1) and (2) of the 1996 Constitution).”

¹¹⁸ *Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC).

¹¹⁹ *Bhe* para 91.

the rule of male primogeniture was invalid and unconstitutional to the extent that it excluded women from succeeding to the position or status of the family head but declined to have its decision affect other areas of customary law.¹²⁰ The court was of the view that the context in which the traditional customary law rule of male primogeniture was applied has now changed and no longer corresponded with an enforceable responsibility to support the family of the deceased.¹²¹ Heirs to the said intestate estates, now reside outside of the family households. Many of them have relocated to other cities for work-related purposes and have therefore established their own homes in those cities. Women are no longer treated as being unequal to their male counterparts. The equality clause in the Constitution made sure of that. With the change in the constitutional dispensation, the customary law principles that are archaic and in conflict with the provisions of the constitution are left with no choice but to align themselves accordingly, particularly the male primogeniture rule which favoured older sons in matters of customary law intestate succession. This warranted a change in the rule itself. The issue with the decision of the *Bhe* case is that when the court was faced with an opportunity to develop customary law and aligning it with the constitution, the court merely ruled on the invalidity but did not fulfil its mandate of developing customary law in terms of section 39(2) of the Constitution. This is because the Court had an innate responsibility to provide relief to those who sought it.

3.5 Summary

Chapter 3 begins with a brief general overview of the historical development and recognition especially in terms of the Constitution. The provisions that played an important role in the recognition and development of customary law were identified as sections 30, 31, 9 and 211. It was reiterated that these provisions are not without limitations. That is where section 36, which is the limitations clause, comes in. I also emphasised the fact that every law or conduct should be aligned with the provisions of the Constitution in order for the law or conduct to be valid. Should there be conduct or law that is in conflict with the Constitution, that law or conduct is invalid in terms of section 39.

¹²⁰ *Bhe* para 92.

¹²¹ *Bhe* para 80 and 91.

I also explained the role played by the judiciary in the application and development of traditional customary law in order to bring it in line with the Constitution. The decisions of the courts in *Mthembu* and *Bhe* were discussed. The only challenge I have with the findings of the courts in the *Bhe* case is that the court was presented with an opportunity of developing the traditional customary law of succession, particularly the rule of male primogeniture, in order to align it with the provisions of the Constitution but did not do so. Instead the court only determined the fact that the rule was invalid and unconstitutional in that it discriminates against women and girls based on gender and sex but left the development thereof to the legislature.

The court provided relief to the parties by ruling that their customary law intestate succession matter ought to be decided in terms of the Intestate Succession Act and no longer in terms of the rule of male primogeniture. However, the court refrained from developing the traditional customary law of intestate succession (as it relates to the male primogeniture rule) and align it with the provisions of the Constitution.

CHAPTER 4: THE REFORM OF CUSTOMARY LAW OF SUCCESSION AND REGULATION OF RELATED MATTERS ACT 11 OF 2009

4.1 Introduction

The Reform of Customary Law of Succession and Regulation of Related Matters Act (hereafter RCLSA) came into operation on 20 September 2010, in an effort to present a new era of customary law of intestate succession that has developed with the evolving world in which it operates. This was in line with the decision made by the Court in the *Bhe* case, requiring the legislature to enact legislation that better represents the current order in the customary law of intestate succession. The *Bhe* case brought about the publication of the proposal of the South African Law Reform of Customary Law of Succession and Regulation of Related Matters Bill in 2008.¹²² The Bill was finally transformed into an Act namely RCLSA.

The long title of the Act which also outlines the purpose thereof states,

“...to modify the customary law of succession so as to provide for the devolution of certain property in terms of the law of intestate succession; to clarify certain matters relating to the law of succession and the law of property in relation to persons subject to customary law; and to amend certain laws in this regard; and to provide for matters connected herewith”.

What should be borne in mind is that the RCLSA is not the embodiment of the customary law in its entirety, but rather, a “modification” of the customary law of succession. This is supported by section 2(1) of the RCLSA which states:

“The estate of 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.”

