THE ROLE OF MALE PRIMOGENITURE AND THE ROLE OF WOMEN TO INHERIT UNDER CUSTOMARY LAW OF SUCCESSION

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a Declaration

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

Signed..

R.K Maunatlala

15 February 2019

Pretoria, South Africa

b Acknowledgements

Firstly, I would like to thank God Almighty for entrusting me with the gift of life, and the opportunity to explore and complete my Masters at an esteemed University such as the University of Pretoria. I am well aware that it is not by might, nor by power that I made it this far, but by the Spirit and the divine will of my Heavenly Father.

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c Abstract

South African customary law has a significant impact on the personal lives of the majority of African people. It has over the years, gained a repute of discriminating against women, treating them as second-class citizens.[1] Central to customary law's application was the rule of male primogeniture. A rule that is at the heart of this research and is identified by its tendency to discriminate against women in areas such as guardianship, inheritance, appointment to traditional offices, exercise of traditional authority and the age of majority.[2]

The legal system of South Africa is pluralistic in nature.[3] Hence, the South African law of succession consisted of the common law of succession as well as the customary law of succession.[4] The Intestate Succession Act,[5] and the Wills Act,[6] regulated common law of succession, whilst customary law of succession was characterised by the application of the rule of male primogeniture, a rule that is central to this research.[7]

Some people argued that extending the Intestate Succession Act, as held in the *Bhe v Magistrate, khayelitsha* 2004 (2) SA 544 (C) case, to apply to indigenous persons had the effect of abandoning the customary system of succession in favour of common law.[8] This method of reform was considered inappropriate because rather than merely imposing common law of succession on people who are subject to customary law, Nhlapo and Himonga argue that it is first vital to investigate the possibility of incorporating those aspects of customary law, and values that are consistent with the Constitution in the reform of the law of succession.[9]

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1 Ndulo "African customary law, customs, and women's rights" 2011 Cornell Law Faculty Publications 89.
2 Ndulo 2011 Cornell Law Faculty Publications 89.
3 Himonga & Nhlapo African customary law in South Africa: Post-apartheid and living law perspective (2015) 161.
4 Himonga and Nhlapo 161.
5 Intestate Succession Act 81 of 1987.
6 Wills Act 7 of 1953.
7 Himonga & Nhlapo 161; The co-existence of customary law and common law in the law of succession will unfortunately lead to a conflict between the two systems which still persists today and will not disappear soon.
8 Himonga & Nhlapo 161.
9 Himonga & Nhlapo 161.

This research will look at some of the problems presented by the abolition of the rule of male primogeniture and the extension of the Intestate Succession Act to customary law of succession. It will also look at the possibility of harmonising common law with customary law without imposing one system of law on the other.
The researcher makes remarks and recommendation on how best to reconcile customary law with the Constitution without imposing western law on customary law.

CHAPTER 1: Introduction

1.1 Background

Before the constitutional dispensation, common law was the primary legal system applied in South Africa, with customary law being applied only when it was not contrary to public policy and natural justice.[1] However, following the constitutional dispensation, the South African legal system became pluralistic in nature, recognising common law and customary law on an equal footing provided that the two legal systems are applied subject to the Constitution, which is the supreme law of the land.[2]

South African customary law has a significant impact on the personal lives of the majority of African people and it has over the years, gained a repute of discriminating against women and treating them as second-class citizens.[3] Central to the application of customary law was the rule of male primogeniture, a rule that forms the core of this research and is identified by its tendency to discriminate against women in areas such as guardianship, inheritance, appointment to traditional offices, exercise of traditional authority and the age of majority.[4]

Customary law has been fossilised and evaded through its codification thereby, subverting its nature and operation among the people who identify with it.[5] This means that the codification of customary law is a way of making customary law fixed and difficult to develop.[6] Therefore, according to the researcher, although it may develop in its contemporary application it will still be perceived as being discriminatory due to how it is drafted in legislation. As a result, the author of this research submits that this codification leads to the continued discrepancy and inconsistency between living customary law and formal customary law. Hence, even

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1 Himonga & Nhlapo African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives (2015) 161.
2 Himonga and Nhlapo 161.
3 Ndulo "African customary law, customs, and women's rights" 2011 Cornell Law Faculty Publications 89.
4 Ndulo 2011 Cornell Law Faculty Publications 89.
5 Ozoemena "Living customary law: A truly transformative tool?" 2013 Constitutional Court Review 147.
6 Ozoemena 2013 Constitutional Court Review 147.

with the presence of formal customary law, majority of South Africans still remain true to the rules, practices and processes of the system as binding on them.[7]

Living customary law is used to denote the practices and customs of the people in their day-to-day lives. It is customary law which emerges from what people do, or more accurately-from what people believe they ought to do, and not from what a class of legal specialists considers they should do. [8]

On the contrary, official customary law is described as the formalized version of customary law that is recorded in the law reports, built upon and interpreted through an Anglo-Saxon or Roman-Dutch Law procedural and substantive law filter.[9] This refers to customary law as codified in statutes such as the Black Administration Act,[10] the Regulations for the Administration and Distribution of Estates of Deceased Blacks,[11] and decisions of the courts. Therefore, official customary law is a product of codification of perceived customary law practices in the past by traditional leaders, colonial and apartheid governments and courts.[12]

In essence, the main aim of this research is not to enquire as to whether the legislature and courts have made any reform to customary law nor is it about comparing customary law of succession in its characterization and application to common law of succession. This research aims to establish whether and to what extent customary law of succession has been reformed to improve the rights of women to be treated equally and justly in relation to being able to inherit and succeed under customary law of succession. This includes ascertaining whether, subsequent to its abolition, the rule of male primogeniture is still being applied in the administration of deceased person's estates. This rule orders the eldest surviving male relative of the deceased to succeed to both the status and the role of the deceased.[13]

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7 Ozoemena 2013 Constitutional Court Review 147.

8 Himonga & Bosch "The Application of African Customary Law under the Constitution of South Africa: Problems solved or just beginning" 2000 SALJ 328.

9 Himonga & Bosch (2000) SALJ 328.

10 Black Administration Act 38 of 1927; Regulations for the administration and Distribution of Estates of Deceased Blacks 2 of GN R200 of 1987.

11 Regulations of the Administration and Distribution of Estates of Deceased Blacks.

12 Beninger "Women's property rights under customary law" 2010 Women's Legal Centre 6.

13 Himonga & Nhlapo161.

Furthermore, this research is not aimed at undermining the transformation and advancement that customary law of succession has already undergone. To the contrary, the researcher compliments the legislature's effort in developing customary law in line with the spirit, purport and object of the Bill of Rights,[14] and to further bring it in line with the democratic values of human dignity, equality and freedom.[15] The aim is to, in addition to the above purpose, enquire the extent to which formal customary law is reflected among the lives of people who are still living subject to such law.

This research contribution will critically unpack the tension that exists between the courts and the legislature and the people who live subject to customary law. The researcher will highlight that, while on the one hand the courts and legislature seek to reform customary law in line with the Constitution,[16] the people who identify with customary law on the other hand, receive the court's solution as an inversion of foreign concepts to their traditional ways of living.[17]

1.2 Research Questions

The purpose and aims of this research will be achieved by answering the subsequent research questions as listed hereunder. After uncovering these questions, the role of women to inherit and succeed under customary law of succession ought to be determined.

a. What is the rule of male primogeniture and what role did it serve in discriminating against South African black women, thereof?
b. How has getting rid of the rule of male primogeniture improved the lives of African women?

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[14] Section 39 of the Constitution of the Republic of South Africa, 1996 (hereafter, Constitution).
[15] Section 7 of the Constitution, 1996.
[16] Madlingozi "Legal academics and progressive politics in South Africa: Moving beyond the ivory tower" 2006 6 https://www.academia.edu/255659/Legal_Academics_and_Progressive_Politics_Moving_Beyond_the_Ivory_Tower_2006 (accessed 02 February 2019).
[17] Himonga "The advancement of African women's rights in the first decade of democracy in South Africa: The reform of the customary law of marriage and succession" 2005 Acta Juridica 83.

c. Although the principle of male primogeniture has been removed in terms of formal and codified customary law, does it still constitute an integral part of living customary law?
d. Can a testator, after the abolition of the rule of male primogeniture revive the rule by exercising his or her right to freedom of testation?
e. Do women have a choice of applicable law between common law rules of succession and customary law rules of succession?

1.3 Motivation

The Constitution has the right to equality and dignity entrenched as constitutional rights afforded to everybody in the Republic.[18] It however, also provides that people belonging to a cultural community may not be denied the right to enjoy their culture,[19] therefore, presenting a conflict between the right to equality and the right of the people to practice and enjoy their culture and customs.

Although, section 9(3) read with 9(4) of the Constitution prohibits any form of discrimination, whether directly or indirectly, on grounds such as race, gender and belief, among others,[20] customary law has unfailingly gained a reputation for perceiving women as 'adjuncts' to the tribe or clan to which they belong rather than equals.[21] As a result, most women have believed and internalised the idea that they are inferior to the male counterparts and that they cannot challenge the position that men hold in society. This meant that women had accepted that they could not succeed men nor administer property in their own name or for the family.[22] This was also because no precedent in custom or tradition for the chieftainship to be transferred from the line of a Hosi to another line, particularly by appointing a female.[23]

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18 Section 9 and section 10 of the Constitution, 1996.
19 Section 31 of the Constitution, 1996.
20 Section 9(3) & (4) of the Constitution,1996
21 Ndulo 2011 Cornell Law Faculty Publications 89.
22 *Shilubana v Nwamitwa* 2009 2 SA 66 (CC) par 22.
23 *Shilubana v Nwamitwa* 2009 2 SA 66 (CC) par 22.

African customary law and customary law of succession have existed and been practiced in traditional communities throughout Africa for many years.[24] The set of rules have had to endure changing community norms and values, as well as the drive by certain countries to achieve equality, freedom and humanity.[25] At the core of customary law was the rule of male primogeniture which has since the promulgation of the Constitution been a contentious issue because of its tendency to victimise women.[26]

There has thus, been some developments and reform of customary law, so as to bring it in line with the Constitution of South Africa. As a result of the dissenting decision of *Bhe v Magistrate, Khayelitsha,*[27] the recommendations of the South African Law Reform Commission (SALRC),[28] the legislature enacted the Reform of Customary Law of Succession and Regulation of Related Matters Act.[29] All this was done to improve the rights of women in customary law, the right to be equally considered for succession and inheritance. This is the focal point of this research.

Although there has been transformation and reform to customary law resulting from the landmark Constitutional Court case of *Bhe v Magistrate, Khayelitsha,*[30] Rautenbach and Bekker state that courts recognise that "official customary law has fallen out of step with changing needs of the society it serves and that there is a widening divergence of the living customary law and the official version that is applied by the state courts".[31] In other words, there is inconsistency relating to the nature of customary law with what it appears to be on paper and what it actually is in reality. A discrepancy between living and official customary law.

The Constitutional Court in the *Bhe v Magistrate, Khayelitsha* case, through the majority found the rule of male primogeniture as it applies in relation to the

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24 Wallis Primogeniture and Ultimogeniture under scrutiny in South Africa and Botswana (LLM dissertation 2016 NWU) 4.
25 Wallis 4.
26 Rautenbach "Is primogeniture extinct like the Dodo or is there any prospect of it rising from the ashes? Comments on the evolution of customary succession laws in South Africa" 2006 SAJHR 99.
27 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C).
28 South African Law Reform Commission (2004) Reports on the Customary Law of Succession.
29 Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.
30 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C).
31 Rautenbach & Bekker Introduction to Legal Pluralism (2014) 14.

succession of property unconstitutional and invalid because it unfairly discriminated against women, consequently abolishing the rule entirely.[32]

Contrasting the majority's view, Ngcobo J, speaking for the minority held that although the rule of male primogeniture is inconsistent with the constitutional guarantee of gender equality, it should have been developed to allow women to succeed the deceased as opposed to scrapping it.[33] He provided that he is satisfied that the limitation imposed by entrusting the responsibilities of a deceased family head to the eldest child is reasonable and justifiable under section 36(1) of the Constitution.[34]

Ozoemena concurs with Ngcobo J's view that, the majority's approach was an avoidance technique not to develop customary law and that there was a need to develop the law than imposing common law values and principles to customary law matters.[35] Rwezaura also provides that he has observed that the opposition to change is based on an ideology that criticises attempts at reforming customary law as contrary to African traditions and culture and an attempt to westernize African society.[36] The researcher agrees with the development of the rule of male primogeniture as a better remedy than the eradication of the rule. Therefore, although the majority judgment was convinced that the replacement of male primogeniture with the Intestate Succession Act,[37] will give the majority of South Africans an immediate redress,[38] the researcher believes the rule could be developed and brought in line with the constitutional values.

The wide acceptance of the official version of customary law resulted in a distortion of the living customary law, as he traces the dominant voices that shaped the official version of customary law to the colonial administrators and powerful African leaders who were then all male. This leads to the dichotomy between the two.[39]

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32 Van Niekerk "Succession, living law and *Ubuntu* in the Constitutional Court" 2005 Obiter 476; *Bhe v Magistrate Khayelitsha* 2004 (2) SA 544 (C) par 136.
33 Van Niekerk 2005 Obiter 477.
34 *Bhe v Magistrate, Khayelitsha 2004 (2) SA 544 (C)* par 183.
35 Ozoemena 2013 Constitutional Court Review 149.
36 Ndulo 2011 Cornell Law Faculty Publications 90.
37 Intestate Succession Act 81 of 1987.
38 Ozoemena 2013 Constitutional Court Review 149.
39 Ntlama "Equality misplaced in the development of the customary law of succession: lessons from *Shilubana v Nwamitwa* 2009 2 SA 66 (CC)" 2009 Stellenbosch Law Review 338.

Therefore, this research seeks to probe the extent to which development of customary law could have possibly been the best remedy to resolve the discriminatory conditions of women under customary law of succession.

1.4 Literature review

I. What is the genesis of the rule of male primogeniture and what role did it serve in discriminating against South African black women thereof?

The pre-colonial law in the most part of South Africa was essentially customary in character and had its sources in the practices and customs of the people, thereof.[40] The rule of male primogeniture was one of the rules applied by the native people in order to regulate their way of living.[41]

Thus, in monogamous and polygynous families, the eldest male relative of the deceased family head is his heir. Consequently, if there are no male descendants to survive the deceased, his father will succeed him as an heir.[42] If his father also does not survive him, another heir is sought among the father's male descendants related to him through the male line.[43]

Justice Ngcobo in handing the minority judgment of the *Bhe v Magistrate, Khayelitsha* case,[44] implores that the social context in which customary rules originated be dissected before discarding them.[45] People who do not live subject to African customs drafted formal customary law with some western influence. Therefore, the researcher agrees with Ngcobo J's argument that it is crucial to employ whether people, to whom customary law of succession applies, also considered the rule of male primogeniture as being discriminatory to women. The researcher further agrees with Ndulo's observation, that most western understanding

40 Ndulo 2011 Cornell Law Faculty Publications 88.
41 Ndulo 2011 Cornell Law Faculty Publications 88.
42 *Bhe v Magistrate, Khayelitsha* (2004) (2) SA 544 (C) par 77.
43 *Bhe v Magistrate, Khayelitsha* (2004) (2) SA 544 (C) par 77.
44 *Bhe v Magistrate, Khayelitsha* (2004) (2) SA 544 (C).
45 Ndulo "Legal pluralism, customary law and women's rights" 2017 Unisa Press Journals 2.

of African customary law is influenced by their negative attitudes towards all things African.[46]

Van Niekerk provides that it essentially needs to be established why the rule of male primogeniture came into existence in the first place and on what principles it was founded.[47] She further submits that this rule emerged with the primary purpose of ensuring that the continued existence of family or the group prevails and for that reason, holds that it could not have been that its goal was to prejudice certain members of the community.[48]

Given the above, it is thus important to note that the customary law rule of male primogeniture was not established with the intention of discriminating against anyone and that, this rule has formed the core of customary law of succession.[49] The purpose and aim of this rule is to protect the continuity of the family lineage, something of fundamental importance to the African people of South Africa.[50]

This is because, the essence of *Ubuntu*, as Van Niekerk remarks, is encapsulated in the belief that the welfare of the individual is linked to the welfare or the group or family.[51] This is why the phrase *motho ke motho ka batho*, which means a person is a person through other persons, is popular among the indigenous communities.[52] Thus, this indicates that western cultures tend to be more individualistic and focused on individual achievements and personal interests, whereas African cultures are collectivistic, group-oriented, and concerned with the welfare of their community.[53] This research will look into the reasons and motivations behind the origin of this rule more extensively, thereof.

