

The Changing Identity on Succession to Chieftaincy in the Institution of Traditional Leadership: Mphephu v Mphephu-Ramabulana (948/17) [2019] ZASCA 58

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Abstract

The institution of traditional leadership has from time immemorial been central to traditional authority in the system of customary law. After the dawn of democracy in 1994, the role was fundamentally entrenched in the *Constitution of the Republic of South Africa*, 1996. The entrenchment would seem to entail the development of a new set of norms and a new ethos in customary law in line with the ideals of the new democracy, and the modification of certain aspects of the system. Of great significance for the transformation of the system is the promotion of the right to gender equality with reference to women's succession to the throne. Various commentators argue for this as an attempt to transform the culture of domination entrenched in a patriarchal system that always undermined the rights of women.

Against this background, this article undertakes a comparative analysis of the recent judgments of the Supreme Court of Appeal in *Mphephu v Mphephu-Ramabulana* 2019 7 BCLR 862 (SCA) and *Ludidi v Ludidi* 2018 4 All SA 1 (SCA) to determine whether the succession of women to the throne is evidence of the desired transformation of the institution of traditional leadership. The article argues that these judgments have initiated a transformation which has the potential to destroy the identity of the institution of traditional leadership by paving the way for the nomination of women to occupy not just any leadership position in the chieftaincy but the throne itself. It also argues that the interpretation of the right to gender equality through the lens of common law instead of in its own context, which has a communal focus, compromises the transformative or developmental agenda of the institution of traditional leadership as envisaged in the Constitution. The discussion is limited to succession to the "throne" and is not applicable to other leadership positions such as occur in matrilineal systems, or regency and other such traditional leadership roles. This is also not a comparative study that considers other jurisdictions, is further limited to the concept of "gender discrimination", and does not deal with the other technicalities that were raised in these cases.

Keywords

Traditional leadership; customary law; gender equality; gender discrimination; human rights.

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1 Introduction

The institution of traditional leadership has from time immemorial been at the apex of customary law rules and practices. Bekker¹ traces this history as he points out that:

During the existence of the pre-colonial sovereign Black 'states', customary law was an established system of immemorial rules which had evolved from the way of life and natural wants of the people, the general context of which was a matter of common knowledge, coupled with precedents applying to special cases, which were retained in the memories of the chief and his councillors, their sons and their sons' sons, until forgotten, or until they become part of the immemorial rules.

Today the history which encapsulates the institution's primary responsibility is grounded in the constitutional recognition of traditional leadership in the 1996 Constitution.² Its new status is evident in many provisions of the Constitution, such as section 211,³ which recognises the system of customary law and section 212,⁴ which further emphasises the recognition

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¹ See Bekker *Seymour's Customary Law* 11; Rautenbach *Introduction to Legal Pluralism* 209; also see Khunou 2009 *PELJ* 81-122, contending that the institution had long existed in South Africa a "socio-political and cultural organisation that delivered on the developmental needs of the communities and preserved the cultures, traditions and values of African communities before being subordinated to the bondages of colonial and apartheid masters". Also see Chigwata 2016 *LDD* 69-90.

² The *Constitution of the Republic of South Africa*, 1996 (hereinafter referred to as the "Constitution").

³ The section reads as follows:

"(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."

⁴ The section provides that:

"(1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.
(2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law:
(a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and
(b) national legislation may establish a council of traditional leaders."

by requiring the adoption of national legislation that will give content to the role of the institution of traditional leadership. This recognition formally legitimises customary law as an integral part of South Africa's laws. It acknowledges the "originality and distinctiveness [of the institution] as an independent source of norms within the legal system"⁵ in regulating its own authority within the broader framework of the Constitution. It is also noteworthy that the recognition marks a fundamental break with the past, as it requires the development of a new set of norms, a new ethos and new values in terms of the new constitutional dispensation. These values include the norms and standards of human rights, which are inclusive of those of the system of customary law. In the past the system was subjugated and neglected or used as an instrument to oppress and divide the many South Africans that subscribe to it. Considering South Africa's diverse character, customary law, like the common law, now has to adapt, develop and transform in line with the ideals of the new democracy.

Of particular importance in the transformation of customary law, which has been especially difficult to achieve with regard to the institution of traditional leadership, is the quest for the promotion of gender equality. The particular difficulty in this context is the question of women's succession to the "throne". There are various leadership positions that may be available in the institution of traditional leadership but the succession to the throne itself is strongly held to be key to determining the pace of reform and the transformation of the practices of the institution in the promotion of gender equality.⁶ As Chauke argues, the exclusion of women's succession to the throne is sometimes described as evidence of the existence of a patriarchal "male-dominated culture and systems of the institution of traditional leadership"⁷ that has always subjugated women. Tshitangoni reinforces the argument and goes further to challenge the very existence and relevance of the institution of traditional leadership in the new democratic dispensation.⁸

Recent court judgments on the succession to the throne have also touched on the legitimacy of the institution, referencing the on-going discussions and debates about its relevance and the need for transformation in the development of the systems and ethos of customary law. These judgments suggest that there is a growing push towards changing the traditional

⁵ See *Alexkor Ltd v Richtersveld Community* 2003 12 BLCR 1301 (CC) para 51.

⁶ Nkasawe 2009 <https://mg.co.za/article/2008-06-24-women-traditional-leaders-progress-or-not>.

⁷ Chauke 2015 *Studies of Tribes and Tribals* 34-39.

