The role and effect of the Constitution in customary law of succession

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SUMMARY

Customary law is the original law of the inhabitants of South Africa; however, it has always been treated as the stepchild of the legal system. The new constitutional dispensation requires that all laws be measured against the Constitution of the Republic of South Africa, 1996. This means that any law that is inconsistent with the Constitution is regarded as being invalid. Over the last few years, courts have had several cases, which have required them to test the constitutionality of some customary law principles and develop customary law in a manner that aligns it with the Constitution. However, we have witnessed a reluctance to develop customary law from the courts, instead, the laws which could have been developed were declared invalid. The focus of this paper will be to interrogate the role and effect of the Constitution in the administration and application of customary law of succession. Furthermore, to justify why we hold the view that customary law is a stepchild of the South African legal system post the democratic dispensation, this is attributed to the fact that most cases that involve the customary law of succession still leave many women in dire social and financial situations where the head of the family dies due to the distorted prevailing principle of male primogeniture.

1 Introduction

Despite customary law being the founding body of law originally in South Africa, there has never been equality between the indigenous laws and the imported laws in the country.[1] "Customary law has [thus] always been treated as the stepchild in the South African legal order and this has disadvantaged many people who live in accordance with [it]".[2] The new constitutional dispensation is motivated by a desire to move from a history that was distorted, notably in customary law. As a result,

1 Rautenbach "South African common law and customary law on intestate succession: A question of harmonisation, integration or abolition" 2008 *Journal of Comparative Law* 120.
2 As above.

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customary law has been blocked by osmification, which has caused its nature and operation to be subverted.[3]

Customary law is defined as "the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples".[4] Therefore, customary law is a term that is now used to describe what was known as "native law".[5] Therefore, customary law is defined as a body of rules and norms that have developed over centuries. As a result, "an inquiry into the position under customary law will therefore invariably involve a consideration of the past practice of [communities]".[6] Additionally, customary law is a system of law that is passed on from one generation to the other, and it is developed throughout the years to meet the changing needs of communities.[7]

Unlike the common law, customary law has not featured in the conventional South African jurisprudence, as a result, a court dealing with customary law matters was established in order to apply the provisions of the Black Administration Act.[8] Moreover, this is due to the fact that statutory regulations that have been set in place undermine living customary law which is exclusively based on the daily practices of people.[9] Furthermore, even though customary law was seen through the lens of common law in the past it must now form an integral part of our law and like all law, its validity depends on the Constitution.[10]

One of the striking features of customary law lies in the fact that the original form of the law is unwritten; the laws of custom are both young and old at the same time and it is because of this that customary law is always up to date as no custom is older than the memory of the eldest living person.[11] This system always allows forgotten rules to fall into oblivion while at the same time accepting new rules with the understanding that the new is old.[12]

However, the Western legal system requires laws to be stable and certain, as a result, rules that are transmitted orally are considered hopelessly unreliable. This is attributed to the imperfections of one's memory because when one presents a verbal account of events whether consciously or otherwise, they place a selection of their interpretation.[13]

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3 Ozoemena "Living customary law: A truly transformative tool?" 2016 *Constitutional Court Review* 147.
4 S 1 of the Recognition of Customary Marriages Act 120 of 1998.
5 Kerr "The nature and future of customary law" 2009 *South African Law Journal* 679.
6 *Shilubana v Nwamitwa* 2009 2 SA 66 (CC).
7 *Alexkor v Richtersveld Community* para 6.
8 38 of 1927 (Black Administration Act).
9 Ozoemena 2016 *Constitutional Court Review* 148.
10 Constitution of the Republic of South Africa, 1996.
11 Bennet *Customary law in South Africa* (2004) 2.
12 As above.
13 Bennet (2004) 3.

Customary law has now been given a place within the state legal system and this has resulted in the line of distinction being blurred and being more complicated than before. The question that arises is the extent to which customary law has been given recognition, the answer lies in the fact that both common law and customary law are measured against the Bill of Rights.[14]

Therefore, with all these developments in the South African legal system, this article seeks to explore the impact that the Constitution has had on the customary law of succession. The aim is to show that instead of developing customary law and advancing some of the principles, which are applied in customary law, the courts are more inclined to invalidate these principles instead of adapting them in such a manner that would be consistent with the Constitution. This will be in line with the changing values of communities, instead, those rules, and principles, which have always been applied, are rather abolished, and customary law is infused with common-law principles. However, there are certain instances in which the courts have tried to reach a middle ground between discrimination and customary law, however, those instances are few.