46 Ndulo 2011 Cornell Law Faculty Publications 91.
47 Van Niekerk 2005 Obiter 478.
48 Van Niekerk 2005 Obiter 479.
49 Van Niekerk 2005 Obiter 479.
50 Himonga & Nhlapo 159.
51 Himonga & Nhlapo 159.
52 Maluleke "Culture, tradition, custom, law and gender equality" 2012 PELJ 4.
53 Maluleke 2012 PELJ 4.

II. How has getting rid of the rule of male primogeniture improved the lives of African women governed by rules of customary law of succession?

Women in South Africa, especially those that live according to customary law, have traditionally denied equal rights because, as Beninger explains in her work, South African customary law is largely based on the tradition of patriarchy.[54] Patriarchy considers women as being inferior to men and as a result, cannot be the head of the family or household nor can they make decisions pertaining to or control property.[55] It is because of such patriarchal views that rules such as male primogeniture have been declared invalid and thus abolished.[56]

Patriarchy typically refers to families ruled by a senior male patriarch, it more generally refers to the systematic domination and subordination of females by males.[57]

One of the developments that were made in customary law to accommodate women's right to equality is evident in the Communal Land Rights Act,[58] which provides as follows:

- Section 4(3): A woman is entitled to the same legally secure tenure, rights in or to land and benefits from land as is a man, and no law, community or other rule, practice or usage may discriminate against any person on ground of gender.[59]
- Section 5(1): Communal land and new order rights are capable of being and must be registered in the name of the community or person, including a woman, entitled to such and or right in terms of this Act and the relevant community rules.[60]

It is therefore clear that there has indeed been a reform and transformation to customary law and that women are now represented in leadership roles as provided

54 Beninger 2010 Women's Legal Centre 7.
55 Beninger 2010 Women's Legal Centre 7-8.
56 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) par 142.
57 Henderson "Law's patriarchy" 1991 Journal of the Law and Society Association 412.
58 The Communal Land Rights Act 11 of 2004.
59 Section 4(3) of Communal Land Rights Act 11 of 2004.
60 Section 5(1) of Communal Land Rights Act 11 of 2004.

for in the above Act.[61] The research will explore various examples of women's improved positions in society and how a significant number of women are becoming even more aware of their rights. However, although this may be the case, many people in South Africa are, although, subject to customary law, often not aware of or do not understand the laws and their rights as developed by the Constitution.[62] Consequently, there are still women in rural areas who are either not aware of such rights due to lack of access to the law or those that are aware but still remain constricted and paralysed by their inferior role under customary law.[63]

This research will be focused on the *Bhe v Magistrate, Khayelitsha,*[64] *Shilubana v Nwamitwa*,[65] and the *Mphephu v Mphephu-Ramabulana*,[66] in particular, in order to show how much of a milestone the reform of customary law has taken place.

III. Although the principle of male primogeniture has been removed in terms of formal and codified customary law, does it still constitute an integral part of living customary law?

A good question of enquiry as posed by Rauterbach is "whether the abolishment of a customary rule, such as the rule of male primogeniture, can be regarded as development as required by section 39(2) of the Constitution or merely a rejection of customary law rules"?[67] This is a question of the legislature's compliance with section 39 (2) of the Constitution which provides:

> "(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".[68]

61 Communal Land Rights Act 11 of 2004.
62 Beninger 2010 Women's Legal Centre 5.
63 Beninger 2010 Women's Legal Centre 5.
64 *Bhe v Magistrate, Khayelitsha 2004 (2) SA 544 (C).*
65 *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC).
66 *Mphephu v Mphephu-Ramabulana* (773/2012) [2017] ZALMPTHC 1.
67 Rauterbach "South African common and customary law on interstate succession: A question of harmonisation, integration or abolition" 2008 Hein Online 119.
68 Section 39(2) of the Constitution, 1996.

Rautenbach provides that the customary law of succession rule of male primogeniture that does not conform to the western notion of equality between sexes and between statuses, was the main feature of customary law of succession that received much criticism and was declared unconstitutional.[69] Moreover, it is also argued that the removal of the customary law rule was not the ideal remedy for improving the rights of indigenous women.[70] Van Niekerk argues that the abolition of the rule that goes to the core of law will be a theoretical exercise and will deepen the divide between living and official law.[71] Therefore, this research thus aims to show that developing the rule of male primogeniture to accommodate and promote women's rights of succession under living customary law might have been the more appropriate approach to follow.

IV. Do women have a choice of applicable law between common law rules of succession and customary law rules of succession?

South African law of succession is a dual legal system consisting of two branches, the common law of succession and the customary law of succession.[72] Hence, it is imperative to recognise that these two branches of law of succession do not consider the principles of succession and inheritance alike.[73] This is to say that according to common law of succession, inheritance concerns mainly the division of the assets of a deceased among his or her heirs.[74] The division of property can take place in terms of the provision of a will (or testament) known as testate inheritance or according to the rules of common law where no will exist namely statutory intestate inheritance.[75]

69 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) par 143.
70 Van Niekerk (2005) Obiter 474.
71 Van Niekerk (2005) Obiter 474.
72 Rautenbach & Bekker Introduction to Legal Pluralism (2014) 173.
73 Rautenbach & Bekker 173.
74 Rautenbach & Bekker 173. See also Oliver et al (1989) 435; the common law of inheritance has been codified by the Intestate Succession Act 81 of 1953.
75 Rautenbach & Bekker 173.

Customary law of succession, as governed by the rule of male primogeniture,[76] is however, not concerned with the inheritance of property, but it is primarily concerned with the succession to the status of the deceased.[77] Hence, the emphasis is on continuation of the status quo. Furthermore, succession means the transfer of rights, duties, powers and privileges associated with a person's status whilst inheritance means the transfer of property rights only.[78]

1.5 Methodology

This dissertation will be prepared on the basis of qualitative research methodology. The aim is to develop a better understanding of the underlying reasons and motivations behind the inconsistency that exists between the rights extended to black women living according to customary law in terms of official customary law and the application of such rights in their daily lives. Hopefully, this research methodology will assist in disclosing the entrenched thought patterns and beliefs that make people stagnant to change, and as a result renders the official customary law futile.

By applying this method of research, the researcher hopes to show that the law as achieved in theory is not always reflected in the real lives of the indigenous people it is meant to govern. This will explain the reason the courts are currently still having to rule on disputes regarding abolished principles like the rule of male primogeniture to this day. Additionally, the reason behind this choice of research methodology is to find ways in terms of which the official law can be reconciled with the living customary law, to be more practical in its aim to protect women's rights and be in line with the Constitution.

The researcher will rely on primary sources of law such as the Constitution, legislation specifically dealing with customary matters, the Intestate succession Act and even case law to present a clear discussion of what the law, generally, provides about the rights of women under customary law. Furthermore, the researcher will

76 Rautenbach & Du Plessis Customary law of succession and inheritance in Rautenbach et al (2010) 121.
77 Rautenbach & Du Plessis 121.
78 Rautenbach & Bekker 173.

consult works of other learned authors and academics who write on and have studied customary law of succession extensively.

1.6 Chapter outline

Chapter 1: Introduction

Chapter 2: The prolonged discriminatory conditions of customary law of succession towards African women and its effects

Chapter 3: The reform of customary law of succession

Chapter 4: The implementation of common law with customary law of succession-unification or separation of the two systems of law

Chapter 5: The role of women in South African customary law of succession

Chapter 6: Conclusion

1.7 Conclusion

This chapter introduces the aims and objectives of this research. The researcher provides a hypothesis to give a possible explanation of the effect of abolishing the rule of male primogeniture and how this may have worsened the discord between living and official customary law. The author further poses several questions that the researcher aims to find answers to in the subsequent chapters of the research.

The chapter provides a literature review that concisely discusses a brief summary of the origin of male primogeniture and its development throughout the years; the effect of getting rid of the rule after the *Bhe v Magistrate, Khayelitsha* case,[79] the discord between living and official customary law, and whether women have a choice of law between applying customary law of succession or common law of succession. All these issues will be explored in greater detail in the subsequent chapters of this dissertation.

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79 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C).

CHAPTER 2: The prolonged discriminatory conditions of customary law of succession towards indigenous African women and its effects

2.1 Introduction

The African system of succession was almost invariably patrilineal.[1] Accordingly, this African system of succession entailed the tracing of ancestral descent through the paternal line.[2] As a result, the rule of male primogeniture has since formed the core of customary law of succession, which resulted in the marginalization of all females that adhered to the respective customary law.[3] It was for this reason that male primogeniture has been a contentious issue and thus could not survive constitutional scrutiny.[4]

Therefore, the main focus in chapter two is unpacking the nature of male primogeniture and how it has played a major role in discriminating against women of South Africa who are governed by customary law. This chapter will thus uncover and highlight the injustices and discriminatory conditions that, steered by male primogeniture, women suffered.

2.2 The rule and role of male primogeniture under customary law of succession

The legal system of South Africa is pluralistic in nature.[5] Hence, the South African law of succession consist of the common law of succession as well as the customary law of succession. Common law of succession is regulated by the Intestate Succession Act,[6] and the Wills Act,[7] whilst, customary law of succession is

1 Bekker & Koyana "The judicial and legislative reform of the customary law of succession" 2012 De Jure 568.
2 Bekker & Koyana 2012 De Jure 568.
3 Bekker & Koyana 2012 De Jure 568.
4 Bekker & Koyana 2012 De Jure 568.
5 Himonga & Nhlapo African Customary Law in South Africa: Post-Apartheid and Living Law Perspective (2014) 161.
6 Intestate Succession Act 81 of 1987.
7 Wills Act 7 of 1953.

characterised by the application of the rule of male primogeniture.[8] A rule that is central to this research.

This rule excluded any possibility of a female successor.[9] It was often criticised and accused for diminishing the status of a woman to being inferior to a man and furthermore, unable to acquire the status of the deceased male person.[10]

Van Niekerk however, argued that this rule emerged with the primary purpose of ensuring that the continued existence of the family or the group prevails and therefore, it could not have been that its goal was to prejudice certain members of the community.[11]

Male primogeniture was thus a rule familiar to the people of South Africa. Where the deceased was in a polygynous marriage, the eldest son of each house succeeds to that specific house.[12] Where the eldest son of a house is absent, his eldest male descendent will therefore succeed. This will continue to happen until all the sons of the deceased and their male descendants have been exhausted.[13] These rules also apply to the succession of a monogamous family head.[14]

Therefore, the acquisition of status or succession in customary law is regulated by the rule of male primogeniture. Succession and inheritance are two distinguishable concepts and should not be misunderstood as one.[15] As noted in chapter one of this research, inheritance refers to the acquisition of property of the deceased,[16] whilst succession refers to the acquisition of the status of the deceased.[17] On the one hand, in common law of succession, inheritance concerns mainly the division of the assets of a deceased among his or her heirs. The division of property can take place in terms of the provision of a will (or testament) known as testate inheritance or

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8 Himonga & Nhlapo 161.
9 Himonga & Nhlapo 162.
10 Ndulo "African customary law, customs, and women's rights" 2011 Cornell Law Faculty Publications 89.
11 Van Niekerk 479.
12 Himonga & Nhlapo 162.
13 Himonga & Nhlapo 162.
14 Himonga & Nhlapo 162.
15 Himonga & Nhlapo 162.
16 Himonga & Nhlapo 162.
17 Himonga & Nhlapo 161.

according to the rules of common law where no will exists, namely statutory intestate inheritance.[18]

Customary law of succession on the other hand, as governed by the rule of male primogeniture, is not concerned with the inheritance of property, but it is primarily concerned with the succession to the status of the deceased.[19] Succession in customary law encompasses, the acquisition of status and the role a deceased person occupied during his lifetime.[20] However, the acquisition or inheritance of the property or some of the property of the deceased may also accompany such succession.[21] Therefore, the purpose of succession is that the deceased's property should be left for the use and benefit of his closest relatives or his dependants during his lifetime.[22] Thus, the successor steps into the shoes of the deceased person by acquiring the rights, duties and obligations that the deceased occupied during his lifetime.[23] According to the latter, it is clear that family headship is a continuous exercise of well-defined rights and liabilities passing from father to son without change or interruption,[24] and not to a female descendant or surviving female spouse. Hence, exposing the discriminatory nature of the rule of male primogeniture and its exclusion of females from succession.

Unlike common law, customary law of succession is first and foremost concerned with the preservation and continuation of the family name and the unity of the family after a person dies.[25] The function of customary law of succession is therefore, to counteract the disruptive effect of death on the integrity of a family unit.[26] In other words, family stability and continuity are of great significance when it comes to African families as opposed to individual success.[27]

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[18] Rautenbach & Bekker 173. See also Oliver et al (1989) 435. The common law of inheritance has been codified by the Intestate Succession Act 81 of 1953.

[19] Rautenbach & Du Plessis Customary law of succession and inheritance (2010) 121.

[20] Rautenbach & Du Plessis 121.

[21] Himonga & Nhlapo 162.

[22] Schoeman-Malan "Recent developments regarding South African common and customary law of succession" 2007 PELJ 112.

[23] Schoeman-Malan 2007 PELJ 112.

[24] Schoeman-Malan 2007 PELJ 112.

[25] Himonga & Nhlapo 159.

[26] The South African Law Commission Harmonisation of the Common Law and Law (1999) 1 (Draft Issue Paper on Law of Succession) http://salawreform.justice.gov.za/ipapers/ip12_prj108_1998.pdf (accessed 09 January 2019).

[27] The South African Law Commission Harmonisation of the Common Law and Law (1999) 1 (Draft Issue Paper on Law of Succession)

Ngcobo J in *Bhe v Magistrate, Khayelitsha* indicated that the obligation to care for family members is a vital and fundamental value in African social system and that this value is now entrenched in the African (Banjul) Charter on Human and Peoples' Rights.[28] The preamble of the African Charter on Human and Peoples' Rights urges member states, including South Africa, to take into consideration the virtues of their historical traditions and values of African civilization, which should inspire and characterize their reflection on the concept of human and peoples' rights.[29] Article 27(1) provides that every individual shall have duties towards his family and society,[30] and Article 29(1) provides that an individual shall have the duty to preserve the harmonious development of the family and to work for the cohesion and respect of the family, to respect his parents at all times, to maintain them in case of need.[31]

2.3 Male primogeniture as an instrument of discrimination against indigenous African women

The rule of male primogeniture was declared inconsistent with the Constitution of the Republic of South Africa in its application to the succession of property.[32] This rule was invalidated to the extent that it excluded women from inheriting property or succession.[33] Until very recently, the intestate law of succession excluded women from inheriting property or succeeding as the head of the family. These women were, prohibited from inheriting land or owning property during their customary marriages and from inheriting property upon the death of a father, husband or male relatives.[34]

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http://salawreform.justice.gov.za/ipapers/ip12_prj108_1998.pdf (accessed 09 January 2019).

28 *Bhe v Magistrate, Khayelitsha 2004 (2) SA 544 (C)* par *166.*

29 *African (Banjul) Charter on Human and Peoples' Rights* adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986 http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf (accessed 04 February 2019).

30 Article 27 (1) of the *African (Banjul) Charter on Human and Peoples' Rights* adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986 http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf (accessed 04 February 2019).

31 Article 29 (1) of the *African (Banjul) Charter on Human and Peoples' Rights* adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986 http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf (accessed 04 February 2019).

32 Bekker & Koyana 2012 De Jure 573.

33 Bekker & Koyana 2012 De Jure 573.

34 Beninger "Women's property rights under customary law" 2010 Women's Legal Centre 8-9.

The researcher seeks to highlight some of the examples that serve as the mirror that reflects how women were for a long time, excluded from succession. The researcher will accordingly, reveal how the rule of primogeniture has fuelled the prohibition of women from inheriting wealth and the unequal treatment of women in customary law of succession. Consequently, resulting in women being dependant on their male relatives for survival and unable to make decisions over how the family estate should be administered adequately.

While traditionalists argue that by promoting traditional values customary law contributes positively to the promotion of human rights, activists on the contrary, argue that certain customary law norms undermine the dignity of women and are used to justify treating women as second-class citizens.[35] Customary law in its application had a reputation of often being discriminatory in areas such as bride price, guardianship, inheritance, appointment to traditional offices and the age of majority.[36] These factors are discussed in more detail, hereafter.

