

The implementation of customary law of succession and common law of succession respectively: With a specific focus on the eradication of the rule of male primogeniture

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SUMMARY

This article pays 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, it supports the possibility of harmonising common law of succession with customary law of succession without imposing common law mechanisms and ideas on customary law. The purpose of this article is to suggest ways on how best to reconcile customary law with the Constitution without imposing western law on customary law. This will be achieved by showing the reader the viability and possibility of customary law and common law co-existing, independently from one another, subject to the Constitution as the supreme law, without the application of common law standards as a measure for customary law, which was the case in the past.

1 Introduction

Customary law is without doubt the oldest system of law in most African societies.¹ It therefore has a significant role on personal lives of the majority of African people and has over the years, gained a repute of discriminating against women, treating them as second-class citizens.² Central to customary law's application was the rule of male primogeniture.³ A rule that is at the heart of this article and is identified by its tendency to discriminate against women in areas such as guardianship, inheritance, appointment to traditional office, exercise of traditional authority and the age of majority.⁴ This article will highlight the discord between formal customary law as inspired by common law

1 Soyapi "Regulating traditional justice in South Africa: A comparative analysis of selected aspects Traditional Courts Bill" 2014 *PER* 1441.

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

principles and standards, as well as living customary law, which to this day, remains a problem in South Africa.

Living customary law is used to denote the practices and customs of the people in their day-to-day lives and 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.⁵ Accordingly, living customary law refers to the original customs and usages of African indigenous people.⁶ 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.⁷ Therefore, given its flexible character, customary law requires perpetual consent and acceptance of the people to whom it applies.⁸

Official customary law, contrary to living customary law, is described as the formalised 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 Recognition of Customary Marriages Act,¹⁰ the Reform of Customary Law of Succession and Regulation of Related Matters Act,¹¹ Traditional Leadership and Governance Framework Act,¹² and decisions of the courts.

The discord between customary law and common law was further steered in *Bhe v Magistrate, Khayelitsha* case,¹³ by the court requiring that the Intestate Succession Act,¹⁴ apply to customary law of succession whilst the legislature works on enacting appropriate legislation to regulate the rights of women under customary law.¹⁵ The majority *in*

3 This rule orders the eldest surviving male relative of the deceased to succeed to both the status and the role of the deceased. Himonga and Nhlapo describes male primogeniture in the following manner; Where the deceased was in a polygynous marriage, the eldest son of each house succeeds to that specific house. 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. These rules also apply to the succession of a monogamous family head.

4 Ndulo 2011 *Cornell Law Faculty Publications* 89.

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

6 Rautenbach *Introduction to Legal Pluralism* (2018) 23.

7 Ozoemena "Living customary law: A truly transformative tool?" 2013 *Constitutional Court Review* 162.

8 Ozoemena 2013 *Constitutional Court Review* 162.

9 Himonga and Bosch (2000) *SALJ* 328.

10 Recognition of Customary Marriages Act 120 of 1998 (hereinafter RCMA).

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

12 Traditional Leadership and Governance Framework Act 41 of 2003.

13 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) para 140.

14 Intestate Succession Act 81 of 1987.

15 *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) para 140.

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 redress.¹⁶ Favourably, women who were subjected to exclusionary customary law rules of intestate succession could now access 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.¹⁷ Hence, this article aims to expose the inadequacy of the aforementioned decision and to show that as a result of the above case, it remains unclear, sixteen years post-ruling, whether the legislature will enact appropriate legislation that will apply exclusively to customary law of succession.

Furthermore, the article will probe into the practical 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 indigenous people to have a choice between having the Intestate Succession Act and customary rules of succession apply to the administration of their estates, and when it suits them, relying entirely on customary law.

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.¹⁸ 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.¹⁹ Even though that is the case, this paper highlights and maintains that the development of customary law should be viewed through the lens of customary law itself without the imposition of common law views.

