

# Effects of the eradication of the rule of male primogeniture on the customary law of succession

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## SUMMARY

This article discusses the consequences of the abolition of the rule of male primogeniture by closely and critically discussing the outcome of the *Bhe v Magistrate Khayelitsha* case. Therefore, exposing the effect of implementing and extending common law solutions as a means of bringing customary law in line with the Constitution to achieve the right of equality. Thus, the author advises that courts and the legislature should have employed a different method rather than one of extending the application of the Intestate Succession Act 81 of 1987, which subsequently led to the promulgation of the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009, to customary law of succession. Summarily, this article cautions against imposing common law solutions, directly or indirectly, on customary law challenges and advises on utilising customary law institutions, mechanisms and/or remedies to bring customary law in line with the Constitution.

## 1 Introduction

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

Therefore, this article unpacks the nature and purpose of male primogeniture, the extent to which it played a role in discriminating against women, and critically analyses the outcome of the *Bhe v Magistrate Khayelitsha* case as the first landmark decision in customary

- 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. This is referred to as the rule of male primogeniture; a rule that entails that the eldest or youngest male relative of the deceased succeeds the deceased and inherits his property.
- 3 Bekker & Koyana 2012 *De Jure* 568.
- 4 Wallis *Primogeniture and ultimogeniture under scrutiny in South Africa and Botswana* (mini-dissertation 2016 North West University) 22.

law in South Africa.<sup>5</sup> This article will moreover pay close attention to *Shilubana v Nwamitwa* case,<sup>6</sup> *M v M* case,<sup>7</sup> and *Mphephu v Mphephu-Ramabulana* case,<sup>8</sup> in order to highlight the dangers and effects of employing common law solutions as a means of bringing customary law in line with the Constitution, to promote equality. These judgments, although decided years after the abolition of the rule of male primogeniture by the Constitutional Court, are linked and affected by the *Bhe v Magistrate Khayelitsha* case, in that they highlight the importance of traditional authorities' role in developing customary law and the need for consultation with such traditional authorities by the civil courts when developing customary law in line with the Constitution. This article will thus, finally, suggest possible solutions that the courts, legislature, and academics should consider when dealing with customary law of succession.

## 2 The rule and role of male primogeniture under customary law of succession

Section 211 of the Constitution of the Republic of South Africa has placed 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.<sup>9</sup> Thus, the legal system of South Africa is pluralistic in nature.<sup>10</sup>

Resultantly, the South African law of succession consists of the common law of succession and the customary law of succession. The former is regulated by the Intestate Succession Act,<sup>11</sup> and the Wills Act,<sup>12</sup> while the latter was primarily characterised by the application of the rule of male primogeniture,<sup>13</sup> a rule that is central to this article. Customary law of succession is currently regulated by the Reform of Customary Law

5 *Bhe v Magistrate Khayelitsha* 2005 1 BCLR 1 CC; Also see Himonga "Reflection on *Bhe v Magistrate Khayelitsha*: In honour of emeritus Justice Ngcobo of the Constitutional Court of South Africa" 2017 *SAPL* 2.

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

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

8 *Mphephu v Mphephu-Ramabulana* (773/2012) [2017] ZALMPHC 1.

9 Himonga & Nhlapo 161.

10 Himonga & Nhlapo *African Customary Law in South Africa: Post-Apartheid and Living Law Perspective* (2014) 161. Pluralism can be interpreted in the narrow and broad sense. On the one hand, narrow/state law pluralism refers to the existence of officially recognised state laws, and it goes hand in hand with two jurisprudential theories, namely, legal positivism and legal centralism. The latter theories of law regard law as law only when it is recognised and authorised by the state. Deep legal pluralism, on the other hand, refers to pluralism in the broader sense which regards legal pluralism as a factual situation that recognises that multiple normative orders may coexist even without belonging to a single, unified state system or emanating from the same source of authority.

11 Intestate Succession Act 81 of 1987.

12 Wills Act 7 of 1953.

13 Himonga & Nhlapo 161; *Bhe v Magistrate Khayelitsha* para 3; Wallis 1.

of Succession and Regulation of Related Matters Act,<sup>14</sup> read with the Intestate Succession Act.