⁸ Also see Tshitangoni and Francis 2017 *Studies of Tribes and Tribals* 70-83.

identity of the institution of traditional leadership by endorsing the nomination of women to succeed to the throne. Of great concern in these judgments is what appears to be the interpretation and application of the right to gender equality through the lens of common law, which was developed beyond and differently from the system of customary law. The *Shilubana v Nwamitwa*⁹ judgment is a case in point. The court in this case granted the right to a woman to succeed to the throne and reasoned that the development undertaken by the community had to be given effect by the courts. In this way the court legitimised the development which, the court argued, was in line with the Bill of Rights, as required by section 39(2),¹⁰ in equating the rights of men and women. It is not the intention in this article to revisit the argument made elsewhere, where it was contended that the modification of the male primogeniture rule under the guise of promoting the right to gender equality in the context of the succession of women to the throne is misplaced.¹¹

Given this background, this article assesses the contribution of the recent judgments of the Supreme Court of Appeal (SCA) in *Mphephu v Mphephu-Ramabulana*¹² and *Ludidi v Ludidi*¹³ to the required transformative ideals of the right to gender equality in the institution of traditional leadership. The objective is to determine whether the succession of women to the throne is evidence of the desired transformation of the institution of traditional leadership.¹⁴ The article argues that these judgments are the beginning of a process of transformation which has the potential to destroy the identity of the institution of traditional leadership by affirming the right of women to be elevated to the throne. It also argues that the interpretation of the right to gender equality through the lens of common law compromises the transformative or developmental agenda of the institution of traditional leadership that is envisaged in the Constitution. The argument is limited to succession to the "throne" and does not impinge on other leadership positions such as those in matrilineal systems, regency and other positions in traditional councils. This is also not a comparative study that takes other jurisdictions into account, is further limited to the concept of "gender

⁹ *Shilubana v Nwamitwa* 2008 9 BCLR 914 (CC), hereinafter referred to as "*Shilubana*".

¹⁰ The section provides that 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.

¹¹ Ntlama 2009 *Stell LR* 333-356.

¹² *Mphephu v Mphephu-Ramabulana* 2019 7 BCLR 862 (SCA), hereinafter referred to as "*Mphephu*".

¹³ *Ludidi v Ludidi* 2018 4 All SA 1 (SCA), hereinafter referred to as "*Ludidi*".

¹⁴ Wang 2017 <https://www.cmi.no/news/1834-it-takes-a-female-chief>.

discrimination", and does not discuss the other technicalities that were raised in these cases.

2 Brief facts

2.1 Mphephu

This was an application for leave to review and set aside the identification and recognition of the first respondent (Mr Toni Mphephu) as the King of Vhavenda community from the Limpopo Division of the High Court in Thohoyandou. The appellant was Princess Masindi Mphephu. This matter can be traced back to 26 February 1994, when the appellant's father, Prince Dimbanyika Mphephu, was installed to succeed his deceased father, Chief Patrick Ramabulana, as the chief of the Mphephu-Ramabulana Tribal Community. At the time, the appellant was three years old and her father appointed the first respondent as his *Ndumi*.¹⁵ After the death of the appellant's father in 1997, the first respondent was identified by the eighth respondent (Mphephu-Ramabulana Royal Family Council) to take over the chieftaincy in 1998. In 2003 the first respondent lodged an application for recognition as the King of Vhavenda, which was dismissed by Lukoto J. In the same year the legislature, acting in terms of section 212 of the Constitution, passed the *Traditional Leadership Framework Act* 41 of 2003 (Original Act) as amended by Act 23 of 2009 (Amendment Act). The Original Act established a Commission with a five-year life span starting in 2004 with the authority to deal with leadership disputes and claims. The Amendment Act also retained the Commission, which also had a five-year life span, to investigate and recommend, but only in the case of a claim. The first respondent then lodged a claim with the old Commission, first for the vesting of the Kingship/Queenship of the Vhavenda to the Mphephu-Ramabulana Royal Family; and secondly for him to be recognised as the incumbent on the throne. There were also three other Vhavenda communities, namely the Ravhura, the Tshivhase and the Mphaphuli, that lodged claims for the Kingship/Queenship.¹⁶

In January 2010 the Commission made its determination and vested the throne on the Mphephu-Ramabulana Royal Family to the exclusion of all others, without pronouncing on the incumbency of the throne.¹⁷ A public statement was made by the second respondent (President of the Republic of South Africa) on 29 July 2010 announcing the determinations of the

¹⁵ Mphephu paras 1-4.

¹⁶ Mphephu para 5-6.

¹⁷ Mphephu para 6.

Commission in the matter of the vesting of Kingships/Queenships, which were inclusive of all South African communities. The second respondent further affirmed that the incumbents to the Vhavenda and Ama-Ndebele Kingships/Queenships were still to be determined by the new Commission, which was yet to be established.¹⁸ Following this statement, the eighth respondent identified the first respondent as the King of the Vhavenda on 14 August 2010 and requested the second respondent for his recognition. After the failed attempt by the other three communities to challenge the award of the throne to the Mphephu-Ramabulana family, the second respondent duly recognised the first respondent, Mr Toni Peter Mphephu, as the King of Vhavenda Community, and this recognition was published in the Government Gazette of 21 September, 2012.¹⁹

The above facts were the crux of this judgment, which dealt with the question whether the first respondent had lawfully been identified by both the Royal Family and the President as the King of the Vhavenda community.

