

THE CUSTOMARY LAW OF INTESTATE SUCCESSION

by

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DECLARATION

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I declare that **The Customary Law of Intestate Succession** is my own work and that all the sources I have used or quoted have been indicated and acknowledged by means of complete references.

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Signature
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SUMMARY OF THE THESIS

The title of this thesis is: The Customary Law of Intestate Succession. The African customary law relating to intestate succession has always been known to discriminate against women. The thesis therefore focuses on the customary law of intestate succession in the countries of South Africa, Ghana and Swaziland and the inroads they have made in improving the rights of women in this discriminatory field of African customary law.

This thesis consists of six chapters. Chapter 1 introduces the reader to the topic of the research. It highlights the organisation of the intended research which comprises: a statement of the problem, the legal framework, research methodology and a summary of the chapter. Chapter 2 defines the general terms and concepts used in the customary law of intestate succession. This facilitates an understanding of the general principles comprising the body of law known as the customary law of intestate succession and lays the foundation for the country specific issues that are investigated in the following chapters. Chapter 3 discusses the recognition, application and development of the customary law of intestate succession in the country of South Africa. Chapter 4 considers the rules and laws of the customary law of intestate succession in the West African country of Ghana. Chapter 5 explains the current rules and laws of the customary law of intestate succession prevailing in the Kingdom of Swaziland.

Finally, chapter 6 brings the thesis to a meaningful end, by criticizing the approaches adopted by the countries of South Africa, Ghana and Swaziland in improving the rights of women as far as the customary law of intestate succession is concerned. The chapter also presents various recommendations for improving the rights of women in this discriminatory field of the law.

KEY TERMS: African customary law; intestate succession; South Africa, Ghana, Swaziland

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and People's Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CDC	Constitution Drafting Committee (Swaziland)
Contralesa	Congress of Traditional Leaders of South Africa
CRC	Constitutional Review Commission (Swaziland)
ICCPR	International Covenant on Civil and Political Rights
SALRC	South African Law Reform Commission
TRC	<i>Tinkhundla</i> Review Commission (Swaziland)
UDHR	Universal Declaration of Human Rights
WLSA	Women and the Law Southern Africa

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CHAPTER 1

INTRODUCTION, OBJECTIVES AND FRAMEWORK OF THE STUDY

1.1 Introduction

In all Western systems of law, succession or inheritance (terms which is often used interchangeably) forms part of private law and is concerned with the principles which determine the distribution of a deceased's estate after his or her death.¹ In customary law, however, the terms "succession" and "inheritance" are ascribed distinctive meanings. The mere division of a deceased's assets among his or her heirs would be regarded as inheritance in African customary law.² Inheritance can either take place according to the provisions of a will, ie, testate inheritance – or "in accordance with the rules of the common law where no will exists, ie, intestate inheritance".³ Succession on the other hand, is mainly concerned with succeeding to the "status of the deceased",⁴ ie, assuming the role of the deceased or taking his position and obtaining authority over the people and property over which the deceased exercised authority.⁵ The customary law of succession therefore outlines the principles to be followed at the death of a deceased (ie, usually the family head).

1.1.1 Problem statement

Amongst all tribes in Africa, succession to status in African customary law is based on

¹ Rautenbach C, Du Plessis W and Venter AM "Law of succession and inheritance" in Bekker JC, Rautenbach C and Goolam NMI *Introduction to legal pluralism in South Africa* (2006) 93.

² Rautenbach C, Mojela K, du Plessis W and Vorster LP "Law of succession and inheritance" in Bekker JC, Labuschagne JMT and Vorster LP *Introduction to legal pluralism in South Africa Part 1 Customary Law* (2002) 109.

³ *Ibid.*

⁴ Maithufi IP "The effect of the 1996 Constitution on the customary law of succession and marriage in South Africa: Some observations" (1998) *De Jure* 288.

⁵ Bekker JC *Seymour's customary law in southern Africa* (1989) 70.

the principle of primogeniture.⁶ According to that principle, the eldest or oldest son is the only person eligible to succeed the deceased.⁷ This means that women and younger siblings are excluded from succeeding to important positions of status purely on the basis of their gender or birth.⁸ This is not the case in Western law, as all persons are entitled to inherit the property of a deceased person irrespective of their gender or birth. The fact that women and younger children are still discriminated against in this day and age on the basis of an age old customary practice can no longer be tolerated. This is especially relevant in the context of the fact that it has become a current trend in most African states to adopt Constitutions which guarantee numerous fundamental and human rights, including such rights as the rights to culture and equality.

To this end, this study therefore generally considers the impact of the customary law of intestate succession on the rights of women in tribal communities in the countries of South Africa, Ghana and Swaziland. The basic objectives of the study are to: (a) determine the elements of both the customary and common laws of intestate succession applicable in each of the countries mentioned above; (b) to determine the role of the courts and other institutions in resolving disputes related to succession but more importantly; the ability of courts to initiate change to the existing rules of customary law affecting intestate succession; (c) an evaluation of the impact of the provisions of the Constitutions of each of the afore-mentioned countries on the customary law of intestate succession; and (d) an assessment of whether the laws currently in place are able to effectively eradicate discrimination in this contentious field of the law.

1.1.2 Demarcation of the field of investigation and the reasons therefore

Succession is a complex field of study and may lend itself to numerous spheres of

⁶ Kerr AJ *The customary law of immovable property and of succession* (1990) 99. See also *Sonti v Sonti* 1929 NAC (C&O) 23 at 24.

⁷ Olivier NJJ, Bekker JC, Olivier NJJ (jnr) and Olivier WH *Indigenous law* (1995)148.

⁸ Bekker JC and De Kock PD "Adaptation of the customary law of succession to changing needs" (1992) *Comparative International Law Journal of South Africa* 368-369.

research. This study is however confined to the customary law of intestate succession in the countries of South Africa, Ghana and the kingdom of Swaziland. The countries of South Africa, Ghana and Swaziland were chosen for this study because:

- (a) all three countries were formally under British rule and administration, where the recognition and application of African customary law was virtually disregarded;
- (b) English law had an impact on the legal development of all three countries, albeit that Roman-Dutch law is the dominant “western” law in Swaziland and South Africa;
- (c) deep legal pluralism prevails in all; i.e. in all three countries, a multiplicity of legal systems are recognised and observed.⁹
- (d) all three countries have relatively new Constitutions granting a wide variety of rights and the researcher wanted to investigate the interplay between rights at customary law (which are traditionally group orientated) and constitutional rights (which are individualistic by nature); and
- (e) South Africa has made numerous changes to its laws relating to intestate succession, Swaziland is one of the last remaining monarchies in Africa, and Ghana’s succession laws are so dissimilar to both South Africa and Swaziland that the researcher regarded it as an interesting comparator. Ghana has also enacted or drafted in depth legislation pertaining to the customary law of intestate succession.

South Africa’s population is diverse and consists of a number of tribal groupings including for example, the Zulus, Xhosa’s, the Ndebele, the Tswana and the Venda.¹⁰ Ghana’s population is also heterogeneous and also consists of numerous tribal communities including the Akan (who comprise most of the population of Ghana), the Ashantis, Fantis, Gas, Ewes, Ga-Dangmes and Gonjas to name but a few.¹¹ However, unlike South Africa and Ghana, the kingdom of Swaziland lacks any tribal

⁹ For a discussion of deep legal pluralism see Van Niekerk GJ “Legal pluralism” in Bekker JC, Rautenbach C and Goolam NMI in *Introduction to legal pluralism in South Africa* (2006) 6.

¹⁰ See generally Van Warmelo NJ “The classification of cultural groups” in Hammond-Tooke WD *The bantu-speaking peoples of southern Africa* (1974) 56-84.

¹¹ Bankas EK “Problems of intestate succession and the conflict of laws in Ghana” (1992) *International Lawyer* 438.

differentiation. It is important to mention that in the course and scope of this study, the customary law of intestate succession will be explored in general terms in the countries under consideration and without any particular reference to any singular tribe or tribes as that would fall outside the capacity of the study and would be too extensive for the purposes of this study.

1.2 The legal framework

This study is conducted from a purely legal perspective. Before embarking on an investigation into the topic, it would be most valuable to firstly consider the sources of law in the countries under consideration in this study and secondly to define customary law and place it in the context of the South African, Ghanaian and Swazi legal systems.

1.2.1 Sources of law

The anthology of legal rules and principles governing the customary law of intestate succession can be found in the sources of law.¹² Sources of law refer to where the law derives from and where it can be located.¹³ In South Africa, the sources of law comprise the Constitution of the Republic of South Africa (Act 108) of 1996 (which is the supreme law of the land),¹⁴ legislation (ie, all laws enacted by an organ of state vested with the powers to do so), common law (ie, all law which is not statutory law and which is not customary law falls into this category), case law (which is derived from the judgments of courts, as courts are permitted to interpret, apply and hence make law) and customary law (which will be defined further below).

In Ghana, the sources of law include: the Constitution¹⁵ (which is also the supreme law of the land);¹⁶ enactments made by or under the authority of the Parliament established by the Constitution (or legislation); any Orders, Rules, Regulations made by any person

¹² Snelch JM *Private education in South Africa: The legal status and management of private schools* (Unpublished LLD thesis Unisa) (1997) 7.

¹³ *Ibid.*

¹⁴ See section 2 of the Constitution of the Republic of South Africa, 1996.

¹⁵ The Constitution of the Republic of Ghana, 1992.

¹⁶ See article 1(2).

or authority under a power conferred by the Constitution (or subsidiary or subordinate legislation); the existing law or the written and unwritten laws of Ghana that existed immediately before the coming into force of the 1992 Constitution; and the common law (or the English common law), English doctrines of equity, and the rules of customary law (which will be defined further below).¹⁷

The law of Swaziland is derived from a number of sources including: the Constitution¹⁸ (which is the supreme law of the land);¹⁹ legislation; common law; judicial precedent (or case law); customary law (which will be defined further below); authoritative texts; and decrees.²⁰

1.2.2 What is customary law?

In South Africa, customary law may be defined as: “the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples”.²¹ The application of customary law in South Africa is sanctioned by section 211(3) of the Constitution of the Republic of South Africa, (Act 108) of 1996 which provides that: “the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law”. Section 211(3) of the Constitution therefore has the effect of raising customary law to the same status as the common law;²² this was not the case in the past as customary law was often viewed as inferior to the common law and was always disregarded or ignored as a source of South African law.

In Ghana, customary law refers to “the rules of law which by custom are applicable to particular communities”.²³ This means that customary law “is now a question of law to

¹⁷ Article 11 of the Constitution. See also Globalex at <http://www.nyulawglobal.org/globalex/Ghana1.htm> 2-3 (accessed 10/02/2012).

¹⁸ The Constitution of the Kingdom of Swaziland Act 101 of 2005.

¹⁹ See section 2(1).

²⁰ Globalex at <http://www.nyulawglobal.org/globalex/Swaziland/htm2> (accessed 09/02/2012).

²¹ Section 1 of the Recognition of Customary Marriages Act 120 of 1998.

²² Bennett TW “The conflict of laws” in Bekker JC, Rautenbach C and Goolam NMI *Introduction to legal pluralism in South Africa* (2006) 17.

²³ Article 11(3) of the Constitution of the Republic of Ghana, 1992.

be determined by the courts”.²⁴ According to sections 42 and 43 of the Ghana Chieftaincy Act 370 of 1971,²⁵ the National House of Chiefs and/or a Regional House of Chiefs, are empowered to draft their own pronouncements of customary law for endorsement and promulgation as possible legislation by the President after consultation with the Chief Justice.²⁶

In the kingdom of Swaziland, customary law may be described as:

... the indigenous system of customary jurisprudence existing amongst the Swazi. It embraces all customary rules of conduct, whatever their source, which are recognised at the present time and can be enforced by them.²⁷

The application of customary law in Swaziland finds its approval in section 252(2) of the Constitution of the Kingdom of Swaziland²⁸ which provides that: “the principles of Swazi law and custom are recognized and adopted and shall be applied and enforced as part of the law of Swaziland.”²⁹

1.2.3 The general characteristics of customary law

1.2.3.1 The unwritten nature of customary law

Originally, customary law was largely unwritten.³⁰ Proceedings in the tribal courts (like the chiefs and headman’s courts)³¹ were conducted orally and the law was also transmitted verbally from one age group to the next.³² As a result thereof, the larger community possessed a basic knowledge of the law. The unwritten nature of the law

²⁴ Globalex at <http://www.nyulawglobal.org/globalex/Ghana1.htm> 8 (accessed 10/02/2012).

²⁵ As amended by the Chieftaincy (Amendment) Decree, 1973 (NCRD 166), the Chieftaincy (Amendment) (no 2) Decree, 1973 (NCRD 226), the Chieftaincy (Amendment) Law, 1982 (PNDCL 25) and the Chieftaincy (Amendment) Law, 1993 (PNDCL 307).

²⁶ *Ibid.*

²⁷ Women and Law in Southern Africa Research and Educational Trust *Inheritance in Swaziland: Law and practice* (1994) 21.

²⁸ Act 101 of 2005.

²⁹ See Globalex at <http://www.nyulawglobal.org/globalex/Swaziland/htm> 5 (accessed 09/02/2012).

³⁰ Van Niekerk GJ *The interaction of indigenous law and western law in South Africa: A historical and comparative perspective* (Unpublished LLD thesis Unisa) (1995) 37.

³¹ See Bekker (1989) *op cit* 15-30.

³² *Id* 14-30.

also manifested itself in both Ghanaian customary law and Swazi law and custom.³³

1.2.3.2 The customary nature of customary law

Customary law is often based on the customs of indigenous African people. The term “custom” refers to the traditions, practices, moral or ethical codes and the rules for living that are adhered to by members of the community.³⁴ The customs of an indigenous community are well known by every member of the community as they are passed down from generation to generation by older members of the group; usually the older men.³⁵ The customs of an indigenous community are generally adhered to for fear of ancestral punishment³⁶ and to maintain social order. Customs commonly transform into customary law over time and especially when they are endorsed by the group’s belief in its “indispensability and desirability”,³⁷ and “through recognition of the judicial decisions of the authority”.³⁸ Therefore, the terms custom and customary law, although distinct, are interrelated.

1.2.3.3 Customary law as an expression of community values

Because the community participates in the process of adjudication, this has resulted in the law giving expression to the established values or the universal ethical code of conduct of the community. This means that as the values in the community change over time, so does the law.³⁹ Amongst the Swazi, variances between legal and moral values are unknown, and hence the evolutionary nature of Swazi customary law is demonstrated. This rule seems to be applicable to all tribal communities. The main focus of customary law is to initiate reconciliation between people and to guarantee the preservation of group harmony.⁴⁰ African customary law, unlike Western law, is also

³³ Marwick BA *The Swazi* (1966) 280.

³⁴ See generally Gluckman M *Order and rebellion in tribal Africa* (1963) 198.

³⁵ See Bekker (1989) *op cit* 11 and Marwick *op cit* 280.

³⁶ Pospisil LJ *Anthropology of law: A comparative theory* (1971) 169-170.

³⁷ Pospisil LJ *The ethnology of law* (1978) 63-64.

³⁸ Pospisil (1971) *op cit* 345.

³⁹ Anspach P *The indigenous rights of personality with particular reference to the Swazi in the Kingdom of Swaziland* (Unpublished LLD thesis Unisa) (2004) 71.

⁴⁰ *Ibid.*

group or community orientated in the sense that rights and duties are shared⁴¹ and are not individually based, and land or property is owned communally.

1.2.3.4 The role of magico-religious conceptions in African customary law

Many African communities believe in the existence of the supernatural and their outlook on the subject may differ from tribe to tribe. In this study the researcher will limit her analysis to a description of only two of the most popular forms of supernatural phenomena viz the belief in ancestral spirits and sorcery.

1.2.3.4.1 The belief in ancestral spirits

The observance of South African customary law, Ghanaian customary law and Swazi law and custom is rooted in the strong belief of ancestral spirits. The Swazis believe that the ancestors (*emadloti*) live in the spiritual world and that all living conventions, and thus also Swazi law and custom originate from and are protected by the ancestral spirits.⁴² The *emadloti* are affirmed by each family at every family event viz birth, death, illness and the construction of and re-location of homesteads.⁴³

The ancestral spirits are interested in the welfare and prosperity of the kinship group⁴⁴ and also ensure that the rules for living and Swazi law and custom are adhered to.⁴⁵ A failure to comply with law and custom and the rules for living “may lead to punishment by the ancestral spirits because such disregard or deviation is regarded as disrespectful and neglectful of the ancestors”.⁴⁶ In such cases, reconciliation or the appeasement of the ancestors is achieved by slaughtering an animal and by partaking in a communal

⁴¹ Van Niekerk (1995) *op cit* 37.

⁴² Whelpton FPvR “Swazi law and custom (*emasiko nemi esiswati*): Law (*lesiko*) or custom (*umhambo*)” (2004) *Codicillus* 30.

⁴³ Kuper H *The Swazi* (1952) 43.

⁴⁴ Hammond-Tooke WD *The roots of Black South Africa* (1993) 153.

⁴⁵ Kuper *op cit* 42.

⁴⁶ Whelpton *op cit* 30-31.

meal.⁴⁷ The belief in ancestral spirits is unique in Africa, in that it promotes mechanisms to keep people in line with acceptable standards of conduct, without the need for regulation by law.⁴⁸

1.2.3.4.1 The belief in sorcery

Sorcery may be defined as: “the malicious use of magic to inflict harm upon other people or their property”.⁴⁹ The sorcerer is usually a person and it is therefore beneficial to the community that the sorcerer be identified and banished from the tribal community. Various techniques such as divination are often employed to identify a sorcerer.⁵⁰ Despite the influence of Westernisation, the belief in sorcery is still regarded as very serious by many tribal communities.⁵¹

1.2.4 Classification of customary law

In African societies, there is often a dichotomy between the actual practices or rules in which people engage or follow and the customary law as it is recorded in the law books of the country. It is therefore quite common practice to make a distinction between “living” and “official” customary law.⁵² “Living” customary law may be defined as: “the law that is actually observed by communities”.⁵³ “Official” customary law may be defined as: “customary law that is contained in legislation and precedents”.⁵⁴ This important distinction should be kept in mind throughout this study.

⁴⁷ Hammond-Tooke WD “World view II: A system of action” in Hammond Tooke WD *The bantu-speaking peoples of Southern Africa* (1974) 353.

⁴⁸ Whelpton *op cit* 31.

⁴⁹ Schapera I *The bantu-speaking tribes of South Africa: An ethnographical survey* (1937) 211.

⁵⁰ Gluckman M *Politics, law and ritual in tribal society* (1965) 218.

⁵¹ Anspach *op cit* 74.

⁵² Bennett TW *Customary law in South Africa* (2004) 29.

⁵³ Lehnert W “The role of the courts in the conflict between African customary law and human rights” (2005) *South African Journal on Human Rights* 246. See also De Koker JY “African customary family law in South Africa: A legacy of many pasts” in Eekelaar J and Nhlapo T (eds) *The changing family* (1998) 322-323.

⁵⁴ *Ibid.*

1.3 Research methodology

This study has been approached from a purely legal perspective and therefore involves legal research. In general, research may be defined as: “the systematic investigation into and study of materials and sources in order to establish facts and reach new conclusions”.⁵⁵ Legal research may be defined as: “finding all the law relevant to the legal question being researched, applying the law to the legal question and reaching an answer”.⁵⁶ In this study, legal research is embarked on in the field of intestate succession in African customary law, with a view to discerning, describing and interpreting a vast array of legal facts and principles relating to the legal status of women.⁵⁷ In this section, the researcher will highlight some of the research methods used in this study in order to collect the relevant data.

1.3.1 Literature review

In general, all research begins with a literature review. Comprehensive legal research requires a methodical inspection of a suitable amount of the substantial legal literature available.⁵⁸ The purpose of a literature review is to broaden ones understanding of the problem at hand and also assists in placing the study in its proper historical context.⁵⁹ The literature review also: “provides a background for the important variables or concepts in the study and describes the similarity and difference between your work and that of other authors and researchers in the field”.⁶⁰ The literature review “contributes the first bricks to building a general understanding of the legal system, its tensions, and also the art and technique of legal research”.⁶¹ A thorough literature review widens the researcher’s knowledge on the subject matter under consideration and promotes the reception of novel data and information, which is essential for a

⁵⁵ The *Oxford English Dictionary* Online (2012) <http://oxforddictionaries.com/definition/research?q=research>.

⁵⁶ Bast CM and Hawkins M *Foundations of legal research and writing* (2006) xxii.

⁵⁷ Squelch *op cit* 12.

⁵⁸ *Id* 13.

⁵⁹ *Ibid*.

⁶⁰ Roberts CM *The dissertation journey: A practical and comprehensive guide to planning, writing, and defending your dissertation* (2010) 25.

⁶¹ Lomio JO and Spang-Hanssen H *Legal research methods in the US and Europe* (2009) 135.

thesis.⁶² When compiling a literature review, numerous sources are usually consulted. The following two types of sources were employed in this study.

1.3.1.1 Primary sources

Primary sources may be defined as: “those sources which are direct, authoritative and not influenced by anybody’s opinion”.⁶³ Examples of primary sources of law may include case law, statutes, ordinances or regulations.⁶⁴ The primary sources of law consulted in this study include: the Constitutions of the various countries under consideration; the relevant national legislation governing or influencing the customary law of intestate succession; the various ordinances and regulations regulating intestate succession; and the relevant case law in each of the areas of investigation.

It is worth noting at this point, that the researcher found it extremely difficult to find Swazi case law on the subject matter. This could be due to the fact that matters pertaining to Swazi law and custom are not heard in the mainstream courts but are often adjudicated on by Swazi (customary) courts. The decisions of Swazi courts are not reported as Swazi law and custom remains largely unwritten and is usually transferred orally from one generation to the next.⁶⁵ Another problem with Swazi case law is that although there is indeed a:

vast body of law on inheritance (or succession) derived from common law through reported cases, unfortunately, most of the reported cases are from South Africa. A quick search for reported cases in Swaziland reveals a dearth of such materials. Causes for this could be that most conflicts on inheritance (or succession) are not brought to the courts either because they are dealt with by rules and procedure under Swazi law and custom or because all the cases end up resolved in the office of the Master of the High Court. It could also be that members of the society are not aware of the remedies available in court, thus they “sleep” over their rights.⁶⁶

⁶² Squelch *op cit* 13.

⁶³ Chatterjee C *Methods of research in law* (1997) 23.

⁶⁴ McCormick MA *Legal research* (1996) 4.

⁶⁵ Globalex (Swaziland) *op cit* 5.

⁶⁶ Iya PF “The law of inheritance in Swaziland” in Women and Law in Southern Africa Research Project *Working Papers on Inheritance law in Southern Africa* (1992) 55.

1.3.1.2 Secondary sources

Secondary sources may be defined as: “works that write about or explain primary sources”.⁶⁷ Examples of secondary sources may include the opinions of experts, books or published articles.⁶⁸ The secondary sources of law consulted in this study include a vast array of textbooks, books, periodicals, law reviews, researched articles, newspaper articles, dissertations and other documents obtained via the internet. A large majority of the body of secondary sources consulted in this study has been written by the known subject specialists in the field of African customary law from the different countries under consideration.

1.3.2 Field research

Field research is not often undertaken when legal research is conducted; as field research is often associated with anthropology.⁶⁹ Anthropology is the “comparative study of human societies and cultures and their development”.⁷⁰ Anthropologists merely define field research as “being away in the field”.⁷¹ Because of the unwritten nature of African customary law and the fact that this study seeks to gauge the “living” or “unofficial” law of the African people in the areas under investigation, fieldwork was an indispensable component of this thesis. Although it is quite plausible for the legal researcher to consider the research methods and techniques of the anthropologist, it is not appropriate for him or her to adopt those methods and techniques as the objectives of the two disciplines are dissimilar.⁷²

For the anthropologist, law is considered as assimilated into a group’s culture and the aim of their field research is to merely document both the law and associated

⁶⁷ McCormick *op cit* 4.

⁶⁸ Chatterjee *op cit* 23.

⁶⁹ Coffey A and Atkinson P *Making sense of qualitative data* (1996) 92.

⁷⁰ The *Oxford English Dictionary* Online (2012) at <http://oxforddictionaries.com/definition/anthropology?q=anthropology>

⁷¹ Coffey and Atkinson *op cit* 93.

⁷² Prinsloo MW “Principles, methods and techniques” in Van Niekerk GJ and Vorster LP (eds) *Field research in indigenous law* (1991) 4.

customs.⁷³ The purpose of the legal researcher in conducting field research is to compile a valuable law reference which may be utilised by the various courts and other legal entities.⁷⁴ It is however worth noting that a comprehensive study of the legal rules and customs of African people can only be done justice by engaging in a contextual analysis of their socio-economic environment and the beliefs and customary traditions at work in their respective communities.⁷⁵ In this regard, anthropology may prove to be quite useful. It is therefore imperative that those facets of custom, which are needed to give us a deeper understanding and explanation of the law, should also be documented simultaneously.⁷⁶ It is for this reason, that although the primary approach of this study was from a legal perspective, the researcher also used anthropological field research techniques and methods to gain insight into the customary law of intestate succession amongst the Swazi.

1.3.2.1 Areas of field research

South Africa contains a large body of completed research on the customary law pertaining to the subject of intestate succession. It is for this reason that very little field research was conducted in South Africa. Informal interviews were however held with students at the University of KwaZulu-Natal and the general public in the province of KwaZulu-Natal. The participants were more than willing to share their opinions with the researcher and were not coerced into engaging with the researcher.

Ghana also contains a large body of completed research on the customary law pertaining to the subject of intestate succession. However, it is not for this sole reason that research was not conducted in this country. A genuine lack of sufficient funding prevented the carrying out of the relevant research in Ghana.

In Swaziland, interviews were held in Mbabane with a an expert and two lay women perceived to be knowledgeable in the field of intestate succession.

⁷³ Anspach *op cit* 33.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ Prinsloo *op cit* 12-13.

1.3.2.2 Panel of experts in Swaziland

The interviews with the panel were conducted in Mbabane, the capital city of the Kingdom of Swaziland. The interviews were organised and facilitated by Mr Richard Dumisa Dlamini. Mr Dlamini was quite capable of conducting and facilitating the interviews as he had been employed for many years in the Civil Service of Swaziland and the Public Broadcaster in the Kingdom. Mr Dlamini served as an interpreter during the interviews and also provided valuable information and insight into the discussion on the customary law of intestate succession in Swaziland.

Two other female experts were also consulted as part of the interviews. Their contribution remains invaluable as they were able to give the researcher a female perspective on both the customs and laws pertaining to intestate succession prevalent in Swaziland. The experts were professional, knowledgeable, and trustworthy and were willing to share their expertise with the researcher. They were also made aware of the reasons for the research.

1.3.2.3 Interviewing process

The researcher employed Prinsloo's⁷⁷ interviewing procedures and techniques. The purpose of the interviews was to gain insight into the research topic from members of the Swazi people who are well acquainted with Swazi customs and Swazi way of life, and with the intention of attaining valid and reliable information. Prinsloo's⁷⁸ control techniques were implemented to ensure the correctness of the information gathered. The interviews were conducted along the following lines: a group of questions were prepared beforehand and the interviewees were given an opportunity to respond to each of the questions individually. The information gathered at these interviews was recorded in written notes. No recording devices were used as it was perceived that this might seriously hamper the collection of the information needed. The interviews were rather informal and questions were formulated objectively always bearing in mind the culture of the people concerned.

⁷⁷ Prinsloo *op cit* 18-27.

⁷⁸ *Id* 28-29.

1.3.3 An analysis of international law

South Africa, Ghana and Swaziland have become parties or signatories to many international instruments. It is therefore significant that this study engages in a brief analysis of these various international documents and investigates each country's level of obligation in regard thereto; and their impact on the customary law of intestate succession. As stated previously, the current customary rules pertaining to intestate succession are discriminatory and therefore infringe upon various human rights. As a result thereof, it is imperative that this study consider international law especially as it affects human rights.

International law is particularly relevant in South Africa as section 39(1)(b) of the Constitution bears an injunction that "when interpreting the Bill of Rights, a court, tribunal or forum must consider international law". In Ghana, section 40(c) of the Constitution states that: "in its dealings with other nations, the Government shall –

- (c) promote respect for international law, treaty obligations and the settlement of international disputes by peaceful means;
- (d) adhere to the principles enshrined in or as the case may be, the aims and ideals of –
 - (i) the Charter of the United Nations;
 - (ii) the Charter of the Organisation of African Unity;
 - (iii) the Commonwealth;
 - (iv) the Treaty of the Economic Community of West African States; and
 - (v) any other international organisation of which Ghana is a member.

In the Kingdom of Swaziland, mere mention is made in section 238(1) of the provision for the execution of international agreements by the Government.⁷⁹

⁷⁹ Section 238 provides that:

- (2) An international agreement executed by or under the authority of the Government shall be subject to ratification and become binding on the Government by –
 - (a) an Act of Parliament; or
 - (b) a resolution of at least two-thirds of the members of a joint sitting of the two Chambers of Parliament.
- (3) The provisions of sub-section (2) do not apply where the agreement is of a technical, administrative or executive nature or is an agreement which does not require ratification or accession.
- (4) Unless it is self-executing, an international agreement becomes law in Swaziland only when enacted into law

1.4 Organisation of the thesis

This thesis consists of six chapters. Chapter 1 introduces the reader to the topic of the research. It highlights the organisation of the intended research which comprises: a statement of the problem, the legal framework, research methodology and a summary of the chapter.

Chapter 2 defines the general terms and concepts used in the customary law of intestate succession. This facilitates an understanding of the general principles comprising the body of law known as the customary law of intestate succession and lays the foundation for the country specific issues that are investigated in the following chapters.

Chapter 3 discusses the recognition, application and development of the customary law of intestate succession in the country of South Africa.

Chapter 4 considers the rules and laws of the customary law of intestate succession in the West African country of Ghana.

Chapter 5 explains the current rules and laws of the customary law of intestate succession prevailing in the Kingdom of Swaziland.

Finally, chapter 6 provides a synopsis of the enquiry and the conclusions and concerns arising from the study.

1.5 Summary of the chapter

Chapter 1 introduces the reader to the subject matter of the research topic and sets out a statement of the problem under investigation. It provides an explanation of the place

by Parliament.

(5) Accession to an international agreement shall be done in the same manner as ratification under sub-section (2).

(6) For the purposes of this section, "international agreement" includes a treaty, convention, protocol, international agreement or arrangement.

of customary law in the legal systems of the various countries under consideration and also presents the reader with various definitions for customary law in the various legal jurisprudences. Attention is then given to a brief exposition on the general characteristics and classification of customary law. The methods of research employed in this study are then discussed at length and finally a brief overview is given of the basic framework of this thesis.

CHAPTER 2

INTESTATE SUCCESSION: GENERAL RULES, TERMS AND CONCEPTS

2.1 Introduction

“African customary law is a community-based system of law”.¹ The family is therefore the most important social construct in African society. In western societies, the most common family form is the nuclear family i.e. a family consisting of a single husband, wife and their children. However, the traditional African family may consist of more than one nuclear family due to the polygynous² nature of African customary marriages. This means that a traditional African family would usually comprise a husband, and his wife or wives and their children. Each customary marriage creates a separate household and several households together produce a family group, which is controlled by a family head (the common husband). The family is also the most important institution in matters of intestate succession, as it is they who are responsible for the appointment and sometimes even the choosing of the intestate successor.

In this chapter, the researcher defines some of the key terms and concepts relevant to the customary law of intestate succession, particularly pertaining to South Africa. Some of the terms and concepts described in this chapter also apply to the customary law of intestate succession in Ghana and Swaziland; however the general rules and concepts governing intestate succession in those countries will be discussed in chapters 4 and 5 of this thesis respectively.

¹ Wicomb W and Smith H “Customary communities as ‘peoples’ and their customary tenure as ‘culture’: What we can do with the *Endorois* decision” (2011) *African Human Rights Law Journal* 427.

² Polygyny refers to the situation whereby a man can be married to more than one woman at the same time.

2.2 The principle of male primogeniture

Amongst most tribes in Africa, succession to status in African customary law is based on the principle of male primogeniture.³ This principle may be expressed as follows:

On the death of a Native his estate devolves on his eldest son or his eldest son's eldest male descendant.⁴ If the eldest son has died leaving no male issue, the next son, or his eldest male descendent inherits, and so on through the sons respectively.⁵

The effect of the rule of primogeniture means that African customary law does not permit women or females to inherit property or to succeed to positions of authority. This generic definition of male primogeniture is applicable to all of the countries under discussion in this thesis.

2.3 Polygamy

It is well known that African people practice polygamy. Polygamy is a collective term used to describe the phenomenon of entering into a marriage with more than one spouse simultaneously. Anthropologists distinguish between two forms of polygamy viz polygyny and polyandry.⁶ Polygyny refers to the form of marriage in which a man is married to more than one woman at the same time.⁷ Although polygynous marriages are no longer common, it must be noted that the African customary marriage is still a potentially polygynous one. Polyandry refers to a form of marriage in which a women is married to more than one man at the same time.⁸ Polyandry is uncommon amongst the indigenous African peoples.

³ Kerr AJ *The customary law of immovable property and of succession* (1990) 99. See *Nzimande v Nzimande and Another* [2005] 1 All SA 608 (W) at 631 E-F.

⁴ See *Mgoza and Another v Mgoza* 1967 (2) SA 436 (A) at 440D-E and *Matambo v Matambo* 1969 (3) SA 717 (A) at 719A-B. Omotola JA "Primogeniture and illegitimacy in African customary law: The battle for survival of culture" (2004-2005) *Indiana International and Comparative Law Review* 116. [should this be deleted?]

⁵ *Sonti v Sonti* 1929 NAC (C&O) 23 at 24.

⁶ Vorster LP "Kinship" in Myburgh AC (ed) *Anthropology for southern Africa* (1981) 94.

⁷ *Ibid.*

⁸ *Id* 95.

2.4 The family head

The family head was responsible for all members of his family group and he also controlled its property. The property of the family group comprised of general (family), house or personal property. General property is: “property which has not been allotted to any house, or which does not accrue automatically to a house”.⁹ House property may be 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”.¹⁰ Personal property on the other hand may be described as: “the property belonging to a person who has acquired it, although it may be under the control of the family head”.¹¹ The death of the family head therefore had significant consequences for the family group and its property. Rules and laws of succession were thus contrived in order to alleviate the burdens associated with death; to maintain the family’s honour and to safeguard the material interests of the deceased’s descendants.

Traditionally, the family head held the most power within the family group.¹² This did not mean that he could act capriciously; but was supposed to confer with the other members of the family group when making important decisions.¹³ He was solely responsible for the support and maintenance of the entire family group. He was liable for their debts, for any fines imposed on them, or damages awarded against them.¹⁴ Members of the family group could only take legal action against other people if they were assisted and represented by the family head; and could also only be sued through him.¹⁵ The family head “is entitled to respect and obedience from the other members of his group, keeps them in order, and must be consulted by them in all their more important undertakings”.¹⁶

⁹ Maithufi IP “The law of property” in Bekker JC, Labuschagne JMT and Vorster LP *Introduction to legal pluralism in South Africa Part 1 Customary law* (2002) 54.

¹⁰ Maithufi *op cit* 55.

¹¹ *Id* 56.

¹² Whitfield GMB *South African native law* (1929) 33.

¹³ See Bekker JC *Seymour’s customary law in southern Africa* (1989) 70.

¹⁴ Schapera I *A handbook of Tswana law and custom* (1970) 50.

¹⁵ *Ibid.*

¹⁶ *Id* 90.

2.5 Factors affecting the order of succession

2.5.1 Sex or gender

Traditionally, sex played a definitive role in the determination of a person's status.¹⁷ Women were considered as perpetual minors and either fell under the guardianship of their fathers (if they were unmarried or single), or husbands (if they were married), or his successor (if they were widows).¹⁸ Only male persons were eligible to succeed to positions of status. A woman was incapable of succeeding to the position of family head or to general or house property,¹⁹ on the sole basis of the fact that she was female. These positions have however changed and these changes will be discussed in the following chapters of this thesis.

2.5.2 Rank

Due to the polygynous nature of the customary marriage, African customary law distinguishes between "family rank" and "house rank". Each of these categories of rank will be discussed individually immediately hereunder.

2.5.2.1 Family rank

Family rank refers to the status of family members within the family group.²⁰ In customary law, males held a higher rank than their female counterparts. A person's rank was ultimately determined by the principle of primogeniture. On the basis of that principle, oldest sons always had a higher rank than younger brothers and all sisters. That meant that females were always subjected to the authority of males and males alone were allowed to become family heads.²¹

In the extended family group however, the rank of a child was determined by the rank

¹⁷ See generally Schapera I *The Tswana* (1962) 37-38.

¹⁸ Olivier NJJ, Olivier NJJ (jnr) and Olivier WH *Die privaatreë van die Suid-Afrikaanse bantoetaal-sprekendes* (1981) 5.

¹⁹ See 2.2 above.

²⁰ Sansom B "Traditional rulers and their realms" in Hammond-Tooke WD *The bantu-speaking peoples of southern Africa* (1974) 262.

²¹ See Bennett TW *Customary law in South Africa* (2004) 335.

of their father within his family of origin.²² So, for example, if the father was the first born son in his family group that would mean that his children would hold a higher rank than any of the other children born of his siblings. This may be illustrated as follows:

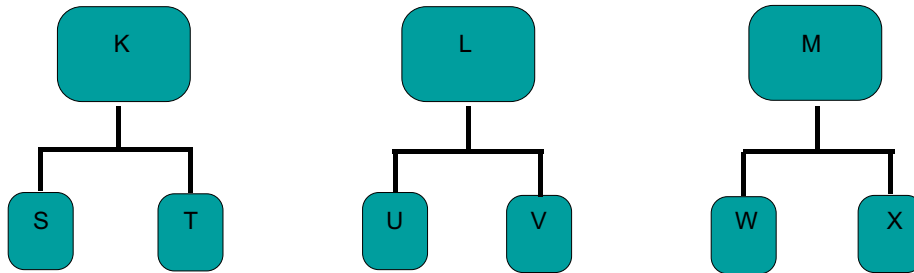


Figure 1: Family rank

For purposes of simplicity, only males have been represented in this diagram. K, L and M are three brothers, whereby K is the oldest and M is the youngest. They are all married and they each have two sons. The sons of K, namely S and T, will have a higher rank than the sons of L and M, irrespective of whether they are older or younger than the sons of L and M. We could go further and say that the sons of L, namely U and V will then rank higher than the sons of M and so on.

2.5.2.2 House rank

House rank simply refers to the hierarchy of the various houses that constitute a family group.²³ In a polygynous marriage, each marriage creates a separate family or household with the husband as the common spouse to all the families.²⁴ Each household or separate family has a particular rank. The rank of a household is determined by either of the following factors: (a) when the house came into existence, ie when the man married the women; or (b) the descent group of the main or great wife. Each of these factors will now be discussed individually.

²² *Ibid.*

²³ Whitfield *op cit* 34.

²⁴ Schapera (1970) *op cit* 15.

2.5.5.2.1 When the house came into existence

Amongst the indigenous African peoples, the wife married first is known as the “main wife” or the “great wife”.²⁵ The rank of the children born in a specific household is thus solely dependent upon the rank of their mother’s house or house rank. In other words, the rank of the children born to the main or great wife (irrespective of age) will be higher than the rank of all the other children born to the ancillary wives. That means that the house rank of the main or great wife and her children will be higher than that of the other spouses and their children in the other houses. This may be explained diagrammatically as follows:

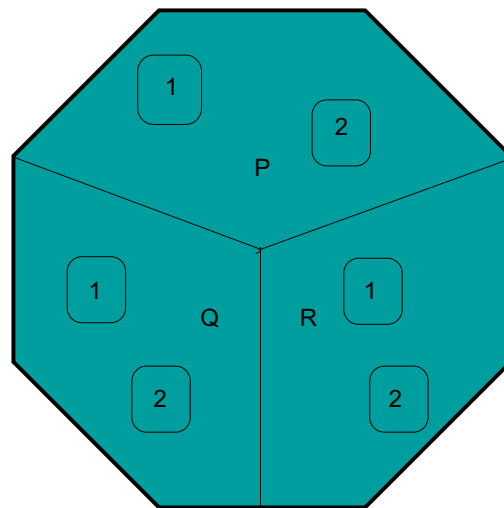


Figure 2: House rank

In the diagram above, the family group comprises of three sections, namely P, Q and R. Each section comprises of two houses (which were created by the marrying of two wives) in a specific order. The order of rank is indicated as “1” and “2”. This means that wife “1” in section P will have a higher rank than wife “1” in section Q and hence her children will also rank higher than the children of wife “1” in section Q. We could go further and say that wife “1” in section Q will have a higher rank than wife “1” in section R and hence her children will also rank higher than the children of wife “1” in section R and so on.

²⁵ Bekker (1989) *op cit* 126. See also *Mahlaba v Mahlaba NO* (1924) NPD 372 at 373.

2.5.2.2.2 The descent group of the main or great wife

With regards to this factor, the order in which the wives are married is not crucial for the ranking.²⁶ The only requirement here is that the main wife must come from a particular descent group, and does not necessarily have to be the wife whom the man marries first.²⁷ This means that the children's rank within the household will once again be determined by their mother's house rank. This type of ranking is common amongst the Swazi.²⁸

2.6 General and special succession

Due to the polygynous nature of customary law, succession in African customary law may be further subdivided into general succession and special succession. The fact that African customary law differentiates between general and special succession also means that it makes provision for specific general successors and house successors.

General succession may be defined as succession to the entire household and the property of the general estate. This means that for this type of succession, the general successor would therefore succeed to all the property belonging to the family group as a whole, and to the property belonging to the household to which he belongs (here the distinction between family rank and house rank is particularly relevant). Special succession may be defined as succession in a specific house and succession to its house property. This means that for this type of succession, the house successor would only succeed to the property belonging to the household to which he belongs (here again, the distinction between family rank and house rank is particularly relevant). This may be explained diagrammatically as follows:

²⁶ Seymour SM *Bantu law in South Africa* (1970) 122.

²⁷ *Ibid.*

²⁸ *Ibid.*

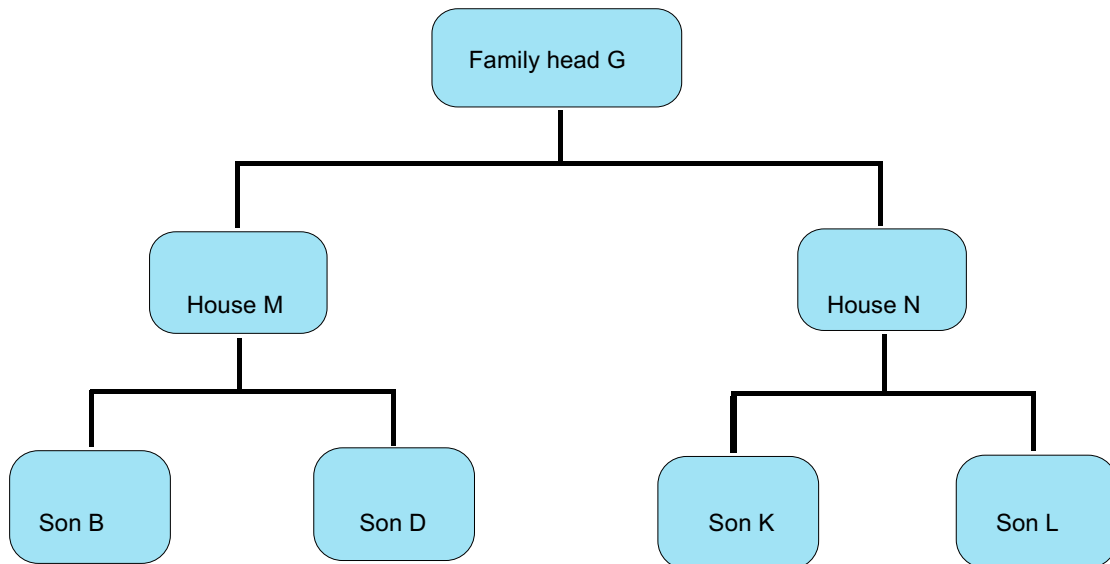


Figure 3: General and special succession

For the sake of simplicity, only male persons have been indicated in the above diagram. Family Head G has two wives which has created two houses, viz House M and House N. Two sons were born in each of the respective houses. Upon the death of Family Head G, Son B would succeed to the position of both general successor and house successor, as he is the first born son of the deceased's main or great wife. Son K, however, would only succeed to the position of house successor in House N, as he is not the oldest son in the wider family group.

2.7 The powers and duties of the successors

The successor in customary law originally succeeded to both benefits and duties.²⁹ In other words, “when a family head died his powers and duties passed to the general successor and to the house successors in more or less direct proportion to the rank of each house”.³⁰ In this regard a house successor's duties included: (a) caring for and supporting the members of the house; (b) managing the payment and collection of debts; (c) ensuring the

²⁹ *Mgoza v Mgoza* 1967 (2) SA 436 (AD) at 440D-G.