2 Law of succession

2 1 Customary law of succession

The law of succession can be defined as

> [t]he totality of the legal rules which control the transfer of those assets of the deceased which are subject to distribution among beneficiaries, or those assets of another over which the deceased had the power of disposal.[15]

In terms of the law of succession, the estate of a person who died without a will devolves in terms of the rules of intestate succession which are contained in the Intestate Succession Act.[16] A person who has died having left a will is referred to as a testator,[17] and the rules regarding the law of testate succession are found in the Wills Act.[18]

The law of succession in South Africa was inspired by both English law and Roman-Dutch law during the 1980s and 1990s. This initial reform did not consider the differences between common-law succession and the customary law of succession, the underlying differences between the

14 Bavinck "Conflicting priorities? Issues of gender equality in South Africa's Customary law" 2013 *Amsterdam Law Forum* 21.
15 De Waal & Schoeman-Malan *Law of succession* (2016) 1.
16 81 of 1987 (Intestate Succession Act).
17 Jamneck & Rautenbach (eds) "The law of succession in South Africa" (2023) 18.
18 7 of 1953 (Wills Act).

two legal systems lie in the unequal treatment of women and men in customary law.[19]

The principles of common-law succession, on the one hand, applied only to White, Coloured, and Indian South Africans and were found mainly in the Intestate Succession Act for those who had died without leaving a will, and the Wills Act for those who had died having left a will. The common law principles of succession are based on the principles of freedom of testation, which is also now supported by section 25 of the Constitution, which guarantees the right to property. This right also includes the right to dispose of one's property as they deem fit and to whomever they want it to go to, however, effect will not be given to testamentary provisions, which are against public policy.[20]

Customary law of succession is fundamentally a system of male primogeniture, this rule is modified by the fact that the eldest son of the family assumes the role. In a polygamous relationship, an heir can be born from a specific research and the facts as well as circumstances of each family will need to be taken into account for this purpose.[21] Furthermore, succession occurs when the eldest son in the family succeeds his father, according to this rule the eldest son takes the place of the deceased, and he must control the property of the deceased in consultation with the deceased's wife, the eldest son must maintain the widow as well as the dependents and he is also responsible for all the debts that were incurred by the deceased.[22]

Therefore, when a person dies, the family property must be perpetuated and a distinction is drawn between inheritance and status.[23] With regards to status, the heir has equal standing with the deceased, which plainly speaking means that he steps into the shoes of the deceased, becomes the guardian of all minors in the family, is in charge of the family property and is also burdened with the same responsibilities of the deceased such as the reception and payment of *lobola*, debts, and maintenance of the family.[24] While inheritance gives ownership to an individual with no responsibilities.

19 Schoeman-Malan "Recent developments regarding South African common and customary law of succession" 2007 *Potchefstroom Electronic Law Journal* 10.
20 S 25 of the Constitution.
21 Bekker & Coertze *Seymour's customary law in Southern Africa* (1982) 268.
22 Watney "Customary law of succession in a rural and urban area" 1992 *Comparative and International Law Journal of Southern Africa* 379.
23 Bekker & de Kock "Adaption of the customary law of succession to changing needs" 1992 *Comparative & International Law Journal of Southern Africa* 368.
24 Janse van Rensburg "*Mthembu v Letsela*: The Non-Decision" 2001 *Potchefstroom Electronic Law Journal* 4.

The difference lies in the fact that firstly, the customary law of succession is concerned with status and assuming a certain position while inheritance is based on property.[25] In traditional customary law, a wife did not inherit her husband's property and she did not even become the owner of the property, which was acquired during the subsistence of her marriage.[26] This meant that as a wife she did not inherit from her husband's property, this position did not accord the wives the notions of equality and dignity that are worthy of the individual.[27]

In terms of testate succession of indigenous people, freedom of testation was limited to certain property, and this was regulated in terms of section 23 of the Black Administration Act which provided that:

1 All movable property belonging to a black and allotted to him or accruing under black law or custom to any woman with whom he lived in a customary union, or to any house (a customary marriage created a 'house') shall upon his death devolve and be administered under black law and custom;
2 All land in a tribal settlement held in individual tenure upon quitrent conditions by a black shall devolve on his death upon one male person, to be determined in accordance with tables of succession prescribed under subsection (10);
3 All other property of whatsoever kind belonging to a black shall be capable of being devolved by a will.[28]

2 2 Administration of deceased estates

The deceased's estate consists of assets and liabilities, in terms of the law of succession, only the assets of the deceased pass to the beneficiaries, however, not all assets are passed to the beneficiaries as the assets are first used to settle debts and meet other obligations.[29]

The winding-up of estates was divided into two categories, firstly, the Master of the High Court had jurisdiction only over the estates of Whites, Coloured, Indians, and Blacks (who had died with a will), and secondly, the Magistrates had jurisdictions over intestate estates of Blacks. The Master could not administer intestate estates of Black people and this was in terms of sections 23(7)(a) and 4(1A) of the Black Administration Act, while Magistrates administered intestate estates of Black people in terms of regulation 3(1) of GN R2000 of 1987.[30] This discriminatory distinction was applied to *Moseneke v The Master*,[31] which is discussed in detail below.

25 Schoeman-Malan 2007 *Potchefstroom Electronic Law Journal* 9.
26 As above.
27 Bekker & de Kock 1992 *Comparative & International Law Journal of Southern Africa* 368.
28 S 23 of the Black Administration Act.
29 De Waal & Schoeman-Malan (2016) 3.
30 S 23(7)(a) of the Black Administration Act.
31 2001 (2) SA 18 (CC).

2 2 1 Moseneke v The Master: *On the discriminatory distinction of the winding up of estates*

The case of *Moseneke v The Master* concerns discrimination between black and white people in the administration of deceased estates, in this case, when Mr Moseneke senior died in 1999 without leaving a will, his estate was reported to the Master of the High Court in terms of the Administration of Estates Act. The Master referred the estate to the Magistrate in Pretoria to be dealt with in terms of the Black Administration Act and later explained that the Master's office did not have the power to administer intestate estates of Black people.[32]

The deceased's family applied to the court for an order declaring that the Master's refusal to register and administer the estate was unconstitutional. The family made an application to the court to declare invalid a regulation made under the Black Administration Act which authorised Magistrates to deal with intestate Black estates.[33]

Justice Sachs, writing for a unanimous court, held that the Administration of Estates Act and the regulation both impose differentiation on the grounds of race, ethnic origin, and colour and as such constitute unfair discrimination in breach of section 9(5) of the Constitution.[34] Notwithstanding its discriminatory provisions, the Black Administration Act had become encrusted with processes of great practical day-to-day importance.[35]

If the court had declared the provision in the Black Administration Act unconstitutional and invalid, the result would be that neither a Master nor a Magistrate could deal with the intestate deceased estates of thousands of Black families, this led to the Constitutional Court dealing with the matter urgently.[36] The answer was to keep the regulation alive for two years to give Parliament a chance to harmonise and de-racialise the laws dealing with deceased estates. During the period of suspension, Black families were given the option to go to either the Master's office or the Magistrates Court. Eventually, a new law was made to cater to Black and White people on the same basis and this was resolved in terms of the Intestate Succession Act.[37]

2 2 2 Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009

The customary law of succession was designed in a manner that was intended to preserve cohesion. Therefore, succession served various purposes, which included ensuring the maintenance of family members;

32 *Moseneke* para 4.
33 *Moseneke* para 5.
34 *Moseneke* para 22.
35 *Moseneke* para 25.
36 *Moseneke* para 9.
37 As above.

in essence, each family member had their own role to play in order to achieve communal good and welfare.[38] Even though the family head was regarded as the custodian of the family property, he was obliged to administer the family property in a manner that would result in the benefit of the whole family unit with the understanding that such responsibility would pass on to the heir who would also fulfil such responsibilities.[39]

The Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 Act (hereafter the Customary Law of Succession Act) came into effect on 20 September 2010. The main objective of this statute is to "modify the customary law of succession and to "clarify certain matters relating to the law of succession and the law of property".[40] Before this Act, aspects of customary law of succession were regulated in section 23 of the Black Administration Act, which was partly repealed by the Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005. This provision endorsed the principle of male primogeniture and it, amongst others, prohibited Africans from bequests, which were related to housing property and quitrent land and stipulated that such property should devolve in terms of customary law.[41]

