

Primogeniture and ultimogeniture under scrutiny in South Africa and Botswana

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Mini-dissertation submitted in fulfilment of the requirements for the degree *Magister Legum* in Estate Law at the Potchefstroom Campus of the North-West University, South Africa

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May 2016



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LIST OF ABBREVIATIONS

AHRLJ	African Human Rights Law Journal
CILSA	Comparative and International Law Journal of Southern Africa
JSAL	Journal of South African Law
PELJ	Potchefstroom Electronic Law Journal
SAJHR	South African Journal on Human Rights
SALC	South African Law Commission
SALJ	South African Law Journal
SALRC	South African Law Reform Commission
SAPL	South African Public Law Journal
Stell LR	Stellenbosch Law Review
THRHR	Journal of Contemporary Roman Dutch Law
TSAR	Journal for South African Law

ACKNOWLEDGEMENTS

This mini-dissertation could not have been completed without the help and support from my study supervisor, the research staff, editors, colleagues and my family. It is my great pleasure to acknowledge the people who have given me the guidance, encouragement, help and support.

First I would like to give glory to God for blessing me with the ability to complete not only two under-graduate degrees but now also a post-graduate degree.

I wish to express my sincere gratitude to my study supervisor Prof. C Rautenbach. Thank you for affording me the opportunity to correctly and efficiently master the topic of this mini-dissertation. Thank-you for always demanding excellence and sharing all your knowledge in this complex field of customary law.

A special thanks go to the research staff at the NWU Potchefstroom campus for all the technical support provided. Thank-you to my style editor Ms. De Jongh as well as my language editor Ms. Nelson.

Last but definitely not least, thank-you to my husband, family, friends and colleagues. Thank-you for all the encouragement and support you all have provided. Thank-you for never losing faith in my ability to complete this degree.

SUMMARY

African customary law and customary law of succession have existed and been practiced in traditional communities throughout Africa for many years. These rules have had to endure changing community norms and values, as well as the drive by certain countries' to achieve equality, freedom and humanity. In many parts of Africa, customary law strives to co-exist with imported modern law that has drastically changed the viewpoint of legal systems in many countries. This co-existence unfortunately leads to conflict between the two systems which still persists today and will not disappear soon.

Many African countries wish to encourage the practice of traditional customs and thus these countries recognise the importance of customary law and customary courts. Due to the importance of customary law structures it is imperative to find more creative ways of dealing with the underlying conflict between the two systems of law.

This study follows the development of two customary law of succession rules (namely: male primogeniture and male ultimogeniture) as they adapt to the legal environment of two African democratic countries' with similar legal systems, namely South Africa and Botswana.

The legal status of customary law and customary law of succession in both South Africa and Botswana is briefly addressed in this study. The main focus of this study is the judgements given by the highest courts in these two countries, pertaining to the practice and constitutional validity of the customary law of succession rules: male primogeniture and male ultimogeniture.

In this study it was found that South Africa followed a constitutional approach with regard to the implementation of the rule of male primogeniture in the *Bhe v Magistrate, Khayelitsha* case. The Constitutional Court held that male primogeniture was inconsistent with the principles of the *Constitution of the Republic of South Africa, 1996* and was thus declared unconstitutional and invalid. Botswana on the other hand followed a customary law approach with regard to the implementation of the rule of male ultimogeniture in *Ramantele v Mmusi* (SCB). The Supreme Court of Botswana ruled that a court first had to develop the customary rule to ensure that it is not in conflict with the *Constitution of Botswana*. The rule of male ultimogeniture was

first applied to the facts at hand and the Court held that no prejudice was present, thus it was not even necessary to dispute the constitutional validity of the case.

South Africa and Botswana have very similar historical legal backgrounds as well as similar current legal principles. Both of these countries' are democratic states and strive to exhibit the principles provided for in their highest form of law, the *South African* and *Botswana Constitution*.

It must however be kept in mind that African intestate succession is not primarily focused on the distribution of the deceased's estate assets, but it rather entails finding a suitable heir that can occupy the deceased's position to minimise disruption.

Thus the continuation of the family and the family property is the main aim of customary law of succession. This principle might lose its effect if African customary succession rules are not adapted, but rather are struck down by courts.

KEYWORDS:

Customary law of succession

Male primogeniture

South Africa

Male ultimogeniture

Botswana

Development

CHAPTER 1

INTRODUCTION

1.1 *Problem statement*

In many African countries, customary laws and traditions comprise of complex rules that regulate every aspect of each member of a traditional community from birth until death.¹ Within these communities customary law was, and still is, the main source of law where these communities find their succession laws.² In a contemporary world, customary law in general has to compete with other legal sources such as constitutional law, statutory law, common law as well as the ever increasing body of international and regional laws.

One of the characteristics of African customary law is its patriarchal nature. The principle of patriarchy which is applicable to succession in African customary law, also applies to the inheritance of property.³ The eldest or youngest male relative⁴ of the deceased succeeds the deceased and inherits his property.

The main purpose of many customary rules of succession is to ensure that when a man (who is considered to be the head of the household) dies; his rights and duties towards his household are transmitted to members of his close or surrounding family or kin. This is to ensure that the bloodline of this man is preserved and continued. In an African customary context, it is believed that the bloodline can only be preserved by succession falling upon a male relative.⁵

In African customary law, succession primarily deals with the title and rights of an heir, whilst inheritance deals with the actual physical property being inherited. The same distinction does not exist in South African common law.⁶ In this study the

1 Mann and Roberts (eds) *Law in Colonial Africa* 4.

2 Fenrich, Galizzi and Higgins (eds) *African Customary Law* 234.

3 *Mthembu v Letsela* 1997 2 SA 936 (T).

4 In a South African context according to the principle of male primogeniture, the eldest male will be the successor and inheritor, whilst in Botswana according to the rule of ultimogeniture the youngest male will be successor and inheritor. These two principles will be discussed in 1.5.5 and 1.5.6.

5 Bekker *Seymour's Customary Law in Southern Africa* 70.

6 Succession and inheritance in South African common law both have the same meaning.

distinction between succession and inheritance in African customary law will be followed as far as possible.⁷

In an era where human rights are being promoted throughout the world,⁸ many African, post-colonial governments (such as South Africa and Botswana) are focusing on customary law of succession and the development thereof to bring it in line with human rights demands. The governments of both countries seem to be determined to ensure that surviving spouses and children are all granted equal rights to inheritance. By passing legislation, these countries' have thus attempted to resolve any wrongs which anyone may have suffered (due to the customary law of succession) or, by having been deprived of inheriting property.⁹

South Africa and Botswana are relevant and comparable in this study due to the fact that the main stream legal systems of both countries' are based on Roman-Dutch law which was the prevailing law in the former province of Holland where the Dutch East Indian Company was based in the 1600s.¹⁰ Both countries also came under British rule in the 1800s which introduced English law into their main stream legal systems, although Roman-Dutch law continued to be the law followed in both countries.¹¹ When Botswana was a British colony, its High Commissioner was based in South Africa in the Cape. It is often stated that this may be why there are strong similarities between the legal systems of both of these two countries.¹²

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- 7 Inheritance in an African customary law context, for purposes of this study, will be seen as a sub-division of customary law of succession. This is true due to the fact that the successor of the deceased estate always inherits the family and house property. The different property classes will be discussed in 1.5.3.
 - 8 Some conventions and declarations that focus on human rights and equality and to which South Africa and Botswana are parties to, are as follows: The *African Charter of Human and Peoples' Rights* ratified by Botswana in 1986 and South Africa in 1996 and the *Convention on the Elimination of All Forms of Discrimination Against Woman* ratified by Botswana in 1996 and South Africa in 1993.
 - 9 Chapter 2.4 discusses the development within South Africa with regard to male dominated inheritance, whilst Chapter 3.4 discusses the development within Botswana.
 - 10 The Dutch occupied the Cape from 1652 to 1795 and then briefly from 1803 to 1806. Iya 2001 *Journal of Legal Education* 355.
 - 11 Britain colonised South Africa from 1795 to 1910 except for a brief interlude from 1803 – 1806. For further reasons why comparison between South Africa and Botswana is prudent see Chapter 4.
 - 12 The similarities between these countries will be expanded upon in Chapter 4, when the development of customary inheritance rules of the two countries will be compared.

The customary law of succession in South Africa and Botswana are both based on the principle of patriarchy. There are, however, important differences between the way the principle is applied in both countries. In South Africa, the customary law of succession used to be the underlying reason for the existence of the controversial rule of male primogeniture. This rule favoured only certain first born sons.¹³ In terms of this rule, the oldest male child in a monogamous¹⁴ customary union has the right to succeed to the estate of an ancestor to the exclusion of younger siblings, both male and female, as well as other relatives.

The rule of male primogeniture in South Africa was indirectly endorsed by section 23 of the *Black Administration Act*¹⁵ (and its regulations).¹⁶ This Act prescribed which property (movable property allocated to a house or a wife in a customary marriage and quitrent land)¹⁷ had to devolve in terms of the customary law of succession. Section 23, its regulations and the customary rule of male primogeniture were assessed by the Constitutional Court in *Bhe v Magistrate, Khayelitsha*.¹⁸ The Court held that both section 23 and the customary rule of male primogeniture were unconstitutional and invalid. The effect of this ground-breaking verdict led to a number of legislative amendments in South Africa. Most notable was the modification of the *Intestate Succession Act*¹⁹ to include customary law estates as well as the enactment of the *Reform of Customary Law of Succession and Regulation of Related Matters Act*.²⁰ The full extent of these developments still needs to be unravelled.²¹

13 In a polygynous marriage the movable property of the husband which was acquired, accrued or allotted to him; when that husband dies, the eldest son of each house succeeds to the property of that specific house. The successor is also responsible for the widow and children of a specific household of which he is the eldest. This is the meaning of certain first born sons mentioned above. South Africa allows for the practice of polygyny in customary marriages. Polygamy is the practice of having more than one spouse. Polygyny on the other hand refers to one man having multiple wives.

14 The rules followed in a polygynous household are discussed in 1.5.4.

15 38 of 1927.

16 Government Gazette 10601 GN R200, 6 February 1987 as amended by Government Gazette 24120 GN R1501, 3 December 2002. Regulations for the Administration and Distribution of the Estates of Deceased Blacks Regulation 2(e) as well as subsections (1), (2) and (6) of section 23 of the *Black Administration Act*.

17 Koyana Customary law 53.

18 2005 1 SA 580 (CC), hereafter referred to as *Bhe decision*. This case will be discussed in more detail in Chapter 2.

19 81 of 1987 (hereafter the *Intestate Succession Act*).

20 11 of 2009 (hereafter the *South African Customary Law of Succession Act*).

21 For a more detailed discussion see Chapter two below.

Contrary to traditional communities in South Africa, the Ngwaketse community in Botswana follow the rule of male ultimogeniture. Ultimogeniture is also based on the patriarchal approach of traditional communities. This rule favours the youngest son of a deceased who has the right to succeed to the family property. The rule of ultimogeniture came under scrutiny in *Mmusi v Ramantele* (BHC).²² The High Court decided on the constitutionality of this customary law rule in the light of section 3²³ of the *Constitution of Botswana*. The Court held that the rule of ultimogeniture did not meet the requirements of the right to equality as set out by section 3²⁴ of the *Constitution of Botswana*. It stated that this rule was unjustifiably discriminatory and thus did not pass constitutional scrutiny. Upon appeal, the Court of Appeal²⁵ in *Ramantele v Mmusi* (SCB), addressed the fact that a customary rule had to satisfy a legal test before it could be considered as an enforceable customary law rule and also found that customary law was not static; it develops and modernises with the constant change of society's ethos. The Court of Appeal followed a different approach from that of the High Court and held that the facts of the case did not call for a constitutional approach and referred it back to the traditional communities to mediate.²⁶ The Court of Appeal thus rather tried to develop the rule of ultimogeniture instead of declaring it unconstitutional and invalid.

22 Botswana High Court Decision MAHLB-000836-10 delivered on 12 October 2012 hereafter referred to as *Mmusi v Ramantele* (Botswana High Court referred to as the BHC). *Ramantele v Mmusi* CACGB-104-12 [2013] BWCA (3 September 2013) to date unpublished (Supreme Court of Botswana referred to as the SCB). For purposes of this study the development of the case through the different court structures will be referred to as the *Mmusi v Ramantele* saga.

23 Section 3 is set out as follows in the *Constitution of Botswana*: "Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely (a) life, liberty, security of the person and the protection of the law; (b) freedom of conscience, of expression and of assembly and association; and (c) protection for the privacy of his home and other property and from deprivation of property without compensation, the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

24 More specifically in conflict with s 3(a) of the *Constitution of Botswana*, as set out in note 23.

25 The Court of Appeal in this case was the Supreme Court of Botswana.

26 The Appeal Court looked at six main requirements which the Appellant had to satisfy in order for the Ngwaketse customary law rule to be applied, and found that the Appellant did not satisfy these requirements. A detailed discussion of these requirements will be discussed in Chapter three.

In order to investigate why South Africa and Botswana followed different approaches, this study will scrutinise the development of customary succession rules in South Africa and Botswana in a comparative context with the emphasis on the patriarchal rules of customary primogeniture and ultimogeniture which are found in South Africa and Botswana respectively.

1.2 Area of focus

1.2.1 Central research question

How has the customary rule of male primogeniture and ultimogeniture developed in South Africa and Botswana respectively?

1.2.2 Aims of the study

The aims of this study are:

1. To determine and understand the practice of male primogeniture in South Africa.
2. To determine the developments of the practice of male primogeniture brought forth by the *Bhe* decision of the South African Constitutional Court.
3. To determine and understand the practice of male ultimogeniture in Botswana.
4. To determine the developments of the practice of male ultimogeniture brought forth by the *Mmusi v Ramantele* saga of the Supreme Court of Botswana.
5. To critically compare the different approaches of the *Bhe* decision (South Africa) and the *Mmusi v Ramantele* saga decision with regard to the customary patriarchal rules of primogeniture and ultimogeniture.

1.3 Research methodology

This study will mainly be conducted according to two types of research methods, namely literature study and a comparative study. The literature study will be based on relevant legislation, case law, law journals, textbooks and any internet sources which relate to how patriarchal customary inheritance has been developed within South Africa and Botswana. The specific legal comparative method that will be used

is the functional approach.²⁷ The starting point of this comparative approach is a concrete social problem and rests on the following assumption:²⁸

The legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results.

The legal comparative study will mainly focus on the legal positions of customary inheritance rules of primogeniture in South Africa and ultimogeniture in Botswana.

1.4 Framework of proposed study

Chapter one introduces the main theme which this study focuses on, namely: the development of customary succession rules, more specifically the rules of male primogeniture and ultimogeniture in South Africa and Botswana respectively. Chapter one, therefore, lays the basic foundation for the study that follows.

Chapter two focuses on the position in South Africa, especially with regard the *Bhe* decision and the legal developments that flowed from it. This chapter also deals with the meaning of male primogeniture within in the South African context, how this rule has been practiced as well as how it has developed and been adapted by case law and legislation, to fit in with the values envisaged by the *Constitution of the Republic of South Africa*, 1996.²⁹

Chapter three focuses on the position in Botswana, especially in the light of the *Mmusi v Ramantele* saga. This chapter also investigates the meaning of the rule of ultimogeniture and how it is practised in Botswana, especially in light of case law.

Chapter four draws a comparison between the customary inheritance rules of South Africa and Botswana. This chapter takes the theory that has been discussed in the previous two chapters about South Africa and Botswana and now critically compares different approaches of the courts with regard to customary law of succession rules.

Chapter five ends with a conclusion and recommendations for the future development of customary inheritance rules, both in South Africa and Botswana. The

27 Peters 2010 www.ius.unibas.ch.

28 Zweigert and Kötz *Comparative Law* 34.

29 Hereafter referred to as the *South African Constitution*.

main aim of this chapter will be to determine whether the developments in South Africa and Botswana are in line with contemporary human rights and values.

1.5 Concepts

Some of the concepts used in this study warrant some explanation. Herewith follows a list of concepts, along with a definition and description of what each concept means in this context. Other relevant concepts will be explained in the text as it comes forth.

1.5.1 Customary law

The Oxford dictionary describes something as being customary if it refers to the usual practices or customs which are connected with a particular society, place or set of circumstances.³⁰ The popular media generally describes customary law as:³¹

The laws, practices and customs of indigenous and local communities. Customary laws are embedded in the culture and values of a community or society; they govern acceptable standards of behaviour and are actively enforced by members of the community.

In a legal context customary law has been defined by some legal scholars as:³²

a generic term, denoting the various laws of the indigenous people of Southern Africa, and is the law that was originally applicable in African countries.

Elias³³ points out that the customary law of a given community "is the body of rules which are recognised as obligatory by its members".

The following definitions are statutory attempts by the South African legislature to define customary law: Section 1(ii) of the *Recognition of Customary Marriages Act*,³⁴ defines customary law as:

the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of these peoples.

30 Ritter and Stevenson 2006 www.oxforddictionaries.com/definition/english/customary.

31 Adjei 2012 www.wipo.int.

32 Van Niekerk *Legal Pluralism* 5.

33 Elias *Nature of African Customary Law* 55.

34 120 of 1998 (hereafter the *Recognition of Customary Marriages Act*).

The *Reform of Customary Law of Succession and Regulation of Related Matters Act*³⁵ defines customary law similarly as follows:

customary law means the customs and practices observed among the indigenous African people of South Africa which form part of the culture of those people.

The South African judiciary also gave their viewpoints regarding the meaning of customary law in a number of decisions. For example, in *Alexkor Ltd v The Richtersveld Community*³⁶ the court said that:

unlike common law, indigenous law is not written. It is a system of law that was known to the community, practised and passed on from generation to generation. It is a system of law that has its own values and norms.