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

“While in the past customary 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

16 Ozoemena 2013 *Constitutional Court Review* 149.

17 Grant “Human rights, cultural diversity, and customary law in South Africa” 2006 *Journal of African Law* 12.

18 Grant 2006 *Journal of African Law* 19.

19 Grant 2006 *Journal of African Law* 19.

ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common-law, but the Constitution”.²⁰

It is therefore imperative to regard customary law as an integral and independent part of our law, subject to the Constitution. In support of this, 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,²¹ and thus, promoting the application of customary law as an independent legal system, subject to the Constitution.

The author therefore proposes that traditional courts should become more involved in matters and questions relating to customary law rules and practices such as male primogeniture. This suggestion is made, bearing in mind that traditional courts exist and are used by millions of people to resolve disputes according to customary law in a manner, which should promote justice.²² They provide communities with dispute resolution mechanisms and focus on the implementation of restorative justice.²³ The Traditional Courts Bill thus provides the following to emphasise the significance of traditional courts:

“Traditional courts –

[...] are intended to promote the equitable and fair resolution of certain disputes, in a manner that is underpinned by the value system applicable in customary law and custom; and

(b) Function in accordance with customary law, subject to the Constitution.

(2) Traditional courts, recognising the consensual nature of customary law, must be constituted and function under customary law and customs [...] in a manner that promotes restorative justice, Ubuntu, peaceful co-existence and reconciliation, in accordance with constitutional imperatives and the provisions of this Act”.²⁴

Therefore it should be noted that 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.²⁵ For this reason, the author maintains that solutions coming from the traditional council will be more meaningful and reliable to the indigenous people

20 *Alexkor Ltd v Richtersveld Community* 2003 (12) BCLR 1301 (CC) at para 51.

21 Section 211(3) of the Constitution, 1996.

22 Griffin “The traditional courts bill: Are they getting it right?” 2017 *Helen Suzman Foundation* 1.

23 Merten “Can ‘everyone live with it?’” 2017 *Daily Maverick* 2. <https://www.dailymaverick.co.za/article/2017-01-23-traditional-courts-bill-ver-2017-can-everyone-live-with-it/#.WJrL5lh97nB>; Griffin 2017 *Helen Suzman Foundation* 1.

24 S 6 of the Traditional Courts Bill of 2017.

25 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 2019-02-12).

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. Hence, it is suggested that it will be much easier to implement solutions coming from 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,²⁶ and consequently, leading to customary law being 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 purpose of ensuring that the continued existence of family or the group prevails.²⁷ The author's in support of Langa DCJ's view agrees that most western understanding of customary law is influenced by their negative attitudes towards all things African.²⁸

As noted above, customary law is a system that is consensus-seeking and is accountable to the people to whom it applies;²⁹ it is flexible. Even when living customary law is developed to suit the needs of society, the author's observes that such development is often not reflected in formal customary law. Magistrates courts and other 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 that have occurred in society.³⁰ This according to the author's 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.³¹

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.³² This means that both the existing legal systems, being customary law 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.³³

26 *Bhe v Magistrate Khayelitsha* (2004) (2) SA 544 (C) para 89.

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

28 Ndulo "African customary law, customs, and women's rights" 2011 *Cornell Law Faculty Publications* 91.

29 Ozoemena 2013 *Constitutional Court Review* 162.

30 *Bhe v Magistrate, Khayelitsha* (2004) (2) SA 544 (C) para 89.

31 Allot "Towards the unification of laws in Africa" 1965 *International and Comparative Law Quarterly* 366.

32 Allot 1965 *International and Comparative Law Quarterly* 366.

33 Allot 1965 *International and Comparative Law Quarterly* 377.

The Constitutional Court in *Bhe v Magistrate, Khayelitsha* provided an interim solution for women by ruling that the Intestate Succession Act should temporarily apply to indigenous women whilst the legislature works on enacting appropriate legislation to regulate the rights of women under customary law.³⁴ The Reform of Customary law of Succession and Regulation of Related Matters,³⁵ provided the following:

“The estate or part of the estate of any person who is subject to customary law who dies after the commencement of this 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, subject to subsection (2)”.³⁶

Extending the use of the Intestate Succession Act, a statute used to regulate common law of intestate succession, is perceived as a conquest of customary law by common law instead of harmonisation between the common law and customary law.³⁷ In this case, the author’s hold 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 and thus, treating customary law through the common law lens.