In light of all the developments in the customary law of succession, legislative provisions, which allowed for the rule of male primogeniture, were declared unconstitutional.[42] In order to fill the void that was left by these developments, the Constitutional Court ordered that the Intestate Succession Act be applied to all intestate estates; this then effectively replaced the customary law of succession with the common law of succession.[43]

3 The constitutional dispensation

3 1 The constitutionality of customary law of succession

The Constitution enumerates fundamental values on which it is premised, according to section 1 of the Constitution, the Republic is "a sovereign, democratic state" and one of the kindred values of the Constitution is that it enshrines human dignity and promotes the achievement of equality.[44] By virtue of section 2 of the Constitution (the supremacy clause), South Africa shifted from parliamentary supremacy

38 Rautenbach "A few comments on the (possible) revival of the customary law rule of male primogeniture: can the common-law principle of freedom of testate come to its rescue" 2014 *Acta Juridica* 135.
39 As above.
40 The Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 Act.
41 S 23 of the Black Administration Act.
42 *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC) para 143.
43 Rautenbach 2014 *Acta Juridica* 137.
44 Devenish *The South African Constitution* (2004) 31.

to constitutional supremacy which has resulted in a change in jurisprudence and the administration of justice.[45]

Furthermore, section 7 of the Constitution affirms the democratic values of dignity, equality, and freedom,[46] and that the state is compelled to "respect, protect and fulfil" these fundamental rights.[47] Therefore, there has been a constitutional transformation of customary law and it is imperative that there is a shift in the understanding of how customary law fits into the legal system in South Africa.

The rule of male primogeniture excludes females from inheriting from the deceased's estate and has been a contentious issue since the promulgation of the Constitution of South Africa.[48] The legal system in South Africa is characterised by constitutional supremacy, which means that any law or conduct that is inconsistent with the Constitution is invalid. The constitutional dispensation is based on the principles of equality, freedom, and the protection of the right to culture. The entrenchment of the right to culture is because South Africa is multicultural, therefore, different systems of law may apply in the field of administration of estates where a person has died intestate.[49]

The application of this rule of male primogeniture victimised women and children, for example, the court in *Mthembu v Letsela,*[50] was reluctant to declare this rule unconstitutional and the court's reasoning was based on the fact that the heir had a maintenance duty towards the family.[51] Furthermore, the court held that the interim Constitution did not apply horizontally.[52] However, this position was subsequently changed in the *Bhe v Magistrate, Khayelitsha,*[53] case where the court made it very clear that the principle of male primogeniture had no role to play in South Africa.[54]

3 1 1 Mthembu v Letsela: *On the issue of male primogeniture before the 1996 Constitution*

The first case to deal with the constitutionality of customary law rule of male primogeniture was the case of *Mthembu v Letsela*,[55] in this case, the deceased was allegedly married to the applicant by customary rites on 14 June 1992 and he had died intestate.[56] Before his death, the deceased

45 Devenish (2004) 34.
46 S 7(1) of the Constitution.
47 S 7(2) of the Constitution.
48 *Bhe* para 138.
49 Maithufi "The effect of the 1996 Constitution on the customary law of succession and marriage in South Africa: some observations" 1998 *De Jure* 286.
50 1997 1 SA 939 (T).
51 As above.
52 *Mthembu* para 40.
53 *Bhe* para 120.
54 As above.
55 *Mthembu* para 20.
56 *Mthembu* para 1.

had lived with the applicant and their daughter in a house in which the deceased was the owner. The applicant was appointed to administer and wind up the deceased's estate when he died.[57]

The respondent is the father of the deceased, and he denied that the applicant and his son were legally married, additionally, because the son died intestate, he claimed that customary law applied to the devolution of the estate.[58] This implied that the deceased's estate had to devolve to him as the deceased's eldest surviving male relative.[59]

The applicant averred that the customary rule which excludes women and children from inheriting is unconstitutional and that the rule is against public policy and consequently should not be enforced.[60] Furthermore, she alleged that common law should apply in administering the deceased's estate and that her daughter should be considered as the only intestate heir in the deceased's estate.[61]