As noted above, this article focusses on gender discrimination and not on the other technicalities that were raised in the judgment and those that were referred back to the High Court.²⁰ The appellant challenged the constitutional validity of the identification of the first respondent as the King at a meeting of 14 August 2010. She argued that she had not been identified to ascend to the throne due to gender discrimination, which offended the Bill of Rights.²¹ The basis of her argument was the criteria for the identification of a king or chief, which required the prospective incumbent: to be from the royal family and *dzekiso* wife; not to have a criminal record; to be a disciplined person (to demonstrate good behaviour); to respect his elders; and to be a good leader. According to Vhavenda customs a female (*makhadzi*) had to be the one to identify the king, and the identification had to be supported by all *makhotsimunene* and other *khadzi*. In the Mphephu-Ramabulana family in particular, the chief or king must be a man.²²

The court reasoned that the first criterion applicable to the identification of the incumbent to the throne was that only men would qualify for the position. Though this was not explicitly stated in the minutes, the court also held that the impact of this criterion not only on the appellant but also on any other woman in the Mphephu-Ramabulana family who might otherwise meet the

¹⁸ *Mphephu* para 7.

¹⁹ See *Mphephu* paras-7-8.

²⁰ See *Mphephu* paras 40-42.

²¹ *Mphephu* para 28.

²² *Mphephu* para 28.

criteria to succeed as queen was that she would be disqualified by her gender.²³ It held that criteria that promote gender discrimination should be declared unconstitutional and invalid, and should consequently be set aside. It cited with approval the *Shilubana* judgment, that:²⁴

Amendments or repeal or changes of customary laws and customs should be in a form of development, implemented progressively by the affected traditional community.

Traditional authorities as envisaged in section 211(2) are empowered to function subject to their own system of customary law so as to bring their customs in line with the values of the new dispensation. On the other hand, the courts are equally obligated in terms of section 39(2) to develop customary law in accordance with the prescripts of the Bill of Rights and to undertake this responsibility in a judicious, sensitive and incremental fashion.

The court also referred to section 2A(4) of the *Framework Act* (original Act), which reads as follows:

A kingship or queenship must transform and adapt customary law and custom relevant to the application of this Act so as to comply with the relevant principles contained in the Bill of Rights in the Constitution, in particular by: (a) preventing unfair discrimination; (b) promoting equality; and (c) seeking to progressively advance gender representation in the succession to traditional leadership positions.

The court concluded that the High Court erred in dismissing the argument on discrimination based on gender because:²⁵

The criteria that only men should succeed to the Throne in the Mphephu-Ramabulana community impedes compliance with the provisions of s 2A(4)(c) of the Framework Act. Section 2A(4)(c) provides for a progressive transformation and adaptation of the selection criteria in order to ensure that the customary law and custom complies with the provisions of the Bill of Rights on gender equality. The Vhavenda traditional communities have an obligation to develop the criteria for identification of a King or Queen to bring it in line with the Bill of Rights. In this case, s 9 of the Framework Act obliged the second respondent to effect recognition of an identified person as King on the recommendation of the third respondent. Thus the second, third and eighth respondents failed to consider this issue in terms of s 6(2)(e)(iii) of PAJA when effecting the identification and recognition respectively of the first respondent as King of Vhavenda. The decisions to identify and recognise the first respondent should thus be reviewed and set aside, as the criteria impedes compliance with s 2A(4)(c) of the Amended Act.

Although the court did not pronounce on the legitimacy of the first respondent's identification as the King of the Vhavenda community, the fact

²³ Mphephu para 29.

²⁴ See *Shilubana* paras 73-74 in *Mphephu* para 30.

²⁵ *Mphephu* para 32.

that it invalidated the criteria for appointing the king/chief as amounting to gender discrimination is a cause for concern, as is argued below.

2.2 Ludidi

The brief facts of this case are as follows: This was an appeal from the Mthatha Division of the Eastern Cape. Phakade J dismissed the application for the review of the decision of the AmaHlubi Royal Family to recognise the first respondent (Ms Nolitha Ludidi - the daughter and only child of the great house of the late Chief Manzodidi) as the rightful heir to succeed her father, Chief Manzodidi. Chief Manzodidi was a brother to Chief Manzezulu and the eldest son of their late father: Chief Dyubhele Ludidi. Chief Manzodidi passed on in 1978 and was survived by his wife, Mafaku, and Ms Ludidi, who was twelve years old at the time. Following his death his brother, Chief Manzezulu, took over the chieftaincy in 1979 and ruled until his death in 2012.

Before the attainment of democracy, the *Transkei Constitution Act* 48 of 1963 and the *Transkei Authorities Act* 4 of 1965 regulated the matters relating to traditional leadership. With the dawn of democracy a new statutory scheme was adopted and the system of traditional leadership is now regulated by the *Traditional Leadership and Governance Framework Act* 41 of 2003 (*Framework Act*), read with the *Traditional Leadership and Governance Act* 4 of 2005 (*Eastern Cape Traditional Act*) in the parties' area of jurisdiction.²⁶

On the death of Chief Manzezulu a dispute arose between the appellant (Mr Ludidi) and the AmaHlubi Royal Family about the legitimate successor to the throne. Ms Ludidi was identified by the AmaHlubi Royal Family for recognition by the Premier of the Eastern Cape Province, whilst there was another MaNcaphayi family that identified Mr Ludidi for the same position.²⁷ Presented with conflicting decisions, the MEC for Cooperative Governance and Traditional Affairs (COGTA) referred the matter back to both families for further discussion and deliberations, after a failed attempt to resolve the impasse in the House of Traditional Leaders (the House).

After extensive discussions between the AmaHlubi and MaNcaphayi Royal Families, in late June 2013, Ms Ludidi was identified as the successor to the throne, and the decision was conveyed to the MEC. It was also the June meeting which agreed that the appellant would be appointed as secretary

²⁶ *Ludidi* para 6.