The rule of male primogeniture excluded any possibility of a female successor.<sup>15</sup> Hence it was often criticised and accused of diminishing the status of women to being inferior to that of their male counterparts and for barring women from acquiring the status of leadership.<sup>16</sup>

This rule which had formed part of the indigenous communities for a prolonged period provided that where the deceased was in a polygynous marriage, the eldest son of each house succeeded to that specific house.<sup>17</sup> Where the eldest son of a house is absent, his eldest male descendant will subsequently succeed.<sup>18</sup> This will continue to happen until all the deceased's sons and their male descendants have been exhausted.<sup>19</sup> These rules also apply to the succession of a monogamous family head.<sup>20</sup>

In terms of customary law, succession, and inheritance are two distinguishable concepts and should not be misunderstood as one.<sup>21</sup> Inheritance refers to the acquisition of property of the deceased,<sup>22</sup> whilst succession refers to the acquisition of the status and role of the deceased, which he acquired during his lifetime.<sup>23</sup> On the contrary, in the common law of succession, inheritance concerns mainly the division of the deceased's assets among his or her heirs.<sup>24</sup> The division of property can take place in terms of the provision of a will (or testament) known as testate inheritance or according to the rules of common law where no will exists, namely statutory intestate inheritance.<sup>25</sup>

Accordingly, the customary law of succession is not concerned with the inheritance of property, but it is primarily concerned with the succession to the status of the deceased.<sup>26</sup> However, the acquisition or inheritance of the property or some of the deceased's property may also accompany such succession.<sup>27</sup> Therefore, the purpose of succession is

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

15 Himonga & Nhlapo 162. See also *Bhe v Magistrate Khayelitsha* para 3.

16 Ndulo "African customary law, customs, and women's rights" 2011 *Cornell Law Faculty Publications* 89.

17 Himonga & Nhlapo as above.

18 Himonga & Nhlapo as above.

19 Himonga & Nhlapo as above.

20 Himonga & Nhlapo as above.

21 Himonga & Nhlapo as above.

22 Himonga & Nhlapo as above.

23 Himonga & Nhlapo 161. Also see, Rautenbach & Du Plessis *Customary Law of Succession and Inheritance* (2010) 121.

24 Rautenbach & Bekker 173.

25 Rautenbach & Bekker as above. See also Oliver et al (1989) 435. The common law of inheritance has been codified by the Intestate Succession Act 81 of 1955.

26 Rautenbach & Du Plessis 121.

27 Himonga & Nhlapo 162.

that the deceased's property should be left for the use and benefit of his closest relatives or dependents.<sup>28</sup> Thus, the successor steps into the deceased person's shoes by acquiring the rights, duties, and obligations that the deceased occupied during his lifetime.<sup>29</sup> 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,<sup>30</sup> and not to a female descendant or surviving female spouse. For this reason, the rule of male primogeniture was subjected to continuous scrutiny for being discriminatory in nature in that it excluded females from succession.

As such, it is pivotal to note that, unlike the common law, the customary law of succession is concerned with the preservation and continuation of the family name and the unity of the family after a person dies.<sup>31</sup> Therefore, the function of the customary law of succession is to counteract the disruptive effect of death on the integrity of a family unit.<sup>32</sup> In other words, family stability and continuity are of great significance when it comes to African families as opposed to individual success.<sup>33</sup>

Ngcobo J in *Bhe v Magistrate Khayelitsha* indicated that the obligation to care for family members is an essential and fundamental value in the African social system.<sup>34</sup> This value is now entrenched in the African (Banjul) Charter on Human and Peoples' Rights.<sup>35</sup> The preamble of the African Charter on Human and Peoples' Rights urges member states, including South Africa, to consider the virtues of their historical traditions and values of African civilisation, which should inspire and characterise their reflection on the concept of human and peoples' rights.<sup>36</sup> Article 27(1) provides that every individual shall have duties towards his family and society,<sup>37</sup> Furthermore, Article 29(1) provides that an individual shall

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

29 Schoeman-Malan 2007 *PELJ* 112.

30 Schoeman-Malan 2007 *PELJ* 112.

31 Himonga & Nhlapo 159.

32 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](http://salawreform.justice.gov.za/ipapers/ip12_prj108_1998.pdf) (last accessed 2019-01-09).

33 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](http://salawreform.justice.gov.za/ipapers/ip12_prj108_1998.pdf) (last accessed 2019-01-09).

34 *Bhe v Magistrate Khayelitsha* 2004 (2) SA 544 (C) para 166.

35 *Bhe v Magistrate Khayelitsha* as above.

36 *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](http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf) (last accessed 2019-02-04).