In considering the constitutional validity of the rule of male primogeniture, the court relied on the provisions of section 31 of the interim Constitution,[62] which stated that everyone has the right to participate in the culture of their choice. Additionally, the court also considered the limitations clause of the interim Constitution in determining whether the discriminatory nature of the principle of male primogeniture was a reasonable and justifiable limitation in terms of the Constitution.[63]

After these considerations, the court concluded that the principle of male primogeniture was not in conflict with the provisions of the interim Constitution and that it was not contrary to public policy.[64] The court also stated that:

> [E]ven if this rule is *prima facie* discriminatory on the grounds of sex or gender, and the presumption contained in section 8(4) comes into operation, this presumption has been refuted by the concomitant duty of support. The rights conferred by this rule are not inconsistent with the fundamental rights contained in Chapter 3 and the injunction found in section 33(3) can accordingly be implemented, namely, to construe the chapter in such a way as not to negate those rights.[65]

Furthermore, the Supreme Court of Appeal held that because the deceased and the wife were found not to be legally married, the minor

57 *Mthembu* para 2.
58 As above.
59 *Mthembu* para 3.
60 As above.
61 *Mthembu* para 5.
62 As above.
63 *Mthembu* para 17.
64 As above.
65 *Mthembu* para 28.

child was thus a child born of unmarried parents and the minor daughter cannot inherit from her natural father if he dies intestate.[66]

The reasoning in the court of first instance and the appeal court is illogical and very chaotic. Here the court failed to comply with its duty to develop customary law in accordance with the values of the Constitution.[67] The court *a quo* and the court of appeal both failed to crucially analyse the provisions of the Constitution, they also failed to consult international law as required by the Constitution.[68]

The *Mthembu v Letsela* cases is an illustration of the conflict between the right to equality and the right to culture. Those who argue for culture use the argument that "this is the manner in which things have always been done" and the court accepted this approach without viewing it in terms of its historical background, particularly the patriarchal context which was accepted uncritically.[69]

The correct application of the rule of male primogeniture means that the father of the deceased as the eldest surviving male in the family, had a duty to maintain the minor child of the deceased and her mother, this would have resulted in the best interests of both parties being served.[70]

The next case of discussion in which the rule of male primogeniture was brought under the spotlight is the case of *Bhe*; this case was brought before the court in 2002 when the Constitution had already been effective for almost a decade.[71]

3 1 2 Bhe v Magistrate*, Khayelitsha: on the rule of male primogeniture in the court of first instance*

In *Bhe* the rule of male primogeniture came under the spotlight. In this case, the deceased died on 9 October 2002. During his lifetime, he and Ms Bhe lived as husband and wife for twelve years and they had two minor daughters born from their union.[72] In terms of customary law, the deceased's property had to devolve to the eldest surviving male in the family, which in this case was the deceased's father who had indicated his intentions to sell the deceased's property to cover for the deceased's funeral expenses.[73] Ms Bhe applied to the court on behalf of her two minor daughters for an order to declare the rule of male primogeniture unconstitutional. The question that the court had to answer in this case was whether the two minor daughters had a right to inherit from their father's intestate estate.[74]

66 *Mthembu v Letsela* 2000 (3) SA 867 (SCA).
67 Kroeze "*Mthembu v Letsela*: Equality v Culture" 1999 *Fundamina* 79.
68 As above.
69 Kroeze 1999 *Fundamina* 80.
70 Janse van Rensburg 2001 *Potchefstroom Electronic Law Journal* 12.
71 As above.
72 *Bhe* para 10.
73 *Bhe* para 17.
74 *Bhe* para 13.

In *Bhe*, it was submitted that the rule of male primogeniture was unconstitutional because it prevented the deceased's minor daughters from inheriting from their father's estate, which was a violation of their right to equality.[75] In this case, the supremacy of the Constitution was confirmed, and the court held that customary law must be tested against the Constitution.[76]

Furthermore, the court declared sections 23(10)(a)(c) and (e) of the Black Administration Act as well as regulation 2(e) unconstitutional and invalid.[77] The court also declared section 1(4)(b) of the Intestate Succession Act invalid insofar as it excludes any part of an estate from devolving in terms of section 23 of the Black Administration Act.[78] Because the deceased had only two minor daughters, as the only beneficiaries the deceased's estate had to devolve in terms of section 1 of the Intestate Succession Act.[79]

While *Bhe* was before the court, a similar case, *Shibi v Sithole*,[80] was also before another court. This case is discussed below.