²⁷ *Ludidi* para 5.

to the AmaHlubi Traditional Council (sixth respondent) so that he would be able to earn a salary to support his family. Thereafter Ms Ludidi was recognised as the next Chief of AmaHlubi and issued with a certificate of recognition, which was published in the Government Gazette in terms of section 18(1)(b) of the *Eastern Cape Traditional Act* 4 of 2005. However, the House was not advised of the recognition by the MEC before the publication.²⁸

It was this decision to recognise Ms Ludidi as the incumbent on the throne of the AmaHlubi Traditional Community that prompted the proceedings before the court. The grounds of appeal from the court *a quo* included the: appellant's legitimate expectation to succeed his father to be appointed as Chief under the *Transkei Constitution Act*; the decision by the MEC to recognise Ms Ludidi as the rightful chief as identified by the faction of the fractured AmaHlubi Royal Family; the MEC's obligation to afford the appellant the right to be heard before recognising Ms Ludidi; and the MEC's failure to inform the House of Ms Ludidi's recognition before its publication in the Government Gazette.²⁹

Without engaging in discussion of each of the grounds, the court rejected the appellant's reliance on his legitimate expectation to be the successor to the throne as envisaged in the *Transkei Act*. It held that when his father died in 2012, the entire system of regulating traditional authority and recognising traditional leaders was overhauled by the adoption of the *Framework Act*.³⁰ The court also affirmed the right of the AmaHlubi Royal Family to recognise a traditional leader as envisaged in both sections 11 of the *Framework Act* and 18 of the Provincial Act. This power was not vested in individual members of the Royal Family and therefore Chief Manzezulu had no right to identify his successor.³¹ The court also went on to hold that there had been no need for the MEC to afford the appellant the right to be heard because on receipt of the conflicting decisions he had referred the matter to the families. Further, informing the House before publishing the notice of recognition was not obligatory but a matter of courtesy.³²

With these facts, at face value, *Ludidi* appears to be distinct from *Mphephu*, whilst they are in fact interrelated. In *Ludidi* the decision of the AmaHlubi Royal Family to appoint a woman to the throne is central to the argument

²⁸ *Ludidi* paras 6-8.

²⁹ *Ludidi* para 17.

³⁰ *Ludidi* para 20.

³¹ *Ludidi* paras 21-24.

³² *Ludidi* paras 25-26.

which is made below. The centrality of the argument is not necessarily the appointment of Mr Ludidi as incumbent on the throne but the uncertainty the appointment of a woman brings to the future regulation of traditional authority. In *Mphephu* the invalidation of the criteria for the recognition of a traditional leader, leaving a vacuum for the future determination of the eligible heir to the throne remains problematic. The act of identifying a woman as successor to the throne has dire consequences for the institution of traditional leadership and the entire system of customary law as evidenced by the arguments to be made below against these judgments.

3 The institution of traditional leadership: an "unwanted child" of the new democratic dispensation?

This section highlights the on-going debates which characterise the system of traditional governance as an illegitimate child of the new constitutional dispensation. It also suggests that the arguments against the legitimacy of customary law are misconceived, as they conflate systems that developed in different settings.

The very existence of the institution of traditional leadership is being challenged by critical discussion. Commentators argue that:³³

... the recognition of traditional leadership poses a threat to a democratic society and if the government persist on recognising them it will maintain the confusion people in rural areas are experiencing between the institution of traditional leadership and elected public representatives, ... [and the uncertainty in clarifying the roles regarding] the existence of this institution has [rendered] it obsolete in our democratic dispensation.

De Vos furthers the contention and points out that:³⁴

... maybe it is time for the government to ... do away with the undemocratic and often oppressive system of traditional leadership. I suspect this will not happen, but I also suspect customary law will only be able to take its rightful place as an equal and important body of law alongside the common law – as required by the Constitution – when traditional leadership structures are fundamentally reformed and democratised. The current system is undemocratic and (often) oppressive and has no place in a Constitutional democracy.

It is not in dispute that the institution needs to be transformed and that the roles of traditional leaders need to be clearly defined in line with the ideals

³³ Ncapayi and Ntungwa 2018 <http://aidc.org.za/land-reform-a-critique-of-traditional-leadership/>. Emphasis added.

³⁴ De Vos 2010 <https://constitutionallyspeaking.co.za/time-for-rethink-on-traditional-leaders/>. Emphasis added.

of the new democracy. South Africa has been a democracy for 25 years now, but 25 year ago nobody knew the direction in which the "democratic ship" might be steered. It is the same with the application and recognition of the institution of traditional leadership, which had its authority undermined by the pre-democratic governments. In the process of re-building the country, including the institution of traditional leadership, continuing learning about the alignment of the various legal systems should have been the cornerstone of the integration of the law in the new dispensation. Hence, the above arguments are a deliberate attempt to turn a blind eye to the impact of South Africa's history on customary law. These arguments perpetuate the dominance of the common law principles which, as Rautenbach correctly argues, had already been subverted:

The colonisers superimposed European law upon customary legal systems [though] there was neither a desire by the local people, nor any degree of consciousness and voluntariness on their part to receive foreign law.³⁵

The impact of South Africa's history on customary law as regulated by the institution of traditional leadership was further captured in the *Gumede*³⁶ judgment where the court held that it:³⁷

Was entirely prevented from evolving and adapting as the changing circumstances of the communities required. It was recorded and enforced by those who neither practised it nor were bound by it. Those who were bound by customary law had no power to adapt it ... [and] 'official' customary law was left unreformed and stone-walled by static rules and judicial precedent, which had little or nothing to do with the lived experience of [people observing the system of customary law.

The 1996 Constitution has constitutionalised the application of all South African legal systems, including customary law. This is particularly important for customary law, because the constitutional recognition requires all the systems to ensure their compliance with the Constitution. In this way, considering the decades of distortion, the constitutionalised status seeks to

³⁵ Rautenbach *Introduction to Legal Pluralism* 7.