2.3.1 Examples of discrimination endured by women before the abolition of the rule of male primogeniture

Some of the discriminatory provisions that undermine women subject to customary law include the perpetual minority status of women, the inability to succeed to the role of a family head or to administer a home and are discussed hereunder.

a. Restriction of women's right to property

Customary laws such as the rule of male primogeniture, that restrict women's rights to property have a real and serious impact because they affect women's day to day lives, including their ability to support themselves and their children and to confront poverty.[37] This was more unfortunate in instances whereby the successor was a distant relative who did not have the wife of the deceased or his female children as a

[35] Beninger 2010 Women's Legal Centre 8-9.
[36] Ndulo 2011 Cornell Law Faculty Publications 89.
[37] Beninger 2010 Women's Legal Centre 5.

primary priority. The heir may only interested in the property but not the responsibilities that go with it.[38]

The concept of an heir under customary law is very important and therefore, requires a distinction between a house heir and a general heir. A house heir refers to a person who is entitled to inherit property in a particular house in a polygynous family, usually that of his mother.[39] A general or principal heir is a person who acquires or succeeds to the status of the deceased, including all the deceased's rights, duties and responsibilities.[40]

b. Women remain vulnerable and at the mercy of the heir

Another problem with official customary law of succession was that it administered the rule of male primogeniture without strictly requiring the heir to take responsibility for the widow and the deceased's dependants.[41] Consequently, this creates a possibility for the heir to be unjustly enriched at the expense of the other family members who have contributed to the accumulation of this property or even the maintance of such property thereof.[42] Thus exposing women and female children to a much more vulnerable position than what they were already susceptible to.

Although the heir is supposed to inherit the deceased's responsibilities to support and protect his family, sometimes the heir does not respect these obligations.[43] Accordingly, leaving women without means of obtaining property and supporting their children.[44] For example, the father of the deceased in the *Bhe v Magistrate, Khayelitsha* case, who was appointed as the sole heir of the estate intended to sell the immovable property of the deceased to defray expenses incurred in connection with the funeral of the deceased.[45] There was no indication that the deceased's father gave any thought to the dire consequences, which would follow the sale of the

[38] Beninger 2010 Women's Legal Centre 9.
[39] Himonga & Nhlapo 162.
[40] Himonga & Nhlapo 162.
[41] South African Law Reform Commission in Report on Customary Law of Succession (2004) 13.
[42] South African Law Reform Commission (2004) 13.
[43] Beninger 2010 Women's Legal Centre 9.
[44] Beninger 2010 Women's Legal Centre 9.
[45] *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) par 17.

immovable property, possibly leaving Ms. Bhe and the two minor children homeless.[46]

The court in the *Shibi v Sithole,*[47] case also found that there was adequate evidence before it to demonstrate that African women and descendants who were not first born males were placed in an extremely vulnerable situation and that their right to equality and dignity were violated by the continued application of the customary succession laws which endorse male primogeniture rule.[48] The position was the same for first born females also, as they could also not succeed the deceased's role or status due to being female.[49]

c. Prohibited from the role of guardianship of their minor children

In instances where the successor was a minor child or incapable of taking the responsibility of administering the deceased's roles and duties, the mother would not be considered a guardian of such an heir regarding the administration of that estate.[50] This meant that, in customary law, the person who acts as an administrator, and simultaneously as a guardian of the heir, is determined according to certain well-recognized customary principles.[51] In polygynous families, a minor heir of any house is subject to the deceased's highest-ranking major son.[52] In monogamous families or in situations where all the deceased's descendants are too young, the estate is administered by one of the deceased's brothers or by his father.[53] This is because, formerly, women could not exercise power and authority over men, so there could be

46 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) par 17.

47 *Shibi v Sithole* 2005 (1) SA 580 (CC).

48 *Shibi v Sithole* 2005 (1) SA 580 (CC) par 18.

49 Schoeman-Malan "Recent developments regarding South African common and customary law of succession" 2007 PELJ 112.

50 The South African Law Commission "Harmonisation of the common law and indigenous law 1998 (Draft Issue Paper on Law of Succession) http://www.justice.gov.za/salrc/dpapers/dp76_prj90_conflicts_1998apr.pdf (accessed 09 January 2019).

51 The South African Law Commission Harmonisation of the common law and indigenous law 1998 (Draft Issue Paper on Law of Succession) http://www.justice.gov.za/salrc/dpapers/dp76_prj90_conflicts_1998apr.pdf (accessed 09 January 2019).

52 The South African Law Commission Harmonisation of the Common law and indigenous law1998 (Draft Issue Paper on Law of Succession) http://www.justice.gov.za/salrc/dpapers/dp76_prj90_conflicts_1998apr.pdf (accessed 09 January 2019).

53 The South African Law Commission harmonisation of the common law and indigenous law 1998 (Draft Issue Paper on Law of Succession) http://www.justice.gov.za/salrc/dpapers/dp76_prj90_conflicts_1998apr.pdf (accessed 09 January 2019).

no question of nor was it conceivable for wives or daughters succeeding as family head.[54]

The discussion of regency is therefore crucial when dealing with minors who were not old enough to take the role of a successor. A regent is defined as any person who, in terms of customary law holds a traditional leadership position in a temporary capacity until a successor to that position who is a minor, is recognised as contemplated in section 13 (4) of the Traditional Leadership and Governance Act 41 of 2003.[55] Regency is a familiar practice and is not foreign to customary law and normally the younger brother of the deceased traditional leader is appointed, by the family council, as a regent.[56] The appointed regent acts as a traditional leader until the successor fulfils all the requirements for traditional leadership.[57] Women are now according to customary law permitted to act as regents if a successor is under-aged or not able to succeed immediately.[58] This is so according to the Traditional Leadership and Governance Act which provides that women can now be recognised as traditional leaders to promote and protect the right of women to equality.[59] A good example of regency is one of the Dalindyebo's kingdom, Eastern Cape. Kaiser Matanzima confirmed that Nqwiliso Duli filled his father's position during Dalindyebo's paramountcy because his father was only thirteen years old when Mvuzo died.[60] Nqwiliso, a cousin of Chief Mvuzo, was nominated as guardian and regent during the minority of Mlingo.[61]

In the *Shibi v Sithole* case,[62] Ms. Shibi approached the court after being refused from inheriting from her deceased brother's intestate estate, who died unmarried and without dependents.[63] In this case, the deceased's intestate estate fell to be

54 The South African Law Commission Harmonisation of the common law and indigenous law 1998 (Draft Issue Paper on Law of Succession) http://www.justice.gov.za/salrc/dpapers/dp76_prj90_conflicts_1998apr.pdf (accessed 09 January 2019).
55 Section 1 of the Traditional Leadership and Governance Act 41 of 2003.
56 Rautenbach Introduction to Legal Pluralism (2018) 216.
57 Rautenbach 216.
58 Rautenbach 213.
59 Section 8 (a) and (c) of Traditional Leadership and Governance Framework Act 41 of 2003.
60 Yekela Unity and Division: Aspects of the History of Abathembu Chieftainship (LLD Dissertation 2011 UCT) 54.
61 Yekela 54.
62 *Shibi v Sithole* 2005 (1) SA 580 (CC).
63 *Shibi v Sithole* 2005 (1) SA 580 (CC).

administered under the provisions of section 23 (10) of the Black Administration Act.[64] Ms. Shibi was, in terms of customary law, precluded from being the heir to the intestate estate of her deceased brother.[65] She challenged the manner in which the estate had been administered and sought an order declaring her to be the sole heir in the estate of the deceased.[66] Customary law was unfortunately, in favour of the deceased's two cousins being joint heirs, to the exclusion of Ms. Shibi. [67]

It is because of such cases that this chapter argues that customary law perpetuated the inferiority status of indigenous women through the application of the customary rule of primogeniture. As a result, women like Ms. Shibi became non-existent for purposes of succeeding their male relative's estate and it appears as though the deceased person's estate would rather devolve outside the deceased's immediate family, to any closest male relative as long as they were not female.

As referred to above, the purpose of succession is that the deceased's property should be left for the use and benefit of his closest relatives or his dependants during his lifetime.[68] So, the application of the rule of male primogeniture victimised many women, especially when a family's communal estate devolved upon a distant family member of the deceased who did not adhere to his customary responsibility of maintenance.[69]

According to Langa DCJ and Ngcobo J in *Bhe v Magistrate, Khayelitsha*, primogeniture excludes women from inheritance. It is based on patriarchy, which reserves for women a position of subservience and subordination and in which they were regarded as perpetual minors under the tutelage of fathers, husbands or the head of the extended family.[70] In other words, women were regarded as perpetual children who could not have a say over a man's life. This serves as a further example of how women were subjected to discrimination, with male primogeniture being employed as an instrument aiding such treatment towards women.

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64 *Shibi v Sithole* 2005 (1) SA 580 (CC) par 21.
65 *Shibi v Sithole* 2005 (1) SA 580 (CC) par 25.
66 *Shibi v Sithole* 2005 (1) SA 580 (CC) par 26.
67 Rautenbach 2006 SAJHR 101.
68 Schoeman-Malan 2007 PELJ 112.
69 Rautenbach 2006 SAJHR 99.
70 Rautenbach 2006 SAJHR 108.

This differential treatment between men and women constituted unfair discrimination.[71] Therefore, contrary to section 9 of the Constitution which provides that everyone is equal before the law and has the right to equal protection and benefit of the law,[72] women were evidently not treated as equals of males. The male person was thus born with an advantageous privilege of being superior to a female person, by virtue of his gender; hence gender qualified a man's superiority over a woman.

Furthermore, this treatment of women being belittled to perpetual minors, who were incapable of succeeding as family heads, was also contravening women's right to dignity.[73] The dignity of these women was certainly not respected nor protected as the Constitution required. By excluding them from succeeding to the family wealth, these women remain dependant on men for survival. Therefore, to survive as a woman, there needed to be a man taking care of the woman and ruling over her because of the women's supposed inability to do so. It is not hard to imagine how women felt being excluded from succeeding to the status of the family head, given the number of women who eventually came forth to challenge the rule of male primogeniture.[74]

Granted the above examples of how women have persistently endured prolonged discriminatory conditions under customary law of succession, there was overwhelming support for changing rules that discriminated against women. However, the manner in which the change had to occur, was not accepted by everyone. There were still some unreconciled ideas of whether to amend or repeal discriminatory customary law of male primogeniture in order to safeguard and promote the rights of women. There was great support for the removal of male primogeniture. The courts which dealt with intestate estates of black deceased persons on a daily basis, also welcomed the reform process and supported the extension of the Intestate Succession Act of 1987 to customary law.[75]

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71 Section 9 (4) of the Constitution, 1996.
72 Section 9 (3) & (4) of the Constitution, 1996.
73 Section 10 of the Constitution, 1996.
74 *Bhe v Magistrate, Khayelitsha*; *Shilubana and Others v Nwamitwa* 2008 (9) BCLR 914 (CC).
75 South African Law Reform Commission (2004) 13.

To the contrary, some people argued that extending the Intestate Succession Act to apply to black persons had the effect of abandoning the customary system of succession in favour of the common law and therefore an incorrect route.[76] This method of reform was considered inappropriate because, rather than merely imposing common law of succession on people who are subject to customary law, they argued, it was first vital to investigate the possibility of incorporating those aspects of customary law and values that are consistent with the Constitution in the reform of the law of succession.[77]

It is submitted that if the rule of primogeniture is always interpreted with reference to the archaic meaning accorded to it by the ancestors of indigenous people, then contemporary people, especially women, may lose faith in it, and may not respect it because male primogeniture seems to be unjust and unfairly discriminatory towards women.[78] For this reason it was essential for the rule to develop with the changing needs of those who look to it as the embodiment of the values and aspirations of the customary law community and its citizens.

2.4 Conclusion

It is evident from the Constitution that every individual in South Africa should be treated with respect and afforded equal protection of their human rights.[79] Women are therefore entitled to exercise their human rights, fundamental rights and fundamental freedoms within the family and society.[80] Customary law, thus, in its application, has to be brought in line with the Constitution, which provides that the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.[81] This means that the discrimination of women could no longer be accepted to justify discriminatory customary laws such as male primogeniture.

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[76] South African Law Reform Commission (2004) 13.
[77] South African Law Reform Commission (2004) 13.
[78] Obeng Mireku "Customary law and the promotion of gender equality: An appraisal of the Shilubana decision" (2010) African Human Rights Law Journal 519.
[79] Section 9 of the Constitution, 1996.
[80] Ndulo 2011 Cornell Law Faculty Publications 90.
[81] Section 211 of the Constitution,1996.

Therefore, given the important role of customary law of succession, it was disconcerting to know that women were denied the opportunity of maintaining the continuity of their family names and that of preserving unity among the family members. Women were thus, rendered incapable of such a responsibility without having been given the choice or opportunity to do so.

Consequently, it would be unreasonable to proceed with applying discriminatory customary law rules that are inconsistent with the fundamental values of the Constitution on the basis of the protection of the family as a social unit. As explored above, it was obvious that women were regarded as second class citizens as compared to male citizens. There needed to be a change that will treat women as equals of male counterparts without undermining customary law of succession by directly or indirectly suggesting that western laws of fairness and equal treatment are better. In other words, the solution to reform the problems outlined above.

CHAPTER 3: The reform of customary law

3.1 Introduction

As it has already been pointed out in chapters one and two above, the Constitutional Court in the *Bhe v Magistrate, Khayelitsha* case,[1] declared the customary law of male primogeniture unconstitutional and invalid.[2] The court moreover, declared unconstitutional and invalid, section 23(7) of the Black Administration Act,[3] which unfairly discriminated against women with regard to the administration and distribution of deceased estates.[4] This was, for indigenous women in South Africa a turning point for the better because women can finally be considered for inheritance.

The focus of this chapter is on the reform of customary law rule of male primogeniture. This chapter will focus on discussing the factors and occurrences that led to the abolition of the rule of male primogeniture, by closely discussing the *Bhe v Magistrate, Khayelitsha* case outcome. The chapter will furthermore, focus on the *Shilubana v Nwamitwa* case,[5] *M v M* case,[6] and *Mphephu v Mphephu- Ramabulana* case,[7] to expose the fact that the discrepancy between living and official customary law still exists and require a different method than the one employed by courts to extend the application of the Intestate Succession Act to customary law of succession. Moreover, the chapter will concentrate on the different and contrasting views of legal contributors to inquire whether abolishing the rule of male primogeniture was a viable solution to remedy the discrimination against women.

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1 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C).
2 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C), Bekker & Koyana "The judicial and legislative reform of the customary law of succession" 2012 De Jure 571.
3 Black Administration Act 38 of 1927.
4 Van Niekerk "Succession, living law and *Ubuntu* in the Constitutional Court" 2005 Obiter 476
5 *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC).
6 *M v M* (63462/12) [2014] ZAGPPHC 1026.
7 *Mphephu v Mphephu- Ramabulana* (773/2012) [2017] ZALMPTHC 1.

3.2 The genesis of customary law reform: The *Bhe v Magistrate, Khayelitsha* case 2004 (2) SA 544 (C)

The *Bhe v Magistrate, Khayelitsha* case involved an application submitted on behalf of the two minor daughters of the deceased, female descendants, descendants other than eldest descendants and extra-marital children who are descendants of people who die intestate.[8] In this case, it was contended that the disputed provisions and the customary law rule of male primogeniture unfairly discriminated against the two children in that they prevented the children from inheriting the deceased estate.[9] Instead, the estate devolved to the deceased's eldest male relative, who was the father of the deceased by application of the rule of male primogeniture.[10]

After the death of the deceased, the relationship between Ms. Bhe and the father of the deceased deteriorated.[11] In spite of the fact that he resided in Berlin in the Eastern Cape, the Magistrate in accordance with section 23 of the Act and the regulations appointed the deceased's father as representative and sole heir of the deceased estate.[12] Therefore, the two minor children did not qualify to be the heirs in the intestate estate of their deceased father.[13]

The applicants challenged the appointment of the deceased's father as heir and representative of the estate in the High Court.[14] The High Court concluded that the legislative provisions that had been challenged and on which the father of the deceased relied, were inconsistent with the Constitution and were therefore invalid.[15]

Langa DCJ, writing for the majority of the Court, holds that, construed in the light of its history and context, section 23 of the Black Administration Act and its regulations are manifestly discriminatory and in breach of the rights to equality in section 9(3) and dignity in section 10 of our Constitution, and therefore must be struck down.[16]

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8 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) par 10.
9 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) par 142.
10 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) par 17.
11 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) par 15.
12 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) par 15.
13 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) par 16.
14 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) par 18.
15 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) par 19.
16 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) par 142.