37 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](http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf) (last accessed 2019-02-04).

have the duty to preserve the family's harmonious development and work for the family's cohesion and respect, respect his parents at all times and maintain them in case of need.<sup>38</sup>

Essentially, contrary to the belief that the rule of male primogeniture was discriminatory, this rule emerged with the primary purpose of ensuring the continued existence of the family or the group.<sup>39</sup> Thus, it could not have been that its goal was to prejudice certain members of the community.<sup>40</sup> This article thus admittedly argues that, although the aim and purpose of the rule were positive, its discriminatory results were unintended. Therefore, whether the rule was in fact discriminatory is not a dispute in this article. Rather, this article cautions against the imposition of common law solutions on customary law challenges.

### 3 Male primogeniture as an instrument of discrimination against indigenous African women and children

The Constitutional Court in the *Bhe v Magistrate Khayelitsha* case, declared the rule of male primogeniture unconstitutional and invalid to the extent that it excludes or hinders women and extra-marital children from inheriting property.<sup>41</sup> Until recently, the intestate law of succession excluded women from inheriting property or succeeding as heads of the family.<sup>42</sup> Therefore, 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.<sup>43</sup>

#### 3 1 Examples of discrimination endured by women before the abolition of the rule of male primogeniture

##### 3 1 1 *Restriction of women's right to property*

Customary rules, such as the rule of male primogeniture, that restrict women's rights to property have a real and severe impact because they affect women's day-to-day lives, including their ability to support themselves and their children and confront poverty.<sup>44</sup> This was apparent in instances whereby the successor was a distant relative who did not have the wife of the

38 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](http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf) (last accessed 2019-02-04).

39 Van Niekerk "Succession, living law and *Ubuntu* in the Constitutional Court" 2005 *Obiter* 479.

40 Van Niekerk as above.

41 *Bhe v Magistrate Khayelitsha* para 136.

42 Richardson "Women's Inheritance Rights in Africa: The Need to Integrate Cultural Understanding and Legal Reform" 2004 *Human Rights Brief* 19.

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

44 Beninger 2010 *Women's Legal Centre* 5.

deceased or his female children as a primary priority. The heir may only be interested in the property but not the responsibilities that go with it.<sup>45</sup>

One of the greatest misfortunes 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.<sup>46</sup> As such, there were no strict regulatory compliance measures that provided the consequences of the heir not adhering to his obligation to take care of the family of the deceased. Consequently, this created a possibility for the heir to be unjustly enriched at the expense of the women who had also contributed to the accumulation or even the maintenance of the property,<sup>47</sup> especially in the modern society where women also work and contribute to the running of the family. Thus, exposing women and female children to a much more vulnerable position than 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.<sup>48</sup> Accordingly, leaving women without means of obtaining property and supporting their children.<sup>49</sup> For example, the deceased's father in the *Bhe v Magistrate Khayelitsha* case, who was appointed as the sole heir of the estate, intended to sell the deceased's immovable property to defray expenses incurred in connection with the funeral of the deceased.<sup>50</sup> There was no indication that the deceased's father gave any thought to the dire consequences, that would follow the sale of the immovable property, possibly leaving Ms Bhe and the two minor children homeless.

The court in *Shibi v Sithole*<sup>51</sup> 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 was violated by the continued application of the customary succession laws which endorse male primogeniture rule.<sup>52</sup> The position was the same for first-born females, as they could also not succeed in the deceased's role or status due to being female.<sup>53</sup>

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45 Beninger 2010 *Women's Legal Centre* 9.

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

47 South African Law Reform Commission (2004) 13.

48 Beninger 2010 *Women's Legal Centre* 9.

49 Beninger 2010 *Women's* as above.

50 *Bhe v Magistrate Khayelitsha* para 17.

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

52 *Shibi v Sithole* para 18.

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

### ***3 1 2 Overlooking women for purposes of succession and their prohibition from inheriting the role of guardianship***

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.<sup>54</sup> In polygynous families, a minor heir of any house is subject to the deceased's highest-ranking major son.<sup>55</sup> 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.<sup>56</sup> This is because, formerly, women could not exercise power and authority over men, so there could be no question of, nor was it conceivable for wives or daughters, to succeed as family heads.<sup>57</sup>

The *Shibi v Sithole* case<sup>58</sup> is a good example of how women were overlooked for the role of succession merely because of their gender. In this case, the deceased was survived by his sister. According to the principle/rule of male primogeniture and the provisions of section 23(10) of the Black Administration Act,<sup>59</sup> Ms Shibi was refused to inherit due to being female.<sup>60</sup> Unfortunately, customary law favoured the deceased's two male cousins being joint heirs, to the exclusion of Ms Shibi.<sup>61</sup> Ms Shibi approached the court after being refused to inherit her deceased brother's intestate estate, who died unmarried, without dependents, parents, and grandparents.<sup>62</sup> 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.<sup>63</sup> The court held that it is just and equitable that the estates of the deceased devolve in accordance with the Intestate Succession Act and thus regarded Ms Shibi as the sole heir of the intestate estate of her deceased brother.