¹²² GN 309 of 2008 in GG 30815 of 25 February 2008.

Therefore, the purpose of this chapter is to examine some of the changes brought about by the RCLSA and whether this Act adequately addresses the inequalities previously faced by women female children. As stated in the preceding chapters, the inequalities were not adequately addressed, especially those relating to the customary law of intestate succession.

4.2 The preamble of the RCLSA

The purpose of the RCLSA was in order to transform

“the customary law of succession by making provision for the devolution of certain property in terms of the 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”.¹²³

The preamble declares the following:

“(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, 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”.¹²⁴

According to the RCLSA, 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, ought to be administered according to the law of intestate succession as governed

¹²³ See the long title of the Reform of the Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

¹²⁴ The preamble of the Act.

by the Intestate Succession Act.¹²⁵ In such cases – (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 greater”;¹²⁶ (b) if the deceased had entered into a union (in accordance with the tenets of customary law) with another woman for the purpose of procreating children for his wife’s house, that woman must be regarded as a descendant of the deceased, if she survives him;¹²⁷ (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”.¹²⁸ The seedraiser is thereby referred to as the spouse for purposes of succession.

4.3 Interpretation of the Intestate Succession Act in line with RCLSA

The RCLSA also makes determinations as to how certain provisions in the Intestate Succession Act should be interpreted. When interpreting section 1(1)(c) of the Intestate Succession Act, this subparagraph must be regarded as having been added to that section: “where the intestate estate is not sufficient to provide each surviving spouse and woman referred to in paragraphs (a), (b) and (c) of section 2(2) of the RCLSA, with the amount fixed by the Minister, the estate shall be divided equally between such spouses”.¹²⁹

What should be borne in mind here is the fact that section 2(1) of the Act reaffirms the fact that the Intestate Succession Act will be applicable to all intestate estates, regardless of the fact that a person is subject to customary law.

Where the deceased is survived by a spouse as well as a descendant (s), such a spouse inherits a child’s portion or so much as does not exceed in value the amount

¹²⁵ Intestate Succession Act 81 of 1987. S 2(1).

¹²⁶ S 2(2)(a).

¹²⁷ S 2(2)(b).

¹²⁸ S 2(2)(c).

¹²⁹ S 3(2).

fixed from time to time by the Cabinet member responsible for the administration of justice in the *Gazette*, whichever one is greater.¹³⁰

4.4 Definitions

The definitions section of the RCLSA, that is section 1, redefines certain traditional concepts of customary and common law as follows:

4.4.1 Customary Law

“Customary law” is defined as “the customs and practices observed among the indigenous African people of South Africa which form part of the culture of those people”.

4.4.2 Descendant

“Descendant” is defined as

“a person who is a descendant in terms of the Intestate Succession Act, and includes – a person who is not a descendant in terms of the Intestate Succession Act 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; and (b) a woman referred to in section 2(2)(b) or (c)”.

These are the categories of descendants in terms of the Act:

- i) a person who is a descendant in terms of the Intestate Succession Act;¹³¹
- ii) a person who was accepted by the deceased as his or her child in terms of customary law; According to Bekker and Konyana¹³² the children that the

¹³⁰ S 2(2)(a). Currently the fixed amount is R125 000,00.

¹³¹ The Intestate Succession Act does not define “descendant”, but the common-law understanding of descendant is that descendants include the blood relations in the descending line. In s1 of the Act, provision is made for an extension of the concept to adopted children who are regarded as the descendants of the adoptive parents. See further Rautenbach and Bekker 189.

¹³² Bekker and Konyana “The judicial and legislative reform of the customary law of succession” 2012 *De Jure* 568.

legislature had in mind here include children of a spinster, children of a wife, children born of a widow (*ukungena unions*¹³³), children of a widow, adopted children and children from seedraisers.