The definitions above confirm the viewpoint of Matthews that the term customary law is used in two senses in South Africa.³⁷ He states that in the first instance customary law means the "indigenous system of customary jurisprudence existing among various African communities". This confirms the definitions that state that customary law is the traditionally practiced customs, usages and system of laws used by African communities. In the second instance customary law refers to legislation that applies to Africans as a special grouping.³⁸ This confirms the fact that customary law has been incorporated within South Africa's broader legal system, and thus is not only recognised in traditional communities, but the broader legal body also recognises customary law as a form of law. As confirmed in *Maneli v Maneli*,³⁹ customary law and common law are equal in South African law, thus creating a dual system of law in South Africa; both are recognised in terms of the *South African Constitution*.

Contrary to South Africa, Botswana has a statute that deals with customary law, specifically Section 2 of the *Customary Law Act*⁴⁰ defines customary law as:

In relation to any tribe or tribal community, the customary law of that tribe or community so far as it is not incompatible with the provisions of any written law or morality, humanity or natural justice.

35 Act 11 of 2009 (hereafter the *South African Customary Law of Succession Act*).

36 2004 5 SA 460 (CC) para 53.

37 Matthews *Bantu Law* 19-20.

38 Matthews *Bantu Law* 19-20.

39 2010 7 BCLR 703 (GSJ) para 22 states the following: "it is a legitimate objective to have a flourishing and constitutionally compliant customary law that lives side by side with the common law and legislation".

40 51 of 1969 (hereafter the *Botswana Customary Law Act*).

In section 2 of the *Botswana Chieftainship Act*⁴¹ customary law has a similar meaning:

In relation to any tribe or tribal community, the general law or custom of such tribe or community except in so far as such law or custom is repugnant to morality, humanity or natural justice, or injurious to the welfare of members thereof or repugnant to the Constitution or any other enactment.

From the above definitions of customary law in both South Africa and Botswana, it is clear that customary law comprises of the following components: a traditional community, customs and usages, in existence for a long period, and passed down from generation to generation. One of the main characteristics of customary law as pointed out by Koyana⁴² is that it "reflects how people live and it expresses the value system in which it is found". Koyana goes further to state that customary law⁴³ "is generated by and develops within the traditional society and for this reason customary law is flexible and adaptive".

Thus, for purposes of this study customary law includes: any usages and rules followed by traditional African communities that regulate the order and cohesion within a community. These rules are usually passed down from generation to generation, however they remain open to adaptation due to the ever changing dynamics of the social environment within a specific country or traditional community.

1.5.2 *Succession and inheritance*

The literature uses the words "succession" and "inheritance" interchangeably, but it is often forgotten that customary law distinguishes between these two words. It is important to know what the distinction is when dealing with African customary law.

Succession is seen to be universal and onerous. Universal means that the heir to the deceased's estate, not only succeeds to the deceased's rights but also to his duties.⁴⁴ The heir steps into the deceased's position or status and gains control over the

41 19 of 1987 (hereafter the *Botswana Chieftainship Act*).

42 Koyana *Customary law* 91.

43 Koyana *Customary law* 156-157.

44 It is assumed that succession involves a deceased male due to the fact that succession to women was socially less important or acceptable in traditional African society. Olivier *et al Indigenous Law* 436.

property and the people over which the deceased had control.⁴⁵ The heir in particular succeeds to the deceased's duty to maintain and protect all surviving dependants of the deceased. The heir does not only succeed to the assets of the estate, but also to the liabilities of the estate.⁴⁶

Judge Ngcobo⁴⁷ held the following with regard to the difference between inheritance and succession in customary law:

A distinction is drawn between succession and inheritance. The successor in title to the male spouse inherits the name and status and not the property and for continuation of the family name such successor is a male descendant. The fact that mistakenly these two roles have been confused should not lead to invalidation of the law, instead the court's function is to clarify and confirm the proper application of the customary law.

Thus for purposes of this study succession in African customary law refers the continuation of status position and thus includes the accumulation of assets, liabilities as well as the rights and responsibilities of the deceased. Inheritance only focuses on the division of property and thus can be seen to be a sub-division under the broader term of succession.⁴⁸

1.5.3 Property

In African customary law there are three main types of property: family property; house property; and personal property.⁴⁹

Family property is property that has not been allocated to any of the houses, or which does not accrue automatically to a specific house.⁵⁰ Even though the family head manages and controls the family property, he is not the owner due to the fact that the whole family has a share in the property. Family property includes: property which the family head inherited from his mother's house; land allotted to the family as a whole

45 Olivier *et al Indigenous Law* 436-437.

46 In African customary law, if the liabilities exceed the assets the heir succeeds to liabilities as well. With regard to Western law (refers to the legal traditions of the Western culture, which has its roots in both Roman law and Canon law) inheritance, the liabilities are settled by the deceased's assets, and the balance thereof is divided accordingly among the heirs. If the liabilities exceed the assets in this instance then the heirs inherit nothing. Bekker *Seymour's Customary Law in Southern Africa* 70.

47 *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC).

48 Jamneck *et al Law of Succession* 98.

49 Olivier *et al Indigenous Law* 49-50.

50 Olivier *et al Indigenous Law* 50.

by a traditional authority; and any property which the family head acquired as a result of his own effort.⁵¹

House property has been defined as "the property which accrues to a specific house, consisting of a wife and her children and has to be used for the benefit of that house".⁵² This property may include the following: anything the household members have earned; livestock which is specifically allocated to the specific household; and any compensation owed to or products produced by the members of the household. This house property is managed with the sole purpose of benefiting the house to which it belongs.⁵³

Personal property refers to property which a specific person acquired. It is often under the control of the family head but must be used to serve the needs of the person to whom it belongs.⁵⁴

In Botswana there are many different tribal communities, each of these communities have unique rules that they follow when it comes to the classification and distribution of different property.

The Mmusi v Ramantele saga, focuses specifically on the Ngwaketse traditional community. In this community there is definitely a distinction between family property and personal property. The family property in this case was a specific homestead, the heir to the youngest male son, according to the Ngwaketse rule of male ultimogeniture.⁵⁵

Property such as livestock and personal property is equally divided among all the children of the household in the Ngwaketse traditional community.⁵⁶

It should be noted that only monogamous marriages are legally condoned in Botswana, however there is a loophole in the sense that a man can marry his first wife under customary law and the second wife under civil law. If this should happen

51 Olivier *et al Indigenous Law* 49-50.

52 Bekker and De Kock 1992 *CILSA* 366.

53 *Mhlongo v Mhlongo* 1919 AD 470.

54 Van der Walt and Pienaar *Law of Property* 389.

55 *Ramantele v Mmusi* CACGB-104-12 [2013] BWCA (3 September 2013) to date unpublished (Supreme Court of Botswana referred to as the SCB) para 6-10.

56 *Ramantele v Mmusi* (SCB). Para 28-36.

then there will be two households and thus the house property of each house will be devolved separately.⁵⁷

1.5.4 Heir

An heir as referred to under African customary law will be understood to be the first or last born son in a marriage, depending on the rule (primogeniture or ultimogeniture) which is applied within that specific traditional community.⁵⁸

When the family head dies he is succeeded by a general heir, as well as heirs to the position of head of the various households. A general heir gains control over the household and property of the general estate. This would include the following property: property which the family head inherited from his mother's house; land allotted to the family as a whole by a traditional authority; and any property which the family head acquired as a result of his own effort.⁵⁹

The special heir or heir of the different households gain control over the constituent houses of a household as well as the house property.⁶⁰ This would include the following: anything the household members have earned; livestock which is specifically allocated to the specific household; and any compensation owed to or products produced by the members of the household.

In terms of South African customary law, in a monogamous⁶¹ household, the general heir is usually the eldest son. Should he be pre-deceased then his eldest son succeeds. If the eldest son of the deceased has no male descendants then the eldest surviving son of the deceased is heir. Should there be no male descendants of the deceased then the heir of the deceased's estate will be the closest male ascendant,⁶² who will gain control of the family property and house property.⁶³

57 Nkomanzana 2006 Polygamy and women within the cultural context in Botswana 265-277.

58 Marriage with one wife and one husband.

59 Bekker *Seymour's Customary Law in Southern Africa* 297-303.

60 Bekker *Seymour's Customary Law in Southern Africa* 297-303.

61 A monogamous marriages means that there is only one husband and one wife.

62 Bekker *Seymour's Customary Law in Southern Africa* 303-306.

63 Bekker *Seymour's Customary Law in Southern Africa* 303-306.

With regard to succession in a polygynous⁶⁴ household, the eldest son of each house is the heir in that particular house property.⁶⁵ The eldest male descendant is sought after. If there is none then the closest male ascendant is the heir.⁶⁶ This household heir will inherit the house property of the specific house to which he is the rightful heir. In this instance there will be two heirs: a general heir and a specific heir.

In terms of customary law, whenever a marriage is concluded a house is created.⁶⁷ There are as many house-heirs as there are houses in a household. Houses differ in rank. This could lead to the fact that the highest ranking household's specific heir will also be the general heir to the family property.⁶⁸

The abovementioned can be illustrated in the following example: The deceased had a cattle farm, on this farm are four houses. The deceased was married to A, B, C and D. The house of A is the highest ranking house. The eldest son of A is now the general heir and inherits the cattle farm (family property), he is also the specific heir of house A and thus inherits house A and all the property within this house (house property). The eldest sons of house B, C and D are specific heirs and thus inherit house B, C and D and all the property within this house (house property). The personal property heir remains the discretion of the deceased. Many times the person will even be buried with the personal property according to customary tradition.

1.5.5 *Primogeniture*

Primogeniture in Latin refers to the first born and it applies to the status of being the first born child among numerous children, who all have the same parents.⁶⁹ Male primogeniture thus refers to the common law rule of inheritance in which the oldest male child inherits or receives the right to succeed to an estate of an ancestor. This

64 Polygynous means one husband and multiple wives.

65 Bekker *Seymour's Customary Law in Southern Africa* 275-279.

66 This will differ if the community follows ultimogeniture, then the youngest heir will be sought after.

67 Olivier et al *Indigenous Law* 50.

68 Olivier et al *Indigenous Law* 50.

69 Gale Group Inc (ed) *West's Encyclopaedia of American Law* 354.

right of succession excludes younger male siblings as well as all female siblings, and other relatives.⁷⁰

The word primogeniture has also been used to describe the situation in African customary law where the eldest son succeeds to the estate of his father in both monogamous and polygynous households. As already explained, in South Africa in a polygynous marriage, when the husband dies, his movable property⁷¹ is succeeded to by the eldest son of each house. The son not only succeeds to the property of that specific house but he is also responsible for the maintenance and care of the widow and children of that specific household of which he is the eldest.⁷²

When referring to primogeniture in this study, it will refer to the inheritance of the firstborn son according to African customary traditions and rules.

1.5.6 *Ultimogeniture*

Male ultimogeniture refers to the youngest son's right to inherit, also known as postremogeniture or junior right.⁷³ The concept refers to the inheritance of the last-born son of a family. It refers to a privileged position to the parent's wealth, estate or office.⁷⁴ Male ultimogeniture thus refers to the male last born son. This tradition of last-born inheritance is historically much rarer than that of first-born son inheritance or male primogeniture.

Even though the inheritance principle of the last born son is not a popular means of inheritance, it does still occur in certain African countries which follow African customary traditions and rules. A perfect example of such a country is Botswana, where the rule is followed in the Ngwaketse community as reflected in the *Mmusi v Ramantele* saga. For purposes of this study ultimogeniture will refer to the last born son inheritance as according to African customary rules and traditions.

70 Wall and Hareven (eds) *Family History Revisited* 343-344.

71 Which was acquired to, accrued by him or allotted to him.

72 Bekker *Seymour's Customary Law in Southern Africa* 273.

73 For purposes of this study, it will be referred to as male ultimogeniture.

74 Rudolf 1918 www.ebooksread.com/authors-eng/rudolf-hbner 88.

1.5.7 Patriarchy

The concept of patriarchy is central to African customary law. Patriarchy, where the father was established as the ruler of the family and traditional community, was also used during Biblical times to refer to the sons of Jacob.⁷⁵ Jacob had twelve sons, these sons went on to be the leaders of the twelve tribes of Israel. For instance, Levi the third eldest son of Jacob was the leader of the Levites; these were the priests of Israel. When Levi died his eldest son became chief priest over Israel. The father of the child always determined to which tribe a specific child belonged.⁷⁶

The Commission on Gender Equality⁷⁷ defines patriarchy as:

The common denominator of the South African nation. It is a system of domination of man over woman, which transcends different economic systems, eras, regions and class.

Patriarchy is however not unique to the African community. Boonzaaier and Sharp⁷⁸ describe patriarchy within a South African context as follows:

Patriarchal tradition of the household is one of the most beautiful legacies of the Afrikaner. As main characteristic of the old farm house-hold we can mention that it was a community of authority. In this small community the father was the highest authority. In other words, he was at the head of the specific authority structure. Since every authority structure can have only one head, the woman was under the authority of her husband. The mother, on the other hand, was pre-eminently the loving and understanding party who cared and served in silence.

The ideology behind the concept of patriarchy has developed as a result of the rise of the idea of the leadership of fathers. This ideology is based on the idea that the father is the head of the specific structure of authority. Due to the fact that this structure may only have one head, and the father is the head, the woman always remains under the authority of her husband.⁷⁹

Although patriarchy thus has a much broader application than customary law, it refers to the position of the eldest living male relative in the highest place of authority

75 Coetsee 2001 *South African Journal of Education* 300.

76 Coetsee 2001 *South African Journal of Education* 300.

77 Commission on Gender Equality 1998 Annual Report of the Commission on Gender Equality 1.

78 Boonzaaier and Sharp *South African Keywords* 154.

79 Coetsee 2001 *South African Journal of Education* 300.

in South Africa and the position of the youngest male relative in Botswana, for the purpose of this study.

1.6 Conclusion

In chapter one the research topic and the research question was introduced and discussed. The aims of this study as well as a brief layout of the contents of the chapters that follow have been set out. The main concepts of this study have been defined and explained. Chapter two will address the first two aims formulated for this study, namely:

1. To determine and understand the practice of male primogeniture in South Africa.
2. To determine the developments of the practice of male primogeniture generated by the *Bhe* decision.

CHAPTER 2

CUSTOMARY RULE OF MALE PRIMOGENITURE IN SOUTH AFRICA

2.1 *General introduction*

The arrival of colonialism⁸⁰ signified troubling times for indigenous⁸¹ laws and customs in South Africa. Colonisation imposed administrative structures and institutions which led to the suppression of people and the subservience of indigenous institutions, customs and laws. Colonisers wished to side-line what they believed to be "primitive" local legal systems which had evolved for many years, and replaced them with "modern" Western legal systems.⁸²

This suppression of indigenous laws and customs continued for many years and was finally brought to an end by the new constitutional dispensation, which came into force in 1993.⁸³ This new constitutional regime, not only recognised customary law but also afforded it the same status as the imported Roman-Dutch and common law.⁸⁴

Section 30 of the *South African Constitution* protects the right to culture. It states the following:

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

80 Noble *Illustrated Official Handbook of the Cape and South Africa* 11-25. John noble had the following to say with regard to South Africa's history of colonisation: "Following a period of Portuguese exploration, trading and dominance in the area, South Africa went through two major periods of colonization. The first was that of the Dutch Cape Colony proceeding the Dutch–Portuguese War, which was established by the Dutch East India Company in 1652. This was followed by the British Cape Colony, first occupied from the Dutch in 1795, then returned at the Peace of Amiens (1802), and then re-occupied by the British in 1806, after the Battle of Blaauwberg".

81 Indigenous refers to the original inhabitants of the land. This statement is controversial, since history books show us that the original inhabitants were Hottentots (Koi) and Bushmen (San). The other black people are immigrants from the north of Africa. Rautenbach 2008 *Electronic Journal of Comparative Law* 2.

82 Mann and Roberts *Law in Colonial Africa* 3-5.

83 *Constitution of the Republic of South Africa Act* 200 of 1993.

84 Section 211 of the *Constitution of the Republic of South Africa*, 1996. S 211 reads as follows: "The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution." See *S v Makwanyane* 1995 6 SA 665 (CC) paras 365-383.

Section 31 goes further by stating the following with regard to cultural, religious and linguistic communities:

1. Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community-
 - (a) to enjoy their culture, practise their religion and use their language; and
 - (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
2. The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

Section 211 of the *South African Constitution* is the section that clearly gives legal status to customary law and the practice thereof in South Africa.

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

It is clear from the above quoted sections, that the new constitutional dispensation makes a clear effort not just to acknowledge the existence of traditional laws and customs. It goes so far as to give legal recognition and authority to enforce the practice of these laws by traditional communities.

Even though customary law is accepted within South Africa the practice and implementation thereof is often complex. This is due to the fact that predominant features and characteristics of customary law, such as patriarchy, are often considered to be against the ideals envisaged by human rights. For example, women, in customary law, are often not able to own property in their own names and thus are excluded from inheriting property and are also barred from holding traditional leadership positions.⁸⁵

The favouritism of males in many customary rules often leads to conflict within the South African democracy.⁸⁶ On the one hand, the *South African Constitution* supports

85 South African Law Reform Commission Report *Project 90: Customary Law of Succession* 3-6.

86 Falola and Salm (eds) *Urbanisation and African Cultures* 417-432.

the practice of customary law and requires the courts to enforce it wherever applicable.⁸⁷ On the other hand, gender equality is an integral part of the core principle of the new constitutional democracy. Section 1 of the *South African Constitution* declares that

The Republic of South Africa is one, sovereign, democratic state founded on the following values: Human dignity, the achievement of equality and the advancement of human rights and freedoms. As well as non-racialism and non-sexism.

Due to the fact that certain customary laws inadvertently lead to discrimination against certain individuals, especially those rules pertaining to the inheritance rights of women, the customary law has been undergoing development throughout the post-democratic era.⁸⁸ Some of these developments will be highlighted in this chapter.

This chapter commences with a brief overview of the background with regard to male primogeniture in South Africa. The background with regard to the reason for the development of male primogeniture in South Africa will be briefly discussed. The concept of male primogeniture will then be discussed prior to the amendments and developments brought about by the *Bhe* decision.