³⁶ *Gumede (born Shange) v President of the Republic of South Africa* 2009 3 BCLR 243 (CC), hereinafter referred to as "*Gumede*".

³⁷ *Gumede* para 20. Also see Langa DCJ in *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC) paras 43 and 90, where the judge pointed out that "customary law was robbed of its inherent capacity to evolve in keeping with the changing life of the people it served ... The outcome has been formalisation and fossilisation of a system which by its nature should function in an active and dynamic manner. ... In the past, mistakes were committed which were partly the result of the failure to interpret customary law in its own setting but rather attempting to see it through the prism of the common law or other systems of law. That approach also led in part to the fossilisation and codification of customary law which in turn led to its marginalisation. This consequently denied it of its opportunity to grow in its own right and to adapt itself to changing circumstances."

fulfil a legitimate purpose and ensure that customary law lives alongside common law and legislation.³⁸ In addition, it also seeks to ensure that the rules, practices and customs that regulate the lives of people that adhere to the system are transformed by the incremental changes that continue to evolve in their respective communities. It is trite but it must be mentioned that customary law, notwithstanding the absence of any definition of it in the Constitution, is composed of rules and practices that are accepted by members of the various communities as binding them. There is an official definition in the *Recognition of Customary Marriages Act* 120 of 1998,³⁹ though, where it is described as "usages and customs traditionally observed among the indigenous African peoples of South Africa, which forms part of the culture of those peoples."

It is deduced from the definition that the recognition of customary law and its institutions meant that the "Constitution present[ed] itself as a pace-setter for all legal interpretive bodies including legislative and judicial authorities, to formulate their opinions on the basis of the current version of African law prevailing in the relevant communities when [dealing with] African law."⁴⁰ This aims to reclaim the lost dignity of those many South Africans who subscribe to the system of customary law. It is also an assertion of the values and principles of customary law, which the Constitution seeks to realise and preserve for a future South Africa. This is of great significance for the institution of traditional leadership. As simply characterised by the Court in the *Pilane*⁴¹ judgment, customary law:⁴²

is a unique and fragile institution. If it is to be preserved, it should be approached with the necessary understanding and sensitivity. Courts, Parliament and the Executive would do well to treat African customary law, traditions and institutions not as an inconvenience to be tolerated but as a heritage to be nurtured and preserved for posterity, particularly in view of the many years of distortion and abuse under the apartheid regime.

Despite the caution by the Court, as noted above, there are persistent and strong arguments against the existence and relevance of the institution of traditional leadership. De Vos argues that the system is based on patriarchal notions about the proper roles of men and women in society and is justified on the basis that a chief can only become one if he was fathered by a chief, which perpetuates the view that men have a higher status in society than women; that there is a dirty little secret which is not spoken about, that many

³⁸ *Gumede* para 22.

³⁹ Hereinafter referred to as "RCMA".

⁴⁰ Ndimma 2014 *SAPL* 297.

⁴¹ *Pilane v Pilane* 2013 4 BCLR 431 (CC), hereinafter referred to as "*Pilane*".

⁴² *Pilane* para 78.

communities were appointed as proxies of the apartheid government and would not want to diminish their power and prestige by amending customary law rules to recognise gender equality; and that the entire system of traditional leadership is deeply problematic and not really compatible with a system of democratic governance.⁴³

This criticism is misplaced, as it views the application and interpretation of customary law through "the lens of legal conceptions that are foreign to it".⁴⁴ It also fails to acknowledge that customary law "developed in different situations and in response to different cultures and conditions".⁴⁵ These factors endorse the emphasis on "patriarchal features instead of communal ones".⁴⁶ The criticism also failed to acknowledge that as Nhlapo contends, quoted with approval in *Bhe*, "the identification of the male head of the household as the only person with property-holding capacity, without acknowledging the strong rights of wives to security of tenure and use of land, for example, was a major distortion".⁴⁷ Customary law was never designed not to entrust women with these roles, but there were factors that were taken into account such as women getting married and leaving for their marital homes.⁴⁸ The continued fossilisation of customary law as was the case in the past distorts the very foundations of the regulation of authority in the system. The meanings and functions of the institution of traditional leadership cannot be interpreted in terms of societal values which are foreign to the system of customary law.⁴⁹ The universal application of individual rights within communal rights disregards the existence of group rights, where values such as limiting the right to ascend to the throne to males serves as the cornerstone of group solidarity.⁵⁰ The hereditary nature of the system of customary law cannot be modelled on the system of elected representatives, which is based on individualism. Wicomb and Smith characterise customary law as a:⁵¹

⁴³ De Vos 2010 <https://constitutionallyspeaking.co.za/time-for-rethink-on-traditional-leaders/>.

⁴⁴ Claassens and Budlender 2016 CCR 77.

⁴⁵ *Alexkor* para 56.

⁴⁶ *Bhe* para 89.

⁴⁷ See Nhlapo "African Customary Law in the Interim Constitution" 162; also *Bhe* para 111.

⁴⁸ Ndimba 2017 CILSA 92.

⁴⁹ See Ndimba 2003 CILSA 333.

⁵⁰ Ake 1987 *Africa Today* 9.