Langa DCJ then considered the African customary law rule of male primogeniture, in the form that it has come to be applied in relation to the inheritance of property and held that it unfairly discriminates against women and children born out of wedlock.[17] He accordingly declares it unconstitutional and invalid.

Langa DCJ holds that while it would ordinarily be desirable for courts to develop new rules of African customary law to reflect the living customary law and bring customary law in line with the Constitution, that remedy is not feasible in this matter, given the fact that the rule of male primogeniture is fundamental to customary law and not replicable on a case to case basis.[18] However, he held that an interim regime to regulate intestate succession of black persons was necessary until the legislature is able to provide a lasting solution.[19] As such the court orders that, estates that would previously have devolved according to the rules in the Black Administration Act and the customary law rule of male primogeniture must now devolve according to the rules provided in the Intestate Succession Act.[20]

Although the role of customary law, according to Ngcobo J, is to ensure that the deceased's dependants always have a home and resources for their maintenance, he agrees with Langa DCJ in that the fundamental values of customary law were changing because of urbanisation, individualisation, formation of nuclear families and the changing roles of women in society.[21] Hence, there had to be a transfiguration of customary law to have it adapted and aligned with these changing values and conditions. Ngcobo J furthermore, said that the rule of primogeniture in favour of male persons was no longer justified and could thus, not be considered reasonable and justifiable under section 36 (1) of the Constitution.[22] This exclusion of women from succeeding and inheriting could therefore, no longer be justified.

In handing the minority, dissenting judgment, Ngcobo J agreed with Langa DCJ that section 23 of the Black Administration Act together with the regulations made under that Act, and section 1(4)(b) of the Intestate Successions Act violate the right to

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17 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) paras 92 & 93.
18 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) paras 110-114.
19 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) par 116.
20 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) par 121.
21 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) par 209.
22 *Bhe v Magistrate, Khayelitsha 2004 (2) SA 544 (C)* par 209.

equality and the right to dignity and are therefore unconstitutional.[23] He also agrees that the principle of male primogeniture discriminates unfairly against women.[24] Ngcobo J also holds that courts have an obligation under the Constitution to develop indigenous law so as to bring it in line with the rights in the Bill of Rights, in particular, the right to equality.[25] He holds therefore that the principle of primogeniture should not be struck down but instead should be developed and brought in line with the right to equality, by allowing women to succeed to the deceased as well.[26]

Ngcobo J holds that Parliament must make laws governing the application of indigenous law. He accepts that pending the enactment of that law, an interim measure must be put in place to regulate succession. He finds that the application only of the Intestate Succession Act may, in certain circumstances, lead to an injustice.[27] This is so because the provisions of this statute are inadequate to cater for the social settings that indigenous laws of succession were designed to cater for, in particular, the transfer of the obligation to look after minor children and other dependents of a deceased.[28] He therefore holds that pending the enactment of the relevant law by Parliament, both the indigenous laws of succession and the Intestate Succession Act should be applied subject to the requirements of fairness, justice and equity.[29] He holds that in the interim, the question of which system of law should be applied must be determined by agreement among family members.[30] However, where there is a dispute, such a dispute must be resolved by the Magistrate Court having jurisdiction. [31]

Inferring from the above, the researcher submits that Ngcobo J, understood that customary law should have been developed by employing customary law methods and procedures. Traditional courts together with the traditional council still play an

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23 *Bhe v Magistrate, Khayelitsha 2004 (2) SA 544 (C)* par 142.
24 *Bhe v Magistrate, Khayelitsha 2004 (2) SA 544 (C)* par 143.
25 *Bhe v Magistrate, Khayelitsha 2004 (2) SA 544 (C)* par 139.
26 *Bhe v Magistrate, Khayelitsha 2004 (2) SA 544 (C)* par 139.
27 *Bhe v Magistrate, Khayelitsha 2004 (2) SA 544 (C)* par 226.
28 *Bhe v Magistrate, Khayelitsha 2004 (2) SA 544 (C)* par 229.
29 *Bhe v Magistrate, Khayelitsha 2004 (2) SA 544 (C)* par 139.
30 *Bhe v Magistrate, Khayelitsha 2004 (2) SA 544 (C)* par 239.
31 *Bhe v Magistrate, Khayelitsha 2004 (2) SA 544 (C)* par 239.

integral part of the administration of justice in much of the rural South Africa.[32] For this reason, the researcher suggests that, in remedying the discriminatory nature of the rule of male primogeniture, the state courts and the legislature should have worked closely with the traditional courts to ascertain the best way of developing the rule in line with the Constitution. Hence, Ngcobo J further argues that customary law in its diversity and the legal pluralism that it imports can be greatly strengthened to advance justice in the communities practising customary law.[33] This means that, instead of demolishing the rule of male primogeniture, which formed the core of customary law, the legislature should have alternatively found a solution within customary law, by the people who follow the customs, to include women in customary law of succession.

Contrary to what Ngcobo J considered to be the most feasible solution, Langa DCJ in handing the majority judgment held that it was not feasible to develop and validate the rule of male primogeniture in terms of the Constitution.[34] According to him, this was not feasible because the rule of male primogeniture could not be reconciled with the notions of equality and human dignity as it violates the rights of women.[35] Consequently, the duty of the successor to support the family is not enough to justify the serious violation of the right to equality and human dignity that women endured under customary law of succession.[36]

The researcher agrees with Ngcobo J that if male primogeniture is struck down, it would theoretically mark the end of the rule, although, the people who observe the rule might continue to observe it.[37] Hence, the researcher by referring to this case law holds that there are still communities, especially in the rural areas, that continue to observe the rule of male primogeniture. This reveals that the rule formed an integral part of the people's lives and worked well for these people over centuries of observing the rule.

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32 South African Law Commission "The harmonization of the common law and law: Traditional courts and the judicial function of the traditional leaders" 1999 (Discussion paper 82) 1 http://www.justice.gov.za/salrc/dpapers/dp82_prj90_tradl_1999.pdf (accessed 12 February 2019).

33 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) par 153.

34 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) par 95.

35 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) par 95.

36 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) par 96.

37 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) at par 215.

Resulting from the *Bhe v Magistrate, Khayelitsha* case, the legislature was required to enact appropriate legislation to regulate succession under customary law.[38] However, before this legislation is passed, the Intestate Succession Act will apply to the distribution of black intestate estates that were previously governed by section 23 of the Black Administration Act, as an interim measure.[39] Therefore, affording women the same rights under succession as all women in South Africa. This position has remained as is and creates the impression that what was intended by the courts to be an interim solution, has become a permanent solution.

3.3 The aftermath of customary law reform: Women included in succession

A genuine system of customary law rests on the existing and generally accepted social practices of the community and therefore, law of succession has to reflect whatever changes have occurred in the social and economic structures of South African society.[40] There needs to be a reflection of what the law says in theory and how the actual African people live and practice their customs.

The guiding principle for the change required was, as Ndulo suggests, that customary law is living law and can therefore, not be static.[41] It should therefore, be interpreted to take account of the lived experience of the people it serves.[42] This guiding principle, as the researcher interprets, suggest that whenever there is a proposed change or amendment to customary law principles that are already applicable to the people, such people should be consulted and involved in the reform process. The researcher further holds that, living customary law practices should be given more attention by the courts and the legislature in order to make suggestions that will be accepted and welcomed by the very people who are expected to abide by such altered laws. In other words, it becomes pointless to have rules such as male primogeniture abolished on paper whilst most of the people, more especially in

38 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) par 140.
39 Himonga "The advancement of African women's rights in the first decade of democracy in South Africa: The reform of customary marriage and succession" 2005 *Acta Juridica* 96.
40 South African Law Reform Commission (2004) 13.
41 Ndulo "African customary law, customs, and women's rights" 2011 Cornell Law Faculty Publications 87.
42 Ndulo 2011 Cornell Law Faculty Publications 87.

the rural areas, still abide by the principle in administering the estate of the deceased.

Below, the researcher will discuss three case law that dealt with the rule of male primogeniture. By doing so, the researcher aims to make the reader aware of indigenous people's resistance to accepting reform that seems to invade on their lifestyle. This is the reason there are still cases brought to the court that deal with the rule of male primogeniture even after its abolition.

a ***Shilubana v Nwamitwa 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC)***

For over five generations, the appointment and succession to chieftaincy within the Valoyi community had been strictly patriarchal, as determined by the organising principle of male primogeniture, which allows succession from father to firstborn son only.[43] This was of course, to the exclusion of female descendants.

The appointment of Hosi Fofoza's only daughter as chief did not sit well with Hosi Richard's first-born son, Sidwell Nwamitwa, the applicant in this case.[44] She was appointed to a position of chieftaincy, a position that she was previously disqualified by virtue of her gender and a position, which, according to the applicant, the tribal authorities had no right to alter or discard because of the primogeniture rule. [45]

The dispute between Ms. Shilubana and Mr. Nwamitwa arose following the death of Hosi Richard where the Royal Family of the Valoyi met and unanimously resolved to confer chieftainship on Ms. Shilubana.[46] Mr. Nwamitwa interdicted an inauguration ceremony scheduled for Ms. Shilubana by the provincial Department of Local Government and Housing.[47] Mr Nwamitwa instituted proceedings in the Pretoria High Court, seeking a declaration that he, and not Ms Shilubana, is heir to the chieftainship of the Valoyi and thus entitled to succeed Hosi Richard.[48] The High Court and thereafter, the Supreme Court of Appeal held in Mr Nwamitwa's favour by

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43 Obeng Mireku "Customary law and the promotion of gender equality: An appraisal of the Shilubana decision" 2010 African Human Rights Law Journal 517.

44 *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC) par 7.

45 *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC) par 1.

46 *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC) paras 3 and 4.

47 *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC) par 6.

48 *Shilubana* 2008 (9) BCLR 914 (CC) par 7.

reasoning that, even if the traditions and customary law of the Valoyi currently permit women to succeed as Hosi, Mr Nwamitwa, as the eldest child of Hosi Richard, is entitled to succeed him.[49] Ms Shilubana applied to the Constitutional Court for leave to appeal against the decision of the Supreme Court of Appeal.[50]

Accordingly, the Constitutional Court held that Mr Nwamitwa has no vested right to the chieftainship of the Valoyi.[51] He has, at most, an expectation that as the eldest son of Hosi Richard, he would have been heir.[52] However, the past practice of the Valoyi community is not determinative and does not itself guarantee that Mr Nwamitwa's possible expectation must be fulfilled. The contemporary practice of the Valoyi reflects a valid legal change, resulting in the succession of Ms Shilubana to the chieftainship. Mr Nwamitwa does not have a right to the chieftainship under this altered position and he cannot be declared the Chief in terms of the current customary law of the Valoyi traditional community.[53]

Given the above, as far as the Valoyi people were concerned, there was neither precedent nor evidence of a female having been appointed chief, even if she was the first-born.[54] Therefore, it was foreign to their traditional customs to have a woman occupy such an influential position, especially over men. In other words, Mr. Nwamitwa according to customary law and the Valoyi people was more suitable to be appointed as chief of the Valoyi people.[55]

The High Court decision in favour of Mr. Nwamitwa was criticised by Mireku for failing to recognise the statutory obligation imposed on traditional communities to transform and adapt their customary law and customs so as to comply with the Bill of Rights, in particular by seeking to progressively advance gender representation in the succession to traditional leadership positions.[56]

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49 *Shilubana* 2008 (9) BCLR 914 (CC) par 7.
50 *Shilubana* 2008 (9) BCLR 914 (CC) par 7.
51 *Shilubana* 2008 (9) BCLR 914 (CC) par 86.
52 *Shilubana* 2008 (9) BCLR 914 (CC) par 86.
53 *Shilubana* 2008 (9) BCLR 914 (CC) par 86.
54 Obeng Mireku 2010 AHRLJ 517.
55 Obeng Mireku 2010 AHRLJ 517.
56 Obeng Mireku 2010 AHRLJ 518.

Thereafter, the Constitutional Court rejected the conservative approach of the High Court and the Supreme Court of Appeal, which in effect upheld the validity of the male primogeniture rule.[57] The Constitutional Court overruled the doctrine of male primogeniture by upholding a woman's right to equality to become the first female chief to inherit a chieftaincy position since the advent of South Africa's new constitutional dispensation in 1994.[58] Mireku submits that:

> "The *Shilubana* decision is not only revolutionary but, more importantly, a transformational judgment celebrating gender equality in chieftaincy succession disputes. Shilubana is also welcomed because it is consistent with the grand transformative agenda of the Constitution, the equality jurisprudence progressively developed by the Constitutional Court since its inception as well as international law obligations in respect of women that South Africa has undertaken after its transition from apartheid in 1994".[59]

However, section 211(2) of the Constitution specifically provides for the right of traditional communities to function subject to their own system of customary law, including the amendment or repeal of laws.[60] The right of communities under section 211(2) includes the right of traditional authorities to amend and repeal their own customs.[61] A community must be empowered to act by itself, so as to bring its customs into line with the norms and values of the Constitution.[62] This is why this chapter highlights the point that communities should be involved at grassroot level to rectify its own discriminatory or unconstitutional laws, such as male primogeniture, in line with the Constitution. Customary law should thus be treated independently and as equal to common law. It should be trusted, by the courts to be able to come up with strategies and solutions that will resolve its laws' inconsistency with the Constitution.

The *Shilubana v Nwamitwa* case reflects on the reform that took place after the *Bhe v Magistrate, Khayelitsha* case was decided. The rule of male primogeniture according to the courts and formal legislation had lost its applicability and power over prohibiting women to succeed from their male relatives.

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57 *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC) par 85.
58 Obeng Mireku 2010 AHRLJ 515.
59 Obeng Mireku 2010 10 AHRJ 522.
60 *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC) par 45.
61 *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC) par 45.
62 Obeng Mireku 2010 AHRLJ 73.

b ***M v M (63462/12) [2014] ZAGPPHC 1026***

The deceased was in a polygamous customary marriage to the first respondent's mother and to the applicant's mother.[63] Both the first and second customary wives are also deceased.[64] During his lifetime, the deceased bought and acquired two adjacent farms known as Portion 302 and 303 of the consolidated farm. The deceased allocated portion 303 to the first customary wife and portion 302 to the second customary wife, to live on and to cultivate crops for sustenance.[65] Following the deceased's death, in accordance with the Venda custom, the Bantu Affairs Commissioner appointed the first respondent as the heir of the deceased estate and transferred both portion 302 and 303 farms to the first respondent, the deceased's eldest son and eldest child of the two families.[66]

The applicant, who was the son of the deceased's second wife wanted relief from the court declaring that, a farm that was allotted to his mother during his father's lifetime should have been inherited by him and not the first respondent.[67] The applicant's stance is that the portion 302 should be returned to the second wife's house and to be shared by her children. [68]

According to Venda customs, all land is communal land, which is allocated to a family head by the chief.[69] Ownership of the land is not registered in the name of the family head but is kept in trust by the chief.[70] After the passing of the family, the land remains with the chief and only the use of the land will be transferred to the heir of the family head.[71] In *casu* however, the deceased bought and owned the land in the

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63 *M v M* (63462/12) 2014 ZAGPPHC 1026 par 5.
64 *M v M* (63462/12) 2014 ZAGPPHC 1026 par 5.
65 *M v M* (63462/12) 2014 ZAGPPHC 1026 par 6.
66 *M v M* (63462/12) 2014 ZAGPPHC 1026.
67 *M v M* (63462/12) 2014 ZAGPPHC 1026 paras 1 & 2.
68 *M v M* (63462/12) 2014 ZAGPPHC 1026 par 11.
69 *M v M* (63462/12) 2014 ZAGPPHC 1026 par 14.
70 *M v M* (63462/12) 2014 ZAGPPHC 1026 par 14.
71 *M v M* (63462/12) 2014 ZAGPPHC 1026 par 15.