2.2 Male primogeniture in South Africa

2.2.1 Background

Male primogeniture was a central component to the South African customary law of intestate succession.⁸⁹ As already explained, male primogeniture generally means that a male who is closely related to the deceased head of house, will qualify to be the deceased's heir.⁹⁰ It is usually the eldest surviving male child of the deceased that

87 Section 39(3) of the *South African Constitution*: The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the *South African Constitution*.

88 Bekker *Seymour's Customary Law in Southern Africa* 70-74; Falola and Salm (eds) *Urbanisation and African Cultures* 417-432.

89 Falola and Salm (eds) *Urbanisation and African Cultures* 417-432.

90 Wall and Hareven (eds) *Family History Revisited* 343-344.

will inherit. All women and extra-marital children are excluded from the line of intestate inheritance.⁹¹

Section 23 of the *Black Administration Act*, together with the regulations promulgated into section 23(10), pertain exclusively to intestate deceased estates of Africans. The regulations in section 23(10) were published in a Government Gazette under the title "Regulations for the Administration and Distribution of the Estates of Deceased Blacks".⁹² Section 23 can thus be seen as the body that gives effect to estates described as "Black"⁹³ law and custom" and these estates are to be administered according to customary law of succession.⁹⁴

2.2.2 *The concept of male primogeniture*

2.2.2.1 Basic principles

When the rule of male primogeniture is applied it ensures that the family property is not subdivided and lost. Rather, it preserves⁹⁵ the property for the widows, younger sons and any unmarried daughters.⁹⁶ The family members of the deceased can thus rest assured that they will benefit from the heir's maintenance and support, as well as his protection.⁹⁷

The main aim that guides this rule is that primogeniture always takes place in the male line. In the instance where the deceased has no male descendants the focus will move on to the male ascendants. These ascendants will be considered according to seniority.⁹⁸

91 Paragraph 3 of the *Bhe* decision.

92 Government Gazette 10601 GN R200, 6 February 1987 as amended by Government Gazette 24120 GN R1501, 3 December 2002.

93 Please note that whereas the *Black Administration Act* used the term "Black" to describe a member of the indigenous race in South Africa, the term "African" has been used in this study.

94 Paragraph 2 of the *Bhe* decision.

95 Bekker stated that the main purpose of succession was to ensure that family property remained in the specific family for generations. He went further to agree in the discussion paper that the rules of succession were put in place to ensure that the family unit's integrity was not disrupted upon the death of the family head. South African Law Reform Commission Draft Report Customary Law of Succession 34.

96 Kerr 1998 *SALJ* 264.

97 Kerr 1998 *SALJ* 264.

98 Knoetze "Westernization or Promotion of the African Woman's Rights?": This exclusion of women from heirship was in keeping with a system dominated by a deeply entrenched system of patriarchy, characterised by the subordination of women to the control of the family head. The

In the customary African culture, a family unit is seen as a cultural concept in which the material needs of family members individually are not the core focus.⁹⁹ The property, land and livestock are the most important assets in customary law. It provides the whole family with a place to reside and ensures subsistence of the family as a whole. According to customary law rules the ownership of the family property or assets are not held individually but rather collectively by the members.¹⁰⁰ To state it differently, each member is owner of the property through the family head.

The ownership of the family property that the family head holds could be compared to a type of trusteeship.¹⁰¹ There are two main goals which customary law of succession has always wished to achieve, firstly, that the family is to be perpetuated and secondly, that all the property of the deceased is to be transferred or devolved to members of the family.¹⁰²

2.2.2.2 Male primogeniture endorsed by section 23

Section 23 of the *Black Administration Act* provided for the protection of house property and quitrent land and thus excluded the following from the operation of a will: any movable property which had been allocated to a house or wife married according to customary law and quitrent land.¹⁰³ This property would be administered according to customary rules of succession.

Section 23 of the *Black Administration Act* provided the following with regard to succession:

- (1) All movable property belonging to a Black and allotted by him or accruing under Black law or custom to any woman with whom he lived in a customary union, or

rule of male primogeniture prevented the partitioning of the family property and kept it intact for the support of the widows, unmarried daughters and younger sons. Members of the family were thus assured of the heir's protection and enjoyed the benefit of his maintenance and support.

99 *Bhe v Magistrate, Khayelitsha* 2004 1 BCLR 27 (C) para 34.

100 *Bhe v Magistrate, Khayelitsha* 2004 1 BCLR 27 (C) para 34.

101 Trusteeship is defined as follows: one in whom an estate, interest, or power is vested, under an express or implied agreement to administer or exercise it for the benefit or to the use of another. *Black Legal dictionary online* 1177. Bekker *Seymour's Customary Law in Southern Africa* 74 supports the view by disclosing that the property belongs in law to his (family head) family as a unit, under his supervision and control and administration.

102 De Waal 1997 *Stell LR* 164.

103 *Black Legal dictionary online* 1008 Quit rent is defined as a perpetual rent reserved on a conveyance in fee simple, sometimes known by the name quit rent.

to any 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 upon his death upon one male person, to be determined in accordance with tables of succession to be prescribed under subsection (10).

Section 23(1) of the *Black Administration Act* thus expressly made provision for all estates to be administered according to "black law and custom". Section 23(2) specifically provided that the land of an individual would devolve to one male person in accordance with "black law and custom".

Regulation 2 of the *Regulation for Administration and Distribution of Estates*¹⁰⁴ provided the circumstances under which an estate of a black person would be devolved under "Black law and custom". Regulation 2(e) specifically provided that minor children did not qualify to be heirs in the intestate estate of their deceased father.

It is clear from the above extracts from section 23 of the *Black Administration Act* and Regulation 2 of the *Regulation for Administration and Distribution of Estates*, that male heirs for land were encouraged and that minor children were not entitled to inherit. Section 23 of the *Black Administration Act*, can thus in fact be said to have endorsed the practice of the customary rule of male primogeniture.

Customary law of succession and section 23 of the *Black Administration Act* had a very rigid way of regulating the succession of property that devolved according to customary law of succession. The fact that these rules and laws only provided for patriarchal succession, meant that it came under scrutiny when deciding if it promoted the purports of the *South African Constitution*. The rule of male primogeniture with regard to succession has undergone drastic development within South Africa, and the case that contributed to this development will be discussed next.

104 Government notice R.200 of 6 February 1987.

2.3 *Bhe decision*

2.3.1 *Facts and background*

The *Bhe decision* incorporated three related cases: *Bhe v Magistrate, Khayelitsha*,¹⁰⁵ *Shibi v Sithole*¹⁰⁶ and *South African Human Rights Commission v President of the Republic of South Africa*,¹⁰⁷ which were decided together. The Constitutional Court held that these three cases embodied the same legal issue: customary inheritance and succession versus the values of the *South African Constitution*.¹⁰⁸

In the first case, Ms Bhe applied to the court on behalf of her two minor daughters for an order to declare the rule of male primogeniture unconstitutional and thus enable them to inherit from their father's estate. According to the customary rule of male primogeniture, the father of the deceased would be inheriting the deceased's estate due to the fact that the deceased had no male descendants. The father of the deceased intended to sell the deceased's property in order to pay for the funeral expenses which were incurred by the deceased's death. Thus the minor daughters would be left with no financial provision for their future.¹⁰⁹

In the second case (*Shibi-case*), the applicant's brother died intestate without a spouse, partner or children. According to section 23(10) of the *Black Administration Act* the estate was to be dissolved in terms of "Black laws and customs", which meant that the closest male heir would have inherited the estate of the deceased in the absence of an eldest son. The closest male relatives were the deceased's two cousins. Ms Shibi challenged the rule of male primogeniture that favours the two male cousins and the Court a quo Court granted her the order of being the sole heir to her deceased brother's estate.¹¹⁰

In the third case the *South African Human Rights Commission v President of the Republic of South Africa*¹¹¹ the South African Human Rights Commission and

105 2004 1 BCLR 27 (C).

106 2005 1 BCLR 1 (CC) (hereafter referred to as the *Shibi*-decision).

107 2005 1 SA 580 (CC).

108 Knoetze "Westernization or promotion of the African woman's rights" 1.

109 Paragraphs 9-20 of the *Bhe* decision.

110 Paragraphs 21-28 of the *Bhe* decision.

111 2005 1 SA 580 (CC).

Women's Legal Centre Trust sought relief that was wider¹¹² than that sought in both the *Bhe*- and *Shibi*-decisions. These two public entities contended that section 23(1), (2) and (6) of the *Black Administration Act* were unconstitutional due to the fact that they were in conflict with sections 9, 10 and 28¹¹³ of the *South African Constitution*.¹¹⁴

The core legal issues that linked these three cases were as follows: the constitutional challenge to the rule of male primogeniture as it applies in the African customary law of succession, as well as constitutional challenges to section 23 of the *Black Administration Act*, regulations promulgated in terms of that section and section 1(4)(b) of the *Intestate Succession Act*.

2.3.2 Legal questions

The Court held that two legal questions were of importance: The first question was whether section 23 of the *Black Administration Act* was constitutionally valid. The second question was whether the customary principle of primogeniture in the context of the customary law of succession was constitutionally valid.

2.3.3 Judgement

Langa DCJ, writing for the majority of the Court, started the judgement by first establishing how customary law was approached in South Africa. Section 23 of the *Black Administration Act* was a provision that regulated customary law. Thus, before the constitutionality of the specific section could be discussed, it first needed to be established whether customary law had a valid legal status within the South African legal system.¹¹⁵

Langa DCJ stated that in *Alexkor Ltd v Richtersveld Community*¹¹⁶ the Constitutional Court endorsed the status of customary law in South Africa:

112 This relief can be wider in the sense that the *Shibi*- and *Bhe* decisions only sought relief with regard to the practice of male primogeniture. The South African Human Rights commission went a step further in the third case and argued that s 23 of the *Black Administration Act* be declared unconstitutional.

113 Section 9 is the right to equality, s 10 is the right to human dignity and s 28 is the rights of children.

114 Paragraphs 29-31 of the *Bhe* decision.

115 Paragraphs 40-46 of the *Bhe* decision.

116 2004 5 SA 460 (CC).

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

From this quote it was clearly established that customary law and practices that were once treated as subordinate legal practices, are recognised by the new *South African Constitution*, and thus could be regarded as a respected part of the South African legal system.

Langa DCJ stated that with regard to the question of constitutional validity, the question in this case was not whether the customary law rule offered similar remedies as that prescribed by the *Intestate Succession Act*.¹¹⁷ The main question was rather, whether these customary law rules were consistent with the core values envisioned by the *South African Constitution*.¹¹⁸

Section 23 of the *Black Administration Act* imposed a system of succession on all Africans, without taking their circumstances or preferences into account. It also inadvertently discriminated based on race, due to the fact that; if one wished to be extricated from this regime one would have to create a will.¹¹⁹ It must however be noted that making a will, did not automatically exclude one from all the regulations in terms of section 23, as there were some categories of property¹²⁰ which were incapable of being devised by a will but had to devolve according to the principles of "Black law and custom".¹²¹

117 Thus meaning the focus in that instance would be the equality between "westernised" intestate succession versus "black" or indigenous intestate succession.

118 Paragraph 42 of the *Bhe* decision.

119 Thus only those people with sufficient resources, knowledge, education or opportunity to make an informed choice would be able to benefit from that provision. Paras 66 and 67 of the *Bhe* decision.

120 An example of these limitations entails the following: All movable property that belongs to a black person will be devolved and administered under black law and custom, upon that person's death; All land that is held in an individual tenure upon quitrent conditions by a black person, shall devolve a male person upon the death of the deceased. This male person will be determined according to the tables of succession prescribed under subsection (10); The last limitation entails all other property of whatever nature, that belongs to a black person, shall be capable of being devolved by a will.

121 Paragraphs 66 and 67 of the *Bhe* decision.

Section 23 of the *Black Administration Act* and its regulations implicated the following rights as constituted in the Bill of Rights: section 9(3),¹²² section 10¹²³ and section 28.¹²⁴ Consequently, section 23 of the *Black Administration Act*, was held to be inconsistent with the *South African Constitution* due to the fact that the estates of black people were treated differently from the estates of white people. It was established that section 23 was a racist provision¹²⁵ and that it was fundamentally incompatible with the *South African Constitution*.¹²⁶ It was found that the section was inconsistent with sections 9 and 10 of the *South African Constitution* due to the fact that it blatantly discriminated on grounds of race,¹²⁷ colour and ethnic origin and because of its harmful effects on the dignity of persons affected by it.¹²⁸ The achievement of equality is not only one of the founding values of the *South African Constitution*, but this right wishes to ensure that people who have been subjected to unfair discrimination in the past, will now be able to enjoy the benefits of "an egalitarian and non-sexist society".¹²⁹ Thus section 9(3) of the *South African Constitution* specifically prohibits unfair discrimination by the state "directly or indirectly against anyone" on grounds which include race, gender and sex.¹³⁰

122 "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

123 Everyone has inherent dignity and the right to have their dignity respected and protected.

124 Section 28(2) "A child's best interests are of paramount importance in every matter concerning the child."

125 Paragraph 38 stated the following: "Section 23 cannot escape the context in which it was conceived. It is part of an Act which was specifically crafted to fit in with notions of separation and exclusion of Africans from the people of 'European' descent. The Act was part of a comprehensive exclusionary system of administration imposed on Africans, ostensibly to avoid exposing them to a result which, 'to the Native mind', would be 'both startling and unjust'. What the Act in fact achieved was to become a cornerstone of racial oppression, division and conflict in South Africa, the legacy of which will still take years to completely eradicate."

126 Paragraph 60 of the *Bhe* decision.

127 *DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 1 SA 500 (CC), Madala J referred to the Act as "a piece of obnoxious legislation not befitting a democratic society based on human dignity, equality and freedom".

128 Paragraphs 46-57 of the *Bhe* decision.

129 Paragraph 50 of the *Bhe* decision.

130 Paragraph 60-67 of the *Bhe* decision. Section 9(3) "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

The next question that the Court had to address was whether section 23 was justified in terms of section 36¹³¹ of the *South African Constitution*.¹³² Section 36 of the *South African Constitution* provides that for a provision to justifiably limit a right constituted in the Bill of rights, it should be a law of general application.¹³³ This limitation should also be reasonable and justifiable in an open democratic society based on human dignity, equality and freedom.¹³⁴

In the *Bhe* decision the Court stated that the rights that were violated in this specific case were important especially in a South African context. Section 9 (equality) and section 10 (human dignity) of the Bill of Rights are core values entwined in any open and democratic state. There is also a great need to protect these specific rights given South Africa's history of discrimination based on race and gender.¹³⁵ Therefore, the Court ruled that section 23 of the *Black Administration Act* could not be justified in terms of section 36 of the *South African Constitution*.

In terms of section 172(1)(a) of the *South African Constitution*,¹³⁶ section 23 of the *Black Administrations Act* accordingly had to be struck down.¹³⁷ Due to the fact that section 23 of the *Black Administration Act* was struck down, the rules of customary law governing succession would then be applicable.¹³⁸ These rules specifically endorsed the practice of the rule of male primogeniture. The applicants in both the *Bhe* and *Shibi* cases, however, also sought the declaration of the invalidity of the customary law rule of primogeniture.¹³⁹ The Court thus also had to scrutinise the

131 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, taking into account all relevant factors, including - (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

132 Paragraph 69 of the *Bhe* decision.

133 Paragraph 69 of the *Bhe* decision.

134 Paragraph 70, s 36(1) of the *South African Constitution*.

135 Paragraph 71 of the *Bhe* decision.

136 Section 172(1) of the *South African Constitution* provides that: "(1) When deciding a constitutional matter within its power, a court (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and (b) may make any order that is just and equitable, including- (i) an order limiting the retrospective effect of the declaration of invalidity; and (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

137 Paragraph 73 of the *Bhe* decision.

138 Paragraph 74 of the *Bhe* decision.

139 This is the customary law rule that would be relied on in the instance where s 23 of the *Black Administration Act* is no longer applicable.

constitutional validity of the principle of male primogeniture in the context of the customary law of succession.

Before Langa DCJ gave a ruling on the constitutional validity of the principle of primogeniture in the context of the customary law of succession, he first gave a detailed discussion of the customary law of succession and in particular the rule of male primogeniture.¹⁴⁰

The customary system of succession is intestate.¹⁴¹ Individuals within customary law are not entitled to decide how and to whom their estates will be devolved.¹⁴² Traditionally, customary property which usually consists mainly of land and livestock, attracts group interest¹⁴³ and for that reason cannot be devolved by will.

African intestate succession¹⁴⁴ is not primarily focused on the distribution of the deceased's estate assets,¹⁴⁵ but it rather entails finding a suitable relative that can occupy the deceased's position to minimise disruption.¹⁴⁶ The duty to support dependants falls upon the heir together with the right to inherit. This obligation remains set even if the deceased's estate does not have enough resources to truly support the surviving widow and children. Should it happen that the estate does not have enough to support the family, then the heir will have to support the family out of his own estate or earnings.¹⁴⁷

140 Paragraphs 74-76 of the *Bhe* decision.

141 Bekker *Seymour's Customary Law in Southern Africa* 74.

142 Maithufi 1994 *TSAR* 276: Although testamentary succession is not known in customary law, a person can make a final allocation of his property *mortis causa*.

143 Bekker and Koyana 2012 *De Jure* 572. In African customary law it is common practice that there are polygynous marriages and thus if the head of the house dies he will possibly have more than one "household". So all the children from each "household" would have a group interest. Due to the fact that African customary law is intestate, the succession can go either to the descendent which would be the children mentioned above, or else succession could go to the ascendants. Thus all would have an interest.

144 Bekker and Koyana 2012 *De Jure* 572. Succession in customary law is not as in European legal systems a matter of winding-up an estate (a deceased's wealth and property) and distributing the proceeds to legally specified heirs. Succession in customary law could aptly be described as universal succession, which cannot be understood in isolation. It is inextricably interwoven with African family law and society. Maine *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* (1930) 202, explains: The decease of individual members makes no difference to the collective existence of the aggregate body, and does not in any way affect its legal incidents, its faculties or liabilities.