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 is upheld, while women are not unjustifiably discriminated against.³⁸ All this was done in order to protect the rights of vulnerable members of families, especially women and children.³⁹ 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 benefits women in practice.⁴⁰ In other words, to test the relevance and success of the reform, the author’s provide 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*,⁴¹ was that the version of customary law applied

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

35 The Reform of Customary law of Succession and Regulation of Related Matters Act 11 of 2009.

36 S 2 of the Reform of Customary law of Succession and Regulation of Related Matters Act.

37 Rautenbach “South African common and customary law on Intestate Succession: A question of harmonization, integration or abolition” 2008 *Journal of Comparative Law* 129.

38 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.

39 Himonga 2005 *Acta Juridica* 106.

40 Himonga 2005 *Acta Juridica* 106.

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

in the case was a distortion of the law as practised.⁴² 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 paper 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.⁴³ 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.

It is thus, 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 through exercising his\her freedom of testation.⁴⁴ Freedom of testation refers to the testator or deceased's wishes in disposing of his\her assets, being carried out except in as far as the law restricts this freedom of the testator or deceased.⁴⁵

It is, and then submitted that it is still too soon to unify customary law and common law.⁴⁶ Consequently, the wounds that were inflicted on African culture and customary law by apartheid and colonialism are still raw and for that reason, the author's 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.⁴⁷ Therefore, this paper supports the harmonisation of common law and customary law, as opposed to the unification of the two systems. This is to say that customary law and common law should remain separate systems of law; with customary law being followed by people who choose to submit under it and its laws. Thus, applying customary law without the burden of common law principles and methods of doing things. As mentioned above, the validity of customary law must now be determined by reference to the Constitution and not common law.⁴⁸

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

42 Grant "Human rights, cultural diversity and customary law in South Africa" 2006 *Journal of African Law* 16.

43 Rautenbach 2008 *Journal of Comparative Law* 129.

44 Rautenbach 2008 *Journal of Comparative Law* 126.

45 De Waal and Schoeman *Malan Law of Succession* (2015) 3.

46 Grant 2006 *Journal of African Law* 22.

47 Grant 2006 *Journal of African Law* 22.

48 *Alexkor Ltd v Richtersveld Community* 2003 (12) BCLR 1301 (CC) at para 51.

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.⁴⁹ Furthermore, 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.⁵⁰ Therefore, the wishes of the deceased will be given effect to. After all, 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.⁵¹

In *Re BOE Trust Ltd*,⁵² 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.⁵³ Therefore, the owner of property may dispose of his/her property as he/she wishes and his/her wishes would have to be given effect to, if such wishes are not contrary to the Constitutional values.

It is thus argued that the approach to solving issues concerning African people through the enactment of legislation must be re-evaluated because it is an approach that has brought destabilisation of practices, values, and norms.⁵⁴ This approach is one that intensifies the disparity between how customary law is said to be theoretically as opposed to how it is practiced daily. Although the author's does not entirely disagree with the application of the Intestate Succession Act to cure the discrimination against women, it is submitted that the approach employed by the courts, to solve customary law issues by the application of western legislation must be avoided and discontinued. Such a remedy should have been employed on a temporary basis with a more definite period, as allocated by the court, to afford the legislature time to enact customary law of succession legislation that specifically deals with the estates of indigenous people. The former approach is seen as an imposition of western ideologies and solutions to a problem that requires to be solved by employing solutions by traditional courts or indigenous people, who know and understand customary law best. It is further submitted that although traditional courts or indigenous people may draw some inspiration from western legislation, those inspired solutions may alternatively be incorporated in legislation that solely governs customary law of succession for indigenous people who are governed by it thereof.