Western sense with a title deed registered in his name. The farms are not communal land kept in trust by the Chief.[72]

The court therefore, held that both portions of the farm should not have been registered in the first respondent's name, as the farm did not belong to him individually. [73] It is undisputed evidence that the deceased had prior to his death, had apportioned the two farms to each of his wife. The farms then belonged to each of his wife's house and it had to be used exclusively for the benefit of the first and second wives' houses.[74] Since the title deed is in the first respondent's name, the children of the second wife have been unable to neither inherit nor enjoy the benefit of their mother's portion of the farm after her death. The winding-up of the deceased's estate should have been done in terms of the Intestate Succession Act and to be consistent with the *Bhe v Magistrate, Khayelitsha* judgment, with portion 302 inherited by the second wife and her children and portion 303 inherited by the first wife and her children.[75]

In *casu*, the rule of male primogeniture was evidently exercised. The first respondent was appointed as an heir on the basis of being the eldest male child of the deceased.[76] Even almost 10 years after the Constitutional Court abolished the rule of male primogeniture, the researcher infers from the above case that South African people were still applying the rule among the communities.

Consequently, house property and family property are also distinguished. House property is used for the benefit of the house to which it belongs whilst the family property refers to the property used for the collective benefit of the family and does not accrue to a specific house.[77] Therefore, on the one hand, family property includes property which the family head inherited from his mother's house, property acquired by the family head by his own efforts and labour and land allotted by the

[72] *M v M* (63462/12) 2014 ZAGPPHC 1026 par 16.
[73] *M v M* (63462/12) 2014 ZAGPPHC 1026 par 26.
[74] *M v M* (63462/12) 2014 ZAGPPHC 1026 par 26.
[75] *M v M* (63462/12) 2014 ZAGPPHC 1026 par 26.
[76] *M v M* (63462/12) 2014 ZAGPPHC 1026 par 21. For purposes of understanding the role of an heir, the researcher refers to the descriptions she provided in chapter two, of two types of heirs. A general heir and a house heir. A house heir refers to a person who is entitled to inherit property in a particular house in a polygynous family, usually that of his mother.[76] On the other hand, a general or principal heir is a person who acquires or succeeds to the status of the deceased, including all the deceased's rights, duties and responsibilities.[76]
[77] Rautenbach Introduction to Legal Pluralism (2018) 120.

traditional authority to the family group and not to a specific house.[78] House property on the other hand, includes earnings of the members of a specific house, livestock allocated to the house and its increase, *lobolo* received for the marriage of the daughters of the house and agricultural products produced by the wife on her fields.

The *M v M* case is a clear indication that, although, the rule of male primogeniture has been found unconstitutional and thereafter, barred from being applied, there are instances whereby people still have their estates devolved according to the rule of male primogeniture. This may be so because this rule formed the core of customary law and as a result, was understood by those it was applicable to. Alternatively, it may be because this solution came with the imposition of western ways on traditional ways of living.

Besides the fact that some women have become aware of the reform that has taken place with regard to customary law as it relates to women, there is still a problem of inconsistency between living and official customary law.[79] For this reason, it is argued that the decision in *Bhe v Magistrate, Khayelitsha* will not benefit most women living under customary law.[80] This is because the official customary law that was changed by the court is different from the living customary law, which in reality regulates the lives of women living under customary law, especially in rural areas.[81] This accordingly meant that living customary law escaped constitutional scrutiny because although formal customary law was amended to be in line with the Constitution, there was little to lack of evident transformation to living customary law.[82] It also meant that the court's decision has little or no bearing on these women's realities.[83]

Moreover, the remoteness of the *Bhe v Magistrate, Khayelitsha* case from the people will most likely require more effort and resources to implement it.[84] The researcher advises state courts and legislature to work hand in hand with the

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[78] Rautenbach 120.

[79] Himonga "The advancement of African women's rights in the first decade of democracy in South Africa: The reform of the customary law of marriage and succession" 2005 Acta Juridica 97.

[80] Himonga 2005 Acta Juridica 97.

[81] Himonga 2005 Acta Juridica 97.

[82] Himonga 2005 Acta Juridica 97.

[83] Himonga 2005 Acta Juridica 97.

[84] Himonga 2005 Acta Juridica 97.

traditional courts to get a clearer picture of how disputes are resolved and how discrepancies in customary law are amended from the traditional courts. The traditional and state courts can work together to develop customary law rules in line with the Constitution.

c *Mphephu v Mphephu-Ramabulana (773/2012) [2017] ZALMPTHC 1*

The applicants in this case were the descendants of the Mphephu-Ramabulana royal family.[85] They brought an application against the respondents declaring that the Mphephu Ramabulana royal family council's decision to identify the first respondent as a suitable person to fill the position of king of the Venda traditional community is unlawful, unconstitutional and invalid.[86] Moreover, they required an order declaring that the rule of male primogeniture as it applies to customary law of succession, to the position of the traditional leader is inconsistent with the Constitution and invalid to the extent that it precludes women from succeeding to the position of a traditional leader.[87]

The first applicant seeked an order declaring her as the sole queen of Vhavenda and alternatively the second applicant to be appointed as the sole king of the Vhavenda.[88] The court held that the issue of male primogeniture in this case is secondary to the issues before the courts and therefore declined to make any declaratory order in that regard.[89] Makgoba JP held further that the first and eighth respondents have never suggested that their tradition does not recognise women leaders.[90] He referred to the *Shilubana v Nwamitwa* case where the royal house agreed that a woman should lead.[91]

However, the applicant's prayer to declare the rule of male primogeniture unconstitutional and invalid is of particular importance to this chapter. The fact that, even in 2017, there were still court cases dealing with women seeking to be treated

85 *Mphephu v Mphephu-Ramabulana* (773/2012) [2017] ZALMPTHC 1.
86 *Mphephu v Mphephu-Ramabulana* (773/2012) [2017] ZALMPTHC 1 par 1.1.
87 *Mphephu v Mphephu-Ramabulana* (773/2012) [2017] ZALMPTHC 1 par 1.4.
88 *Mphephu v Mphephu-Ramabulana* (773/2012) [2017] ZALMPTHC 1 par 1.6.
89 *Mphephu v Mphephu-Ramabulana* (773/2012) [2017] ZALMPTHC 1 par 89.
90 *Mphephu v Mphephu-Ramabulana* (773/2012) [2017] ZALMPTHC 1 par 89.
91 *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC).

equally to men under customary law is a problem. It is clear that the rule of male primogeniture still forms part of living customary law and that the discrepancy between living and customary law still exists. This case reveals that South Africa still has a long way to go to remedy the inconsistency between formal and living customary law. The researcher warns that although the court in *Bhe v Magistrate, Khayelitsha* requested the legislature to draft and enact appropriate legislation to regulate succession under customary law,[92] the legislature may still make an error of drafting legislation that does not reflect living customary law. Consequently, the problem of inconsistency will remain a problem, with people practicing customary laws that are different from what the formal customary law provides.

This chapter thus suggests that traditional courts should become more involved in matters and questions relating to customary law rules and practices such as male primogeniture. For this reason, it is maintained that solutions coming from the traditional council will be more relevant and relatable to indigenous people. Therefore, the consent of indigenous people will be easily ascertained if the development of rules such as male primogeniture comes from local leaders and the community at large. The native people understand and relate to traditional courts much more than the largely imported common law or the statutory law applied in the state courts.[93]

Traditional leaders in general support the improvement of their status and role in the new South African order in various forums, including parliament, conferences, public addresses and in the media.[94]

92 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) par 140.

93 South African Law Commission "The harmonization of the common law and indigenous law: Traditional courts and the judicial function of the traditional leaders" 1999 (Discussion paper 82) 1 http://www.justice.gov.za/salrc/dpapers/dp82_prj90_tradl_1999.pdf (accessed 12 February 2019).

94 South African Law Commission "The harmonization of the common law and indigenous law: Traditional courts and the judicial function of the traditional leaders" 1999 (Discussion paper 82) 7 http://www.justice.gov.za/salrc/dpapers/dp82_prj90_tradl_1999.pdf (accessed 12 February 2019).

3.4 Was discarding the rule of male primogeniture the best solution to remedying customary law of succession's injustices towards women?

The Constitution obliges the court to develop customary law to promote the spirit, purport and objects of the Bill of Rights.[95] The researcher in this chapter aims to show support for the development of customary law rule of male primogeniture rather than the striking down the rule.[96] The defect of male primogeniture is that it excludes women from being considered for succession to the deceased family head and therefore, the researcher suggests that this could be rectified by removing the reference to males and extending the scope of customary law of succession to allow females to succeed to the deceased's estate.[97] Therefore, like Ngcobo J, the researcher holds that it is possible to develop the rule of male primogeniture.

Whilst the rules of customary succession were thoroughly understood by Africans and were suitable to their lifestyle,[98] it is also maintained that, the opposition to change is based on the ideology that characterises attempts at reforming customary law as contrary to African traditions and culture and as an attempt to westernize African societies.[99] Accordingly, the need to reform customary law was thus, viewed as an attempt to impose western values on African societies.[100]

For example, the Christian community regards women's submission as women's obedience to God. The Bible provides that a wife should submit to her husband as they do to God and that the husband is the head of the wife.[101] However, from the western perspective, when males are chosen as family heads of their households under customs such as male primogeniture, such is regarded as being unconstitutional and discriminatory to women.[102] Thus, although both christianity and customary law support the notion of a men being the family head, only customary law male primogeniture is considered discriminatory to women. Therefore, it is submitted that the approach to reform the rule of male primogeniture was influenced

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95 Section 39(2) of the Constitution 108 of 1996.

96 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) par 215.

97 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) par 222.

98 South African Law Reform Commission in Report on Customary Law of Succession (2004) 13.

99 Ndulo 2011 Cornell Law Faculty Publications 90.

100 Ndulo 2011 Cornell Law Faculty Publications 90.

101 Ephesians 5 verse 22 "Wives, submit yourselves to your own husbands as you do to the Lord. For the husband is the head of the wife as Christ is the head of the church".

102 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C).

by western ideologies, and that this approach misunderstands and negatively views customary law.

Therefore, this chapter suggests that in order to resolve some of the inequitable conditions that are faced by women subject to customary law, traditional councils should be consulted on a regular basis. Moreover, it suggests that the courts and the legislature should thoroughly observe living customary law in order to ascertain the best suitable solution that will be received and practiced by African people, to avoid further inconsistency between living and formal customary law.

Ntlama and Ndima accuse the court of rejecting customary law principles and values at the expense of western conceptions of human rights norms.[103] In support of the above, this chapter highlights that the court, by outlawing male primogeniture, disregarded a communal-oriented tenet of customary law in favour of a western conception of gender equality, which promotes individualism.[104] As a result, the researcher holds that this decision will further worsen the divide between formal and living customary law.

Swart J pointed out in the *Shilubana v Nwamitwa* case that the most important consideration in the Tsonga/Shangaan and Valoyi custom is that a chief must father a chief of the tribe, as this has traditionally been the practice.[105] This argument in favour of precluding succession of women, according to Rautenbach is that:

> "Where a woman gets married, the traditional title will divest from the right royal family and vests in foreign hands, as a result bringing with it foreign rule and that woman should, in the first place bear children who will succeed in the place of their father".[106]

It is no revelation that when a woman is married, such a woman takes the surname of her husband and becomes part of her husband's family. Thus, when a man pays

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103 Ntlama & Ndima "The significance of South Africa's Traditional Courts Bill to the challenge of promoting African traditional justice systems" 2009 International Journal of African Renaissance Studies African Human Law Rights Journal 15.

104 Ntlama & Ndima 2009 International Journal of African Renaissance Studies African Human Law Rights Journal 615.

105 *Nwamitwa v Phillia* 2005 3 SA 536 (T) par 545 G.

106 Rautenbach (2018) 216.

lobolo to marry a woman, her children or procreative being are transferred to her husband's community.[107] This woman will consequently bear children for her husband's family and not her own family. Therefore, if this is the case, the object of male primogeniture to preserve family continuity will be redundant because a woman cannot bear children for her maiden family. Thus, the responsibility of family continuity is placed on the males of the family.

Based on the above scenario, it *prima facie* appears as though there existed a valid reason to exclude women from succession by male primogeniture. However, times are changing and so are traditional structures. These changes include the fact that some women had no desire to get married whilst some made a valuable contribution to the growth and maintenance of the deceased's estate during his lifetime. Hence, it is unreasonable to exclude women from succession merely because they were born female. Women, like men, have a right to be treated equally before the law, including customary law of succession.[108]

The researcher understands that if a female is appointed as chief and thereafter gets married, her children would not have been fathered by a Valoyi chief and would bear a different name. Therefore, those children would follow the family linage of the new husband and not that of the royal family. A result of which would lead to confusion and uncertainty in successorship.[109] Hence, the decision to preclude women from succession is founded on this functional principle because the family name and linage is vital to the South African people.

Therefore, instead of excluding or prohibiting women from entirely succeeding to the role of a family head, the living customary could have developed the rule of male primogeniture with certain conditions. It is thus, recommended by this chapter that if a woman wants to become the family head she would have to keep her family name and could not make any decision that put the family name or continuity at jeopardy. Her children would moreover, in such instances, need to take the family name of the family head. Alternatively, women who renounce their desire to get married could

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107 Rautenbach (2018) 216.
108 The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
109 *Nwamitwa v Phillia* 2005 3 SA 536 (T) par 545 G-H.

also be allowed a choice to succeed their fathers, husbands, or brothers as the family head. In this way, women are given the choice to choose whether they prefer to succeed as family head or to get married instead.

If a woman chooses to remain unmarried, the it is further suggested that, for the purpose of family continuity, such a woman would have to bear children with royal blood for the royal family. This could be possible through requiring that the woman have intercourse with a relative chosen by the royal council or family for purposes of producing future royal offspring. In this way, the family continuity will be guaranteed.

3.5 Conclusion

The rule of male primogeniture remains a problem even after the Constitutional Court in the *Bhe v Magistrate Khayelitsha* abolished it. This is a consequence of the conflict and inconsistency between formal and living customary law. Though there has been evidence of transformation and reform to customary law, the majority of South Africans still remain devoted to the rules, practices and processes of the system as binding on them.[110] For this reason, until recently, the courts are still approached regarding family disputes about intestate estates of the people who died without wills. Some women remain subjected to the rule of male primogeniture to this day, regardless of the fact that they have the privilege to challenge discriminatory and unconstitutional treatment in a court of law.

The legislature and the courts have employed an approach in reforming customary law, to replace it with South African common law with little accommodation of customary law.[111] This meant that the courts replaced the impugned provisions of the Black Administration Act, the regulations and the principle of male primogeniture with the Intestate Succession Act.[112] Although they disagreed with regard to whether the rule of male primogeniture should have been developed or abolished, Langa

[110] Ozoemena "Living customary law: A truly transformative tool?" 2013 Constitutional Court Review 147.
[111] Himonga (2005) 83.
[112] Himonga (2005) 93.

DCJ and Ngcobo J agreed that customary law should not be viewed from a common law perspective but in its own right, subject to constitutional values.[113]

As it stands, the researcher submits that the legislature and courts have not developed customary law. Instead, they have preferred to apply the Intestate Succession Act to cure the unconstitutionality of customary law of succession. However, the researcher submits that courts and the legislature should refrain from imposing common law on customary law, to resolve the challenges faced under customary law. Instead, the researcher recommends that it should be the traditional courts that play an active role in bringing customary law in line with the Constitution. The Constitution should also play the bigger role in ensuring that customary law is practiced independently without being interpreted through common law lens.

113 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) par 43.

CHAPTER 4: The implementation of common law with customary law of succession with specific focus on the unification and separation of the two systems of law

4.1 Introduction

The discord between formal customary law and living customary law remains a problem in South Africa. The unique character of living customary law is that, it is a system that is consensus seeking and is accountable to the people to whom it applies.[1] Therefore, given its flexible character, customary law requires consent and acceptance of the people to whom it applies.[2] By such consent, the researcher submits that there will be less discord witnessed between living and official customary law.

Living customary law refers to the original customs and usages of African indigenous people.[3] Official customary law is described as the formalized version of customary law that is recorded in the law reports, built upon and interpreted through an Anglo-Saxon or Roman-Dutch Law procedural and substantive law filter.[4] This refers to customary law as codified in statutes such as the Black Administration Act,[5] the Regulations for the Administration and Distribution of Estates of Deceased Blacks,[6] and decisions of the Courts.