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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](http://www.justice.gov.za/salrc/dpapers/dp76_prj90_conflicts_1998apr.pdf) (last accessed 2019-01-09).

55 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/salrcdpapers/dp76\\_prj90\\_conflicts\\_1998apr.pdf](http://www.justice.gov.za/salrcdpapers/dp76_prj90_conflicts_1998apr.pdf) (last accessed 2019-01-09).

56 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](http://www.justice.gov.za/salrc/dpapers/dp76_prj90_conflicts_1998apr.pdf) (last accessed 2019-01-09).

57 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](http://www.justice.gov.za/salrc/dpapers/dp76_prj90_conflicts_1998apr.pdf) (last accessed 2019-01-09).

58 *Shibi v Sithole*.

59 *Shibi v Sithole* para 21.

60 *Shibi v Sithole* para 25.

61 Rautenbach 2006 SAJHR 101.

62 *Shibi v Sithole*.

63 *Shibi v Sithole* para 26.

Because of such cases, this article submits that it does not deny the fact 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 succession 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. In addition to being contrary to section 9 of the Constitution, the treatment of women being belittled to perpetual minors, who were incapable of succeeding as family heads, also contravened women's right to dignity.<sup>64</sup> The dignity of women was undoubtedly not respected nor protected as the Constitution mandates. By excluding women from succeeding to the family wealth, women remained dependent 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 woman's supposed inability to do so.

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. The courts that 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.<sup>65</sup>

Nevertheless, this article disagrees with the view that extending the Intestate Succession Act to apply to the customary law of succession is beneficial, rather, it has the effect of abandoning the customary system of succession in favour of common law and, therefore, is an incorrect route. This article, thus, submits that this method of reform is inappropriate because, rather than merely imposing rules of the common law of succession on people who are subject to customary law, the court should have prioritised exploring possible ways of promoting equality by bringing customary law in line with the Constitution without imposing the Intestate Succession Act on the customary law of succession. Thus, the author submits that the issue in contention is the manner in which customary law was brought in line with the Constitution to achieve equality; by ignorantly imposing a common law statute on customary law.

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64 S10 of the Constitution, 1996.

65 South African Law Reform Commission (2004) 13.



## 4 The reform of customary law

### 4 1 The genesis of customary law reform: *Bhe v Magistrate Khayelitsha* case

One cannot discuss the genesis of the reform of the customary law of succession without a discussion of the landmark case, *Bhe v Magistrate Khayelitsha*. It involved an application submitted on behalf of the deceased's two minor daughters, female descendants, descendants other than eldest descendants, and extra-marital children who are descendants of people who died intestate.<sup>66</sup> 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's estate.<sup>67</sup> Instead, the Magistrate, in accordance with section 23 of the Black Administration Act and the regulations, appointed the deceased's father as representative and sole heir of the deceased estate.<sup>68</sup> As a result, the two minor children did not qualify to be the heirs in their deceased father's intestate estate.<sup>69</sup>

The applicants challenged the appointment of the deceased's father as heir and representative of the estate in the High Court.<sup>70</sup> 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.<sup>71</sup>

Langa DCJ, writing for the majority of the court held that African customary law rule of male primogeniture in the form that it has come to be applied in relation to the inheritance of property unfairly discriminates against women and children born out of wedlock.<sup>72</sup> He accordingly declared it unconstitutional and invalid. He held 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.<sup>73</sup> However, he held that an interim regime to regulate the intestate succession of black persons was necessary until the legislature was able to provide a lasting solution.<sup>74</sup> As such, the court ordered that estates that would previously have devolved according to the rules in the Black Administration Act and the customary law rule of male primogeniture

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66 *Bhe v Magistrate Khayelitsha* para 10.

67 *Bhe v Magistrate Khayelitsha* para 142.

68 *Bhe v Magistrate Khayelitsha* as above.

69 *Bhe v Magistrate Khayelitsha* para 16.

70 *Bhe v Magistrate Khayelitsha* para 18.

71 *Bhe v Magistrate Khayelitsha* para 19.

72 *Bhe v Magistrate Khayelitsha* paras 92 & 93.

73 *Bhe v Magistrate Khayelitsha* paras 110-114.