49 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.

50 Himonga and Nhlapo *African customary law in South Africa: Post-apartheid and living law perspective* (2015) 160.

51 De Waal and Schoeman-Malan *Law of Succession* 4.

52 *Re BOE Trust Ltd* 2009 (6) SA (WCC).

53 *Re BOE Trust Ltd* 2009 (6) SA (WCC) para 27.

54 Ozoemena 2013 *Constitutional Court Review* 162.

3 Ensuring the right to equality and culture

Culture is like an umbrella under which some people like to hide from the rain and to shade themselves from the sun, but sometimes you need to fold it.⁵⁵ 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.⁵⁶ 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 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.⁵⁷

Equality includes the full and equal enjoyment of all rights and freedoms.⁵⁸ It can be limited provided that the limitation is reasonable and justifiable in terms of the Constitution.⁵⁹ The Constitution prohibits unfair discrimination towards anyone and therefore only permits discrimination when it is said to be fair and justifiable.⁶⁰

Section 36 of the Constitution makes it 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”.⁶¹

The Constitution affirms the democratic values of human dignity,⁶² equality,⁶³ and freedom.⁶⁴ Therefore, these rights to human dignity, freedom, and equality, 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.⁶⁵ Hence, the norms and lifestyle of one group should not be used as a measuring standard for the other. Common law and customary law should be equally respected and

55 Maluleke “Culture, tradition, custom, law and gender equality” 2012 *PELJ* 1.

56 Maluleke 2012 *PELJ* 1.

57 Rautenbach *Introduction to legal pluralism in South Africa* 21.

58 S 9(2) of the Constitution.

59 S 36 of the Constitution.

60 S 9(5) of the Constitution.

61 S 36(1) of the Constitution.

62 S 10 of the Constitution.

63 S 9 of the Constitution.

64 Ss 7 and 12 of the Constitution.

65 S 31 of the Constitution.

applied respectively, all subject to the Constitution. However, it is often a problem which of the rights between the right to equality and the right to culture should prevail over the other.

There is no clear ranking of rights to provide conclusive answers to all the questions relating to the relationship between the rights to equality and culture.⁶⁶ 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.⁶⁷ Therefore, the use of cultural rights and practices as an excuse to treat people unequally will not be sufficient enough to escape constitutional scrutiny.⁶⁸ The preamble states that the 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.⁶⁹

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.⁷⁰ The evidence of which is envisaged in the *Bhe v Magistrate, Khayelitsha* case,⁷¹ 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.⁷²

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.⁷³ This is because equality forms a fundamental and core value of the Constitution.⁷⁴ Therefore, women, under customary law are now considered 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.⁷⁵ However, the fact that the right to equality is not internally limited in the same way as sections 30 and 31 of the Constitution,⁷⁶ by the *proviso* that the rights to

66 Kaganas and Murray "The contest between culture and gender equality under South Africa's interim Constitution" 1994 *Journal of Law and Society* 415.

67 S 9(1) of the Constitution.

68 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* 108.

69 The preamble of the Constitution, 1996.

70 Kaganas and Murray 1994 *Journal of Law and Society* 424.

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

72 *Bhe v Magistrate, Khayelitsha* (2004) (2) SA 544 (C) para 109.

73 Grant Human rights, cultural diversity and customary law in South Africa" 2006 *Journal of African Law* 9.

74 S 1(a) of the Constitution.

75 S 7(3) of the Constitution.

76 Ss 30 and 31 of the Constitution.

language,⁷⁷ culture,⁷⁸ or religion,⁷⁹ are to be exercised subject to the Bill of Rights strengthens the above argument that the right to equality trumps the right to culture.⁸⁰ For example, as discussed above, the court in *Shilubana v Nwamitwa* case declared that females might now be recognised as traditional leaders.⁸¹ The court found that the succession to the leadership of the Valoyi had operated in the past according to the principle of male primogeniture.⁸² However, the traditional authorities had the authority to develop customary law and they did so in accordance with the constitutional right to equality.⁸³ The value of recognising the development by a traditional community of its law following the Constitution was not outweighed by the need for legal certainty or the protection of rights.⁸⁴ 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).⁸⁵