³⁰ Rautenbach C, Mojela K, Du Plessis W and Vorster LP “Law of succession and inheritance” in Bekker JC, Labuschagne JMT and Vorster LP *Introduction to legal pluralism in South Africa part 1 Customary law* (2002) 113.

provision of marriage goods for sons and wedding garments for daughters;³¹ (d) maintaining and catering for the needs of the widow and her minor children; and the (e) responsibility for the delicts committed by members of his household.³²

The house successor was entitled to: (a) the earnings of minors and the widow of the house; (b) the *lobolo* paid in consideration of a customary marriage for a woman in his particular house; and the (c) debts owed to the deceased.³³ A house successor's duties were however constrained somewhat by the fact that he was obliged to consult with the widow in all matters concerning the administration of the house property. In fact a widow was empowered to prevent the house successor from squandering the house assets or impoverishing the house itself.³⁴

"With regard to the house to which he succeeds, the general successor's powers and duties were the same as those of the other house successors".³⁵ The general successor's duties included: (a) assuming the role of the deceased family head albeit limited in respect of the authority over the various houses; (b) acquiring control over the general property; (c) responsibility for the general debts of the household; (d) the collection of outstanding debts; and (e) the performing of family rituals on behalf of family members.³⁶

The successor succeeded to both the assets and liabilities of the deceased's estate³⁷ irrespective of whether the liabilities exceeded the assets.³⁸ This situation of universal succession is however not uniform in the whole of South Africa. For example, in KwaZulu-Natal, a successor's liability for the debts of a predecessor is restricted to debts equivalent to the assets of the estate.³⁹ The successor is however fully liable for debts arising from marriage contracts, ie, *lobolo* debts. The successor was also responsible for the delicts of the deceased. In this regard his delictual responsibility was however restricted to cases where the action originated prior to the death of the

³¹ *Ibid.*

³² Bekker (1989) *op cit* 297-298.

³³ Olivier NJJ, Bekker JC, Olivier NJJ (jnr) and Olivier WH *Indigenous law* (1995) 148.

³⁴ Seymour *op cit* 277.

³⁵ Rautenbach (*et al*) (2002) *op cit* 113.

³⁶ *Ibid.*

³⁷ See *Mgoza and Another v Mgoza* 1967 (2) SA 436 (A) at 440D, *Lloyd v Nkolele* (1907) EDC 127 at 130.

³⁸ Kerr AJ "Customary law, fundamental rights and the Constitution" (1994) *South African Law Journal* 128. See also *Galeka v Sheriff of Natal* (1891) 12 NLR 127 at 128.

³⁹ *Msutu v Bovele* (1896) 17 NLR 357 at 358.

deceased or where the deceased acknowledged or admitted his responsibility before his death. Here, the successor's liability for the delicts of the predecessor is limited to the affordability of the estate.⁴⁰

With regard to the successor's rights and responsibilities to the widow; the widow has a right to continue living in the family homestead (or kraal of her deceased husband) and the successor is obliged to assign a place of residence for her.⁴¹ As long as the widow remains in the family homestead of her deceased husband or in the residence assigned to her by the successor, she and her children are entitled to appropriate maintenance and the use of the assets of the estate, despite the fact that she has no right of ownership with regards to that property.⁴² The successor may not arbitrarily dispose of or sell house property unless he has first consulted with the widow and the sale or disposal is essential for the maintenance of the widow and her children.⁴³

If the successor fails to adequately maintain the widow and her children or if he neglects them in any way, the widow (with the permission of the chief or the court) may be allowed to establish her own homestead or kraal and a male may be appointed as guardian or trustee of her and her children. In cases where the successor is a minor, then he, his mother and other minor children fall under the guardianship of a senior male relative of the deceased family head. In these instances, even though the successor is the owner of the property, the senior male relative controls the family property and uses it for the benefit of the successor until he reaches majority.⁴⁴

2.8 The order of succession

In order to determine the eligibility of the surviving members of the family group to succeed to the intestate estate of the deceased, three important factors are taken into consideration viz "succession on death, primogeniture and succession by males in the

⁴⁰ Bekker (1989) *op cit* 301-302.

⁴¹ Olivier (*et al*) (1995) *op cit* 161.

⁴² Schapera I *Married life in an African tribe* (1939) 316.

⁴³ Olivier (*et al*) (1995) *op cit* 161.

⁴⁴ *Ibid.*

male line of descent".⁴⁵ The researcher also stated above that customary law permits the practice of polygyny. It is important to state that not all family heads may choose to exercise their right to enter into marriages with more than one woman. This means that African customary law makes provision for families that are monogamous and families that are polygynous. The order of succession in these afore-mentioned family structures differs and will be highlighted immediately below.

2.8.1 Succession in monogamous families

The order of succession in a monogamous family is as follows:

- The eldest son, or, if he is deceased, his eldest son.
- If the eldest son died without any male heirs, the second born son or his male heirs succeed, in order of their birth.
- If the deceased died without leaving behind any male heirs, or if he outlived all his male heirs, the deceased's father is the successor.
- If the deceased outlived all his male heirs and his father, he is succeeded by his eldest brother.
- If the deceased outlived all his male heirs and his father and his eldest brother, he is succeeded to by his eldest brother's oldest son i.e. the deceased's nephew.
- If the deceased's father or the deceased's brothers have no male heirs to succeed him, the deceased is succeeded to by his grandfather or one of the grandfather's male heirs according to their rank and status. This rule would also be applicable should the great-grandfather and his male heirs ever be considered for succession.
- If the list of eligible heirs above is exhausted, meaning that there are no available male heirs to succeed the deceased, the deceased is succeeded to by the traditional ruler of his traditional authority.
- If the deceased's traditional authority does not have a traditional ruler, the President of the country succeeds the deceased.⁴⁶

2.8.2 Succession in polygynous families

As stated above, in some cases the family head may have entered into more than one customary marriage. Polygynous succession deals with this scenario. Each polygynous marriage establishes a separate family or house, with the husband being the common

⁴⁵ Rautenbach (*et al*) (2002) *op cit* 111.

⁴⁶ Bennett TW *A sourcebook of African customary law for southern Africa* (1991) 399-401; Rautenbach (2002) (*et al*) *op cit* 111, Bekker (1989) *op cit* 274-5 and Olivier (1995) (*et al*) *op cit* 148.

spouse to all the houses or families.⁴⁷ The rank of each wife or the order in which she was married plays an important role in polygynous succession. The distinction between general and house property and between tribal groups who “divide their households into sections and those who do not”⁴⁸ also plays a decisive role in this type of succession.⁴⁹ Polygynous succession can be classified as either simple or complex.⁵⁰ What follows hereafter is an explanation of these two forms of polygynous succession.

2.8.2.1 Simple polygynous succession

Here succession is similar to succession in monogamous families. The eldest son (or if he is deceased, his eldest son) of the senior wife⁵¹ succeeds to the status of the deceased.⁵² If the eldest son died without any male descendants, the second born son (or his male heirs in order of their birth) of the senior wife succeeds.⁵³ If the senior house failed to produce any sons or other male descendants, the eldest son (and his descendants) of the wife married second would be the next eligible successor in the order of succession.⁵⁴ This type of succession is practiced amongst the Tsonga tribes.⁵⁵

2.8.2.2 Complex polygynous succession

For this type of succession, the rank of each wife or her house and the time at which she was married is imperative.⁵⁶ The wife married first is known as the main or great wife. All wives married after the main or great wife are subordinate to her and to each other depending upon the time at which they were married. This can be explained diagrammatically as follows:

⁴⁷ Bennett (1991) *op cit* 401.

⁴⁸ Rautenbach (*et al*) (1995) *op cit* 111.

⁴⁹ Olivier (*et al*) (1995) *op cit* 149.

⁵⁰ Bennett (1991) *op cit* 401.

⁵¹ *Ngeqe v Zwelinjani* (1897) 18 NLR 135 at 136.

⁵² Kerr AJ *The native law of succession in South Africa* (1961) 71.

⁵³ *Id* 72.

⁵⁴ *Namba v Namba* 1956 NAC 35 (S) at 36 where the Court stated that: “as eldest son of the third wife, the *qadi* to the great house, plaintiff is entitled to succeed to the property of the great house in the absence of male issue in that house”.

⁵⁵ Bekker (1989) *op cit* 275.

⁵⁶ *Ibid*.

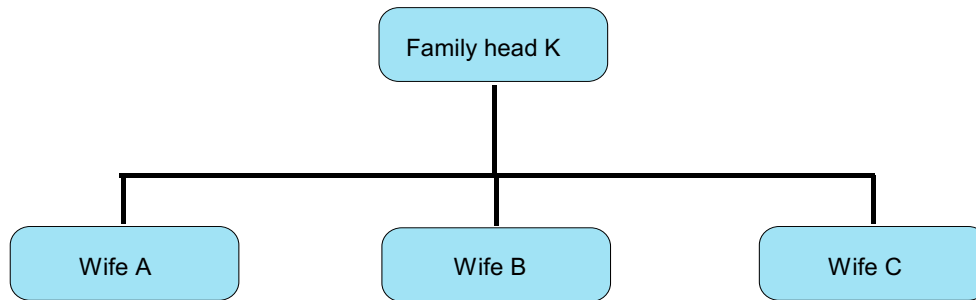


Figure 4: Ranking of wives

In the diagram above, Family Head K has three wives, namely A, B and C. Wife A is the main or great wife because she was married first. Wife B is the second wife and Wife C is the third wife. Wives B and C are subordinate to Wife A and Wife C is subordinate to Wife B because she was married last.

Due to the numerous wives and households created by the multiple marriages this type of succession is rather complicated and takes place as follows. The eldest son of the main or great wife succeeds to the status of the deceased.⁵⁷ He also succeeds to the property of the main (also referred to as great) house and any unallocated general property.⁵⁸ The eldest sons in each of the remaining houses succeed to the property of their respective houses.⁵⁹ This can be explained diagrammatically as follows:

⁵⁷ Bennett (1991) *op cit* 401.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

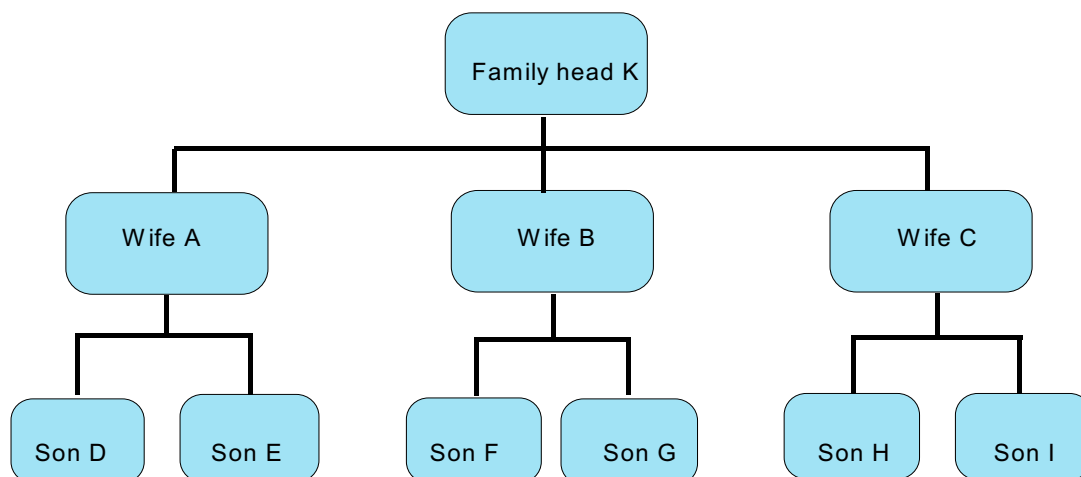


Figure 5: Complex polygynous succession

In the diagram above, Family Head K has three wives, namely A, B and C. Each marriage creates a separate house, namely house A, house B and house C and K is the common spouse in each house. K has two children with A (namely sons D and E), two children with B (namely sons F and G) and two children with C (namely sons H and I). If K dies, D will succeed to the status of K and to the property of house A and any allocated property. Succeeding to the status of K means that D will become the new family head in the place of K. Son F on the other hand will only succeed to the property of house B and Son H will only succeed to the property of house C.

In cases where an inferior house does not have an heir, that particular house is succeeded to by the great house.⁶⁰ Alternatively, if there is no heir in the great house, that house is succeeded to by the “eldest son of the next senior house and so on”.⁶¹

Among some tribal groups (like the Cape Nguni and the Xhosa), that practice the complex system of polygyny, houses are divided into sections. For example, each main house will have two affiliated (*qadi*) houses attached to it thus forming a section.⁶² In cases where there is no heir in the main house or in an inferior house, the successor must first be acquired from the houses affiliated to the main house within that section

⁶⁰ Bennett (1991) *op cit* 401. See also *Sonti v Sonti* 1929 NAC (C&O) 23 at 24 and *Sigcau v Sigcau* 1944 AD 67 at 72.

⁶¹ Bekker (1989) *op cit* 276.

⁶² *Id* 275.

before proceeding to the next section for a successor. In other words, if there is no male within a specific section who can succeed, then only may a successor be obtained from the section next in rank.⁶³

2.9 The provision of a successor in a house in which there is no successor

The principal purpose of the customary marriage is the continuation of the family lineage of the husband through the procreation of descendants. The importance of descendants is directly linked to the belief in ancestor spirits. The deceased must procreate offspring to perpetuate his name and to take care of his spirit in the spiritual realm. We can therefore infer that the procreation of descendants is extremely important amongst the indigenous African peoples. For succession, the procreation of descendants is very important as it ensures that the deceased has someone to assume his position upon death and also to maintain and look after the family and their property. However, situations may arise where either of the parties to the marriage are unable (for whatever reason) to have children. In customary law, what happens when such situations present themselves to the families or parties involved in the marriage contract?

All customary marriages require the delivery of *lobolo*⁶⁴ (*emalobolo* or *bohali* in Swazi law and custom and *tanu* in Ghanaian customary law) in African law. The principal effect of the *lobolo* contract (the payment of which is a requirement for a valid marriage)⁶⁵ is to transfer the reproductive capacity of the women from her guardian (her father) to her husband.⁶⁶ By virtue of the fact that *lobolo* has been paid, substitution may occur in cases where one of the spouses is unable to produce a successor.⁶⁷

⁶³ Rautenbach C, Du Plessis W and Venter AM “Law of succession and inheritance” in Bekker JC, Rautenbach C and Goolam NMI *Introduction to legal pluralism in South Africa* (2006) 96.

⁶⁴ *Lobolo* may be defined as: “property in cash or kind which a prospective husband or the head of his family undertakes to give to the head of the prospective wife’s family in consideration of a customary marriage” (section 1(iv) of the Recognition of Customary Marriages Act 120 of 1998).”

⁶⁵ See section 3 of the Recognition of Customary Marriages Act 120 of 1998.

⁶⁶ Bekker (1989) *op cit* 150.

⁶⁷ It is important to note that the Recognition of Customary Marriages Act 120 of 1998 is silent on the matter of substitution. However, the fact that the death of a spouse is not unequivocally listed as a way of dissolving a customary marriage, we can presume that the rules of customary law are still applicable here.

Alternatively, other means such as the institution of a legitimate son in one house as successor in another house, the institution of an illegitimate son as heir and the adoption of a successor could also be employed in order to ensure a successor for the deceased.

Customary law generally identifies three possibilities of substitution namely the *ukuvusa* custom, seed-raising (the “sororate” custom) and the *ukungena* (or levirate) and *ukuzalela* customs. Each of these possibilities will now be discussed independently.

2.9.1 *Ukuvusa*

Ukuvusa is an Nguni word which literally means “to wake” or “to raise”. The *ukuvusa* custom is not practiced in Swaziland and Ghana. Generally, the *ukuvusa* custom is employed where a man dies (leaving property) before getting married and before procreating a successor.⁶⁸ His family will then marry a wife in his name in order to continue his family lineage. The *ukuvusa* custom is recognised by the Zulu and is defined in section 1(1) of the KwaZulu-Natal Codes of Zulu Law⁶⁹ as:

A form of vicarious union which occurs when the heir at law or other responsible person uses property belonging to a deceased person or his own property to take a wife for the purpose of increasing or resuscitating the estate of such deceased person or to perpetuate his name and provide him with an heir.

The *ukuvusa* union creates a new house and house estate in the name of the deceased.⁷⁰ The *ukuvusa* wife and the children born of the *ukuvusa* union are regarded as the deceased’s. The *ukuvusa* successor (ie, the male person who marries a wife for the deceased for the purpose of procreating a successor) has no claim on the deceased’s estate. The eldest son born of the *ukuvusa* union is the rightful heir to the property of the deceased.⁷¹ The *ukuvusa* union is regarded as a customary marriage and has to be registered. It is also important to note that because the *ukuvusa* union is recognised as a customary marriage it must now fulfil all the legal requirements

⁶⁸ Kerr (1990) *op cit* 141.

⁶⁹ Proclamation R151 of 1987.

⁷⁰ Olivier (*et al*) (1981) *op cit* 536.

⁷¹ Mönnig HO *The Pedi* (1967) 206-207.

provided for in the Recognition of Customary Marriages Act⁷² in order to be valid. According to section 3 of the Act, the legal requirements for a valid customary marriage⁷³ are as follows:

- (1) The prospective spouses:
 - (i) must both be above the age of 18 years; and
 - (ii) must both consent to be married to each other under customary law; and
- (2) The marriage must be negotiated and entered into or celebrated in accordance with customary law.

The *ukuvusa* union cannot satisfy the consensual requirement⁷⁴ for a valid customary marriage, since one of the spouses to the marriage is dead and his consent can obviously not be procured. We can therefore assume that the *ukuvusa* union is no longer applicable under current South African law.

2.9.2 The marrying of seed-raisers (“sororate” custom)

The term “sororate” is derived from the Latin word “*soror*”, which literally means “sister”. A seed-raiser is married when a wife is unable to reproduce (for various reasons) a successor. Her husband will then enter into a marriage with another woman (known as *ihlati* in Swazi law and custom) in order to procreate children for himself and on behalf of his barren wife.⁷⁵ This custom is practiced amongst the Swazi, but under the literature consulted, no reference was made to such a custom under Ghanaian customary law. Some of the general principles of this custom may be summed up as follows:

- (a) A man can marry a seed-raiser as a substitute or supporting wife for a wife in one of his main houses.⁷⁶ A seed-raiser is seldom married as a substitute for an affiliated wife.⁷⁷
- (b) Marriage to a seed-raiser may take place where the wife concerned:
 - dies without leaving a surviving son (or his descendants);
 - is unable to procreate or is barren;

⁷² 120 of 1998.

⁷³ Please note that the Recognition of Customary Marriages Act 120 of 1998 distinguishes between marriages entered into before 15 November 2000 and marriages entered into after 15 November 2000. Here we are referring to marriages entered into after 15 November 2000.

⁷⁴ Section 3(1)(ii) of Act 120 of 1998.

⁷⁵ Schapera (1970) *op cit* 155.

⁷⁶ Seymour *op cit* 258.

⁷⁷ *Ibid.*

- has already passed the fertility age without leaving a surviving son;
 - has her marriage dissolved (through divorce) without the birth of a son that could be an heir;
 - deserted her husband without leaving a son as heir; or
 - left young children behind after her death or the dissolution of her marriage.⁷⁸
- (c) It is uncommon to put a seed-raiser in a house where there is already a son or where it is still possible for the wife to procreate children.⁷⁹
- (d) The husband is not entitled to alter the status of his wives, and therefore he may not, put a *qadi* wife as seed-raiser in the house of a deceased wife.⁸⁰
- (e) It is customary, but not compulsory, that the seed-raiser be chosen from the family group of the wife concerned.⁸¹
- (f) The union of the seed-raiser is a normal customary marriage concluded with the usual ceremonies.⁸²
- (g) A husband should notify his relatives of his intention to marry a seed-raiser, and at the marriage ceremony he should publicly announce that the wife is married as seed-raiser in a specific house.⁸³
- (h) A seed-raiser has no separate status of her own, and she, with her children, do not form a separate house.⁸⁴
- (i) The sons of a seed-raiser are regarded as full heirs as if born of the original wife in that house.⁸⁵
- (j) If it would happen that children are born of the original wife, then the children of the seed-raiser are regarded as junior brothers and sisters of those children.⁸⁶

The “sororate” union is regarded as a customary marriage but its effects and consequences differ significantly from those of a marriage. For example, the seed-raiser does not create a new house as a legal unit with separate house property.⁸⁷ In fact, she is merely “an auxiliary wife of the house into which she has been placed, and all her children belong to that house as if they were the children of the main wife”.⁸⁸

⁷⁸ Olivier (*et al*) (1995) *op cit* 166.

⁷⁹ *Dumalisile v Dumalisile* 1948 NAC 7 (S) at 8.

⁸⁰ *Ibid.*

⁸¹ Whitfield *op cit* 34.

⁸² Olivier (*et al*) (1995) *op cit* 166.

⁸³ *Ibid.*

⁸⁴ *Yoywana v Yoywana* (1912) 3 NAC 301 at 302.

⁸⁵ Olivier (*et al*) (1981) *op cit* 541.

⁸⁶ Olivier (*et al*) (1995) *op cit* 166.

⁸⁷ Seymour *op cit* 258.

⁸⁸ *Ibid.*

2.9.3 *Ukungena (levirate custom) and ukuzalela*

2.9.3.1 *Ukungena*⁸⁹ (levirate custom)

The term levirate is derived from the Latin word “*levir*” which literally means “brother-in-law”. The indigenous African people refer to the levirate custom by various names for example, among the Nguni, this custom is generally known as *ukungena* (which literally means “to enter”), and amongst the Sotho, it is known as *go tsena mo tlung* (which literally means “to enter the house”) or *go tsena* (which means “to enter”).⁹⁰ Among the Swazi and under Ghanaian customary law the custom is simply referred to as the levirate. The Ghanaians specifically refer to the custom as *ahosi dede* which literally means “marriage to a widow”.

The *ukungena* custom is practiced when a married man dies before he can procreate a successor with his wife. If his wife is still capable of reproducing, one of his relatives (the relative here is referred to as an *umngeni* by the Swazi’s which literally means “one who enters”) will enter into a relationship with her in order to procreate a successor for the deceased.⁹¹ The *ukungena* custom is defined in section 1(1) of the KwaZulu-Natal Codes of Zulu Law⁹² as follows:

a union with a widow undertaken on behalf of her deceased husband by his full or half brother or other paternal male relative for the purpose (i) in the event of her having no male issue by the deceased husband of raising an heir to inherit the property or property rights attaching to the house of such widow ...

From the above we can conclude that in customary law, the death of a male spouse does not dissolve a marriage. In fact, the contract of marriage continues to exist between the two family groups concerned.⁹³ The so called “widow” is expected to remain in the family group of her deceased husband and must avail herself for the

⁸⁹ See generally *Gobeyana v Maranana* (1900) 21 NLR 19 at 19-20, *Nkomiyapi v Nontuntu* (1896) 17 NLR 238 at 239 and *Upahlana v Ujwaba* (1897) 18 NLR 15 at 17.

⁹⁰ Schapera (1970) *op cit* 233.

⁹¹ Preston-Whyte E “Kinship and marriage” in Hammond-Tooke WD *The bantu-speaking peoples of southern Africa* (1974) 189-190.

⁹² Proclamation R151 of 1987.

⁹³ Olivier (*et al*) (1985) *op cit* 163.

procreation of children on his behalf.⁹⁴ The main principles of the *ukungena* custom may be summed up as follows:

- (a) The *ukungena* partner is usually a close relative of the deceased for example a younger brother.⁹⁵ In fact, amongst the Zulu and Swazi, older brothers are precluded from entering into an *ngena* union with their younger brother's widow.⁹⁶ Those tribes only permit a younger brother of the deceased to *ngena* his brother's widow or widows.⁹⁷ A son may never be the *ukungena* partner of his own mother as that amounts to incest.⁹⁸
- (b) The widow of the deceased sometimes had a choice as to which relative of her deceased husband would fulfil the duty of *ukungena* partner.⁹⁹ However, the family council or a particular person could also select the *ukungena* partner on the wife's behalf.¹⁰⁰
- (c) The *ukungena* union must take place with the consent of the widow.¹⁰¹ If such consent is obtained and she later regrets her decision, she has a right to terminate the union at any time.¹⁰²
- (d) The *ukungena* union must be authorized or sanctioned by the family council of the deceased. Usually ceremonial acts like the slaughtering of an animal are performed as evidence that the *ukungena* union exists.¹⁰³
- (e) Women who have already passed the age of child-bearing are not expected to participate in an *ukungena* union.¹⁰⁴
- (f) The widow may remain in her own house or kraal (ie, the house of the deceased) or may choose to reside in the house of the *ukungena* partner.¹⁰⁵ The widow however, is not under the guardianship of the *ukungena* partner, but falls under the guardianship of her deceased husband's successor. The

⁹⁴ Seymour *op cit* 265.

⁹⁵ Kerr (1961) *op cit* 63.

⁹⁶ Seymour *op cit* 270.

⁹⁷ *Ibid.*

⁹⁸ Kerr (1990) *op cit* 139 and Seymour *op cit* 267.

⁹⁹ Schapera (1939) *op cit* 317.

¹⁰⁰ Seymour *op cit* 268.

¹⁰¹ Section 56(1)(b) of the KwaZulu-Natal Codes of Zulu Law. See also *Mhlongo v Sibeko* 1937 NAC (T&N) 34 at 37.

¹⁰² Section 56(3) of the KwaZulu-Natal Codes of Zulu Law. See also Kerr (1990) *op cit* 140.

¹⁰³ Olivier (*et al*) (1981) *op cit* 521.

¹⁰⁴ Van Warmelo NJ *Venda law: Part 4 Inheritance* (1967) 915.

¹⁰⁵ Olivier (*et al*) (1995) *op cit* 163 and Seymour *op cit* 268.

children born of the *ukungena* union are regarded as the children of the deceased with full rights of succession; subject to the rules of primogeniture of course.¹⁰⁶

- (g) The *ukungena* union does not establish a new marital union; the original marital union is merely continued. It is therefore logical that no further marriage goods or *lobolo* is required for the *ukungena* union to be valid.

2.9.3.2 *Ukuzalela*

The *ukuzalela* custom is practiced when a married man dies, leaving male issue.¹⁰⁷ If his wife is still capable of reproducing, one of his relatives will enter into a relationship with her in order to procreate more children for the deceased.¹⁰⁸ The *ukuzalela* custom is defined in section 1(1) of the KwaZulu-Natal Codes of Zulu Law¹⁰⁹ as follows:

a union with a widow undertaken on behalf of her deceased husband by his full or half brother or other paternal male relative for the purpose ... or (ii) in the event of her having such male issue of increasing the nominal offspring of the deceased.

The *ukuzalela* custom is distinguishable from the *ukungena* custom with regards to their individual purpose and this is accentuated by the quotation immediately below:

Ukungena is normally used to denote an alliance for the express purpose of raising an heir for a deceased kraal-head who has no sons, while *ukuzalela* is used to denote an alliance entered into merely for the purpose of raising further regular children when the deceased already has a son and heir.¹¹⁰

The *ukuzalela* custom is not practiced by either the Swazi or Ghanaians. The main principles of the *ukuzalela* custom may be summarised as follows: (a) the children born of a valid *ukuzalela* union are regarded as the children of the deceased;¹¹¹ (b) the *ukuzalela* union must be authorised or sanctioned by the family council of the deceased.¹¹² As with the *ukungena* custom, the family council could select the *ukuzalela*

¹⁰⁶ *Guma v Guma* (1919) 4 NAC 220 at 224.

¹⁰⁷ Kerr (1990) *op cit* 141.

¹⁰⁸ Whitfield *op cit* 184.

¹⁰⁹ Proclamation R151 of 1987.

¹¹⁰ Seymour *op cit* 269.

¹¹¹ *Id* 270.

¹¹² *Ibid*.

partner on the wife's behalf;¹¹³ and (c) amongst the Zulus, the *ukungena* and *ukuzalela* partners may claim a fee as compensation for their services.¹¹⁴ The fee is redeemable against the estate of the widow's house.¹¹⁵

Most of these supporting marital unions are fast becoming obsolete¹¹⁶ and the principles of non-discrimination, freedom of marriage guards against women being forced into such unions against their will.¹¹⁷

2.10 Other methods used for the provision of a successor

2.10.1 The institution of a legitimate son in one house as successor in another house

Amongst some indigenous communities it is an accepted customary practice for a son from one house to be instituted as successor in another house that has no successor.¹¹⁸ In such cases, the instituted son "loses his right of succession to the house or family from which he was taken".¹¹⁹ If a male child or successor is subsequently born in the house having no successor, the instituted son reverts back to his former position.¹²⁰ The institution of a legitimate son in one house as successor in another house must be publicly sanctioned by the family group concerned and notification of the formal declaration must be sent to the chief of the tribe.¹²¹

2.10.2 The institution of an illegitimate son as successor

Amongst some indigenous communities it is an accepted customary practice for a head of a house to institute an illegitimate son (by a *dikazi*¹²² or spinster and not by another

¹¹³ *Ibid.*

¹¹⁴ *Id* 272.

¹¹⁵ Bennett TW "The equality clause and customary law" (1994) *South African Journal on Human Rights* 126.

¹¹⁶ Bennett TW *Human rights and African customary law under the South African Constitution* (1999) 128.

¹¹⁷ *Ibid.*

¹¹⁸ Seymour *op cit* 262.

¹¹⁹ Kerr (1991) *op cit* 122.

¹²⁰ Seymour *op cit* 262-263.

¹²¹ *Zondani v Dayman* (1911) 2 NAC 132 at 133.

¹²² According to Kerr, a *dikazi* is "a widow whose customary union (marriage) has been dissolved, or an unmarried girl having borne more than one child" (Kerr (1991) *op cit* 133 footnote 44).

man's wife) as successor in cases where he has no legitimate male children.¹²³ Such an institution is only valid if the head of the house has paid damages and *isondlo*¹²⁴ to the guardian of the women concerned and that the necessary formalities must have been complied with or performed.¹²⁵ Logic dictates that if the head of a house subsequently marries the woman who is the mother of his illegitimate son or successor, the son is automatically legitimised and entitled to the usual rights of succession.¹²⁶

2.10.3 The adoption of a successor

Amongst some indigenous communities it is an accepted customary practice for the head of a house to adopt a successor in instances where he has no sons at all.¹²⁷ In customary law, it is preferable that the head adopt the son of a close relative in his own family group rather than one having no relationship by blood through the male line.¹²⁸ The male person who is adopted as successor does not have to be a child, but may be a young male or a youth.¹²⁹ The adoption of a son for purposes of succession must be consented to and must be publicly approved by the family group concerned.¹³⁰ The adopted child is for all intents and purposes regarded as a son of the head and is therefore eligible for both general and special succession.¹³¹ It is sometimes customary, but not compulsory, for the head to compensate the child's father with cattle for the adoption.¹³²

2.11 Disposition of assets by the family head before death (disposition *inter vivos*)

Succession in customary law only occurs on the death of the family head. However, "a family head may during his lifetime dispose of his assets by means of a final disposition

¹²³ Kerr (1961) *op cit* 57.

¹²⁴ Generally, *isondlo* may be defined as: "the bringing up or maintaining of a child" (see Seymour *op cit* 232.)

¹²⁵ *Mkanzela v Rona* (1950) 1 NAC (S) 219 at 221.

¹²⁶ Seymour *op cit* 262.

¹²⁷ Kerr (1961) *op cit* 58.

¹²⁸ Seymour *op cit* 264.

¹²⁹ *Ibid.*

¹³⁰ Kerr (1991) *op cit* 134.

¹³¹ Kerr (1961) *op cit* 58.

¹³² Kerr (1991) *op cit* 134.

or according to traditional customs".¹³³ Both Swazi (see chapter 5 below) and Ghanaian (see chapter 4 below) law allow for a disposition *inter vivos* and both laws also accommodate a deathbed disposition (which is specifically known as a *samansiw* in Ghanaian law).

2.11.1 Disposition of assets by means of a final disposition

According to Olivier, a family head may on his deathbed or while he is still in good health make a declaration as to how his assets should be dealt with.¹³⁴ In his final disposition, the family head must still comply with the principles of customary law.¹³⁵ For example, the family head may not:

- disinherit his sons in favour of daughters;
- disregard the principle of primogeniture;
- exclude an heir from the law of succession unless it is not according to customary law and procedure; and
- alter the status of the different houses in order to favour certain descendants.¹³⁶

The family head must make his disposition known to at least several persons of the wider family circle (including the family council and the main successor). The deathbed wishes of the family head are usually respected and honoured. The family head must ensure that the final disposition of property is done by him and that it is conducted in the presence of all concerned parties including those who would also probably be disadvantaged as a result of a disposition.¹³⁷ In cases where an heir is dissatisfied with the disposition, he or she must object immediately and may even have recourse to the courts.¹³⁸

2.11.2 Disposition of assets according to customary law

During his lifetime a family head may employ the following methods to dispose of his assets according to customary law:

¹³³ Olivier (*et al*) (1995) *op cit* 153. See also *Sotobe v Sikoteni* (1896) 17 NLR 247 at 247.

¹³⁴ Olivier (*et al*) (1995) *op cit* 153.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Id* 153-154.

¹³⁸ Olivier (*et al*) (1981) *op cit* 453.

- the allocation of property to a particular house or son (such allocation must comply with all formalities and may take place more than once);¹³⁹
- the adoption of a young child (usually the child of a relative) will affect the normal hierarchy of succession (an adopted child, however, would be excluded by the birth of a legitimate child – the Zulu and Swazi do not recognise adoption). The adoption must be consented to by both family groups and the tribal chief must be advised of the adoption;¹⁴⁰
- the transfer of a younger son from one house to another house without a son (such a son succeeds to the latter house);¹⁴¹
- seed-raising is also a possibility when trying to secure a successor in a house where there is no male heir;
- the transferral of daughters to sons in a house as a way of securing the marriage goods of these sons (the marriage goods acquired for a daughter are then utilised as marriage goods for the wife of one of the sons);¹⁴²
- *ukungena* custom (which was discussed above); and
- disherison (disinheritance) the means of excluding a successor from the sequence of succession (disherison can only be done if there are special reasons and certain formalities have been complied with).¹⁴³

2.12 Disinheritance

In terms of customary law, a family head may (under certain circumstances and according to the prescribed formalities) disinherit his son and eliminate him from his lawful right of succession.¹⁴⁴

2.12.1 Reasons for disinheritance

Disinheritance requires sound reasons.¹⁴⁵ The special reasons for disinheritance include:

¹³⁹ *Dingezweni v Ndabambi* (1906) 1 NAC 126 at 127.

¹⁴⁰ Whitfield *op cit* 39-40.

¹⁴¹ See *Boko v Magononda* (1910) 2 NAC 14 at 16 and *Pato v Pato* (1910) 2 NAC 25 at 26.

¹⁴² *Sonqishe v Sonqishe* 1943 NAC (C&O) 6 at 7.

¹⁴³ Olivier (*et al*) (1995) *op cit* 158.

¹⁴⁴ *Ibid.* See also *Makalina v Nosanti* 1926 EDL 82 at 83.

¹⁴⁵ *Mani v Mani* [1996] 3 All SA 47 at 511.

- serious misconduct making him unworthy to succeed his father as family head eg misconduct of a criminal nature, stealing repeatedly, prodigality or other serious misconduct;¹⁴⁶
- behaviour towards his father that is irreconcilable with being his father's successor, eg assaulting his father, chasing his father out of the latter's kraal, or serious disobedience;¹⁴⁷
- wastefulness or extravagance in respect of the personal property of the family head, the family estate (i.e. the general property) or house property;
- a persistent refusal to contribute to the maintenance of the family;
- if he is an illegitimate child begotten by an outsider (if an illegitimate child is repudiated by the family head, he is automatically disinherited);
- being an idiot or insane;¹⁴⁸
- amongst the Venda specific circumstances such as an attempt to murder his father in order to expedite his succession, adultery with the younger wives of his father, repeated assaults on his father, desertion of his father and repeated acts of adultery;
- the KwaZulu-Natal Codes¹⁴⁹ state that a child may be disinherited by his father on application to the chief by reason of the fact that he refuses to be controlled by his father or has by gross misconduct disgraced the family or refuses to make reasonable contribution towards the maintenance of the family, or for other good and sufficient cause;
- amongst the South Eastern Nguni (i.e. the Nguni in areas outside the Eastern Cape), gross misconduct, insanity and any other reasonable cause qualify as circumstances entitling disinheritance;
- amongst the Nguni in the Eastern Cape gross misconduct incompetence to deal with the inheritable property, being insane or an idiot qualify as circumstances entitling disinheritance.¹⁵⁰

2.12.2 The prescribed formalities

As stated previously, a family head may disinherit his son and exclude him from the right of succession according to certain prescribed formalities. In this regard, the head of the family may follow any one of two procedures (described hereunder) in order to exclude an heir from succession: (1) He may convene a meeting of the members of the family group (including the son to be disinherited) and publicly declare his son disinherited stating the reasons therefore. The disinherited son will then be afforded the

¹⁴⁶ Whitfield *op cit* 355.

¹⁴⁷ *Mfenqa v Tshali* (1900) 1 NAC 31 at 32.

¹⁴⁸ *Mani v Mani* [1996] 3 All SA 47 at 511.

¹⁴⁹ See section 81(9)(a)(i) of the KwaZulu Law on the Code of Zulu Law 16 of 1985 and the Natal Code of Zulu Law Proc R151 of 1987.

¹⁵⁰ Olivier (*et al*) (1995) *op cit* 158. See also *Paqa and Mgxunga v Mpantu and Paqa* 1942 NAC 94 at 96.

opportunity to defend himself. If the family tribunal considers his defence as unacceptable; the disinheritance will be authorised and a report will be furnished to the chief to that effect. The report is an essential requirement for the validity of the disinheritance.¹⁵¹ (2) He may convene a meeting of the members of the family group (excluding the son to be disinherited) and discuss the charges or complaints against his son. After the completion of the afore-mentioned discussions, a request must be made to the chief to call upon the son to furnish reasons (to the family tribunal) as to why he should not be disinherited. If the chief is satisfied with the reasons for the disinheritance and sanctions it, he may make it known administratively.¹⁵²

2.12.3 Appeal and reinstatement or revocation

A disinherited son may not appeal to a court of law in order to have the decision of the family tribunal reversed or overturned. However, a court will nullify the decision of the family tribunal to disinherit a son, “where the reasons therefore as required by customary law are absent or where the customary law procedures have not been followed”.¹⁵³

With regard to revocation, the family head is entitled to revoke his position to disinherit his son at any stage of the process. Such revocation must be express or necessarily implied.¹⁵⁴ The revocation will have the effect of reinstating the heir as successor.¹⁵⁵

2.12.4 Consequences of disinheritance

One of the main and most obvious consequences of disinheritance is that the disinherited son is no longer eligible for succession. As a result thereof, he is prohibited from inheriting the property (ie, general and house property) of the family head and is also precluded from succeeding as the family head.¹⁵⁶ The family head’s successor will now be the individual (son or male) second in rank to the disinherited heir. The family

¹⁵¹ Whitfield *op cit* 354.

¹⁵² *Mnengelwa v Mnengelwa* 1942 NAC (C&O) 2 at 5.

¹⁵³ Olivier (*et al*) (1981) *op cit* 480.

¹⁵⁴ *Nkosi v Khanyile No and Another* 2003 (2) SA 63 (N) at 70A-G.

¹⁵⁵ Olivier (*et al*) (1995) *op cit* 159.

¹⁵⁶ Kerr (1961) *op cit* 30.

head is precluded from appointing an heir or successor capriciously.¹⁵⁷ In other words, the rules of succession in customary law must still be applied even in the case of disinheritance. “A disinherited son is only excluded from his right of succession in respect of his own father, and it does not affect his qualification to inherit in respect of another member of his family group”.¹⁵⁸ Finally, the disinheritance of a successor does not have the effect of disqualifying his male descendants.¹⁵⁹

2.13 Summary of the chapter

In chapter 2, a few of the terms and concepts relevant for an understanding of the customary law of intestate succession (particularly in South Africa) are defined and explained. Amongst the many concepts explained, are included the rule of male primogeniture, polygamy and the role of the family head. Some of the various principles or rules affecting succession are also examined in this chapter and they include: the factors affecting the order of succession (ie, sex or gender and rank (where a further distinction is made between family rank and house rank)); general and special succession; the powers and duties of the successor; the order of succession (in monogamous and polygynous families); the provision of a successor in a house in which there is no successor (here attention is paid to the substitutionary customs of *ukuvusa*, *sororate*, *ukungena* and *ukuzalela*); other methods used for the provision of a successor (here attention is given to the institution of a legitimate son in one house as successor in another house, the institution of an illegitimate son as a successor and the adoption of a successor); the disposition of assets by the family head before death (disposition *inter vivos*) and disinheritance.

¹⁵⁷ *Sithole v Sithole* 1938 NAC (T&N) 35 at 37.

¹⁵⁸ Olivier (*et al*) (1995) *op cit* 159.

¹⁵⁹ *Ibid.*

CHAPTER 3

THE RECOGNITION, APPLICATION AND DEVELOPMENT OF THE CUSTOMARY LAW OF INTESTATE SUCCESSION IN SOUTH AFRICA

3.1 Introduction

In this chapter, attention is given to the historical development of the customary law of intestate succession and the current legislative and constitutional framework put in place for the recognition and application of the customary law of intestate succession in South Africa. Reference is also made to the leading cases affecting and altering the rules of the customary law of intestate succession. This is followed by a brief discussion of two innovative statutes amending the existing rules of intestate succession and changing the face of customary law forever.

3.2 Historical context

Prior to 1993, customary law enjoyed limited recognition and was never wholly accepted as an integral part of the South African legal system. In the former Cape colony (which comprised of Bechuanaland, British Kaffraria, the Transkei and the rest of the colony), customary law was considered to be uncivilised and was therefore disregarded. Roman-Dutch Law was proclaimed as the legal system for the Colony because it was perceived to be a “civilised” system.¹ Up until 1859, the Colony was administered under martial law to avoid the problem of recognition of customary law or native law as it was then known.² Most of the indigenous groups residing in the colony however, continued to

¹ Bennett TW *Application of customary law in Southern Africa* (1985) 40.

² Kahn E “Recognition of native law and creation of native courts” in Hahlo HR *The Union of South Africa: The development of its laws and constitution* (1960) 319.

reside according to the tenets of customary law. Finally, in 1864 in British Kaffraria and the rest of the Colony, the promulgation of the Native Succession Act³ gave courts the authority to apply customary law in cases involving intestate succession.⁴ In British Bechuanaland, native law was recognised. So too was the civil authority of chiefs over tribal members and the chief's criminal authority over most crimes except crimes of a serious nature.⁵

In the former Transkei, customary law was recognised through various annexation Acts.⁶ Magistrates' courts were vested with powers to apply either colonial law generally, but were not precluded from deciding cases between Natives based on customary law (or native law).⁷ The Supreme Court (as it was then known) as a court of first instance, could not exercise the discretionary power afforded to magistrates' courts with regards to the choice of law, but could when hearing appeals from the Transkeian Magistrates' courts determine whether the magistrates' court had applied its mind judicially, to a matter involving Natives, and if not, it could itself apply the correct system of customary law.⁸ "By this means, native systems of private law came to be recognised in uncodified form; to be determined as a fact from case to case".⁹

In the former Transvaal customary law was only recognised to the extent that it was not in conflict with the generally accepted principles of civilisation. As a result thereof, polygamy and *lobolo* were not recognised. Legislation regulating marriage was only applicable to Whites¹⁰ and only in 1897 was provision made for the solemnisation of civil (Christian) marriages between non-Whites.¹¹ The State President was appointed as paramount chief and assumed all powers and authority vested in a paramount chief at customary law.¹² The State President had the authority to appoint native commissioners, who could preside over civil matters between Natives (belonging to

³ 18 of 1864.

⁴ Brookes EH *History of native policy in South Africa* (1924) 87.

⁵ Whitfield GMB *South African native law* (1929) 5-6.

⁶ Legislation through which these areas were incorporated into the Cape Province.

⁷ Kahn *op cit* 320.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ See Law 3 of 1871.

¹¹ See Law 3 of 1897.

¹² Brookes *op cit* 130.

their tribal area of jurisdiction) on the basis of native laws as long as there was no injustice and the native law was not contrary to the principles of natural justice.¹³ Law 4 of 1885, created a court system for deciding civil cases between Natives.

With few changes, the legal system established in 1885, continued until 1927. During that period however, commissioners and traditional leaders had the authority to apply customary law alone. If Black persons wanted the common law to be applied to their case, they had to make an application to a magistrates' court or the Supreme Court.¹⁴ Section 70 of Proclamation 28 of 1902 also gave commissioner's courts exclusive jurisdiction to preside over matters pertaining to the distribution of the intestate estates of Natives who were married according to customary law or who were single.¹⁵ By virtue of the same Ordinance, the intestate estates of Natives married according to civil law and the offspring of such marriages, had to be distributed according to the law of the Transvaal Colony.¹⁶ The former Orange Free State did not develop any policy towards the recognition of customary law.¹⁷

In the former province of Natal however, the development of customary law flourished. The annexation of Natal by Britain in 1843 brought with it the establishment of Roman-Dutch law as the general or official law of the Colony.¹⁸ Ordinance 3 of 1849 gave some recognition to customary law provided that "it was not repugnant to the general principles of humanity observed throughout the civilised world". Additionally, the task of administering justice according to customary law was assigned to the local tribal chiefs or traditional leaders and government was still vested with the ultimate power of amending or abolishing customary law. Law 11 of 1864 (as amended by Law 28 of 1865) created a system which enabled Africans to make an application to the Governor to be exempt from customary law.¹⁹ In order to qualify for such an exemption an African person had to "state particulars of family, property, local chief and so on, and furnish

¹³ Kahn *op cit* 325.