74 *Bhe v Magistrate Khayelitsha* para 116.

must now devolve according to the rules provided in the Intestate Succession Act.<sup>75</sup>

In handing the minority dissenting judgment, Ngcobo J concurred with the majority judgment that the principle of male primogeniture unfairly discriminates against women.<sup>76</sup> Ngcobo J also held that courts have an obligation under the Constitution to develop indigenous law to bring it in line with the rights in the Bill of Rights, in particular, the right to equality.<sup>77</sup> Therefore, he held 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 the deceased as well.<sup>78</sup>

Inferring from the above, this article submits that Ngcobo J understood that the premise on which customary law is based is different from that on which common law is based, and thus customary law should be developed by employing customary law methods and procedures. However, the question that this article poses to the minority judgment is whether the development of the rule of male primogeniture to include women does not in essence change the fundamental nature of male primogeniture. Hence, this article does not support the development of the rule to include women but rather the decision to abolish the rule entirely. However, it is against the manner in which common law statute was extended to apply to customary law as a means of bringing it in line with the Constitution.

Together with the traditional council, traditional courts still play an integral part in the administration of justice in much of rural South Africa.<sup>79</sup> For this reason, the author advises that in remedying the discriminatory nature of the rule of male primogeniture, the courts, and the legislature should have worked closely with the traditional courts to ascertain the best way to advance justice and give effect to the right of equality for women.

It is submitted that customary law is not stagnant. On the contrary, it changes to meet the evolving needs of society and as such, with thorough studying of customary practices and consultation with members of the community or cultural experts, a different and more meaningful solution, such as the inclusion of women in succession through engagement with the community could have been achieved.

As a result of the *Bhe v Magistrate Khayelitsha* case, the legislature was required to enact appropriate legislation to regulate succession under

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75 *Bhe v Magistrate Khayelitsha* para 121.

76 *Bhe v Magistrate Khayelitsha* para 143.

77 *Bhe v Magistrate Khayelitsha* para 139.

78 *Bhe v Magistrate Khayelitsha* para 139.

79 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](http://www.justice.gov.za/salrc/dpapers/dp82_prj90_tradl_1999.pdf) (last accessed 2019-02-12).

customary law.<sup>80</sup> This article submits that the subsequent enactment of the Reform of Customary Law of Succession Act (RCLSA),<sup>81</sup> as a response to the Constitutional Court's order to enact legislation that specifically deals with customary law of succession is not a viable solution. The RCLSA does not do away with the concern of common law (i.e. Intestate Succession Act) being imposed on customary law. The author argues that it, in fact, solidifies such imposition. Section 2 of the RCLSA provides that the estate or part of the estate of any person who is subject to customary law who dies after the commencement of the Act and whose estate does not devolve in terms of that person's will must devolve in accordance with the law of intestate succession as regulated by the Intestate Succession Act. The author submits that this Act is not much different from the Intestate Succession Act and as such, finds that the application of the Intestate Succession Act and the RCLSA may, in certain circumstances, lead to an injustice in that these statutes' provisions are inadequate to cater to the social settings that indigenous laws of succession were designed to cater to, particularly the transfer of the obligation to look after minor children and other dependents of the deceased.<sup>82</sup>

## 4 2 The aftermath of customary law reform: A case law analysis

The guiding principle for the change required was that customary law is living law and can, therefore, not be static.<sup>83</sup> Therefore, it should be interpreted to take account of the lived experience of the people it serves.<sup>84</sup> As the author interprets, this guiding principle suggests 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 author further submits that the courts and the legislature should give living customary law practices more attention in order to provide valuable and relatable solutions that will be accepted and welcomed by the very people who are expected to abide by such laws.

Below, the author discusses two recent court cases that dealt with the rule of male primogeniture. The author aims to make the reader aware of the fact that the rule, although abolished, still manifests itself as a challenge in communities that adhere to customary law. This explains why there are still cases brought to the court that deal with the rule of male primogeniture even after its abolition.

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80 *Bhe v Magistrate Khayelitsha* para 140.

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

82 *Bhe v Magistrate Khayelitsha* para 229.