145 Paragraphs 76-77 of the *Bhe* decision.

146 Bennett *Customary Law* 335.

147 Paragraphs 76-77 of the *Bhe* decision.

Customary law of succession has three main common place branches in terms of distribution namely: intestate, universal, and patriarchal. Distribution is seen as being intestate due to the fact that it does not allow individuals to elect to get out of the inheritance rules by drafting a will. It is thought to be universal due to the fact that the heir inherits all the deceased's rights and duties. The succession is seen as being patriarchal due to the fact that property transfers according to a rule of male primogeniture.¹⁴⁸

The property of a traditionally South African customary home is collectively owned by the whole family.¹⁴⁹ The family head, however administers this property for the benefit of the family. It is clear that the customary law of succession functions as a core part of a system that finds its base in the community's needs and everyday way of living. This system has its own ways in which it ensures that there is an equilibrium formed between rights, duties and responsibilities. An example of this equilibrium is a customary law of succession rule that ensures that a widow has a right to support and maintenance through instigating certain remedies. It can thus be concluded that the main focus of customary law of succession is centred on ensuring stability and cohesion of the entire family as well as the broader community. However, for purposes of this study, the focus will mainly be on the inheritance of property and not succession of liabilities.

When the rule of male primogeniture is applied it ensures that the family property is not subdivided and lost. Rather, it preserves the property for the widows, younger sons and any unmarried daughters.¹⁵⁰ The members of the deceased's family can thus rest assured that they will benefit from the heir's maintenance and support, as well as his protection.¹⁵¹

Customary law of succession and section 23 of the *Black Administration Act* had a very rigid way of regulating the inheritance of property that devolved according to customary law of succession. The fact that these rules and laws only provided for

148 Nelson 2008 *The Journal of Religion, Spirituality and Aging* 466-469.

149 Prinsloo 1990 *SALJ* 493-497. Prinsloo notes that under the *Black Administration Act* 38 of 1927 that only house property and quitrent land had to devolve according to the rules of intestate succession, any other property was entitled to be provided for in a will which is governed by South African common law.

150 Kerr 1998 *SALJ* 264.

151 Paragraphs 90-93 of the *Bhe* decision.

patriarchal inheritance, meant that it often came under scrutiny when deciding if it promoted the purports of the *South African Constitution*.¹⁵²

The Court¹⁵³ found that the basis of the constitutional challenge to the official customary law of succession was the fact that the rule of primogeniture excluded the following people from inheriting:

- (a) widows from inheriting as the intestate heirs of their late husbands;
- (b) daughters from inheriting from their parents;
- (c) younger sons from inheriting from their parents, and
- (d) extra-marital children from inheriting from their fathers. It was contended that these exclusions constitute unfair discrimination on the basis of gender and birth and are part of a scheme underpinned by male domination.¹⁵⁴

Langa DCJ found that the rule of male primogeniture as applied to the customary law of succession could not be reconciled with the current values of equality and human dignity which are entrenched in the Bill of Rights. Male primogeniture was the centrepiece of the customary law system of succession and the rule clearly violated the equality rights of women and was an affront to their dignity,¹⁵⁵ due to the fact that they were excluded from inheriting on the grounds of gender.¹⁵⁶ This led to the fact that the limitation of the rule imposed on the rights of those subject to the rule and thus it was not "reasonable and justifiable in an open and democratic society founded on the values of equality, human dignity and freedom".¹⁵⁷

Langa DCJ came to the conclusion that: "the official system of customary law of succession is incompatible with the Bill of Rights. It cannot, in its present form, survive constitutional scrutiny".¹⁵⁸ He was of the opinion that it was not possible to develop¹⁵⁹ the rule of male primogeniture¹⁶⁰ as it attained to the customary law rules

152 Paragraph 91 of the *Bhe* decision.

153 Paragraph 64 of the *Bhe* decision.

154 Paragraph 64 of the *Bhe* decision.

155 Paragraph 67 of the *Bhe* decision. Langa DCJ stated "It is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order."

156 Section 9(3) of the *South African Constitution*.

157 Paragraph 71 of the *Bhe* decision. S 36 of the *South African Constitution*.

158 Paragraph 73 of the *Bhe* decision.

159 Paragraph 67 Langa DCJ stated "it is not possible to develop the rule of primogeniture as it applies within the customary law rules governing the inheritance of property, it is not necessary or desirable in this case for me to determine whether the discrimination against children, who

that prevailed over customary law of succession of property.¹⁶¹ He thus held that in dilemmas such as this,¹⁶² it would be preferable for the courts to develop "new rules of African customary law to reflect the living customary law and bring customary law in line with the Constitution."¹⁶³

Langa DCJ stated that given the circumstances surrounding this case, it would not suffice to simply strike down the customary provisions that were in conflict with the *South African Constitution*.¹⁶⁴ There are many people whose affairs are governed by the customary law, thus it is necessary to rather formulate appropriate measures than disadvantage those who are subject to the customary law.¹⁶⁵

It must however also be noted that, Langa DCJ believed that the Court could not leave the current legal regime in place until it was ratified by the legislature. The rights that were infringed upon by section 23 of the *Black Administration Act* were important. People should not be denied the rights afforded to them by the *South*

happen not to be the eldest, necessarily constitutes unfair discrimination. I express no view on that question. Nor, I emphasise again, does this judgment consider at all the constitutionality of the rule of male primogeniture in other contexts within customary law, such as the rules which govern status and traditional leaders."

160 Knoetze "Westernisation or promotion of the African woman's rights?" Male primogeniture can be regarded as a form of discrimination that entrenches past patterns of disadvantage among a very vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under a constitutional order. Arguably male primogeniture also violates the right of women to human dignity contained in s 10 of the Constitution in that it implies that women are not fit or competent to own and administer property or assume positions of status

161 Paragraph 94 of the *Bhe* decision. Langa DCJ also states the following in this paragraph:"it is not necessary or desirable in this case for me to determine whether the discrimination against children, who happen not to be the eldest, necessarily constitutes unfair discrimination. Nor, I emphasise again, does this judgment consider at all the constitutionality of the rule of male primogeniture in other contexts within customary law, such as the rules which govern status and traditional leaders".

162 Referring to the constitutional validity of legally recognised rule, such a male primogeniture.

163 Paragraph 45 of the *Bhe* decision.

164 Knoetze "Westernisation or promotion of the African woman's rights?": The abolition of the male primogeniture rule potentially infringes on people's right to be governed by customary law. Allegedly there are a substantial number of people whose lives are governed by customary law. The South African Constitution recognizes the right to the application of customary law. It could be argued that those who want to arrange their lives according to custom can make wills to regulate the devolution of their estates accordingly. However, it must be noted that the concept of wills is foreign to most customary systems and often those who need the protection of the law are not conversed with westernised systems.

165 Paragraph 107 of the *Bhe*-decision.

African Constitution, and should no longer be subjected to inequality and unfair discrimination.¹⁶⁶

It was also suggested that due to the fact that the Court could not develop the rules of customary law, it should rather allow for flexibility in order to facilitate development of the customary law rules.¹⁶⁷ The argument supporting this notion, was that since customary law was inherently flexible,¹⁶⁸ "courts should introduce into the system those constitutional principles that the official system of succession violates".¹⁶⁹

Langa DCJ, stated that the abovementioned amounted to an advocacy for a case to case development as a remedy to the issue in this case.¹⁷⁰ He also stated that there had been signs of evolution in court decisions, whereby some courts had shown an acceptance to the changes in customary law.¹⁷¹ In *Mabena v Letsoalo*,¹⁷² for instance,

it was accepted that a principle of living, actually observed law had to be recognised by the court as it would constitute a development in accordance with the 'spirit, purport and objects' of the Bill of Rights contained in the interim Constitution.

Even though there was a possibility to develop the customary law on a case to case basis, Langa DCJ believed that the changes brought on by the development would be very slow; uncertainties regarding the real rules of customary law would be prolonged and there might well be different solutions to similar problems.¹⁷³ The uncertainties and the lack of uniformity that results from this method could be seen in some cases already. A perfect example thereof was seen in the trilogy cases of *Mthembu v Letsela*.¹⁷⁴ In that case Justice Le Roux¹⁷⁵ and Justice Mynhardt¹⁷⁶ both

166 Paragraph 108 of the *Bhe* decision.

167 Paragraph 110 of the *Bhe* decision.

168 In Bennett *Human Rights and African Customary Law* 63.

169 Paragraph 110 of the *Bhe* decision. It was suggested that this could be done by using the exceptions in the implementation of the primogeniture rule which do occur in the actual administration of intestate succession as the applicable rule for customary law succession.

170 Paragraph 111 of the *Bhe* decision.

171 See for example *Mabuza v Mbatha* 2003 7 BCLR 743 (C).

172 1998 2 SA 1068 (T).

173 Paragraph 112 of the *Bhe* decision.

174 *Mthembu v Letsela* 1997 2 SA 936 (T), 1998 2 SA 675 (T) and 2000 3 SA 867 (SCA).

175 Judge in the first case *Mthembu v Letsela* 1997 2 SA 936 (T).

176 Judge in the second case *Mthembu v Letsela* 1998 2 SA 675 (T).

concluded that rules of African customary law of succession were not in conflict with the Bill of Rights.¹⁷⁷

Langa DCJ stated that he doubted whether there would be sufficient guarantee that the constitutional protection of woman and children's rights in the devolution of customary intestate estates would truly take place if the courts were left to develop the customary law as proposed.¹⁷⁸ He believed that something more certain had to be put in place in order to guarantee that these rights would be protected.

According to him the legislature was best suited to handle the gap in the legislation as pointed out by the Court. The legislature had to adopt appropriate legislation that could incorporate customary law, but at the same time protect core values as provided for in the *South African Constitution*.¹⁷⁹ The Court in this instance had to "fashion an effective and comprehensive order that will be operative until appropriate legislation is put in place".¹⁸⁰ Thus the order made by this court was an interim order and the Court did not desire that this order be made final and long standing.

The Court referred to recommendations which had been made by the SALRC¹⁸¹ regarding the legislative reform of customary law of intestate succession. The Commission¹⁸² proposed that the *Intestate Succession Act* be adjusted so that it

177 *Mthembu v Letsela* (1997) at 946 C and *Mthembu v Letsela* (1998) at 686G-H.

178 Paragraph 113 of the *Bhe* decision.

179 Paragraph 115 of the *Bhe* decision.

180 Paragraph 116 of the *Bhe* decision.

181 Schoeman-Malan 2007 *PER* 4. On 15 November 2000 the *Recognition of Customary Marriages Act* 120 of 1998 came into operation. The SALC (or SALRC since 2003) also has, since 1996, been investigating the possible harmonisation of the law of succession (statutorily and common law regulated) and customary or indigenous law of succession in accordance with the new constitutional order (SALC 1999 *Harmonisation of the Common Law and Indigenous Law*; SALRC 2004 *Customary Law of Succession*). The Commission launched an Issue Paper entitled *Succession in Customary Law* in 1998 and published Discussion Papers in 2000 and 2001 (SALC 2000 *Customary Law: Succession Discussion* and SALC 2001 *Customary Law: Administration of Estates*). The SALRC continued its work and in April 2004 completed a further report entitled "*Customary Law of Succession*". This report was completed after the High Court judgment in *Bhe v Magistrate, Khayelitsha* 2004 1 BCLR 27 (C) but before the Constitutional Court judgment in the same case. The Report was submitted to the Minister of Justice and Constitutional Development.

182 Schoeman-Malan 2007 *PER* 4. SALRC 2004 *Customary Law of Succession*. In chapter 7 one can find a summary of a proposed Draft Bill. They debated the question whether customary rules of succession are appropriate to modern social conditions and serve the purposes expected of the law of succession in the light of the new human rights dispensation. In par 2.3.13 of the report the Commission stated: "There can be no doubt that customary law in South Africa, as in other Southern African countries, is responding in a pragmatic fashion to social needs."

could accommodate customary law of succession.¹⁸³ The Commission believed that the *Intestate Succession Act* was capable of accommodating the customary law of succession.¹⁸⁴

The Commission's proposals also suggested that apart from the *Black Administration Act* and the *Intestate Succession Act*, there were other statutes that also have an influence on succession.¹⁸⁵ This proposal suggested that the *Intestate Succession Act* as well as other legislation should be taken into account to replace the current customary succession framework.¹⁸⁶

The Court recommended using section 1 of the *Intestate Succession Act* due to the fact that it did not exclude or discriminate against extra-marital children, woman (married or unmarried) and any other children. The only issue that arose when using this provision is that it only caters for one spouse and not multiple spouses¹⁸⁷ as is often found in the customary community. In order to cater for this, the Court made the following adjustments to sections 1(1)(c)(i) and 1(4)(f) of the *Intestate Succession Act*, which prescribed how a child's share, of a monogamous marriage, should be calculated. The Court prescribed the following in the instance where there was more than one spouse.¹⁸⁸

- (a) A child's share in relation to the intestate estate of the deceased, shall be calculated by dividing the monetary value of the estate by a number equal to the number of the children of the deceased who have either survived or predeceased such deceased person but are survived by their descendants, plus the number of spouses who have survived such deceased;
- (b) Each surviving spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister for Justice and Constitutional Development by notice in the Gazette, whichever is the greater; and

183 Paragraph 102 of the *Bhe* decision.

184 An example would be to give the Master of the High Court powers to resolve a dispute among parties (SALRC Project 90 Customary Law of Succession 2004, 65).

185 Refer to paras 67-68 of the judgement where it is suggested that the *Administration of Estates Act* 66 of 1965 be amended as part of the repeal of all the regulations regarding intestate succession by Africans.

186 In this respect, the Commission refers to the impact of the *Recognition of Customary Marriages Act* 120 of 1998, s 7 of which provides for community of property in every customary marriage. It proposes that widows of such customary unions be treated as spouses of their late husbands and that children born from such unions be regarded as dependants of the deceased, refer to para 70 of the judgement.

187 Spouses in this context would refer to more than one wife due to the fact that only polygyny is found in South Africa.

188 Paragraph 125 of the *Bhe* decision.

- (c) Notwithstanding the provisions of subparagraph (b) above, where the assets in the estate are not sufficient to provide each spouse with the amount fixed by the Minister, the estate shall be equally divided between the surviving spouses.

The Commission recommended that the adjustments made to the *Intestate Succession Act* should ensure that spouses¹⁸⁹ and children would enjoy preference of inheritance over other dependants of the deceased.¹⁹⁰ The Court also reiterated that the rules in the *Intestate Succession Act* should not be seen as fixed rules; the beneficiaries should be allowed to conclude a family agreement which could be in accordance with the customary rules of intestate succession.¹⁹¹

According to the *Intestate Succession Act* a spouse was originally limited to: any party to a valid marriage in terms of the *Marriage Act* 25 of 1961. The Constitutional Court as well as the Commission provided that:

A party in a subsisting customary marriage which is recognized in terms of section 2 of the *Recognition of Customary Marriages (Act 120 of 1998)* is also a spouse for intestate succession purposes.

These recommendations by the Commission were meant for the legislature to take into consideration.¹⁹²

The discussion above reflected the decision of the majority of the Court in the *Bhe* decision, in determining the correct legal answer to the legal questions stated at the beginning of the discussion, namely: the constitutional validity of section 23 of the

189 Schoeman-Malan 2007 *PER* 5. For purposes of law reform, it is important to take note of changed social conditions such as urbanisation, but no law reform can take place if it is not within the boundaries of the new constitutional order. Not only is gender discrimination prohibited in s 9 of the Constitution, but it is reinforced by South Africa's obligation under the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Signed on 29 January 1993. S 14 and 16(1)(h)) and more recently the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (see ss 8(c) and (d)).

190 Parties to be excluded from the reform and persons who are not subject to customary law, namely: (a) parties who entered into a civil marriage; (b) those persons who entered into a customary union after the coming into operation of the Recognition of Customary Marriages Act 120 of 1998 (the Recognition Act); and (c) those who have changed their matrimonial property regime in terms of s 7(4) of the Recognition Act, and (d) persons who made a will.

191 Rautenbach 2014 *International Journal of Humanities* 678.

192 One of the interim decisions made by the Court was that the Master of the High Court was now to be allowed access to estates devolved according to s 23 of the *Black Administration Act*. S 4(1A) of the *Administration of Estates Act* provided that the Master shall not have jurisdiction over estates that devolve in terms of customary law. This thus meant that the Master would be able to elect an executor for an estate, as well as s 18(3) *Administration of Estates Act* also permits the Master to "give directions as to the manner in which any such estate shall be liquidated and distributed."

Black Administration Act and the constitutional validity of the principle of primogeniture in the context of the customary law of succession.¹⁹³ It is clear that the majority of the Court adopted a constitutional approach to the development of male primogeniture in South Africa. This means that the *South African Constitution* was chosen as the core point of departure and anything contradictory to the values of the Constitution was declared invalid. Section 23 of the *Black Administration Act* and the principle of male primogeniture were both declared inconsistent with the *South African Constitution*. Due to this the Court had to make proposals for the future of customary law of succession.

In a partially dissenting judgment, Ngcobo J agreed with Langa DCJ with regard to the following aspects: section 23 of the *Black Administration Act* together with Regulation 2 infringe upon the right to equality (section 9) and the right to dignity (section 10) and are therefore unconstitutional. Ngcobo J also agreed that the principle of male primogeniture unfairly discriminates against women.¹⁹⁴ Ngcobo J however was of the opinion that the principle of primogeniture does not discriminate against younger children due to the fact that the main purpose of the rule was to ensure that someone took over the responsibilities of the deceased head of the family.¹⁹⁵ The heir thus did not become owner of the property, but rather administered it on behalf of the family so that they were maintained and supported.¹⁹⁶

Ngcobo J was of the opinion that the Court had an obligation under the *South African Constitution* to develop customary law¹⁹⁷ so that it would be brought in line with the Bill of Rights.¹⁹⁸ Ngcobo J also believed that the principle of primogeniture should not be struck down but rather be developed so that it is in line with the right to equality.¹⁹⁹

193 Bekker and Koyana 2012 *De Jure* 573. This judgment was widely hailed as a major victory for rights of African women, particularly those married in terms of customary law. They now enjoy the same rights of succession as their white counterparts and men. Women in polygynous marriages and their children have equal succession rights. Extra-marital children are brought into the fold of successors. Above all the law no longer recognises the concept of "indlalifa" or universal heir.