¹⁴ Seymour SM *Bantu law in South Africa* (1970) 5-6.

¹⁵ See *Rakuba v Rakuba* 1919 TPD 344 at 345 (per De Villiers JP) and at 347 (per Gregorowski J).

¹⁶ Seymour *op cit* 6.

¹⁷ Brookes *op cit* 162.

¹⁸ Ordinance 12 of 1845 (Cape). See also Holleman FD "The recognition of bantu customary law in South Africa" in Afrika Instituut Leiden, Studie Centrum *The future of customary law in Africa* (1956) 234.

¹⁹ Bennett TW *Customary law in South Africa* (2004) 38.

proof of an ability to read and write”.²⁰ Law 1 of 1869 codified the customary laws of marriage and divorce and in 1891, a code²¹ dealing with issues relating to family law, succession, public law and procedure was enacted to guide courts in their adjudication of matters relating to customary law. Unfortunately, the code proved to be ineffective as it was a gross misrepresentation of customary law.²²

The Unionisation of South Africa in 1910 brought to the fore that the divergent approaches to customary law needed to be reconsidered and reformulated. Between 1910 and 1927, numerous pieces of legislation were promulgated (unsuccessfully) to regulate Africans and African customary law, as apartheid was slowly beginning to evolve. For example, the Native Land Act 27 of 1913, barred Africans from purchasing or leasing land outside certain prescribed areas contained in the Schedule of the Act. In order to protect the interests of white South Africans, the Native Trust and Land Act 18 of 1936, made more land available for the settlement of Africans, but clamped down on African tenancies on white-owned farms in an attempt to eliminate such practices.

In 1927 however, the Native Administration Act²³ created a homogeneous approach to the recognition of customary law and also made provision for special courts furnished with the task of resolving disputes between Africans. Section 11 of the afore-mentioned Act granted national recognition to customary law in the courts of traditional leaders (chiefs) and commissioners. The courts of traditional leaders were confined to applying customary or native law alone, whereas the courts of native commissioners could apply either customary or common law in any cases between Natives involving issues pertaining to the customs practiced by Natives.²⁴ Section 11(1) of the Act gave a discretion to the native commissioner’s courts in all proceedings between Natives involving questions of customs followed by natives to apply the relevant native law

²⁰ Bennett (1985) *op cit* 44.

²¹ Law 19 of 1891. See also Bennett TW and Pillay A “The Natal and KwaZulu codes: The case for repeal” (2003) *South African Journal on Human Rights* 219-220.

²² Whitfield *op cit* 8 and Marais JS “The imposition and nature of European control” in Schapera I *The bantu-speaking tribes of South Africa* (1937) 344.

²³ 38 of 1927. This Act was later known as the Black Administration Act 38 of 1927.

²⁴ Section 12(1)(a) of the Native Administration Act 38 of 1927 which provided that: “The Minister may – authorise any Bantu chief or headman recognized or appointed ... to hear and determine civil claims arising out of Bantu law and custom brought before him by Bantu against Bantu resident within his area of jurisdiction”.

thereto, provided that it was not contrary to the principles of public policy or natural justice.²⁵

The jurisdiction of courts of traditional leaders and native commissioners was confined exclusively to blacks as it was presumed that only blacks could submit to customary law.²⁶ The courts could hear any matter pertaining to civil claims. Additionally, the defendant had to reside, be engaged in business or employed within the court's area of jurisdiction.²⁷ In terms of the Native Laws Further Amendment Act 79 of 1957,²⁸ the jurisdiction of the commissioner's courts was expanded to include criminal matters involving Africans.²⁹

Section 12(1) of the Native Administration Act³⁰ also made provision for chiefs' and headmen's courts. According to that section, the Minister could authorise any state-recognised chief or headman to hear civil claims arising out of customary law. The courts of chiefs and headmen were restricted from presiding over any matter pertaining to civil or Christian marriages. Section 10 of the Native Administration Amendment Act 9 of 1929³¹ made provision for special courts to preside over matters pertaining to civil or Christian marriages concluded by Africans.

In the 1980s, and after a realisation that the apartheid system had failed, the regime in power commissioned an inquiry into the structure and functioning of the courts³² (the Hoexter Commission). The recommendations of the Commission included:

- (a) the abolition of the commissioner's courts, the Appeal Courts and the Black Divorce Courts;
- (b) the jurisdiction of the commissioner's courts and the Appeal Courts was resumed by the magistrate's courts and the Supreme Court; and the jurisdiction of the

²⁵ Kahn *op cit* 328.

²⁶ Section 10(1) of the Native Administration Act 38 of 1927 provided that: "The Governor-General may, by Proclamation in the *Gazette* constitute courts of Bantu Affairs Commissioners for the hearing of all civil causes and matters between Bantu and Bantu only".

²⁷ Section 10(3)(a) of the Native Administration Act 38 of 1927.

²⁸ Later known as the Bantu Laws Further Amendment Act 79 of 1957.

²⁹ Bennett (1985) *op cit* 48.

³⁰ 38 of 1927.

³¹ Later known as the Black Administration Amendment Act 9 of 1929.

³² Hoexter Commission *South African Government Commission of Inquiry into the Structure and Functioning of the Courts Fifth Report* (1984) 46.

- Divorce Courts was resumed by the proposed family courts; and
(c) the preservation of the courts of chiefs and headmen.³³

The apartheid government accepted the Commission's recommendations and eliminated the separate court system for blacks by promulgating the Special Courts for Blacks Abolition Act.³⁴ Section 11(1) of the Black Administration Act was repealed and was replaced by section 54A(1)³⁵ of the Magistrates' Courts Act 32 of 1944. This temporary resolution continued to be in force until 1988, until the Law of Evidence Amendment Act³⁶ was enacted.

In the 1980s and 1990s, the law of succession was also amended; for example, the Intestate Succession Act 81 of 1987 codified the common law of intestate succession and the Law of Succession Amendment Act 43 of 1992 amended testate succession by effecting essential modifications to the Intestate Succession Act and the Wills Act 7 of 1953.³⁷ The changes effected to the South African law of succession however, "failed to consider the distinction between the common law of succession and the customary law of succession and inheritance applicable to black South Africans living predominantly in rural areas".³⁸

In 1988, the Law of Evidence Amendment Act 45 of 1988 (hereafter referred to as the Law of Evidence Amendment Act) was enacted which gave the courts a discretion to recognise foreign legal systems and indigenous law. In this regard, section 1 provides that:

³³ *Ibid.*

³⁴ 34 of 1986.

³⁵ Section 54A(1) provided that; "Notwithstanding the provisions of this Act or any other law a court may in all suits or proceedings between Blacks, including the hearing of an appeal in terms of the provisions of section 29 of this Act or section 309 of the Criminal Procedure Act, 1977 (Act 51 of 1977), involving questions of customs followed by Blacks, take judicial notice thereof and decide such questions according to the Black law applying to such customs except in so far as it has been repealed or modified: Provided that such Black law shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any court to declare that the custom of *lobola* or *bogadi* or other similar custom is repugnant to such principles".

³⁶ 45 of 1988.

³⁷ Schoeman-Malan MC "Recent developments regarding South African common and customary law of succession" (2007) *Potchefstroom Electronic Law Journal* 3.

³⁸ See generally Corbett MM, Hofmeyer G and Kahn E *The law of succession in South Africa* (2001) 69-78 and 566-577.

- (1) Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy and natural justice: Provided further that it shall not be lawful for any court to declare that the custom of *lobola* or *bogadi* or other similar custom is repugnant to such principles.
- (2) The provisions of subsection (1) shall not preclude any party from adducing evidence of the substance of a legal rule contemplated in that subsection which is in issue at the proceedings concerned.
- (3) In any suit or proceedings between Blacks who do not belong to the same tribe, the court shall not in the absence of any agreement between them with regard to the particular system of indigenous law to be applied in such suit or proceedings, apply any system of indigenous law other than that which is in operation at the place where the defendant or respondent resides or carries on business or is employed, or if two or more different systems are in operation at that place (not being within a tribal area), the court shall not apply any such system unless it is the law of the tribe (if any) to which the defendant or respondent belongs.
- (4) For purposes of this section "indigenous law" means the law or custom as applied by the Black tribes in the Republic.

The Law of Evidence Amendment Act omitted any reference to race from the provisions recognising customary law and extended the application of customary law to all courts in South Africa.³⁹ The promulgation of the Act however, did not improve the status of customary law in the country, as customary law continued to remain subordinate to the common law and Roman-Dutch law. In fact, the promulgation of both the Black Administration and the Law of Evidence Amendment Acts introduced a system of legal dualism in South Africa. In the next section; attention is given to legal dualism and its impact on the customary law of intestate succession.

3.3 Legal dualism

The South African legal system makes provision for two different systems of succession: the common law (together with the statutes amending it) which is founded on Roman-Dutch law and various customary laws.⁴⁰ This meant that when presented with a case, the courts had to determine (on a case-by-case basis) which of the two

³⁹ See *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC) *op cit* para 52.

⁴⁰ South African Law Reform Commission *The Harmonisation of Common law and Indigenous Law (Draft Issue Paper on Succession)* Project 108 Issue Paper 12 (1998).

legal systems to apply to a given set of facts.⁴¹ Historically, this also meant that a person's race and more specifically the type of marriage contracted⁴² and the patrimonial consequences arising from such marriage determined the applicability of customary or common law in each and every matter involving a deceased estate.⁴³

In cases where an African died intestate, the law regulating the devolution of the estate was governed by choice of law rules.⁴⁴ The choice of law rules governing the intestate succession of Black estates were embodied in the Black Administration Act 38 of 1927 (hereafter referred to as the Black Administration Act) and the Regulations⁴⁵ promulgated there-under. In this regard, section 23 of the Black Administration Act provided that:

- (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 to any house, will 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 will devolve upon his death upon one male person to be determined in accordance with tables of succession to be prescribed under section 23(10).
- (3) All other property of whatsoever kind belonging to a black may be devised by will.
- (4) ...
- (5) Any claim or dispute in regard to the administration or distribution of any estate of a deceased Black shall be decided in a court of competent jurisdiction.
- (6) In connection with any such claim or dispute, the heir, or in case of minority his guardian, according to Black law, if no executor has been appointed by a Master of the Supreme Court shall be regarded as the executor in the estate s if he had been duly appointed as such according to the law governing the appointment of executors.
- (7) Letters of administration from the Master of the Supreme Court shall not be necessary in, nor shall the Master or any executor appointed by the Master have any powers in connection with, the administration and distribution of –
 - (a) the estate of any Black who has died leaving no valid will;

⁴¹ Bennett TW *Human rights and african customary law under the South African Constitution* (1999) 51.

⁴² That is customary marriage or civil marriage. The Recognition of Customary Marriages Act 120 of 1998 now governs the application of customary marriages.

⁴³ Knoetze E "Customary law of succession in a dualistic system" (2005) *Tydskrif vir die Suid-Afrikaanse Reg* 138.

⁴⁴ *Ibid.*

⁴⁵ Regulations for the Administration and Distribution of the Estates of Deceased Blacks (GN R200 of 1987).

- (b) any portion of the estate of a deceased Black which falls under subsections (1) or (2).
- (8) A Master of the Supreme Court may revoke letters of administration issued by him in respect of any Black estate.
- (9) Whenever a Black has died leaving a valid will which disposes of any portion of his estate, Black law and custom shall not apply to the administration or distribution of so much of his estate as does not fall under subsections (1) or (2) and such administration and distribution shall in all respects be in accordance with the Administration of Estates Act, 1965 (Act 66 of 1965).
- (10) The Governor-General may make regulations not inconsistent with this Act –
 - (a) prescribing the manner in which the estates of deceased Blacks shall be administered and distributed;
 - (b) defining the rights of widows or surviving partners in regard to the use and occupation of the quitrent land of deceased Blacks;
 - (c) dealing with the disherison of Blacks;
 - (d) ...
 - (e) prescribing tables of succession in regard to Blacks; and
 - (f) generally for the better carrying out of the provisions of this section.
- (11) Any Black estate which has, prior to the commencement of this Act, been reported to a Master of the Supreme Court shall be administered as if this Act had not been passed, and the provisions of this Act shall apply in respect of every Black estate which has not been so reported.

The first three subsections of section 23 of the Act determined the applicable system of law, ie, customary law or common law.⁴⁶ Generally, the implication of subsections (1) and (2) of the Act was that all other property could be disposed of by means of a will but that movable house property belonging to the deceased and quitrent land in a tribal settlement held in individual tenure by a black person had to devolve according to the customary rules of succession and inheritance.⁴⁷ Estates that were partly or wholly bequeathed by a will were to be administered by the Administration of Estates Act 66 of 1965.⁴⁸ Persons excluded from the application of customary law, included persons who had concluded a civil marriage and single men and women (who had never been married) who held rights to property individually; such persons could dispose of their estates by means of a will.⁴⁹ Section 23 of the Black Administration Act obviously

⁴⁶ Kerr AJ *The customary law of immovable property and of succession* (1990) 157.

⁴⁷ See chapter 1 of this thesis.

⁴⁸ Rautenbach C, du Plessis W and Venter AM “Law of succession and inheritance” in Bekker JC, Rautenbach C and Goolam NMI *Introduction to legal pluralism in South Africa* (2006) 101.

⁴⁹ *Ibid.*

amounted to racial discrimination,⁵⁰ as no such provision was included in any of the legislation regulating the intestate inheritance of Whites, Coloureds and Indians.

The applicability of the common or customary law to other divisions of property was made provision for in the additional choice of law rules found in the Regulations for the Administration and Distribution of the Estates of Deceased Blacks (GN R200 of 1987)⁵¹ (hereafter referred to as “the regulations”). The regulation was issued in terms of section 23(10)⁵² of the Black Administration Act and gave legal credence to the customary law rule of male primogeniture.⁵³ It also provided for rules for the devolution of a deceased black estate in instances where section 23 of the Black Administration Act did not apply, and in cases where the deceased failed to dispose of his estate by means of a valid will.⁵⁴ In such cases, the property of the deceased had to be distributed according to the rules laid down in regulation 2 which provided that:

If a Black dies leaving no valid will, so much of his property, including immovable property, as does not fall within the purview of subsection (1) or subsection (2) of section 23 of the Act shall be distributed in the manner following:

- (a) ...
- (b) If the deceased was at the time of his death the holder of a letter of exemption issued under the provisions of section 31 of the Act, exempting him from the operation of the Code of Zulu law, the property shall devolve as if he had been a European.
- (c) If the deceased, at the time of his death was –
 - (i) a partner in a marriage in community of property or under antenuptial contract; or
 - (ii) a widower, widow or divorcee, as the case may be, of a marriage in community of property or under antenuptial contract and was not survived by a partner to a customary union entered into subsequent to the dissolution of such marriage, the property shall devolve as if the deceased had been a European.
- (d) When any deceased Black is survived by any partner –
 - (i) with whom he had contracted a marriage which, in terms of subsection (6) of section 22 of the Act, had not produced the legal consequences of a marriage in community of property; or
 - (ii) with whom he had entered into a customary union;
 - (ii) who was at the time of his death living with him as his putative spouse;
 - (iv) or by any issue of himself and any such partner, and the circumstances are such as in the opinion of the Minister to render the application of Black

⁵⁰ Knoetze (2005) *op cit* 138.

⁵¹ GG 10601 of 6 February 1987. These regulations were amended by the Amendment of Regulations for the Administration and Distribution of Estates (GN R1501 of 2002).

⁵² See above.

⁵³ See chapter 2 of this thesis.

⁵⁴ Rautenbach (*et al*) (2006) *op cit* 101.

law and custom to the devolution of the whole, or some part, of his property inequitable or inappropriate, the Minister may direct that the said property or the said part thereof, as the case may be, shall devolve as if the said Black and the said partner had been lawfully married out of community of property, whether or not such was in fact the case, and as if the said Black had been a European.

- (e) If the deceased does not fall into any of the classes described in paragraphs (b), (c) and (d), the property shall be distributed according to Black law and custom.

The property of persons excluded from the application of customary law in terms of section 31⁵⁵ of the Black Administration Act, had to be disposed of according to the common law of succession as regulated by the Intestate Succession Act 81 of 1987⁵⁶ (hereafter referred to as the Intestate Succession Act). According to this regulation, the type of marriage contracted by the deceased was also important in determining which legal system would be applicable to the estate of the deceased. In cases where the deceased had only concluded a civil marriage and the matrimonial property system governing the marriage was in community of property; the deceased's estate had to devolve according to the rules of the common law of succession. If the Minister was of the opinion that "the partial or whole application of customary law to the devolution of the estate would result in inequitable or inappropriate circumstances, he was entitled to make an equitable distribution".⁵⁷

In KwaZulu-Natal, the KwaZulu Act on the Code of Zulu Law 16 of 1985 did not adhere to the choice of law rules. The relevant sections of the Code actually provide that in cases where the deceased contracted a civil or Christian marriage or had no male heir, the estate devolves according to common law, irrespective of the matrimonial property system applicable to the marriage.

In addition to the problems outlined above, the choice of law rules presented more problems with the advent of the Constitution of the Republic of South Africa (Act 108) of 1996 as they clearly violated the right to equal treatment⁵⁸ and freedom from racial

⁵⁵ Section 31 gave the president the power to exempt any black from the operation of customary law under any conditions as he may see fit.

⁵⁶ Bekker (1989) *op cit* 320.

⁵⁷ Rautenbach (*et al*) (2006) 102.

⁵⁸ Section 9(1) and 9(2).

discrimination.⁵⁹ The rules of intestate succession were therefore outdated and no longer justifiable and were in dire need of amendment in order to bring it into line with the Constitution, current social practices and human rights. The impact of the Constitution on the customary law of intestate succession is the focus of the following section in this chapter.

3.4 Constitutional recognition of customary law

3.4.1 The Interim Constitution⁶⁰

Prior to 1994, customary law enjoyed limited recognition as a legal system. It was a system regarded as “inferior to the existing body of South African law and its recognition, application and development was largely subject to the whim of the courts who were not always comfortable with or well versed in customary law, and who were often-prejudiced”.⁶¹ In 1994, South Africa emerged as a democracy from a history characterised by racial oppression and discrimination. An interim and supreme⁶² Constitution was adopted with a justiciable Bill of Rights⁶³ and for the first time, all South Africans were vested with rights to dignity,⁶⁴ equality,⁶⁵ freedom and security of the person,⁶⁶ including freedom of religion,⁶⁷ freedom from racial discrimination,⁶⁸ etc. The Interim Constitution also made specific provision for a right to culture.⁶⁹ Section 31 provided that:

Every person shall have the right to use the language and to participate in the cultural life of his or her choice.

⁵⁹ Section 9(3), (4) and (5).

⁶⁰ The Constitution of the Republic of South Africa Act 200 of 1993.

⁶¹ See generally Himonga C and Bosch C “The application of African customary law under the Constitution of South Africa : Problems solved or just beginning” (2000) *South African Law Journal* 309.

⁶² See section 4(1) of the Constitution of the Republic of South Africa Act 200 of 1993.

⁶³ Chapter 2.

⁶⁴ Section 10.

⁶⁵ Section 8.

⁶⁶ Section 11.

⁶⁷ Section 14.

⁶⁸ Section 8(2).

⁶⁹ Section 31.

In addition to section 31, the Interim Constitution also outlined and established the powers of traditional authorities⁷⁰ (albeit subject to the fundamental rights) and gave them a mandate to form both provincial and national Houses of Traditional Leaders.⁷¹

⁷⁰ Section 181(1) made provision for the recognition of a “traditional authority which observes a system of indigenous law” and section 181(2) provided that “indigenous law shall be subject to regulation by law”.

⁷¹ In this regard section 183 provided that:

- (1) (a) The legislature of each province in which there are traditional authorities and their communities, shall establish a House of Traditional Leaders consisting of representatives elected or nominated by such authorities in the province.
- (b) Draft legislation providing, subject to this Chapter, for the establishment, the composition, the election or nomination of representatives, and the powers and functions of a House contemplated in paragraph (a), and for procedures applicable to the exercise and performance of such powers and functions, and for any other matters incidental to the establishment and functioning of such a House, shall be introduced in a provincial legislature not later than six months after the election of the first Premier of such province in terms of this Constitution.
- (c) The traditional authorities resident in a province shall before the introduction of draft legislation referred to in paragraph (b), be consulted, in a manner determined by resolution of the provincial legislature, to establish their views on the content of such legislation.
- (2) (a) A House referred to in subsection (1) (a), shall be entitled to advise and make proposals to the provincial legislature or government in respect of matters relating to traditional authorities, indigenous law or the traditions and customs of traditional communities within the province.
- (b) Any provincial Bill pertaining to traditional authorities, indigenous law or such traditions and customs, or any other matters having a bearing thereon, shall be referred by the Speaker of the provincial legislature to the House for its comments before the Bill is passed by such legislature.
- (c) The House shall, within 30 days as from the date of such referral, indicate by written notification to the provincial legislature its support for or opposition to the Bill, together with any comments it wishes to make.
- (d) If the House indicates in terms of paragraph (c) that it is opposed to the Bill, the provincial legislature shall not pass the Bill before a period of 30 days as from the date of receipt by the Speaker of such written notification has lapsed.
- (e) If the House fails to indicate within the period prescribed by paragraph (c) whether it supports or opposes the Bill, the provincial legislature may proceed with the Bill.

Section 184 provided that:

- (1) There is hereby established a Council of Traditional Leaders consisting of a chairperson and 19 representatives elected by traditional authorities in the Republic.
- (2) The Chairperson and members of the Council shall be elected by an electoral college constituted by the members of the Houses of Traditional Leaders referred to in section 183.
- (3) (a) Draft legislation providing, subject to this Chapter, for the composition, the election of representatives and the powers and functions of the Council established by subsection (1), and for procedures applicable to the exercise and performance of such powers and functions, and for any other matters incidental to the establishment and functioning of the Council, shall be introduced in Parliament not later than six months as from the commencement of this Constitution.
- (b) Section 183(1)(c) shall apply mutatis mutandis in respect of draft legislation referred to in paragraph (a) of this subsection, and in such application a reference therein to a provincial legislature shall be construed as a reference to Parliament.
- (4) The Council shall, in addition to any other powers and functions assigned to it by any other law, be competent –
 - (a) to advise and make recommendations to the national government with regard to any matter pertaining to traditional authorities, indigenous law or the traditions and customs of traditional communities anywhere in the Republic, or any other matters having a bearing thereon; and
 - (b) at the request of the President, to advise him or her on any matter of national interest.
- (5) (a) Any parliamentary Bill pertaining to traditional authorities, indigenous law or the traditions and customs of traditional communities or any other matters having a bearing thereon, shall, after having been passed by the House in which it was introduced but before it is passed by the other House, be referred by the Secretary to Parliament to the Council for its comments.
- (b) The Council shall, within 30 days as from the date of such referral, indicate by written notification to the Secretary to Parliament its support for or opposition to the Bill, together with any comments it wishes to make.
- (c) If the Council indicates in terms of paragraph (b) its opposition to the Bill, the other House shall not pass the Bill before a period of 30 days as from the date of receipt by the said Secretary of such written notification has lapsed.

In addition to the afore-mentioned provisions, the term “customary law” was specifically mentioned in the following sections namely, sections 33(2),⁷² 33(3)⁷³ and 35(3).⁷⁴ The inclusion of so many express references to customary law in the Interim Constitution made it abundantly clear that “customary law was now being treated as a foundation of the South African legal system on the same terms as Roman-Dutch law”.⁷⁵ Furthermore, the Interim Constitution, “thus guaranteed people the freedom to live according to the legal system applicable to their particular cultural group” and placed an accompanying obligation on the State to ensure that this was possible in the case of customary law as well.⁷⁶ The Bill of Rights also enhanced the status of African customary law (albeit indirectly) by altering the way in which courts would determine “public policy”. Prior to the enactment of the Interim Constitution, courts only considered the views of a small group of the population of South Africa, when determining what was consistent with, or opposed to, public policy. The fact that the Interim Constitution promotes equality between the people of South Africa and its explicit provision for the protection and promotion of the heterogeneous cultures in South Africa, seems to suggest that courts have no option but to consider the views of the wider South African population when determining the content of public policy.⁷⁷ However, the birth of a customary law jurisprudence was not without problems since the:

application of customary law was still subject to the repugnancy clause⁷⁸, and large sections of it were threatened with constitutional review on the ground that they contravened various provisions in the Bill of Rights.⁷⁹

To compound this problem, the version of customary law that was about to come

(d) If the Council fails to indicate within the period prescribed by paragraph (b) whether it supports or opposes the Bill, Parliament may proceed with the Bill.

⁷² Section 33(2) provided that: “Save as provided for in subsection (1) or any other provision of this Constitution, no law, whether a rule of the common law, customary law or legislation, shall limit any right entrenched in this Chapter”.

⁷³ Section 33(3) provided that: “The entrenchment of the rights in terms of this Chapter shall not be construed as denying the existence of any other rights or freedoms recognized or conferred by common law, customary law or legislation to the extent that they are not inconsistent with this Chapter”.

⁷⁴ Section 35(3) provided that: “In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter”.

⁷⁵ Olivier NJJ, Bennett TW, Church J, Mqoke RB, Rautenbach C, Du Plessis W, Olivier WH and Rugege S “Indigenous law” in Joubert WA and Faris JA (eds) *The law of South Africa (LAWSA)* (2004) 29.

⁷⁶ Himonga and Bosch *op cit* 310.

⁷⁷ *Ibid.*

⁷⁸ Section 1(1) of the Law of Evidence Amendment Act 45 of 1988.

⁷⁹ Olivier (*et al*) (2004) *op cit* 29.

under scrutiny had recently been discredited for its association with apartheid and for being an invented tradition i.e. lacking genuine roots in African history.⁸⁰

Despite these overwhelming challenges, the Constitutional Principles attached to the Constitution lobbied for the retention of the recognition of customary law in the Final Constitution. In this regard, like the other Constitutional Principles, Constitutional Principles XI⁸¹ and XIII⁸² could not be amended or repealed by the Constitutional Assembly (ie, the body responsible for drafting the final Constitution)⁸³ and the Constitutional Assembly was obliged to abide by the Constitutional Principles when drafting the Final Constitution.⁸⁴

3.4.2 The final Constitution

3.4.2.1 General

On 4 February 1997 (and in accordance with the Constitutional Principles discussed above), South Africa adopted a Final Constitution⁸⁵ (hereafter referred to as the Constitution) guaranteeing a number of human rights and also guaranteeing the protection and application of customary law, which was once again dependant on a right to culture. In this regard, sections 30 and 31 provide that:

⁸⁰ Bennett (2004) *op cit* 78.

⁸¹ Which provides that: the diversity of language and culture shall be encouraged.

⁸² Which provides that: the institution, status and role of traditional leadership, according to indigenous law shall be recognised and protected in the Constitution and indigenous law like the common law shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.

⁸³ In this regard section 74(1) provided that:

No amendment or repeal of –

(a) this section or the Constitutional Principles set out in Schedule 4; or

(b) any other provision of this Chapter in so far as it relates to –

(i) the Constitutional Principles; or

(ii) the requirement that the new constitutional text shall comply with the Constitutional Principles, or that such text shall be certified by the Constitutional Court as being in compliance therewith, shall be permissible.

⁸⁴ In this regard section 71(1) provided that

(1) A new constitutional text shall –

(a) comply with the Constitutional Principles contained in Schedule 4; and

(b) be passed by the Constitutional Assembly in accordance with this Chapter.

See also Kerr AJ “Customary law, fundamental rights and the Constitution” (1994) *South African Law Journal* 722-723.

⁸⁵ The Constitution of the Republic of South Africa (Act 108) of 1996.

- 30 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.
- 31 (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, practice 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.

In addition to sections 30 and 31, section 211 provides that:

- (1) The institution, status and role of traditional leadership, according to customary law, are recognized, 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.

According to section 211(3), courts no longer have a choice in applying customary law to a particular case; they are now compelled to apply customary law, although constantly subject to the Constitution and any applicable legislation.⁸⁶ Furthermore, customary law may be sub-divided into “official” and “living” customary law. This distinction was highlighted in chapter 1 of this thesis and will not be elaborated on any further here. However, what needs to be said is that South African courts are also acquainted with this distinction and should not only consider “official” customary law when making judicial pronouncements, but should also consider “living” customary law.⁸⁷

African customary law seems to enjoy the same status as the common law in sections 39(2) and (3) of the Constitution which provides that:

- (2) When interpreting any legislation, and when developing the common law, or

⁸⁶ Bennett TW “Re-introducing African customary law to the South African legal system” (2009) *American Journal of Comparative Law* 7-8.

⁸⁷ Maithufi IP “The Constitution and the application of customary family law in South Africa” (2002) *De Jure* 213. See also *Kewana v Santam Insurance Co Ltd* 1993 (4) SA 771 (T) at 774B-F.

customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

Section 181(1)(c) of the Constitution also makes provision for the formation of a Commission for the Promotion and Protection of the Rights of Cultural and Linguistic Communities. Section 235 of the Constitution also makes provision for a right to self-determination for cultural and linguistic communities.⁸⁸ With the introduction of the Constitution and the provisions making reference to customary law it seems that the status of customary law has improved considerably, in comparison to the status customary law endured under colonialism and apartheid.

However, although the Constitution guarantees numerous rights, including a right to culture, it must be noted that the rights in the Bill of Rights are not absolute. They may be restricted by the rights of others and by pressing national concerns like public order, safety, health and democratic values”.⁸⁹ Section 36 of South Africa’s Constitution prescribes a formula for the justification of limitations of the rights in the Bill of Rights.

- (1) 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.
- (2) Except as provided for in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

In addition to the set of criteria listed in section 36, any limitations analysis requires a

⁸⁸ Section 235 provides that: “The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the notion of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation”.

⁸⁹ Currie I and de Waal J *The Bill of Rights handbook* (2005) 163.

balancing of interests.⁹⁰ This means that when one has to confirm a legitimate violation of any single right, the specific right (eg, the right to equal treatment) must be balanced against another right (eg, the right to culture) and the restricting law (eg, the customary law of intestate succession) in order to determine whether the offending law would be permissible in an open and democratic society.⁹¹ The case of *Christian Education SA v Minister of Education*⁹² is a good example here. In that case, the rights to freedom of religion and culture were at variance with the law banning corporal punishment in educational academies. After weighing up the rights against the limiting law; and after careful consideration of the general limitations provision, the court found that the law banning corporal punishment was reasonable and justifiable under section 36,⁹³ because the rights of children to dignity and freedom and security of the person were by far more deserving of protection than their parents' rights to culture and religion.⁹⁴ The case of *Prince v President of the Law Society of the Cape of Good Hope and Others*⁹⁵ is also a good example here. In that case the court had to determine whether the failure to make provision for an exemption for the religious consumption of illegal narcotics constituted a justifiable limitation of the appellant's constitutional rights to freedom of religion and culture.⁹⁶ The court found that although the embargo on the consumption and possession of prohibited drugs constituted an obvious violation of the appellant's right to smoke cannabis as part of his religion and culture; the violation was reasonable and justifiable because there were no other means available to limit and deter the harmful use of illegal drugs.⁹⁷

3.4.2.2 The right to culture as encapsulated in sections 30 and 31 of the Constitution of the Republic of South Africa, 1996

Section 30 provides for an individual right to participate in the culture of one's choice, whilst section 31 provides for a group right to participate in cultural activities. It is

⁹⁰ SALRC (1998) *op cit* 10.

⁹¹ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 104.

⁹² 2000 (4) SA 757 (CC).

⁹³ *Christian Education* (2000) *op cit* para 52.

⁹⁴ *Christian Education* (2000) *op cit* paras 41, 43 and 47.

⁹⁵ 2002 (2) SA 794 (CC).

⁹⁶ The appellant in the case claimed that he smoked cannabis as part of his religion and culture.

⁹⁷ *Prince op cit* paras 133-134 and 138.

important to note that neither of these sections makes any mention of customary law *per se*, however, customary law is assumed to be an important component of African cultural tradition.⁹⁸ “Culture” may be defined as:

A people’s entire store of knowledge and artefacts, especially the languages, systems of beliefs, and laws, that give social groups their unique character.⁹⁹

For anthropologists, “culture” refers to:

the total way of life of a society. Such a way of life comprises a system of thought, values, norms and material creations of a society which have come into being through interaction with the environment.¹⁰⁰

From the above definitions, we can conclude that, although “culture” and customary law are distinct, they are nevertheless inextricably linked. Therefore, when lawyers attest to a right to culture, under constitutional and international law, they commonly mean a solid rule or practice that is idiosyncratic to the traditions of a specific community.¹⁰¹

Because international law is considered as part of the South African legal system¹⁰² and because the Constitution places a duty on courts to consider international law when interpreting the Bill of Rights,¹⁰³ the right to culture must be analysed against public international law.¹⁰⁴ The right to culture in international law is based on article 27 of the International Covenant on Civil and Political Rights (1966), the right to self-determination

⁹⁸ Bennett (2004) *op cit* 78.

⁹⁹ Bennett (1999) *op cit* 23-24.

¹⁰⁰ Church J “The constitutional right to culture and the judicial development of indigenous law: A comparative analysis of cases” (2007) *Anthropology Southern Africa* 57.

¹⁰¹ Olivier (*et al*) (2004) *op cit* 30.

¹⁰² In this regard section 231(4) provides that: “Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament”.

Section 232 also provides that: “Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament”.

¹⁰³ In this regard section 39(1) provides that: “When interpreting the Bill of Rights, a court, tribunal or forum –

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

¹⁰⁴ Bennett (2004) *op cit* 84.

and the doctrine of aboriginal rights.¹⁰⁵ Article 27 of the International Covenant on Civil and Political Rights (1966) provides that:

In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Article 27 may only be claimed by minority groups and may therefore not be relevant to African indigenous communities in South Africa as they are not in the minority but in the majority. However, the right in article 27 is augmented by a general right to self-determination which may be claimed by “all peoples” and not just minorities. In international law, the right to self-determination is usually limited to situations where people are professing political independence however, it is a wide enough right that may also include a right to cultural development.¹⁰⁶ Aboriginal rights may be claimed by cultural communities who have been historically disadvantaged or dispossessed of land or natural resources by colonial entities.¹⁰⁷ African indigenous people definitely fall into this category and therefore, a claim to the acknowledgement of an African cultural traditional would fit nicely into this doctrine.¹⁰⁸

The similarities of sections 30 and 31 of the Constitution and article 27 of the International Covenant on Civil and Political Rights (1966) are obvious. The rights protected under section 30 of the Constitution and article 27 of the International Covenant on Civil and Political Rights are individual rights, but they are dependant on the group’s capacity to preserve its culture, language or religion. The state must not interfere with the rights of the individual and must allow the existence of institutions that would be necessary to maintain the culture concerned.¹⁰⁹ The rights contained in both pieces of legislation are therefore formulated as “both an individual and a group entitlement”.¹¹⁰ Group and individual rights are thus symbiotic in nature: as culture isn’t

¹⁰⁵ Olivier (*et al*) (2004) *op cit* 31.

¹⁰⁶ Bennett (2004) *op cit* 84.

¹⁰⁷ Bennett (1999) *op cit* 14.

¹⁰⁸ Olivier (*et al*) (2004) *op cit* 31.

¹⁰⁹ *Id* 33.

¹¹⁰ Bennett (1999) *op cit* 24.

experienced in isolation, but in relation to others as well.¹¹¹ The individual right to adhere to a culture of choice assumes the existence of a cultural group or community, and this community must first exist before the individual may have any rights in it.¹¹² We can therefore conclude that a person's entitlement to have customary law applied in a judicial challenge, is dependant upon his or her membership of a group or community and the group must be recognised by the state before the individual may enforce his or her right.¹¹³

The right of a person to participate in a culture of choice is not without restriction.¹¹⁴ In addition to the general limitations clause found in section 36 of the Constitution, sections 30 and 31 contain an "internal limitation clause"¹¹⁵ or is qualified by stating that the right to culture may not be "exercised in a manner inconsistent with any provision in the Bill of Rights". Here, the case of *Christian Education SA v Minister of Education*¹¹⁶ might be an apt illustration of how the "internal qualifier" (ie, section 31(2)) functions. The applicant in the case contested the constitutionality of section 10 of the South African Schools Act 84 of 1996, which outlawed the practice of corporal punishment in schools. The applicant contended that the outlawing of corporal punishment breached their rights to religious and cultural freedom, since the chastisement of children was a crucial feature of Christianity. The court *a quo*¹¹⁷ held that because corporal punishment violated numerous other rights in the Bill of Rights,

to allow corporal punishment to be administered at Applicant's schools, even if it is done in the exercise of the religious beliefs or culture of those involved, would be to allow the applicant's members to practice their religion or culture in a manner inconsistent with the Bill of Rights in contravention of section 31(2) of the Constitution.¹¹⁸

The applicant then appealed to the Constitutional Court. At the outset, the Court noted

¹¹¹ Robinson K "The minority and subordinate status of African women under customary law" (1995) *South African Journal on Human Rights* 469.

¹¹² Bennett (1999) *op cit* 25.

¹¹³ *Ibid.*

¹¹⁴ Beukes M "Culture and cultural rights" in Joubert WA and Faris JA (eds) *The law of South Africa* (2004) 423-424.

¹¹⁵ Bennett (2004) *op cit* 89.

¹¹⁶ 2000 (4) SA 757 (CC).

¹¹⁷ *Christian Education South Africa v Minister of Education* 1999 (4) SA 1092 (SE).

¹¹⁸ *Id* at 1108B/C-C/D.

that the case involved a plurality of converging constitutional values and interests, some overlapping and some conflicting with one another.¹¹⁹ The Court held that the:

interest protected by section 31 is not a statistical one-dependent on a counter-balancing of numbers, but a qualitative one based on respect for diversity. Section 31(2) ensures that the concept of rights of members of communities that associate on the basis of language, culture and religion, cannot be used to shield practices which offend the Bill of Rights.¹²⁰

The Court presumed (without deciding) that the appellant's religious rights under section 15 and 31(1) were both in contention. The Court also assumed that corporal punishment, as it was practiced by the appellant's members was not inconsistent with any provision of the Bill of Rights as provided for in section 31(2). On the basis of these two assumptions, the Court concluded that section 10 of the South African Schools Act 84 of 1996 (that prohibited corporal punishment in all schools in South Africa), limited the rights of parents under sections 15 and 31.¹²¹ The Court argued that the limitation on the rights of the appellants could only be justified if they passed the constitutionality tests set out in section 36 of the Constitution.¹²²

The South African Schools Act 84 of 1996 prevented corporal punishment in schools and did not prevent parents from raising their children according to the tenets of Christianity.¹²³ The prohibition of corporal punishment was not only aimed at dealing with disciplinary problems but was also designed to promote respect for the dignity and physical and emotional integrity of all children.¹²⁴ The parents (ie, the appellants members) in the case were not precluded from practicing their Christian beliefs, they were merely prevented from giving educators the power, "acting in their name and on school premises, to fulfill what they regarded as their conscientious and biblically ordained responsibilities for the guidance of their children".¹²⁵ Considering all the issues and in light of the factors enumerated in section 36(1) – and "weighing those

¹¹⁹ *Christian Education* (2000) *op cit* para 15.

¹²⁰ *Id* para 26.

¹²¹ *Id* para 27.

¹²² *Id* para 31.

¹²³ *Id* para 38.

¹²⁴ *Id* para 50.

¹²⁵ *Id* para 51.

considerations cumulatively – the Court could not but find that the generality of the law in question had to be upheld over the appellant’s claim for a constitutionally compelled exemption from the prohibition against the use of corporal punishment in schools”.¹²⁶

Although the inclusion of a specific right to culture in the Constitution is a step forward for our democracy, it nevertheless creates numerous other problems for the existing body of customary law, since customary law must now be interpreted¹²⁷ and evaluated in the light of the fundamental rights embodied in the Bill of Rights, and particularly in the light of the equality clause articulated in section 9¹²⁸ of the Constitution. In addition to section 9 of the Constitution, the UN Convention on the Elimination on All Forms of Discrimination Against Women (CEDAW) calls on all States to “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women”.¹²⁹ African customary law and human rights are intrinsically incompatible because:

Human rights emphasise the individual while customary law emphasises the group or community; customary law stresses duties, human rights regimes normally stresses rights; and customary law is imbued with the principle of patriarchy which means that any freedoms of thought, speech, movement or association are qualified by the respect due to all senior men.¹³⁰

It is often assumed that because sections 211(3), 30 and 31 of the Constitution makes the application of customary law subject to the Bill of Rights, and because of the patriarchal

¹²⁶ *Id* para 52.

¹²⁷ Section 39(2) of the Constitution provides:

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.

¹²⁸ Section 9 provides that:

- (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, 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.

¹²⁹ Article 2(f).

¹³⁰ Bennett TW “The compatibility of African customary law and human rights” (1991) *Acta Juridica* 23. See also Bekker JC “How compatible is African customary law with human rights? Some preliminary observations” (1994) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 441.

nature of African communities, a vast majority of the customary law will be found to be unconstitutional especially when considering the horizontal application of the Bill of Rights.¹³¹ One of the most crucial questions asked during the drafting process of the interim Constitution was whether the Bill of Rights would apply “vertically” (ie, regulating relationships between the citizen and state) or “horizontally” (ie, regulating relationships between private individuals). At that point in time it was generally accepted that fundamental rights only applied vertically and that relationships between private individuals would continue to be governed by private law.¹³² The final Constitution resolved this issue and coherently affirmed that fundamental rights would also be horizontally applicable.

The fact that the Bill of Rights also applies horizontally does not mean that citizens can enforce all the rights mentioned in the Constitution. For example, the rights to a fair trial¹³³ and citizenship¹³⁴ are only enforceable against the state. Section 9 however, also applies horizontally, since section 9(4) specifically states that: “No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3)”. The Promotion of Equality and Prevention of Unfair Discrimination Act¹³⁵ also endorses the horizontal applicability of the Bill of Rights by proclaiming that neither the state nor any person may unfairly discriminate against any other person.¹³⁶

Furthermore, section 8 of the Constitution provides that:

- (1) The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary, and all organs of state.
- (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
- (3) In applying the provisions of the Bill of Rights to natural and juristic persons in terms of subsection (2), a court –
 - (a) in order to give effect to a right in the Bill, must apply, or where necessary, develop, the common to the extent that legislation does not give effect to that right; and
 - (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

¹³¹ Pieterse M “Killing it softly: Customary law in the new constitutional order” (2000) *De Jure* 39.

¹³² *Du Plessis v De Klerk* 1996 (5) BCLR 658 (CC) at 695E.

¹³³ Section 35(3).

¹³⁴ Section 20.

¹³⁵ 4 of 2000. Some of the provisions of this Act are discussed in detail at 3.7.1 below.

¹³⁶ Section 6.

- (4) Juristic persons are entitled to the rights in the Bill of Rights to the extent required by the nature of the right and of the juristic person.

With regards to African customary law, however, whether the Bill of Rights applies both directly vertically and horizontally is not clear. Section 8(1) implies horizontality by stating that the Bill of Rights applies to “all law”; that includes customary law. Section 8(2) unequivocally allows for the horizontal application of a right as it states that the Bill of Rights “binds natural persons ...”.¹³⁷ However, section 8(3) creates a problem in that it limits the application of the Bill of Rights and the developmental task of the courts to the common law alone.¹³⁸ Furthermore, section 173¹³⁹ of the Constitution also makes exclusive reference to the courts power to develop the common law. None of these sections make mention of the development of customary law. On the other hand, sections 39(2) and (3) makes reference to the development of both the common law and customary law.¹⁴⁰ The fact that section 8(3) omits a reference to customary law has the effect that “the Bill of Rights will only be applied to the customary law in a direct horizontal manner in terms of sections 8(1), 39(2) and 211 of the Constitution”.¹⁴¹

Some have also assumed that where the right to culture conflicts with the right to equality, the right to equality will always prevail.¹⁴² This argument is too simplistic and fails to consider that “culture” and “customary law” are distinguishable and that the right protected in the Constitution is a right to culture, and not a right to abide by customary law. That being said however, the connection between culture and customary law is undeniable.¹⁴³ One cannot assume that socio-cultural attitudes and daily traditions will be discontinued when a feature or rule of customary law is declared unconstitutional by a court of law.¹⁴⁴ Culture is dynamic and is capable of accommodating social change.¹⁴⁵ If customary law is evaluated and interpreted in its proper context, one may conclude

¹³⁷ Olivier (*et al*) (2004) *op cit* 36.

¹³⁸ Rautenbach C “A commentary on the application of the Bill of Rights to customary law” (1999) *Obiter* 120.

¹³⁹ Section 173 of the Constitution provides that: “The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice”.

¹⁴⁰ Rautenbach (1999) *op cit* 126.

¹⁴¹ *Ibid.*

¹⁴² Church (2007) *op cit* 30.

¹⁴³ Pieterse (2000) *op cit* 39-40.

¹⁴⁴ Nhlapo T “Human rights – the African perspective” (1995) *African Law Review* 38 and 40.