83 Ndulo "African customary law, customs, and women's rights" 2011 Cornell Law Faculty Publications 87.

84 Ndulo 2011 *Cornell Law Faculty Publications* 87.

**4 2 1 M v M (63462/12) [2014] ZAGPPHC 1026**

The deceased was in a polygamous marriage to the first respondent's mother and the applicant's mother.<sup>85</sup> Both the first and second customary wives are also deceased.<sup>86</sup> During his lifetime, the deceased bought and acquired two adjacent farms and allocated portion 303 to the first customary wife and portion 302 to the second customary wife to live on and cultivate crops for sustenance.<sup>87</sup> 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.<sup>88</sup>

The applicant, who was the son of the deceased's second wife, wanted relief from the court, declaring that a farm allotted to his mother during his father's lifetime should have been inherited by him and not the first respondent.<sup>89</sup> The applicant's stance is that portion 302 should be returned to the second wife's house and shared by her children.<sup>90</sup>

Therefore, the court 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.<sup>91</sup> There is undisputed evidence that the deceased had prior to his death, apportioned the two farms to each of his wives. The farms then belonged to each of his wives' houses, and they had to be used exclusively for the benefit of the first and second wives' houses.<sup>92</sup> Since the title deed was in the first respondent's name, the second wife's children were unable to either inherit or enjoy the benefit of their mother's portion of the farm after her death. To remedy the above, it was held that 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.<sup>93</sup>

*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.<sup>94</sup> Even almost ten years after the Constitutional Court abolished male primogeniture, the author infers from the above case that South African people were still applying the rule among indigenous communities. The rule is thus revived through use although abolished in theory.

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85 *M v M* para 5.

86 *M v M* as above.

87 *M v M* para 6.

88 *M v M* as above.

89 *M v M* paras 1 & 2.

90 *M v M* para 11.

91 *M v M* para 26.

92 *M v M* as above.

93 *M v M* as above.

94 *M v M* para 21.

The *M v M* case is another clear indication that, although the rule of male primogeniture has been abolished, there are instances where estates are still being indirectly distributed in accordance with the rule of male primogeniture. This may be so because this rule formed the core of customary law since time immemorial and, as a result, its purpose is understood by those it applies to. Alternatively, it may be because this solution came with the imposition of common law statutes on traditional ways of living. So, although the indigenous communities may not necessarily be against the inclusion of women in positions of inheritance and succession, they may be seeking practical customary measures in terms of which the purpose of family continuity can still be achieved without the exclusion of women and children.

#### **4 1 2 Mphephu v Mphephu-Ramabulana (773/2012) [2017] ZALMPTHC 1**

The applicants, in this case, were the descendants of the Mphephu-Ramabulana royal family.<sup>95</sup> 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 was unlawful, unconstitutional, and invalid.<sup>96</sup> Moreover, they required an order declaring that the rule of male primogeniture as it applies to the 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.<sup>97</sup>

The first applicant sought 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.<sup>98</sup> 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.<sup>99</sup> Makgoba JP held further that the first and eighth respondents never suggested that their tradition does not recognise women leaders.<sup>100</sup> He referred to the *Shilubana v Nwamitwa* case, where the royal house agreed that a woman should lead.<sup>101</sup>

However, the applicant's prayer to declare the rule of male primogeniture unconstitutional and invalid is of particular importance to this article. The fact that, even in 2017, there were still court cases dealing with women seeking to be treated equally to men under customary law is a problem. It is clear that male primogeniture still forms

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

96 *Mphephu v Mphephu-Ramabulana* para 1.1.

97 *Mphephu v Mphephu-Ramabulana* para 1.4.

98 *Mphephu v Mphephu-Ramabulana* para 1.6.

99 *Mphephu v Mphephu-Ramabulana* para 89.

100 *Mphephu v Mphephu-Ramabulana* as above.

101 *Shilubana v Nwamitwa*.

part of living customary law and that the discrepancy between living and formal 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 author 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,<sup>102</sup> the legislature may unintentionally still make the blunder of drafting legislation that is disconnected from the people to whom it is meant to apply.

Thus, this article 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 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.<sup>103</sup>

## **5 Were there other customary mechanisms to develop customary law in line with the Constitution other than the extension of the Intestate Succession Act to the customary law of succession?**

The discussion of male primogeniture should ultimately boil down to a question of the purpose of the practice. It has been argued and thus revealed that the purpose of such a rule was to preserve the continuation of the family name and the unity of the family after a person dies,<sup>104</sup> and thus to counteract the disruptive effect of death on the integrity of a family unit.<sup>105</sup> Therefore, the question that naturally follows is whether the succession by male heirs to the exclusion of females is the only way to achieve the purpose or whether the purpose can be achieved by other means without the exclusion and the unfair discrimination of women. Consequently, this article suggests that to resolve some of the inequitable

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102 *Bhe v Magistrate Khayelitsha* para 140.

103 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](http://www.justice.gov.za/salrc/dpapers/dp82_prj90_tradl_1999.pdf) (last accessed 2019-02-12).