This discord was further steered by the *Bhe v Magistrate*, *Khayelitsha* case,[7] by the court requiring that the Intestate Succession Act apply to customary law of succession whilst the legislature works on enacting an appropriate legislation to regulate the rights of women under customary law.[8] The majority *in casu* was convinced that it was only by replacing customary law of male primogeniture with the Intestate Succession Act that the majority of South Africans could find immediate

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1 Ozoemena "Living customary law: A truly transformative tool?" 2013 Constitutional Court Review 162.
2 Ozoemena 2013 Constitutional Court Review 162.
3 Rautenbach Introduction to Legal Pluralism (2018) 23.
4 Himonga and Bosch "The Application of African Customary Law under the Constitution of South Africa: Problems solved or just beginning" (2000) SALJ 328.
5 Black Administration Act 38 of 1927.
Regulations for the Administration and Distribution of Estates of Deceased Blacks 2 of GN R200 of 1987.
7 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) par 140.
8 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) par 140.

redress.[9] Consequently, women who were subjected to exclusionary customary law rules of intestate succession currently have access to common law protection under the Intestate Succession Act.

The effect of the above decision is, according to Grant one that suspends the operation of customary law of succession, with no indication as to whether and when it would be operational again.[10] Thus, this chapter aims to show that as a result of the above Constitutional Court case, it remains unclear whether the legislature will enact appropriate legislation that will apply to customary law of succession and that is relevant for people.

Furthermore, the researcher will probe into the possible problems that exist as a consequence of having more than one system of law applicable to the administration of indigenous people's estates. This includes probing into the confusion that may be created by allowing women to have a choice between having the Intestate Succession Act and customary rules of succession apply to the administration of their estates.

4.2 Should customary law of succession and common law of succession be harmonised to promote women's rights?

While many Africans would adhere to some aspects of traditional culture, it is no longer the case that their identities are entirely bound up with that culture.[11] This means that it is widely recognised that cultural adherence in modern societies has shifted and more people, specifically women, no longer feel obliged to strictly adhere to traditional customs, especially those that oppressed them.[12] Even though that is the case, this chapter highlights and maintains that the development of customary law should be viewed through the lens of customary law itself without imposition of common law views.

9 Ozoemena 2013 Constitutional Court Review 149.
10 Grant "Human rights, cultural diversity and customary law in South Africa" 2006 Journal of African Law 12.
11 Grant 2006 Journal of African Law 19.
12 Grant 2006 Journal of African Law 19.

In *Alexkor Ltd v Richtersveld Community*, the following was stated:

> "While in the past law was seen through the common law, it must now be seen as an integral part of our law. Like all law, it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common-law, but the Constitution".[13]

Additionally, the Constitution provides that courts must apply customary law when it is applicable, subject to the Constitution and any legislation that specifically deals with customary law.[14] Thus, promoting the application of customary law as an independent legal system, subject to the Constitution.

The chapter proposes that traditional courts should become more involved in matters and questions relating to customary law rules and practices such as male primogeniture. This is because indigenous people understand and relate to traditional courts much more than the largely imported common law or the statutory law applied in the state courts.[15] The latter view will be further explored in chapter five of this dissertation when dealing with the possible factors affecting the proper implementation of the new and reformed customary law. For this reason, the researcher maintains that solutions coming from the traditional council will be more meaningful and reliable to the indigenous people and that their consent will be easily ascertainable when the development of rules such as male primogeniture comes from their local leaders and the community at large. Therefore, it is suggested that it will be much easier to implement solutions that come from the traditional courts or royal councils than from western state courts.

Customary law has been distorted in a manner that emphasises its patriarchal features and minimises its communitarian ones.[16] This means that customary law is distorted by highlighting the negative application of the rule of male primogeniture whilst ignoring the fact that the rule of male primogeniture emerged with the primary

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13 *Alexkor Ltd v Richtersveld Community* 2003 (12) BCLR 1301 (CC) at par 51.
14 Section 211(3) of the Constitution, 1996.
15 South African Law Commission "The harmonization of the common law and law: Traditional courts and the judicial function of the traditional leaders" 1999 (Discussion paper 82) 1 http://www.justice.gov.za/salrc/dpapers/dp82_prj90_tradl_1999.pdf (accessed 12 February 2019).
16 *Bhe v Magistrate Khayelitsha* (2004) (2) SA 544 (C) par 89.

purpose of ensuring that the continued existence of family or the group prevails.[17] Consequently, the researcher in supporting Langa DCJ's view, agrees that most western understanding of African customary law is influenced by their negative attitudes towards all things African.[18] As noted above, customary law is a system that is consensus seeking and is accountable to the people to whom it applies,[19] it is flexible. Even when living customary law is developed to suit the needs of society, the researcher observes that such development is often not reflected in formal customary law. Magistrates and courts responsible for the administration of intestate estates often choose to adhere to the rules of formal customary law, with the consequent anomalies and hardships as a result of changes which have occurred in society.[20] This according to the researcher is the reason the contrast between formal and living customary law continues to exist.

Given that the South African legal system is pluralistic in nature, it is often problematic for people, which legal system should be applied in matters regarding customary disputes, such as disputes relating to inheritance and succession. For this reason authors like Allot suggest the harmonisation of laws in Africa.[21]

Harmonisation refers to the removal of discord, the reconciliation of contradictory elements between the rules and effects of two legal systems, which continue in force as self-sufficient bodies of law.[22] This means that both the existing legal systems, being customary and common law, remain in force but the incompatible results of applying one or another of the two systems are eliminated and so is the doubt as to which system is to apply in a particular case.[23]

Extending the use of the Intestate Succession Act, a statute used to regulate the common law of intestate succession, might be perceived as a conquest of customary law by common law instead of a harmonisation between the common and customary

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17 Van Niekerk "Succession, living law and *Ubuntu* in the Constitutional Court" (2005) 479.
18 Ndulo "African customary law, customs, and women's rights" 2011 Cornell Law Faculty Publications 91.
19 Ozoemena 2013 Constitutional Court Review 162.
20 *Bhe v Magistrate, Khayelitsha* (2004) (2) SA 544 (C) par 89.
21 Allot "Towards the unification of laws in Africa" 1965 International and Comparative Law Quarterly 366.
22 Allot 1965 International and Comparative Law Quarterly 366.
23 Allot 1965 International and Comparative Law Quarterly 377.

law.[24] In this case, the researcher holds that although the courts have made an effort in bringing customary law of succession in line with the Constitution, such an effort may be construed to be an imposition of common law solutions on customary law problems. Thus, treating customary law through the common law lens.

This chapter supports Rautenbach's caution that, the courts should not confirm allegations that common law is being used to undermine the survival of customary law, in spite of constitutional guarantees to its continued existence on par with the common law of South Africa.[25] Thus, meaning that courts must be careful in their application of the Intestate Succession Act to customary law not to impose common law solutions on customary law problems, especially in their attempt to address the discriminatory effects of the rule of male primogeniture.

As already advised in chapter two, it is ineffective to have the courts and the legislature formulate a solution to resolve the discriminatory nature of the customary law rule of male primogeniture if such a solution will not be implemented by the people whom such a solution is meant to apply to. For this reason, it is argued that even though the rule of male primogeniture has been abolished, it could be applied if the deceased chose to do so by means of exercising his or her freedom of testation.[26] Freedom of testation refers to the testator or deceased's wishes in disposing of his assets, being carried out except in as far as the law places a restriction on this freedom of the testator or deceased.[27]

It is therefore, submitted that it is still too soon to unify customary law and common law.[28] Consequently, the wounds that were inflicted on the African culture and customary law by apartheid and colonialism are still raw and for that reason, the researcher proposes that maintaining a pluralistic system, developed on a basis of full equality, is the better approach to reconcile the competing demands of culture and equality.[29] This is to say that customary law and common law should remain separate systems of law; with customary law being followed by those people who choose to submit under it and its laws. Thus, being applicable without the burden of

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24 Rautenbach "South African common and customary law on Intestate Succession: A question of harmonization, integration or abolition" 2008 Journal of Comparative Law 129.
25 Rautenbach 2008 Journal of Comparative Law 129.
26 Rautenbach 2008 Journal of Comparative Law 126.
27 De Waal and Schoeman Malan Law of Succession (2015) 3.
28 Grant 2006 Journal of African Law 22.
29 Grant 2006 Journal of African Law 22.

common law principles and method of doing things. As mentioned above, the validity of customary law must now be determined by reference to the Constitution and not common law.[30]

There could be various reasons why a person might wish to restore the consequences of the rule of male primogeniture in a given situation; for example, to ensure that a close knit family adhering to family traditions in a rural area continues to be provided for after the death of the family head.[31]

For example, a family head may during his lifetime allot property to or make a deathbed wish in favour of his eldest son or the eldest male relative, being influenced by the rule of male primogeniture. These allocations and deathbed wishes are given effect to in the same manner as if they were contained in a will.[32] Therefore, the wishes of the deceased will be given effect to. This is because section 25 (1) of the Constitution, which is the property clause, guarantees the institution of succession and the principle of freedom of testation that supports it.[33] In *Re BOE Trust Ltd*,[34] the court explained that by not giving effect to freedom of testation, the right to dignity would be infringed. This is because the right to dignity allows the living and the dying the peace of mind of knowing that their last wishes could be respected after they have passed away.[35] Therefore, the owner of the property may dispose his property as he wishes and his wishes would have to be given effect to.

It is thus argued that the approach to solving issues in relation to African people through the enactment of legislation must be re-evaluated because it is an approach that has brought destabilization of practices, values and norms.[36] This approach is one that intensifies the disparity between how customary law is said to be theoretically as opposed to how it is practiced on a daily basis. Although the researcher does not entirely disagree with the application of the Intestate Succession Act to cure the discrimination against women, it is submitted that the

30 *Alexkor Ltd v Richtersveld Community* 2003 (12) BCLR 1301 (CC) at par 51.
31 Rautenbach "A few comments on the possible revival of customary rule of male primogeniture: Can the common law principle of freedom of testation come to its rescue? 2013 Acta Juridica 138.
32 Himonga and Nhlapo African customary law in South Africa: Post-apartheid and living law perspective (2015) 160.
33 De Waal and Schoeman- Malan Law of Succession (2015) 4.
34 *Re BOE Trust Ltd* 2009 (6) SA (WCC).
35 *Re BOE Trust Ltd* 2009 (6) SA (WCC) par 27.
36 Ozoemena 2013 Constitutional Court Review 162.

approach employed by the courts, to solve customary issues by the application of western legislation must be avoided and discontinued, as this is an imposition of western ideologies and solutions to a problem that requires to be solved by employing solutions by the traditional courts or the indigenous people, who know and understand customary laws best. It is further submitted that although the traditional courts or indigenous people may draw some inspiration from western legislation, those inspired solutions may alternatively be incorporated in a legislation that governs customary law of succession independently for the indigenous people who are governed by it thereof.

4.3 Ensuring the right to equality and culture

Culture is like an umbrella under which some people like to hide from rain, and to shade themselves from the sun, but sometimes you need to fold it.[37] This statement was declared by Maluleke to indicate people's tendency to use the right to culture as a scapegoat under which they can discriminate against or ill-treat others without facing legal consequences for such ill treatment.[38] For this reason, it is often necessary to determine which right should prevail in instances where the right to culture and the right to equality are in conflict.

Although there is no exact definition of culture provided by the Constitution, culture is described as a way of life that is common to a group of people, a collection of beliefs and attitudes, shared understandings, and patterns of behaviour that allow people to live in peace but set them apart from other people.[39]

Equality includes the full and equal enjoyment of all rights and freedoms.[40] It can be limited provided that the limitation is reasonable and justifiable in terms of the Constitution.[41] The Constitution when dealing with equality prohibits unfair

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37 Maluleke "Culture, tradition, custom, law and gender equality" 2012 PELJ 1.
38 Maluleke 2012 PELJ 1.
39 Rautenbach Introduction to legal pluralism in South Africa (2018) 21.
40 Section 9 (2) of the Constitution, 1996.
41 Section 9 of the Constitution, 1996.

discrimination towards anyone and therefore only permits discrimination when it is said to be fair and justifiable.[42]

Section 36 of the Constitution makes it quite clear that no right is absolute. It provides as follows:

> "The rights in the Bill of Rights may be limited only in terms of 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".[43]

Also, the Constitution affirms democratic values of human dignity, equality and freedom.[44] Therefore, the rights to human dignity,[45] freedom,[46] and equality,[47] are highly regarded as fundamental rights in the Constitution. However, the right to culture is also protected in the Constitution which provides that persons belonging to a cultural community may not be denied the right, with other members of that community, to enjoy their culture.[48] Thus, norms and lifestyle of one group should not be used as a measuring standard for the other. Each system of law should be equally respected and applied, all subject to the Constitution. It is often a problem which of the rights between the right to equality and the right to culture should take preference over the other.

There is obviously no clear ranking of rights to provide conclusive answers to all the questions relating to the relationship between the rights to equality and to culture.[49] However, it can be derived from the preamble of the Constitution that equality will prevail over the right to culture. This is because the primary aim of the Constitution is to guarantee equal protection and treatment of all people.[50] Therefore, the use of cultural rights and practices as an excuse to treat people unequally will not be sufficient enough to escape constitutional scrutiny.[51] The preamble states that the

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42 Section 9 (5) of the Constitution, 1996.
43 Section 36 (1) of the Constitution, 1996.
44 Section 7 of the Constitution, 1996.
45 Section 10 of the Constitution, 1996.
46 Section 12 of the Constitution, 1996.
47 Section 9 of the Constitution, 1996.
48 Section 31 of the Constitution, 1996.
49 Kaganas and Murray "The contest between culture and gender equality under South Africa's interim Constitution" 1994 Journal of Law and Society 415.
50 Section 9(1) of the Constitution, 1996.
51 Rautenbach "Is primogeniture extinct like the Dodo or is there any prospect of it rising from

Constitution aims to lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law.[52]

Hence, in the event that a cultural practice is challenged from within the cultural group itself on grounds of its failure to comply with the constitutional guarantee of equality, equality should be the determining value.[53] The evidence of which is envisaged in the *Bhe v Magistrate, Khayelitsha* case,[54] where the Constitutional Court held that the rule of male primogeniture as applied to inheritance in customary law is inconsistent with the constitutional guarantee of equality.[55]

As a consequence of the overriding importance of the right to equality in the Constitution, it is clear that in the inevitable clash between the right to culture and the right to equality, equality must take priority.[56] This is because equality forms a fundamental and core value of the Constitution.[57] Therefore, women, under customary law are now considered as equal to men and the right to culture does not take priority over the right to equality.

Moreover, all rights in the Constitution, including the right to equality, are to be exercised subject to the Constitution.[58] However, the fact that the right to equality is not internally limited in the same way as section 30 and 31 of the Constitution,[59] by the *proviso* that the rights to language,[60] culture,[61] or religion,[62] are to be exercised subject to the Bill of Rights strengthens the above argument that the right to equality trumps the right to culture.[63] For example, as discussed above, the court in *Shilubana v Nwamitwa* case declared that females might now be recognised as

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the ashes? Comments on the evolution of customary succession laws in South Africa" 2006 SAJHR 108.

52 The preamble of the Constitution, 1996.
53 Kaganas and Murray 1994 *Journal of Law and Society* 424.
54 *Bhe v Magistrate, Khayelitsha* (2004) (2) SA 544 (C).
55 *Bhe v Magistrate, Khayelitsha* (2004) (2) SA 544 (C) par 109.
56 Grant 2006 Journal of African Law 9.
57 Section 1(a) of the Constitution, 1996.
58 Section 7(3) of the Constitution, 1996.
59 Sections 30 and 31 of the Constitution, 1996.
60 Section 30 of the Constitution, 1996.
61 Section 30 of the Constitution, 1996.
62 Section 31 of the Constitution, 1996.
63 Grant "Human rights, cultural diversity and customary law in South Africa" 2006 Journal of African Law 9.

traditional leaders.[64] The court found that the succession to the leadership of the Valoyi had operated in the past according to the principle of male primogeniture.[65] However, the traditional authorities had the authority to develop customary law and they did so in accordance with the constitutional right to equality.[66] The value of recognising the development by a traditional community of its own law in accordance with the Constitution was not outweighed by the need for legal certainty or the protection of rights.[67] The court thereafter held that the change in customary law did not create legal uncertainty and Mr Nwamitwa did not have a vested right to be *Hosi* (King).[68]

Thus, people need to be cautions against the assumption that, culture and equality cannot be reconciled.[69] For this reason Bronstein argues that it should be recognised that culture is constantly evolving and therefore, urges a case to case investigation of customary practices and principles to determine the extent to which custom and culture in its contemporary manifestation already complies with human rights and constitutional norms and how it can be transformed in order to satisfy the demands of equality.[70] Thus, the researcher submits that customary law in its application is equitable and even in its contemporary manifestation, already complies with constitutional norms. However, the researcher also agrees with Ntulo that due to the negative attitude towards customary law, it can also be misunderstood as being discriminatory in nature.[71]

It is possible to ensure that both the right to equality and the right to culture are promoted and protected. Here are the three ways in which this can be achieved, namely:

- An acknowledgment of the importance of both culture and equality and their interrelationship;
- A need for training and research;

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64 *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) par 87.
65 *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) par 87.
66 *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) par 87.
67 *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) par 87.
68 *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) par 56.
69 Bronstein "Confronting custom in the new South African state: an analysis of the recognition of Customary Marriages Act 120 of 1998" 2000 SJHR 558.
70 Bronstein 2000 SJHR 558.
71 Ndulo 2011 Cornell Law Faculty Publications 91.