⁵¹ Wicomb and Smith 2011 *AHRLJ* 427, footnotes omitted. As simply put by Allot 1969 *Africa Spectrum* 12-22: "the integration of the law with the way of life and beliefs of society, and a reflection of the way of life of the people; flexible in character, because customary law does change, can change and has changed – even in the pre-colonial period; qualified by kinship, that is in the private sphere the laws were organised

Community-based system of law in which rights are generally relational and not held by individuals as atomistic beings, but as members of a group and relational to the other members. To restrict the protection of customary law to individual rights, therefore, denies members of customary communities the ability to assert their tenure rights outside the sphere of their own communities and their internal, customary dispute resolution mechanisms. Customary systems are not based strictly on rules associated with the mainstream understanding of common law. In all societies there are discrepancies between the 'rules' people describe and the actual practices in which they engage. This discrepancy is particularly pertinent with regard to customary law systems. While underlying values and commonalities can be identified in customary practices, rules are not treated as a fixed structure that regulate societal organisation with some occasional leeway for exceptions. Rather than blindly referring to rules in making a decision, the current reality of every situation is considered and the rule tested against the customary values. Customary systems are thus outcomes-based rather than rule-based. Once custom is codified, it loses this ability to adapt contextually.

Rautenbach similarly contends that:⁵²

The apex of a traditional African community is a hereditary king or traditional leader. Although the king and the traditional leader would normally give effect to the will of the people, they do not operate as democratically elected functionaries such as cabinets, legislative assemblies and trained and remunerated judges. The system functions in such a way that it allows for free participation in making decisions that affect members of the community. This happens through mechanisms such as [(imbizo) in [Xhosa] which can be referred to as a community gathering which normally takes place at the King's or traditional leader's kraal.

Trotha shares the same sentiments, saying that the system of customary law was:⁵³

[Never designed] around the western conceptions of authority, based on universal suffrage, free elections, secret ballot and other democratic variables from a liberal perspective. It is instead grounded on a social and moral idea of authority and is based on a communitarian form of social relationships ... the unity of sacred traditions and common religious beliefs ... the construction of a common history ... and the unity which domination demands.

The argument about the problematic nature of the system of customary law and the call for its abandonment do not appreciate that the system is founded differently from other legal systems. It relegates customary law with its systems and values to an inferior legal status that seems to render it invisible to the dominant legal sphere. This is a great humiliation to the right

around family and family relationships; customary laws were built around status differentiation, around the conception that everyone is not born equal, and differentiation by rank, sex, and age."

⁵² Rautenbach *Introduction to Legal Pluralism* 25.

⁵³ Trotha 2014 *Journal of Power, Politics and Governance* 75 in Chakunda and Chikerema 2014 *Journal of Power, Politics and Governance* 67-78. Also see Sithole and Mbele 2008 <http://repository.hsrc.ac.za/handle/20.500.11910/5547>.

to dignity⁵⁴ of the many South Africans that follow the prescripts of the system. The democratic ideals of the new constitutional order include the extension of civil rights to groups, as envisaged in the cultural provisions of the Bill of Rights.⁵⁵ Hence, the civil right to dignity captures the content of the protection that is accorded to people subscribing to the system of customary law. The right to dignity should prevent the continual denigration of the system, which appears evident in the debates that are taking place in South Africa's legal, judicial and academic circles. Since the attainment of democracy, the right to dignity has given rise to progress in the area of transforming the system of customary law. It was this system, which was stifled by both the colonial and apartheid governments, which has recently made progress in its alignment with the Constitution.

4 Women's succession to the throne: a determinant of the pace of transformation in the institution of traditional leadership?

4.1 The "yoke" of Shilubana in the corridors of the institution of traditional leadership

This section contends that the perpetuation of the common law principles of gender equality in promoting the rights of women to succeed to the throne undermines the noble objectives of the transformative and developmental projects which are envisaged in the Constitution.

The quest for the transformation of the institution of traditional leadership cannot be overemphasised. It can also not be denied that since the attainment of democracy, progress has been evident in the transformation of the institution of traditional leadership. However, the biggest question that has not been answered decisively is how to undertake the process of reforming customary law and its institutions. The thorn in the flesh for the institution of traditional leadership is in the area of gender equality, with reference to the succession of women to the throne.

The court in *Mphephu* rejected the customary criteria for the appointment of the male to the throne as discrimination on the basis of gender. In *Ludidi* the act of recognising a woman was also a direct rejection of the customary criteria for the appointment of a traditional leader. In both these judgments, the court invalidated the long-standing principle of preserving succession to

⁵⁴ See s 10 of the Constitution.

⁵⁵ See for example ss 30 and 31 with their direct linkage to ss 211 and 212 of the Constitution.

the throne to the male line as discrimination against women based on their gender. In *Mphephu* the court directly adopted the approach in *Ludidi*. In the latter case, it upheld the decision of the Royal Family to recognise a woman whilst in the former it invalidated the criteria for succession to the throne. At face value, the two cases appear distinct but they are interrelated because they endorsed the same principle of rejecting the male primogeniture rule pertaining to succession to chieftaincy. The rejection is contrary to principle of giving a meaningful effect to the "legitimate purpose" in the upholding of a particular custom, which in this instance was the preservation of the throne through the male line. The rejection is clear evidence of the expanded force of the *Shilubana* judgment in the institution of traditional leadership. Rautenbach seems to have thrown in the towel and accepted that women's succession to traditional leadership is no longer an issue because it is envisaged in section 2(3) of *Framework Act* and was further affirmed in the decision of the Constitutional Court in *Shilubana*. It is not the intention to revisit the critique made in *Shilubana* where the Court adopted an approach designed to destroy the entire system of customary law by abolishing its traditional identity and adopting the official system of succession to the throne envisaged in the *Framework Act*. This version of the system of customary law might be thought to apply ore broadly as well, to the succession of women leaders in matrilineal systems, but that argument is not made in this article.