194 Paragraphs 141-146 of the *Bhe* decision.

195 Paragraphs 48-55 of the *Bhe* decision.

196 Paragraphs 156-176 of the *Bhe* decision.

197 Also referred to as indigenous law.

198 Paragraphs 212-221 of the *Bhe* decision.

199 Paragraphs 224-231 of the *Bhe* decision.

An example of such a development would be to allow women to succeed to the deceased as well.²⁰⁰

The Constitutional Court did not refer to court rulings in Botswana. However, Ngcobo's finding that the customary law should have been developed by the Court and that the courts should judge each case on its merits, is profoundly similar to the finding by the Botswana Court of Appeal in *Ramantele v Mmusi* (SCB) which will be discussed in chapter three.²⁰¹

The South African Constitutional Court thus followed what can be referred to as a constitutional approach. It measured, the customary law of succession principles as set out in section 23 of the *Black Administration Act* and its regulations, according to the values and principles of the *South African Constitution*. The Court found that the customary law of succession rules as promoted by the *Black Administration Act* were inconsistent with the *South African Constitution*. The Court followed the basis that anything which is inconsistent with the *South African Constitution* is invalid and thus declared section 23 of the *Black Administration Act* and ultimately the rule of male primogeniture unconstitutional.

The decision made by the Constitutional Court in the *Bhe* decision, meant that the legislature had to consider legal developments with regard to customary law of succession, to ensure that the practice of these customary traditions were not contradictory to the values of the *South African Constitution*. On 21 April 2009, parliament approved the findings by the Commission and passed the *Reform of Customary Law of Succession and Regulation of Related Matters Act*.²⁰² This Act provided for the devolution of certain property in line with the customary law of

200 Paragraphs 187-191 and 224-231 of the *Bhe* decision.

201 The majority of the Court however found the following, which is contradictory to which Ngcobo J found. The Court found that the primogeniture rule, as applied in succession in customary law, inconsistent with one of the constitutional core values of equality. The question whether the Court would be able to develop the primogeniture rule so that it would be in line with the "spirit, purport and objects of the Bill of Rights" has already been mentioned. In order for the Court to be able to develop primogeniture, it would first have to determine the true content of customary law as it is today. Langa DCJ believed that there was not enough evidence and material to enable the Court to make such a determination. Langa DCJ also believed that the key "lies not so much in the acceptance of the notion of living customary law, as distinct from official customary law, but in determining its content and testing it." This testing referred to what the Court should do in terms of the Bill of Rights.

202 11 of 2009.

intestate succession; the disposition of house property by will; the protection of property rights in customary marriages. There also was an *amendment of the Intestate Succession Act* to protect the rights of younger male children; as well as an amendment of the *Maintenance of Surviving Spouses Act 27 of 1990* to enable wives in customary marriages to make claims for maintenance.²⁰³

2.4 Conclusion

Customary law has continued to exist throughout the transitional phases of colonisation, apartheid and the forming of a democratic state. The *South Africa Constitution* provided the following with regard to customary law:²⁰⁴

When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

It is thus clear that customary law is acknowledged as a source of law in South Africa. The difficulty that often arises is when certain customary rules are contradictory to the values entrenched in the *South African Constitution*.

In the *Bhe*-decision the constitutionality of section 23 of the *Black Administrations Act* and its regulations, including the customary rule of male primogeniture was challenged. Male primogeniture is the centrepiece of the customary law system of succession.

Section 23 of the *Black Administrations Act* was declared unconstitutional by the *Bhe*-decision. The Constitutional Court found that section 23 was in conflict with sections 9(3), 10 and 28 of the *South African Constitution* and that the discrimination was not justifiable in terms of section 36 of the *South African Constitution*:

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, taking into account all relevant factors.

203 Diala *AHRLJ* 645-646.

204 Section 39 of the South African Constitution.

The Constitutional Court also found that the customary rule of male primogeniture was unconstitutional. Langa DCJ reached the following conclusion with regard to the constitutionality of male primogeniture: "the official system of customary law of succession is incompatible with the Bill of Rights. It cannot, in its present form, survive constitutional scrutiny".

The Constitutional Court emphasised that the basis for the challenge of the unconstitutionality of the rule of male primogeniture was the fact that it in effect prevented a widow from inheriting intestate from her deceased husband, a daughter from inheriting from her father, a young son from inheriting from his father and it prevented an extra-marital child from inheriting from his or her natural or biological deceased father.

The Constitutional Court was of the opinion that the legislature should try to find the best solution to address the situation due to the fact that vital rights and values entrenched in the *South African Constitution* were being infringed upon by applying this customary rule. The Court's judgement and recommendation were only to operate on an interim basis until appropriate legislation was affected. This legislation was effected on 21 April 2009 when parliament approved the findings by the Commission and passed the *Reform of Customary Law of Succession and Regulation of Related Matters Act*.

This chapter has thus discussed the customary rule of male primogeniture and how it has been applied in South Africa, as well as how it has been developed by the South African courts. This chapter established that the South African Constitutional Court in the *Bhe* decision adopted a constitutional approach towards the development of male primogeniture in South Africa. There were also legal developments that took place after the *Bhe* decision, namely the introduction of the *Reform of Customary Law of Succession and Regulation of Related Matters Act*,²⁰⁵ an amendment of the *Intestate Succession Act* which protect the rights of younger male children; as well as an amendment of the *Maintenance of Surviving Spouses Act 27* of 1990 which enables wives in customary marriages to make claims for maintenance.

205 11 of 2009.

The next chapter will critically discuss the development of the customary rule of male ultimogeniture and the development thereof in Botswana. Chapter three will address aims 3 and 4 that were laid out for this study in chapter one, namely: To determine and understand the practice of male ultimogeniture in Botswana. To determine the developments of the practice of male ultimogeniture brought about by the *Mmusi v Ramentele* saga.

The Botswana Court of Appeal is the highest Court of authority in Botswana. The Botswana Court of Appeal in the *Mmusi v Ramentele* saga, reached a different conclusion to that reached by the South African Constitutional Court in the *Bhe* decision. The aim is to determine why the court system of these two countries reached different conclusions with regard to customary law of succession. See chapter four for a discussion on the different decisions reached.

CHAPTER 3

CUSTOMARY RULE OF ULTIMOGENITURE IN BOTSWANA

3.1 General introduction

The nomadic Bushmen²⁰⁶ were the earliest inhabitants of the region that is today referred to as the country of Botswana. Tswana-speaking people started to settle in the region in the 17th and 18th century. Botswana gained its independence in 1966 after the Botswana Independence Order of 1966 came into effect. It is at this time the *Constitution of Botswana* came into effect.²⁰⁷

The *Constitution of Botswana*²⁰⁸ does not expressly state that the Constitution is the supreme law of the country. However there is case law that confirms the fact that any law that is inconsistent with the values and principles of the *Botswana Constitution* is declared invalid. To illustrate this statement, in *Petrus v The State*²⁰⁹ the Court of Appeal declared section 301(3)²¹⁰ of the *Criminal Procedure and Evidence Act*²¹¹ void due to the fact that it infringed section 7(1) of the *Botswana Constitution*.²¹² In *Attorney-General v Dow*²¹³ the Court of Appeal declared section 4(1) of the *Citizenship Act*²¹⁴ void due to the fact that it violated the prohibition of discrimination set out in section 3 and 15 of the *Botswana Constitution*. In *Students' Representative Council of Molepolole College of Education v Attorney-General*²¹⁵ the Court of Appeal declared that the regulation instituted by the Molepolole College²¹⁶ was void due to the fact that it was contrary to section 15 of the *Botswana Constitution*.

The three cases mentioned above, may give rise to the fact that that the *Botswana Constitution* is viewed as being the highest authority of law in modern Botswana, and

206 Also referred to as the Basarwa.

207 Nsereko *Constitutional Law in Botswana* 29-42.

208 Of 1966 (hereafter the *Botswana Constitution*).

209 1984 1 BLR 14.

210 Section 301(3) made provision for corporal punishment to be permissive or mandatory.

211 67 of 1938.

212 Section 7(3) prohibits torture, inhuman, or degrading punishment.

213 1992 BLR 119.

214 17 of 1984. S 4(1) denied citizenship to the offspring of Botswana women married to foreigners, but granted citizenship to the offspring of Botswana men married to foreigners.

215 1994 BLR 178.

216 This regulation instituted by the college mandate required pregnant women to leave college for at least one year.

that any law or rule that is inconsistent with the values and principles entrenched in the *Botswana Constitution* will be declared invalid.²¹⁷

Customary law is the legal system that governs traditional or indigenous bodies. Today it is still acknowledged in Botswana,²¹⁸ but it is subject to the *Botswana Constitution*.²¹⁹ Botswana also has a *Customary Law Act*²²⁰ which provides the following in its preamble:

An Act to provide for the application of customary law in certain actions before the courts of Botswana, to facilitate the ascertainment of customary law and to provide for matters ancillary thereto.

Section 3 of the *Customary Law Act* states the following:

The courts of Botswana shall, within the limits of their jurisdiction, apply customary law in all cases and proceedings in which, by virtue of the provisions of this Act or any other law, customary law is properly applied and where it is not properly applied such courts shall apply the common law.

It is thus clear that Botswana legislation provides for the application and interpretation of customary law. Customary law in general and customary law of succession in particular is an accepted legal practice within the traditional communities in Botswana. There are many communities within Botswana and each of these communities' customary practices differ from one another.²²¹ In this study the focus will be on the Ngwaketse community and its inheritance rule of male ultimogeniture as it developed through the Botswana case namely, the *Mmusi v Ramantele* saga.²²²

Before the Ngwaketse customary inheritance rules can be discussed, it will first be important to give an overview of the development of customary law in Botswana. The next step is to explain the concept of male ultimogeniture. This chapter will conclude

217 Nsereko *Constitutional Law in Botswana* 29-42.

218 Nsereko *Constitutional Law in Botswana* 29-42.

219 Nsereko *Constitutional Law in Botswana* 29-42.

220 Act 51 of 1969.

221 Nsereko *Constitutional Law in Botswana* 29-42. Tibaijuka (ed) *Land tenure, housing rights and gender review in Southern Africa* 22-36.

222 Botswana High Court Decision MAHLB-000836-10 delivered on 12 October 2012 hereafter referred to as *Mmusi v Ramantele* (Botswana High Court referred to as the BHC). *Ramantele v Mmusi* CACGB-104-12 [2013] BWCA (3 September 2013) to date unpublished (Supreme Court of Botswana referred to as the SCB). For purposes of this study the development of the case through the different court structures will be referred to as the *Mmusi v Ramantele* saga.

with a detailed discussion of the development of the different court rulings in the *Mmusi v Ramantele* saga.

3.2 Historical development of customary law in Botswana

Traditional norms, values and principles associated with different ethnic groups in the Botswana region, helped maintain order in the region before the British colonisers arrived. The social, political, legal and economic affairs of the various groups were regulated by this rudimentary customary legal system. This legal system was uncodified and the remains thereof were handed down through oral tradition from one generation to the next. The male elders within the specific groups were responsible for enforcing the laws and customs.²²³

Many High Commissioners for Botswana were seated in South Africa, and it is for this reason that it can be understood why British interference in the internal administration of the country was minimal. This was consistent with the colonial policy of indirect rule, which facilitated existing indigenous systems of customary rules and laws in the Botswana region to remain in use.²²⁴ The indirect rule worked well in Botswana due to the fact that the Tswana community had already introduced a highly refined judicial system.²²⁵

The British did not interfere much with the indigenous legal system in which the chiefs were seen as the most prominent part. There were several levels or hierarchies of customary courts among the Tswana tribes.²²⁶ There were also other bodies in place such as family or household and descent groups, which parties had to use first before being able to go to the formal court system.

The application of customary law by customary communities has always been acknowledged within Botswana,²²⁷ the problem that often arises is that there is no

223 Alverson *Mind in the Heart of Darkness* 25-30.

224 Schapera *Tswana Law and Custom* 1-34 and 279-300.

225 Alverson *Mind in the Heart of Darkness* 25-30.

226 Schapera *Tswana Law and Custom* 1-34 and 279-300.

227 In the interstices of the customs and usages of the different tribes and draws its influence and power from the elaborate network of mystical beliefs, rituals and observances that constitutes a large part of the social structure of these tribes. Schapera *Tswana Law and Custom* 1-34 and 279-300

comprehensive definition of customary law.²²⁸ As with many other British colonies, Botswana retained many of the narrow and vague definitions of customary law that were given in the colonial era.²²⁹ Section 4(1) of the *Common Law and Customary Law Act*²³⁰ states:

Customary law, as comprised in the laws of Botswana, consists of rules of law which by custom are applicable to any particular tribe or tribal community in Botswana, not being rules which are inconsistent with the provisions of any enactment or contrary to morality, humanity or natural justice.

The above definition fails to explain what customary law truly means, and thus fails to indicate how it differs from unsystematic norms such as mere customs or rules of morality.²³¹ Over and above the fact that definition is vague, the second part of the definition has often stirred controversy due to the fact that it excludes customary law from being considered by courts if it is "inconsistent with the provisions of any enactment or contrary to morality, humanity or natural justice." This repugnancy clause was introduced by the British in most of their former African colonies, and was often used by judges and administrators to exclude customary rules from being considered.²³² This repugnancy clause was also referred to by the Court of Appeal in the *Mmusi v Ramantele* saga which will be discussed later on in this chapter.

The development of customary law can be summarised as follows: prior to British colonisation there was a variety of indigenous legal systems living in tribal areas, which is today collectively referred to as customary law.²³³ The Botswana legal system has established a definition for customary law. This definition can be found under section 2 of the *Customary Courts Act*, 1969 and section 4 of *Common law and Customary Act*.

Even though the British colonisers respected and recognised the native laws of the indigenous people of Botswana, these laws were never formally incorporated into the general law of the country. The 1966 *Botswana Constitution* also never changed the

228 The statutory definitions that were developed in the colonial era can be seen as being eccentric and vague, and thus lead judges in statutory courts to repeal or revoke customary rules which they considered to be in contravention to their legal system.

229 Woodman and Obilade *African Law and Legal Theory* 145-169.

230 51 of 1969 (Cap 16:01).

231 Bennett *Sourcebook of African Customary Law* 5.

232 *Eshungbaji Eleko v Officer Administering the Government of Nigeria* 1931 AC 662.

233 Booi 2006 www.nyulawglobal.org.

position of customary law within the country's general law, and thus the status of customary law in Botswana remains unchanged today.²³⁴

It has now been established that customary law has always been recognised within Botswana, even though the precise position within the Botswana legal system is unclear, it can be concluded that customary law practices are accepted within Botswana and recognised by the Botswana legal system as well as the Botswana Court system.²³⁵ The next topic to clarify is the customary law of succession rule of male ultimogeniture.

3.3 Male ultimogeniture

3.3.1 Background with regard to customary law of succession in Botswana

The customary rule of male ultimogeniture is fundamental to the Ngwaketse customary law of succession. Customary law²³⁶ of succession aims to protect the family and to make sure that all the people that were dependant on the deceased are looked after when the deceased dies. Customary law of succession wishes to achieve this through assigning the responsibility of caring for and protecting the deceased's dependants to one person. This one person in return gains control of the family property.²³⁷

Customary law of succession ensures that all dependents of the deceased will continue to have a home and resources that will assist their maintenance. This system thus ensures that there is no homelessness after the head of a household passes away.²³⁸

Family property and the preservation of family property are at the heart of customary law of succession. Family property not only provides a residence to the family members but also enables members to share in any economic proceeds or benefits which may ensue from cultivating the land.²³⁹ The fact that all family members have

234 Booi 2006 www.nyulawglobal.org.

235 Booi 2006 www.nyulawglobal.org.

236 Indigenous refers to originating or occurring naturally in a particular place, in this instance referring to Botswana.

237 Section 41(3) of the *Customary Courts Act* 51 of 1969.

238 Schapera *Tswana Law and Custom* 1-34 and 279-300.

239 Nwauche 2013 *Open University Law Journal* 2-6.

an interest in the property ensures that there is continuous interaction between family members, which in turn facilitates growth within society. It improves the values of unity and instils an ethic of caring for one another.²⁴⁰

It is thus important to note that the perpetuation and preservation of the family unit and its property lies at the heart of customary law of succession. As was mentioned in chapter one, customary succession is patriarchal by nature. It is often argued that by striking down any discrimination against women in customary law of succession, women would get the opportunity to be head of the family and thus become responsible for the maintenance and protection of the family property.²⁴¹ It must however be kept in mind that female inheritance is not a completely new concept in customary law of succession. Customary history shows that women have always been entitled to inherit their mother's agricultural fields and personal property. It is also confirmed by evidence that since the 1980's, women were increasingly inheriting family plots and also being named guardians over these family plots even though there were men in the family.²⁴² It is thus clear that not all customary law of succession rules will always discriminate against woman. Some traditional communities' inheritance rules may accept female succession whilst others may not be in favour of it.²⁴³

Botswana have many different traditional communities, and all these communities apply certain rules and traditions under the broader term of customary law. For purposes of this study only the Ngwaketse communities' customary succession of family property will be discussed. Firstly the concept of male ultimogeniture, which is a central component of the Ngwaketse tribe tradition, will be discussed and then how this rule has developed through different rulings made by the different court structures within Botswana during the *Mmusi v Ramantele* saga.

240 Nwauche 2013 *Open University Law Journal* 2-6.

241 Nwauche 2013 *Open University Law Journal* 2-6.

242 Richardson "Women's inheritance rights in Africa: The need to integrate cultural understanding and legal reform" 19.

243 Nwauche 2013 *Open University Law Journal* 2-6. Richardson "Women's inheritance rights in Africa: The need to integrate cultural understanding and legal reform" 19.