- A commitment to sensitive and sustained legal development of both customary and common law to serve the purposes of the Constitution is necessary; and
- In the long term, creative ways of reconciling the practical needs of a modern legal system, the cultural heritage of society it serves and the observance of internationally recognized human rights norms.[72]

Consequently, the researcher agrees with Grant, that the right to equality and the right to culture can co-exist. This chapter reveals that the practice and application of culture can always be brought in conformity with the principle of equality. Equality should be the overarching principle that guides the manner in which culture and all other rights should be enjoyed.

The researcher makes the following comments in light of Grant's suggestions above:

a) <u>An acknowledgment of the importance of both culture and equality and their interrelationship</u>:

   Both culture and equality can co-exist for as long as there is a constant evaluation of cultural norms and practices to ensure that customary law is in tune with the constitutional values, including equality. Therefore, as Ngcobo J has recommended, the rule of male primogeniture could have been developed by removing the discriminatory exclusion of women to succession. Thus, the practice could have been maintained and yet developed to grant women equal treatment to men.

b) <u>A need for training and research</u>:

   The researcher recommends that there be training programmes that will educate and inform both local, indigenous people and the western people of each other's legal system. In this way, the researcher argues that this will promote mutual respect of each legal system, without the desire to impose one on the other or viewing customary law through common law lens.

It is therefore possible to have co-existence of customary law and the right to equality. Only when there is a conflict between the two will equality trump the right to

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72 Grant 2006 Journal of African Law 22.

customary law. However, customary law can be developed to ensure it is in line with the spirit, purport and object of the Constitution.[73]

4.4 Conclusion

In light of the above discussion of this chapter, it is clear that extending the use of the Intestate Succession Act is often perceived by indigenous people, as a conquest of customary law by common law instead of a harmonisation between the common and customary law.[74] For this reason, the researcher holds that, although the courts have made an effort to bring customary law of succession in line with the Constitution, such an effort may be construed to be an imposition of common law solutions on customary law problems. Thus, treating and perceiving customary law through the common law lens. The researcher suggests that customary law should be evaluated and reformed within customary law lens, by allowing participation of the traditional courts and the indigenous people in the transformation of customary law of succession.

Therefore, this chapter proposes that maintaining a pluralistic system that is developed on a basis of full equality, is a better approach to reconcile the competing demands of culture and equality. It is additionally submitted that customary law and common law should remain separate systems of law; with customary law being followed by those people who choose to submit under it and its laws. Thus, being applicable without the burden of common law principles. In this way, those who choose to be governed by customary law should do so freely, provided that those rules are developed in line with the Constitution.

The researcher further submits, that the approach employed by the courts to solve customary issues by the application of western legislation must be avoided and discontinued because this is an imposition of western ideologies and solutions to a problem that requires to be solved by employing solutions by the traditional courts or the indigenous people, who know and understand customary laws best.

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73 Section 39 (2) of the Constitution, 1996.
74 Rautenbach 2008 Journal of Comparative Law 129.

It should be kept in mind that indigenous people are not law unto themselves. This means that, they too, are still subject to the Constitution entirely and that any customary principle and rule that contravenes the Constitution and any legislation that deals with it specifically, will be struck down and abolished. Therefore, even though the researcher suggests that courts' solutions to customary problems should be solved by employing solutions by the traditional courts or the indigenous people, it is maintained that people should be prohibited from using the right to culture as a scapegoat under which they can discriminate against or ill-treat others without facing legal consequences for such ill treatment.

Furthermore, customary law should be implemented in accordance to the constitutional values and principles. It is possible to reconcile customary laws with equality. There needs to be recognition that culture is constantly evolving and therefore requires a case to case investigation of customary practices and principles to determine the extent to which custom and culture in its contemporary manifestation already complies with human rights and constitutional norms and how it can be transformed in order to satisfy the demands of equality.[75] Therefore, whenever customary laws, such as with male primogeniture, are discriminatory towards a particular group of people, traditional councils and courts bear the burden of developing it in line with the constitutional values of freedom, human dignity and equality.

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75 Bronstein 2000 SJHR 558.

CHAPTER 5: The role of women in South African customary law of succession

5.1 Introduction

This chapter aims to draw attention to the changes that have taken place to reform customary law of succession in order to promote the rights of women to equal treatment. It includes looking at the different ways women are now treated equally to men, the change of women's minority status and their ability to administer their family affairs.

The courts and legislature should be commended for the effort they have made to resolve conflicts between customary law of succession and the Constitution, such as ensuring the practice of culture whilst ensuring women are not unjustifiably discriminated against.[1] All this was done in order to protect the rights of vulnerable members of families, especially women and children.[2] However, the effectiveness of the court's and legislature's intervention should be measured by the extent to which the implementation of the new laws benefit women in practice.[3] In other words, to test the relevance and success of the reform, the researcher in this chapter provides that it is important to delve into the extent to which the reformed law is accessible and practiced by those it is designed to benefit.

The arguments presented and largely accepted by the court in *Bhe v Magistrate, Khayelitsha*,[4] was that the version of customary law applied in the case was a distortion of the law as practised.[5] Thus, customary law in theory contradicted customary law in practice, hence, people who had previously adhered to customary law remained devoted to it and continued to abide by it.

This chapter will conclude by showing that courts and parliament's efforts to improve the rights of women have been effective. In addition to this, the researcher will also

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1 Himonga "The advancement of African women's rights in the first decade of democracy in South Africa: The reform of the customary law of marriage and succession" 2005 Acta Juridica 106.
2 Himonga 2005 Acta Juridica 106.
3 Himonga 2005 Acta Juridica 106.
4 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C).
5 Grant "Human rights, cultural diversity and customary law in South Africa" 2006 Journal of African Law 16.

suggest ways in which the legislature can shift towards a more permanent solution, moving away from imposing foreign, common law principles on customary law, as this can be seen as reducing customary law to being inferior to common law. Bearing in mind that in *Alexkor Ltd v Richtersveld Community*,[6] the Constitutional Court noted that customary law is not a fixed body of formally classified and easily ascertainable rules. Customary law by its very nature evolves as the people who live by its norms change their patterns of life and it has throughout history evolved and designed to meet the changing needs of the community.[7]

5.2 The changed role of women under customary law of succession

There has been evidence to show that the role of women under customary law has been improved to grant women equal legal standing to men. This shift in status came as a consequence of the *Bhe v Magistrate, Khayelitsha* case.[8] Below, the researcher discusses the different ways the lives of women have changed after the abolition of the rule of male primogeniture.

5.2.1 Women as family head and traditional leaders

Previously, succession to status was limited to males and it was generally accepted that a woman could not succeed a man.[9] The institution of traditional leadership among the people of South Africa was embedded in the system of patriarchy, and only male members of the family could be traditional leaders.[10]

Surprisingly, although the above was the case, the ba*Lobedu* tribe was the only tribe that had a woman as a traditional leader whilst males in that community held positions of ward heads.[11] Currently, the Traditional Leadership and Governance Act permits the recognition of females as traditional leaders.[12] This means women can

6 *Alexkor Ltd v Richtersveld Community* 2004(5) SA 460 (CC) at par 53.
7 *Alexkor Ltd v Richtersveld Community* 2004 (5) SA 460 (CC) par 53.
8 *Bhe v Magistrate, Khayelitsha*2004 (2) SA 544 (C).
9 Rautenbach Introduction to Legal Pluralism in South Africa (2018) 180.
10 Rautenbach (2018) 213.
11 Rautenbach (2018) 213.
12 Traditional Leadership and Governance Framework Act 41 of 2003.

now enjoy an equal opportunity to be designated as traditional leaders of their communities like their male counterparts.[13]

Furthermore, the Traditional Courts Bill provides that members of a traditional court must consist of women and men, pursuant to the goal of promoting the right to equality as contemplated in section 9 of the Constitution and traditional courts must promote and protect the representation and participation of women, as parties and members thereof.[14]

Therefore, in the current legal dispensation it is no longer tenable to confine family headship or traditional leadership to males only and thus women can also be family heads and traditional leaders. This is why the Traditional Leadership and Governance Act even makes reference to queens and headwomen.[15] Evidently, as referred to in chapter three of this research, the court in the *Shilubana v Nwamitwa* case also declared that females may now be recognised as traditional leaders, a decision that was upheld by the overall community.[16]

5.2.2 Legal status of the spouses

Section 6 of the Recognition of Customary Marriages Act,[17] provides for the legal capacity of women to be equal to that of their husband. This section provides that:

> "A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property systems governing the marriage, full status and capacity, including the capacity to acquire assets and dispose of them, to enter into contracts and litigate, in addition to any rights and powers that she might have at customary law".[18]

The legislature has therefore given effect to section 10 of the Constitution,[19] by dignifying women through allowing them to have equal legal status and capacity as

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13 Section 3(2)(b) of the Traditional Leadership and Governance Framework Act 41 of 2003.
14 Sections 5(1) and (2) of the Traditional Courts Bill of 2017.
15 Section 8(a) and (c) Traditional Leadership and Governance Framework Act 41 of 2003.
16 *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) par 87.
17 Recognition of Customary Marriages Act 120 of 1998.
18 Section 6 of the Recognition of Customary Marriages Act 120 of 1998.
19 Section 10 of the Constitution, 1996.

men.[20] In other words, women also have legal capacity to enter into transactions independently and are able to acquire and dispose of assets.[21] Therefore, women are now entitled to inherit property under customary law.[22] The Recognition of Customary Marriages Act,[23] makes all customary marriages automatically in community of property unless the parties contract otherwise.[24] This means that the assets and income of both spouses are merged into one estate, and both husband and wife have equal powers to manage that estate.[25] Upon dissolution of the marriage, each spouse has an equal right to the estate. Thus women are guaranteed an equal share in all property held by the couple during the marriage.[26]

Section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected.[27] As a result, the researcher submits that the perpetual minority and legal incapacity of married women, as well as the subjection of women to the husband's marital power are no longer features of customary law. According to the long-standing rule of male primogeniture and official customary law, *lobolo* agreements required the consent of the bride and groom's guardians.[28] Currently, it is no longer the case that women are entirely excluded and therefore, subject to their husband's marital power. For example, the court in *Mabena v Letsoalo* case,[29] held that a daughter's mother was legally competent to negotiate *lobolo* and receive it in respect of the daughter and that she is also competent to act as the daughter's guardian in approving her marriage.[30] This shows that the legal position of women has improved under living customary law, with women now being granted equal legal status and capacity as men.

In the case of *Ramuhovhi v President of the Republic of South Africa*,[31] the court ordered that husbands and wives have joint and equal ownership and equal rights of

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20 Section 6 of the Recognition of Customary Marriages Act 120 of 1998.
21 Section 10 of the Constitution, 1996.
22 Beninger "Women's property rights under customary law" 2010 Women's Legal Centre 9.
23 Recognition of Customary Marriages Act 120 of 1998.
24 Section 7(2) of the Recognition of Customary Marriages Act 120 of 1998.
25 Beninger 2010 Women's Legal Centre 14.
26 Beninger 2010 Women's Legal Centre 14.
27 Section 10 of the Constitution, 1996.
28 Rautenbach Introduction to legal pluralism in South Africa (2018) 41.
29 *Mabena v Letsoalo* 1998 2 SA 1068.
30 *Mabena v Letsoalo* 1998 2 SA 1068.
31 *Ramuhovhi v President of the Republic of South Africa* 2017 ZACC.

management and control over marital property.[32] This supports the notion that women are now permitted to own and administer property independently and like men.

The reformed roles of women as discussed above signify the transformation of formal customary law and it being brought in line with the Constitution. However, it should be remembered that living customary law is not rigid, static, immutable and ossified.[33] It too can be developed to promote the spirit, purport and object of the Bill of Rights.[34] On the contrary, customary law is living law because its practices, customs and usage have evolved over the centuries and are adapted to the changing socio- economic and cultural norms as practised in the modern era.[35]

Therefore, based on the above, the researcher submits that customary law continues to evolve and shift to meet the social needs of those it applies to. This change was, as suggested in this chapter, inspired by taking into account the changed time and roles of women in society, as a result of urbanisation, the increase of female headed families due to the absence of fathers and industrialisation. However, despite the fact that these changes might have taken place to bring the constitutional norms and practices in line with the Constitution, such changes remained unnoticed due to the inconsistency that continues to exist between customary and common law. Hence, the official rules of customary law sometimes contrast with living customary law, in which the rules were adapted to fit in with changed circumstances.[36]

5.3 Factors affecting the implementation of the reformed customary laws

As a result of legal pluralism, with customary law and common law being recognised as equal legal systems, there is inevitably, situations in which individuals find themselves subject to contradictory obligations.[37] Therefore, in instances where conflict arises between the applicability of customary and common law, on the one

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32 *Ramuhovhi v President of the Republic of South Africa* 2017 ZACC par 71.
33 Ndulo "African customary law, customs, and women's rights" 2011 Cornell Law Faculty Publications 87.
34 Section 39 (2) of the Constitution 108 of 1996.
35 *Sengadi v Tsambo* (40344/2018) [2018] ZAGPJHC 613 par 20.
36 Beninger "Women's property rights under customary law" 2010 Women's Legal Centre 67.
37 Rautenbach Introduction to legal pluralism in South Africa (2018) 42.

hand, some courts held that common law was primary applicable, with customary law only being applied in matters that were peculiar to customs falling outside the principle of Roman-Dutch Law?[38] On the other hand, some courts took the view that customary law should be the primary applicable law to indigenous people and only as a matter of exception, the common law.[39]

This chapter shows support for the latter view as it advices that indigenous people should have their lives governed by laws and principles familiar to them and not laws imposed on them by western legislation. This is not to say that indigenous people are law unto themselves, it is however, to recognise that where customary law of succession is concerned, customary laws should be applied to administer the deceased's estate.

It is important to remain mindful of the fact that an important objective of the constitutional enterprise is to be united in our diversity,[40] and the desire to find social cohesion. Our Constitution thus protects and celebrates diversity and difference. Hence, the preamble of the Constitution provides that South Africa belongs to all who live in it, united in our diversity.[41] Moreover, this is the reason the Constitution goes far in guaranteeing cultural, religious and language practices in generous terms provided that they are not inconsistent with any right in the Bill of Rights.[42] This is why the researcher supports that customary law should be the primary applicable law to indigenous people who choose to live according to such law. This is because customary law is law consented to by indigenous people for their own regulation.

In order to determine which law between customary law of succession and common law of succession is applicable, it should in the first place be determined by agreement. For example, after the burial, it is common for the family to meet and decide what should happen to the deceased's estate and if an agreement can be reached there seems to be no reason for any interference.[43]

Ngcobo J further provides that the Magistrate court having jurisdiction should resolve any dispute relating to the choice of law and moreover, that in determining such

38 Rautenbach (2018) 43.
39 Rautenbach (2018) 43.
40 The preamble of the Constitution, 1996.
41 The preamble of the Constitution, 1996.
42 Sections 31 and 211 (2) of the Constitution, 1996.
43 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) par 239.

dispute, a magistrate must have regard to what is fair, just and equitable in the circumstances of the case.[44]

5.3.1 Inaccessibility of the reformed law

Many people in South Africa are subject to customary law, but often people are not aware of or do not understand the laws and their rights as developed by the Constitution.[45] The unavailability of the new legislatively reformed laws threaten to reduce the reformed laws to paper rights that are of little, if any, real benefit to the majority of women.[46] Thus, exacerbating the gap and the discord between customary law as practised on a daily basis and customary law as regulated by statute. The extension of common law to customary law problems introduces complex and foreign legal procedures that are peculiar to customary law dispute resolution mechanisms and most people living under customary law and as a result, render these new laws as explored above, inaccessible to ordinary South Africans.[47]

Traditional courts form part of the heritage of African people and are easily accessible, inexpensive and have a simple system of justice.[48] For example, traditional courts have simple and flexible procedures that involve parties presenting their cases and have their witnesses give their versions of events and thereafter, have the chief or headman and his councillors question them and provide a verdict.[49] This informality of traditional courts makes these courts user-friendly and public participation makes the process popular in the sense of regarding it as their own and not something imposed from above.[50]

Contrary to the procedure followed by traditional courts, the procedure followed by western courts is more technical.[51] In western courts (magistrate courts, high courts

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44 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) par 239.
45 Beninger 2010 Women's Legal Centre 5.
46 Himonga 2005 Acta Juridica 83.
47 Himonga 2005 Acta Juridica 83.
48 The South African Law Commission "Harmonisation of the common law and indigenous law: Traditional courts and the judicial function of traditional leaders" (1999) (Draft Issue Paper on Law of Succession) 1 http://salawreform.justice.gov.za/ipapers/ip12_prj108_1998.pdf (accessed 09 January 2019)
49 The South African law Commission (1999) 2.
50 The South African law Commission (1999) 2.
51 The South African law Commission (1999) 2.

and supreme court of appeal etc.), there are pre-trial, trial and sentencing stages whereby strict rules are followed in terms of how evidence can be presented and how examination of evidence takes place.