The same *Shilubana* approach was adopted by the court in *Mphephu*, when it held that the criterion of limiting the succession to males offended the right to equality as envisaged in the Bill of Rights. The fact that the court limited its insight into the essence of this criterion is disturbing. The criterion is designed to ensure certainty of the lineage system through the male line, which serves the legitimate purpose of retaining the identity of the community in the regulation of traditional authority. It also does not necessarily mean that the eldest male will remain on the throne when there is evidence of his incapacity. Various factors such as ill-behaviour, misconduct and other related factors may result in the appointed heir's being dethroned from the seat. The court focussed on addressing issues emanating from customary law through the prism of common law by also not acknowledging the "level of autonomy which has been acquired by women with the resultant number of female-headed households which came into existence [to the extent] of having a diluted patrilineal system".⁵⁶

⁵⁶ Rautenbach *Introduction to Legal Pluralism* 31.

In these cases, the court misdirected the lived realities of the people in their communities, where their own identities would so much be threatened as be completely destroyed. The short-term goal of resolving two customary law disputes lost sight of the future implications of the judgments not only on the respective communities but on the entire system of customary law. These judgments are also not "developmental", as envisaged in section 39(2) of the Constitution, nor "transformative", as also entrenched in section 2A(4) of the *Framework Act*. They have in fact compromised the equal rights of women to reproductive rights⁵⁷ and privacy.⁵⁸ They subject women to the unnecessary pressure of undermining their own privacy and reproductive rights because they will have to make, for example, uncomfortable choices about their private lives, such as to decide whether they will have children or not, or even if they will get married. If they opt for the latter, they cannot marry with the "throne" to the marital family, a crux of the argument in this paper, which means the opening of a vacuum and uncertainty on leadership within the system. If the woman opted to have a child without getting married, she would at first, engage in what I could refer to as "scouting" for a partner, whether the potential candidate would be of royal blood or not. Secondly, the partner selected would also have his own responsibilities towards his own royal family, as he would be expected to get married as a "prince". Thirdly, the child born out of such a relationship would not succeed her whether the father was of the royal family or not, because he or she would not be eligible for the succession in the family group that the woman chief was representing. Under a close-microscope and despite uncertainty, the *Shilubana* judgment affirmed the hereditary nature of the system of customary law, as it endorsed that Ms Shilubana would, "albeit not be succeeded by her own daughter or son but a "sociological" child born of the Nwamitwa bloodline".⁵⁹ This is indicative that the chief in customary law gets married to ensure certainty of lineage and the identity of the traditional community, which the woman cannot provide. This means that a chief in customary law is born and not elected, which seems to be the approach that the court steered the system towards. This prompts questions on whether a woman assuming this role is a catalyst that transforms the institution of traditional leadership by succeeding to the throne, a catalyst that destroys the Royal Family system in customary law, that puts an end to family in customary law relationships, that extends royalty to those not of the royal blood (commoners), or that increases individualism in customary law?

⁵⁷ See s 12(2) of the Constitution.

⁵⁸ See s 14 of the Constitution.

⁵⁹ *Shilubana* para 90.

The above questions give rise to another broad question, whether women's leadership qualities and skills in customary law are of relevance when they occupy the throne? Further, there will be uncertainty about the succession to the throne in the institution of traditional leadership, as these judgments open up possibilities for future contestation as to who might be next in line in the Royal Family. The approach of the court in these cases reinforces the argument about the irrelevance of the institution in the new democratic dispensation by abolishing the very foundations of the system of traditional authority. It endorses the tone of ridicule in the language of those who criticise the institution of traditional leadership, which is called atavistic and pedantic and thus not only contrary to democracy but its antithesis and nemesis; a gerontocratic, chauvinistic, authoritarian and increasingly irrelevant form of rule that is antithetical to democracy; a relic of the past that may actually impede democratic development; and a major setback to democracy, holding traditional values which are patriarchal, and silencing the views of the youth and women. Such critique condemns traditional leaders as being least qualified to talk about democracy.⁶⁰

In addition, the court missed an opportunity to bring about a re-orientation of attitudes of the people towards the institution of traditional leadership. It is not in dispute that the *Framework Act* envisages a "progressive approach" in the transformation of the institution. The progression entails incremental changes that take place over time. These changes are not to take place overnight but are to be infused into the entire system of customary law on a step-by-step basis. However, the recent judgments appear to be insisting on promoting gender equality in succession to the throne without limitations. How can that be done in a dispensation which gives equal constitutional recognition to all the legal systems in South Africa? It is not denied that the Constitution is the foundation for the promotion of the values of the new dispensation because of its supremacy in declaring any conduct, rule or practice as invalid if it is inconsistent with it.⁶¹ The same goes with the adoption of the *Equality Act*,⁶² which is also characterised as a unique

⁶⁰ Chakunda and Chikerema 2014 *Journal of Power, Politics and Governance* 67.

⁶¹ See s 2 of the Constitution.

⁶² *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000, hereinafter referred to as the "*Equality Act*". The *Equality Act* gives substance to s 9 of the Constitution which reads as follows: "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (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,

instrument in the prohibition of discriminatory practices that undermine the human worth of a person. The *Equality Act* acknowledges the "progress made in restructuring and transforming our societies and its institutions which are still characterised by systemic inequalities and discrimination that remain deeply embedded in social structures, practices and attitudes which undermine our constitutional democracy".⁶³ The *Equality Act* defines discrimination as "an act or omission, including a policy, law, rule, practice or situation which directly or indirectly (a) imposes burdens, obligations or disadvantage on; or (b) withholds benefits, opportunities, or advantages from, any person on one or more of the prohibited grounds."⁶⁴

It also specifically, prohibits discrimination on the grounds of gender, including any practice including traditional or customary law practices as envisaged in section 8(d). In assessing the pace of transformation or the development of customary law practices, a focus on the constitutionalised "rights approach" which is context sensitive, tracing the history and purpose in the determination of the legitimacy of the rule of primogeniture in the new constitutional dispensation could have provided a foundation for determining the approach to be taken, instead of ridiculing the institution as being un-transformative and undemocratic.