¹⁴⁵ Bronstein V “Reconceptualising the customary law debate in South Africa” (1998) *South African Journal on Human Rights* 338-410.

that it does not conflict with human rights perpetually but rather aims for the same result (the achievement of human dignity) through varying means.¹⁴⁶ The simple eradication of the rules, traditions and customs of African customary law, in the name of the Constitution, without considering its proper context and significance is disdainful.¹⁴⁷ Culture should be afforded the opportunity, “to the extent possible and tolerable in the constitutional dispensation, to change from within”.¹⁴⁸ If women are given the requisite authority and motivation to question various aspects of their culture, they can promote change without abolishing their culture and submitting to Western ideals and norms. The courts and the legislature must always contemplate this when deliberating on the implications of the Bill of Rights on customary law.¹⁴⁹

3.4.2.3 Interpretation of fundamental rights

The fundamental rights mentioned in the Constitution are not arranged in a hierarchical order; that is from more important to less important. As a result thereof, the Constitution may not be interpreted in such a way that customary law is preferred at the expense of other fundamental rights.¹⁵⁰ Rather the principle here should be that “fundamental rights must determine the content of customary law”.¹⁵¹ The provisions of the Constitution’s interpretations clause¹⁵² confirms this rule. Section 39(2) is particularly important for customary law, because courts are now compelled to interpret customary law so as to “promote the spirit, purport and objects of the Bill of Rights”. This rule “amounts to ‘indirect application’¹⁵³ of the Bill of Rights to family relationships”.¹⁵⁴ The principle of “indirect application” is quite valuable for customary law since it provides the court with

¹⁴⁶ Bennett TW “The equality clause and customary law” (1994) *South African Journal on Human Rights* 122, 130.

¹⁴⁷ Pieterse (2000) *op cit* 40.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ SALRC (1998) *op cit* 10.

¹⁵¹ *Ibid.*

¹⁵² Section 39.

¹⁵³ “Direct application implies that a right can be used as a ground for striking down a rule of common or customary law. By contrast, indirect application assumes that the offending rule should be allowed to stand but that it be modified so as to reflect the spirit and objects of the fundamental rights.” (Bennett TW “The conflict of laws” in Bekker JC, Labuschagne JMT and Vorster LP *Introduction to legal pluralism in South Africa Part 1 Customary law* (2002) 23 footnote 18).

¹⁵⁴ SALRC (1998) *op cit* 10.

a mechanism for favouring “living customary law” to “official customary law”.¹⁵⁵ This was illustrated in the case of *Mabena v Letsoalo*.¹⁵⁶ The case dealt with the age old practice of *lobolo*. According to official customary law, the consent of the bride’s and groom’s guardians was essential for the concluding of a *lobolo* agreement. The court nevertheless endorsed a contemporary social practice¹⁵⁷ which allowed the groom to negotiate *lobolo* with the bride’s mother. This innovative gender-neutral custom was found to be in harmony with the “spirit, purport and objects” of the Bill of Rights.¹⁵⁸

The Constitution establishes and clarifies particular rules. Firstly, the right to culture is subordinate to the right to equal treatment, irrespective of the fact that the law is obliged to respect African culture and tradition. Secondly, discrimination based on any of the grounds listed in section 9(3) is strictly prohibited, irrespective of whether the discrimination takes place within the family and is permissible under private law. Thus rules of customary law can be upheld when they are in accordance with the equal treatment rule, however, when customary law offends the principle of equal treatment, it must be adapted.¹⁵⁹

The tension between these competing principles namely, the right of the individual to equal treatment and the right of the group to adhere to the culture of its choice, initiated an investigation into the customary law of succession; a branch of customary law which aptly reflects the problems associated with the constitutional recognition of customary law. The investigation was spearheaded by the South African Law Reform Commission (SALRC) and it is their report or findings which forms the basis of the next section in this chapter.

¹⁵⁵ The distinction between “official customary law” and “living customary law” is fully explored in chapter 1 of this thesis.

¹⁵⁶ 1998 (2) SA 1068 (T).

¹⁵⁷ See the findings of Prinsloo MW, Van Niekerk GJ and Vorster LP “Perceptions of the law regarding, and attitudes towards, lobolo in Mamelodi and Atteridgeville” (1998) 31 *De Jure* 75-76.

¹⁵⁸ *Mabena op cit* 1074-1075.

¹⁵⁹ SALRC (1998) *op cit* 11.

3.5 The role of the South African Law Reform Commission (SALRC) in the development of the customary law of intestate succession

3.5.1 Introduction

On 28 April 1998, the South African Law Reform Commission¹⁶⁰ (hereafter the SALRC) released an Issue Paper¹⁶¹ challenging the existing customary law rules of succession. The topics discussed in the paper included things like succession to the head of a family; variations in the order of succession (including disinheritance and distributions of property *inter vivos*; underage heirs; widows; succession to women; wills; burial and funeral ceremonies and administration of estates.¹⁶² The releasing of an Issue Paper on the customary law of intestate succession was prompted by South Africa's commitment to the promotion of formal¹⁶³ and substantive equality.¹⁶⁴ The country's dedication to the advancement of equality is accentuated by numerous other sections¹⁶⁵ of the Constitution and various conventions under international law.¹⁶⁶ Although succession to the status and property of a deceased person, as a branch of private law, can exist in harmony with the Constitution, it is important to note that the customary law rules regulating succession are discernibly at variance with section 9 of the Bill of Rights.

¹⁶⁰ The South African Law Reform Commission is a body tasked with the responsibility of conducting research with respect to all branches of the law for the sole purpose of making recommendations to Government for the development, improvement, modernisation or reform of the law (<http://www.justice.gov.za.salrc/> accessed 14/12/2011).

¹⁶¹ South African Law Commission *Harmonisation of the common law and the indigenous law: Draft Issue Paper on Succession* Issue Paper 12. Project 108 (1998).

¹⁶² SALRC (1998) *op cit* ix.

¹⁶³ Formal equality means "sameness of treatment: the law must treat individuals in like circumstances alike" (Currie and de Waal *op cit* 232).

¹⁶⁴ Substantive equality "requires the law to ensure equality of outcome and is prepared to tolerate disparity of treatment to achieve this goal" (Currie and de Waal *op cit* 233).

¹⁶⁵ For example, one of the founding values listed in section 1 is "the achievement of equality and the advancement of human rights and freedoms". Section 7(1) also makes mention of the fact that "the Bill of Rights enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom". Section 39(1) says that "when interpreting the Bill of Rights, a court, tribunal or forum - must promote the values that underlie and open and democratic society based on human dignity, equality and freedom". Also see section 36 discussed above.

¹⁶⁶ For example, the sole objective of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979 (which was signed by South Africa on 29 January 1993) is to "eliminate discriminatory behaviour which is adverse to women" (article 1). The Convention places an obligation on States Parties to change and abolish all laws violating the principle of gender equality.

Prior to the changes prescribed by the SALRC, all statutory attempts to develop this subdivision of customary law were restricted to Roman-Dutch Law.¹⁶⁷ The government of the day failed to keep customary law in line with changing social needs. As a result thereof, the plight of widows and dependant children was in serious and desperate need of reform.¹⁶⁸ The enactment of the final Constitution with an entrenched right to equality provided the perfect opportunity for improving the rights of these disadvantaged groups of society.¹⁶⁹ The SALRC was seen as the entity best suited to conduct an investigation into this aspect of customary law.

3.5.2 The Customary Law of Succession Amendment Bill, 1998

The issues raised in the paper sparked considerable public interest and debate. From the vast number of comments received, it was evident that the customary law of succession was in need of reformulation. Succumbing to extensive pressure from various sources, the Department of Justice developed a Draft Bill¹⁷⁰ (amending the customary law of succession) in a vain attempt to bring the customary law of succession into line with the South African Constitution, the common law, the Wills Act¹⁷¹ and the Intestate Succession Act¹⁷².

The Bill proposed the following changes to the existing body of customary law: The common law of succession must be made applicable to all individuals.¹⁷³ This meant that a Black person must be free to dispose of any of his or her property by executing a will. The restriction imposed in terms of section 23(1) of the Black Administration Act 38 of 1927 must therefore be removed. In cases where a Black person died intestate, his or her estate must be administered in terms of the rules of the common law of

¹⁶⁷ SALRC (1998) *op cit* para 1.1.

¹⁶⁸ Please note that section 79(3) of the KwaZulu and Natal Codes altered customary law by providing that: if a deceased leaves no male heir, his estate devolves according to the rules of intestate succession applicable to a civil marriage.

Under this section, a widow and even daughters would be eligible to inherit from the estate. Secondly, provided that the deceased is married by civil rites, his or her estate will be distributed according to the 1934 Succession Act (Bennett (2004) *op cit* 358).

¹⁶⁹ Maithufi IP "Indigenous law: Constitutionality of regulations for the administration and distribution of estates of deceased Blacks" (2000) *De Jure* 156.

¹⁷⁰ Entitled the Amendment of the Customary Law of Succession Bill B109 of 1998.

¹⁷¹ 7 of 1953.

¹⁷² 81 of 1987.

¹⁷³ Clause 2(1).

intestate succession.¹⁷⁴ In other words, the intestate estates of all persons in South Africa, irrespective of their race, must be administered in terms of the Administration of Estates Act.¹⁷⁵ It substantially altered section 1 of the Intestate Succession Act, by extending the definition of “spouse” to include a spouse with whom the deceased had concluded a customary marriage.¹⁷⁶ In fact, clause 4 made specific provision for various anomalies arising from the death of the deceased namely: in cases where the deceased had one wife or many wives or had children or didn’t have children.

The Bill was submitted to Cabinet in June 1998 and then presented to Parliament, shortly thereafter. It immediately evoked strong criticism from traditional leaders who were dissatisfied with the terms of the Bill and the Department’s failure to consult with the relevant role players and stakeholders. They were offended by the adoption of Eurocentric and Roman-Dutch law principles to African customary law. The various stakeholders held numerous meetings in an effort to resolve the dispute brought to the fore by the traditional leaders. All the parties finally agreed not to proceed with the Bill, and the matter was referred back to the Law Reform Commission for further comment and consideration.

3.5.3 The Discussion Paper on Succession 1999

In 1999, the SALRC resumed its probe into the customary law of succession which culminated in the publication of Discussion Paper 93.¹⁷⁷ The Commission asserted that

¹⁷⁴ Clause 2(2).

¹⁷⁵ 66 of 1965.

¹⁷⁶ Clause 4. In fact sections 2(1) and 2(2) of the Recognition of Customary Marriages Act 120 of 1998 specifically recognises the validity of all customary marriages. For further information on customary marriages in general see Bekker JC “Requirements for validity of customary marriages” (2001) *South African Journal of Ethnology* 41-47; Bonthuys E “Still unclear: The validity of certain customary marriages in terms of the Recognition of Customary Marriages Act” (2000) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 616-625; Dlamini CRM “The ultimate recognition of the customary marriage in South Africa” (1999) *Obiter* 14-40; Jansen RM “Family law” in *Introduction to legal pluralism in South Africa* (2006) 29-52; Maithufi IP “The Recognition of Customary Marriages Act of 1998: A commentary” (2000) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 509-516; Mqoke RB “The ‘rainbow jurisprudence’ and the institution of marriage with emphasis on the Recognition of Customary Marriages Act 120 of 1998” (1999) *Obiter* 52-68; Oomen B “Traditional woman-to-woman marriages, and the Recognition of Customary Marriages Act” (2000) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 274-282; Vorster LP, Dlamini-Ndwanwe N and Molapo MJ “Consequences of the dissolution of customary marriages” (2001) *South African Journal of Ethnology* 62-66 and Whelpton FPvR and Vorster LP “Dissolution of customary marriages” (2001) *South African Journal of Ethnology* 56-61.

¹⁷⁷ South African Law Reform Commission *Customary Law of Succession* Discussion Paper 93: Project 90 (1999).

it was impossible for them to reform the whole of the customary law of succession and for purposes of expediency, decided to limit their investigation to those sections of the customary law of succession which violated or potentially violated the Constitution. It was their task to determine whether issues could be reformed by amending legislation already in existence. The Commission observed that the customary law rules of succession were outdated and failed to adequately cater for the needs of modern society. They also noted that customary laws that violated the democratic principle of equality could not be allowed to persist in our current constitutional dispensation. The Discussion Paper made numerous proposals which may be summarised as follows.

- (a) The order of succession had to be developed to provide a material basis of support for surviving spouses and immediate descendants of the deceased.
- (b) The Intestate Succession Act had to be amended to be applicable to the estates of deceased Africans in order to ensure inheritance of surviving spouses, children and parents of the deceased.
- (c) The right of a surviving spouse to the matrimonial home and its contents had to be secured.
- (d) The changed role of the customary heir had to be recognised by removing his liability to pay for the debts of the deceased.
- (e) The rules regarding succession to the traditional office had to be removed from the ambit of the proposed Act.¹⁷⁸

The recommendations of the Commission were consolidated in the Draft Bill for the Amendment of the Customary Law of Succession, whose provisions resembled (rather surprisingly) the Customary Law of Succession Amendment Bill B109 of 1998 and which will be discussed immediately below.

3.5.4 The Draft Bill for the Amendment of the Customary Law of Succession

Clause 1 of the Bill defined the concepts of customary law,¹⁷⁹ Minister,¹⁸⁰ personal

¹⁷⁸ Rautenbach C and du Plessis W "South African Law Commission's proposals for customary law of succession: Retrogression or progression" (2003) *De Jure* 27.

¹⁷⁹ "Customary law" means the laws and customs traditionally observed by the indigenous African peoples of South Africa which form part of the culture of those peoples, whether or not such laws and customs are codified.

¹⁸⁰ "Minister" means the Minister of Justice.

belongings¹⁸¹ and traditional leader.¹⁸² Clause 2(1) provided that testate estates devolved in terms of a person's will and intestate estates devolved according to the Intestate Succession Act. Clause 2(2) extended the application of the amended Intestate Succession Act to cover the intestate estate of a person who contracted a valid customary marriage before the Draft Bill came into force. Clause 2(3) guaranteed the inheritance of the deceased's house and personal belongings to the surviving spouse¹⁸³ and provided that the surviving spouse could choose the house she wanted to inherit, in cases where the deceased owned more than one home.¹⁸⁴ Clause 2(4) excluded the application of succession to the office of a traditional leader from the provisions of the Bill.

Clause 4 dealt exclusively with the amendment of section 1 of the Intestate Succession, thereby extending the scope of the Act to include spouses of monogamous and polygamous customary marriages. Clause 4 also amended section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 by broadening the definition of "survivor" to include "any child or other person related to the deceased who was in fact dependant upon the deceased for support prior to the deceased's death". Clauses 5(a) and (b) repealed certain sections of the KwaZulu Act on the Codes of Zulu Law,¹⁸⁵ the Natal Code of Zulu Law¹⁸⁶ and the whole of section 23 of the Black Administration Act. Clause 5(c) repealed the customary law duty of the heir to maintain the dependants of the deceased and also repealed the heir's universal succession obligations to settle the debts owed by the deceased.

Although the provisions of the Bill were commendable, they nevertheless presented many additional problems for customary law. Although securing equal treatment for all women, it abrogated the whole of the customary law of intestate succession and opted

¹⁸¹ "Personal belongings" means a deceased person's articles of clothing, personal use or adornment, furnishings and other items of household equipment, simple agricultural and hunting equipment, books, motor vehicles or means of transportation ; the term does not include money or security for money or articles used by the deceased for business purposes.

¹⁸² "Traditional leader" means any person who in terms of customary law or any other law holds a position in a traditional ruling hierarchy.

¹⁸³ Clause 2(3)(a).

¹⁸⁴ Clause 2(3)(b).

¹⁸⁵ Act 16 of 1985.

¹⁸⁶ Proc R151 GG 10966 of 1987.

for a moderately transformed portrayal of the common law.¹⁸⁷ The Bill also distorts the customary law concepts of property, as it fails to consider that most property in customary law is communally owned.¹⁸⁸ As a result thereof, in cases where house or family property is bequeathed to a non-family member in terms of a will, the family members of the deceased would lose all their rights in the said property, because of the provisions of the proposed Bill.¹⁸⁹

Secondly, the position of house property was unclear in the Bill. Clarity needed to be obtained on whether house property would constitute part of the deceased's estate or whether it would be distributed to the house in terms of customary law.¹⁹⁰ The Bill failed to make provision for a clause dealing specifically with the rights and duties of the heir.¹⁹¹ Thirdly, the clause relating to the selection of a house was defunct or insufficient. It failed to account for circumstances in which there are insufficient houses to distribute amongst the various wives, and does not consider the fate of the occupants of the house the wife chooses, as a real possibility exists that she may not choose the house that she and her family currently inhabit.¹⁹² Fourthly, the Bill omitted any discussion on the important question of retrospectivity.¹⁹³ And finally, and in my opinion most importantly, the drafters of the Bill failed to consider the impact of the proposed legislation (once enacted) on communities practicing and adhering to the rules of the customary law of intestate succession. Would they unquestioningly accept the elimination of the rule of primogeniture or would they merely continue to live their lives as they always have, strictly adhering to the age old traditions of intestate succession?¹⁹⁴

In this regard, Rautenbach and du Plessis are of the opinion that "the enforcement of new succession rules might have the repercussion of their becoming mere paper law

¹⁸⁷ Pieterse (2000) *op cit* 49.

¹⁸⁸ Pieterse M "The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 : Final nail in the customary law coffin" (1999) *South African Law Journal* 632. See also van Niekerk GJ "Indigenous law and narrative: rethinking methodology" (1999) *Comparative International Law Journal of South Africa* 227.

¹⁸⁹ Pieterse (2000) *op cit* 49.

¹⁹⁰ Rautenbach and du Plessis (2003) *op cit* 30.

¹⁹¹ Pieterse (2000) *op cit* 49.

¹⁹² Rautenbach and du Plessis (2003) *op cit* 29-30.

¹⁹³ *Id* 30.

¹⁹⁴ *Id* 29.

if the social issues encompassing the customary law of succession are not addressed. However, on the other hand, the legislature is obliged to promote social change by enacting legislation. The question that remains is however, whether such legislation will be effective and enforceable”.¹⁹⁵

The Draft Bill was never promulgated or even submitted to Parliament. This was due to the significant judicial and legislative developments that ensued during the course of and after the drafting of the Bill. Numerous individuals dissatisfied with the effects of the choice of law rules challenged the constitutionality of the rules regulating the customary law of succession in various divisions of the courts. Their attempts to change the status quo altered the face of the African customary law of intestate succession forever. It is these important judicial and legislative developments that the researcher will now consider.

3.6 The role of the judiciary in the development of the customary law of succession

The “official” and “living” customary laws of intestate succession have for years been premised on superfluous notions such as choice of law rules, male primogeniture and inequality. Since the inception of the new constitutional democracy and the recognition of customary law as an indispensable source of South African law, the courts have been one of the major driving forces in reforming both official and living customary law.¹⁹⁶ In this section, we examine the way in which the courts have reformed the existing customary laws of intestate succession in order to bring it into line with the Constitution and international law. For purposes of convenience, the researcher has divided this section into two distinct parts. In the first part (3.6.1), the researcher will be discussing all cases abolishing (or seeking to abolish) the rule of male primogeniture and thereby promoting equality; and in the second part (3.6.2), a discussion of the cases relating to the choice of law rules governing the customary law of intestate succession will be considered.

¹⁹⁵ Rautenbach and du Plessis (2003) *op cit* 31.

¹⁹⁶ Bekker JC and van Niekerk G “*Gumede v President of the Republic of South Africa*: Harmonization, or the creation of new marriage laws in South Africa?” (2009) *SA Publiekreg/Public Law* 207.

3.6.1 The rule of male primogeniture and the promotion of equality

3.6.1.1 *Mthembu v Letsela*¹⁹⁷

Briefly, the facts of *Mthembu* are as follows: Tebalo Watson Letsela (the deceased) was killed by unidentified assailants on 13 August 1993. The deceased (who died intestate) possessed a 99-year leasehold title which gave him the full right, title and interest in a house located in Vosloorus, Boksburg. The applicant (Mildred Mthembu) and her two minor daughters lived on the property with the deceased. One of these minor children namely Thembi, was in fact the daughter of the deceased and Mildred Mthembu and she was born on 7 April 1988. The deceased had no other offspring besides the daughter, but had three sisters and a father (the first respondent). The applicant contended that she had been married to the deceased by customary tradition and a customary union was entered into on 14 June 1992. An amount of R2 000 was agreed upon as *lobola* but only an initial instalment of R900 was paid. The balance of the *lobola* was to be paid in October 1993, however the deceased died on 13 August 1993, and thus the balance was never paid.

The respondent disputed the authenticity of the applicant's contention and denied the existence of a customary marriage between the deceased and the applicant. Furthermore, he insisted that she and her daughters abandon the property and relinquish the deceased's movable assets. The respondent denied that he was under any obligation to maintain the applicant and her daughter. In fact, he averred that the relevant property had to devolve upon him as this was in accordance with the customary law rule of male primogeniture as envisaged in section 23 of the Black Administration Act, read with regulation 2 of Government Notice R200 of 1987.

In the court of first instance,¹⁹⁸ the applicant sought an order confirming:

¹⁹⁷ 1997 (2) SA 936 (T); 1998 (2) SA 675 (T) and 2000 (3) SA 867 (SCA).

¹⁹⁸ *Mthembu v Letsela* 1997 (2) SA 936 (T).

- 1.1 that the rule of African customary law which generally excludes African women from intestate succession is inconsistent with the Constitution and consequently invalid;
- 1.2 that section 23 of the Black Administration Act 38 of 1927 and section 2 of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks made under section 23(10) of the Act by Government Notice R200 of 6 February 1987 are invalid insofar as they demand the application of the customary law rule;
- 1.3 that the administration and distribution of the estate of the late Tebalo Watson Letsela is governed by the common law of intestate succession; and
- 1.4 that Tembi Mthembu is the deceased's only intestate heir.¹⁹⁹

Alternatively, the applicant sought an order declaring:

- 2.1 that the customary law rule offends against public policy and natural justice and is consequently unenforceable;
- 2.2 that upon a proper interpretation of section 23 of the Act and section 2 of the regulations (particularly in the light of section 1 of the Law of Evidence Amendment Act²⁰⁰ and sections 35(3) and 232(3) of the Constitution), they do not demand the application of the customary law rule;
- 2.3 that the administration and distribution of the estate of the deceased is not governed by the customary law rule; and
- 2.4 that Tembi Mthembu is the deceased's only intestate heir.²⁰¹

Counsel for the applicant argued that the rule of primogeniture and regulation 2(e) of the regulations was grossly discriminatory against African women and children, who are not the eldest child. He claimed that this situation was inherently unconstitutional and violated sections 8(1)²⁰², 8(2),²⁰³ 8(4)²⁰⁴ and section 14²⁰⁵ of the Interim Constitution as

¹⁹⁹ *Mthembu* (1997) *op cit* 939.

²⁰⁰ 45 of 1988.

²⁰¹ *Mthembu* (1997) *op cit* 939-940.

²⁰² Section 8(1) provided that: "(1) Every person shall have the right to equality before the law and to equal protection of the law".

²⁰³ This section provided that:

No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

²⁰⁴ This section provided that:

Prima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.

²⁰⁵ Section 14 provided that:

(1) Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning.
 (2) Without derogating from the generality of subsection (1), religious observances may be conducted at state or state-aided institutions under rules established by an appropriate authority for that purpose, provided that such religious observances are conducted on an equitable basis and attendance at them is free and

it amounted to unfair discrimination on the established grounds of sex or gender.²⁰⁶ He further contended that the regulations enacted under GN R200 of 1987, were *ultra vires* and had actually been expunged by the decreeing of the Intestate Succession Act, which provided for the intestate inheritance of any surviving descendant in cases where the deceased was not survived by a spouse, and which also made provision for illegitimate children to inherit the intestate estates of their parents.

Counsel for the respondent argued that a decision as to whether a customary marriage existed between Mildred Mthembu and Tebalo Watson Letsela was crucial for determining the manner in which the estate was to be distributed and was also pertinent to settling the dispute regarding the legal guardianship of Tembi.²⁰⁷ Counsel requested that the matter be referred for the hearing of oral evidence on the following issues:

- (1) whether or not a customary union existed;
- (2) whether the applicant has *locus standi* in the application;
- (3) whether the applicant is the legal guardian of the minor child Tembi; and
- (4) whether the applicant was obliged to exhaust her remedies under regulation 2(d).²⁰⁸

In the court of first instance, it was decided that the rule of male primogeniture had to be balanced against the provisions of section 31²⁰⁹ of the Interim Constitution. The court was also mindful of the fact that it had to consider the provisions of the limitations clause as well.²¹⁰ After balancing the rule of primogeniture against the provisions of section 31 of the Interim Constitution and after careful consideration of the limitations

voluntary.

- (3) Nothing in this Chapter shall preclude legislation recognising –
 - (a) a system of personal and family law adhered to by persons professing a particular religion; and
 - (b) the validity of marriages concluded under a system of religious law subject to specified procedures.

²⁰⁶ *Mthembu* (1997) *op cit* 941.

²⁰⁷ *Id* 942.

²⁰⁸ *Ibid*.

²⁰⁹ This section made provision for the right of every person to use the language and participate in the cultural life of their choice.

²¹⁰ In this regard section 33 provided that:

- (1) The rights entrenched in this chapter may be limited by law of general application, provided that such limitation –
 - (a) shall be permissible only to the extent that it is –
 - (i) reasonable; and
 - (ii) justifiable in an open and democratic society based on freedom and equality; and
 - (b) shall not negate the essential content of the right in question.
- (2) Save as provided for in ss(1) or any other provision of this Constitution, no law, whether a rule of the common law, customary law or legislation, shall limit any right entrenched in this chapter.

clause, the court found that the customary law rule of male primogeniture was not in conflict with sections 8 and 14 of the Constitution; nor was it in the court's opinion contrary to public policy or natural justice.²¹¹

According to the court, the rule of male primogeniture is primarily applied in rural areas and upon distribution of the deceased's estate onto the male successor, the male successor has an inherent duty to support and protect the customary spouse or spouses and the children born of the customary marriage/s and affiliated to a specific house of the deceased. In addition to support and protection, the customary spouse may continue to reside at the deceased's home and may continue to utilise the property of the estate without being evicted by the successor.²¹² In the court's assessment of the customs and practices associated with the rule of male primogeniture (as mentioned immediately above), it concluded that if one accepts the successor's duty to provide support, maintenance and sanctuary as an essential corollary of the practice of primogeniture, it was challenging to parallel this form of differentiation between men and women with the idea of "unfair discrimination" as used in section 8 of the Constitution.²¹³ In the court's opinion, "even if the rule of male primogeniture was prima facie discriminatory on the grounds of sex or gender and the presumption contained in section 8(4) came into operation", the presumption would be rebutted by the inherent duty of support.²¹⁴ However, the court noted that if the right to support fell away, the whole matter would be different.

In terms of African customary law, an illegitimate child belongs to the maternal family and has no claim on the estate of the biological father. It is for this reason that the court concluded that it was important to first confirm what the marital state was between the applicant and the deceased, *inter alia* by reason of the provision found in regulation 2(d)(iii)²¹⁵ of the regulations framed under the Black Administration Act 38 of 1927.²¹⁶ The application was then postponed and the matter was referred for the hearing of oral evidence on the following issues:

²¹¹ *Mthembu* (1997) *op cit* 945-946.

²¹² *Id* 945.

²¹³ *Ibid.*

²¹⁴ *Id* 946.

²¹⁵ Regulation 2(d) makes provision for surviving partners of a deceased Black who had contracted a marriage out of community of property, or who had entered into a customary union, or who was at the time of his death living with him as his putative spouse, to be considered as being lawfully married out of community of property for purposes of the devolution of the estate.

²¹⁶ *Mthembu* (1997) *op cit* 946.

- (a) whether the applicant had entered into a valid customary union with the deceased during the latter's lifetime; or
- (b) whether a putative marriage under customary law existed between the applicant and the deceased.²¹⁷

At the second hearing,²¹⁸ the applicant relied on four distinct grounds for her claim that the rule of male primogeniture be held to be invalid and that Tembi be declared the deceased's sole heir. Those grounds are as follows:

- (1) The regulation in terms of which the deceased's estate is to be administered according to African law and custom, is *ultra vires* at common law.
- (2) The aforesaid regulation has been impliedly repealed by section 1(1) read with section 1(4)(b) of the Intestate Succession Act, Act 81 of 1987.
- (3) The customary law rule of succession which excludes women ought to be developed in terms of section 35(3) of the Interim Constitution with due regard to the fundamental value of equality, to avoid discrimination between men and women.
- (4) If the customary law rule is not so developed, then it would be repugnant to the "principles of public policy or natural justice" within the meaning of section 1 of the Law of Evidence Amendment Act 45 of 1988.²¹⁹

With regards to the matters referred for the hearing of oral evidence, at the first hearing, Mynhardt J concluded that neither the applicant (Mildred Mthembu) nor the first respondent (the deceased's father) had produced any evidence either proving or disproving the issues, and therefore, the application in the court had to proceed and be adjudicated on the basis that the applicant and the deceased were not married to each other and that Tembi was illegitimate.²²⁰

After a brief explanation of the rule of male primogeniture and the concomitant duty of support of the successor to the wives and children of the deceased,²²¹ the court found that because the applicant and the deceased were not married to each other according to African customary law, the applicant and Tembi were not entitled to continue residing at the deceased's home and they also did not have a right to use the deceased's movable property.²²²

²¹⁷ *Mthembu* (1997) *op cit* 947.

²¹⁸ *Mthembu v Letsela* 1998 (2) SA 675 (T).

²¹⁹ *Id* 681.

²²⁰ *Id* 679.

²²¹ *Id* 679-680.

²²² *Id* 680.

The court came to the conclusion that the regulations in terms of which the deceased's estate was to be administered according to African law and custom, were not *ultra vires*, since sections 23(1) and (2) of the Black Administration Act acknowledged the rule of male primogeniture. As a result thereof, the fact that the State President was entitled to enact regulations in terms of section 23(10)(a) of the Black Administration Act, inevitably gave him a mandate to implement and observe the rules of male primogeniture "when prescribing the manner in which the estates of deceased Blacks are administered and distributed".²²³

Secondly, the court found (contrary to the applicant's contention) that regulation 2(e)²²⁴ had not been impliedly repealed by the Intestate Succession Act. In this regard, the court argued that the fact that section 23 of the Black Administration Act was specifically mentioned in section 1(4)(b) of the Intestate Succession Act, meant that it obviously incorporated a reference to subsection (10) of section 23 of the Black Administration Act.²²⁵ With regards to the applicant's third ground of contention and after engaging in a lengthy discussion of the place of the rule of male primogeniture in customary family law,²²⁶ the court concluded that because the applicant was not married to the deceased, Tembi was therefore an illegitimate child. She therefore had no claim to inherit intestate from the deceased, and that was based purely on her illegitimate status. It did not matter that Tembi was female because even an illegitimate son would not be entitled to inherit intestate from the deceased. Therefore, Tembi was ineligible to succeed because she was an illegitimate child and not because she was female and that the system of primogeniture is applied in African customary law.²²⁷ In the present case there was therefore no unfair discrimination on the grounds of sex or gender, and neither was the value of equality infringed,²²⁸ because Tembi was still entitled to be maintained and supported by her guardian.²²⁹ The court further felt that it was not the correct forum to develop the customary law of intestate succession. In its opinion, that particular task was assigned to and had to be performed by the legislature.

²²³ *Id* 682.

²²⁴ Enacted under GN R200 of 1987.

²²⁵ *Mthembu* (1998) at 683.

²²⁶ *Id* 681.

²²⁷ *Id* 686.

²²⁸ *Ibid*.

²²⁹ *Ibid*.

Finally, the court argued that the customary law rule of intestate succession was valid and not contrary to the principles of public policy or natural justice. The learned judge asserted that if he found the succession rule to be offensive to public policy, he would be guilty of “applying western norms to a rule of customary law which is still adhered to and applied by many African people”.²³⁰ The application was subsequently dismissed.

Mildred Mthembu then sought relief in the Supreme Court of Appeal.²³¹ Her claim for relief was once again based on the four grounds relied on at the second hearing.²³² At the outset, the court said that in African customary law, a child is legitimised by a marriage (customary union) and the payment of *lobola*.²³³ In the case under consideration, there was no customary union in existence between the appellant (Mildred Mthembu) and the deceased (Tebalo Watson Letsela), at the time of Tembi’s birth. No customary union was either concluded after her birth. As a result thereof, Tembi was illegitimate, because although a part of the *lobola* had been paid, no marriage existed between her biological parents.²³⁴ The court then moved to consider each of the four grounds of relief individually.

They resolved that regulation 2(e) merely attributed statutory credence to a system which had been observed and adhered to for many years by the African population. In their opinion, and in accordance with current law,²³⁵ Blacks had a choice as to how their estates could devolve. By doing so, they could circumvent the negative consequences associated with the application of the customary law of intestate succession; if that was their desire.²³⁶ The regulation²³⁷ in question could therefore not be said to be *ultra vires* at common law, as it honoured the wishes of the deceased.²³⁸ The learned judge agreed with the reasoning of the court *a quo*, and concluded that regulation 2(e) had not been impliedly repealed by the Intestate Succession Act.²³⁹ Like the court *a quo*, the

²³⁰ *Id* 688.

²³¹ *Mthembu v Letsela* 2000 (3) SA 867 (SCA).

²³² See *Mthembu v Letsela* 1998 (2) SA 675 (T) *op cit* at 681.

²³³ *Mthembu* (2000) *op cit* para 17.

²³⁴ *Id* para 18.

²³⁵ See specifically section 23(3) of the Black Administration Act 38 of 1927.

²³⁶ *Mthembu* (2000) *op cit* para 23.

²³⁷ Regulation 2(e).

²³⁸ *Mthembu* (2000) paras 23-24.

²³⁹ *Id* para 29.

appeal court held that Tembi's ineligibility to succeed was based purely on the fact that she was an illegitimate child. Her circumstances would not be altered even if she was a male child. There was therefore no gender discrimination in the case at hand.²⁴⁰ The court also felt inadequate to develop the rule of male primogeniture for lack of sufficient information. The court stated that any development of the rule of primogeniture would ideally be left to the legislature.²⁴¹

The decisions of the courts in the *Mthembu* cases were disappointing to say the least. The courts were presented with a perfect opportunity to develop the rule of male primogeniture, but declined to do so, even though it was under an obligation to develop the rule in accordance with the provisions of the Constitution.²⁴² The decisions in *Mthembu* have thus been extensively criticised and in the paragraphs that follow, some of these criticisms are highlighted.

According to Janse van Rensburg,²⁴³ the crucial failure in the three *Mthembu* cases was the lack of an enquiry into whether a valid customary union existed between Mildred Mthembu and the deceased. In all three *Mthembu* cases, the court maintained that Tembi was not eligible to inherit the deceased's estate because she was an illegitimate child. In other words, the non-existence of a valid marriage between Tebalo Letsela and her mother, Mildred disqualified her from inheriting the intestate estate of the deceased. The court (without examining the leading cases and literary authorities on the subject matter)²⁴⁴ resolved that the applicant and the deceased were not married because one of the requirements for the conclusion of a valid marriage was not satisfied namely; the entire amount of *lobola* stipulated was not fully paid at the time of the deceased's death.²⁴⁵

In the researcher's opinion the court erred in its finding. According to all the leading

²⁴⁰ *Id* para 33.

²⁴¹ *Id* para 40.

²⁴² Jagwanth S and Murray C "Ten years of transformation: How has gender equality in South Africa fared?" (2002) *Canadian Journal of Women and the Law* 297.

²⁴³ Janse van Rensburg AM "*Mthembu v Letsela*: The non-decision" (2001) *Potchefstroom Electronic Law Journal* 8).

²⁴⁴ Kerr AJ "Issues arising from a challenge to the constitutionality of the customary law of intestate succession: *Mthembu v Letsela* [2000] 3 All SA 21 (A); 2000 (3) SA 867 (SCA)" (2001) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 325.

²⁴⁵ *Mthembu* (2000) para 18.

authors on the matter, the legal requirement (for the conclusion of a customary union) relating to the provision of *lobola* by the family of the husband, merely requires an agreement that *lobola* will be paid.²⁴⁶ The amount agreed to as *lobola* need not be paid in its entirety in order for the marriage to be valid. A mere agreement will suffice.²⁴⁷ In the researcher's opinion, the applicant (or appellant) therefore provided sufficient evidence confirming that an agreement was concluded between her family and the deceased's family for *lobola* in the sum of R2 000.²⁴⁸ Although the full amount had not been paid at the time of the deceased's death, this did not render Tembi illegitimate.

In fact, according to African customary law, a child born into a customary marriage is presumed to be legitimate and thus part of the father's family, irrespective of the *lobola* amount paid²⁴⁹ but subject to the qualification that a failure to comply with the full *lobola* obligation can render the customary marriage null and void, and can ultimately impact on the status of the children.²⁵⁰ It is therefore submitted, that were it not for the deceased's untimely death, he would have performed his obligations with regard to the payment of the full *lobola*.²⁵¹ After an assessment of the evidence, the position in customary law and that in all matters affecting a child, a child's best interests are of paramount importance, one could have only concluded that a customary marriage existed between the appellant and the deceased and that Tembi was therefore legitimate and eligible to inherit from the estate of the deceased.

²⁴⁶ See Dlamini CRM "Family law" in Bekker JC (*et al*) *Introduction to legal pluralism in South Africa Part 1 Customary law* (2002) 44; Olivier Olivier NJJ, Olivier NJJ (jnr) and Olivier WH *Indigenous law* (1995) 20-21; Bennett TW *Customary law in South Africa* (2004) 234-235 and Prinsloo MW (*et al*) (1998) 72-92, 82-84 and 87.

²⁴⁷ See Bekker JC *Seymour's customary law in southern Africa* (1989) 112-113; South African Law Reform Commission *Harmonisation of the common law and the indigenous law: Indigenous marriages* Discussion Paper 74 Project 90 (1998) 43 and *Ngcongolo v Parkies* 1953 NAC 103 (S) at 104-105. In the more recent case of *Bhe and Others v Magistrate, Khayelitsha and Others* 2004 (2) SA 544 (C) the court commented that: "It has never been a prerequisite under African customary law to pay *lobolo* before marriage is consummated. There must be agreement, however, as regards *lobolo*. It may be deferred as long as circumstances do not permit payment. It is not uncommon that *lobolo* be paid upon the couple's eldest daughter being '*lobolaed*'" (551). See also Venter T and Nel J "African customary law of intestate succession and gender (in)equality" (2005) *Tydskrif vir die Suid-Afrikaanse Reg* 98.

²⁴⁸ *Mthembu* (1997) *op cit* 938-939.

²⁴⁹ Taylor DC *An historical comparative perspective of normative approaches in indigenous law and Roman-Dutch law in South Africa with reference to the case of Mthembu v Letsela and Another* 1998 (2) SA 675 (T) (unpublished LLM thesis Unisa) (2000) 35.

²⁵⁰ Janse van Rensburg (2001) *op cit* 9-10.

²⁵¹ *Id* 10.

The third *Mthembu* judgment came when the legislature was adopting the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.²⁵² Therefore, although the Court intimated that it was deciding the case on the basis of illegitimacy and not on gender, the Court failed to identify that discrimination against children on the grounds of birth is prohibited by the Constitution,²⁵³ by the Promotion of Equality and Prevention of Unfair Discrimination Act,²⁵⁴ and is also prohibited international law as well.²⁵⁵

The court could have used regulation 2(d)(iii) as an alternative remedy to resolving the dispute.²⁵⁶ Regulation 2(d) provides that:

- (d) When any deceased Black is survived by any partner –
 - (i) with whom he had contracted a marriage which, in terms of subsection (6) of section 22 of the Act, had not produced the legal consequences of a marriage in community of property; or
 - (ii) with whom he had entered into a customary union;
 - (iii) who was at the time of his death living with him as his putative spouse;
 - (iv) or by any issue of himself and any such partner, and the circumstances are such as in the opinion of the Minister to render the application of Black law and custom to the devolution of the whole, or some part, of his property inequitable or inappropriate, the Minister may direct that the said property or the said part thereof, as the case may be, shall devolve as if the said Black and the said partner had been lawfully married out of community of property, whether or not such was in fact the case, and as if the said Black had been a European.

The effect of regulation 2 would be that an intestate estate will be distributed according to African customary law, unless the Minister was of the opinion that such a distribution would be inequitable. The determination as to whether the distribution according to African customary law was inequitable can be made on application by the deceased's surviving putative spouse who was residing with the deceased at the time of his death.²⁵⁷ If the

²⁵² Kult AP "Intestate succession in South Africa: The westernization of customary law practices within a modern constitutional framework" (2001) *Indiana International and Comparative Law Review* 723.

²⁵³ See section 9(3) of the 1996 Constitution.

²⁵⁴ See section 1 of the Act under the definition of "prohibited grounds".

²⁵⁵ For example, the European Convention on the Legal Status of Children Born Out of Wedlock (to which South Africa is a signatory) provides that: "a child born out of wedlock shall have the same right of succession in the estate of its father and its mother and of a member of its fathers and its mothers family as if it had been born in wedlock" (article 9).

²⁵⁶ Janse van Rensburg (2001) *op cit* 11.

²⁵⁷ *Ibid.*

Minister finds the distribution to be inequitable, then he may direct that the intestate's property be distributed as if the parties had been lawfully married out of community of property and if the Black person had been a European, in other words, section 1(1)(c) of the Intestate Succession Act would be applicable.²⁵⁸ A putative marriage would then be applicable here. "A putative marriage comes into existence when one or both of the parties *bona fide* believe that a lawful marriage was indeed contracted; or were *bona fide* unaware of the existence of a fact nullifying their union, such as non-compliance of an essential requirement".²⁵⁹ Such a shortcoming renders the marriage contract null and void *ab initio*, but irrespective of this fact, the children born out of such a union are regarded to be legitimate.²⁶⁰ It is therefore contended, that the court in the three *Mthembu* cases could have regarded Mildred Mthembu as a putative spouse, as she clearly believed (in good faith) that she was legally (and customarily) married to Tebalo Watson Letsela due to the fact that part payment of the agreed *lobola* had been furnished. This would have meant that a determination (in terms of regulation 2) had to be made by the Minister regarding the application by Mildred Mthembu.²⁶¹ Further, if the court had proceeded in this manner, Mildred would have been entitled to claim half of the difference in accrual, as well as a child's share or an amount not exceeding R125000, whichever amount was greater.²⁶² Tembi would have also inherited something here despite her illegitimate status as the Intestate Succession Act does not distinguish between children based on birth.²⁶³ Alternatively, granting Tembi legitimate status would have meant that the deceased's father as the lawful successor, was bound to maintain her and her mother.²⁶⁴

Furthermore, section 1(1) of the Law of Evidence Amendment Act makes provision for the calling of an expert witness by a court to give evidence as to the existence or not of a valid customary marriage. In other words, the mere calling of an expert could have resolved the evidentiary burden pertaining to the existence of a valid customary marriage between the deceased and Mildred Mthembu.²⁶⁵

²⁵⁸ *Id* 11.

²⁵⁹ *Ibid*.

²⁶⁰ *Ibid*.

²⁶¹ *Id* 12.

²⁶² *Ibid*.

²⁶³ Section 1(2).

²⁶⁴ Janse van Rensburg (2001) *op cit* 12.

²⁶⁵ *Id* 13.

Another criticism leveled against the *Mthembu* decisions was that the courts merely applied “official” customary law without enquiring into whether a specific system of “living” law governed the cause of action.²⁶⁶ The courts in *Mthembu* ignored the fact that a particular system of African customary law could have been in issue and that a revolutionary rule could have developed in the community in which the parties had resided. In fact, one of the courts declined to engage in such an investigation by relying on a statement in *S v Makwanyane and Another*,²⁶⁷ which proclaimed “public opinion” to be superfluous when courts are required to interpret and apply the Constitution.²⁶⁸

In the *Mthembu* decisions, “the passive development of customary law might have considerably mitigated the conflict with human rights, since by contrast with the ‘official’ customary law, in the ‘living’ law, the principle of male primogeniture is, in fact, not strictly applied”.²⁶⁹ Field research conducted into the customary law of succession in South Africa and other Southern African countries illustrates that women are entitled to inherit.²⁷⁰ There is also customary evidence that illegitimate children are also granted rights of inheritance.²⁷¹ By simply considering the application of “living” customary law, the courts could have allowed the two daughters to inherit and could have circumvented making a determination into the discriminatory nature of the rule of male primogeniture.²⁷²

By presuming that the successor had a duty to support and maintain the surviving spouse and children of the deceased, the court neglected to discern that the socio-economic standing in communities living under customary law are constantly evolving.²⁷³ Academic research shows that successors in both rural and urban

²⁶⁶ Bennett TW “Re-introducing African customary law to the South African legal system” (2009) *The American Journal of Comparative Law* 11-12.

²⁶⁷ 1995 (3) SA 391 (CC).

²⁶⁸ *Mthembu* (1998) *op cit* para 685.

²⁶⁹ Lehnert W “The role of the courts in the conflict between African customary law and human rights” (2005) *South African Journal on Human Rights* 256.