3 1 3 Shibi v Sithole *in the court of first instance*

In the case of *Shibi v Sithole*,[81] Ms Shibi approached the court after she was barred from inheriting from her brother's deceased estate, the deceased was not married and had no dependents. Therefore, according to the customary law of succession, the deceased's two male cousins would jointly inherit from his intestate estate.[82] Similar to *Bhe*, Ms Shibi applied to the court to have an order declaring the rule of male primogeniture unconstitutional.[83] In this case, the central question was whether Ms Shibi was entitled to inherit from her brother's intestate estate.[84]

In *Shibi v Sithole*, the court declared that the rule which prohibited her from inheriting from her brother's estate was unconstitutional because it resulted in discrimination against African women but counsel for the defendant argued that the court was bound by the decision in *Mthembu v Letesela*.[85] However, the court held that: (1) *Mthembu v Letsela* case was heard before the 1996 Constitution;[86] (2) the prospective heir was disinherited because she was born of unmarried parents and not because

75 As above.
76 *Bhe* para 31.
77 As above.
78 *Bhe* para 103.
79 *Bhe* para 125.
80 Unreported case of 19 November 2003, Case No 7292/01 (TPD).
81 As above.
82 *Shibi* para 21.
83 As above.
84 *Shibi* para 31.
85 *Shibi* para 128.
86 *Mthembu* para 28.

she was female;[87] and (3) *Mthembu v Letsela* considered the fact that women are considered to be perpetual minors under the guardianship of their husbands while the Recognition of Customary Marriages Act afforded equal status and capacity to spouses.[88]

The court confirmed the order in *Bhe* in terms of section 23 of the Black Administration Act, and regulation 2(e) of GN R200 was declared unconstitutional.[89] The court also stated that Black women and descendants who were not first-born males were placed in an equal and vulnerable position and that their rights to equality and dignity were violated by the continued application of the principle of male primogeniture.[90]

Bhe as well as *Shibi v Sithole* were both taken to the Constitutional Court for constitutional confirmation and were heard together because they were both concerned with the same issue. Both these cases were heard as *Bhe* and are discussed below.

3 2 *Bhe v Magistrate, Khayelitsha*: On the rule of male primogeniture in the Constitutional Court

Bhe are all cases that were heard in the Constitutional Court together because they were all concerned with the same issue of the customary law of succession. The *Bhe* and the *Shibi v Sithole* decisions were before the court for confirmation while the third case was an application for direct access by the South African Human Rights Commission and Women's Legal Centre Trust and the court found that both these institutions had *locus standi*[91].

The court stated that customary law must be consistent with the provisions of the Constitution and that it should be accommodated rather than tolerated.[92] The court also emphasised that customary law has equal status to common law and other laws that our Constitution refers to.[93] The court also held that there are circumstances in which the customary law of succession has to be adopted with changing circumstances of society and that African communities are transforming and the exclusion of women from inheriting can no longer be justified.[94]

Justice Langa also added that customary law is applied in family gatherings and meetings and such family gatherings contribute to family unity and foster a sense of responsibility as well as nurturing healthy communications and traditions such as *ubuntu*.[95]

87 As above.
88 *Shibi* para 78.
89 *Shibi* para 79.
90 *Shibi* para 80.
91 *Bhe* para 40.
92 *Bhe* para 41.
93 *Bhe* para 42.
94 *Bhe* para 209.
95 *Bhe* para 45.

However, the Constitutional Court's decision was an attempt to correct the imbalance that existed in the law and to correct the material disadvantage of women, which emanated from this principle. The main question that the court had to answer in this case, was not whether the principle should be repealed but rather how customary law should be treated in comparison to common law.[96]

The court's refusal to develop customary law was a failure to develop customary law as required by the Constitution and there is evidence to suggest that the *Bhe* decision had little impact on the lives of women who live in remote rural areas. The decision did not necessarily have a positive impact on the lives of women.[97] This highlights the difference between formal and informal law and shows a need to improve the court's understanding of what happens in terms of living customary law.[98]