The "rights approach" captures the content of the "differentiation approach" which was developed by the Court in the *Harksen v Lane*⁶⁵ judgment. The judgment established a cardinal test to determine whether the practice differentiates unfairly between people, especially women, and is related to a legitimate government purpose.⁶⁶ The principle in *Harksen* entails the analysis of the importance, purpose and the extent to which it promotes a legitimate government purpose. The *Harksen* test was devised earlier by Sachs J in *Coetzee v Government of the Republic of South Africa*,⁶⁷ wherein the judge held that courts should adopt a:⁶⁸

culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

⁶³ Preamble of the *Equality Act*.

⁶⁴ See s 1(1) under "discrimination".

⁶⁵ *Harksen v Lane* 1997 11 BCLR 1489 (CC), hereinafter referred to as "*Harksen*".

⁶⁶ *Harksen* para 53.

⁶⁷ *Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer Port Elizabeth Prisons* 1995 10 BCLR 1382 (CC), hereinafter referred to as "*Coetzee v Government of the Republic of South Africa*".

⁶⁸ *Coetzee v Government of the Republic of South Africa* para 46, footnotes omitted.

Holistic, value-based and case-oriented framework ... [which] is not restrictive to *ad hoc* technicism but rather [a focus] ... on synergetic relation between the values underlying the guarantee of fundamental rights and the circumstances of the particular case. ... based on an understanding of the values our society is being built on and the interests at stake ... that cannot be made in the abstract, ...[and] the judge must situate the analysis in the facts of the particular case, weighing the different values represented in that context.

Drawing from this test, the question that has to be asked is whether the imposition of the western concept of gender equality, which is imposed in a different setting of law, is related to a legitimate government purpose? In the context of customary law, the question that needs to be asked is whether the development taken by the Royal Families, the criteria in *Mphephu* and the act of recognition of a woman in *Ludidi* were related to a legitimate government purpose, which, as argued in this paper, has to do with the governance and authority of the institution of traditional leadership? Preserving the throne only to males is whether its importance and purpose captures the content of the legitimacy, which the rule seeks to achieve. The reservation of the throne to the male line and the exclusion of women are reasonable. They have a legitimate governmental purpose. The succession was not reserved specifically and only to the senior male. As noted above, the core determinants of the eligibility of the successor to the throne included that he should be a leader of high integrity and should have various other essential qualities, which were needed and are still needed in the regulation of traditional authority. This means that discrimination on the grounds of gender is justified, because the limitation seeks to fulfil a legitimate government purpose, which is the preservation of the identity of the institution of traditional leadership through the male line.

With this in mind, it is a considered, firm view that the court entered the fray and perpetuated a threat to the existence of the institution in the new democratic dispensation. The minority judgment in *Pilane* cautioned against the threat and argued that:⁶⁹

Bearing in mind the need to help these fledgling institutions to rebuild and sustain themselves, threats to traditional leadership and related institutions should not be taken lightly. The institution of traditional leadership must respond and adapt to change, in harmony with the Constitution and the Bill of Rights. But courts ought not to be dismissive of these institutions when they insist on the observance of traditional governance protocols and conventions on the basis of whatever limitation they might impose on constitutional rights. Like all others, the constitutional rights the applicants to vindicate are not

⁶⁹ *Pilane* para 79, footnotes omitted.

absolute. They co-exist within a maze of other rights to which expression must also be given.

The affirmation by the court was an endorsement of customary law as a constitutional, legal and human rights system that is recognised in terms of its own prescripts. Any offending prescript or rule that emanates from it should equally be subject to constitutional scrutiny within its own context. In this way, the question arises whether the preservation of the throne to the male heir, acknowledging the complexity of the context of values and guiding principles that underlie the traditional processes of the system of customary law, undermines the broader principles of gender equality. This question has not been answered in the affirmative by the court in either case, as it chose the easy way out of using a common law lens through which to view the right to gender equality in customary law.

5 Conclusion

From this discussion, it is evident that there is a continued manifestation of the subjugation of customary law, as was the case in the past. The cases discussed herein are indicative of the struggle still to be undertaken to bring customary law in line with the ideals of the new democracy. They are an indication of the need to transform the jurisprudence of our courts. Interpreting the principles of customary law in terms of those of common law undermines the development of the former's prescripts. These two cases, which were grounded in *Shilubana*, prevent progress from being made in the infusion of the ethos of constitutional law into customary law. The limitation of rights in customary law has not been decisively conceptualised by the court. Instead, the court focussed on the common law frame of reference in interpreting a customary law prescript. The court eroded the legitimate purpose of preserving the succession to the throne through the male line. At this stage, there appears to be a progression towards changing the identity of the institution of traditional leadership by the interpretation of the concept of gender equality within the framework of "womanhood" as a transformative determinant of the system of customary law. However, as was the case in past when customary law survived attempts to destroy it, a concerted effort should again be undertaken by various sectors, not only the institution of traditional leadership, to inhibit any attempt to prevent the transformation of customary law in its own context.

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List of Abbreviations

AHRLJ	African Human Rights Law Journal
CCR	Constitutional Court Review
CILSA	Comparative and International Law Journal of Southern Africa
LDD	Law, Democracy and Development
PELJ	Potchefstroom Electronic Journal
RCMA	Recognition of Customary Marriages Act
SAPL	Southern African Public Law
Stell LR	Stellenbosch Law Review