²⁷⁰ Himonga C “Implementing the rights of the child in African legal systems: The *Mthembu* Journey in search of Justice” (2001) *International Journal of Children’s Rights* 89 and 107 and Mbatha L “Reforming the customary law of succession” (2002) *South African Journal on Human Rights* 269 and 271.

²⁷¹ Mbatha *op cit* 268-269 and 271-272.

²⁷² Lehnert *op cit* 257.

²⁷³ *Ibid.*

communities are incrementally disregarding their inherent duty of support.²⁷⁴ “Because heirs are becoming increasingly disobedient with regard to performing their duties, customary law no longer achieves its social purpose of protecting the interests of all family members, and the formal recognition of women’s and children’s rights under customary law does not ensure that they will be respected”.²⁷⁵

Maithufi argues that when the validity of the principles of customary law are evaluated in terms of our current constitutional dispensation, the dynamic nature of customary law should always be borne in mind.²⁷⁶ Because customary law is always changing, the rules relating to male primogeniture may have also changed. Although the judgments in *Mthembu* did not prove to be a satisfactory one for improving the property rights of African women, it nevertheless provided the necessary impetus for the challenges to the customary law rules of intestate succession that were to follow.

3.6.1.2 *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae; Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another*²⁷⁷

The following case is unique as the case was heard together with another application.²⁷⁸ In this section, each application is treated separately and is discussed individually. The facts and judgment of the court *a quo* in the case of *Bhe* will be discussed first and it will then be followed by a discussion of the facts and judgment of the court *a quo* in *Shibi*. In the next part of this section of the thesis, the researcher will then examine the single judgment of the Constitutional Court in both these matters.

²⁷⁴ Himonga *op cit* 106 and Maithufi IP “The constitutionality of the rule of primogeniture in customary law of intestate succession” (1998) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 146.

²⁷⁵ Lehnert *op cit* 257.

²⁷⁶ Maithufi (1998) *op cit* 147.

²⁷⁷ 2005 (1) SA 580 (CC).

²⁷⁸ *Shibi v Sithole and Minister for Justice and Constitutional Development* Case no 7292/01, 19 November 2003 (unreported) and *South African Human Rights Commission and Women’s Legal Centre Trust v The President of the Republic of South Africa and Minister for Justice and Constitutional Development*.

The facts of the *Bhe* case are briefly as follows: Nontupheko Marena Bhe (the third applicant) and the deceased had lived together as husband and wife for twelve years. Nontupheko bore the deceased two minor children namely Nonkululeko, a nine year old girl (the first applicant) and Anelisa, a two year old girl (the second applicant). Due to the fact that the first and second applicants were minors and female, they could not bring the application themselves, but had to be assisted by their mother. It is important to note that all three applicants were African and of Xhosa descent. During their lives as husband and wife, the deceased and Nontupheko purchased immovable property (which they and their children inhabited) with the aid of a state housing subsidy procured by the deceased. The deceased intended erecting a house on the said property, but unfortunately died intestate before fulfilling his plan. The first three applicants continued to reside on the property after the deceased's death.

At the time of the deceased's untimely death, his father (the second respondent) contended that he was in fact the rightful intestate heir of the deceased in accordance with the rules applicable to African customary law. On the basis of this assumption, he asserted that he was entitled to inherit the immovable property of the deceased. He intimated that he planned to sell the property in question in order to defray the expenses of the deceased's funeral. When the applicants discovered the malicious intentions of the respondent, they immediately acquired an interdict *pendente lite*, thereby restricting him from selling the property pending the outcome of their urgent application.

In the court *a quo*,²⁷⁹ the court was called upon to make a determination as to whether a female person of African descent, whose parents were not married, or married according to the tenets of African customary law, was eligible for intestate succession, upon the death of her biological father. The court approached the case by first engaging in a detailed discussion of the status and position of African customary law in the current South African legal system. In that part of the judgment, the court gave a historical synopsis of the status of African customary law before and after the Unionisation of South Africa. It referred to various pieces of legislation, like the Codes

²⁷⁹ *Bhe and Others v Magistrate, Khayelitsha, and Others* 2004 (2) SA 544 (C).

of Zulu Law, the Black Administration Act, etc that regulate intestate succession amongst Black people. The court also referred to a number of cases in which customary law was marginalised and not recognised.²⁸⁰

The court then embarked on a brief discussion of the customary law of succession. Here, the court explained that customary law is unwritten, community orientated and supports male domination. Family members could only own common property through the family head. The court distinguished between the terms succession and inheritance²⁸¹ and explained that intestate succession in African customary law is based on the principle of male primogeniture.²⁸²

Before attempting to resolve the issues mentioned immediately above, the court was first confronted with a dispute pertaining to the legitimacy of the first two applicants. The court indicated that the answer to the question of legitimacy lay in the payment of *lobolo*. The third applicant denied that the deceased paid any *lobolo* for her, whilst the second respondent maintained that the deceased did in fact pay the requisite *lobolo*. The second respondent then argued that on the basis of the fact that the deceased had paid the requisite *lobolo*, he was therefore the legal guardian and custodian of the first applicant. According to Xhosa custom, the custody and guardianship of a grandchild can only be affirmed if the deceased has paid the mandatory *lobolo* for the child's mother and irrespective of whether the marriage was consummated or not.²⁸³ On the basis of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,²⁸⁴ the court found the first two applicants to be legitimate.

The court then engaged into an investigation of the constitutionality of the customary law rule of male primogeniture. The court began by carefully considering the provisions of

²⁸⁰ *Bhe and Others* (2004) *op cit* 548-549.

²⁸¹ See chapter 1 of this thesis.

²⁸² *Bhe and Others* (2004) *op cit* 550-551.

²⁸³ Bekker (1989) *op cit* 251.

²⁸⁴ 1984 (3) SA 623 (A). "In this case the court found that in certain cases the denial by a respondent of a fact alleged by an applicant may not be such that it raises a real, genuine or *bona fide* dispute of fact- if the respondent in such a case fails to apply for deponents concerned to be called for cross-examination, the court may proceed on the basis of the correctness of the fact alleged by the applicant if the court is satisfied as to inherent credibility of the applicant's averments" (Venter and Nel *op cit* 88).

sections 2²⁸⁵ and 9²⁸⁶ of the 1996 Constitution, and the findings of the courts in *Mabuza v Mbatha*,²⁸⁷ *Moseneke v The Master of the High Court*²⁸⁸ and *Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government and Another*²⁸⁹ and *Mthembu v Letsela*.²⁹⁰ In the court's view, when testing law, be it common law, statute or African customary law, the law must be tested against the values in the Constitution. The court noted that the rule of male primogeniture had acquired statutory recognition in the Black Administration Act and the regulations promulgated there-under.²⁹¹ The court then explained some of the sections of the Black Administration Act and the regulations, to show how they made provision for the intestate succession of Blacks. The court concluded that the Black Administration Act was not a code of African customary law but was a piece of legislation which was based on racial inequality.²⁹² The Intestate Succession Act applies to all races in South Africa and allows descendents (irrespective of race, gender or status) to inherit an intestate estate. The first and second applicants were however precluded from invoking the provisions of the Intestate Succession Act because according to section 1(4)(b) "intestate" means any part of any estate which does not devolve by virtue of a will or in respect of which section 23 of the Black Administration Act 38 of 1927 does not apply.²⁹³ In other words, the only impediment to the first two applicants inheriting from their father's estate was because they were black and female. That amounts to discrimination *per se* on the specific grounds of race and gender. The court found the discrimination to be *prima facie* unfair and offended against the equality provisions of the Constitution (specifically sections 9(1) and 9(3)).²⁹⁴ After stating that some of the provisions of section 23 of the Black administration Act prevented the full realisation of its constitutional goals and was in dire

²⁸⁵ Section 2 provides that: "This Constitution is the supreme law of the Republic; law and conduct inconsistent with it is invalid; and the obligations imposed by it must be fulfilled".

²⁸⁶ See note 128 above.

²⁸⁷ 2003 (7) BCLR 743 (C). In *Mabuza op cit* para 752E-F the court said:

The proper approach is to accept that the Constitution is the supreme law of the Republic. Thus any custom which is inconsistent with the Constitution cannot withstand constitutional scrutiny. In line with this approach, my view is that it is not necessary at all to say that African customary law should not be opposed to the principles of public policy or natural justice. That approach is fundamentally flawed as it reduces African law (which is practiced by the vast majority in this country) to foreign law – in Africa!

²⁸⁸ 2001 (2) SA 18 (CC).

²⁸⁹ 2001 (1) SA 500 (CC).

²⁹⁰ 1997 (2) SA 936 (T); 1998 (2) SA 675 (T) and 2000 (3) SA 867 (SCA).

²⁹¹ *Bhe and Others* (2004) *op cit* 552.

²⁹² *Id* 553.

²⁹³ *Id* 554.

²⁹⁴ *Ibid*.

need of modification, the court was still reluctant to develop African customary law. In the court's point of view, the case at hand did not support a revision of the whole Black Administration Act and like the court in *Mthembu*, resolved that this salient responsibility lay in the capable hands of the legislature.²⁹⁵

The court concluded by stating that under our current constitutional dispensation, it will no longer be possible for a male person to be granted preference over a female person for purposes of inheritance. That amounted to discrimination, plain and simple. The first two applicants were declared to be the only heirs to the deceased's estate and they were entitled to inherit equally.²⁹⁶ The court then issued the following order:

- 1 It is declared that section 23(10)(a), (c) and (e) of the Black Administration Act are unconstitutional and invalid and that regulation 2(e) of the Regulations of the Administration and Distribution of the Estates of Deceased Blacks, published under *Government Gazette* 10601 dated 6 February 1987 is consequently also invalid.
- 2 It is declared that section 1(4)(b) of the Intestate Succession Act 81 of 1987 is unconstitutional and invalid insofar as it excludes from the application of section 1 any estate or part of any estate in respect of which section 23 of the Black Administration Act 38 of 1927 applies.
- 3 It is declared that until the foregoing defects are corrected by competent Legislature, the distribution of intestate black estates is governed by section 1 of the Intestate Succession Act 81 of 1987.
- 4 It is declared that the first and second applicants are the only heirs in the estate of the late Vuyu Elius Mgolombane, registered at Khayelitsha magistrate's court under reference No 7/1/2-484/2002.
- 5 The second respondent is ordered to sign all documents and to take all other steps reasonably required of him to transfer the entire residue of the said estate to the first and second applicants in equal shares. If the second respondent fails to do so the Deputy Sheriff is authorised and directed to do so in his stead.
- 6 It is declared that the applicants are exclusively entitled to reside in the house at 35 Jula Street, Makaza situated at erf 39678, Khayelitsha, in the City of Tygerberg, until its distribution and transfer in accordance with this order.²⁹⁷

The facts of the *Shibi* case are briefly as follows: In 1995, Daniel Solomon Sithole died unmarried (with no children) and intestate and was not survived by a parent or

²⁹⁵ *Ibid.*

²⁹⁶ *Id* 554-555.

²⁹⁷ *Id* 555.

grandparent. The fact that he died without leaving a will meant that his estate had to be administered in terms of section 23(10) of the Black Administration Act and the regulations promulgated thereunder. This would mean that the only persons eligible to inherit the deceased's intestate estate would be his male cousins; namely Mantabeni Sithole (first respondent) and Jerry Sithole (second respondent). After considering the decision of the court in *Mthembu*, the magistrate responsible for the administration of the deceased's estate designated the first respondent as executor of the deceased's estate. The first respondent however squandered the estate's capital and was subsequently removed from the appointment. Mr Nkuna (an attorney) was then appointed as executor, and in accordance with the rules of customary law he appointed the second respondent as the sole heir to the estate of the deceased.

Charlotte Shibi (the deceased's sister and the applicant in the matter) opposed the magistrate's findings and objected to the system or law implemented in administering the estate. She approached the court pursuing an order pronouncing her to be the only heir in the estate of the deceased. She also sought compensation from the first and second respondents and the Minister. For reasons analogous to the ones enunciated in the *Bhe* case, the court rejected the decision of the magistrate and affirmed Charlotte Shibi as the deceased's only heir. She was also granted recompense against the first and second respondents.

Both these cases then proceeded to the Constitutional Court,²⁹⁸ where the applicants (*Bhe* and *Shibi*) sought confirmation of the orders they had obtained in the Cape High Court and the Pretoria High Court respectively. A third application for direct access was brought jointly by the South African Human Rights Commission (SAHRC)²⁹⁹ and the

²⁹⁸ The majority judgment was delivered by the Deputy Chief Justice (as he was then known) Pius Langa. The following justices concurred in the judgment of Langa DCJ: Chaskalson CJ (as he was then known), Madala J, Mokgoro J, Moseneke J, O'Regan J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J.

²⁹⁹ Which was established under chapter 9 of the Constitution and is a State organisation promoting constitutional democracy. Its functions include:

- (1) (a) promoting respect for human rights and a culture of human rights;
(b) promoting the protection, development and attainment of human rights; and
(c) monitoring and assessing the observance of human rights in the Republic.
- (2) The Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power –
 - (a) to investigate and to report on the observance of human rights;
 - (b) to take steps to secure appropriate redress where human rights have been violated;
 - (c) to carry out research; and

Women's Legal Centre Trust,³⁰⁰ who sought an order declaring the whole of section 23 of the Black Administration Act, or alternatively sections 23(1), (2) and (6), to be unconstitutional and invalid because they were contrary to the tenets of sections 9, 10³⁰¹ and 28³⁰² of the Constitution.³⁰³ The Commission for Gender Equality acted as *amicus curiae* in the matter.

The central issues before the Court were the constitutional validity of (a) section 23 of the Black Administration Act, and (b) the customary law rule of male primogeniture.³⁰⁴ The majority's approach in this matter (as per Langa DCJ) proceeded along the following lines. The Court initially set out the legislative provisions governing the customary law of intestate succession. It examined section 23 in its entirety, and also contemplated certain of the regulations promulgated there-under namely regulations 2, 3 and 4. The Court also considered section 1(4)(b) of the Intestate Succession Act. The Court took cognisance of the fact that the Constitution³⁰⁵ and the Constitutional Court³⁰⁶ has given full recognition to customary law. However, the Court cautioned that although customary law is

(d) to educate (sections 184(1) and (2) of the 1996 Constitution).

³⁰⁰ Which is not a State organisation, but whose primary goal: "is to advance and protect the human rights of all women in South Africa, particularly black women who suffer many intersecting forms of disadvantage (*Bhe and Others* (2005) *op cit* para 29).

³⁰¹ Section 10 provides that: "Everyone has inherent dignity and the right to have their dignity respected and protected".

³⁰² Section 28 provides that:

- (1) Every child has the right to –
 - (a) to a name and a nationality from birth;
 - (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
 - (c) to basic nutrition, shelter, basic health care services and social services;
 - (d) to be protected from maltreatment, neglect, abuse or degradation;
 - (e) to be protected from exploitative labour practices;
 - (f) not to be required or permitted to perform work or provide services that –
 - (i) are inappropriate for a person of that child's age; or
 - (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development.
 - (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be –
 - (i) kept separately from detained persons over the age of 18 years; and
 - (ii) treated in a manner, and kept in conditions, that take account of the child's age.
 - (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
 - (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.
- (2) A child's best interests are of paramount importance in every matter concerning the child.
- (3) In this section "child" means a person under the age of 18 years.

³⁰³ *Bhe and Others* (2005) *op cit* para 31.

³⁰⁴ *Id* para 3.

³⁰⁵ See specifically sections 30, 31, 211, 39(2) and 39(3).

³⁰⁶ See *Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC) *op cit* para 51.

recognised by the Constitution and now forms an integral branch of the general law of the land, it is still subject to the provisions of the Bill of Rights.³⁰⁷

In the past, customary law was interpreted through common law; nowadays it must be viewed as a vital component of our legal system. Like all law it depends for its ultimate force and validity on the Constitution. Therefore, the validity of African customary law must now be determined by reference to the Constitution and not to the common law.³⁰⁸ The Court averred that customary law is not static, but dynamic. The Constitution facilitates change and development of customary law through sections 39(2) and 211(3).³⁰⁹

The Court then dealt extensively with the constitutional rights which the *amicus curiae* alleged were being infringed upon namely, the rights to human dignity,³¹⁰ equality³¹¹ and the rights of children.³¹² The learned justice made reference to the fact that the Constitutional Court has frequently reiterated the importance of human dignity in our current constitutional dispensation in the cases of *S v Makwanyane and Another*,³¹³ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Other*,³¹⁴ *S v Mamabolo (E TV and Others Intervening)*,³¹⁵ and *Dawood and Another v Minister of Home Affairs and Others*.³¹⁶ The right to equality was also highlighted in numerous judgments of the Constitutional Court. Here the Court referred to the case

³⁰⁷ Section 39(2)-(3) of the Constitution.

³⁰⁸ *Bhe and Others* (2005) *op cit* para 43-44.

³⁰⁹ *Id* para 44.

³¹⁰ See section 10 of the Constitution.

³¹¹ *Id* section 9.

³¹² *Id* section 28.

³¹³ 1995 (3) SA 391 (CC) *op cit* para 144.

³¹⁴ 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) *op cit* para 28 where Ackermann J stated that “the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society”.

³¹⁵ 2001 (3) SA 409 (CC); 2001 5 BCLR 449 (CC) *op cit* para 41 where Kriegler J referred to human dignity as one of three “conjoined reciprocal and covalent values which are foundational to this country”.

³¹⁶ 2000 (3) SA 936 (CC) *op cit* para 35 where the Court noted that:

The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected.

of *Fraser v Children's Court, Pretoria North, and Others*.³¹⁷ "Not only is the achievement of equality one of the founding values of the Constitution, section 9 of the Constitution also guarantees the achievement of substantive equality to ensure that the opportunity to enjoy the benefits of an egalitarian and non-sexist society is available to all, including those who have been subjected to unfair discrimination in the past".³¹⁸ The Deputy Chief Justice (as he was then known) noted that numerous international instruments (to which South Africa is a party) recognise the need to safeguard the rights of women and to eradicate all laws that discriminate against them as well as to abolish all forms of racial discrimination in our society.³¹⁹

With regards to the rights of children, the Court noted that "our constitutional obligations in relation to children are particularly important for we vest in our children our hopes for a better life for all".³²⁰ It was thus noted that section 28 is not the only right conferred on children but most other rights in the Bill of Rights applies equally to children as well. Children may therefore not be exposed to unfair discrimination in contravention of section 9(3) just as their adult counterparts may not be.³²¹ In particular, the judge highlighted two prohibited grounds of discrimination pertinent to the case at hand, namely sex and birth.³²² The Court noted that numerous international instruments,³²³ to

³¹⁷ 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC) *op cit* para 20 where Mahomed DP stated that:
There can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised. In the very first paragraph of the preamble it is declared that there is a "... need to create a new order ... in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms".

³¹⁸ *Bhe and Others* (2005) *op cit* para 50.

³¹⁹ *Id* para 51. See also *Bhe and Others* (2005) footnotes 57-59.

³²⁰ *Id* para 52.

³²¹ *Ibid*.

³²² *Id* para 53-54.

³²³ Here the Court made reference to the UN Convention on the Rights of the Child, which asserts that "children, by reason of their physical and mental immaturity need special safeguards and care" (see the preamble of the Convention). Article 2 of the Convention also states that: "the rights set forth in the Convention shall be enjoyed regardless of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status". The court (*ibid*) also made reference to article 24(1) of the International Covenant on Civil and Political Rights (1966) which provides that: "Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measure of protection as are required by his status as a minor, on the part of his family, society and the State". The court (*ibid*) also mentioned article 3 of the African Charter on the Rights and Welfare of the Child which provides that: "children are entitled to enjoy the rights and freedoms recognized and guaranteed in the Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex...birth or other status" and article 21(1)(b) which provides that: "States parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular" (*Bhe and Others* (2005) *op cit* para 55).

which South Africa is a party, also protected and enhanced the rights of children.³²⁴ The Court also found it necessary to differentiate between common and customary law stigmas associated with extra-marital birth.³²⁵ The meaning of “birth” in section 9(3) of the Constitution was important because one of the pertinent issues in the case was whether the differential claims of legitimate and illegitimate children amounts to unfair discrimination.³²⁶ The Court stated that:

The prohibition of unfair discrimination on the ground of birth in s 9(3) of our Constitution should be interpreted to include a prohibition of differentiating between children on the basis of whether a child's biological parents were married either at the time the child was conceived or when the child was born. As I have outlined, extra-marital children did, and still do, suffer from social stigma and impairment of dignity. The prohibition of unfair discrimination in our Constitution is aimed at removing such patterns of stigma from our society. Thus, when section 9(3) prohibits unfair discrimination on the ground of “birth”, it should be interpreted to include a prohibition of differentiation between children on the grounds of whether the children’s parents were married at the time of conception or birth. Where differentiation is made on such grounds, it will be assumed to be unfair unless it is established that it is not.³²⁷

The Court concluded that section 23 (in its entirety) and the regulations promulgated there-under were unconstitutional, on the basis that they were blatantly discriminatory and based purely on race and therefore contravened sections 9 and 10 of the Constitution. The Court then had to determine whether section 23 and its regulations could withstand the justification enquiry in terms of the limitations clause. The learned justice took cognisance of the fact that:

Section 23 was enacted as part of a racist programme, intent on entrenching division and subordination. Its effect has been to ossify customary law. In the light of its destructive purpose and effect, it could not be justified in any open and democratic society.³²⁸

The court subsequently held that section 23 severely infringed the rights to equality and human dignity and could therefore not be justified under section 36 of the Constitution.

³²⁴ *Bhe and Others* (2005) *op cit* paras 55-56.

³²⁵ *Id* para 58.

³²⁶ *Id* para 54.

³²⁷ *Id* para 59.

³²⁸ *Id* para 72.

In the court's opinion and in accordance with section 172(1)(a)³²⁹ of the Constitution; section 23 had to be struck down.³³⁰

The Court then turned to consider the constitutionality of the rule of male primogeniture which was challenged by both the appellants in the matter. Langa DCJ noted that customary law must be evaluated in its context and is community oriented.³³¹ Each family member had a role to play in the extended family structure which would contribute to the good of the community.³³² Property was owned communally and was managed by the family head for the benefit of the family as a whole.³³³ Primogeniture disqualified women from succeeding to the intestate property of the family head.³³⁴ "The exclusion of women from heirship and consequently from being able to inherit property was in keeping with a system dominated by a deeply embedded patriarchy which reserved for women a position of subservience and subordination and in which they were regarded as perpetual minors under the tutelage of the fathers, husbands or the head of the extended family".³³⁵

The Court noted that illegitimate children do not qualify for succession to their father's estate in African customary law.³³⁶ The Court also took cognisance of the fact that the social and economic circumstances of Blacks has changed. Extended families have been substituted with nuclear families. The successor often does not reside with the entire extended family and as a result thereof, "succession of the heir to the assets of the deceased does not necessarily correspond in practice with an enforceable responsibility to provide support and maintenance to the family and dependents of the deceased".³³⁷ Customary law is dynamic and must therefore be given an opportunity to adapt and keep pace with changing social conditions and values.³³⁸

³²⁹ This section provides that:
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; ...

³³⁰ *Bhe and Others* (2005) *op cit* para 73.

³³¹ *Id* para 75.

³³² *Ibid.*

³³³ *Id* para 76.

³³⁴ *Id* para 77.

³³⁵ *Id* para 78.

³³⁶ *Id* para 79.

³³⁷ *Id* para 80.

³³⁸ *Id* para 81-82.

The Court identified that the rule of male primogeniture prohibited the following categories of persons from inheriting namely widows, daughters, younger sons and extra-marital children.³³⁹ This prohibition obviously amounted to unfair discrimination on the grounds of birth and gender. In addition to these two grounds, the rule of primogeniture also contravened the right to human dignity. Since these values form the foundation of the Constitution, the rule could not be justified under the limitations clause.³⁴⁰ The Court was however emphatic that the judgment reached with regard to the rule of male primogeniture, in no way affected the constitutionality of the rule in other areas of customary law (for example the rules regulating succession to traditional leadership).³⁴¹ The majority of the Court declined to develop the rule of male primogeniture on the basis that it did not have sufficient evidence of “living” customary law to enable it to do so.³⁴²

After careful consideration of the remedies available, the Court made the following order. It set aside the orders of the Cape High Court in the *Bhe* case and the Pretoria High Court in the *Shibi* case and subsequently declared the whole of section 23 and the regulations promulgated thereunder to be unconstitutional and invalid.³⁴³ It restricted the unconstitutionality of the rule of male primogeniture to the customary law of intestate inheritance alone, since it prevented women and extra-marital children from inheriting property.³⁴⁴

Section 1(4)(b) of the Intestate Succession Act 81 of 1987 was also found to be unconstitutional and invalid. Section 1 of the Intestate Succession Act was now applicable to intestate estates that would have formerly been governed by section 23 of the Black Administration Act.³⁴⁵ The Court also held that when applying sections 1(1)(c)(i) and 1(4)(f) of the Intestate Succession Act to the estate of a deceased person who was survived by more than one spouse:

(a) A child’s share in relation to the intestate estate of the deceased, shall be

³³⁹ *Id* para 88.

³⁴⁰ *Id* para 95.

³⁴¹ *Id* para 94.

³⁴² *Id* para 109.

³⁴³ *Id* para 136.

³⁴⁴ *Ibid.*

³⁴⁵ *Id* para 136.

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 of Justice and Constitutional Development by notice in the *Gazette*, which is the greater; and
- (c) notwithstanding the provisions of sub-paragraph (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.³⁴⁶

The Court maintained that its order did not operate retrospectively. Finally, it declared Nonkululeko and Anelisa Bhe and Charlotte Shibi to be the sole heirs of the respective deceased estates.

The minority's approach to the issues in dispute differed from that of the majority and it is that judgment that the researcher will now consider. The judgment of the minority was delivered by Ngcobo J. He agreed with the majority that section 23 of the Black Administration Act is unconstitutional and infringes on the rights to equality and dignity.³⁴⁷ He also agreed that the regulations promulgated in terms of section 23 of the Black Administration Act and that section 1(4)(b) of the Intestate Succession Act were also unconstitutional.³⁴⁸ He was also in agreement that the rule of male primogeniture was unconstitutional to the extent that it excluded women from succeeding to the position or status of a family head.³⁴⁹ However, Ngcobo J was of the opinion that the "rule of primogeniture should be developed to bring it in line with the rights in the Bill of Rights" as that is what the Constitution instructs us to do.³⁵⁰

In this regard section 39(2) of the Constitution places a duty on courts to develop customary law so as to bring it in line with the Constitution, in particular the Bill of Rights.³⁵¹ The development proposed by Ngcobo was to simply remove the reference to a male so as to allow an eldest daughter to succeed to the intestate estate of the

³⁴⁶ *Id* para 136.

³⁴⁷ *Id* para 144.

³⁴⁸ *Ibid.*

³⁴⁹ *Id* para 210.

³⁵⁰ *Id* para 139.

³⁵¹ *Id* para 212.

deceased.³⁵² In his opinion, after the burial of the deceased, the family usually meet to discuss the devolution of the deceased's estate. If the family reaches an agreement with regards to the devolution of the estate, it should be respected and honoured and there seems to be no reason for any further interference.³⁵³ In other words, customary law will prevail. However, should a dispute arise relating to the choice of law, such dispute (in Ngcobo's opinion) should be resolved by the magistrates' court having jurisdiction. The magistrate must then make a determination as to the most appropriate system of law to be applied.³⁵⁴ When adjudicating such a dispute, the magistrate must consider what is fair, just and equitable. When making a determination as to what is fair, just and equitable, the magistrate must consider: the assets and liabilities of the estate, the widow's contribution to the acquisition of assets, the contribution of family members to such assets, and whether there are minor children or other dependents of the deceased who require support and maintenance (to name but a few).³⁵⁵

This leading decision of the Constitutional Court finally brings the customary law of intestate succession into line with the values entrenched in the Constitution and eliminates the gender inconsistencies prevalent with this system of law. However, numerous criticisms have been levelled against the judgment and these criticisms will now be considered.

The Constitutional Court invalidated a rule central to African customary law instead of adapting it to comply with the constitutional principles of equality and dignity.³⁵⁶ South Africa is a plural society consisting of numerous cultures and ethnic groups, and a plurality of laws where African customary law is specifically recognised as a legal system in our Constitution. "Law reform in the country should therefore be aimed at the establishment of state law pluralism which is based on the equality of the legal systems".³⁵⁷ Laws or legal systems must therefore be harmonised rather than simply eliminated.³⁵⁸

³⁵² *Id* para 222.

³⁵³ *Id* para 239.

³⁵⁴ *Id* para 240.

³⁵⁵ *Id* para 239.

³⁵⁶ Van Niekerk GJ "Succession, living indigenous law and *Ubuntu* in the Constitutional Court" (2005) *Obiter* 486.

³⁵⁷ *Ibid*.

³⁵⁸ *Id* 486-487.

The majority in *Bhe*, therefore erred in opting to abolish the rule of male primogeniture. Development or adaptation of the rule in line with section 39(2) of the Constitution would have been a more appropriate remedy. Courts cannot simply abolish customary law and substitute it with the common law whenever it conflicts with the Constitution,³⁵⁹ as that is not in line with section 39(2).³⁶⁰ It seems that whenever the Constitutional Court is challenged with balancing the values of the Constitution with traditional customary practices, custom or culture is always sacrificed in favour of the constitutional values which is exactly what happened in *Bhe*. However, it is important to note that the values and spirit of African customary law are not dissimilar to the values and spirit of the Constitution.³⁶¹ In fact, it might be possible to harmonise the values of African customary law and the values of the Constitution (a document based on Western legal tradition) “by following an interpretation of Western human rights within the traditional, African context”.³⁶² Here the concept of *ubuntu* is particularly relevant. Ngcobo J defined “*ubuntu*” as “encapsulating communality and the inter-dependence of the members of a community”.³⁶³ In terms of the African customary law of intestate succession, *ubuntu* would guarantee that in the system of shared responsibilities and obligations, every family member had access to essential necessities of life such as food, clothing, shelter and healthcare.³⁶⁴ In this way, African society and African customary law guarantees human dignity “in all material respects, as within extended families”³⁶⁵ and the “powerful ethic of generosity towards all kinfolk assured women and children of nurture and protection”.³⁶⁶ In *S v Makwanyane and Another*,³⁶⁷ the Constitutional Court gave *ubuntu* the status of a legal value and equated it with the right to human dignity which is one of the cornerstone values of the Constitution.³⁶⁸ Therefore, if the fundamental values of *ubuntu* coincide with the foundational values in the Constitution, the Constitution could be the vehicle for harmonising the laws of South Africa instead of eliminating them.³⁶⁹

³⁵⁹ Himonga (2001) *op cit* 104.

³⁶⁰ *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC) *op cit* para 214.

³⁶¹ Knoetze E and Olivier M “To develop or not to develop the customary law: That is the question in *Bhe*” (2005) *Obiter* 131.

³⁶² *Ibid.*

³⁶³ *Bhe and Others* (2005) *op cit* para 163.

³⁶⁴ *Ibid.*

³⁶⁵ Knoetze and Olivier *op cit* 131.

³⁶⁶ Bennett (1999) *op cit* 5 as quoted by Knoetze and Olivier *op cit* 131-132.

³⁶⁷ 1995 (3) SA 391 (CC) *op cit* para 308.

³⁶⁸ *Bhe and Others* (2005) *op cit* para 224.

³⁶⁹ Van Niekerk (2005) *op cit* 487.

Another problem with the decision of *Bhe* is that it does not reflect “living” customary law, and will therefore have little or no consequence for the lives of women living under customary law, especially in rural communities.³⁷⁰ This renders the decision inaccessible to the people it was supposed to assist and will in all likelihood “require more effort and resources to implement it than would have been the case if the decision had been concerned with ‘living’ customary law”.³⁷¹ If the Court had considered “living” customary law, it might have actually been able to develop the rule of primogeniture without alienating the indigenous communities that live under customary law, from the new law. “This is especially so since ‘living’ customary law may already have developed in ways that accommodate egalitarian constitutional values”.³⁷² Secondly the scarcity of sufficient research data on “living” customary law should not lead courts to simply decline to develop customary law. In fact, it amplifies the fact that more research data must be made accessible to the courts so that customary law can be developed.³⁷³ One does not need extensive theoretical research to develop customary law: active development can be done without determining the complex content of “living” customary law.³⁷⁴ Such development is more desirable than merely replacing customary law with the common law rules of intestate succession because “actively developed customary law can reflect its underlying norms and values”.³⁷⁵

African customary law was previously regarded as an inferior system of law under apartheid and colonialism. After the enactment of the Constitution, customary law and common law have equal status. The decision in *Bhe* once again creates the impression that African customary law is inferior to the common law. Moreover, the substitution of African customary law with the common law may be viewed as preferential treatment for: one legal system over another and the values of one group of South African society over another.³⁷⁶ This could seriously hamper the implementation of the law as the affected communities may simply ignore the “legislation concerned if they do not identify

³⁷⁰ Himonga C “Advancement of African women’s rights in the first decade of democracy in South Africa: The reform of the customary law of marriage and succession” (2005) *Acta Juridica* 97.

³⁷¹ *Ibid.*

³⁷² *Ibid.*

³⁷³ Lehnert *op cit* 269.

³⁷⁴ *Ibid.*

³⁷⁵ *Id* 269-270.

³⁷⁶ Himonga (2005) *op cit* 103.

with it, and reduce it to mere paper law that has no relevance to their lives or the lives of those it intended to protect”.³⁷⁷

The decision in *Bhe* has created numerous problems of implementation. In this regard, Higgins³⁷⁸ states that in her interviews with South African lawyers and representatives of non-governmental organisations working on gender equality issues, the decision in *Bhe* has had little or no effect on the adjudication of disputes relating to rights of intestate succession. Despite the fact that legal services organisations have instituted training sessions for lawyers and magistrates, numerous intestate estates are still being administered by members of the family group or traditional leaders in both rural and urban areas where people are generally ignorant of the *Bhe* decision.³⁷⁹

Finally, one of the greatest shortcomings of the *Bhe* decision is that the Court failed to encourage active public debate and participation, especially from women. Rather it imposed a politically motivated decision on the vast majority of South African society.³⁸⁰ Public debate would have created the foundation for extensive knowledge and acceptance of such a revolutionary standard for the African customary law of intestate succession.³⁸¹ The Court might even have initiated the development of the rule of male primogeniture within communities themselves, thereby allowing communities to “work out an understanding of the traditions true reflection of the Constitution’s paradigm of rights”.³⁸² After all isn’t that what true democracy is all about?

3.6.1.3 *Shilubana and Others v Nwamitwa*³⁸³

This was the first case to come before the Constitutional Court dealing with the question of succession to traditional leadership and gender discrimination. Although this case is not relevant to the topic of this dissertation, it is an important case to consider as it contains important principles and has changed the face of customary law forever.

³⁷⁷ *Ibid.*

³⁷⁸ Higgins TE “Constitutional chicken soup” (2006-2007) *Fordham Law Review* 714.

³⁷⁹ *Id* 714-715.

³⁸⁰ *Id* 717.

³⁸¹ *Ibid.*

³⁸² Michelman FI “2009 Edward A Seegers lecture – legitimation by Constitution and the news from South Africa” (2009-2010) *Valparaiso University Law Review* 1031.

³⁸³ 2008 (9) BCLR 914 (CC).

The facts of the case were briefly as follows: In 1968, *Hosi*³⁸⁴ Fofeza the traditional leader of the Valoyi community died. The only heir born to him from his principal wife, was a daughter. *Hosi* Fofeza's younger brother, Richard, was subsequently appointed as *hosi* of the Valoyi community, as women were not allowed to succeed in terms of the customary law prevalent at the time.³⁸⁵ On 22 December 1996 (during the reign of *Hosi* Richard), the Royal family of the Valoyi, in co-operation with *Hosi* Richard, corporately affirmed the conferment of traditional leadership on Ms Shilubana.³⁸⁶ However, at the time of the affirmation, Ms Shilubana was strongly opposed to *Hosi* Richard being replaced. Therefore, the Royal Council decided that *Hosi* Richard would continue to occupy the position of *hosi* of the Valoyi community for an indefinite period.

On 17 July 1997, *Hosi* Richard acknowledged in the presence of the Chief Magistrate and 26 witnesses, that Ms Shilubana was the successor to traditional leadership of the Valoyi community. In keeping with customary protocol and customary law, the Tribal Authority of the Valoyi, sent a letter to the Commission for Traditional Leaders of the Limpopo Province, advising them of the decision of the Royal Family to appoint Ms Shilubana as *hosi*. On 5 August 1997, the Royal Council agreed to approve the transferal of *Hosi* Richard's powers to Ms Shilubana. On the same day, during a "duly constituted meeting of the Valoyi tribe", chaired by *Hosi* Richard, it was resolved that "in accordance with the usages and customs of the tribe", Ms Shilubana would be designated as *hosi*.³⁸⁷

However, on 25 February 1999, *Hosi* Richard reneged on his support for Ms Shilubana's traditional leadership in a letter which was acknowledged by the High Court³⁸⁸ and the Supreme Court of Appeal.³⁸⁹ The Royal Family, at a duly constituted meeting held on 4 November 2001, soon after the death of *Hosi* Richard, once again affirmed that Ms Shilubana would succeed as *hosi*. However, Sidwell (Richard's son), contested Ms Shilubana's planned confirmation as *hosi* by bringing an urgent interdict

³⁸⁴ *Hosi* means traditional leader.

³⁸⁵ *Shilubana and Others* (2008) *op cit* para 3.

³⁸⁶ *Id* para 4.

³⁸⁷ *Id* para 5.

³⁸⁸ *Nwamitwa v Phillia* 2005 (3) SA 536 (T).

³⁸⁹ *Shilubana and Others v Nwamitwa (Commission for Gender Equality as Amicus Curiae)* 2007 (2) SA 432 (SCA).

and claiming the position of traditional leadership for himself. Sidwell claimed that because his father was *hosi* of the Valoyi community, and being the only son of his father; he was entitled to succeed as *hosi*.³⁹⁰ Ms Shilubana challenged Sidwell's claim on the basis that she was the sole heir of her father (Fofozza) and had a constitutional right to succeed her father as *hosi* of the Valoyi.

In the Pretoria High Court,³⁹¹ Swart J relied on four questions on which oral evidence had been led to arrive at a decision. The four questions were:

- 1.1 Whether in terms of the customs and traditions of the Tsonga/Shangaan tribe, more particularly the Valoyi tribe, a female can be appointed as Hosi of the Valoyi tribe?
- 1.2 Whether [Hosi Richard] was appointed as Hosi or acting Hosi since October 1968?
- 1.3 Whether when appointing [Ms Shilubana] as a Hosi of the Valoyi tribe the royal family acted in terms of the customs and traditions of the Valoyi tribe i.e. of the Tsonga/Shangaan nation?
- 1.4 Whether decision No 32/2002 by the Executive Council of Limpopo Provincial Government dated 22 May 2002 appointing [Ms Shilubana] as chief of the Valoyi tribe, is in accordance with the practices and customs of the Valoyi tribe within the meaning of the Constitution of the Republic of South Africa Act 108 of 1996?³⁹²

In response to these questions, the court found that before the enactment of the Interim Constitution, the customs and the traditions of the Valoyi tribe prevented women from being appointed as a Hosi.³⁹³ It was confirmed that Hosi Richard was appointed as Hosi.³⁹⁴ The court further declared that the appointment of Ms Shilubana was not in accordance with custom or tradition as it could find "no precedent in custom or tradition for the chieftainship to be transferred from the line of a Hosi to another line particularly by appointing a female".³⁹⁵ The court also dismissed the claim that the Royal family of the Valoyi had adapted custom, as the Royal family only has the power to identify and

³⁹⁰ *Shilubana and Others* (2008) *op cit* paras 6 and 7.

³⁹¹ *Nwamitwa v Phyllia* 2005 (3) SA 536 (T).

³⁹² *Id* para 539 B-E.

³⁹³ *Id* para 539G-541B.

³⁹⁴ *Id* para 541B-E.

³⁹⁵ *Id* para 544E-546C.

confirm a hosi. The Royal Family did not have the power to elect a hosi.³⁹⁶ Without evidence from all the members of the Valoyi community itself, it was beyond the powers of the court to conclude that customary law had been altered or adapted.³⁹⁷ The court further found that the Executive Council's appointment of Ms Shilubana as chief of the Valoyi tribe was contrary to the traditions and customs of the Valoyi community.³⁹⁸ According to the court, Ms Shilubana was therefore disqualified from succeeding to hosi on the basis of her ancestry and not on the basis of her sex.³⁹⁹

The Supreme Court of Appeal⁴⁰⁰ relied on the same four questions as Swart J in the Pretoria High Court and substantially confirmed the High Court's judgment in all respects.⁴⁰¹ The case then proceeded to the Constitutional Court. The Commission for Gender Equality, the National Movement of Rural Women and the Congress of Traditional Leaders of South Africa (CONTRALESA) were all admitted as *amicus curiae* in the matter.⁴⁰² The Constitutional Court had to determine whether the Royal family had the requisite power to develop the customary laws of the Valoyi community to prohibit discrimination based on gender when choosing a successor to traditional leadership. The Court also had to consider whether the Valoyi community had the power to restore the position of traditional leadership to the house from which it had been removed by virtue of pre-constitutional gender discrimination.⁴⁰³

The Court began addressing the various issues placed before it by asking a question: What is the proper approach to adopt when seeking to determine a rule of customary law?⁴⁰⁴ In this regard, the Court noted that the status of customary law is recognised in our Constitution; that section 211 recognises the institution, status and role of traditional leadership, subject to the Constitution; and that a traditional authority that observes a system of customary law may function subject to applicable legislation and customs,

³⁹⁶ *Id* para 545B-F.

³⁹⁷ *Id* para 545D.

³⁹⁸ *Id* paras 546D-547D and 548E-H.

³⁹⁹ *Id* para 548E-H.

⁴⁰⁰ *Shilubana and Others v Nwamitwa (Commission for Gender Equality as Amicus Curiae)* 2007 (2) SA 432 (SCA).

⁴⁰¹ *Id* paras 46, 47, 49 and 50-51.

⁴⁰² *Shilubana and Others* (2008) *op cit* paras 17 and 18.

⁴⁰³ *Id* para 59.

⁴⁰⁴ *Id* para 41.

including amendments to or repeal or that legislation and those customs, and that courts must apply customary law where it is applicable, subject to the Constitution and relevant legislation.⁴⁰⁵ On the basis of the Constitutional Court's decisions in *Bhe* and *Alexkor v Richtersveld Community* the Court found that customary law must comply with the Constitution, and must be treated with respect and as an intrinsic part of our law.⁴⁰⁶ Accordingly, the proper approach to adopt when seeking to determine a rule of customary law "must be informed by several factors".⁴⁰⁷ First, one must examine the customs and practices of the relevant community.⁴⁰⁸ Second, one must honour the right of communities that adhere to systems of customary law to develop their law.⁴⁰⁹ Third, courts must take into consideration the fact that African customary law controls and governs the lives of people. The demand for adaptability and the necessity to promote development must be weighed up against the value of legal certainty, respect for inherent rights, and the preservation of constitutional rights.⁴¹⁰ Furthermore, a court deliberating on any customary law matter must continue to be diligent to its constitutional duty under section 39(2) to promote the spirit, purport and objects of the Bill of Rights.⁴¹¹

The Court then turned to consider whether Mr Nwamitwa had a lawful right to succeed under African customary law. In making this determination, the Court began its enquiry by referring to the classical test for the existence of custom as a source of law as set out in *Van Breda and Others v Jacobs and Others*⁴¹² where it was held that to be recognised as law, a practice must be certain, uniformly observed for a long period of time and reasonable. The standard of reasonableness would now have to be applied in a manner consonant with the Constitution.⁴¹³ The Court noted that customary law is dynamic and that "change is intrinsic to and can be invigorating of customary law".⁴¹⁴

⁴⁰⁵ *Id* para 42.

⁴⁰⁶ *Id* para 43.

⁴⁰⁷ *Id* para 44.

⁴⁰⁸ *Ibid*.

⁴⁰⁹ *Id* para 45.

⁴¹⁰ *Id* para 47.

⁴¹¹ *Id* para 48.

⁴¹² 1921 AD 330 *op cit* 334.

⁴¹³ *Shilubana and Others* (2008) *op cit* para 52.

⁴¹⁴ *Id* para 54.

Development implies some departure from past practice. A rule that requires absolute consistency with past practice before a court will recognise the existence of a customary norm would therefore prevent the recognition of new developments as customary law. This would result in the courts applying laws which communities themselves no longer follow, and would stifle the recognition of the new rules adopted by the communities in response to the changing face of South African society. This result would be contrary to the Constitution and cannot be accepted.⁴¹⁵

The Court held that the test in *Van Breda* could not be applied to customary law, where the development of “living law” was at issue.⁴¹⁶ The Court reasoned that although past customs are cardinal in African customary law, they merely constitute one integral factor to be contemplated with other integral factors. Where a cultural pattern is apparent from traditional practice and there is no further evidence that a modern development has occurred or is still occurring, past practice will be enough to establish a rule. But where the modern custom of the community intimates that development has taken place, past practice alone is insufficient and cannot on its own, confirm a right (in this case a right of succession) with certainty.⁴¹⁷ The Court concluded that the past practice of the Valoyi community was cardinal, but not conclusive in determining whether Sidwell Nwamitwa had the right to succeed as hosi.⁴¹⁸

The Court then turned to consider the lawfulness of the actions of the Royal family in the case. At this point, the Court felt that on the evidence placed before it,⁴¹⁹ it could not clearly ascertain whether the installation of Ms Shilubana as hosi of the Valoyi community by the Royal family or traditional authorities was permissible or lawful according to African customary law.⁴²⁰ The Court then turned to consider whether the decision of the traditional authorities to elect Ms Shilubana as hosi was an attempt to bring their customary law in line with the Constitution. Here the Court found that the Royal family of the Valoyi purported to restore the chieftainship to a woman who would have been appointed hosi in 1968, were it not for the fact that she was a woman. As far as ancestry is relevant, the chieftainship was also restored to the line of Hosi Fofeza

⁴¹⁵ *Id* para 55.