Thus, people need to be cautious against the assumption that, culture and equality cannot be reconciled.⁸⁶ 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.⁸⁷ The author's submits that customary law in its application is equitable and even in its contemporary manifestation, already complies with constitutional norms. However, the author's also agrees with Ntulo that due to the negative attitude towards customary law, it can also be misunderstood as being discriminatory in nature.⁸⁸

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;

77 S 30 of the Constitution.

78 S 30 of the Constitution.

79 S 31 of the Constitution.

80 Grant 2006 *Journal of Journal of African Law* 9.

81 *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) para 87.

82 *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) para 87.

83 *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) para 87.

84 *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) para 87.

85 *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) para 56.

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

87 Bronstein 2000 *SJHR* 558.

88 Ndulo 2011 *Cornell Law Faculty Publications* 91.

- A commitment to sensitive and sustained legal development of both customary law 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.⁸⁹

Consequently, the author's agrees with Grant, that the right to equality and the right to culture can co-exist. This article 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 author's makes the following comments in light of Grant's suggestions above:

- a An acknowledgment of the importance of both culture and equality and their interrelationship:

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) A need for training and research:

The author's recommends that there be training programmes that will educate and inform both local, indigenous and western people of each other's legal system. In this way, it is argued 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 customary law. However, customary law can be developed to ensure it is in line with the spirit, purport, and object of the Constitution.⁹⁰

4 Bringing customary law in line with the Constitution

4 1 Women as family head and traditional leaders

Previously, succession to status was limited to males and it was generally

89 Grant 2006 *Journal of African Law* 22.

90 S 39 (2) of the Constitution.

accepted that a woman could not succeed a man.⁹¹ 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.⁹²

Surprisingly, although the above was the case, the *baLobedu* tribe was the only tribe that had a woman as a traditional leader whilst males in that community held positions of ward heads.⁹³ Currently, the Traditional Leadership and Governance Act permit the recognition of females as traditional leaders.⁹⁴ This means women can now enjoy an equal opportunity to be designated as traditional leaders of their communities like their male counterparts.⁹⁵

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.⁹⁶

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 make reference to queens and headwomen.⁹⁷ Evidently, as referred to above, the court in *Shilubana v Nwamitwa* case also declared that females may now be recognised as traditional leaders, a decision that was upheld by the overall community.⁹⁸

4 2 Legal status of married women

Section 6 of the Recognition of Customary Marriages Act,⁹⁹ 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”.¹⁰⁰

91 Rautenbach *Introduction to Legal Pluralism in South Africa* 180.

92 Rautenbach *Introduction to Legal Pluralism in South Africa* 213.

93 Rautenbach *Introduction to Legal Pluralism in South Africa* 213.

94 Traditional Leadership and Governance Framework Act 41 of 2003.

95 S 3(2)(b) of the Traditional Leadership and Governance Framework Act 41 of 2003.

96 S 5(1) and (2) of the Traditional Courts Bill of 2017.

97 S 8(a) and (c) Traditional Leadership and Governance Framework Act 41 of 2003.

98 *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) para 87.

99 Recognition of Customary Marriages Act 120 of 1998.

100 S 6 of the Recognition of Customary Marriages Act.

The legislature has therefore given effect to section 10 of the Constitution,¹⁰¹ by dignifying women through allowing them to have equal legal status and capacity as their counterparts.¹⁰² In other words, women also have legal capacity to enter into transactions independently and are able to acquire and dispose of assets.¹⁰³ Therefore, women are now entitled to inherit property under customary law.¹⁰⁴ The Recognition of Customary Marriages Act,¹⁰⁵ makes all customary marriages automatically in community of property unless the parties state otherwise.¹⁰⁶ 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 the estate.¹⁰⁷ 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.¹⁰⁸

Section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected.¹⁰⁹ As a result, it is submitted 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.¹¹⁰ 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,¹¹¹ 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.¹¹² 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*,¹¹³ the court ordered that husbands and wives have joint and equal ownership and equal rights of management and control over marital property.¹¹⁴ This supports the notion that women are now permitted to own and administer property independently, like men.