- iii) a woman from a substitute marriage (a woman who enters a union in terms of customary law for the purpose of providing children for the household (seed-raiser), is regarded as a spouse if she survives the deceased husband).¹³⁴ A seedraiser is a woman a man marries for either one of his principal wives who has either died or barren, for the purpose of bearing an heir.¹³⁵ This means that the seedraiser becomes a descendant as well as a spouse in terms of s 2(2)(b) of the RCLSA. The oversight of the legislature was dealt with by the heads of offices of Masters of the High Court in a meeting during November 2010. The resolution was as follows: “The women referred to in sections 2(2)(b) - (c) and 3(1) of the RCLSA are regarded as spouses of the deceased in terms of section 1 of the Intestate Succession Act but not as his descendants”.¹³⁶
- iv) a woman from a woman to woman marriage (a woman who marries another under customary law for the purpose of bearing children for the deceased’s household is regarded as a descendant).¹³⁷ “In this type of marriage, an older woman of wealth and status provides lobola in order to acquire a younger woman as her “wife”. The “wife” is expected to have sexual relations with a selected male consort so that she can produce children for the “husband’s” house.”¹³⁸ These woman-to-woman marriages, are not common, but are still provided for in legislation. These women are also regarded as spouses in terms of section 3(1) of the RCLSA.

¹³³ Himonga (*et al*) defines *ukungena* as “a union with a widow undertaken on behalf of her deceased husband by his full or half-brother or other paternal male relative for the purpose (i) in the event of her having no male issue by the deceased husband of raising an heir to inherit the property or property rights attaching to the house of such a widow or (ii) in the event of her having such male issue of increasing the nominal offspring of the deceased”. See also s 1(1) of the KwaZulu Act on the Code Zulu Law and of the Natal Code of Zulu Law.

¹³⁴ See further Himonga (*et al*) 181.

¹³⁵ See further Bekker and Konyana 2012 *De Jure* 578.

¹³⁶ Bekker and Konyana 2012 *De Jure* 578-579.

¹³⁷ Himonga (*et al*) 181. See further s 2(2)(c) of the RCLSA.

¹³⁸ Bekker and Konyana 2012 *De Jure* 579.

Here, we need to remember that Africans have a liberal view in respect of children. To them, children always belong to some or another person or family. I believe this is where the notion of “it takes a village to raise a child” stems from.

4.4.3 House

“House” includes “the family, property, rights and status which arise out of the customary marriage of a woman”.

4.4.4 Spouse

“Spouse” includes “a partner in a customary marriage that is recognised in terms of section 2 of the Recognition of Customary Marriages Act”.¹³⁹ It is also important to take note of section 3 of the RCLSA which provides rules that should be applied when interpreting certain provisions of the Intestate succession Act. Any reference in section 1 of the Intestate succession Act to spouse, 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.¹⁴⁰

4.4.5 Traditional leader

“Traditional leader” is defined as follows “a traditional leader as defined in section 1 of the Traditional Leadership and Governance Framework Act”.¹⁴¹ In section 1 of the latter Act, “traditional leader” means any person who, in terms of customary law of the

¹³⁹ Act 120 of 1998.

S 2 Recognition of customary marriages

- (1) A marriage which is a valid marriage at customary law and existing at the commencement of this Act is for all purposes recognised as a marriage.
- (2) A customary marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognised as a marriage.
- (3) If a person is a spouse in more than one customary marriage all valid customary marriages entered into before the commencement of this Act are for all purposes recognised as marriages.
- (4) If a person is a spouse in more than one customary marriage, all such marriages entered into after the commencement of this Act which comply with the provisions of this Act, are for all purposes recognised as marriages.

¹⁴⁰ See para 4.4.2 above and para 4.5 hereunder.

¹⁴¹ Act 41 of 2004.

traditional community concerned, holds a traditional leadership position and is recognised in terms of that Act.

4.4.6 Will

“Will” is defined to mean “a will to which the provisions of the Wills Act apply”.¹⁴²

4.5 Interpretation

Section 3 of the RCLSA provides rules that should be applied when interpreting certain provisions of the Intestate Succession Act.