3.3.2 *The concept of male ultimogeniture*

It is important to start by pointing out that generally, the customary rule of ultimogeniture consists of a series of rules and not just one single uniform rule. The details of these rules vary in practice and usage among the different communities and the type of property that may be involved.²⁴⁴ Generally, ultimogeniture refers to the inheritance of the last-born of a family. It refers to a privileged position to the parent's wealth, estate or office.²⁴⁵ Male ultimogeniture thus refers to the male last born son. This tradition of last-born inheritance is historically far rarer than that of primogeniture, which is first-born inheritance.²⁴⁶

In a seminar paper which describes the agricultural production in a Lebowa village, Molepo²⁴⁷ refers to the transfer of property from parents to their youngest sons. In the case study that Molepo conducted, evidence showed that there are certain African communities that consider their last-born to be the heir to the family home. Molepo concluded that this practice is "contrary to ethnographic literature which suggests that it is the first son of a first wife who takes his father's property".²⁴⁸

The practice of ultimogeniture is, however, not a rigidly defined one, there are certain exceptions allowed: if the last-born does not want the land, one offers it to one's other son or sons.²⁴⁹

Goody refers to ultimogeniture as a type of bribe or bargain,²⁵⁰ he believes that the practice of ultimogeniture represents a form of attempted control over the earnings of a son, due to the fact that the last-born son will stay with the parents for the longest period.

Deborah James²⁵¹ confirms Goody's statement that ultimogeniture could be seen as a form of a bribe or a bargain due to the following statement:

244 Fombad 2014 *The Journal of Modern African Studies* 478.

245 Rudolf 1918 www.ebooksread.com/authors-eng/rudolf-hbner 88.

246 Fombad 2014 *The Journal of Modern African Studies* 478.

247 Molepo "Peasants and/or proletariat? A case study of a group of migrant workers at Haggie Road from Molepo Tribal Village" 1.

248 Molepo "Peasants and/or proletariat? A case study of a group of migrant workers at Haggie Road from Molepo Tribal Village" 1.

249 James 1988 *Social Dynamics* 36-51.

250 Goody *Death, property and the ancestors* 40-56.

251 James 1988 *Social Dynamics* 36-51.

The practice of giving one child custom of offering at least this one child the security of an agricultural supplement to his income, and a rural home for his eventual retirement, may help to ensure that he will remain based at this parents' home, and will continue to remit to them the cash essential for their livelihood.

James²⁵² notes that many studies which have been done in different parts of rural southern Africa show that there is a radical transformation taking place in the mutual reliance which binds youngsters to their older relatives, and children to their parents. This is due to the entrenchment, need and popularity of migrant labour. The elder children go off to foreign countries to find work and are no longer close to their relatives to ensure that they are properly cared for as would be the case in the traditional rule of male primogeniture discussed in chapter two.

Delius²⁵³ found that this independent earning power, which young male migrants are achieving, pose a threat to senior male relatives' authority. The threat ensues from the fact that this senior authority was mainly based on the material control and social resources. Now that those young male migrants are becoming the main breadwinners in their families, this previous senior authority is dwindling, as the seniors are finding that they are now dependent on the young male relatives.

Due to the agrarian nature of many African communities, the land is seen as being the most important form of family property because it can provide subsistence and store the family's wealth. It thus has economic and social significance. It is therefore important that the family property is sustained and remains within the family as far as possible.²⁵⁴

As already explained, this study focuses on the Ngwaketse custom and practice of the rule of ultimogeniture. In this custom the last-born son is entitled to inherit the parents' homestead to the exclusion of the other children. The rule of ultimogeniture recently came under the magnifying glass in the *Mmusi v Ramantele* saga which will be discussed next.

252 James 1988 *Social Dynamics* 36-51.

253 Delius *The land belongs to us* 76.

254 Nwauche 2014 *University of Botswana Law Journal* 4.

3.4 *Mmusi v Ramantele (BHC) and Ramantele v Mmusi (SCB)*²⁵⁵

3.4.1 *Facts and background*

This case has endured for several years in different court structures within Botswana, and it started as follows. In 2007, Edith Mmusi²⁵⁶ and her sisters brought an application against Molefi Ramantele, who claimed to be the true owner of the homestead on which Mmusi and her sister's currently resided. Mmusi's youngest brother Banki had entered into an agreement with his half-brother Segomotso,²⁵⁷ who was the father of Molefi Ramantele.²⁵⁸ Banki agreed to bequeath the family home to Ramantele upon Banki's death, as Banki believed he would receive the homestead according to the rule of male ultimogeniture. In exchange for the family homestead that Banki agreed to bequeath to Segomotso, Banki received community plots from Segomotso (Ramantele's father).

Banki (Mmusi's brother) believed he was entitled to the family property according to the local Ngwaketse custom which provided that the family homestead always passes to the last born male child.²⁵⁹ Banki, concluded this agreement with Ramantele's father before the distribution of inheritance, especially the family homestead, had been finalised.²⁶⁰

Ramantele claimed that he was the rightful owner of the family home under the agreement reached between his father and Banki (Edith Mmusi's brother). Molefi

255 Botswana High Court Decision MAHLB-000836-10 delivered on 12 October 2012 hereafter referred to as *Mmusi v Ramantele* (Botswana High Court referred to as the BHC). *Ramantele v Mmusi* CACGB-104-12 [2013] BWCA (3 September 2013) to date unpublished (Supreme Court of Botswana referred to as the SCB).

256 Hereafter referred to as Mmusi.

257 Segomotso was the son of Silabo and another woman. Silabo and Thwesane were the parents of both Edith Mmusi and Banki. There is no evidence that Segomotso was ever legally adopted into the marriage of Silabo and Thwesane. Neither is there evidence that Segomotse ever stayed in the matrimonial home of Silabo and Thwesane. Paras 2-3 *Ramantele v Mmusi* (SCB).

258 Hereafter referred to as Ramantele.

259 The Ngwaketse custom also prescribes that the rest of the property has to be divided equally among the other children, regardless of gender.

260 When Silabo (Mmusi and Banki's father) died in 1952, his estate was distributed among his heirs. His widow (Thwesane) remained with the family homestead which Mmusi and her sister's subsequently developed to host three dwellings. Mmusi believed that she and her sisters would inherit the homestead by means of intestate succession on the death of Thwesane in 1988. Paras 7-9 *Ramantele v Mmusi* (SCB).

Ramantele claimed that upon the death of Banki and Mmusi's father the property would pass to him.²⁶¹

Molefi Ramantele tried to evict the Mmusi sisters. They contended this eviction in a customary court, stating that they had paid to maintain the house and had also expanded the house with their own money.²⁶²

Ramantele opposed the High Court decision in *Mmusi v Ramantele (BHC)* and thus appealed this ruling in the Botswana Court of Appeal in *Ramantele v Mmusi (SCB)*.²⁶³ The development of this case through the customary, High and Appeal court structures will be discussed below.

3.4.2 *Development of the Mmusi v Ramantele saga through different court structures*

Botswana is one of the few African countries that maintain and develop its customary courts which now play an important role in settling disputes in an inexpensive, prompt and informal manner.²⁶⁴

Three conflicting customary court decisions followed in the *Mmusi v Ramantele* saga. The first and lowest customary court approached was the lower customary court.²⁶⁵ The lower customary court stated that the Ngwaketse custom dictated that the last-born male child was entitled to inherit the family homestead where the father died intestate.²⁶⁶ The Court found that the home was given to Segomotso and accordingly awarded to Molefi as his heir. The court subsequently gave Mmusi six months to vacate the homestead.²⁶⁷ On appeal of the decision by the lower customary court, the Higher Customary Court declared that the homestead belonged to all the children and that they all had the right to use it for common events. The Higher Customary

261 Paragraphs 7-9 *Ramantele v Mmusi* (SCB).

262 Paragraph 10 *Ramantele v Mmusi* (SCB).

263 CACGB-104-12 [2013] BWCA (3 September 2013) – to date unpublished. Two judgments were delivered, one by Lesetedi JA with Kirby JP, Twum JA, Foxcroft JA and Legwaila JA concurring. This judgment will be referred to as *Ramantele v Mmusi* (main judgment). The other judgment was a separate but concurring judgment by Kirby JP. This judgment will be referred to as *Ramantele v Mmusi* (separate judgment).

264 Fombad 2014 *The Journal of Modern African Studies* 481.

265 Paragraphs 11-31 *Ramantele v Mmusi* (SCB).

266 Paragraphs 11-31 *Ramantele v Mmusi* (SCB).

267 Paragraphs 11-31 *Ramantele v Mmusi* (SCB).

Court also directed the elders of the family to convene a meeting in which they would appoint a child that would look after the homestead on behalf of the whole family.²⁶⁸

On appeal of the decision of the higher customary court, the Customary Court of Appeal found that according to the Ngwaketse customary law and culture, it was the last-born son that inherited the parents' homestead as an intestate heir.²⁶⁹ Mmusi was ordered by the court to vacate the property with all her belongings within three months.

Mmusi appealed this decision to the High Court of Botswana. There were three prominent features that emerged in the *Mmusi v Ramantele* saga High Court ruling. The first feature which the High Court emphasised was the legal protection from unfair discrimination, which section 3²⁷⁰ of the *Botswana Constitution* provides.²⁷¹

The effect of the Ngwaketse Customary law, sought to be impugned, is to 'subject women to a status of perpetual minority, placing them automatically under the control of male heirs, simply by virtue of their sex'. I do not think it can be credibly argued that discrimination alluded to above serves any worthy or important societal purpose. It is a matter of record that the government is concerned about this discrimination and its wish to see it ended, if what it proclaims at International forums is anything to go by. Speaking for myself, I am unable to reconcile the rule under discussion with the equality provisions captured by Section 3 (a) of our Constitution.

The emphasis was important due to the fact that Section 15²⁷² excludes inheritance and marriage matters from its prohibition on discrimination. The High Court disagreed with previous court's interpretation of the prohibition of discrimination. The High Court built on the interpretation made in the *Botswana v Unity Dow case*,²⁷³ by stating that the guarantee of equality before the law would only be limited in two instances: "where the limitation prevents prejudice to the rights of others, or promotes the public

268 Paragraph 32 *Ramantele v Mmusi* (SCB).

269 Paragraph 33 *Ramantele v Mmusi* (SCB).

270 *Mmusi v. Ramantele* para 91. S 3 of the *Constitution of Botswana* refers to the "protection of the law" applying to all regardless of race, place of origin, political opinions, colour, creed or sex.

271 Justice Key Dingake in para 196 of *Ramantele v Mmusi* (SCB).

272 Paragraphs 200 and 202 *Ramantele v Mmusi* (SCB). Botswana, like several other African countries, has a caveat for discrimination that deals with marriage, divorce or inheritance (15(c)) or is the result of the application of customary law (15(d)). The provisions of s 15 are not applicable in these cases, but those of article 3 have no such limitation. S 3 does, however, limit the right in light of "respect for the rights and freedoms of others and for the public interest".

273 1992 BLR 119 (CA) 168.

interest". Neither of these instances is applicable when women are discriminated against in customary inheritance.

The second feature which the High Court emphasised was the interpretation of the *Customary Law Act*.²⁷⁴ The High Court stated that where there is doubt about the content of a customary rule, it should be measured according to the underlying principle of "humanity".²⁷⁵ The High Court stated that according to the underlying value of the Ngwaketse inheritance rules, the people who are responsible for the family's welfare, the people who invested in the upkeep of the property and the people who needed the home due to external circumstances were always to be prioritised. The High Court concluded that all these aspects related to Mmusi and her sisters and thus it would be against the underlying sense of "humanity" in customary law to deprive Mmusi and her sisters of their inheritance rights.

The third feature that the High Court emphasised was the enunciation of living customary law. Before this case, the Botswana jurisprudence did not often refer to the concept of "living" customary law. The High Court stated that historical literature and the decision made by the lower customary courts led to the idea that customary law was "living", which in essence meant that it was subject to fluctuating social dynamics. The High Court stated that "there is no rational and justifiable basis for sticking to the narrow norms of days gone by when such norms go against current value systems".²⁷⁶

The High Court ruling in the *Mmusi v Ramantele* saga to a certain extent undermined the typical customary succession stereotype of being rigid and only providing for a male heir. At the same time it also elevated women's inheritance in customary law of succession.

Ramantele was not satisfied with the ruling given by the High Court of Botswana. He approached the highest court of appeal in Botswana, the Supreme Court of Botswana.²⁷⁷

274 Of 1969.

275 Paragraph 197 *Ramantele v Mmusi* (SCB).

276 Paragraph 80 *Ramantele v Mmusi* (SCB).

277 Booi 2006 www.nyulawglobal.org (hereafter referred to as the Court of Appeal).

3.4.3 *Legal question in Ramantele v Mmusi (SCB)*

The legal question that had to be decided by the Court of Appeal was whether the rule of ultimogeniture was unconstitutional as declared by the Botswana High Court.

3.4.4 *Judgement of Ramantele v Mmusi (SCB)*

The Court of Appeal said the following with regard to the judgement given by the High Court:²⁷⁸

These are all imponderables which unfortunately merely serve to unnecessarily lengthen the litigation. The constitutional question did not advance the determination of the case in anyway and not much thought seems to have been given to this aspect either by the judge or counsel of representing parties. The wheels of justice must not be mired and slowed by philosophical and theoretical issues which do not advance the dispute resolution process, nor by uncalled for piece-meal determination of litigation.

The Court of Appeal stated that it was a general rule of decision-making²⁷⁹ that "where it is possible to decide a case before the court without having to decide a constitutional decision, the court must follow that approach."²⁸⁰ The Court of Appeal thus stated that the determination of the constitutional question had no relevance to the real dispute between the parties.

The Court of Appeal did not follow the route instituted by the High Court of the constitutionality of the ultimogeniture rule, but rather decided on the correct implementation and application of the Ngwaketse customary law rule. It set out the following requirements which the appellant (Ramantele) had to satisfy in order to succeed in his claim to the family homestead.²⁸¹

Ramantele had to prove that Banki, did inherit the property from the deceased parents. If there truly was an inheritance, it would be practiced in such a manner that it unfairly excluded Mmusi and her sisters. Ramantele also had to prove that an

278 Paragraph 40 *Ramantele v Mmusi* (SCB).

279 Paragraph 41 *Ramantele v Mmusi* (SCB).

280 *S v Mhlungu and Others* 1995 2 SA 867 at 895E.

281 Paragraphs 41-43 *Ramantele v Mmusi* (SCB).

agreement between Banki and Segomotso (Ramantele's father), took place in which Banki gave ownership of his inheritance of the family homestead to Segomotso.²⁸²

The Court of Appeal pointed out that Mmusi and her sisters had been in possession of the property for more than 20 years. There was no evidence led in the Customary Court of Appeal of any distribution of property to Banki, thus no evidence that the ownership of property asserted to him during his lifetime. On this alone the Ramantele's case failed.²⁸³

The Court of Appeal however stated that, had the appellant succeeded by proving that Banki did indeed inherit the family homestead, he would have had to prove the existence of the Ngwaketse customary rule of ultimogeniture (last born son inherits to the exclusion of everyone else). This practice of exclusion was in accordance with an Ngwaketse custom.²⁸⁴ It should also be proven that this custom entitles the last born son to deal with the homestead for his own benefit. This would be in reference to the fact that Banki traded his inheritance to the family homestead for other tribal plots.

Evidence was contradictory to the existence of an inflexible rule where the last born son inherited the homestead.²⁸⁵ The ultimogeniture rule only applied in the instance where the last born son never left the parents' home except when he married or for bad behaviour. It was not disputed that Banki had left the homestead long ago, got married and established a home of his own.²⁸⁶ The respondents led undisputed evidence in the High Court that Banki had been banished by his uncles for bad behaviour and thus had never returned.²⁸⁷ According to this evidence Banki would not have been able to inherit the property under the rule of ultimogeniture as he had left the homestead and was also banished from the family homestead by his uncles.²⁸⁸

The Court of Appeal, wished to address the discussion by the High Court as to whether the Ngwaketse rule was in fact a customary rule. It had to be determined whether this said Ngwaketse custom constitutes a law in terms of the definition of

282 Paragraph 43 *Ramantele v Mmusi* (SCB).

283 Paragraph 44 *Ramantele v Mmusi* (SCB).

284 Paragraphs 41-43 *Ramantele v Mmusi* (SCB).

285 Paragraph 45 *Ramantele v Mmusi* (SCB).

286 Paragraph 45 *Ramantele v Mmusi* (SCB).

287 Paragraph 46 *Ramantele v Mmusi* (SCB).

288 Paragraph 46 *Ramantele v Mmusi* (SCB).

customary law in section 2 of the *Customary Law Act*.²⁸⁹ The Court of Appeal wished to address the fact that a customary rule had to satisfy a legal test before it could be considered as an enforceable customary law.²⁹⁰ *Customary Law Act*²⁹¹ defines customary Law as:

In relation to any tribe or tribal community, the customary law of that tribe or community so far as it is not incompatible with the provisions of any written law or morality, humanity or natural justice.

This definition must be read together with section 10(2) of the same Act:

If the system of customary law cannot be ascertained in accordance with subsection (1) or if the customary law is not ascertainable, the court shall determine the matter in accordance with the principles of justice, equity and good conscience.

These two provisions thus set out the values which a customary rule should possess before it can receive recognition as law.²⁹² The rule must not be inconsistent with the values or principles of natural justice either and it should not be immoral either of itself or its effect. Neither should it be inhuman.²⁹³

Customary law must be applied in accordance with the set out principles of morality, humanity and natural justice.²⁹⁴ A rule that denies the children who played a key role in developing the estate of their deceased parents, a right to any share of the property; in favour of a child that refused to play any part in the upkeep of the property, while this child offers no compensatory award to the other children, is against fairness, equity and good conscience. The Court of Appeal thus declared that this rule does not qualify to be given the status of a law or to be enforced by courts.²⁹⁵

The Court of Appeal stated that if there was doubt about the extent that such a custom, of law, was discriminatory or did not afford the respondents (Edith Mmusi and sisters) equal protection, only then should it be declared unconstitutional.²⁹⁶

289 The steps to determine whether a custom was law, will be discussed below.

290 Paragraph 47 *Ramantele v Mmusi* (SCB).

291 51 of 1969.