Furthermore, the Constitutional Court failed to conceptualise the wider context in which customary law applies. Experts in the field of customary law state that the Constitutional Court was too focused on the fact that the principle of male primogeniture is unconstitutional but failed to find a middle ground. They also explain that the judges failed to think outside of the box when trying to formulate a solution.[99]

Moreover, courts have to deal with the harmonisation of customary law and the Constitution with sensitivity and care, this is due to the fact that sections 39(3) and 211(1) acknowledge the continued existence of customary law.[100] Additionally, harmonisation would be an incremental process and it cannot be expected for the transformation to happen overnight the "delicate and complex nature of the task cannot justify courts in avoiding their responsibility to accommodate customary law to the values which underlie an open and democratic society based on freedom and equality".[101]

4 Equality issues in the customary law of succession

Considering the history of South Africa, cultural inequality, racial inequality, and cultural diversity remain sensitive topics in South Africa. This has also been made more pronounced because the spirit of solidarity, known as *ubuntu*, has played a vital role in the drafting of the Constitution and the transition from apartheid to democracy.[102] Gender

96 Weeks "Customary law of succession and the development of customary law: the Bhe legacy" 2015 *Acta Juridica* 216.
97 Weeks 2015 *Acta Juridica* 217.
98 As above.
99 Bekker and Koyana 2012 *De Jure* 572.
100 Ss 39(3) and 211(3) of the Constitution.
101 *Du Plessis v De Klerk* para 45.
102 Bavinck 2013 *Amsterdam Law Forum* 21.

equality has always been an issue of concern in a South African context, and failure to adhere to the issues arising from this would result in the impairment of one practising their human rights.[103]

The Constitution has brought about a head-on confrontation by recognising customary law and at the same time prohibiting gender discrimination because African culture is permeated by patriarchy which is the authority that has been given to all male seniors in a community. As a result, the gender equality clause threatens some of the principles which have been applied in accordance with customary law.[104]

The Constitution is committed to the protection of the right to equality as well as the right to culture.[105] This dual protection has resulted in the development of these competing interests, and the equal protection of these rights has also resulted in tensions in the application of customary law. These tensions manifested in customary law is viewed as a source perpetuating gender discrimination.[106] One of the cases that highlight this tension is the case of *Nwamitwa v Phillia,*[107] which is later known as the *Shilubana v Nwamitwa* case,[108] which is discussed in detail below.

4 1 *Nwamitwa v Phillia* (later known as *Shilubana v Nwamitwa)*: On gender equality

Aspects of gender inequality have always received judicial attention; the courts have tried over the past few years to harmonize the issues of culture with gender equality. One of the first cases in this regard is the case of *Nwamitwa v Phillia.*[109] The court had to determine whether a woman had the right to succeed her late father to be a chief. The first and second respondents respectively are female and male members of the royal family of approximately 70 000 Shangaan/Tsonga nation of the Valoyi community in Limpopo South Africa.[110]

The two parties to the case were cousins and their fathers were brothers, for many years the appointment to chieftaincy has always been patriarchal and was determined by the principle of male primogeniture, which allows succession to occur according to the male lineage.[111] In 1948, *Hosi* (chief) Fofoza Nwamitwa was enthroned as a chief and he reigned until 1968 and died without any male heirs. The deceased was the father of the first respondent (a woman), at the time of his death, the

103 Bavinck 2013 *Amsterdam Law Forum* 20.
104 Bennet "The equality clause and customary law" 1994 *South African Journal on Human Rights* 123.
105 S 9 of the Constitution.
106 Ntlama "'Equality' misplaced in the development of the customary law of succession: lessons from *Shilubana v Nwamitwa* 2009 2 SA 66 (CC)" 2009 *Stellenbosch Law Review* 333.
107 2005 3 SA 536 (T).
108 2009 2 SA 66 (CC).
109 *Nwamitwa v Phillia* para 1.
110 *Nwamitwa v Phillia* para 3.
111 As above.

first respondent was only a child and at the time it was unimaginable that a woman could become a chief in the community.[112]

Therefore, when *Hosi* Fofoza died in 1968 his younger brother Richard was appointed to be chief, the applicant, in this case, is *Hosi* Richard's son from his first wife.[113] *Hosi* Richard died in 2001 after South Africa had transitioned to democracy in which gender equality is promoted and celebrated.[114]