Section 3(1) provides that “any reference in section 1 of the Intestate Succession Act to a spouse who survived the deceased must be interpreted to include every spouse and every woman referred to in sections 2(2)(a)-(c)”. This subsection widens the scope of the term spouse to include spouses of the deceased in terms of the section 1 of the RCLSA. This warrants spouses to inherit in terms of customary law, which further enhances gender equality.

In addition to the above, section 3(2) states that the words “the estate shall be divided equally between such spouses” must supplement section 1(1)(c) of the Intestate Succession Act to provide for the situation where the intestate estate is not sufficient to provide each spouse of the deceased with the amount fixed by the Minister.

And finally, in terms of section 3(3) the following paragraph must supplement section 1(4) of the Intestate Succession Act when determining a child’s portion: “a child’s portion, in relation to the intestate estate of the deceased, shall be calculated by dividing the monetary value of the estate by a number equal to the number of children of the deceased who have their descendants, plus the number of spouses and women referred to in paragraphs (a), (b) and (c) of section 2(2) of the Reform of Customary Law of Succession and Regulation of Related Matters Act, 2008.

¹⁴² Act 7 of 1953.

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

Section 4 of the RCLSA deals with the property to a woman of a deceased person married in terms of customary law. Section 4(1) provides that the property belonging to such woman may be disposed of according to the will of the said woman. Therefore, section 4 does not thwart any person subject to customary law, from disposing of their assets by means of a will.¹⁴³

4.7 Disputes or uncertainties

Should there be a dispute or uncertainty regarding consequences of the nature of customary law relating to either the status of the person making a claim; the nature and content of any asset in the deceased's estate; or the devolution of the family property involved in the deceased's estate, the Master of the High Court having jurisdiction under the Administration of Estates Act, 1965,¹⁴⁴ may subject to section 5(2), make such a determination as may be just and equitable in order to resolve the dispute or eradicate the uncertainty.¹⁴⁵ Section 5(2) provides that the Master may direct that an inquiry be facilitated by either a magistrate or traditional leader within the area of the Master's jurisdiction, who will then make a recommendation to the Master.

What is imperative here is the provision in section 5(4), which emphasises the fact that the Master, magistrate or traditional leader, must have the best interests of the family members of the deceased, as well as the equality of spouses in civil or customary marriages, at heart when making a determination or recommendation. This provision is particularly important to our discourse in that it highlights the best interest

¹⁴³ S 4(3) of the RCLSA.

¹⁴⁴ Act 66 of 1965.

¹⁴⁵ S 5(1) of the RCLSA. S 5 further provides as follows:

- 2) Before making a determination under subsection (1), the Master may direct that an inquiry into the matter be held by a magistrate or traditional leader in the area in which the Master has jurisdiction.
- 3) After the inquiry referred to in subsection (2), the magistrate or traditional leader, as the case may be, must make a recommendation to the Master who directed that an inquiry be held.
- 4) The Master, in making a determination, or the magistrate or traditional leader, as the case may be, in making a recommendation referred to in this section, must have due regard to the best interests of the deceased's family members and the equality of spouses in customary and civil marriages.
- 5) The Cabinet member responsible for the administration of justice may make regulations regarding any aspect of the inquiry referred to in this section.

of all family members and not just the male members and puts female spouse on equal footing regardless of the type of marriage they concluded with the deceased.

Furthermore, sections 6 and 7 of the Recognition of Customary Marriages Act¹⁴⁶ (hereafter RCMA) shed more light to the status of women in property matters of customary law, as it protects spouses who are party to some customary marriages. Section 6 provides as follows:

“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.”

This section reaffirms the fact that wives, who are parties to customary marriages have the capacity to dispose of assets equally as their husbands. This then brings into question, the inclusion of section 4(1) to the RCLSA which regurgitates the provisions of section 6 of the RCMA. There seem to be no reason why an enactment was necessary to enable her to dispose of her own property by will. 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. In addition, cases of women making use of this provision and concluding wills to disperse of their properties are few and far in between.