292 Paragraph 49 *Ramantele v Mmusi* (SCB).

293 Paragraph 49 *Ramantele v Mmusi* (SCB).

294 Paragraphs 49-57 *Ramantele v Mmusi* (SCB).

295 Paragraphs 49-57 *Ramantele v Mmusi* (SCB).

296 Paragraphs 41-43 *Ramantele v Mmusi* (SCB).

Even though the Court of Appeal did not believe the High Court was correct to declare the Ngwaketse rule unconstitutional, it still provided an explanation to ascertain whether a law was constitutional or not. The Court of Appeal stated that a court first has to consider whether no proper construction which is consistent with the *Botswana Constitution* can be given to that law.²⁹⁷ The Court of Appeal further stated that each law is presumed to be in line with the supreme law of the country, which is the *Botswana Constitution*, unless otherwise proven.²⁹⁸ If no such construction can be given to a law, then it is in contrast with the *Botswana Constitution* and thus declared unconstitutional.

The Court of Appeal stated that section 15 of the *Botswana Constitution* was not a stand-alone provision, and that it should be read together with section 3 of the *Botswana Constitution*.²⁹⁹ Section 3 sets out the fundamental rights of each individual, whilst section 15 is intended to provide equal protection for individuals before the law and to ensure that discrimination is prohibited.³⁰⁰ Section 15 thus ensures that the rights and freedoms of one individual's do not prejudice another individual rights and freedoms.³⁰¹

Once the Court of Appeal set out section 3 and 15 of the *Botswana Constitution* and found that the judgement made by the High Court declaring the rule unconstitutional was not necessary.³⁰² The Court of Appeal stated that there was not an informed constitutional question before the High Court judge.³⁰³ The Court of Appeal also held that declaring a provision unconstitutional would in any case not resolve the dispute before the parties.³⁰⁴

The Court of Appeal stated that customary law was not static. It stated that customary law develops and modernises with the constant change of society's ethos.³⁰⁵ The Court of Appeal confirms this conclusion by stating the following:³⁰⁶

297 Paragraph 58 *Ramantele v Mmusi* (SCB).

298 Paragraph 58 *Ramantele v Mmusi* (SCB).

299 Paragraph 65 *Ramantele v Mmusi* (SCB).

300 Paragraph 68 *Ramantele v Mmusi* (SCB).

301 Paragraph 72 *Ramantele v Mmusi* (SCB).

302 Paragraph 79-85 *Ramantele v Mmusi* (SCB).

303 Paragraph 103 *Ramantele v Mmusi* (SCB).

304 Paragraph 103 *Ramantele v Mmusi* (SCB).

305 Barton *Law in radically different culture* 255-256.

For after all what is customary law but a set of rules developed by society to address issues around certain values which protect the community's social fabric and cohesion. No purpose is served by trying to categorise customary law into a written or unwritten law as the appellant attempted to do, more especially in our jurisdiction where customary law has not been codified or reduced into a statutory form.

The Court of Appeal held that the appropriate relief in this situation was firstly to interpret the Ngwaketse customary law and then take the merits of the dispute and apply it to the Ngwaketse principle of the rule of male ultimogeniture.³⁰⁷ The Court of Appeal declared that the Ngwaketse customary law of inheritance did not prohibit female or elder children from inheriting as intestate heirs.³⁰⁸ The Court of appeal also held that Ramantele's claim to inheritance would never have succeeded according to the proper application of the Ngwaketse customary inheritance rule.³⁰⁹ The Court of Appeal finally found that the surviving children of Silabo and Thwesane had to determine among themselves who would take care of the property on behalf of the other children, if they could not settle this, then the matter had to be referred to the uncles to appoint someone.³¹⁰

3.5 Conclusion

This chapter has shown that customary law existed in Botswana before any settlers of "European" descent settled in the area. Unlike South Africa, Botswana was left largely untouched during the colonisation period. Apart from declaring a protectorate over Botswana, the British left most of the administration of legal matters to the indigenous legal systems in place at the time. Botswana makes provision for a customary judicial system and even has a Customary Court of Appeal. Thus it is clear that customary law is an accepted practice within Botswana.

This chapter gave a clear discussion of the Ngwaketse tribe's customary succession rule, which provides for male ultimogeniture. The application of this rule was scrutinised in the different court judgements in the *Mmusi v Ramantele* saga. The judgements made in the customary courts and High court were briefly discussed. The

306 Paragraph 77 *Ramantele v Mmusi* (SCB).

307 Paragraph 104 *Ramantele v Mmusi* (SCB).

308 Paragraph 105 *Ramantele v Mmusi* (SCB).

309 Paragraphs 45-52 *Ramantele v Mmusi* (SCB).

310 Paragraph 105 *Ramantele v Mmusi* (SCB).

main focus was the judgement given by the Highest Court in Botswana -the Court of Appeal.

The Court of Appeal however did not follow the route instituted by the High Court of the constitutionality of the ultimogeniture rule, but rather decided on the correct implementation and application of the Ngwaketse customary law rule and found that the rule did not apply in this instance. The Court of Appeal found that the sisters were entitled to stay in the family homestead. The Court of Appeal stated that a customary rule was not seen to be customary law, until it fulfilled the following prerequisites: "the values or principles of natural justice, also not be immoral either of itself or its effect and it should also not be inhuman".³¹¹

It can thus be concluded that customary law and customary law of succession are accepted within the Botswana legal system. However, due to the patriarchal nature of many of the customary rules, there is pressure on these customary rules and traditions to conform to the values and rights laid out in the *Botswana Constitution*. The final judgement given by the Supreme Court of Botswana (Court of Appeal), differed drastically to the final judgement given by the Constitutional Court of South Africa. It can clearly be established that the judgement with regard to the implementation and practice of customary rules of succession within a democratic state can differ in interpretation. These differences in interpretation will be discussed in the chapter to follow.

311 Paragraph 49 *Ramantele v Mmusi* (SCB).

CHAPTER 4

SOUTH AFRICA AND BOTSWANA COMPARED

4.1 Introduction

Before differences in interpretation of the customary rules of male ultimogeniture and primogeniture, within two countries can be compared, it is first important to establish whether there are similarities in the legal systems of these two countries. It is of no use to compare a development within one country with that of another country if the legal systems in the two countries differ immensely from each other. The developments within one country cannot easily be applied within the other country because the legal systems are so far removed from one another.

South Africa has a mixed legal system: the civil law system was inherited from the Dutch, the common law system was inherited from the British and then there is also a customary law system which was inherited from the indigenous people in South Africa.³¹²

In 1652 the Dutch landed in the Cape of Good Hope and brought with them the Roman-Dutch legal system. The Roman-Dutch legal system remained the main legal system until the establishment of the Union of South Africa,³¹³ which was a dominion of the British Empire. Roman-Law did however not fall into disuse, where British law did not stand South Africa referred to Roman-Dutch law for clarity, Roman Dutch law was thus retained as the common law of the country. The English law influenced the procedural law and methods of adjudication. South Africa's criminal and civil procedure law, company law, constitutional law and the law of evidence is influenced by English law, whilst the Roman-Dutch common law is found in law of contracts, law of delict, law of persons, and family law.

In 1996 the final *Constitution of the Republic of South Africa* was introduced and this Constitution was seen as the:³¹⁴

312 Wille, Du Bois and Bradfield *Wille's Principles of South African Law*.

313 31 May 1910.

314 Section 2 of the *South African Constitution*.

Supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

Due to the distinctive heritage of the South African legal system, and the constitutional belief to regard comparative law,³¹⁵ foreign law is often consulted, it is however only used as persuasive authority and is not considered to be binding.³¹⁶

The *South African Constitution* vests all the judicial authority in the courts. The courts are independent and only subject to the *South African Constitution* and the law.³¹⁷

Section 166 of the *South African Constitution* provides for the following courts:

The South African court system is organised hierarchically, and consists of (from lowest to highest legal authority): Magistrates' Courts, High Courts; a Supreme Court of Appeal, the highest authority in non-Constitutional matters; and a Constitutional Court, which is the highest authority in constitutional matters.

Section 166(e) provides for customary courts and tribunals:

any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High of Magistrates Court.

The composition of the South African legal system has now been established. The judicial authority which is conferred upon the South African courts by the *South African Constitution*, as well as the court hierarchy has briefly been discussed. It is now important to look at the composition of the Botswana legal system, before these two countries can be compared.

The nomadic Bushmen³¹⁸ were the earliest inhabitants of the Bechuanaland region that is today referred to as the country of Botswana. Tswana-speaking people started to settle in the region in the 17th and 18th century. In the early 19th century Europeans started to venture into the region. At this time Khama III was the most prominent indigenous leader in the country. The British established a protectorate over the

315 Section 39 of the *South African Constitution* Interpretation of Bill of Rights.-(1) When interpreting the Bill of Rights, a court, tribunal or Fromm - (b) must consider international law; and (e) may consider foreign law.

316 Quansah *Introduction to the Botswana legal system* 34.

317 Section 165 of the *South African Constitution* Judicial authority. The judicial authority of the Republic is vested in the courts. (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

318 Also referred to as the Basarwa.

territory³¹⁹ in 1885 and a High Commissioner was appointed. The High Commissioner was seated in the Cape and thus Bechuanaland was governed from South Africa. It is for this reason that Botswana remained mainly untouched until it gained independence in 1966.

In 1908 the British established the *Act of Union* which declared that Bechuanaland, Basutoland and Swaziland would be connected or rather added to South Africa.³²⁰ Section 19 of the *Foreign Jurisdictions Act* provided for the application of the laws which were applied in the Cape Colony, to be applied in Botswana. As noted earlier with regard to the South African legal system, the common law enforced in the Cape Colony was Roman-Dutch law that had been developed by the superior courts of the Cape Colony.³²¹ The Roman-Dutch law of the Cape colony, as influenced by the English law is the common law which applies in Botswana. This common law operates in cohesion with legislation, judicial decisions and customary law as a source of law within Botswana. Roman-Dutch principles with regard to law of persons, law of delict and law of property were followed, just as they are in South Africa. English law principles are followed with regard to law of contract.³²²

Botswana gained its independence in 1966 after the Botswana Independence Order of 1966 came into effect. At this time the *Constitution of Botswana* with its modifications also came into effect. Even though the *Constitution of Botswana* does not expressly state that it is the supreme law of the country, it is assumed to be so.³²³

The judiciary's independence is provided for in the *Botswana Constitution*.³²⁴ The Botswana Constitution states the following with regard to the High Courts:³²⁵

There shall be for Botswana a High Court which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law

319 Known as the Bechuanaland Protectorate, this was due to Khama III appealing to the British for protection from both the Afrikaners in South Africa and the Matabele in the north.

320 The addition of these regions was also facilitated by the *Foreign Jurisdictions Act* of 1890.

321 Quansah *Introduction to the Botswana legal system* 34.

322 Pain 1978 *The Comparative and International Law Journal of Southern Africa* 137-167.

323 *Attorney General v Dow* 1992 BLR 119 illustrates the supremacy of the Botswana Constitution, due to the fact that the majority of the judges in the Court of Appeal declared s 4(1) of the *Citizenship Act* void due to the fact that it violated the prohibition of discrimination set out in s 3 and 15 of the *Botswana Constitution*.

324 Dingake *An introduction to the constitutional law of Botswana* 23.

325 Section 95(1) Jurisdiction and Composition.

and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law.

It can thus be concluded that in essence the British Protectorate which was declared over Botswana incorporated South African law with very little modification in Botswana.³²⁶ During the time of the protectorate, courts in Botswana had to consider the way South African courts interpreted and applied legislation.³²⁷ South Africa and Botswana thus have very similar legal backgrounds, principles and legal make-up. As the focus of this study is the application of customary principles of male primogeniture and ultimogeniture, the status of customary law within the two countries should briefly be compared.

4.2 Legal status of customary law within South Africa and Botswana

4.2.1 Customary law in legislation

In the South African court case *Shilubana v Nwamitwa* the Court found that it was "important to respect the right of communities that observe a system of customary law to develop their law, particularly if the initiative comes from them".³²⁸ This above mentioned principle is what South Africa wishes to do, yet in the end it has a duty to uphold the core values of the *South African Constitution*, and thus once again, anything that is not in line with these values cannot be applied as law.

In the minority judgement given by Judge Ngcobo in the *Bhe* decision, the judge made the following remarks with regard to the development of customary law:³²⁹

These considerations require that, where possible, courts should develop rather than strike down a rule of indigenous law. Furthermore, there may be disputes as to whether indigenous law is applicable in a particular situation. There will be circumstances where its application may result in an injustice. In others it may not. Until such time that the legislature enacts the relevant legislation, disputes as to whether indigenous law should apply must be managed and regulated.

326 Especially after the Act of Union 1908.

327 This is confirmed in the fact that South African textbooks with regard to criminal procedure law are recognized in Botswana.

328 *Shilubana v Nwamitwa* 2008 9 BCLR 914 (CC) para 45.

329 Paragraphs 215 and 225 of the *Bhe* decision.

The further findings made by Judge Ngcobo will be discussed later in this chapter that follows. Courts in Botswana had the following conclusions to make with regard to customary law.

The Botswana *Customary Law Act* definition was also referred to by the Court of Appeal in the *Ramantele v Mmusi* saga.³³⁰ The Court stated that:³³¹

A customary rule to receive the status of a law and thus enforceable by the courts must not be inconsistent with the values of or principles of natural justice.

The Court of Appeal stated that customary law was not static. It stated that customary law develops and modernises with the constant change of society's ethos.³³² The Court of Appeal confirms this conclusion by stating the following:³³³

For after all what is customary law but a set of rules developed by society to address issues around certain values which protect the community's social fabric and cohesion. No purpose is served by trying to categorise customary law into a written or unwritten law as the appellant attempted to do, more especially in our jurisdiction where customary law has not been codified or reduced into a statutory form.

It can be concluded that customary law within South Africa and Botswana can be summarised as the customs and rules that are used by indigenous African people to regulate their customary traditions, beliefs and practices. Both of these countries' are dedicated to enforcing the ethos of their constitution's. However, they do make provision for the practice of customary law within the general legal system of the country. The controversy comes in with the question: to what extent can customary law rules, specifically male primogeniture and ultimogeniture, be practiced before they contradict the broader values and principles of these countries' legal systems.

This question can only be answered by looking at how the highest courts in these two countries approached the development and implementation of the customary law of succession principles of primogeniture and ultimogeniture. The similarities and differences in the judgements of the *Bhe* decision and *Mmusi v Ramantele* saga will be discussed next.

330 Paragraph 47 *Ramantele v Mmusi* (SCB).

331 Paragraph 49 *Ramantele v Mmusi* (SCB).

332 Barton *Law in radically different culture* 255-256.

333 Paragraph 77 of the *Bhe* decision.

4.3 Differences in judgements of the two countries' highest courts

4.3.1 Similarities

The Court's in both the *Bhe* decision and *Mmusi v Ramantele* saga confirmed that customary law was an accepted legal practice within the country.³³⁴ Customary law of succession embraces the family as a whole and wishes to promote the family's interest as a whole. This is confirmed in the South African discussion which states that in the traditional African culture a family unit is seen as a cultural concept in which the material needs of family members individually is not the core focus.³³⁵ Botswana also confirmed the core principle of customary law of succession, in the Botswana discussion which states that family property and the preservation of family property is at the heart of customary law of succession. Family property not only provides a residence to the family members but also enables members to share in any economic proceeds or benefits which may result from cultivating the land.³³⁶

The *Bhe* decision and *Mmusi v Ramantele* saga focused on specific customary law of succession principles, namely male primogeniture and male ultimogeniture. It was confirmed in both of these cases that these two principles wish to achieve the main purpose of the customary law of succession which has been discussed in the previous paragraph. The rule of male primogeniture is applied to ensure that the family property is not subdivided and lost. Rather, it preserves the property for the widows, younger sons and any unmarried daughters.³³⁷ Male ultimogeniture aims to protect the family and to make sure that all the people that were dependent on the deceased are cared for. The practice of male ultimogeniture "may help to ensure that he will remain based at this parents' home, and will continue to remit to them the cash essential for their livelihood".³³⁸

It is clear that the customary law and customary law of succession practices in both South Africa and Botswana have legal status within the two countries' and they strive

334 See para 2.3.3 for *Bhe* decision confirmation and para 3.4.4 for *Mmusi v Ramantele* saga confirmation.

335 Refer to para 2.2.2.2.

336 Refer to para 3.3.1.

337 Refer to para 2.3.3.

338 Goody *Death, property and the ancestors* 40-56.

to achieve similar goals with regard to family interests being promoted during succession.

One of the main similarities between the *Bhe* decision and *Mmusi v Ramantele* saga is with regard to the concept of living customary law which adapts according to society changes. This discussion is found in the majority judgement given by the Court of Appeal in *Mmusi v Ramantele* saga, and the minority judgement given by Judge Ngcobo in the *Bhe* decision. These judgements also provide an argument for the fact that customary rules of succession should be developed on a case to case basis due to the fact that it should rather be accepted as being "living".

There are two versions of customary law known as "official" and "living" customary law.³³⁹ "Official" customary law is that version which consists of the indigenous version of customary rules that have been developed by colonial administrators in written interpretations, case law and legislation. "Living" customary law,³⁴⁰ on the other hand, refers to the indigenous rules and laws that have been adapted³⁴¹ to suit changing circumstances within traditional communities.³⁴²

Judge Ngcobo's minority decision in the *Bhe* decision gave a true rendition of the customary law of succession and the possibility of developing it, as well as opened up the possibility of the concept of "living" customary law of succession.³⁴³

It lies in flexibility and willingness to examine the applicability of indigenous law in the concrete setting of social conditions presented by each particular case. It lies in

339 Rautenbach *et al Introduction to Legal Pluralism* 28-30.

340 Bekker and Koyana 2012 *De Jure* 570. Bekker and Koyana state that this is due to the following two factors that are currently emerging in modern day traditional communities: Patrilocality residence is no longer practiced, that is the families no longer converge around a male-headed household children move to centres where they are employed and there are innumerable female-headed households. Communal lands are no longer coherent entities. Some erstwhile communal areas are, for instance, huge conurbations where acquisition of ownership and succession differ vastly from typical rural areas. The monetary value of property is far less important than in an industrial economy.