Furthermore, since traditional courts are accessible within a social distance, it is easier for the local inhabitants to access traditional courts without travelling long distances to access magistrate courts.[52] This makes it cheaper due to the fact that the disputants do not have to travel far to access the courts. Hence, costs of traditional litigation are not as expensive as those of civil and criminal western litigation.

The language and legal terms that are used in legal texts and the courts are a barrier that threatens the applicability of the law as introduced by common law. The researcher submits that the latin terms and bombastic english words that are used in legal texts can be hard to understand, especially, by the average person. Traditional courts make use of the local language of the parties to the disputes and thus avoid the risk of distortion through interpreting.[53] Even the language used in legal texts is in a language that is mostly not understood or reliable to the inhabitants of the community. As a result the researcher argues that the people are unable to fully apply the law as they may not fully understand its relevance and find it easier to relate to sources they can understand.

It is for this reason that the researcher maintains that solutions coming from traditional councils will be more meaningful and relatable to the people and that their consent will be easily ascertainable when the development of rules such as male primogeniture comes from their local leaders and the community at large. The researcher moreover holds that it will be easier to implement solutions that come from traditional courts or royal councils than from western state courts.

5.4 Conclusion

Customary law has undergone a transformation by abolishing the rule of male primogeniture. This led to the roles of women under customary law changing to

52 The South African law Commission (1999) 2.
53 The South African law Commission (1999) 2.

afford women equal legal standing. As discussed above, the Traditional Leadership and Governance Act permits the recognition of females as traditional leaders.[54] This means women can now enjoy an equal opportunity to be designated as traditional leaders of their communities. It is therefore, no longer tenable to confine family headship or traditional leadership to males only.

Furthermore, women also have legal capacity to enter into transactions independently and are able to acquire and dispose of assets.[55] Women are also entitled to inherit property.[56]

By the above examples, this chapter shows that customary law continues to evolve and shift to meet the social needs of those it applies to.

The researcher also argues that the extension of common law to customary law problems introduces complex and foreign legal procedures that are peculiar to customary law dispute resolution mechanisms and most people living under customary law and as a result, render these new laws as explored above, inaccessible to ordinary South Africans.[57] This is the reason the researcher supports that customary law should be the primary applicable law to indigenous people who choose to live according to such law.

From the above discussion, the researcher holds that women have very little control when it comes to the choice of law, either because of traditional beliefs and attitudes, ignorance of their rights and the lack of power to enforce their rights. This may be based on the reason that for many years women have been subject to the rule of male primogeniture so much that they have internalised this rule as a way of doing things.

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[54] Traditional Leadership and Governance Framework Act 41 of 2003.
[55] Section 10 of the Constitution, 1996.
[56] Beninger 2010 Women's Legal Centre 9.
[57] Himonga 2005 Acta Juridica 83.

CHAPTER 6: Conclusion

6.1 Scope and Purpose

The author of this research has paid close attention to some of the problems and practical challenges presented by the abolition of the rule of male primogeniture and thereafter, the extension of the Intestate Succession Act to customary law of succession. Additionally, the researcher in support of Allot's suggestion, discussed the possibility of harmonising common law of succession with customary law of succession without imposing common law mechanisms and ideas on customary law. Therefore, the purpose of this research is to suggest ways on how best to reconcile customary law with the Constitution without imposing western law on customary law. This is achieved by showing the reader the possibility of developing the rule of male primogeniture in line with the Constitution by removing reference made to men only and including women in succession and inheritance.

The scope and focus of the research is thus, unpacking the nature of male primogeniture and the manner in which it has played a major role in discriminating against women in South Africa. This research focused on how the abolition of a rule that constituted the core of customary law has had an impact on the rights and lifestyle of women in South Africa. Because of the reform of customary law of succession by the abolition of the rule of male primogeniture, the researcher discussed factors that inspired such transformation, by closely discussing the *Bhe v Magistrate, Khayelitsha* case outcome and the different views of the judges.[1] Furthermore, the researcher discussed several case law that was decided on after the *Bhe v Magistrate, Khayelitsha* case, to show whether in fact the removal of this rule has indeed improved the state of affairs as faced by women. By doing so, the researcher inquires as to whether the change intended by the courts and legislature has been accepted and incorporated among the people to whom living customary law applies or whether such change is only theoretically applicable.

[1] *Bhe v The Magistrate, Khayelitsha* 2004 (2) SA 544 (C).

This research aimed to draw attention to the changes that have taken place to reform customary law of succession in order to promote the rights of women to equal treatment. This included, looking at the different ways women are now treated equally to men, the change of women's minority status and their ability to administer their family affairs.

It concluded by showing that the courts and legislature's efforts to improve the rights of women have indeed been effective. Although in addition, also suggesting ways in which the legislature can shift to a more permanent solution, moving away from imposing foreign, common law principles on customary law of succession, as this can be seen as reducing customary law to being inferior to common law. The research further, maintained that the legislature must devise a more permanent legislative solution that will regulate customary law of succession independent from common law legislative measures. Thus, the courts and the legislature must discontinue the use of western legislation or solutions to solve or develop traditional, customary law.

Moreover, customary law should be implemented in accordance to the values and principles of the Constitution such as the democratic values of freedom, human dignity and equality.[2] There needs to be recognition that culture is constantly evolving and therefore, requires a case to case investigation of customary practices and principles to determine the extent to which custom and culture in its contemporary manifestation already complies with human rights and constitutional norms and how it can be transformed in order to satisfy the demands of equality.[3] Therefore, the researcher indicated that whenever customary laws, such as with male primogeniture, are discriminatory towards a particular group of people, traditional councils and courts must bear the burden of developing it in line with the constitutional values of freedom, human dignity and equality.

[2] Section 39 of the Constitution,1996.

[3] Bronstein "Confronting custom in the new South African state: an analysis of the recognition of Customary Marriages Act 120 of 1998" 2000 SJHR 558.

6.2 Summary: Overview of chapters

Chapter 1: Chapter one of the research introduced the reader to the aims and objectives of this research work. It provides a hypothesis to give a possible explanation of the effect of abolishing the rule of male primogeniture and how this may have worsened the discord between living and official customary law. This chapter also lists questions which are answered in the subsequent chapters of the research.

Chapter one further, provides a literature review that concisely discusses a brief summary of the origin of male primogeniture and its development throughout the years; the effect of getting rid of the rule after the *Bhe v Magistrate, Khayelitsha* case,[4] the discord between living and official customary law, and whether women have a choice of law between applying customary law of succession or common law of succession.

Chapter 2: Chapter two focuses on the prolonged discriminatory conditions women, have endured at the mercy of customary law practices that were steered by the application of the rule of male primogeniture. This is done by placing focus on unpacking the nature of male primogeniture and the role it has played in discriminating against women of South Africa who are governed by such customary law and its principles, thereof.

The chapter provides several examples in detail, of areas in law under which women have been excluded and side-lined under customary law of succession. Thereafter, concluding by reasoning that discrimination of women could no longer be accepted to justify discriminatory customary laws such as the rule of male primogeniture.

Chapter 3: Chapter three discusses the rule of male primogeniture extensively by focusing on the genesis of the rule. Following this discussion, the chapter focuses on the *Bhe v Magistrate, Khayelitsha* case whereby the Constitutional Court abolished the rule of male primogeniture.

Thereafter, the chapter proceeds by making reference to three other cases where the rule of male primogeniture, even after its abolition, was brought in question

4 *Bhe v The Magistrate, Khayelitsha* 2004 (2) SA 544 (C).

before the courts. This is done to bring attention to the fact that the application of the rule of male primogeniture, although abolished by the Constitutional Court in *Bhe v Magistrate, Khayelitsha*, can still be seen being applied in the lives of the people. This highlights the discrepancy and discord between living and formal customary law.

Furthermore, chapter three looks at different views by different authors and the judges in the *Bhe v Magistrate, Khayelitsha* case, with regard to whether abolition of the rule of male primogeniture was a better approach than the development of the rule, thereof. The researcher in this regard agrees with the approach of developing the rule in line with the Constitution.

Chapter 4: Chapter four deals with the possibility of harmonising customary law of succession and common law of succession to promote women's rights and dignity. By this, the author refers to the removal of discord, the reconciliation of contradictory elements between the rules and effects of two legal systems which continue in force as self-sufficient bodies of law.[5]

Moreover, the researcher shows the reader that it is possible to have customary law rules that are in line with the constitutional values of human dignity, freedom and equality and that in the event that customary law rules are in conflict with the right to equality, the right to equality prevails. However, the researcher also agrees with Ntulo,[6] that due to the negative attitude towards customary law, it can also often, be misunderstood as being discriminatory in nature, especially when viewed through common law.

Chapter 5: Chapter five discusses the role of women under customary law, after the rule of male primogeniture was abolished. It revisits some of the discriminatory conditions as explored in chapter two and reveals how women now enjoy rights and privileges they were previously excluded from. In other words, highlighting the current and improved stance of women under customary law.

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[5] Allot "Towards the unification of laws in Africa" 1965 International and Comparative Law Quarterly 366.

[6] Ndulo "African customary law, customs, and women's rights" 2011 Cornell Law Faculty Publications 91.

Although, this chapter deals with the improved position of women under customary law, it also looks at the possible barriers that may play a role in making the implementation of the Intestate Succession Act to women difficult.

6.3 Final remarks and recommendations

Customary law like all law in South Africa, in its application, has to be brought in line with the Constitution, which provides that the courts should apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.[7] This means that the discrimination of women can no longer be accepted to justify discriminatory customary laws such as the rule of male primogeniture. It would therefore, be unreasonable to proceed with applying discriminatory customary law rules that are inconsistent with the fundamental values of the Constitution on the basis of the protection of the family as a social unit. There needed to be a change that will treat women as equals of men without undermining customary law by suggesting that western laws of fairness and equal treatment are better.

As it stands, the researcher submits that the legislature and courts have not developed customary law. Instead, they have preferred to apply the Intestate Succession Act to cure the unconstitutionality of customary law of succession. This research shows appreciation that this was a temporary and necessary solution by the courts and therefore does not hold that the solution was wrong. However, it is submitted that courts and the legislature should refrain from imposing common law on customary law, to resolve the challenges faced under customary law. Instead, the this research recommends that it should be the traditional courts that play an even more significant role in bringing customary law in line with the Constitution.

The research further identified that women have very little control when it comes to the choice of law, either because of traditional beliefs and attitudes, ignorance of their rights and the lack of power to enforce their rights. This may be based on the reason that for many years women have been subject to the rule of male

[7] Section 211 of the Constitution, 1996.

primogeniture so much that they have internalised this rule as a way of doing things. As a result, although courts have made the application of the Intestate Succession Act accessible to women, the researcher observed that women still find themselves subject to living customary law.

Therefore, this research provides that it will take a lot of work and effort from grassroots level to make women more aware of their rights as provided by the law, such as the application of the Intestate Succession Act to customary law of succession. Additionally, it recommends promoting the involvement of traditional courts and councils in redefining and developing customary law to be more relatable to the people and in line with the Constitution, and that courts should also take an active role to study living customary law and ensuring that the formal customary law is reflecting it, thereof.

The researcher moreover, recommends that there should be educational campaigns that teach and make women and local communities more aware of the rights applicable to them. This is because, as pointed out in chapter one, it remains pointless for the law to be transformed in theory but remain unchanged among the people it is meant to apply to. This is to say that the law becomes pointless when the people to whom it is meant to apply to cannot relate to it or apply it. Therefore, it should be inferred from people's resistance to change, that the people of South Africa prefer to live by rules and customs made by them, for them without imposition of western ideologies and standard of living; or they are just not aware of how to apply the common law rules to their situations. Thus, the remoteness of the *Bhe v Magistrate, Khayelitsha* case from the people will most likely require more effort and resources to implement it.[8]

Even so, the courts and legislature must also educate themselves about the nature and purpose of customary law rules and customary law in general. They must do so with the desire to understand it within its own and not common law. Only after such careful interest and observation of customary law has been made can courts come up with solutions that are suitable and relatable to the people to whom it is meant to

[8] Van Niekerk "Succession, living law and *Ubuntu* in the Constitutional Court" (2005) 479.

apply. This is not to say that people are law unto themselves, the Constitution remains the highest law of the land and all law should be subject to it. The people at grassroots level need to identify with the reformed customary law of succession laws that are meant to regulate them and should not feel overburdened with foreign lifestyle and way of doing things. For this reason, the researcher maintains that courts and the legislature must minimise the use of western legislation or solutions to solve or develop traditional, customary law. Customary law must independently be applied and respected in the same manner as common law and should not be viewed or developed through common law lens. People and courts should be allowed to practise and develop their customs as they wish, provided such customs are not contrary to the Constitution.

6.4 Conclusion

From the above discussion, the researcher holds that women have very little control when it comes to the choice of law, either because of traditional beliefs or because of attitudes, ignorance of their rights and the lack of power to enforce their rights. This may be based on the reason that for many years women have been subject to the rule of male primogeniture so much that they have internalised this rule as a way of doing things.

Ngcobo J in handing the minority judgment of the *Bhe v Magistrate, Khayelitsha* case,[9] holds that the social context in which customary rules originated be dissected before discarding them.[10] Hence, the researcher agrees with Ngcobo J's argument that, it is crucial to inquire whether the people, to whom customary law of succession applies, also consider the rule of male primogeniture as being discriminatory to women. Furthermore as discussed in chapter one, Van Niekerk also provides that the rule of male primogeniture emerged with the primary purpose of ensuring that the continued existence of family or the group prevails and for that reason, holds that it could not have been that its goal was to prejudice certain members of the community.[11]

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9 *Bhe v Magistrate, Khayelitsha* (2004) (2) SA 544 (C).
10 Ndulo "Legal pluralism, customary law and women's rights" 2017 Unisa Press Journals 2.
11 Van Niekerk (2005) 479.

Thus, this research provides that it will take a lot of work and effort from grassroots level to make women more aware of their rights as provided by the law. This work includes promoting the involvement of traditional courts and councils in redefining and developing customary law to be more relatable to the people and in line with the Constitution. Additionally, the courts should also take an active role to study living customary law and ensuring that the formal customary law is reflecting it, thereof.

Another recommendation is that there should be educational campaigns that teach and make women and local communities more aware of the rights applicable to them. This is because as pointed out in chapter one, it remains pointless for the law to be transformed in theory but remain the same among the people it is meant to apply to. It is therefore submitted that it should be inferred from the indigenous people's resistance to change, that the people of South Africa prefer to live by rules and customs made by them, for them or they are just not aware of how to apply the new laws to their situations. Thus, the remoteness of the *Bhe v Magistrate, Khayelitsha* case from the people will most likely require more effort and resources to implement it.[12]

The people at grassroots level need to identify with the new laws that are meant to regulate them and should not feel overburdened with foreign lifestyle and way of doing things. This is the reason this research maintains and advices that courts and the legislature must minimise the use of western legislation or solutions to solve or develop traditional, customary law. Customary law must independently be applied and respected in the same manner as common law and should not be viewed or developed through common law lens. People and courts should be allowed to practise and develop their customs as they wish, provided such customs are not contrary to the Constitution.

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12 Van Niekerk (2005) 479.

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