In terms of section 7(1) and (2) of the RCMA,

“(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

¹⁴⁶ Act 120 of 1998.

consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage.”¹⁴⁷

However, the Constitutional Court in the *Gumede v The President of the Republic of South Africa*,¹⁴⁸ held that section 7 (1) of the RCMA was unconstitutional in as far as it relates to monogamous customary marriages. This meant that all monogamous customary marriages entered into before the commencement of the RCMA were deemed to be in community of property and of profit and loss. The Court also held that section 7(2) was unconstitutional in as far as it distinguished between marriages entered into before and after the commencement of the Act. The consequence of the above finding is that the patrimonial consequences of marriages entered into before and after the commencement of the Act, are currently identical.

What needs to be borne in mind here, is the fact that the matrimonial property systems have an influence on the division of property at death, that is why it is important to ascertain them. The implications of the above is that the property of the spouses in monogamous customary marriages prior to the marriage as well as property obtained subsequent to the marriage form part of the joint estate of the parties. This meant that the woman would acquire property on the grounds that that said property belonged to her husband. Madinginye added as follows:

“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 and 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...so that she could dispose of only her share by will.”

The effects of the provisions of section 7(1) on “old” polygamous marriages is to exclude the wives in such marriages from certain rights, which meant that the position

¹⁴⁷ Madinginye *Impact of the Intestate succession on the interests of women and children* (2017) Unpublished mini-dissertation University of Pretoria 42.

¹⁴⁸ 2009 (3) SA 1521 (CC).

in respect of “old” polygamous customary marriages remained unchanged. The question that remains is what happens to the family property?

The Constitutional Court in *Mayelane v Ngwenyama*¹⁴⁹ held that in order for a husband to conclude a second customary marriage, the first wife has to give consent thereto so as to validate the second marriage.¹⁵⁰ In this case the applicant concluded a customary marriage with the deceased in 1984 while the respondent concluded hers in 2008. Each party sought a court order declaring their marriage valid.

Another case that had an impact on the division of estates at death in customary law is that of the Constitutional Court in *Ramuhovhi v President of the Republic of South Africa and Others*.¹⁵¹ This case dealt with the validity of section 7(1) of the Recognition of Customary Marriages Act as far as it deals with the fact that the proprietary consequences of polygamous customary marriages concluded before the RCMA are regulated by customary law.¹⁵² The section was deemed invalid on the ground that it discriminates unfairly against women in polygamous customary marriages entered into before the commencement of the RCMA on the bases of gender, race, ethnic or social origin.¹⁵³ The interim relief granted by the court was as follows: wives who are parties to “old” polygamous customary marriages should enjoy equal matrimonial property rights;¹⁵⁴ their rights should be qualified to ensure that the differentiation is retained and the character of the custom is acknowledged;¹⁵⁵ The exercise of rights should serve the best interest of the family unit;¹⁵⁶ courts can be approached in the event of disputes;¹⁵⁷ and vested rights emanating from the living customary law must be retained.¹⁵⁸

¹⁴⁹ (CCT 57/12) [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918(CC) (30 May 2013).

¹⁵⁰ *Mayelane* para 75.

¹⁵¹ (CCT 194/16) [2017] ZACC 41 (30 November 2017).

¹⁵² S 7(1) provides as follows:

“The proprietary consequence of a customary marriage entered into before the commencement of this Act continue to be governed by customary law.”

¹⁵³ *Ramuhovhi* 27.

¹⁵⁴ *Ramuhovhi* 63.1.

¹⁵⁵ *Ramuhovhi* 63.2.

¹⁵⁶ *Ramuhovhi* 63.3.

¹⁵⁷ *Ramuhovhi* 63.4.

¹⁵⁸ *Ramuhovhi* 63.5.

4.6 Summary

It is important to note that the RCLSA does not apply retroactively. Essentially, it applies to the intestate succession of customary law. The Act widened the scope of the application of the intestate succession in customary law to include women and children. The Act also made provision for women-to-women marriages for the purpose of providing children to a household, as well as seed raisers. These unions are unique to dispose of assets allotted to them in terms of customary law, by means of a will. This section is the same as section 6 of the RCMA. This is deemed as an immense leap from the previous position of women in terms of traditional customary law.