⁴¹⁶ *Id* para 56.

⁴¹⁷ *Ibid.*

⁴¹⁸ *Id* para 57.

⁴¹⁹ *Id* para 59-65.

⁴²⁰ *Id* para 66.

from which it was removed on the basis that he only had a female and not a male heir.⁴²¹ On this basis the Court concluded that the Royal family or traditional authorities had the requisite power to act as they did,⁴²² as they are the benchmark of any power in the relevant customary community on issues of succession.⁴²³

Section 211(2) specifically provides for the right of traditional communities to function subject to their own system of customary law, including amendment or repeal of laws. A community must be empowered to itself act so as to bring its customs into line with the norms and values of the Constitution. Any other result would be contrary to section 211(2) and would be disrespectful of the close bonds between a customary community, its leaders and its laws.⁴²⁴

The Court concluded that the traditional authority had the power to consider the Constitution when determining matters of traditional leadership and that the conduct of the Royal family in appointing Ms Shilubana as hosi of the Valoyi tribe, amounted to a development of African customary law.⁴²⁵ The next question the Court had to consider was whether the development of African customary law by the Valoyi community should be recognised as law? Although the Valoyi may have detracted from the previously existing rule that a woman could never be appointed as a chief, they nevertheless complied with all the other aspects of customary law regulating matters of succession to chieftainship.⁴²⁶ The installation of Ms Shilubana as hosi may require further development. Such further developments must first be conducted by the relevant traditional authorities pursuant to the customs and practical needs of the relevant community and the Constitution.⁴²⁷ The Court deduced that the High Court and the Supreme Court of Appeal had erred in concluding that the Royal family did not have the necessary authority to act as they did. Furthermore, these lower courts did not deliberate adequately on the historical and constitutional context of the judgment, more importantly the entitlement of traditional authorities to develop their own customary law.⁴²⁸ The Court concluded that Sidwell Nwamitwa had no legal claim to the

⁴²¹ *Id* para 70.

⁴²² *Id* para 71.

⁴²³ *Id* para 72.

⁴²⁴ *Id* para 73.

⁴²⁵ *Id* para 75.

⁴²⁶ *Id* para 82.

⁴²⁷ *Id* para 83.

⁴²⁸ *Id* para 85.

chieftainship of the Valoyi. At most, he merely had an expectation that as the oldest male child of Hosi Richard, he would have been successor. The past practice of the Valoyi community does not itself ensure that Sidwell Nwamitwa's expectation must be realised. The modern customs and traditions of the Valoyi attest to a valid legal change, thereby effectuating or culminating in the succession of Ms Shilubana to the chieftainship. Because of this amended position and in terms of the present customary law of the Valoyi, Sidwell Nwamitwa could not be appointed or installed as chief.⁴²⁹

The judgment of the Constitutional Court in *Shilubana* has been met with mixed emotions by the legal fraternity. Some legal scholars have applauded the decision, whilst others have criticised it extensively. In this section, the researcher will highlight some of the views of academics on this decision. Ntlama⁴³⁰ is of the opinion that the Court's reluctance to consider past practice as establishing a customary law rule, obviates the essential need to determine and understand the nature of customary law for the purpose of investigating intestate succession. If no reference is made to past practice because it is assumed that it will hinder the evolution of new customary practices, it restricts the potential of a court to confirm the context or history of a rule of customary law with absolute certainty.⁴³¹ Furthermore, the Court's acceptance of the dynamic nature of customary law not only requires a mere reference to past practice, but an in depth examination and investigation of the rule of customary law – something that was clearly lacking in the *Shilubana* judgment.⁴³²

The Court's reliance on section 211(2) of the Constitution as the foundation for its development of customary law, was erroneous.⁴³³ The main purpose of section 211 of the Constitution is to recognise the institution, status and role of traditional leadership and the applicability of customary law to traditional leadership.⁴³⁴ Although section 211(2) alludes to the dynamic nature of customary law, the development of African

⁴²⁹ *Id* para 86.

⁴³⁰ Ntlama N "Equality misplaced in the development of the customary law of succession: Lessons from *Shilubana v Nwamitwa* 2009 2 SA 66 (CC)" *Stellenbosch Law Review* 347-348.

⁴³¹ *Id* 348.

⁴³² *Ibid*.

⁴³³ Mailula D "Abdication of judicial responsibility, cultural self-determination and the development of customary law: Lessons from *Shilubana*" (2008) 23 *SA Publiekreg/Public Law* 221.

⁴³⁴ *Id* 222.

customary law is merely implied in these provisions, as express provision for the development of African customary law is made in other sections of the Constitution.⁴³⁵ In this regard, section 39(2) of the Constitution definitively provides for the development of customary law by a court, tribunal or forum in accordance with the spirit, purport and objects of the Constitution. The “obligation imposed on courts is therefore peremptory in character”.⁴³⁶

If we read section 39(2) contextually, it is clear that customary law can only be developed by particular institutions, namely the courts, tribunals and forums. Such institutions are “independent and impartial” and are bound by the Constitution and all other laws of South Africa”,⁴³⁷ and their principal function is to interpret the law and to apply such law in order to find a solution to disputes.⁴³⁸ Therefore, in terms of our law, customary law can only be developed during an adjudicative process, “which is amongst others, when a customary law principle is being interpreted. In other words, courts, tribunals and forums do not have a constitutional mandate to develop customary law as a mandate separate from their interpretive and adjudicative functions”.⁴³⁹ Neither the Royal family nor the Royal Council, is a judicial body. A traditional court might qualify as a judicial body and would thus have the authority to develop customary law as envisaged in section 39(2) of the Constitution. However, the issue in *Shilubana* was never adjudicated on by a traditional court, and thus, there was no development of the customary law by the relevant customary community within the context of section 39(2).⁴⁴⁰ One could therefore contend that in *Shilubana*, the Constitutional Court relinquished its obligation to develop customary law in accordance with the spirit, purport and objects of the Bill of Rights. Instead of interpreting the rule of male primogeniture as it applies to succession to traditional leadership and in the context on section 39(2), the Court merely accepted the development of customary law by the community as its legal and constitutional yardstick.⁴⁴¹ Proper interpretation of the courts

⁴³⁵ *Id* 222-223.

⁴³⁶ *Id* 224.

⁴³⁷ Section 165(2) of the Constitution provides that: “The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice”.

⁴³⁸ *Mailula op cit* 225.

⁴³⁹ *Id* 225-226.

⁴⁴⁰ *Id* 226.

⁴⁴¹ *Id* 226-227.

obligation in terms of section 39(2) of the Constitution would have resulted in the Court investigating the rule of male primogeniture in the context of succession to chieftaincy, then weighing it up against the values of the Constitution especially the value of equality and then finally engaging in a justification analysis in terms of section 36 of the Constitution.⁴⁴² However, no such procedure ever manifested itself in the Constitutional Court in *Shilubana*.

According to our Constitution, we have three legislative making bodies, namely national, provincial and local government. If we grant legislative powers to traditional leaders; we would be adding a fourth legislator to the dimension and that would be contrary to the powers afforded to the three constitutionally recognised levels of government. Secondly, if traditional leaders were assigned powers to create legislation, they might change other rules of customary law unnecessarily and unilaterally without even consulting the communities their laws would affect.⁴⁴³

In this regard, the Traditional Leadership and Governance Framework Act 41 of 2003 could have been of assistance.⁴⁴⁴ It is rather unfortunate that none of the three courts mentioned the relevant Act. Section 2(3) of the Traditional Leadership and Governance Framework Act 41 of 2003 provides that:

A traditional community must transform and adapt customary law and customs 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 *Shilubana* decision has also been criticised for not making reference to the available literature on the topic of traditional leadership and for failing to adequately

⁴⁴² *Id* 228-230.

⁴⁴³ Bekker JC and Boonzaaier CC “Succession of women to traditional leadership: Is the judgment in *Shilubana v Nwamitwa* based on sound legal principles?” (2009) *Comparative and International Law Journal of Southern Africa* 460.

⁴⁴⁴ Mireku O “Customary law and the promotion of gender equality: An appraisal of the *Shilubana* decision” (2010) *African Human Rights Law Journal* 518.

investigate the rules or practices of customary law in that regard.⁴⁴⁵ According to Bekker and Boonzaaier,⁴⁴⁶ no customary law rule permits a royal family to unilaterally make law. If a traditional council changes an existing law or practice, such a change must be referred to a community gathering or *pitso* for endorsement.⁴⁴⁷ From the facts of the *Shilubana* case it does not appear that such community confirmation occurred.

The *Shilubana* judgment has been applauded for being revolutionary, creative and transformative and has been hailed as a decision that commemorates gender equality in disputes relating to succession to traditional leadership.⁴⁴⁸ It has also been commended for being “consistent with the grand transformative agenda of the Constitution, the equality jurisprudence progressively developed by the Constitutional Court since its inception as well as international law obligations in respect of women, that South Africa has undertaken after its transition from apartheid in 1994”.⁴⁴⁹ One academic also argues that one will likely see an improvement in the number of women appointed to the office of traditional leadership, as a result of the judgment, and that the approach adopted by the Court is success for the protection and realisation of women’s rights.⁴⁵⁰ The decision also considers the customary community and honours the ruling of a traditional authority especially when it is consistent with the spirit and purport of the Bill of Rights.⁴⁵¹ Both the criticisms and praises for the *Shilubana* judgment are noted. Although the decision leaves many unanswered questions like the future succession of the Valoyi tribe, and although the approach of the Court may be legally defective and erroneous, the researcher welcomes the decision (to an extent) as it is in keeping with sections 2⁴⁵² and 39(2) of the Constitution and ultimately brings a rule of customary law in line with the values and principles of the Constitution. The researcher also favours the judgment as it endorses (albeit not explicitly) the community nature of customary law and accepts that communities may develop existing rules of custom. If a community

⁴⁴⁵ Kerr AJ “The Constitution and customary law: Notes” (2009) *South African Law Journal* 41-42.

⁴⁴⁶ Bekker and Boonzaaier (2009) *op cit* 459.

⁴⁴⁷ *Ibid.*

⁴⁴⁸ Mireku *op cit* 522.

⁴⁴⁹ *Ibid.*

⁴⁵⁰ Mmusinyane B “The role of traditional authorities in developing customary laws in accordance with the Constitution: *Shilubana and Others v Nwamitwa* 2008 (9) BCLR 914 (CC)” (2009) *Potchefstroom Electronic Law Journal* 155.

⁴⁵¹ *Ibid.*

⁴⁵² Section 2 of the Constitution provides that: “the Constitution is the supreme law of the Republic and any law inconsistent with it will be invalid”.

(like the Valoyi) collectively welcome change and progression in a continuously evolving society; then who are we to judge.

From the decisions of the courts above, it is self-evident that the Constitutional Court is a forerunner in amending, developing and abolishing laws inconsistent with the provisions of the Constitution. In instances where the lower courts have tread cautiously regarding the customs of the indigenous African people of South Africa (like in the cases of *Mthembu*), the Constitutional Court has rigorously (like in the cases of *Bhe* and *Shilubana*) developed the existing rules of customary law thereby protecting the rights of the most vulnerable members of our society, ie, women and children, and thus ensuring that the “systematic discrimination of Black people (especially women and children) in all aspects of social life”⁴⁵³ is slowly being eradicated.

The Black Administration Act and the regulations promulgated there-under have also been severely criticised for being racist, outdated and discriminatory. As a result thereof, both these pieces of legislation have also been at the forefront of South Africa’s judicial debate. In the following section, the researcher will discuss how the courts have dealt with the choice of law rules governing the customary law of intestate succession in South Africa’s constitutional democracy.

3.6.2 The choice of law rules

3.6.2.1 *Zondi v The President of the Republic of South Africa and Others*⁴⁵⁴

The facts of the case were as follows: On 24 July 1953, Simon Mfana Ngidi and Beauty Ngidi concluded a marriage out of community of property and of profit and loss in terms of section 22(6)⁴⁵⁵ of the Black Administration Act. No children were born to them during the subsistence of their marriage. Beauty Ngidi died in October 1992 and Simon Ngidi

⁴⁵³ *Brink v Kitshoff No* 1996 (4) SA 197 (CC) para 40.

⁴⁵⁴ 2000 (2) SA 49 (N).

⁴⁵⁵ Section 22(6) has subsequently been repealed but it nevertheless gave a black person the choice to enter into one of three types of marriage viz marriage by ante-nuptial contract, marriage in community of property or marriage out of community of property.

(the deceased) died on 24 June 1995. According to the evidence presented to the court, the deceased was not a partner to another customary union at the time of his demise. He did however father two illegitimate children. At the time of his death it was agreed that his estate had to be administered in terms of regulation 2 of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks.⁴⁵⁶ Regulation 2 contained different rules of succession applicable to different marriages.

The fact that the deceased's estate had to be administered in terms of Black law and custom, meant that the deceased's brother, Muntu Frederick Ngidi (the fourth respondent) was the only male person eligible to inherit the intestate estate. This was in accordance with the rule of male primogeniture. The deceased's illegitimate children were excluded from the line of inheritance because customary law disqualified children born out of wedlock from inheriting property. As a result of this obviously unjustifiable situation, the applicant (one of the illegitimate female children of the deceased), sought an order declaring regulation 2 to be unconstitutional.

The court first identified that the Black Administration Act regulated the marriage of Africans and distinguished between marriages concluded in terms of an antenuptial contract according to the law of the land, marriages solemnised in community of property and traditional customary union marriages. The Black Administration Act and the Regulations promulgated there-under also regulated intestate succession. In cases where a marriage was concluded out of community of property, intestate succession would proceed according to the rules found in the Black Administration Act and the regulations promulgated there-under. However, the regulations provided that where a marriage was concluded in community of property, intestate succession was regulated according to the rules applicable in the Intestate Succession Act. In this regard section 1(2) of that Intestate Succession Act provided that:

notwithstanding the provisions of any law or the common law, but subject to the provisions of this Act and section 5(2) of the Children's Status Act 82 of 1987, illegitimacy shall not affect the capacity of one blood relation to inherit the intestate estate of another blood relation.

⁴⁵⁶ Contained in Government Notice R200 of 1987 GG 10601 of 6 February 1987.

From the above it is poignantly clear that the Intestate Succession Act makes no distinction between a child born out of wedlock and a child born in wedlock for purposes of intestate succession.⁴⁵⁷ The court noted that the drafters of the regulations distinguished between the different forms of marriage for purposes of intestate succession, to ensure that if a male person had contracted a customary union, his property would be distributed according to customary law.⁴⁵⁸ The court stated that customary law is recognised in our Constitution and that African customary law has its own inherent family support systems. In this regard, children born out of wedlock would therefore be maintained and supported by their maternal family and would not be allowed any maintenance and support from the paternal side.⁴⁵⁹ The court further pointed out that the fact that the deceased contracted a marriage out of community of property is evidence that he did not want his property to be distributed according to customary law.⁴⁶⁰

The court pointed out that the distinction between the different types of marriages and the way in which that distinction affected an individual's vested right to inherit, had the effect of differentiating between classifications of illegitimate children. The court established that both legitimate and illegitimate children were capable of inheriting from the intestate estates of their natural fathers, under the Intestate Succession Act; irrespective of the type of marital regime governing the marriage.⁴⁶¹ The court also stated that it was indeed possible for both legitimate and illegitimate children of a deceased African person to be eligible for inheritance in cases where the deceased was either married in community of property or by way of an ante-nuptial contract. On the other hand though, the illegitimate children of a deceased African married out of community of property did not qualify for inheritance at all, and that amounted to unfair discrimination.⁴⁶²

The court then turned to consider the constitutionality of the regulations promulgated under the Black Administration Act. In this regard, the court considered the supremacy

⁴⁵⁷ *Zondi op cit* para 52.

⁴⁵⁸ *Ibid.*

⁴⁵⁹ *Ibid.*

⁴⁶⁰ *Ibid.*

⁴⁶¹ *Id* para 52.

⁴⁶² *Id* para 53.

and equality clauses of the Constitution and concluded that the regulation in question violated the equality provisions of the Constitution.⁴⁶³

In order to advance the values enshrined in the Constitution, the court held that the regulation be struck down,⁴⁶⁴ thereby conferring equal rights of succession to all children born out of wedlock. The court commented that its decision and approach was in accordance with international law which provided that: “A child born out of wedlock shall have the same rights of succession in the estate of its father and its mother and of a member of its father’s or mother’s family as if it had been born in wedlock”.⁴⁶⁵

The *Zondi* decision was well received by the legal fraternity. The general consensus was that the distinction drawn by regulation 2 was undeniably discriminatory and warranted invalidity.⁴⁶⁶ However, the decision has also evoked considerable criticism. According to Mamashela and Freedman,⁴⁶⁷ the only disappointing omission of the judgment was that the court “did not indicate the precise grounds upon which it found the differentiation to be discriminatory and thus invalid”. In the opinion of the authors,⁴⁶⁸ the court failed to investigate the differentiation in terms of the equality test pronounced by the Constitutional Court in the case of *Harksen v Lane*.⁴⁶⁹

⁴⁶³ *Id* para 52-53.

⁴⁶⁴ “To the extent that it distinguished for the purpose of intestate succession between the estates of Black persons who were, at the time of their death or had been at some stage prior to their death, a partner in a marriage which in terms of section 22(6) of Act 38 of 1927 was not a marriage in community of property on the one hand and the estates of Black persons who, at the time of their death or at some stage prior to their death, had been a partner in a marriage under an ante-nuptial contract or a marriage in community of property on the other hand” (*Zondi op cit* para 54).

⁴⁶⁵ Article 9 of the European Convention on the Legal Status of Children Born Out of Wedlock (1975). See also *Zondi op cit* para 53-54.

⁴⁶⁶ Maithufi (2000) *op cit* 159-160.

⁴⁶⁷ Mamashela M and Freedman W “The internal conflict of laws and the intestate succession of Africans” (2003) *Tydskrif vir die Suid-Afrikaanse Reg* 205.

⁴⁶⁸ *Id* 205-206.

⁴⁶⁹ 1998 (1) SA 300 (CC). In terms of this test, a court has to engage in a three-stage enquiry in order to determine a violation of the equality clause.

- (a) Does the challenged law or conduct differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 9(1).
- (b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
 - (i) Firstly, does the differentiation amount to “discrimination”. If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics that have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
 - (ii) If the differentiation amounts to “discrimination”, does it amount to “unfair discrimination”? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness

When contrasting the scenarios in common law and customary law, the court erroneously presupposed the rigid application of the rule of primogeniture.⁴⁷⁰ If the court employed “living” customary law, it could have circumvented excluding Zondi from inheriting. In fact, “the development of the customary law in this case would have achieved the same result as the application of the common law”.⁴⁷¹

The decision in *Zondi* is also problematic because it assumes that the application of customary law is discriminatory because people are treated more satisfactorily under the common law than under customary law.⁴⁷² This argument intimates that discrimination is intrinsic in legal pluralism. In order to alleviate this problem, the court should have therefore contrasted children, who, under customary law, possess or do not possess rights to inherit instead of contrasting illegitimate children under the common law and under customary law.⁴⁷³

Another criticism leveled against the judgment is that the methodology employed by the judge in reaching his decision was substantially flawed. According to some academics,⁴⁷⁴ the case should have been decided on the basis of the provisions of the KwaZulu-Natal Codes of Zulu Law. In this regard, section 81(5) of the KwaZulu Act on the Code of Zulu Law⁴⁷⁵ and section 79(3) of the Natal Code of Zulu Law⁴⁷⁶ provide that:

Notwithstanding any provisions in any other law contained, the estate of a Black married by civil rites shall devolve according to the Succession Act, 1934 (Act 13 of 1934) as amended.

This meant that in cases where Blacks solemnised their marriages according to civil law or the tenets of Christianity, their intestate estates would devolve according to the Intestate Succession Act, regardless of the matrimonial property regime governing the

focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (*Harksen op cit* para 54).

⁴⁷⁰ Lehnert *op cit* 260.

⁴⁷¹ *Ibid.*

⁴⁷² *Ibid.*

⁴⁷³ *Ibid.*

⁴⁷⁴ Rautenbach (*et al*) (2002) *op cit* 120.

⁴⁷⁵ 16 of 1986.

⁴⁷⁶ Proc R151 of 1987.

marriage. It was therefore inessential for the court to investigate the constitutionality of regulation 2.⁴⁷⁷

Although the decision in *Zondi* was not without considerable shortcomings, it nevertheless sparked the beginning of a movement by especially the judiciary, to re-think and re-evaluate the choice of law rules regarding intestate succession. This movement continued to gain momentum in the cases that are going to be considered hereafter.

3.6.2.2 *Moseneke v The Master of the High Court*⁴⁷⁸

Sedise Samuel John Moseneke died intestate in October 1999. His estate comprised immovable property, motor vehicles, shares, unit trusts and insurance policies. He was survived by his widow and four sons (the applicants). Shortly after the deceased's death, the applicants sent a collection of documents pertaining to the administration of the deceased's estate to the Master. They were subsequently informed by the magistrate, that he was responsible for administering the estate. The reason for this was governed by section 23(7) of the Black Administration Act which provided that:

Letters of administration from the Master of the Supreme Court shall not be necessary in, nor shall the Master or any executor appointed by the Master have any powers in connection with, the administration and distribution of –
(a) the estate of any black who has died leaving no valid will.

Additionally, regulation 3(1)⁴⁷⁹ provided that:

All the [designated] property in any estate [of a black person who dies leaving no valid will]... shall be administered under the supervision of the magistrate in whose area of jurisdiction the deceased ordinarily resided and such magistrate shall give such directions in regard to the distribution thereof as shall seem to him fit and shall take all steps necessary to ensure that the provisions of the Act and of these regulations are complied with.

⁴⁷⁷ Freedman and Mamashela *op cit* 207.

⁴⁷⁸ 2001 (2) SA 18 (CC).

⁴⁷⁹ GN R200 of 1986.

In other words, these previously mentioned provisions prohibited the Master of the High Court from administering the estates of blacks who died intestate. It is important to note that the Master of the High Court did in fact have the power though to administer the testate estates of Blacks and the intestate estates of all Whites, Coloureds and Indians in South Africa. The applicants found this situation to be intolerable and commenced proceedings in the Transvaal High Court. They sought an order directing the Master to administer the estate and asked the court to affirm that his refusal to do so was illegal and unconstitutional.⁴⁸⁰ The Master of the High Court filed a report with the court to the effect that, in terms of the Black Administration Act, and the regulations promulgated there-under, his office did not have the requisite authority to administer the intestate estates of Blacks.⁴⁸¹ The family then lodged a supplementary affidavit in which they claimed that the Black Administration Act and its regulations were unconstitutional and invalid.⁴⁸² The High Court found section 23(7) of the Black Administration Act and regulation 3(1) to be unconstitutional and invalid.⁴⁸³ The Registrar of the High Court referred the matter to the Constitutional Court for confirmation of the order of the High Court in accordance with section 172(2)(a)⁴⁸⁴ of the Constitution.

The Master opposed confirmation of the High Court's order on the basis that his office was not tasked with the requisite manpower, monetary resources and infrastructure, to administer intestate Black estates. Both he and the Minister argued that the delegation of the administration of deceased estates to magistrates was labour-saving and cost effective.⁴⁸⁵ The Women's Legal Centre Trust joined the debate as *amicus curiae*⁴⁸⁶ and endorsed the nullification of the offending provisions as they discriminated directly and indirectly against African widows on the grounds of race, gender and culture.⁴⁸⁷

The Court began its judgment by giving a brief outline of South Africa's unpleasant

⁴⁸⁰ *Moseneke op cit* para 5.

⁴⁸¹ *Ibid.*

⁴⁸² *Id* para 6.

⁴⁸³ *Id* paras 9-10.

⁴⁸⁴ Section 172(2)(a) provides that: "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court".

⁴⁸⁵ *Moseneke op cit* paras 14-15.

⁴⁸⁶ *Id* para 17.

⁴⁸⁷ *Id* para 17.

racist history and its association with the offending Act.⁴⁸⁸ The Court expressed dissatisfaction with the plain fact that people were still being treated as “Blacks” instead of ordinary individuals and contended that such a state of affairs hindered the formation of a non-racial society.⁴⁸⁹ The Court averred that section 23(7) and regulation 3(1) both inflicted differential treatment on the grounds of race, ethnic origin and colour,⁴⁹⁰ and as such established discrimination which was presumably unfair in terms of section 9(5) of the Constitution and also infringed the right to human dignity in section 10.⁴⁹¹

The Court also found that the relevant provision in the Black Administration Act and the regulation are not reasonable and justifiable in an open and democratic society based on equality, freedom and dignity, as no society would condone a distinction of treatment based exclusively on skin colour.⁴⁹² The Court held section 23(7) of the Black Administration Act and regulation 3(1) to be inconsistent with the Constitution and invalid.⁴⁹³

The formulation of a just and equitable order however, posed an enormous challenge for the court. The Court acknowledged that the immediate and arrant nullification of section 23(7) and regulation 3(1) would generate operational difficulties.⁴⁹⁴ As a result thereof, they reached a compromise and ordered that: (a) settlements or arrangements already concluded under the relevant section and regulation should not be disrupted or altered; and (b) African families could opt to either have the estate of a deceased relative administered by the Master or the magistrate, in cases where a family member died intestate and their estate does not fall to be administered in terms of the rules of customary law. In order to give effect to (b), the court ruled that section 23(7)(a) was invalid with immediate effect, but postponed the invalidity of the relevant regulation for a period of two years thereby still making it possible for magistrates to administer the estates of blacks.⁴⁹⁵

⁴⁸⁸ *Id* para 20-21.

⁴⁸⁹ *Id* para 21 and para 22.

⁴⁹⁰ See section 9(3) of the Constitution.

⁴⁹¹ *Moseneke op cit* para 22.

⁴⁹² *Id* para 23.

⁴⁹³ *Id* para 24.

⁴⁹⁴ *Id* para 25.

⁴⁹⁵ *Id* para 27.

The recommended resolution expounded upon above was however rejected by counsel for the *amicus curiae*. In her opinion, the administration of intestate estates by magistrates and the continued existence of regulation 3 on our law books had a negative impact on widows and children. She duly noted that the Administration of Estates Act⁴⁹⁶ empowered women by allowing them to either appoint an executor or be nominated as an executor.⁴⁹⁷ She suggested that the declaration of invalidity of regulation 3(1) be suspended for a shorter period than the two years advocated by the Court.⁴⁹⁸ However, in the Court's assessment of the case, it felt that it did not have sufficient information to warrant an enquiry into the enigmatic issue raised by counsel for the *amicus*.⁴⁹⁹

It must be emphasised, that application of the decision in *Moseneke* was only restricted to estates that are distributed according to the common law and does not affect estates that are distributed according to African customary law.⁵⁰⁰ The judgment in *Moseneke* also did not have any impact on the other regulations (promulgated in terms of the Black Administration Act 38 of 1927) and pertaining to the powers and duties of magistrates to administer property that devolved according to customary law.⁵⁰¹ In other words, magistrates still had the authority to administer the estates of:

- (a) a deceased who was a partner to a customary marriage;
- (b) a deceased who had never contracted a marriage.⁵⁰²

In pursuance of the judgment in *Moseneke*, the legislature amended the Administration of Estates Act 66 of 1965 (as amended by the Administration of Estates Amendment

⁴⁹⁶ 66 of 1965.

⁴⁹⁷ Section 18(1) provides that the Master may convene a meeting with: "the surviving spouse ... the heirs of the deceased and all persons having claims against the estate ... for the purpose of recommending to the Master for appointment as executor or executors, a person or specified number of persons".

⁴⁹⁸ *Moseneke op cit* para 29.

⁴⁹⁹ *Id* para 30.

⁵⁰⁰ *Id* para 27.

⁵⁰¹ Rautenbach C "*Moseneke v The Master* 2001 2 SA 18 (CC): Racial discrimination laws and the interests of justice" (2003) *Potchefstroom Electronic Journal* 14.

⁵⁰² Bekker JC "The official status of customary law – ten years later" (2003) *Anthropology Southern Africa* 127. See also Rautenbach C "The administration of black estates: Life before and after 5 December 2002" (2004) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 227.

Act 47 of 2002) with the insertion of a section 2A⁵⁰³ which provided for the creation of “service points” throughout the country where authorised persons acting on behalf of and under the direction of the Master could assist the families of Blacks whose estates devolve according to the common law. With regards to this development, it is rather interesting that although the legislature is against discrimination on the grounds of race, it still finds it acceptable to discriminate on the ground of the applicable rules of succession,⁵⁰⁴ especially those pertaining to the continued authority of magistrates as explained above.

The Recognition of Customary Marriages Act,⁵⁰⁵ together with the cases of *Zondi* and *Bhe* have eliminated some of the problems associated with the choice of law rules. For example, one could assert that marriage has no rational connection to a deceased’s cultural affiliation therefore regulation 2(c) is no longer necessary.⁵⁰⁶ Secondly, the Recognition of Customary Marriages Act has eliminated the justification for the rules, since all monogamous customary marriages are now naturally in community of property unless the spouses concluded an antenuptial contract which makes provision for an alternative matrimonial property system.

⁵⁰³ Section 2A provides that:

- (1) The Minister may designate posts in, or additional to, the fixed establishment of the Department of Justice and Constitutional Development for the purpose of this section.
- (2) Persons appointed to, or acting in, posts which have been designated by the Minister, must exercise the powers and perform the duties delegated to them on behalf of, and under the direction of the Master.
- (3) The Minister may designate places within the area of jurisdiction of a Master as service points where the powers are exercised and the duties are performed on behalf of the Master in terms of subsection (2).
- (4) The Minister may delegate any power conferred on him or her in terms of this section to the Director-General: Justice and Constitutional Development or to a person in the Department holding the rank of a deputy-Director-General.

⁵⁰⁴ Bekker (2003) *op cit* 127.

⁵⁰⁵ 120 of 1998.

⁵⁰⁶ Knoetze *op cit* 142.

3.6.2.3 *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae; Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another*⁵⁰⁷

The case of *Bhe* is also relevant to the issue of the choice of law rules. However the case was discussed at length under section 3.5 of this thesis and will not be elaborated upon any further at this juncture. All that needs to be said is that in *Bhe*, the Constitutional Court took the debate concerning the administration of black estates one step further than *Moseneke* and declared the whole of section 23 of the Black Administration Act to be fundamentally unconstitutional, as from 15 October 2004.⁵⁰⁸

As a result of the orders made in *Bhe*, *Moseneke* and *Zondi*, the legislature was then tasked with the responsibility of enacting legislation developing the customary law of intestate succession in order to give effect to the rulings of the various courts. In the next section of this chapter, we consider the legislative inroads made in the area of the customary law of intestate succession.

3.7 The role of the legislature in the development of the customary law of intestate succession

3.7.1 The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

3.7.1.1 Introduction and general provisions of the Act

Section 9(4) of the Constitution obliges government or Parliament to enact national legislation preventing or prohibiting unfair discrimination. In 2000, the legislature discharged the obligation imposed by this section and enacted the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (hereafter the Equality

⁵⁰⁷ 2005 (1) SA 580 (CC).

⁵⁰⁸ *Bhe* (2005) *op cit* paras 130, 132 and 136.

Act). The Equality Act also complies with South Africa's obligations under international law with particular reference to the International Convention on the Elimination of All Forms of Racial Discrimination⁵⁰⁹ and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).⁵¹⁰

The Act applies both horizontally and vertically as it "binds the State and all persons".⁵¹¹ Any person acting in their own interest; any person acting on behalf of another person who cannot act in their own name; any person acting as a member of, or in the interest of, a group or class of persons; any person acting in the public interest; any association acting in the interest of its members and the South African Human Rights Commission, or the Commission on Gender Equality may institute proceedings in terms of or under the Act.⁵¹² The Act establishes Equality Courts whose sole jurisdiction involves the hearing of complaints instituted under the Act.⁵¹³ In terms of the Act, every magistrate's court and every High court is regarded as an equality court for the area of its jurisdiction⁵¹⁴ and the Human Rights Commission (HRC) and the Commission on Gender Equality (CGE) is recognised as "alternative forums".

3.7.1.2 Specific provisions relating to the customary law of succession

For purposes of this chapter, only the sections relating to or affecting the customary law of intestate succession will be discussed. In this regard section 6 is of particular importance as it prohibits the State and any other person from unfairly discriminating against any person. The Act defines discrimination as:

Any act or omission, including a policy, law, rule, practice, condition 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.⁵¹⁵

⁵⁰⁹ Adopted in 1965 and came into operation in 1969.

⁵¹⁰ Adopted in 1979 and came into operation in 1981.

⁵¹¹ Section 5.

⁵¹² Section 20.

⁵¹³ Section 19.

⁵¹⁴ Section 16(1).

⁵¹⁵ Section 1.

The Act sets out the meaning of unfair discrimination and lists the factors to take into account in determining fairness or unfairness,⁵¹⁶ since discrimination is only unlawful if it is unfair. In addition to the general prohibition against discrimination in section 6, the Act makes provision for the prohibition of discrimination on specified listed grounds which include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.⁵¹⁷ This list is not exhaustive as the Act also sets out “additional criteria for determining whether an unlisted ground is a prohibited ground”.⁵¹⁸ Although the seventeen listed grounds are important, the Act takes special cognisance of three grounds: race, gender and disability. Of these three grounds, gender has the most significant impact on customary succession laws and it is this particular ground that I now focus on.

Section 8 of the Act provides that:

Subject to section 6, no person may unfairly discriminate against any person on the ground of gender, including –

- (a) gender-based violence;
- (b) female genital mutilation;
- (c) the system of preventing women from inheriting family property;
- (d) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child;
- (e) any policy or conduct that unfairly limits access of women to land rights, finance, and any other resources;
- (f) discrimination on the ground of pregnancy;
- (g) limiting women’s access to social services or benefits, such as health, education and social security;
- (h) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons;

⁵¹⁶ See section 14(1)-(3).

⁵¹⁷ Section 1(1)(xxii)(a).

⁵¹⁸ Albertyn C, Goldblatt B and Roederer C *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2001) 55. In this regard, section 1(1)(xxii)(b) provides that: any other ground where discrimination based on that other ground –

- (i) causes or perpetuates systemic disadvantage;
- (ii) undermines human dignity; or
- (iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a).

- (i) systemic inequality of access to opportunities by women as a result of the sexual division of labour.

Section 8(c), (d) and (e) endeavours to eliminate discrimination arising from cultural and religious laws and practices. The Act identifies that women experience discrimination in cultural and religious communities whereby men are granted certain rights and privileges to the exclusion of women. One such example is the customary law prohibition on the inheritance of property by women (the rule of primogeniture) and their inability to participate in traditional decision-making organisations in their social groups.⁵¹⁹ Such discrimination is grossly unfair and in need of eradication, which is what the Act purports to do.

The inequality and injustice experienced by the majority of South Africa's citizens is finally being eradicated by the enactment of legislation aimed at eliminating discrimination of any kind. The Act supplements section 9 of the Constitution and once again highlights Government's continued commitment to the promotion of the constitutional values of human dignity, equality and the advancement of human rights and freedoms.⁵²⁰ The Equality Act also seeks to alter existing "social relations in the country"⁵²¹ by obliging persons operating in the public domain to promote equality⁵²² and the social commitment by all persons to promote equality.⁵²³

The Act is however not free from problems. Section 8(c) of the Equality Act seems to eradicate the whole system of the customary law succession, without considering the cultural consequences of such an extreme measure.⁵²⁴ In this regard, the Equality Act does not determine what will replace the system that it has appeared to eradicate. This situation creates a legal void, which will negatively affect the lives of millions of South Africans who follow customary law. A mere replacement of customary law with the common law will not suffice here, as common law cannot accommodate the needs or

⁵¹⁹ Albertyn (*et al*) *op cit* 63.

⁵²⁰ Section 1 of the 1996 Constitution.

⁵²¹ Pityana B "The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000" (2003) *Codicillus* 7.

⁵²² Section 26.

⁵²³ Section 27.

⁵²⁴ Pieterse M "The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Final nail in the customary law coffin" (1999) *South African Law Journal* 633.

realities or extended families.⁵²⁵ “Whereas the right to culture in the Constitution does not permit discriminatory practices to perpetuate, it at least, mandates that indigenous law not merely be replaced by common law without first considering more culture-tolerant options”.⁵²⁶ Furthermore, section 8(d) of the Act is phrased in very wide and evasive terms, and therefore has the potential for jeopardising the continued existence of a significant number of customs like *lobolo* and polygyny which are fundamental to African customary family law.⁵²⁷

The fact that the Equality Act establishes Equality Courts which must be easily accessible to the people and which must provide them with rapid justice, thereby improving the socio-economic rights of women in particular,⁵²⁸ might prove to be irrelevant for most people (especially women) living under African customary law, as disputes are usually and traditionally settled within the family group and not within the arena of a court of law.⁵²⁹

3.7.2 Repeal of the Black Administration Act and Amendment of Certain Laws Act⁵³⁰

A declaration of invalidity by the court in *Bhe* did not mean that the Black Administration Act together with its regulations was immediately expunged from South Africa’s law books. Only the legislature has the power to change, amend or repeal legislation. In 2005, after considerable debate and strong opposition,⁵³¹ the legislature promulgated the Repeal of the Black Administration Act and Amendment of Certain Laws Act (hereafter referred to as “the Act”).⁵³² A discussion of the provisions of this Act forms the basis of this section of the chapter.

⁵²⁵ *Ibid.*

⁵²⁶ *Ibid.*

⁵²⁷ *Id* 633-635.

⁵²⁸ Liebenberg S and O’Sullivan M “South Africa’s new equality legislation a tool for advancing women’s socio-economic equality” (2001) *Acta Juridica* 103. See also Pityana *op cit* 8.

⁵²⁹ Myburgh AC *Indigenous public law in KwaNdebele* (1985) 111.

⁵³⁰ 28 of 2005.

⁵³¹ Which mostly came from CONTRALESA (Congress of Traditional Leaders of South Africa). CONTRALESA was formed in 1987 and is “the sole and authentic representative of progressive traditional leadership in South Africa” (see <http://contralesa.org/html/about-us/index.htm> accessed 07/02/2012).

⁵³² 28 of 2005.

The preamble of the Act is important here as it gives us some insight into the additional reasons for the enactment of the Act. The preamble of the Act begins by stating that the Constitution is the supreme law of the Republic, and was adopted in order to – (a) create a society based on democratic values, social and economic justice, equality and fundamental human rights; (b) improve the quality of life of all citizens; and (c) free the potential of each person by every means possible.

The preamble recognises that the Black Administration Act must be repealed since it is regarded as a law that – (a) is repugnant to the values set out in the Constitution, particularly section 1 and the Bill of Rights in chapter 2 thereof; and (b) is reminiscent of past divisions and discrimination. Finally, the preamble concludes that for reasons of legal certainty and good governance, the Act could not be implemented fully, but rather incrementally; thereby allowing the legislature sufficient time to effect the necessary legislative alternatives.

Section 1(1) of the Act repeals various sections of the Black Administration Act, including sections 1,⁵³³ 2(1), (2), (3), (5), (6) and (9),⁵³⁴

⁵³³ Section 1 provided that:

The Governor-General shall be the supreme chief of all Natives in the Province of natal, Transvaal and Orange-Free State, and shall in any part of the said Provinces be vested with all such powers and authorities in respect of all Black persons as are, at the commencement of this Act, vested in him in respect of Natives in the Province of Natal.

⁵³⁴ Section 2(1) provided that:

The Governor-General may, subject to the law relating to the public service, appoint for any area an officer, to be styled chief native commissioner, who shall exercise such powers and perform such duties as the Minister may from time to time prescribe.

Section 2(2) provided that:

The Governor-General may, subject to the law relating to the public service, appoint for any area in which large numbers of Black persons reside a native commissioner and so many assistant native commissioners as he may deem necessary. Such officers shall perform such duties as may be required by any law or assigned to them by the Minister, and shall, within the area for which they are appointed, have the powers of justices of the peace.

Section 2(3) provided that:

Any person who at the commencement of this Act holds the position of native commissioner or sub-commissioner shall be eligible for appointment under sub-section (2). No person other than an officer in the public service who has since the 31st day of May, 1910, been on the fixed establishment of either the Department of Native Affairs or the Department of Justice shall thereafter be appointed to be a native commissioner or assistant native commissioner unless he has passed the civil service lower law examination or an examination determined by the Public Service Commission for the purposes of this section to be equivalent thereto.

Section 2(5) provided that:

Notwithstanding the provisions of sub-section 3, the Minister may, when circumstances require, appoint any person to act temporarily as a native commissioner or assistant native commissioner in the place of or in addition to the ordinary incumbent of the post.

Section 2(6) provided that:

The Minister may appoint superintendents to assist in the control and supervision of locations, and may prescribe duties.

3,⁵³⁵ 5(1)(a),⁵³⁶ 11(3)(a),⁵³⁷ 11A,⁵³⁸ 21A,⁵³⁹ 26(1),⁵⁴⁰ 27,⁵⁴¹ 31,⁵⁴² 33,⁵⁴³ 34⁵⁴⁴ and the

⁵³⁵ Section 3 provided that:

- (1) Subject to the provisions of this section, a Black person or tribe shall not be responsible for the personal obligations of its chief; nor shall a tribe or the ground occupied by a tribe be bound in any way whatsoever by any contract entered into or any liability incurred by a chief unless it has been approved by the Minister after having been adopted by a majority of the adult male members of the tribe present at a public meeting convened for the purpose of considering such contract or liability.
- (2) The written certificate of a native commissioner that the contract or liability referred to therein has been adopted in terms of sub-section (1) shall be conclusive evidence of that fact.

⁵³⁶ Section 5(1)(a) provided that: "The Governor-General may – define the boundaries of the area of any tribe or of a location, and from time to time alter the same, and may divide existing tribes into one or more parts or amalgamate tribes or parts of tribes into one tribe, or constitute a new tribe, as necessity or the good government of the Blacks may in his opinion require...".

⁵³⁷ Section 11(3)(a) provided that:

The capacity of a Black person to enter into any transaction, or to enforce or defend his rights in any court of law shall, subject to any statutory provisions affecting any such capacity of a Black person, be determined as if he were a European; provided that:

- (a) if the existence or extent of any right held or alleged to be held by a Black person or of any obligation resting or alleged to be resting (whether codified, or uncodified) the capacity of the Black person concerned in relation to any matter affecting that right or obligation shall be determined according to the said Black law; ...

⁵³⁸ Section 11A provides that: "Notwithstanding any law affecting the status of contractual capacity of any person by virtue of Black law and custom, the capacity of a Black woman to perform any juristic act with regard to the acquisition by her of a right of leasehold or ownership under the Black Communities Development Act 4 of 1984 or the disposal of such right or the borrowing of money on security of such right or the performance of any other juristic act in connection with such right or to enforce or defend her rights in connection with such right in any court of law, shall be determined and any rights acquired by her shall vest in her and any obligation incurred by her shall be enforceable by or against her as if she were not subject to Black law and custom".

⁵³⁹ Section 21A provides that:

- (1) The Minister may, after consultation with any community council established under section 2(1) of the Community Councils Act, 1977 (Act no 125 of 1977) confer on a Black in respect of the area of such council or of such portion of such area as the Minister may determine, the same judicial power as in terms of sections 12 and 20 of this Act may be conferred on a Black chief or headman.
- (2) The appropriate provisions of the said sections 12 and 20 and any regulations made thereunder shall, subject to such exceptions and to such adaptations and modifications with reference to such regulations as the Minister may in general or in a particular case deem necessary and make known by notice in the *Gazette*, *mutatis mutandis* apply in connection with the judicial power conferred on any person in terms of subsection (1).

⁵⁴⁰ Section 26(1) provided that: "Every proclamation issued by the Governor-General under the authority of this Act shall be laid upon the Tables of both Houses of Parliament within fourteen days after its promulgation if Parliament is then in ordinary session, or if Parliament is not then in ordinary session within fourteen days after the commencement of its next ensuing ordinary session, and every such proclamation shall be in operation unless and until both Houses of Parliament have, by resolutions passed in the same session, requested the Governor-General to repeal such proclamation or to modify its operation, in which case such proclamation shall forthwith be repealed or modified as the case may be, by a further proclamation in the *Gazette*".

⁵⁴¹ Section 27 provided that:

- (1) The Governor-General may make regulations with reference to all or any of the following matters:–
 - (a) the exhibition of pictures of an undesirable character in any location or Black compound or in any urban location or Black village constituted under the Natives (Urban Areas) Act, 1923 (Act no 21 of 1923);
 - (b) the carrying of assegais, knives, kieres, sticks or other weapons or instruments by Blacks;
 - (c) the prohibition, control or regulation of gatherings or assemblies of Blacks;
 - (d) the observance by Blacks of decency; and
 - (e) generally for such other purposes as he may consider necessary for the protection, control, improvement and welfare of the Blacks, and in furtherance of peace, order and good government.
- (2) Any such regulation may be made applicable only in any particular areas or in respect only of particular classes of persons, and or in respect of different classes.