In 2002, the first respondent was appointed as a chief in accordance with the principles outlined in the Constitution of South Africa. This appointment did not sit well with *Hosi* Richard's son who alleged that the tribal authorities had no right to alter the principle of male primogeniture, which had been practiced for decades.[115] The High Court gave a verdict, which was in his favour and reasoned that a woman could not become a chief in terms of the traditions and customs of the community.[116] As far as the community was concerned, there was no evidence of a female being appointed as a chief even if she was a firstborn in the family.[117]

The learned judge, in this case, was more focused on what would happen to a woman if she got married and she and her children would have to bear the surname of the husband who is not from the Nwamitwa royal family.[118] Events, which unfolded, have shown that his concerns were rather misplaced as the first respondent, in this case, she dropped her husband's surname and assumed the official name of *Hosi* TLP Nwamitwa II when she became chief.[119]

The *Nwamitwa* decision can be criticised for its failure to develop customary rules that promote the spirit, purport, and objects of the Bill of Rights. The court's decision is also not in line with the transformative agenda of the Traditional Leadership and Governance Framework Act, which states that institutions of traditional leaders must transform in accordance with the principles of the Constitution and that "gender equality within the institution of traditional leadership may progressively be advanced".[120] This High Court decision also failed to transform customary law and customs so that it may comply with the Bill of Rights as imposed on traditional communities by statutory obligations. Furthermore, the High Court decision is not in line with the gender equality jurisprudence and it takes back the judicial development of customary law.[121]

112 *Nwamitwa v Phillia* para 5.
113 *Nwamitwa v Phillia* para 3.
114 *Nwamitwa v Phillia* para 2.
115 *Nwamitwa v Phillia* para 7.
116 As above.
117 *Nwamitwa v Phillia* para 26.
118 As above.
119 Mireku "Customary law and the promotion of gender equality: an appraisal of the Shilubana decision" 2010 *African Human Rights Law Journal* 517.
120 Mireku *African Human Rights Law Journal* 518.
121 As above.

These criticisms can be observed in the Constitutional Court's decision in this case, where the court stated that the High Court and Supreme Court of Appeal decisions were too narrow and considered the history of South Africa, and failed to develop customary law.[122] Moreover, on this issue, Justice Moseneke stated that

> many steeped in the indigenous tradition would not consider the rule that adult male offspring are entitled to all inheritance and status within the family to be offensive. However, the more public clamour for retention of this patriarchal arrangement ought not to weigh heavier than the express dictates of the Constitution to obtain equal worth for all.[123]

The *Shilubana v Nwamitwa* decision is transformative, and it celebrates gender equality as far as chieftaincy succession disputes are concerned. This decision is welcomed because it is in line with the transformative agenda of the Constitution for the respect of women.[124]

Others have criticised the Constitutional Court decision for rejecting customary law and values at the expense of Western conceptions of human rights norms, in other words, according to them the court was in favour of the Western conception of gender equality, which unlike customary law promotes individualism.[125] This argument is illogical because the Constitution establishes its supremacy over all law in South Africa, and this includes customary law.[126]

There has always been an "either/or" approach to issues of culture and equality, and this approach has failed to recognise women as active members of a society who contribute to shaping the culture in the community, the approach of culture versus equality in which the legal system has to choose a side rather makes women victims of culture than the creators of culture.[127]

5 Conclusion

In conclusion, the cases discussed above all have one thing in common, our courts are reluctant to develop customary law as stipulated in the Constitution. Instead, they are more inclined to invalidate customary law rules and declare them unconstitutional. Before the final Constitution, the courts chose the right to culture over the right to equality. After the final Constitution came into effect, the courts declared the rule of male primogeniture unconstitutional instead of developing this rule in a manner that would be in line with the Constitution. There are only a few

122 *Nwamitwa v Phillia* para 85.
123 Mireku 2010 *African Human Rights Law Journal* 521.
124 Mireku 2010 *African Human Rights Law Journal* 522.
125 Mireku 2010 *African Human Rights Law Journal* 520.
126 As above.
127 Williams "Democracy, gender equality, and customary law: constitutionalizing internal cultural disruption" 2011 *Indiana Journal of Global Legal Studies* 66.

court cases where the courts developed customary law in line with the Constitution instead of declaring the particular customary law rule as unconstitutional and invalid.