I also highlighted the impact of the Constitutional Court's decision of declaring unconstitutional the provisions of sections 7(1) and (2) of the RCMA. The impact thereof was that the patrimonial consequences of monogamous customary marriages entered into before and after the commencement of the RCMA were deemed to be the same. Both cases were deemed to be in community of property and of profit and loss.

What remains undisputed, consequently, is that the legislature and judiciary have vastly reformed traditional customary law of intestate succession so as to include widows and female children. What remains to be seen however, is whether traditional customary law of intestate succession has evolved adequately in order to protect women and female children who are currently living under customary law. On paper, the purpose and intentions of the RCLSA are good, but the application therefore ought to be closely monitored in order to see to it that the purpose of the legislature continues to find expression and implementation.

In my final chapter I will discuss the implementation challenges of the RCLSA and make recommendations in order to advance and protect the rights of women and female children.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

Traditional customary law has always been known to discriminate against women. In order to try and curb this discrimination, legislation was enacted, and court decisions were made, including but not limited to the *Bhe* case and the RCLSA. The influence of these two were dealt with in the previous chapters of this mini dissertation.

In some cases, the Constitutional Court applied the notion of transformative constitutionalism in dealing with the complexities created by a pluralistic legal system like customary law. The transformative nature of the Constitution was further enunciated by the Constitutional Court in *S v Makwanyane*¹⁵⁹ as follows:

“What the Constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting future.”

The late Chief Justice Langa further explained it as follows:

“The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.”¹⁶⁰

Also, in *Gumede v President of the Republic of South Africa*¹⁶¹ Deputy Chief Justice Moseneke pointed out that “courts have a constitutional obligation to develop customary law in order to align it with constitutional dictates.”

¹⁵⁹ 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC) para 262.

¹⁶⁰ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* In re: *Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 (1) SA 545 (CC) para 21.

¹⁶¹ *Gumede* para 166.

Therefore, it is without question that the recent legislation relating to the reform of traditional customary law, that is the RCLSA, played a significant role in the eradication of inequality between men and women practising customary law. What remains however, is whether or not this legislation was successful in effectively improving the rights of women as well as their rights to access intestate property under customary law. The question sought to be answered in this chapter is whether or not the RCLSA has improved the lives of women living under customary law currently.

5.2 The need to amend the RCLSA

Presently, the Intestate Succession Act also applies to estates previously governed by customary law. This was also the stance held by the Constitutional Court in the *Bhe* case. However, Ngcobo J, in the minority judgment, had concerns about the application of the Intestate Succession Act. He believed that it would be inappropriate as it would result in the unbundling of family property so as to meet the demands of distribution to heirs under the Intestate Succession Act. He said the following:

“The application [of the Intestate Succession Act] may lead to an injustice in certain circumstances. Take the case where both parents die simultaneously leaving a number of children, including minor children and other persons who were dependent upon the estate is an immovable property which is a family home. Each child will be entitled to a share in the estate. Let us assume that one or two children insist on getting their share and they cannot be bought out. This will require the family property to be sold and the proceeds to be divided equally amongst the children. Once the house is sold, there will be no shelter for the minor children and other dependants of the deceased. There is no duty on any of the other heirs to provide such shelter.”¹⁶²

Ngcobo’s judgment in *Bhe* highlighted the fact that, the person living under customary law, who is deemed as an heir in terms of common law, was only a steward. This person was, therefore, responsible for the administration of the communal property to which the family and extended family had a claim.

¹⁶² Para 231.

This means that there is a need to amend the RCLSA so as to make provision for family property, not only when there are disputes or uncertainties regarding that property. This purported provision should emphasise the “living customary law’s flexibility in dealing with ‘legal’ matters”.¹⁶³ What I mean by this is that, living customary law as it relates to communal property, should be cognisant of the fact that there is community ownership that should be protected.