⁵⁴² Section 31 provided that:

- (1) In any case in which he may deem fit, the Governor-General may grant to any Black person a letter of exemption exempting the recipient from such laws, specially affecting Blacks, or so much of such laws as

Second Schedule of the Black Administration Act, 1927 (Act 38 of 1927). Sections 2(7),⁵⁴⁵ (7)bis, (7)ter and (8)⁵⁴⁶ of the Act were also repealed to the extent that they applied to the provinces of Gauteng, the Western Cape and the Northern Cape.⁵⁴⁷ The Act also repeals section 23(1), (2), (3), (5), (6), (7)(b), (8), (9), (10)(a), (b), (c), (e) and (f) and (11),⁵⁴⁸ ie, the sections specifically affecting the customary law of intestate succession.

Section 2(7), (7)bis, (7)ter and (8) were repealed on 31 July 2006 or on the date at which the provinces of KwaZulu-Natal, Free State, Mpumalanga, North West, Limpopo and the Eastern Cape repeal those sections that were allocated to them and enact correlating provincial legislation governing the issues dealt with in the afore-mentioned sections.⁵⁴⁹ Sections 12(1), (2), (3), (4) and (6); 20(1), (2), (3), (4), (5), (6) and (9); the Third Schedule of the Act; section 22(7) and (8) and section 24 are repealed on 31 July 2006 or on the date upon which national or provincial legislation (whichever one applies) is enacted to manage the matters dealt with in those sections.⁵⁵⁰

The Act has retroactive effect, as the repeal of any section of the Act does not alter or affect “any right which was acquired in terms of any section of the Black Administration Act, 1927”.⁵⁵¹ Section 2 of the Act amends numerous other Acts. For example, it

may be specified in such letter: Provided that no such exemption shall be granted under this section from any provision of law regulating the ownership or occupation of land, or imposing taxation or controlling the sale, supply or possession of intoxicating liquor.

- (2) Any such exemption may be made subject to any condition imposed by the Governor-General and specified in such letter.
- (3) Any letter of exemption issued under any law included in the Schedule to this Act shall be deemed to have been granted under sub-section (1).
- (4) Any letter of exemption granted under sub-section (10, or referred to in sub-section (3), may at any time be cancelled by the Governor-General without assigning any reason.

⁵⁴³ Section 33 provided that: “Notwithstanding anything in any other law contained, no stamp duty or fee shall be payable in respect of any declaration made under the provisions of this Act”.

⁵⁴⁴ Section 34 provided that: “The Governor-General may, by proclamation in the *Gazette*, apply *mutatis mutandis* the provisions of Chapter III of this Act or of any portion thereof to any area or piece of land in the district of Namaqualand in the Province of the Cape of Good Hope, which has been granted, set apart, reserved or made available for occupation by persons commonly described as Hottentots”.

⁵⁴⁵ Section 2(7) provided that: “The Governor-General may recognise or appoint any person as a chief or headman in charge of a tribe or of a location, and is hereby authorised to make regulations prescribing the duties, powers and privileges of such chiefs or headman. The Governor-General may depose any chief or headman so recognised or appointed”.

⁵⁴⁶ Schedule 2 contained a list of all the laws repealed by the Act.

⁵⁴⁷ Section 1(2).

⁵⁴⁸ These sections were discussed in detail above.

⁵⁴⁹ Section 1(2)(a) and (b).

⁵⁵⁰ Sections 2(3)(a) and (b); (4)(a) and (b) and (5)(a) and (b).

⁵⁵¹ Section 8(a).

amends section 4 of the Administration of Estates Act⁵⁵² by replacing subsection (2) with a provision that augments the jurisdictional powers of the Master in matters relating to property belonging to a minor, including property of a minor governed by the principles of customary law, or property belonging to a person under curatorship or to be placed under curatorship.⁵⁵³

3.7.3 Reform of Customary Law of Succession and Regulation of Related Matters Act⁵⁵⁴

The Reform of Customary Law of Succession and Regulation of Related Matters Act (hereafter referred to as “the Act”) was promulgated for the purpose of “transforming the customary law of succession by making provision for the devolution of certain property in terms of the law of intestate succession; to make clear certain matters relating to the law of succession and the law of property in relation to persons subject to customary law; and to adapt certain laws in that regard”.⁵⁵⁵

The preamble of the Act makes the following declarations: (a) “under the customary law of succession, a widow in a customary marriage whose husband dies intestate, does not enjoy sufficient protection and benefit; (b) children born out of wedlock, also do not enjoy satisfactory protection under customary law; (c) section 9(3) of the Constitution provides that everyone has the right to equal protection and benefit of the law; (d) due to a change in social circumstances, customary law no longer has the capacity to make suitable provision for the welfare of family members; and (e) the Constitutional Court has confirmed that the principle of male primogeniture, as applied in the customary law of succession, cannot be reconciled with the current notions of equality and human dignity as contained in the Bill of Rights”.⁵⁵⁶

The Act provides that the whole or partial estate of any person subject to the application

⁵⁵² 66 of 1965.

⁵⁵³ Subsection (2)(a) and (b).

⁵⁵⁴ 11 of 2009.

⁵⁵⁵ The long title of the Reform of the Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

⁵⁵⁶ The preamble of the Reform of the Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

of customary law and who dies intestate after the commencement of the Act must be administered according to the law of intestate succession as governed by the Intestate Succession Act.⁵⁵⁷ 58 When applying the Intestate Succession Act to such a case – (a) if the deceased referred to in section 2(1) of the Act, is survived by a spouse, as well as a successor, “the spouse must 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 Cabinet member responsible for the administration of justice by notice in the *Gazette*, whichever is the greater”;⁵⁵⁸ (b) if the deceased had entered into a union (in accordance with the tenets of customary law) with another women for the purpose of procreating children for his wife’s house, that women must be regarded as a descendant of the deceased , if she survives him;⁵⁵⁹ (c) “if the deceased was a women who was married to another woman under customary law for the purpose of providing children for the deceased’s house, that other woman must, if she survives the deceased, be regarded as a descendant of the deceased”.⁵⁶⁰

The Act then goes on to state how certain provisions in the Intestate Succession Act should be interpreted. For example, “any reference in section 1 of the Intestate Succession Act to a spouse who survived the deceased must be interpreted to include every spouse and every woman referred to in sections 2(2)(a)-(c) above”.⁵⁶¹ When interpreting section 1(1)(c) of the Intestate Succession Act, the following subparagraph must be regarded as having been added to that section: “where the intestate estate is not sufficient to provide each surviving spouse and woman referred to in paragraphs (a), (b) and (c) of section 2(2) of the Reform of Customary Law of Succession and Regulation of Related Matters Act, 2008, with the amount fixed by the Minister, the estate shall be divided equally between such spouses”.⁵⁶²

When determining a child’s portion for purposes of dividing the estate of a deceased in terms of the Intestate Succession Act, paragraph (f) of section 1(4) of that Act must be read as follows: “a child’s portion, in relation to the intestate estate of the deceased, shall be

⁵⁵⁷ 81 of 1987. Section 2(1).

⁵⁵⁸ Section 2(2)(a).

⁵⁵⁹ Section 2(2)(b).

⁵⁶⁰ Section 2(2)(c).

⁵⁶¹ Section 3(1).

⁵⁶² Section 3(2).

calculated by dividing the monetary value of the estate by a number equal to the number of children of the deceased who have either survived the deceased or have died before the deceased but are survived by their descendants, plus the number of spouses and women referred to in paragraphs (a), (b) and (c) of section 2(2) of the Reform of Customary Law of Succession and Regulation of Related Matters Act, 2008”.⁵⁶³

Section 4 of the Reform of Customary Law of Succession and Regulation of Related Matters Act, 2008, makes provision for the disposition of property allotted or accruing to women in customary marriages to be disposed of by means of a will. In this regard, the Act provides that: “property allotted or accruing to a woman or her house (ie, house property) under customary law by virtue of her customary marriage may be disposed of in terms of a will of such woman”.⁵⁶⁴ “Any reference in the will of a woman referred to in subsection (1) to her child or children and any reference in section 1 of the Intestate Succession Act to a descendant, in relation to such a woman, must be interpreted as including any child – (a) born of a union between the husband of such a woman and another woman entered into in accordance with customary law for the purpose of providing children for the first-mentioned woman’s house; or (b) born to a woman to whom the first-mentioned woman was married under customary law for the purpose of providing children for the first-mentioned woman’s house”.⁵⁶⁵ Section 4 does not prevent any person subject to customary law; other than the woman referred to in subsection (1), from disposing of their assets by means of a will.⁵⁶⁶

If any dispute or uncertainty arises pertaining to “(a) the status of or any claim by any person in relation to a person whose estate or part thereof must, in terms of the Reform of Customary Law of Succession and Regulation of Related Matters Act, 2008, devolve in terms of the Intestate Succession Act; (b) the nature or content of any asset in such estate; or (c) the devolution of family property involved in such estate, the Master of the High Court having jurisdiction under the Administration of Estates Act, 1965,⁵⁶⁷ may, subject to subsection (2), make such a determination as may be just and equitable in

⁵⁶³ Section 3(3).

⁵⁶⁴ Section 4(1).

⁵⁶⁵ Section 4(2).

⁵⁶⁶ Section 4(3).

⁵⁶⁷ 66 of 1965.

order to resolve the dispute or remove the uncertainty”.⁵⁶⁸ Before making a decision under subsection (1), the Master of the High Court may direct an inquiry into the matter, to be conducted by a magistrate or a traditional leader in the area in which the Master has jurisdiction.⁵⁶⁹ After the inquiry, the magistrate or traditional leader must make a recommendation to the relevant Master.⁵⁷⁰ When making a determination or a recommendation, the respective Master and/or magistrate or traditional leader must take into consideration the best interests of the deceased’s family members and the equality of spouses in customary and civil marriages.⁵⁷¹ Section 5(5) of the Reform of Customary Law of Succession and Regulation of Related Matters Act, 2008 empowers the Cabinet member responsible for the administration of justice to make regulations regarding any aspect of the inquiry referred to above.

The customary law regulating the disposal of the property of a deceased traditional leader and which was held in his or her official capacity on behalf of a traditional community referred to in the Traditional Leadership and Governance Framework Act 41 of 2003 remains unchanged.⁵⁷² Marriages concluded on or after 1 January 1929,⁵⁷³ but before 2 December 1988⁵⁷⁴ in terms of the Marriage Act,⁵⁷⁵ or civil marriages concluded during the subsistence of any customary marriage between the husband and any woman other than the spouse of the marriage under the Marriage Act; have no effect on the proprietary rights of any spouse of a customary marriage or any issue thereof.⁵⁷⁶ “The widow of the marriage under the Marriage Act, and the issue thereof have no greater rights in respect of the estate of the deceased spouse than she or they would have had if the marriage under the Marriage Act, had been a customary marriage”.⁵⁷⁷

In conclusion, it is important to note that the Reform of the Customary Law of Succession and Regulation of Related Matters Act does not have retroactive effect, is

⁵⁶⁸ Section 5(1).

⁵⁶⁹ Section 5(2).

⁵⁷⁰ Section 5(3).

⁵⁷¹ Section 5(4).

⁵⁷² Section 6.

⁵⁷³ That is the date of commencement of sections 22 and 23 of the Black Administration Act 38 of 1927.

⁵⁷⁴ That is the date of commencement of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988.

⁵⁷⁵ 25 of 1961.

⁵⁷⁶ Section 7(1).

⁵⁷⁷ Section 7(2).

limited in application to intestate customary estates alone, and essentially substitutes the customary law with the Intestate Succession Act, ie, the common law.⁵⁷⁸ It also introduces unfamiliar concepts to the existing body of African customary law like freedom of testation which may create problems of implementation in the future. For example, in African customary law, the eldest son is obliged to support his family (from the inheritance he receives) on the death of his father. If a deceased bequeaths his property in terms of a will, to someone other than the oldest male, that would seriously frustrate the successor's concomitant duty to support his family. Such situations have not been sufficiently addressed by the legislature and it might be that that is why the legislation still remains inoperational.

3.8 Conclusion

In the past in South Africa, customary law (which was the law of the majority of the South African population) received very little recognition. In fact, laws were generally created to meet the needs of "that section of the community whose traditions and way of life may be classified as Western and capitalist",⁵⁷⁹ ie, the minority. However, the inception of a Constitution, guaranteeing human rights to all South Africans irrespective of race or gender, has forced South Africa's judiciary and legislature to reconsider and re-evaluate the existing rules of customary law including the rules regulating intestate succession. In this regard, vast inroads have been made into the promotion of equal rights for both men and women for example, eradicating rules such as the rule of male primogeniture which has long prevented women from inheriting property. Racist and defunct legislation like the Black Administration Act have been repealed and new legislation has been put in place to regulate the customary law of intestate succession. As a result thereof, South Africa has not only emerged as a country where customary law is simply recognised; but it is also a country in which customary law is constantly evolving in order to accommodate the changing needs of the communities it regulates: or so it seems.⁵⁸⁰

⁵⁷⁸ Rautenbach C and Du Plessis W "Reform of the customary law of succession: Final nails in the customary law coffin" in Fenrich J, Galizzi P and Higgins T (eds) *The future of African customary law* (2011) 347.

⁵⁷⁹ Van Niekerk GJ "Legal pluralism" in Bekker JC, Labuschagne JMT and Vorster LP *Introduction to legal pluralism in South Africa Part 1 Customary law* (2002) 3.

⁵⁸⁰ See chapter 6 of this thesis.

3.9 Summary of chapter

Chapter 3 begins with a general overview of the historical development of the recognition of customary law in South Africa. The fact that the South African legal system makes provision for two different systems of succession: the common law (together with the statutes amending it) which is founded on Roman-Dutch law and various customary laws and how this affects the customary rules of intestate succession, is then considered. The impact of the adoption of both the interim and final Constitutions with their Bills of Rights, on the recognition and application of the customary law of intestate succession is also highlighted in this chapter. Attention is also given to the role of the South African Law Commission, the judiciary and the legislature in the development of the customary law of intestate succession so as to ensure that customary law is brought in line with the provisions of the Constitution.

CHAPTER 4

INTESTATE SUCCESSION IN GHANA

4.1 Introduction

Ghana is a country located in West Africa with a diverse religious¹ and ethnic population. It consists of numerous tribal communities including the Akan (who comprise most of the population of Ghana), the Ashantis, Fantis, Gas, Ewes, Ga-Dangmes and Gonjas to name but a few.² Like most other countries in Africa, Ghana was a former British colony. As a result thereof, various legal systems currently operate in Ghana, viz English law, African customary law and Islamic law. It must be noted however, that African customary law and Islamic law “do not subsist as independent entities in Ghanaian law”.³ This chapter examines some of the general principles and laws governing intestate succession and the historical development of customary law in Ghana. It also investigates the successfulness of innovative statutory enactments aimed at promoting the empowerment of women in the field of intestate succession.

4.2 Intestate succession under customary law

4.2.1 General principles

The law of intestate succession in Ghana has two sources: customary law and legislation governing succession. Intestate succession under Ghanaian customary law hinges on the concept of the family (referred to as *abusua*).⁴ Under customary law, the term “family” encompasses much more than the traditional Western concept of a nuclear family which is usually constituted by a husband, wife and their children.⁵ In Ghanaian customary law the “family” may be defined as:

¹ See Elom D “Religion in the public sphere: challenges and opportunities in Ghanaian lawmaking” (2005) *Brigham Young University Law Review* 629-658.

² Bankas EK “Problems of intestate succession and the conflict of laws in Ghana” (1992) *International Lawyer* 438.

³ Allott AN “Marriage and internal conflict of laws in Ghana” (1958) *Journal of African Law* 166.

⁴ Sarbah JM, Danquah JB and Ollennu NA “African legal tradition” (1987) *Journal of African Law* 47.

⁵ Kludze AKP *Modern law of succession in Ghana* (1988) 238.

a group of persons lineally descended from a common ancestor exclusively through males (in communities called patrilineal for this reason) or exclusively through females starting from the mother of such ancestor (in communities called matrilineal for this reason) and within which group succession to office and to property is based on this relationship.⁶

From the definition above we can deduce that Ghanaian customary law recognises two distinct types of family organisations namely, the patrilineal family and the matrilineal family. A person's right to succession is therefore dependent upon their tribal affiliation and the kind of family system common to or prevalent within the particular tribe.⁷ These important concepts and distinctions will become clearer in the sections that follow. At this point however, we need to consider some of the general principles affecting intestate succession.

In Ghanaian society, property is owned communally and not individually and it is for this reason that the successor of a Ghanaian is never an individual, but is his or her family.⁸ It is generally understood that because the family is responsible for the burial of the deceased, it is them who must succeed to the property of the deceased.⁹ This rule is confirmed by the Ga proverb which says *Moni fuo kpitiyelo le le enoo etokota* (he, who buries the leper, is entitled to the leper's sandals).¹⁰ The status of an individual is dependent upon his or her membership of the group.¹¹ The family is therefore viewed as the most important social group in society, since it determines a person's right to succeed to property and political position, but also regulates the family's entitlement to the use and possession of land.¹²

The most general rule of Ghanaian customary law is that when a person dies intestate, his or her self-acquired property becomes family property which must be administered

⁶ Bentsi-Enchill K *Ghana land law* (1964) 25.

⁷ Dowuona-Hammond C "Women and inheritance in Ghana" in *Women and law in West Africa: Situational analysis of some key issues affecting women* (1998) 135.

⁸ Ollenu NA "The changing law and law reform in Ghana" (1971) *Journal of African Law* 150.

⁹ Ollenu NA *The law of testate and intestate succession in Ghana* (1966) 69.

¹⁰ *Ibid.* See also *Vanderpuye v Botchway* (1951) WACA 164 at 168, where the Court stated that:
The family is the unit for the purpose of ownership of property. All the members have a joint interest in the family property which is indivisible.

¹¹ Sarbah (*et al*) (1987) *op cit* 47.

¹² Dowuona-Hammond (1998) *op cit* 134.

by the family in accordance with the conventions of customary law.¹³ In Ghana, the principles of primogeniture, although not strictly adhered to,¹⁴ and joint heirship (or coparcenary) applied to the customary law of succession.¹⁵ For example, where there were two males of equal status in a family, the eldest would be given preference as the rightful successor.¹⁶ Like the former rules of customary law in South Africa, a wife could not succeed to the intestate property of her deceased husband under Ghana's customary law.¹⁷ Unlike South Africa however, daughters were not prohibited from succeeding to the intestate property of their fathers. In fact, if a family was only constituted of daughters, all the daughters would succeed to the estate of the deceased as joint heirs.¹⁸ The rules of intestate succession prevented a person from electing or designating his own successor.¹⁹ In fact, if a person wished to dispose of his property to a specific family member/s, the only legal options available to him were to: (1) to make provision for a gift *inter vivos* to the particular individual;²⁰ (2) to execute a *donatio mortis causa* in favour of the person he wishes to appoint; (3) to draft a customary law will (*samansiw*)²¹ specifically outlining his wishes; or (4) to draw up a statutory will²² in

¹³ Freeman DA "Ghana: Legislation for today" (1988-1989) *Journal of Family Law* 159. See also Woodman G "The family as a corporation in Ghanaian law and Nigerian law" (1974) *African Law Studies* 7 and Kludze AKP "A century of changes in the law of succession" in Ekow Daniels WC and Woodman GR *Essays in Ghanaian law: Supreme Court Centenary Publication 1876-1976* (1976) 263. See also *Larkai v Amorkor* (1933) 1 WACA 323 at 329 where the Court stated that:

Now the presumption of law on the Gold Coast is that property held by an individual became family property on his death intestate, and that presumption can only be displaced by satisfactory evidence that during his lifetime he parted with the property by giving it to another.

See also *Kwakye v Tuba* [1961] GLR 535 at 538 where the Court stated that:

...upon the death of a person intestate...his self-acquired property becomes the property of his whole family, the immediate and extended, together.

¹⁴ See Rattray RS *Ashanti law and the Constitution* (1929) 3 and 85.

¹⁵ Bankas *op cit* 436.

¹⁶ *Ibid.*

¹⁷ Adinkrah KO "Ghana's Marriage Ordinance: An enquiry into a legal transplant for social change" (1980) *African Law Studies* 14.

¹⁸ Dowuona-Hammond (1998) *op cit* 132.

¹⁹ Kludze (1988) *op cit* 276.

²⁰ See *Asare v Kumoji* [2000] SCGLR 298 at 302 where the Court stated that for an *inter vivos* disposition to be lawful, the presentation of the gift must be made and acknowledged and accepted by the donee in the presence of witnesses. See also *Mahama Hausa v Baako Hausa* [1972] 2 GLR 469 at 474-475 where the Court stated the advantages of the rule:

This requirement serves many purposes, and solves many problems relating to gifts. In the first place, a proffered gift which the donee does not accept is thereby prevented from becoming a gift. Secondly, where no gift was intended by a putative donor, a purported acceptance in the presence of witnesses affords an opportunity for express denial of a donative intent. Thirdly, the requirement of acceptance in the presence of witnesses ensures publicity and makes the gift not only impossible or difficult to deny afterwards, but operates as a double check preventing the donor from making a gift of what is not his own, namely, family property, and preventing fraud.

²¹ Such wills must be drafted in accordance with the rules of customary law and where such wills are oral in nature, the courts must be convinced by the reliability of the evidence of the witnesses called to prove them (Ekow Daniels WC "The interaction of English law with customary law in West Africa"

favour of the nominated legatee.²³ The inability of a person to choose his own successor did not however prevent the individual from nominating a caretaker to manage his property.²⁴ The nominee could be any family member and need not necessarily be his successor or the family head. However, the nominee would definitely be male and would be entirely responsible for the property of the nominator.²⁵

Three types of property are identifiable under Ghanaian customary law namely family (or patriarchal) property, ancestral property including stool property and self-acquired (or private) property.²⁶ Family property refers to the property generated by the labour of two or more family members or property obtained by them during their lifetime. Immovable family property may only be sold with the approval of the senior members of the family²⁷ however movable property may be alienated by the head of the family. Stool or ancestral property simply refers to all property that is inherited. In this regard, where stool property comprised of land it could easily be transferred from one family to another however, stool property could never be transferred to aliens.²⁸ Self-acquired or private property referred to property acquired by an individual through his own personal labour.

Ghanaian customary law maintains that the family rightfully bears the responsibility of electing a suitable successor.²⁹ This rule is so strictly adhered to that even the courts decline to make declarations concerning the appointment of successors. A court may confirm the election of a successor by the family, but must refrain from appointing the suitable successor itself.³⁰ The rule empowering the family to elect the successor does not give them *carte blanche* to appoint anyone they feel. They must abide by the customary law principles and appoint the rightful successor unless there is proof of his

(1964) *International and Comparative Law Quarterly* 611).

²² In order to be valid, such wills must be in writing, must be signed by the testator, or by someone else in his presence and by his direction, a signature must appear at the end of the will, the signature must be attested to by two witnesses present at the same time, and the witness must also sign the will in the presence of the testator (Ekow Daniels (1964) *op cit* 610).

²³ Kludze (1988) *op cit* 276.

²⁴ *Id* 279.

²⁵ *Ibid*.

²⁶ Sarbah (*et al*) (1988) *op cit* 48.

²⁷ *Lintott v Solomon* (1888) Sar FCL 122 at 124.

²⁸ Sarbah (*et al*) (1988) *op cit* 48-49

²⁹ Allott AN *The Ashanti law of property* (1966) 180. See also *Serwah v Kesse* (1959) PCLLG (1st ed) 201 at 204.

³⁰ Kludze (1988) *op cit* 279.

or her inability to carry out the responsibility.³¹ This means that although succession is automatic it is not absolute;³² as the family is authorised to and may, in extraordinary circumstances and on just grounds elect to by-pass the person bearing the right of succession in favour of another family member.³³

When a family is called upon to elect a successor, they need to consider three important rules. These rules will now be discussed individually. Rule 1 compels the family to consider the principle of *seniores priores*³⁴ which requires the family to identify the most senior individuals eligible for succession first. The maxims illustrating this primary principle are: *Nuanom nsai a, wofase nni adi* which translated means “when one’s brothers are not exhausted the sister’s child does not inherit”,³⁵ and *Nniwa mma nsae a wofase nni adee* which means “except there are no mother’s sons (ie, brothers), no nephew inherits”.³⁶ In other words, the most senior generation of successors is preferred over all other suitable generations³⁷ and both men and women qualify for succession. This rule operates as follows:

When an individual dies in a matrilineal family, with the exception of the mother, the first group of persons that the family should look to, when appointing a successor, is the group of the same generation as the successor, ie, the group formed by his brothers and sisters. In cases where the deceased is not survived by any brothers or sisters or in instances where the siblings of the deceased are ineligible to succeed for good reasons, the next group of successors, ie, the nieces and nephews of the deceased’s sisters will be considered. If the deceased is not survived by any nieces or nephews,

³¹ *Krabah v Krakue* [1963] 2 GLR 122 at 145 where the minority judgment in this case expressed the following opinion:

since family rights are always enjoyed in lineal groups, the successor appointed, as I have already indicated, must come from the group entitled to the inheritance. Thus there is a limit on the exercise of the rights of the family in this respect.

³² See *Okoe v Ankrah* [1961] GLR 109 at 119, where the Court stated that: “another well established principle of our customary law of intestate succession is that succession is not as of right, that is, no person has an inherent right to succeed, succession is by appointment”.

³³ *Ollenu* (1971) *op cit* 150-151. See also *Poh v Konamba* (1957) 3 WALR 74 at 81, where the Court held that:

The right given to the family to elect or approve a person entitled to succeed cannot be exercised capriciously and contrary to customary law. A person who, by virtue of his relationship to the deceased, is entitled to succeed, cannot be passed over by the family unless he has disqualified himself.

³⁴ *Ollenu* (1966) *op cit* 98.

³⁵ *Ratray* (1929) *op cit* 40.

³⁶ Danquah JB *Akan Laws and Customs* (1928) 182.

³⁷ *Ollenu* (1966) *op cit* 99.

or in instances where the nephews or nieces of the deceased are ineligible to succeed for good reason, the next group of successors, ie, children of uterine nieces will be considered. The same rules of succession apply in a patrilineal family.³⁸

The second rule is also quite remarkable and distinct from other African countries like South Africa and Swaziland, as it moves away from the discriminating principle of primogeniture. According to this rule, when electing a suitable successor for a man, a male is favoured over a female and when choosing a successor for a woman, a female is favoured over a male.³⁹ The relevant maxim here is: *Oba di oba adie na obarima adie* which means “a woman inherits from a woman and a man from a man”.⁴⁰ The rule is complied with in order to necessitate expediency and interestingly, does not form part of customary law.⁴¹ It is also important to note that this rule is not absolute and that depending on the circumstances of the case, it is possible that a man may succeed a female and a female may succeed a male.⁴²

The third rule is rather complicated in that it provides that eligible persons of the deceased’s own generation are preferred over those of succeeding generations and prohibits senior members of the family from succeeding younger or junior persons in the family.⁴³ The rationale for this principle is that senior family members (including senior individuals in the same generation), may in fact occupy the position of family head, either by selection or by virtue of the fact that they are the eldest person in the family. This means that the oldest person would qualify for customary succession in the event of there being no official appointment of a successor and may therefore preside over the body responsible for the appointment of the successor, ie, the family council.⁴⁴ This rule may be explained diagrammatically as follows:

³⁸ *Ibid.*

³⁹ Kronenfeld DB *Fanti kinship and the analysis of kinship terminologies* (2009) 310.

⁴⁰ Ollenu (1966) *op cit* 100.

⁴¹ *Id* 159.

⁴² *Id* 158.

⁴³ Kronenfeld *op cit* 310.

⁴⁴ Ollenu (1966) *op cit* 101.

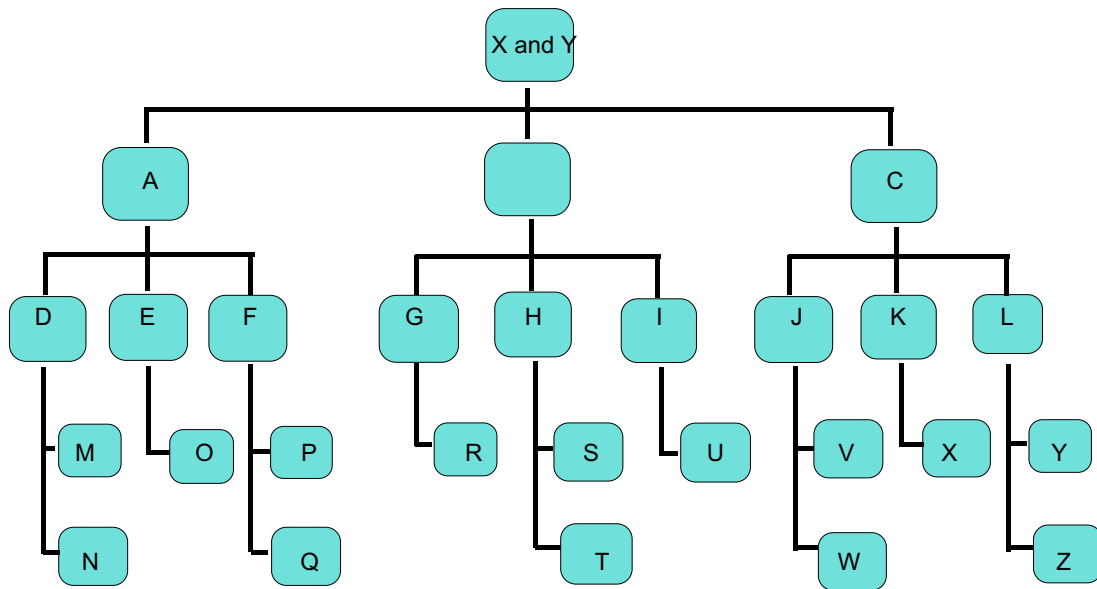


Figure 6: Ghanaian rules affecting the choice of a successor

The diagram above represents a matrilineal Ghanaian family, where left to right represents older to younger. A, B and C are the children of X and Y and therefore belong to the first generation of descendants of X and Y. A, B and C respectively had 3 children each namely, D, E and F, G, H and I and J, K and L. The children of A, B and C belong to the second generation of descendants of X and Y. The children of A, B and C also had children of their own namely, N, O, P, Q, R, S, T, U, V, W, X, Y and Z. The grandchildren of A, B and C belong to the third generation of descendants of X and Y. If H of the second generation dies, none of the persons in the first generation, ie, his mother Y, nor his uncles and aunts A, B and C can succeed him. His older sisters F and G and his older brothers D and E are also prohibited from succeeding H. However, his younger sisters and brothers, ie, I, J, K and L and all his nieces and nephews, ie, M, N, O, P, Q, R, S, T, U, V, W, X, Y and Z are all eligible to succeed H.

Rule 3 therefore rules out any conflicts of interest. The third rule does not however prevent an individual belonging to a younger generation and who is senior in age to the deceased of an older or previous generation; to be elected as a successor.⁴⁵ The principle underlying this rule is therefore: a person's eligibility for succession is not

⁴⁵ *Id* 103.

dependant on his or her age, but is rather dependant upon the generation to which he or she belongs.⁴⁶ It must be noted that the rules enunciated above are not rules of law, but are all general rules of practice.⁴⁷

4.2.2 Matrilineal and patrilineal succession

As stated earlier, Ghanaian customary law distinguishes between succession in a matrilineal family and succession in a patrilineal family.⁴⁸ In other words, different rules of succession exist for the succession to property of women and men in matrilineal societies and succession to the property of women and men in patrilineal societies. The next section of this chapter highlights the main features of these two systems of succession.

4.2.2.1 The matrilineal family

Some of the tribal communities of Ghana which are matrilineal include the Akan, Lobi, Tampolense and the Vagala or Baga.⁴⁹ The matrilineal family consists of all members of the family who are “lineally descended in a direct female line”⁵⁰ from a mutual female ancestor. In order to qualify for succession to and ownership of property in a matrilineal family, each individual family member must have received nourishment from the common blood in the mother’s uterus.⁵¹

⁴⁶ For further in this regard see Kronenfeld *op cit* 310-311.

⁴⁷ Ollennu (1966) *op cit* 103.

⁴⁸ Higgins T “A reflection on the uses and limits of western feminism in a global context” (2005) *Thomas Jefferson Law Review* 425.

⁴⁹ Dowuona-Hammond (1998) *op cit* 135.

⁵⁰ Kuenyehia A “Women and family law in Ghana: An appraisal of property rights of married women” (1986-89) *University of Ghana Law Journal* 72.

⁵¹ Ollennu NA *Principles of customary land law in Ghana* (1962) 141. Also see *Amarfio v Ayorkor* (1954) 14 WACA 554 at 556, where the Court had to determine who was eligible for succession to the intestate estate of a man named, Ayiku and whom belonged to the Ga-Mashi tribe. The court began its investigation by firstly determining “which family” the deceased belonged to during his lifetime. Because the deceased belonged to his mother’s family, the court concluded that his estate should be distributed according to matrilineal succession. In the case of *Mills v Addy* (1958) 3 WALR 357 at 362-363, the Court described a matrilineal family as:

In the matrilineal areas of Ghana every woman who, being married, has children, originates a family. The family so originated is a branch of the wider family to which the originator belongs. The self-acquired property of such an originator, dying intestate, becomes the family property of her family (although it may be subject to prior life interests in the mother and the collaterals of the deceased). upon the failure of her family and the sub-families created within it by her daughters or remoter female issue in the female line, this family property reverts to the wider family of which the originator was a member: thus, “once family property, always family property” – the fact that the

4.2.2.1.1 Succession to the property of a man in a matrilineal community

When a man died intestate in a matrilineal community his self-acquired property became family property and was divided in accordance with the tenets of customary law. This meant that the deceased's mother and her offspring were the only persons eligible to succeed.⁵² Thus the only persons that qualified for succession in this regard were: the deceased's mother, the brothers of the deceased according to their rank, nephews according to their rank and sisters, and daughters of the deceased's sisters. If the afore-mentioned groups were incapable of inheriting, then the deceased's property would fall to his maternal uncles by rank or selection, maternal aunts and maternal sister's children.⁵³ The general rule therefore precluded the deceased's wife and children from succeeding to or receiving any particular share of the deceased's estate because the constitution of the man's matrilineal family did not incorporate his wife and children.⁵⁴ In fact, women almost never owned property during their lifetimes,⁵⁵ even in cases where they acquired property with the assistance of their husbands, such property became the sole property of the husband.⁵⁶ The only rights enforceable by the surviving wife and children against the estate of the deceased were in respect of maintenance and accommodation in the matrimonial home.⁵⁷

members of a class entitled for the time being to the enjoyment of family property are reduced to one does not cause the property to lose its character as family property and become the absolute property of that person.

In *Ampamah v Budu* (1989-90) 2 GLR 291 at 299 where the Court stated that:

In a matrilineal society, however, the family is originated by a female, who is a member of her own mother's family by right of birth. Her children constitute her own or personal family, with her at the apex. Her male issues will not be able to originate their own branches of the successional family, since by custom their accretions or issues cannot be incorporated in her family as their personal family. The male members only continue to remain in their mother's personal family, "as the nearest successional family they can have".

⁵² Sarbah JM *Fanti customary laws: A brief introduction to the principles of the native laws and custom of the Fanti and Akan districts of the Gold Coast: With a report of some cases thereon decided in the law courts* (1968) 101-102.

⁵³ *Id* 102.

⁵⁴ Woodman GR "Ghana reforms the law of intestate succession" (1985) *Journal of African Law* 119. See also *In Re Antubam (dec'd): Quaicoe v Fosu and Anor* [1965] GLR 138 at 145, where the Court stated that:

The proposition that children are not considered members of the father's family is contrary to all biological principles, alien to well-known doctrines of all accredited religions and opposed to common sense. The logic of the customary rule is that because children are not considered members of the father's family, therefore they are completely excluded from any share of or right to his property. As I have already argued if the basis for this exclusion does not make sense then the exclusion itself cannot stand.

⁵⁵ Higgins (2005) *op cit* 428.

⁵⁶ Ollennu (1962) *op cit* 39-40. See also *Quartey v Martey and Another* [1959] GLR 377 at 380 where the Court stated that:

By customary law, it is the domestic responsibility of a man's wife and children to assist him in the carrying out of the duties of his station in life, eg, farming or business. The proceeds of this joint effort of a man and his wife and/or children and any property which the man acquires with such proceeds are by customary law the individual property of the man. It is not the joint property of the man and his wife and/or children.

⁵⁷ Rattray (1929) *op cit* 28.

This group of successors mentioned above, were obliged (under the principles of customary law) to share the entitlement to ownership and benefit of the estate with the dependants of the deceased, especially the children and widow or widows of the deceased for whom the successor is required to be accountable for.⁵⁸ This important obligation however was seldom upheld and often resulted in severe adversity for the living widow as she was now tasked with the responsibility of caring and providing for her children without the assistance of any financial or social resources she could have acquired from her deceased husband's estate.⁵⁹

4.2.2.1.2 Succession to the property of a woman in a matrilineal community

The general rule here is that the real successors of a woman's individually acquired property are her mother, her children and her maternal brothers and sisters.⁶⁰ Thus the only persons eligible for succession in this regard were: the intestate's mother, her sisters (by order of rank), her female children (by order of rank), her nieces (born of her sisters), her female grandchildren (born of her daughters), her sister's female grandchildren (born of her nieces), her maternal aunts and her female cousins (born of her maternal aunts). If the afore-mentioned groups were incapable of inheriting, then the deceased's property would fall to the male beneficiaries in the same order as given above.⁶¹ The deceased's mother ranks the highest in the order of succession.⁶² Possessions of a strictly feminine nature are characteristically given to women in the family circle.⁶³ When choosing a successor, the members of the immediate family take precedence over all other family members and if a successor cannot be found in that generation, then the family considers the next generation of successors and so the process goes on until a suitable successor is found.⁶⁴

⁵⁸ Dowuona-Hammond (1998) *op cit* 138.

⁵⁹ *Ibid.*

⁶⁰ Ollenu (1966) *op cit* 155.

⁶¹ Manoukian M *Akan and Ga-Adangbe peoples of the Gold Coast* (1950) 29.

⁶² Rattray (1929) *op cit* 39.

⁶³ Manoukian *op cit* 29.

⁶⁴ Ollenu (1966) *op cit* 157.

4.2.2.2 The patrilineal family⁶⁵

Some of the tribal communities of Ghana which are patrilineal include the Ewe, the Ga-Dangmes, the Guan and Kyerepong.⁶⁶ The patrilineal family consists of all members of the family who are “lineally descended in a direct male line”⁶⁷ from a mutual male ancestor. In this type of family, an individual’s affiliation to the group is determined by the “possession of a common spirit”⁶⁸ (called *Ntoro* among the Akan) which may be defined as:

the force, personal magnetism, character, personality, power or soul; we call it the common sacred germ or spirit which, it is believed, conceives the child and is the dominant influence which directs his or her course through life and upon which depend health, wealth, worldly power, possession, success in any venture, in fact, everything that makes life at all worth living.⁶⁹

It is believed that the *Ntoro* is possessed by all members lineally descended from a common male ancestor in the direct male line and that it is passed on by a man to each child borne of him.⁷⁰

4.2.2.2.1 Succession to the property of a man in a patrilineal community

When a man died intestate in a patrilineal community his self-acquired property also

⁶⁵ See *In Re Adum Stool; Agyei and Another v Fori and Others* [1998-99] SCGLR 191 at 199 and *Ampomah v Budu* [1989-90] 2 GLR 291 at 298-299 where the Court explained the patrilineal family as:

In the patrilineal community those who belong to a man’s family are his children (male and female), his paternal brothers and sisters, children of his paternal brothers, his paternal grandfather and the descendants of the paternal uncles in the direct male line. For example, if a person from a patrilineal community, A, has four children, two sons and two daughters, his family is constituted by all his sons, his two daughters (as his own or personal family of which he stands at the apex) and all descendants, male and female, of the two sons in the direct line of males, but the children of his female daughters are in my view outside that family, they customarily belong to their father’s family. When any of the two sons of A dies, it seems to me that the real successor is his father Mr A, Mr A’s brothers and sisters, the deceased’s other brother and sisters and his children (both male and female), if any. These constitute the deceased’s immediate family, and they together with the brothers and sisters of Mr , assisted by the family of the deceased’s mother, are responsible for the appointment of a successor to the deceased. Under normal circumstances, the first set of people to consider will be the deceased’s brother and sisters of the whole blood, but failing a suitable candidate from the group, the next set for consideration are the deceased’s own sons, then his paternal half-brothers, his paternal uncles, etc.

⁶⁶ Dowuona-Hammond (1998) *op cit* 135.

⁶⁷ Kuenyehia (1986-1989) *op cit* 72.

⁶⁸ Ollennu (1966) *op cit* 79.

⁶⁹ Rattray (1929) *op cit* 46.

⁷⁰ Ollennu (1962) *op cit* 141.

became family property and was divided in accordance with the rules of customary law. The general rule here once again excluded the deceased's wife, but included his children (irrespective of their gender) for succession to the estate of the deceased. Other persons eligible to succeed included the deceased's "paternal brothers and sisters, children of his paternal brothers, his paternal grandfather, paternal brothers and sisters of the grandfather and the descendants of the paternal uncles in the direct male line".⁷¹ When electing a successor in a patrilineal community it is common for a father or paternal uncle to rank higher and therefore take precedence over a paternal brother, sister, children and grandchildren of the deceased.⁷²

4.2.2.2 Succession to the property of a woman in a patrilineal community

The general rule here is that the father of the deceased woman is the rightful successor to her estate.⁷³ This does not disqualify the deceased woman's female relatives from being appointed as successors. Female relatives who do in fact qualify in this regard include "a sister of the whole blood, where one exists, failing which, a paternal half-sister or a paternal aunt".⁷⁴ The mother and children (regardless of their gender) of the deceased only acquire a "life interest" in the deceased's property.

As in the case of succession to the self acquired property of a woman in a matrilineal society, traditional female articles are awarded to other females in the family.⁷⁵ In the event of death of either the paternal sister or aunt, the children of the deceased may control the property as family property. This type of succession therefore displays elements of both matrilineal and patrilineal succession because both male and female children are equally entitled to benefit from the deceased's property. When electing a suitable successor, the immediate family of the primary female proprietor designates one of them to administer the property on behalf of all interested parties.⁷⁶

⁷¹ Ollennu (1966) *op cit* 171.

⁷² *Ibid.*

⁷³ *Id* 178.

⁷⁴ *Id* 179.

⁷⁵ *Ibid.*

⁷⁶ Ollennu (1966) *op cit* 179.

4.2.3 The rights and responsibilities of the successor at customary law

Like South African customary law, a successor in Ghanaian customary law generally assumes all the functions and duties of the deceased as he “steps into the shoes of the deceased”. However, it must be noted, that the manner in which the successor deals with the property of the deceased differs in matrilineal communities and in patrilineal communities. This section takes note of these differences and thereafter investigates the impact of the responsibilities of the successor on the lives of people in his or her particular social group.

4.2.3.1 The nature of the successor’s interest at customary law

In matrilineal communities the intestate successor only obtains a “life interest in the inherited property”.⁷⁷ This principle has been confirmed by many authors⁷⁸ on the subject and is consonant with the rule stating that the self-acquired property of the deceased becomes family property upon his death, intestate.

In patrilineal communities, the intestate successor acquires an “absolute interest” in the property left by the deceased.⁷⁹ This means that the successor or successors (whatever the case may be) may do with the property as they please and includes the right to alienate the inherited property.⁸⁰ This unique circumstance is contrary to the generally accepted rule concerning succession to the self-acquired property of a deceased. In other words, in patrilineal communities the self-acquired property of an intestate deceased could never become family property as this fact alone would prevent successors from alienating such property and that is obviously not the case here.⁸¹ There is however an exception to the “absolute interest rule” amongst patrilineal Ewe communities: in instances where an Ewe woman succeeds to her father’s intestate estate, she merely acquires a life interest in the said property as such property must

⁷⁷ Kludze (1988) *op cit* 292.

⁷⁸ See Bentsi-Enchill *op cit* 154 and Ollennu (1966) *op cit* 231.

⁷⁹ Kludze (1973) *op cit* 310.

⁸⁰ *Id* 293.

⁸¹ Kludze (1973) *op cit* 306-307.

remain in the control of the patrilineal family.⁸²

4.2.3.2 The successor's responsibilities to the children of the deceased

Ghanaian customary law provides that the surviving children of the deceased (even in a matrilineal community) have a right to inhabit and occupy the home of their deceased father⁸³ and they also have a right to be maintained from their father's estate.⁸⁴ The right to reside in the family home is however not without restriction, but is dependant upon the behavioural conduct of the children.⁸⁵ This means that if any child residing in the home disputes the entitlement of the rightful successor, or engages in unlawful conduct such as vandalising the property, selling it or restricting the sale of it; he loses his right to live in the paternal home.⁸⁶

Ghanaian customary law provides that the duty to maintain a child rests solely upon the father. His liability for maintenance generally exists from birth till puberty.⁸⁷ Since the successor steps into the shoes of the deceased he subsequently bears the responsibility of maintaining the children of the deceased.⁸⁸

4.2.3.3 The successor's responsibilities to the surviving spouse of the deceased

During his lifetime, a husband must ensure that his wife has a home to live in, is

⁸² *Ibid.* The rule was also confirmed in *Golo v Doh* [1966] GLR 447 at 448 where the Court held that: Children, sons and daughters inherit their fathers as of right but the daughters have only a life interest in the property descending to them from their father ... On the death of a daughter her father's property reverts to her father's family. A daughter cannot therefore make any absolute disposition of property inherited from her father.