104 Himonga & Nhlapo 159.

105 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](http://salawreform.justice.gov.za/ipapers/ip12_prj108_1998.pdf) (last accessed 2019-01-09).

conditions faced by women subject to customary law, courts, and the legislature should thoroughly observe living customary law in order to ascertain the best suitable solutions that will be received and practised by the indigenous people, to avoid further inconsistency between living and formal customary law. The author agrees with Ntlama and Ndima, who accuse the court of rejecting customary law principles and values at the expense of Western conceptions of human rights norms.<sup>106</sup> In support of the above, this article highlights that the court, by extending common law statutes to the customary law of succession, disregarded a communal-oriented tenet of customary law in favour of a Western conception of gender equality, which promotes individualism.<sup>107</sup>

The role and functions of a traditional leader in a cultural community include providing support and care to members of the community and ultimately ensuring that there is peace and stability in the entire community.<sup>108</sup> The customs and traditions of a cultural community will include encouraging group interests rather than individual needs on the basis that the needs of a group build a community for the betterment of tomorrow.<sup>109</sup> Respect and tolerance for elders and other people in general, which is key for the well-being of a particular individual and the broader community is fundamental and encouraged. Even though they find themselves under traditional rule and administration, traditional communities are autonomous and independent.<sup>110</sup>

Swart J pointed out in the *Shilubana v Nwamitwa* case that the most crucial 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.<sup>111</sup> This argument in favour of precluding succession of women 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.<sup>112</sup>

Naturally, the question that follows from the above is; will the purpose of succession still be achieved if the eldest surviving child of the deceased is a married female? It is no revelation that when a woman is married, such a woman becomes part of her husband's family. Thus, when a man

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106 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.

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

108 Maimela "The role and importance of African customary law in the 21st century South Africa" 2019 *University of Milano-Bicocca School of Law Research Paper* 5.

109 Maimela as above.

110 Maimela as above.

111 *Nwamitwa v Phillia* 2005 3 SA 536 (T) para 545 G.

112 Rautenbach (2018) 216.

pays *lobolo* to marry a woman, her children or procreative beings are transferred to her husband's community.<sup>113</sup> The woman will consequently bear children for her husband's family and not her own family.<sup>114</sup> 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 for family continuity is placed on the males of the family.

Based on the above scenario, it appears *prima facie* 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 have no desire to get married while some women might have made a valuable contribution to the growth and maintenance of the deceased's estate during his lifetime. As of 2019, almost half (41.8%) of South African households are female-headed, with more rural areas having a larger number of female-headed households.<sup>115</sup> Hence, it is unreasonable to exclude women from succession merely because they were born female. Like men, women have a right to be treated equally before the law, including the customary law of succession.<sup>116</sup>

The author understands that if a female is appointed as chief and thereafter gets married, her children will not be fathered by the maternal royal bloodline and will bear a different name. Therefore, those children would follow the new husband's family lineage and not that of the royal family. A result of which would lead to confusion and uncertainty in successorship.<sup>117</sup> Hence, the decision to preclude women from succession is founded on this functional principle because the family name and lineage are vital to the indigenous people.

Nevertheless, one's marital status should not bar her from succession. The married daughter should be given the freedom to choose whether or not she accepts the benefit of succession and thus wants to succeed in the role of family head. If she accepts, such a daughter shall succeed to the role of family head in the interest of the family unit and not in her personal capacity (i.e. she receives a limited real right to the family property). This will mean that her role is to oversee the proper administration of the family estate in the best interest of the family. Therefore, the family estate does not form part of her marital or personal

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113 Rautenbach as above.

114 *Hlophe v Mahlalela* 1998 1 SA 449 (TPD) para 9; Ngema "the enforcement of the payment of lobolo and its impact on children's rights in South Africa" *PELJ* 410.

115 Saifaddin Galal "Distribution of female-headed households in South Africa 2019, by province" 2021 Statistics South Africa <https://www.statista.com/statistics/1114301/distribution-of-femaleheaded-households-in-south-africa-by-province/> (last accessed 2021-07-21).

116 The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

117 *Nwamitwa v Phillia* para 545 G-H.



estate. This principle is not restricted to family succession only but applies to succession to the role of traditional leadership.

The married female heir can also choose to renounce the benefit to succeed to the next best suitable heir. This may be for reasons such as wanting to solely focus on her own marital affairs.

This choice allows women to exercise their freedom of choice rather than merely being excluded by virtue of their gender or marital status.