5.3 The meaning of ‘spouse’

Moreover, section 2 of the RCLSA made provision for people who were deemed to be spouses in terms of customary law. They too were declared intestate heirs. The categories of these included:

- (1) a wife of a customary marriage;
- (2) a woman who was brought into a house for the purpose of providing children, if she survives the deceased husband;
- (3) a woman who marries another woman, contracted under customary law, if she survives her woman partner.

What is not clear however, is whether the women mentioned in (2) and (3) above, are both spouses and descendants for the purpose of succession. Section 1(b) defines them as descendants, while section 3(1) refers to them as spouses. These positions need to be rectified by the legislature, seeing as the rules of succession governing each are different. For example, if the women in (2) and (3) above are regarded as spouses for purposes of succession, then they are entitled to “a child’s portion 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, whichever is greater.”¹⁶⁴

¹⁶³ See Himonga (*et al*) 185.

¹⁶⁴ S2(2)(c) of the RCLSA.

5.4 Replacing customary law with common law

In addition to the clarification needed for the term ‘spouse’ above, the replacement of customary law with the common law has or could have a number negative consequences for customary law as a system of law as a whole, for the following reasons: Firstly, the deterioration of customary law as a body of law in that reference will always be made to common law; secondly the traditional or community leaders could hinder the reception and implementation of the new laws in the customary communities in which they serve, as the common law does not reflect living customary law;¹⁶⁵ and finally, the changes to living customary law brought about by the legislature and the judiciary assume that the traditional communities will readily adopt those amendments.

It was therefore recommended by Moodley that the “legislature rather engage in a proper development of customary law rather than opting for a ‘substitutionary’ development all the time, as the common law is not an acceptable mechanism for change and can actually paint an exaggerated picture of what customary law actually entails.”¹⁶⁶

Moodley went further to say that based on section 39(2) of the Constitution, “we can therefore infer that development by the legislature should involve actual drafting of legislation that is consonant with the culture or customs practiced by traditional communities and the values of the Constitution”.¹⁶⁷

The question that remains is what happens to the women who are currently under customary law precepts? The legal services organisations have made headway in educating lawyers and magistrates concerning the implications of the RCLSA. However, many estates are still being administered in terms of the traditional customary law by family members as well as traditional leaders due to the fact that the knowledge of the *Bhe* decision as well as the RCLSA is virtually non-existent.¹⁶⁸ In alignment with this, Madinginye¹⁶⁹ said the following:

¹⁶⁵ Himonga (*et al*) 98-99.

¹⁶⁶ Moodley 270.

¹⁶⁷ *Ibid.*

¹⁶⁸ Bekker and Konyana (2012).

¹⁶⁹ Madinginye *Impact of the Intestate succession on the interests of women and children* (2017) Unpublished mini-dissertation University of Pretoria 44.

“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 be evicted from the property, particularly if she has no children of her own.”

This begs to question whether the RCLSA is just law on paper which has no effectual change for the people it is meant to serve. This question stems largely from the fact that no account was taken of the financial and social circumstances of the people that will have to live under the new customary law of succession in years to come.¹⁷⁰ It seems as if the only people who will benefit from the developed customary law of succession position, are those in urban areas who have access to these changes in the legal system; as well as those who have the financial muscle to challenge the continued application of traditional customary law in court.

Moreover, families are left distraught upon learning the fact that their family homes are no longer family homes but are now part of assets in an estate. The assets will now have to be converted into money so as to be distributed between the heirs of that estate. This ultimately leaves more women and children without a roof over their heads. And in their eyes, this image does not in any way depict equality.

Therefore, the issue is essentially not the development of customary law per se, but rather the shared knowledge and education of the said development with those that are affected the most by the said development.