101 S 10 of the Constitution.

102 S 6 of the Recognition of Customary Marriages Act.

103 S 10 of the Constitution.

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

105 Recognition of Customary Marriages Act.

106 S 7(2) of the Recognition of Customary Marriages Act.

107 Beninger 2010 *Women's Legal Centre* 14.

108 Beninger 2010 *Women's Legal Centre* 14.

109 S 10 of the Constitution.

110 Rautenbach *Introduction to legal pluralism in South Africa* 41.

111 *Mabena v Letsoalo* 1998 2 SA 1068.

112 *Mabena v Letsoalo* case 1068.

113 *Ramuhovhi v President of the Republic of South Africa* 2017 ZACC.

114 *Ramuhovhi v President of the Republic of South Africa* 2017 ZACC para 71.

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.¹¹⁵ It too can be developed to promote the spirit, purport and object of the Bill of Rights.¹¹⁶ 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.¹¹⁷

Therefore, based on the above, the author's submits that customary law continues to evolve and shift to meet the social needs of those it applies to. This change was 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 law 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.¹¹⁸

4 3 Factors affecting the implementation of the reformed customary laws – 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.¹¹⁹ 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.¹²⁰ 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.¹²¹

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

116 S 39(2) of the Constitution.

117 *Sengadi v Tsambo* (40344/2018) [2018] ZAGPJHC 613 para 20.

118 Beninger 2010 *Women's Legal Centre* 67.

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

120 Himonga 2005 *Acta Juridica* 83.

121 Himonga 2005 *Acta Juridica* 83.

Traditional courts form part of the heritage of African people and are easily accessible, inexpensive and have a simple system of justice.¹²² 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/her councillors question them and provide a verdict.¹²³ 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.¹²⁴

Contrary to the procedure followed by traditional courts, the procedure followed by western courts is more technical.¹²⁵ In western courts (magistrate courts, high courts 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.¹²⁶

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.¹²⁷ This makes it cheaper due to the fact that 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. This article 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 local language of the parties to the disputes and thus avoid the risk of distortion through interpreting.¹²⁸ 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 author's 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 author's 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

122 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 2019-01-09)

123 The South African law Commission (1999) 2.

124 The South African law Commission (1999) 2.

125 The South African law Commission (1999) 2.

126 The South African law Commission (1999) 2.

127 The South African law Commission (1999) 2.

128 The South African law Commission (1999) 2.

leaders and the community at large. The author's moreover hold that it will be easier to implement solutions that come from traditional courts or royal councils than from western state courts. It is argued for the harmonisation of common law and customary law as opposed to the unifying of the two systems of law, is a solution.

5 Conclusion

In light of the above discussion, 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 harmonisation between the common law and customary law.¹²⁹ For this reason, the author's 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 author's moreover, suggests that customary law should be evaluated and reformed within a customary law lens. By allowing participation of traditional courts and the indigenous people in the transformation of customary law of succession.

Therefore, this paper proposes that maintaining a pluralistic system that is developed based on 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.

This paper further submits that the approach employed by the courts to solve customary law 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 traditional courts or the indigenous people, who know and understand customary law best.

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 author's suggests that court solutions to customary law 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

129 Rautenbach 2008 *Journal of Comparative Law* 129.

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 following 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 comply with human rights and constitutional norms and how it can be transformed to satisfy the demands of equality.¹³⁰ 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 constitutional values of freedom, human dignity and equality.

130 Bronstein 2000 *SJHR* 558.