341 Bekker and Koyana 2012 *De Jure* 571; Ubink 2008 *In the Land of the Chiefs* 221. Bekker and Koyana state further that some fields of study indicate that the youngest son or even the daughter will inherit property; this may even be done in terms of a will. They concluded that living customary law should not be considered general rule of law unless a fixed line of behaviour is followed by a more or less constant group of persons for a certain period, and a custom, in order to be law, must be commonly believed to be obligatory.

342 Form example is some communities a system of ultimogeniture is followed instead of primogeniture.

343 Paragraph 233 of the *Bhe* decision.

accommodating different systems of law in order to ensure that the most vulnerable are treated fairly.

Judge Ngcobo agreed with the fact that male primogeniture discriminated in terms of gender. He thus suggested the following development of the rule of male primogeniture.³⁴⁴

The defect in the rule of male primogeniture is that it excludes women from being considered for succession to the deceased family head. In this regard it deviates from section 9(3) of the Constitution. It needs to be developed so as to bring it in line with our Bill of Rights. This can be achieved by removing the reference to a male so as to allow an eldest daughter to succeed to the deceased estate.

Judge Ngcobo did however agree that considering the inequality the male primogeniture rule brings, the appropriate remedy should be to strike down the rule with immediate effect. The problem that he said may rise is that when a rule or law is struck down it may no longer be used, and thus there will be no "legal mechanism that regulates the circumstances in which indigenous law of succession is applicable".³⁴⁵

Judge Ngcobo concluded that customary law may be applicable in some situations and not in others. However, he believed that the opportunity should still be afforded to those who wish to make use of the customary rules in instances where injustice does not take place. He believed that courts should afford customary law the ability to adapt to modern day social structures³⁴⁶

These considerations require that, where possible, courts should develop rather than strike down a rule of indigenous law. Furthermore, there may be disputes as to whether indigenous law is applicable in a particular situation. There will be circumstances where its application may result in an injustice. In others it may not. Until such time that the legislature enacts the relevant legislation, disputes as to whether indigenous law should apply must be managed and regulated.

The Court of Appeal in Botswana offers support to Judge Ngcobo's notion. It stated that customary law was not static. It stated that customary law develops and

344 Paragraph 222 of the *Bhe* decision.

345 Paragraph 224 of the *Bhe* decision.

346 Paragraphs 215 and 225 of the *Bhe* decision.

modernises with the constant change of society's ethos.³⁴⁷ The Court of Appeal confirms this conclusion by stating the following³⁴⁸

For after all what is customary law but a set of rules developed by society to address issues around certain values which protect the community's social fabric and cohesion. No purpose is served by trying to categorise customary law into a written or unwritten law as the appellant attempted to do, more especially in our jurisdiction where customary law has not been codified or reduced into a statutory form.

The Court of Appeal stated that a court should first decide on the correct implementation and application of the Ngwaketse customary law rule, before they look at the constitutionality of the customary rule. The Court of Appeal thus substantiated the need for customary law of succession rules to be decided on a case to case basis and also to be developed first if it is contradictory to the *Botswana Constitution*.³⁴⁹ In this case declaring a customary rule to be unconstitutional should be the last resort.

Now that the similarities between the cases have been highlighted, the next step is to determine the core differences in the final majority judgement of the two cases.

4.3.2 Differences

It is important to note that there is a slight difference in the essence of the two customary law principles that are being scrutinised in this study. Both male primogeniture and male ultimogeniture always takes place in the male line. With regard to male primogeniture, in the instance where the deceased has no male descendants the focus will move on to the male ascendants and these ascendants will be considered according to seniority.³⁵⁰ On the other hand male ultimogeniture is, not a rigidly defined one. There are certain exceptions allowed: if the last-born does not want the land, one offers it to one's other son or sons. Primogeniture in this sense is slightly more fixed whilst ultimogeniture allows for a little bit of flexibility in that an heir can decline the inheritance that has been allocated to the specific person.

In the *Bhe* decision, Langa DCJ found that the rule of male primogeniture as applied to the customary law of succession could not be reconciled with the current values of

347 Barton *Law in radically different culture* 255-256.

348 Paragraph 77 of the *Bhe*-decision.

349 Refer to paras 3.4.1, 3.4.2 and 3.4.3.

350 Refer to para 2.2.2.2.

equality and human dignity which are entrenched in the Bill of Rights. In the *Mmusi v Ramantele* saga the Court of Appeal declared that the Ngwaketse customary law of inheritance did not prohibit female or elder children from inheriting as intestate heirs.³⁵¹ The Court of Appeal achieved this decision by first applying the Ngwaketse rule to the facts of the case and also investigating the true essence of the Ngwaketse rule. The court found that Ramantele would never have been able to inherit the family homestead according to the Ngwaketse ultimogeniture rule. The Court of Appeal thus never believed that it was necessary to look at the constitutionality of the rule due to the fact that no discrimination was present in the outcome of the case.

In the *Bhe* decision, Langa DCJ was of the opinion that it was not possible to develop³⁵² the rule of male primogeniture³⁵³ as it attained to the customary law rules that prevailed over customary law of succession of property.³⁵⁴ Langa believed that the rule of primogeniture could not be constructed in a way that would lead to the rule being in line with constitutional morals and values. In the *Mmusi v Ramantele* saga the Court of Appeal stated that a court has to first consider whether no proper construction which is consistent with the *Botswana Constitution* could be given to that law.³⁵⁵ It was also suggested that due to the fact that the Court of Appeal could not develop the rules of customary law, it should rather allow for flexibility in order to

351 Paragraph 105 *Ramantele v Mmusi* (SCB).

352 Paragraph 67 Langa DCJ stated "it is not possible to develop the rule of primogeniture as it applies within the customary law rules governing the inheritance of property; it is not necessary or desirable in this case for me to determine whether the discrimination against children, who happen not to be the eldest, necessarily constitutes unfair discrimination. I express no view on that question. Nor, I emphasise again, does this judgment consider at all the constitutionality of the rule of male primogeniture in other contexts within customary law, such as the rules which govern status and traditional leaders."

353 Knoetze "Westernization or promotion of the African woman's rights?" Male primogeniture can be regarded as a form of discrimination that entrenches past patterns of disadvantage among a very vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under a constitutional order. Arguably male primogeniture also violates the right of women to human dignity contained in s 10 of the Constitution in that it implies that women are not fit or competent to own and administer property or assume positions of status

354 Paragraph 94 of the *Bhe* decision. Langa DCJ also states the following in this para:"it is not necessary or desirable in this case for me to determine whether the discrimination against children, who happen not to be the eldest, necessarily constitutes unfair discrimination. Nor, I emphasise again, does this judgment consider at all the constitutionality of the rule of male primogeniture in other contexts within customary law, such as the rules which govern status and traditional leaders".

355 Paragraph 58 *Ramantele v Mmusi* (SCB).

facilitate development of the customary law rules.³⁵⁶ The argument supporting this notion, was that since customary law was inherently flexible,³⁵⁷ "courts should introduce into the system those constitutional principles that the official system of succession violates".³⁵⁸

In the *Bhe* decision, Langa DCJ stated that construction of a customary rule to ensure that it was in line with the constitutional principles, amounted to an advocacy for a case to case development as a remedy to the issue in this case.³⁵⁹ He also stated that there had been signs of evolution in court decisions, whereby some courts had shown an acceptance to the changes in customary law.³⁶⁰ In *Mabena v Letsoalo*,³⁶¹ for instance,

it was accepted that a principle of living, actually observed law had to be recognised by the court as it would constitute a development in accordance with the 'spirit, purport and objects' of the Bill of Rights contained in the interim Constitution.

Even though there was a possibility to develop the customary law on a case- to-case basis, Langa DCJ believed that the changes brought on by the development would be very slow; uncertainties regarding the real rules of customary law would be prolonged and there might well be different solutions to similar problems.³⁶² The uncertainties and the lack of uniformity that resulted from this method could be seen in some cases already.³⁶³ In the *Mmusi v Ramantele* saga the Court of Appeal stated that it was a general rule of decision-making³⁶⁴ that "where it is possible to decide a case before the court without having to decide a constitutional decision", the court must follow that approach.

356 Paragraph 110 of the *Bhe* decision.

357 In Bennett *Human Rights and African Customary Law* 63.

358 Paragraph 110 of the *Bhe*-decision. It was suggested that this could be done by using the exceptions in the implementation of the primogeniture rule which do occur in the actual administration of intestate succession as the applicable rule for customary law succession.

359 Paragraph 111 of the *Bhe* decision.

360 See for example *Mabuza v Mbatha* 2003 7 BCLR 743 (C).

361 1998 2 SA 1068 (T).

362 Paragraph 112 of the *Bhe* decision.

363 A perfect example thereof was seen in the trilogy cases of *Mthembu v Letsela*. In that case Justice Le Roux Judge in the first case *Mthembu v Letsela* 1997 2 SA 936 (T) and Justice Mynhardt Judge in the second case *Mthembu v Letsela* 1998 2 SA 675 (T) both concluded that rules of African customary law of succession were not in conflict with the Bill of Rights

364 Paragraph 41 *Ramantele v Mmusi* (SCB).

In the *Bhe* decision, Langa DCJ stated that he doubted whether there would be sufficient guarantee that the constitutional protection of woman and children's rights in the devolution of customary intestate estates would truly take place if the courts were left to develop the customary law as proposed.³⁶⁵ He believed that something more certain should be placed in order to guarantee that these rights would be protected. According to him the legislature was best suited to handle the gap in the legislation as pointed out by the Court. In a discussion of the *Mmusi v Ramantele* saga Court of Appeal judgement, Fombad³⁶⁶ stated the following which truly captures the essence of the Court of Appeal judgement. Fombad stated:

Active development of the living customary law by judges in close consultation with the parties and the community provides the best way in which its basic principles can be adjusted to eliminate some of its deleterious anomalies.

This statement truly captures why the Court of Appeal in the *Mmusi v Ramantele* saga was of the opinion that a court should not immediately declare a customary rule unconstitutional just because it is controversial. The Court of Appeal placed the burden of the development of customary law of succession rules on the judiciary rather than the legislature.

4.4 Conclusion

The discussion in this chapter clearly proved that South Africa and Botswana have very similar historical legal backgrounds as well as similar current legal principles. Both of these countries' are democratic states and strive to exhibit the principles provided in their supreme law, the *South African* and *Botswana Constitution*.

It is thus clear from the decisions made in the South African and Botswana courts, that anything that is in conflict with the countries' constitutions will be declared unconstitutional and invalid. However, something that both Judge Ngcobo in his minority judgement in the *Bhe* decision, and the Botswana Court of Appeal touched on was the interpretation and adaption of customary rules. Both of these judges focused on the fact that where a rule may be contradictory to the values of a

365 Paragraph 113 of the *Bhe* decision.

366 Fombad 2014 *The Journal of Modern African Studies* 486.

constitution, an effort should first be made to understand and develop the rule, before it is just declared unconstitutional and falls into disuse.

It can thus be concluded from the decisions and recommendations made by both the South African and Botswana courts, that customary law, especially the customary law of succession stereotype of having a male heir, is undergoing transformation to ensure that it suits the social structure of modern day communities.

It must however be kept in mind that African intestate succession is not primarily focused on the distribution of the deceased's estate assets, but it rather entails finding a suitable relative that can occupy the deceased's position to minimise disruption.³⁶⁷ The duty to support dependants falls upon the heir together with the right to inherit. This obligation remains set even if the deceased's estate does not have enough resources to truly support the surviving widow and children. In this instance the heir will have to support the family out of his own estate or earnings.

Thus the continuance of the family and the family property is the main aim of customary law of succession. This principle might lose its effect if African customary succession rules are not adapted, but rather get struck down by courts.

³⁶⁷ Bennett *Customary Law* 335.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

Male primogeniture and male ultimogeniture are customary rules of succession that play an integral part in the customary distribution of a deceased property within South Africa and Botswana. Even though it has been established that these two countries' constitutions are the supreme law, the practice of customary law is allowed in both South Africa and Botswana. The main aims of this study was to determine the meaning of the concepts of male primogeniture and ultimogeniture and how these customary principles have developed within the respective countries' legal systems. The final aim of this study was to formulate a recommendation for the future approach and practice of customary principles such as male primogeniture and ultimogeniture within countries such as South Africa and Botswana.

Male primogeniture is a central component to the South African customary law of intestate succession. As previously explained in chapter two, male primogeniture generally means that a male who is closely related to the deceased head of house, will qualify to be the deceased's heir. It is usually the deceased's eldest surviving male child that will inherit.

With regard to the development of the practice of male primogeniture, South Africa first formulated the *Black Administration Act* to regulate customary succession. Section 23 of this Act was found to be contradictory to the constitutional regime of South Africa. In the *Bhe* decision the Constitutional Court made an interim solution for customary estate's to be administered according to the *Intestate Succession Act*. The Court recommended that the Legislature develop a legislative solution to the current discrimination brought about by the customary law of succession rule of male primogeniture.

The legislative solution took place in the form of legal developments, namely the introduction of the *Reform of Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009 and an amendment of the *Intestate Succession Act* which protected the rights of younger male children.

The difficulty with trying to codify customary law of succession is the fact that the customary environment is continually changing. Thus it will be challenging to codify a naturally uncodified source of law. The South African Constitutional Court in the Bhe decision, does however have a point with regard to the fact that it is difficult to apply customary law on a case-to-case basis, as it is so complex and certain traditional communities have different versions of customs.

Male ultimogeniture, on the other hand, is not a central component to the practice of the customary law of succession in Botswana. Chapter 3 of this study highlighted the variety of traditional communities in Botswana and the fact that these communities have been allowed to practice their own customs and traditions. Male ultimogeniture is a custom practiced by the Ngwaketse traditional community.

It is important to start by pointing out that generally, the customary rule of ultimogeniture consists of a series of rules and not just one single uniform rule. The details of these rules vary in practice and usage of the different communities and the type of property that may be involved. Generally, ultimogeniture refers to the inheritance of the last-born of a family. It refers to a privileged position to the parent's wealth, estate or office.

Regarding the development of the rule of male ultimogeniture, Botswana provides for a more practical approach to conflict between customary succession rules and the general law of the country. Botswana believes that there is a difference between customary rules and customary law. A customary rule will only achieve legal status and be declared a customary law if it complies with the customary law definition. Only if a customary rule is a law will it then be determined whether this law is in line with the *Botswana Constitution*. In *Ramantele v Mmusi* the Supreme Court of Botswana³⁶⁸ held that before the constitutionality of a customary law should be brought into dispute, a court should first see whether they can adapt the law to be consistent with the *Botswana Constitution*. Only if this adaption is not possible should the law then be declared unconstitutional.

368 Referred to as the Court of Appeal in chapter 3.

5.2 Recommendation

The rules of male primogeniture and ultimogeniture have been discussed in great detail in the above chapters. The development of these two principles within the court structures of South Africa and Botswana have been clearly set out. The differences in judgements in the highest courts of South Africa and Botswana respectively, have been highlighted in chapter four. The final point of discussion is to determine whether these differences in the court judgements can be combined in order to formulate a probable solution to cater for the practice of customary law of succession in a way that does not contradict the essence of the countries' constitutions.

In conclusion of this study the following two step approach is recommended with the hope to facilitate proactive development of customary law of succession rules within African democratic states.

The first step is an approach that can be seen as the customary law approach. This approach is based on the *Ramantele v Mmusi* Botswana Court of Appeal judgement. The court in this instance will first look at the merits of the case, the court will try to understand the custom that is applicable and how this custom is applied during a dispute. The court will apply the rules of the custom to the case at hand and determine whether there are any parties' that are unfairly prejudiced by the practice of the custom in question.

Should it be found by a court that one party is being prejudiced by the practice of the custom then the second step of the approach will be initialised. This second step can be seen as the constitutional approach and it is based on the *Bhe* decision South African Constitutional Court judgement. The court at this stage will look at the custom being applied and determine whether this custom contradicts the spirit, purports and objectives set out by the constitution of that country. The specific customs in this study that seemed to be contradictory to the *South African Constitution* and *Botswana Constitution* were male primogeniture in the *Bhe* decision and male ultimogeniture in the *Mmusi v Ramantle* saga. When a court wishes to determine the constitutional validity of a custom, then the court is objectively considering whether the custom is consistent with the supreme law of that country, namely the constitution of the specific country.

This customary law approach and constitutional approach can ensure that room is granted to customary rules of succession to be given the freedom to first be applied to the matter at hand, but at the same time be monitored to ensure that the outcome of the specific custom is not contradictory to the general law of the country.

In the *Mmusi v Ramantle* saga the court found that Ramantele was not even entitled to the homestead as Banki would never have inherited the family homestead according to the rule of male ultimogeniture. In this case it was not even necessary to consider the constitutionality of the rule of male ultimogeniture due to the fact that this form of inheritance was not applicable to the case at hand. In this instance the court would only have applied the customary law approach of the recommended two step approach.

In the *Bhe* decision, the Court did not apply the male primogeniture rule to determine whether the male heir was truly entitled to inherit. The court looked at the principle of male primogeniture objectively. This basically means that should a party successfully inherit according to the principle of male primogeniture, it should be determined whether this inheritance is in line with the constitution or not. It was concluded that the implementation and practice of this rule unfairly discriminated against one of the parties to the dispute and was thus declared unconstitutional and invalid. In this case the second step, the constitutional approach was immediately applied.

Customary law and customary law of succession often provide for the practice of controversial customs and these customs often seem to be against the new era of equality before the law. It must however be taken into account that these rules and customs have existed for many years and were constructed when community norms drastically differed from community norms today.

If democratic countries, which welcome the practice of customary law and customary law of succession, can adopt the suggested two step approach they will ensure that customary law does not remain static and rigid but rather that it develops along with changing society needs and views. These countries will thus encourage the practice of customary traditions that conform to the current national legal objective which is set out in the countries' supreme law – The Constitution.

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DECLARATION

I, Tamara P Wallis, declare that this study is my own work and all the sources have been indicated and acknowledged by means of complete references.



26 November 2015

TP Wallis

Date