This article submits that, instead of entirely excluding or prohibiting women from succeeding to the role of a family head or traditional leadership, the court and legislature could have developed customary law of succession with certain conditions such as providing that, if a woman wants to become the family head, she cannot, whether married or not, make any decision that puts her family's wealth, name or continuity in jeopardy. In such instances, her children would need to take the family name of the family head. In this way, women are given a choice to choose whether they prefer to succeed as family heads as opposed to being completely excluded.

## 6 Factors to consider for succession

Customary law places much store in consensus-seeking and naturally provides for family and clan meetings which offer excellent opportunities for the prevention and resolution of disputes and disagreements.<sup>118</sup> These aspects are not only useful in the area of disputes. They provide a setting that contributes to the unity of family structures and the fostering of co-operation, a sense of responsibility in and of belonging to its members, as well as the nurturing of healthy communitarian traditions such as *ubuntu*.<sup>119</sup> Therefore, the author submits that especially upon the death of the deceased, the family elders and advisers (including women) should, guided by some objective criteria of succession, collectively come together and agree on the best suitable successor, taking into account the constitutional principles of fairness, equality, and human dignity. All of this will be done, bearing in mind the purpose of succession which is the protection of the family, its property, and continuity.

Although the Intestate Succession Act has a prescribed way of succession that might be in the best interest of the community and family, extending its application to customary law may have an unintended outcome of treating customary law as a stepchild of common law. As such, the author suggests the following customary factors that can be considered in the developing customary law of succession in line with the Constitution:

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118 *Shibi v Sithole* para 45.

119 *Shibi v Sithole* para 45.

- (a) Women should not be overlooked for the purposes of succession. Their gender should not be used as an exclusionary measure to qualify them as competent successors.
- (b) Practice and experience should be a determining factor. In other words, by virtue of having witnessed how a person lives his/her life with integrity and responsibility, the family, or in the case of traditional leadership, should be able to consider such a person's competency for succession. The person should be considered, bearing in mind the rules of succession. In other words, the eldest surviving descendant of the deceased is eligible as opposed to the eldest surviving son.
- (c) There must be strict accountability measures on the prospective succeeding heir to support, protect, and act in the best interest of the surviving dependants of the deceased. Thus, there should be consequences for not adequately carrying out the duties of a successor. Such consequences may include a disciplinary hearing by the family advisers and elders (*bagolo ba le lapa*), as well as the removal and replacement of such a successor with the next best suitable successor if the need arises.

## 7 Conclusion

The indirect revival and application of the rule of male primogeniture remains a problem even after the Constitutional Court in the *Bhe v Magistrate Khayelitsha* abolished the rule. Though there has been evidence of transformation and reform to customary law, many South Africans still remain devoted to the rules, practices, and processes of the system as binding on them.<sup>120</sup> For this reason, until recently, the courts are still approached regarding family disputes about the intestate estates of the deceased persons whereby the rule is indirectly applied by the family or traditional councils in favour of the eldest male descendant of the deceased.

The legislature and the courts have employed an approach to reforming customary law, to replace it with South African common law with little accommodation of customary law.<sup>121</sup> This meant that the courts replaced the impugned provisions of the Black Administration Act, the regulations, and the principle of male primogeniture with the RCLSA applied with the Intestate Succession Act.<sup>122</sup>

As it stands, this article submits that the legislature and courts have not developed law. Instead, they have preferred to apply the RCLSA and the Intestate Succession Act to cure the unconstitutionality of the customary law of succession. Although the article agrees that the decision in *Bhe v Magistrate Khayelitsha* has given women an equal standing with their male counterparts in succession and thus is a fair and equitable judgment in the interest of women, the means used to achieve this goal are

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120 Ozoemena "Living customary law: A truly transformative tool?" 2013 *Constitutional Court Review* 147.

121 Himonga (2005) 83.

122 Himonga (2005) 93.

however problematic. This is because, the manner in which the court reached a solution has unintended devastating effects on the customary law of succession, such as cementing customary law as a stepchild of common law. The precedent set is one that suggests that customary law has no tools or means to develop itself in line with the Constitution but rather relies on common law for solutions.

Thus, the author cautions that courts and the legislature should refrain from imposing common law on customary law to resolve the challenges faced under customary law. Instead, they should apply customary law parallel with common law, allowing it to be interpreted in its own setting, enabling it to grow in its own right and thus, to adapt itself to changing circumstances. Hence, the author recommends that it should be the traditional courts and cultural experts that play an active role in bringing customary law in line with the Constitution within its own independent setting.