5.5 Transformative constitutionalism

Transformative constitutionalism involves:

“a long-term project of constitutional enactment, interpretation and enforcement committed (not in isolation, or course, but in a historical context of conducive political developments) to transforming a country’s political and social institutions and power relationships in a democratic, participatory, an egalitarian direction. ‘Transformative

¹⁷⁰ South African Law Commission “Report on the Customary Law of Succession” (2014) www.justice.gov.za>salrc>reports_...

constitutionalism connotes an enterprise of inducing large scale social change through non-violent political processes grounded in law.”¹⁷¹

Lang DCJ believed that the majority of South Africans have waited far too long for justice, equality as well as freedom and that it would be inappropriate for there to be further delays in that regard. He said,

“...the problem with development by the courts on a case to case basis is that changes will be very slow; uncertainties regarding the real rules of customary law will be prolonged.”¹⁷²

It is for that reason that the Court in the *Bhe* case made an immediate and significant change to the customary rule of male primogeniture. Some critics were of the view that the court’s decision was an encroachment on customary practices. The question now, is whether the law, in the form of legislation and case law, can play a pivotal role in effecting social change especially in terms of living customary law.

The court in *Alexkor* stated that:

“...it is important to note that indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by it its norms change their patterns of life ... In applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written. It is a system of law that was known to the community, practiced and passed on from generation to generation. It is a system of law with its own values and norms. Throughout history, it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution.”¹⁷³

¹⁷¹ Klare “Legal culture and transformative constitutionalism” 1998 *South African Journal on Human Rights* 146, 150.

¹⁷² *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 112.

¹⁷³ *Alexkor Ltd v Richtersveld Community* 2004 5 SA 460 (CC) paras 52-54; See also n 130 above at paras 48 and 81.

5.6 Recommendation

When developing living customary law, it is important to take into account, the social norms and customs of the people who are currently living under customary law. This ensures two things: firstly, that the said development will have an impact on the people affected by it and secondly, that the development will then be communicated to the people it affects. It is futile for the legislature and the judiciary to continue developing customary law, without monitoring the communities that are affected by such developments so as to see whether the developments are effective. Ozoemena said the following:

“Living customary law has powerfully guided the behaviour of a significant portion of the country’s population for a long time, and therefore should then be viewed as semi-autonomous, because the ties that bind its observers together are stronger than the ties that bind them to external factors such as state legislation.”¹⁷⁴

In addition to the above the Court in *Shilubana v Nwamitwa* laid down principles to be considered when developing customary law in this way:

“

- (a) consideration of the traditions of the community concerned;
- (b) the right of communities that observe systems of customary law to develop their law;
- (c) the need for flexibility and development must be balanced against the value of legal certainty, respect for vested rights and the protection of constitutional rights; and
- (d) while development of customary law by courts is distinct from its development by a customary community, the courts when engaged with the adjudication of a customary-law matter, must remain mindful of their obligations under section

¹⁷⁴ Ozoemena “Legislation as a critical tool in addressing social change in South Africa: Lessons from *Mayelane v Ngwenyama*” 2015 *PER Journal* 997.

39(2) of the Constitution to promote the spirit, purport and objects of the Bill of Rights.”¹⁷⁵

Therefore, in my view, in addition to the recommended amendments to the RCLSA made in paragraph 5.4 and 5.5 above, the legislature and the judiciary have an innate duty to bring into context the values that are relevant to the community when developing customary law. In as much as the constitutional provisions trump any law or conduct that are in conflict with the Constitution, when tasked with the development of the said customary law, reference should always be made to the communities themselves. Research and interactions should be done with those affected by the proposed changes and amendment to the laws.

Coupled with the above, when the legislation is thereby enacted, it is the task of the state to initiate educational drives in communities that are affected by the enacted legislation, so as to ensure the implementation thereof. While in the employ of the office of the Public Protector, I learned that the Johannesburg Metro Police Department was required to initiate educational drives to ensure that motorists knew and understood their rights with regards to traffic fines. These drives were a success in that the information was taken to the people who would be affected by the knowledge of the law or lack thereof. In the same way that traditional communities cannot function in isolation, the legislature and judiciary cannot do the same either. There should be continuous interactions in both directions.

¹⁷⁵ *Shilubana v Nwamitwa* 2009 2 SA 66 (CC) para 44-49; *Mayelana v Ngwenyama* 2013 (4) SA 415 (CC) para 45.

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