⁸³ See *Boham v Marshall* (1892) Sar FCL 193 at 194 and *Barnes v Mayan* (1871) Sar FCL 180 at 181.

⁸⁴ Sarbah (1968) *op cit* 50.

⁸⁵ *Ibid.* See also *Amissah Abadoo v Abadoo* [1974] 1 GLR 110 at 131, where the Court expressed his dissatisfaction with the Akan customary law and rule that on the death intestate of a husband, the surviving widow and her children could only reside in his home during widowhood and subject to good behaviour.

⁸⁶ Sarbah (1968) *op cit* 90.

⁸⁷ Danquah (1928) *op cit* 188-189.

⁸⁸ This rule was confirmed in the case of *Manu v Kuma* (1963) 1 GLR 464 at 469 where the Court held that: The responsibility of a successor to maintain and train the child of his predecessor is a legal one, and the right enuring therefrom to the child is different in its nature from a right to succeed to or have a share in the estate of his deceased father... We say therefore that a successor under customary law is under an enforceable obligation not only to maintain but also to educate the children of his predecessor to the extent of the property of the deceased which has come to his possession and his dealings therewith.

maintained and that she receives adequate medical treatment when needed. His liability for maintenance continues, even if the spouse in question has the necessary skills and knowledge to support and maintain herself.⁸⁹ The husband's duty to maintain his wife is not unfettered and only extends to the provision of household necessities. He is subsequently not accountable for any contracts entered into by his spouse nor is he responsible for any liabilities she may have sustained and which extend beyond the scope of his provision of household necessities.⁹⁰ The husband's duty to maintain his wife falls on his successor at death.⁹¹

If the deceased had more than one surviving spouse or widow the rule of Ghanaian customary law states that he has a right to the widows and is obliged to marry them, as death does not dissolve the union.⁹² In Ghana, this practice is referred to as the levirate. Kludze⁹³ argues (and rightly so) that the previous mentioned principle disregards the framework of the family in patrilineal communities. In such communities it is a basic principle that children succeed their fathers; which would mean that they would succeed to their father's widows. The application of this rule in patrilineal communities is quite absurd, as it would mean that children would have to marry their own mothers. In the author's opinion, the preferred position in patrilineal communities is that a potential husband is sought for the wife or wives from the deceased's family.⁹⁴ The widow or widows may choose to accept or reject the proposal and the chosen male is also under no obligation to marry the widow or widows.⁹⁵ The rules of the levirate custom in Ghana⁹⁶ are similar to the rules explained in chapter 2 of this thesis, with one major difference however; the children born of the levirate under Ghanaian customary law belong to the successor and not to the deceased husband.⁹⁷

⁸⁹ Ollennu (1966) *op cit* 224.

⁹⁰ *Ibid.*

⁹¹ Kludze (1973) *op cit* 306.

⁹² Allott AN *Essays in African law* (1960) 234.

⁹³ Kludze (1988) *op cit* 297.

⁹⁴ *Ibid.*

⁹⁵ Kludze (1973) *op cit* 311.

⁹⁶ *Id* 310-313 and Sarbah (*et al*) (1988) *op cit* 50-51.

⁹⁷ Allott (1960) *op cit* 234.

4.2.3.4 The successor's liability for debts

Generally, every member of the family was responsible for the payment of family debts.⁹⁸ With regards to debts incurred by the intestate, Ghanaian customary law operates on the principle of universal succession. In other words, the successor acquires the deceased's property and the debts incurred by the deceased during his lifetime and which are still outstanding at the time of his death.⁹⁹ All creditors of the intestate must formally appear and declare the debts owing to them.¹⁰⁰ Generally, the debts owed by the deceased would be settled from the monetary resources in the estate itself, provided the estate was solvent.¹⁰¹ If there were insufficient funds available in the estate to discharge the liability,¹⁰² the successor would (if he could afford to) pay the debt from his personal financial resources. If he did not have the pecuniary means to extinguish the debts himself, he would seek assistance from the family who were obliged to assist him in this regard.¹⁰³ Corresponding to the successor's right to settle the liabilities of the deceased, is the right to exact and recover the debts owed to the deceased.¹⁰⁴

4.2.4 The family head in Ghanaian customary law

The family head (referred to as *penin* or *egya*) in Ghanaian customary law is distinguishable from the concept explained in chapter 2 of this thesis. The family head in Ghanaian customary law is not generally the successor but is usually a senior or other male kinsmen (usually the father of the family) who manages the family and is its spokesperson.¹⁰⁵ The family head is therefore the sole guardian of every family member and is the only person that has legal capacity, ie, he can sue and be sued.¹⁰⁶ A person may become a family head by official appointment, by popular commendation, or failing which, the oldest male member of the family becomes the family head or failing him, the oldest female member of the

⁹⁸ Ollennu (1962) *op cit* 143 and Kludze (1973) *op cit* 69.

⁹⁹ Kludze (1988) *op cit* 298.

¹⁰⁰ Ollennu (1966) *op cit* 216.

¹⁰¹ Kludze (1988) *op cit* 300.

¹⁰² *Id* 301.

¹⁰³ Danquah (1928) *op cit* 184.

¹⁰⁴ Ollennu (1966) *op cit* 232.

¹⁰⁵ Sarbah (1968) *op cit* 37.

¹⁰⁶ *Ibid*.

family becomes the head of the family.¹⁰⁷ A family head is usually elected by the older and more senior blood relatives¹⁰⁸ and may also be removed from office for misconduct.¹⁰⁹

Under Ghanaian law, the family head is a “caretaker, trustee or a manager of family property”¹¹⁰ and is immune from actions from younger members of the family for an account of the manner in which he has used family property; in this regard they can merely ask that he be removed from office.¹¹¹ However the family head is accountable to senior members of the family, at a family meeting, for an account of the way in which he has used the family property. If it is found that he has misappropriated or squandered the family property, he must be removed from office.

The family head’s accountability towards the family group for family property entrusted to his care has been codified in The Head of Family Accountability Law, 1985.¹¹² According to this very short law, “any head of family or any person who is in possession or control of, or has in his custody, any family property shall be accountable for such property to the family to which the property belongs”.¹¹³ Section 1(2) then provides that:

Every head of family or any person who is in possession or control of, or has in his custody, any family property shall cause to be taken and filed an inventory of all such family property.

In terms of section 2 of the Law, any member of the family may apply to court for an order to compel the family head to produce or file the inventory referred to in section 1(2), subject to the proviso that he has in fact made an attempt to resolve the matter within the family, and that such resolution was unsuccessful.

4.2.5 Disinheritance

Serious grounds must exist for the removal of a successor.¹¹⁴ A successor may be

¹⁰⁷ Ollenu (1962) *op cit* 145.

¹⁰⁸ Sarbah (*et al*) (1987) *op cit* 38.

¹⁰⁹ Bentsi-Enchill *op cit* 187. See also *Mould v Agoli* (1871) Sar FCL 202 at 203 and *Ankrah v Allotey* (1943) PCLLG (1st ed) 167 at 168.

¹¹⁰ Ekow Daniels WC “Recent reforms in Ghana’s family law” (1987) *Journal of African Law* 93.

¹¹¹ See *Fynn v Gardiner* (1953) 14 WACA 260 at 261.

¹¹² PNDCL 114.

¹¹³ Section 1(1).

¹¹⁴ Sarbah (*et al*) (1987) *op cit* 53.

disinherited for the following reasons: maladministration, squandering and wasting of the property in his charge, failure to discharge obligations to the dependents of the deceased.¹¹⁵ An act of disinheritance is complete when the person who is intended to be disinherited, is driven away.¹¹⁶

4.3 Legislation governing intestate succession in Ghana

4.3.1 Historical context

Prior to British occupation, the traditional communities of Ghana were governed exclusively by customary law.¹¹⁷ The customary law of the day was diverse as it varied from one tribal group to the next, but was voluntarily implemented and adhered to by both kings and their subjects.¹¹⁸ However, on 24 July 1874, the Gold Coast (Ghana) was proclaimed a British colony, with its own legislature and executive.¹¹⁹ The colonial legislature soon passed the Supreme Court Ordinance 4 of 1876 (hereafter referred to as “the Supreme Court Ordinance”) in an attempt to introduce English common law to Ghana. The effect of the Ordinance was the introduction of a dual legal framework in the country¹²⁰ that comprised of English common law¹²¹ and Ghanaian customary law. Section 19 of the Ordinance established the right of a citizen of Ghana to be governed by his or her own customary law by guaranteeing the right of the Supreme Court to adhere to and implement the observance of any law or custom in the colony. The Supreme Court Ordinance created a choice of law in that judges had to make a determination as to the system of law to apply, ie, either English law on the one hand or Ghanaian customary law on the other hand. In other words, judges had a choice of law when determining a particular case.¹²²

¹¹⁵ Ollennu (1971) *op cit* 152.

¹¹⁶ *Welbeck v Brown* (1876) Sar FCL 185 at 186.

¹¹⁷ Quashigah K “The historical development of the legal system of Ghana: An example of the coexistence of two systems of law” (2008) *Fundamina* 96.

¹¹⁸ Archer PENK “Codification of the law: Ghana’s experience” (1987) *Commonwealth Law Bulletin* 1044.

¹¹⁹ Akamba JB and Tufuor IK “The future of customary law in Ghana” in Fenrich J, Galizzi P and Higgins T (eds) *The future of African customary law* (2011) 204.

¹²⁰ Luckman Y “Law and the status of women in Ghana” (1976) *Columbia Human Rights Law Review* 73.

¹²¹ Section 14 of the Ordinance provided that: “The Common law, the doctrines of equity, and the statutes of general application which were in force in England at the date when the colony obtained a local legislature, that is to say, on the 24th day of July, 1874, shall be in force within the jurisdiction of the Court”.

¹²² Allott (1960) *op cit* 155.

The legal recognition of customary law “brought with it the question of ascertainment of its content”.¹²³ The Supreme Court Ordinance established complex rules for the terms and conditions according to which “native law and custom” should be adhered to and implemented by the court.¹²⁴ In terms of the Ordinance, “native law and custom” could only be applied and enforced by the courts if they were not “repugnant to natural justice, equity and good conscience”.¹²⁵ The application of Ghanaian customary law was therefore subject to a repugnancy clause. In order to be enforceable, customary law had to comply with the following criteria:

- (1) Evidence had to be provided that the law or custom was in existence in the relevant colony before the promulgation of the Supreme Court Ordinance.
- (2) The law or custom must not be repugnant to natural justice, equity and good conscience.
- (3) The law or custom must not be directly or implicitly irreconcilable with any other law in the country for the period of its enforcement.
- (4) The customs must not be contrary to public policy.¹²⁶

Furthermore, under the Supreme Court (Civil Procedure) Rules of 1954, customary law had to be ascertained as a question of fact by the proof or evidence of witnesses.¹²⁷ The courts also accepted commentaries in authoritative textbooks and sources, the views of native courts, the counsel of expert assessors and reports of referees as proof of customary law.¹²⁸

In 1883, the colonial legislature passed the Native Jurisdiction Ordinance 5 of 1883 which made provision for the establishment of native courts, which primarily adjudicated on matters of customary law and which would be presided over by chiefs and their

¹²³ Akamba and Tufuor *op cit* 208.

¹²⁴ *Ibid.*

¹²⁵ Section 19 of the Ordinance provided that: “Nothing in this Ordinance shall deprive the Courts of the right to observe and enforce the observance, or shall deprive any person of the benefit, of any native law or custom not being repugnant to natural justice, equity and good conscience”.

¹²⁶ Akamba and Tufuor *op cit* 208-209.

¹²⁷ Ollenu (1966) *op cit* 56. See also *Angu v Attah* (1916) PC '74-'28, 43 at 44.

¹²⁸ Woodman GR “Customary law, state courts, and the notion of institutionalization of norms in Ghana and Nigeria” in Allott AN and Woodman GR (eds) *Peoples law and state law: The Bellagio papers* (1985) 147. See also Woodman GR “Some realism about customary law – the West Africa experience” (1969) *Wisconsin Law Review* 131-133.

councillors. The native courts could hear both civil and certain criminal matters¹²⁹ subject to the restrictions placed on the value of the property involved.¹³⁰ Appeals arising from the native courts had to be heard by the Supreme Court. There were therefore two systems of courts in place in Ghana during colonialism: the first system comprised of the Privy Council, West African Court of Appeal, the Supreme Court of the Gold Coast and Magistrates' Courts which heard cases involving common law or British law, and the second system comprised of native courts, which presided over cases involving customary law alone.¹³¹ This established a type of internal conflict of law and gave the courts a choice when determining whether the normal courts (ie, those courts enforcing English law) or the native courts had jurisdiction in a particular case.¹³² This situation persisted until Ghana obtained independence.¹³³

On 6 March 1957, Ghana gained independence from Britain. In 1960, the legislature adopted its First Republican Constitution¹³⁴ and a new Courts Act (CA 9) 1960¹³⁵ (hereafter referred to as "the Courts Act, 1960") which altered the existing position of customary law dramatically. For example, section 67(1) of the Courts Act, 1960 made the ascertainment of any rule of customary law a question of law and no longer one of fact.¹³⁶ This situation has been retained in the current Courts Act 459 of 1993.¹³⁷ Any issues arising from the internal conflict of laws (ie, whether to apply customary law or English common law to an issue) were initially regulated by the Courts Act, 1960, but are now regulated by the choice of law rules found in section 54 of the current Courts Act 459 of 1993.¹³⁸ The Courts Act 459 of 1993 consolidated both the British and native judicial

¹²⁹ See section 10.

¹³⁰ See section 11.

¹³¹ Davies JA and Dagbanja DN "The role and future of customary tort law in Ghana: A cross-cultural perspective" (2009) *Arizona Journal of International and Comparative Law* 305-306.

¹³² Allott (1960) *op cit* 155.

¹³³ Quashigah *op cit* 104.

¹³⁴ Which became effective on 1 July 1960.

¹³⁵ Followed by the Courts Act 732 of 1971 and eventually the Courts Act 459 of 1993.

¹³⁶ Davies and Dagbanja *op cit* 306. See also *Ibrahim v Amalibini* (1978) GLR 368 at 397.

¹³⁷ Section 55(1) of the Act provides that: "Any question as to existence or content of a rule of customary law is a question of law for the court and not a question of fact".

¹³⁸ Section 54 provides that:

(1) Subject to this Act and any other enactment, a court when determining the law applicable to an issue arising out of any transaction or situation, shall be guided by the following rules in which references to the personal law of a person are references to the system of customary law to which he is subject or to the common law where he is not subject to any system of customary law:

Rule 1 An issue arising out of a transaction shall be determined according to the system of law intended by the parties to the transaction to govern the issue or the system of law which the parties may, from the nature or form of the transaction be taken to have intended to govern the issue.

systems into a single hierarchy of courts.¹³⁹ The court system on Ghana now only makes provision for a Supreme Court,¹⁴⁰ Courts of Appeal,¹⁴¹ High Courts,¹⁴² Regional Tribunals,¹⁴³ Circuit Courts,¹⁴⁴ District Courts¹⁴⁵ and Juvenile Courts.¹⁴⁶ All these courts have jurisdiction to preside over matters pertaining to customary law. Section 39(d) of the Courts Act 459 of 1993 however, restricts the jurisdiction of regular courts in matters affecting chieftaincy to traditional adjudicatory bodies, particularly the National House of Chiefs, Regional Houses of Chiefs, and Traditional Councils. Appeals arising from such tribunals however still vest in the Supreme Court of Ghana.¹⁴⁷ The legislation enacted to regulate courts in Ghana, significantly affected the customary law of intestate succession. It is these laws that the researcher will now consider.

4.3.2 Ghana's Courts Acts and their effect on intestate succession

As stated at the outset of this chapter it was stated that the Ghanaian legal system makes provision for a multiplicity of legal systems of intestate succession, ie, common law, English law, African customary law and Islamic law. This meant that when

Rule 2 In the absence of any intention to the contrary, the law applicable to any issue arising out of the devolution of a person's estate shall be the personal law of that person.

Rule 3 In the absence of any intention to the contrary, the law applicable to an issue as to title between persons who trace their claims from one person or group of persons or from different persons all having the same personal law, shall be the personal law of that person or those persons.

Rule 4 In applying Rules 2 and 3 to disputes relating to titles to land, due regard shall be had to any overriding provisions of the law of the place in which the land is situated.

Rule 5 Subject to Rules 1 to 4, the law applicable to any issue arising between two or more persons shall, where they are subject to the same personal law, be that law; and where they are not subject to the same personal law, the court shall apply the relevant rules of their different systems of personal law to achieve a result that conforms with natural justice, equity and good conscience.

Rule 6 In determining an issue to which the preceding Rules do not apply, the court shall apply such principles of the common law, or customary law, or both, as will do substantial justice between the parties, having regard to equity and good conscience.

Rule 7 Subject to any directions that the Supreme Court may give in exercise of its powers under article 132 of the Constitution, in the determination of any issue arising from the common law or customary law, the court may adopt, develop and apply such remedies from any system of law (whether Ghanaian or non-Ghanaian) as appear to the court to be efficacious and to meet the requirements of justice, equity and good conscience.

(2) Subject to this Act and any other enactment, the rules of law and evidence (including the rules of private international law) that have before the coming into force of this Act been applicable in proceedings in Ghana shall continue to apply, without prejudice to any development of the rules which may occur.

¹³⁹ Asante SKB "Over a hundred years of a national legal system in Ghana: A review and critique" (1987) *Journal of African Law* 70.

¹⁴⁰ See sections 1-9 of the Courts Act 459 of 1993.

¹⁴¹ *Id* sections 10-13.

¹⁴² *Id* sections 14-22.

¹⁴³ *Id* sections 23-27.

¹⁴⁴ *Id* sections 39-44.

¹⁴⁵ *Id* sections 45-51.

¹⁴⁶ *Id* sections 49-50.

¹⁴⁷ Article 131(4) of the Constitution of Ghana, 1992.

presented with a case, the courts had to determine (on a case-by-case basis) which of these legal systems to apply to a given set of facts.¹⁴⁸ Like South Africa, in cases where a Ghanaian died intestate, the law regulating the devolution of the estate was governed by choice of law rules. The choice of law rules governing the intestate succession of Ghanaian estates were originally embodied in the Courts Act, CA 9 of 1960 (hereafter referred to as “the Courts Act, 1960”) and thereafter the Courts Act 732 of 1971 (hereafter referred to as “the Courts Act, 1971”) and also to an extent in the Marriage Ordinance. In the sections that follow, the researcher considers the relevant provisions of both Courts Acts and the Marriage Ordinance as it affected the customary law of intestate succession and she also examines how the introduction of the Intestate Succession Law 1985 (PNDCL 111) (hereafter referred to as “the Intestate Succession Law”) affected the existing rules of the customary law of intestate succession in Ghana.

The Courts Act, 1960 repealed the former Supreme Court Ordinance. The choice of law rules governing the intestate succession of Ghanaian estates were embodied in Part III of the Courts Act, 1960 and provided that:

- (1) Subject to the provisions of any enactment other than this subsection, in deciding whether an issue arising in civil proceedings is to be determined according to the common law or customary law, and if the issue is to be determined according to customary law, in deciding which system of law is applicable, the court shall be guided by the following rules, in which references to the personal law of a person are references to the system of customary law to which he is subject or, if he is not shown to be subject to customary law, are references to the common law: –
 - Rule 1 Where two persons have the same personal law one of them cannot, by dealing in a manner regulated by some other law with property in which the other has a present or expectant interest, alter or affect that interest to an extent which would not in the circumstances be open to him under his personal law.
 - Rule 2 Subject to Rule 1, where an issue arises out of a transaction the parties to which have agreed, or may from the form or nature of the transaction be taken to have agreed that such an issue should be determined according to the common law or any system of customary law effect should be given to the agreement.
In this rule “transaction” includes a marriage and an agreement or arrangement to marry.
 - Rule 3 Subject to Rule 1, where an issue arises out of any unilateral disposition

¹⁴⁸ Allott (1958) *op cit* 164.

and it appears from the form or nature of the disposition or otherwise that the person effecting the disposition intended that such an issue should be determined according to the common law or any system of customary law effect should be given to the intention.

- Rule 4 Subject to the foregoing rules, where an issue relates to entitlement to land on the death of the owner or otherwise relates to title of land –
- (a) If all the parties to the proceedings who claim to be entitled to the land or a right relating thereto trace their claims from one person who is subject to customary law, the issue or from one family or other group of persons all subject to the same customary law, the issue should be determined according to that law;
 - (b) If the said parties trace their claims from different persons, or families or other groups of persons, who are all subject to the same customary law, the issue should be determined according to that law;
 - (c) In any other case, the issue should be determined according to the law of the place in which the land is situated.
- Rule 5 Subject to Rules 1 to 3, where an issue relates to the devolution of the property (other than land) of a person on his death it should be determined according to his personal law.
- Rule 6 Subject to the foregoing rules, an issue should be determined according to the common law unless the plaintiff is subject to any system of customary law and claims to have the issue determined according to that system, when it should be so determined.
- (2) Where under this section customary law is applicable in any proceedings but a relevant rule of customary law has been assimilated by the common law under any enactment such as is mentioned in section 18(1) of the Interpretations Act, 1960, that rule shall nevertheless apply in those proceedings, but in the form in which it has been assimilated.
 - (3) Notwithstanding anything contained in the foregoing provisions of this section, but subject to the provisions of any other enactment –
 - (a) the rules of the common law relating to private international law shall apply in any proceedings in which an issue concerning the application of law prevailing in any country outside Ghana is raised;
 - (b) the rules of estoppels and such other of the rules generally known as the common law and the rules generally known as the doctrines of equity as have heretofore been treated as applicable in all proceedings in Ghana shall continue to be so treated.¹⁴⁹

From the above provisions, it is obvious that the Courts Act attempted to regulate matters of succession more effectively by simplifying the law applicable to the process of distribution thereby making it easier for judges to determine cases of contestation brought

¹⁴⁹ Section 66.

before them. The Courts Act, 1960 however, failed to alleviate many of the burdens associated with the regulation of intestate succession. For example, the rules of the statute were unable to resolve inter-tribal conflicts of law.¹⁵⁰ For obvious reasons, Rules 1 and 3 of the statute will not be applicable in the afore-mentioned instance and will also be irrelevant to cases of dispositions *inter vivos*. Rules 4 and 5 of the Act did not provide any considerable assistance to the court when dealing with matters pertaining to the title to land. Rule 2 may provide some assistance as far as title to land is concerned however; it is phrased too widely and is ill defined. The fact that a court may apply common law unless the plaintiff is subject to any customary law in Rule 6 which makes provision for a court to apply common law unless the plaintiff is subject to customary law, provides the plaintiff with an unjustifiable advantage in almost each case of conflict.¹⁵¹ One of the general problems with these rules was that they gave the judge extensive (theoretical) leeway to adapt the customary law on the ground of repugnancy and therefore allowed the courts to formulate their own guidelines and procedures in the pursuit of justice.¹⁵²

The rules embodied in the Court's Act, 1960 places the common law on an elevated level to customary law. Prior to the enactment of the legislation there was a presumption in favour of the application of customary law in instances where the parties were "natives" or of "African descent". Under the Courts Act, 1960, "the initial presumption favours the application of the common law in many instances where previously a contrary presumption would have prevailed".¹⁵³ None of the six rules found in the Courts Act, 1960 forces the court (on its own enterprise) to investigate a foundation for applying customary law. The court must apply the common law, unless the affected person can substantiate the correctness of applying a personal law from the customary systems.¹⁵⁴

The Courts Act, 1960 was later amended by the Courts Act 732 of 1971. The choice of law rules governing the intestate succession of Ghanaian estates in the 1971 Courts Act are still embodied in Part III of the Act and provided that:

(1) Subject to the provisions of this Act and any other enactment, the Court when

¹⁵⁰ Bankas *op cit* 451. See also *Ghamson v Wobill* [1947] 12 WACA 181 at 181-182.

¹⁵¹ Bankas *op cit* 451

¹⁵² *Ibid.*

¹⁵³ Harvey WB "The evolution of Ghana law since independence" (1962) *Law and contemporary problems* 600.

¹⁵⁴ Harvey *op cit* 600.

determining the law applicable to an issue arising out of any transaction or situation, shall be guided by the following rules in which references to the personal law of a person are references to the system of customary law to which he is subject or to the common law where he is not subject to any system of customary law:

- Rule 1 An issue arising out of a transaction shall be determined according to the system of law intended by the parties to the transaction to govern the issue or the system of law which the parties may, from the nature or form of the transaction be taken to have intended to govern the issue.
 - Rule 2 In the absence of any intention to the contrary, the law applicable to any issue arising out of the devolution of a person's estate shall be the personal law of that person.
 - Rule 3 In the absence of any intention to the contrary the law applicable to an issue as to title between persons who trace their claims from one person or group of persons or from different persons all having the same personal law, shall be the personal law of that person or those persons.
 - Rule 4 In applying Rules 2 and 3 to disputes relating to titles to land due regard shall be had to any overriding provisions of the law of the place in which the land is situated.
 - Rule 5 Subject to the foregoing Rules, the law applicable to any issue arising between two or more persons shall, where they are subject to the same personal law, be that law; and where they are not subject to the same personal law, the Court shall apply the relevant rules of their different systems of personal law to achieve a result comfortable to natural justice, equity and good conscience.
 - Rule 6 In determining an issue to which the foregoing Rules do not apply, the Court shall apply such principles of the common law, or customary law, or both, as will do substantial justice between the parties, having regard to equity and good conscience.
 - Rule 7 Subject to any directions that the Supreme Court may give in exercise of its powers under article 107 of the Constitution, in the determination of any issue arising from the common law or customary law, the Court may adopt, develop and apply such remedies from any system of law (whether Ghanaian or non-Ghanaian) as appear to the Court to be efficacious and to meet the requirements of justice, equity and good conscience.
- (2) Subject to the provisions of this Act and any other enactment, such rules of law and evidence (including the rules of private international law) as have hitherto been applicable in proceedings in Ghana shall continue to apply, without prejudice to any development of such rules which may occur.¹⁵⁵

The choice of law rules embodied in the Courts Act, 1971 are a complete departure from the previous rules found in the Courts Act, 1960. Although the rules are similar in

¹⁵⁵ Section 49. The Courts Act, 1971 has further been amended by the Courts Act 459 of 1993, however, section 49 of the Courts Act, 1971 has not been altered substantially, but for a few minor changes in language.

structure and form to the 1960 rules, they differ in many respects. For example, the 1971 rules are constructed in much broader terms than the 1960 rules in that the 1960 rules aided the courts by allowing them to choose between either “common law or customary law”; whereas the 1971 rules aid the courts “when determining the law applicable”.¹⁵⁶ The new rules,¹⁵⁷ allow the parties to choose “any system of law” (and may apply to law within or outside Ghana) whereas the previous rule restricted the court to give effect to their choice of either the common law or any system of customary law.¹⁵⁸ The new Rule 1 is phrased wide enough to cover contracts, including the contract of marriage and Rule 2 has been clearly amended to incorporate succession on death.¹⁵⁹

However, although the new rules are admirable, they are not faultless. For example, Rule 2 of the Courts Act, 1971 is vague in the sense that the phrase “whose intention” is not defined or qualified and it is therefore unclear as to “whose intention” is relevant under the rule. The same criticism applies to Rule 3. In Rule 2 however, one would be willing to limit the intention to that of the person whose estate is for distribution; however such a restriction of intention is unclear under Rule 3.¹⁶⁰

Rule 4 is also phrased in imprecise terms as there is no clarity as to what “due regard” or “overriding provisions of the law of the place in which the land is situated” means. For example, does the phrase “law of the place in which the land is situated” refer to “the customary law of the place; or to that law as it has been modified or influenced by statute; or does it refer to that law incorporating its own indigenous internal conflict rules?”¹⁶¹

Rule 5 is problematic because it may still entice judges to disregard or manipulate the rules to conform to the case at hand; thereby promoting disorder and unfairness which was the *modus operandi* when the 1960 rules were in operation.¹⁶² Another difficulty with Rule 5 is that in a case involving more than two parties, some of the parties may practice the same personal law *inter se*, whilst the other parties may practice conflicting

¹⁵⁶ Allott AN “Courts Act, 1971” (1972) *Journal of African Law* 60.

¹⁵⁷ See Rule 1 of the Courts Act, 1971.

¹⁵⁸ See Rule 2 of the Courts Act, 1960. Allott (1972) *op cit* 61.

¹⁵⁹ Allott (1972) *op cit* 61.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² Allott (1972) *op cit* 62.

systems of personal law. In such cases, Rule 5 authorises the courts to hypothesise, intertwine and implement the “relevant rules” of the conflicting systems of personal law in order to “achieve a result comfortable to natural justice, equity and good conscience”. This will certainly pose to be a challenging task for judges, particularly when the germane rules of the conflicting systems express or display incompatible results or outcomes; which are by no means uncommon.¹⁶³ It is also unfortunate that the contentious concepts of natural justice, equity and good conscience have once again found their way into Ghana law,¹⁶⁴ years after having been substituted by the Courts Act, 1960.¹⁶⁵

Rule 7 is quite fascinating in that it gives one the distinct impression that the Ghana courts are empowered to adopt the legal system of any other country or countries even if that legal system does not form part of Ghana’s common law tradition.¹⁶⁶ This might have the effect that the court may impose a remedy on parties from any system of law, ie, Ghanaian or non Ghanaian which might be contrary to the actual law applicable to the parties involved.¹⁶⁷

In addition to the choice of law rules found in the Courts Acts, the type of marriage contracted also affected the customary law of intestate succession. In Ghana, parties could conclude customary marriages, ie, marriages in accordance with the rules and tenets of Ghanaian customary law or could opt to enter into so-called English common law type marriages in terms of the Marriage Ordinance Cap 127¹⁶⁸ (hereafter referred to as “the Marriage Ordinance”) or could conclude a marriage in terms of Islamic Law and which was regulated by the Marriage of Mohammedan Ordinance.¹⁶⁹ The Marriage Ordinance affected the customary law of intestate succession and it is this important piece of legislation that the researcher considers in the next section of this thesis.

¹⁶³ *Ibid.*

¹⁶⁴ See Rules 5, 6 and 7 of the Courts Act, 1971.

¹⁶⁵ Allott (1972) *op cit* 62.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Id* 63.

¹⁶⁸ 1951 edition of the Laws of the Gold Coast.

¹⁶⁹ Cap 129 (1951 Rev). For a further explanation of these types of marriages see Allott *op cit* 172-176.

4.3.3 The Marriage Ordinance¹⁷⁰

4.3.3.1 General

Until its repeal in 1985 by the Intestate Succession Law,¹⁷¹ the Marriage Ordinance allowed couples subject to customary law to conclude a monogamous marriage either by a civil or religious ceremony.¹⁷² This meant that where an Ordinance marriage was concluded, it gave an indication that the person choosing that type of marriage purposed that succession to his property will be regulated by English law and not customary law.¹⁷³ Of particular importance was section 48 of the Ordinance which impacted on succession to the intestate property of persons married in terms of the Ordinance and who were survived by a spouse and children born of such a marriage.¹⁷⁴ The relevant provision provided that:

Subject to the provisions of the succeeding sub-section, where any person who is subject to native law or custom contracts a marriage, whether within or without Ghana, in accordance with the provisions of this Ordinance or of any other enactment relating to marriage or has contracted a marriage prior to the passing of this Ordinance which marriage is validated hereby and such person died intestate on or after the 15th day of February, 1909, leaving a widow or husband or any issue of such marriage; And also where any person who is issue of any such marriage dies intestate on or after the said 15th day of February 1909, the personal property of such estate, and also any real property of which the said intestate might have disposed by will, shall be distributed or descend in the manner following, viz

Two thirds in accordance with the provisions of the law of England relating to the distribution of the personal estate of intestates in force on the 19th day of November, 1884, any native law or custom to the contrary notwithstanding; and one-third in accordance with the provisions of the native customary law which would have obtained if such person had not been married under this Ordinance.¹⁷⁵

This section amended the existing customary law by subjecting two-thirds of the intestate estate of a person married under the Ordinance, to the principles or rules of English law.¹⁷⁶ This meant that the remaining one third was distributed according to the

¹⁷⁰ Cap 127 (1951 edition of the Laws of the Gold Coast).

¹⁷¹ 1985 (PNDCL 111).

¹⁷² Dankwa E V O "Property rights of widows in their deceased husband's estate" (1982-85) *University of Ghana Law Journal* 14.

¹⁷³ Kludze (1976) *op cit* 247.

¹⁷⁴ Dankwa *op cit* 14.

¹⁷⁵ Section 48 of the Marriage Ordinance.

¹⁷⁶ Kludze (1988) *op cit* 209.

conventions of customary law.¹⁷⁷ In order for section 48 to apply, the following factors had to be established:

- (i) the intestate must have been subject to the customary law; and
- (ii) must have contracted a marriage under the Marriage Ordinance or any other law relating to marriage, whether in Ghana or outside (as in England); and
- (iii) must be survived by a spouse of such marriage or offspring of such marriage.¹⁷⁸

In addition to the factors listed immediately above, section 48 of the Ordinance provided that it was also applicable if:

- (i) the deceased's father or mother was subject to customary law, and
- (ii) the deceased's parents were married under the Marriage Ordinance or any other law relating to marriage, whether such marriage was concluded in Ghana or outside, and
- (iii) the deceased was a legitimate child under the marriage in (ii).¹⁷⁹

The Marriage Ordinance therefore widened the net of persons qualifying for inheritance by not only including surviving husbands, wives or children, but also incorporating the parents of the deceased.

4.3.3.2 The division of intestate property under the Marriage Ordinance

As stated earlier, the Ordinance provided that two-thirds of the deceased's intestate estate would devolve according to the laws of England. In order to gain an understanding of the complex "accounting principles" involved in the distribution of this part of the intestate estate, reference must be made to the English rules mentioned in the Ordinance. The English rules were developed in accordance with the Statute of Distribution,¹⁸⁰ the Statute of Frauds,¹⁸¹ the Administration and Distribution of Estates

¹⁷⁷ Bentsi-Enchill *op cit* 173.

¹⁷⁸ Kludze (1988) *op cit* 210.

¹⁷⁹ *Ibid.*

¹⁸⁰ 1670 (22 and 23 Car 2, c 10).

¹⁸¹ 1677 (29 Car 2, c 3), section 24.

Act,¹⁸² and the Matrimonial Causes Act.¹⁸³ It is these important rules that the researcher will now consider.

Rule 1: The English law provided that if a woman died intestate leaving a surviving spouse, her entire estate would be inherited by her husband.¹⁸⁴ In cases where the wife had attained a decree of judicial separation; subsequent to her death intestate, all the property she accumulated from the date of the decree, would be distributed as if her husband was dead.¹⁸⁵ In Ghana, the rule manifested itself as follows:

- (i) Where a woman married under the Marriage Ordinance died intestate and was survived by a husband, the husband was solely entitled to 2/3 of her estate, irrespective of whether she was survived by offspring or not.¹⁸⁶
- (ii) If the intestate was a woman who was the offspring of a marriage concluded under the Marriage Ordinance and she was survived by a husband, irrespective of whether or not she was also survived by offspring, her husband was entitled to 2/3 of the estate to the exclusion of any surviving issue. The children here got nothing.¹⁸⁷

Rule 2: In English law this rule provided that if a man died intestate and was survived by a widow and children, the widow would inherit 1/3 of the estate. In cases where the deceased was only survived by a widow, the widow would inherit 1/2 of the estate.¹⁸⁸ In Ghana, the rule was expressed as follows:

- (i) If the intestate was a man who had concluded a marriage in terms of the Marriage Ordinance and was survived by a wife of the said marriage or any other wife or wives, and left behind issue, the widow or widows took 1/3 of the 2/3, that is 2/9 of the estate. The surviving issue were entitled to share the remaining 2/3 equally, that is 2/9 of the estate. Under section 49 of the Ordinance, illegitimate children did not

¹⁸² 1685 (1 Jac 2, c 17), section 7.

¹⁸³ 1857 (20 and 21 Vict, c 85), sections 7 and 25.

¹⁸⁴ Section 24 of the Statute of Frauds.

¹⁸⁵ Section 25 of the Matrimonial Causes Act.

¹⁸⁶ Ollennu (1966) *op cit* 248-249.

¹⁸⁷ Kludze (1988) *op cit* 223.

¹⁸⁸ Section 3 of the Statute of Distribution.

qualify for inheritance in this regard.

- (ii) If the intestate was a man married under the Marriage Ordinance and who was survived by a widow of the said marriage but no offspring, the widow took $\frac{1}{2}$ of the $\frac{2}{3}$ of the estate that is $\frac{1}{3}$ of the whole estate. The residue of the estate, was distributed to the persons entitled under the other rules, including Rule 8.
- (iii) If the intestate was a man who was the offspring of a marriage under the Marriage Ordinance and was survived by (a) a spouse or spouses with whom he had contracted either a marriage under customary law or under the Ordinance, and (b) legitimate children; the spouse or spouses would take $\frac{1}{3}$ of the $\frac{2}{3}$, that is $\frac{2}{9}$ of the entire estate; the children took the $\frac{4}{9}$ residue, and the remaining $\frac{1}{3}$ was distributed according to the rules of the applicable customary law.
- (iv) If the intestate was the offspring of a marriage under the Marriage Ordinance and was survived by a wife or wives, however married, but no offspring, the wife or wives were entitled to $\frac{1}{2}$ of the $\frac{2}{3}$ of the estate, that is $\frac{1}{3}$ of the entire estate. The remaining $\frac{1}{3}$ went to the deceased's surviving father (if any).¹⁸⁹

Rule 3 of the English rules is no longer applicable¹⁹⁰ and will not be discussed as a result thereof.

Rule 4: The English rule provided that subject to the rights of the husband or the surviving spouse; where the deceased was survived by children, each child (or their legal representative if the child was deceased) would receive an equal share of the personal estate of the deceased.¹⁹¹ In Ghana the rule was phrased as follows:

- (i) If the intestate was a man or a woman who were married under the Marriage Ordinance and was not survived by a spouse, but was only survived by issue; if any such child was an issue of a marriage under the Ordinance, section 48 of the Marriage Ordinance would apply and the children proportionally shared $\frac{2}{3}$ of the whole estate. If any such

¹⁸⁹ Kludze (1988) *op cit* 223-224.

¹⁹⁰ Ollenu (1966) *op cit* 247.

¹⁹¹ Sections 3, 6 and 7 of the Statute of Distribution.

heir was deceased, his or her descendants were entitled *per stirpes* to his or her share.¹⁹²

- (ii) If the intestate was the offspring of a marriage under the Marriage Ordinance, and he or she died without a surviving spouse, the 2/3 of the whole estate was divided in equal shares to any surviving children *per stirpes* to his or her portion.¹⁹³

Rule 5: Here the English rule provided that where the deceased left no heirs (i.e. no children, father, brothers, sisters, or nieces or nephews) besides his surviving wife; his mother inherited his entire estate, subject to the rights of the widow.¹⁹⁴ However, if the deceased left brothers or sisters, or children of brothers or sisters or the deceased was survived by his mother, the estate would be divided equally amongst these heirs.¹⁹⁵ The grandchildren of the deceased's brother did not qualify for inheritance under this rule and if they were the only surviving heirs left, the deceased's mother inherited everything.¹⁹⁶ In Ghana, the rule was formulated as follows:

- (i) If the intestate was a man was married under the Marriage Ordinance and was survived by the widow of such marriage (*not* a customary law wife) as well as his mother, brothers or sisters, and nieces and nephews, but had no offspring himself, the widow took 1/2 of the 2/3, that is 1/3 of the entire estate; the mother shared the other 1/3 of the entire estate proportionally with any brothers or sisters of the deceased.
- (ii) If the intestate was a man or woman who were married under the Marriage Ordinance and who were survived by a mother, brothers and sisters, but not by a spouse, nor children of the marriage, neither section 48 of the Marriage Ordinance nor the English rules of 1884 were applicable to his or her estate.
- (iii) If the male intestate was a child of a marriage concluded under the Marriage Ordinance, and was not survived by a spouse, or offspring or a father, brother, sister or nieces or nephews, but was solely survived

¹⁹² Ollennu (1966) *op cit* 250.

¹⁹³ Kludze (1988) *op cit* 224. "Descendants" would be determined by the Ghanaian *lex domicilii*.

¹⁹⁴ *Id* 225.

¹⁹⁵ Section 7 of the Statute of Distribution.

¹⁹⁶ Kludze (1988) *op cit* 225.

by his mother, the mother was entitled to 2/3 of the whole estate.

- (iv) If the male intestate was the child of a marriage concluded under the Marriage Ordinance and was survived by a spouse (whether married under customary law or under the Ordinance), his mother, brothers, sisters or nieces and nephews, but had no offspring of his own or father surviving him, the spouse was entitled to 1/2 of the 2/3, that is 1/3 of the entire estate; the mother shared the remaining 1/3 of the estate equally with the brothers, sisters and nieces and nephews of the deceased (whether of the full blood or not).
- (v) If the male intestate was a child of a marriage contracted under the Marriage Ordinance and was not survived by a spouse but only by his mother and his nieces and nephews, the mother shared the 2/3 of the entire estate equally with the deceased's nieces and nephews.¹⁹⁷

Rule 6: In English law this rule provided that if the deceased left no surviving spouse, children or parent, but was in fact survived by a grandparent/s and brothers or sisters, the brothers and sisters took precedence over the grandparent/s and inherited 2/3 of the entire estate.¹⁹⁸ The English rule did not apply to the intestate estate of a man or woman who only married under the Marriage Ordinance but died without a husband or wife or children of such a marriage surviving him; for, in such instances, section 48 of the Marriage Ordinance could not be relied upon.¹⁹⁹

Rule 7: For this rule, if the intestate was survived by brothers and sisters and children of deceased brothers or sisters, the estate was divided amongst them *per stirpes*; this rule was restricted to instances where at least one brother or sister was alive. In a case where all the descendants were children of brothers and sisters who were no longer living, the estate was divided among them *per capita*.²⁰⁰ In Ghana the rule applied as follows:

- (i) If the intestate was a man married under the Marriage Ordinance and

¹⁹⁷ Ollennu (1966) *op cit* 251.

¹⁹⁸ Kludze (1988) *op cit* 227.

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

was survived by a spouse and only brothers and sisters (whether of the whole-blood or of the half-blood) and nieces and nephews, the wife took 1/2 of the 2/3, that is 1/3 of the entire estate; the brothers and sisters of the deceased and his nieces and nephews shared the other 1/2 of the estate equally, the nieces and nephews taking *per stirpes* the share of the deceased brother or sister. If the intestate was not survived by a brother or sister and was only survived by nieces and nephews, the nieces and nephews shared the 1/3 of the entire estate *per capita*. The same rules of distribution were applicable where the intestate was the child of a marriage concluded under the Marriage Ordinance, and he was (a) survived by a spouse, whether married under customary law or under the Ordinance, and (b) brothers, sisters and nieces and nephews.

- (ii) ...
- (iii) If the male intestate deceased was the child of a marriage contracted under the Marriage Ordinance but left no surviving spouse, but was survived by brothers or sisters and nieces and nephews, they shared the 2/3 of the estate equally, the children of a deceased brother or sister taking *per stirpes* the share of the deceased brother or sister. If the deceased was only survived by nieces and nephews, the nieces and nephews were equally entitled to the 2/3 of the entire estate and they took *per capita*.
- (iv) If the male intestate was not a child of a marriage under the Marriage Ordinance, even if he himself was married under the Ordinance, and he was not survived by a spouse or children from the Ordinance marriage, this rule did not apply because section 48 of the Marriage Ordinance could not be relied on.²⁰¹

This also meant that in cases where the deceased was an issue of a marriage under the Marriage Ordinance, the rule enunciated immediately above applied to 2/3 of his whole estate.²⁰² If the deceased was not an issue of a marriage under the Marriage Ordinance but himself had solemnised a marriage under the Ordinance and had left

²⁰¹ *Id* 227-228.

²⁰² *Ibid*.

behind a living wife, the English rule was relevant, allotting 1/3 to the surviving spouse and the other 1/3 was sub-divided amongst the next-of-kin.²⁰³

Rule 8: Here the English rule provided that:

in all other cases, subject to the rights of the widow (if any), the estate went to the next-of-kin ascertained in accordance with the civil law rule, namely, *quot personae tot gradus*, computing up from the intestate to the common ancestor and then down again to the claimant, the next-of-kin of equal degree sharing equally *inter se* and no priority being given to males over females, or to the whole blood over the half-blood.²⁰⁴

In Ghanaian customary law this rule operated on the same basis as the English rule with one significant difference; Ghanaian customary law was inclined to favour males over females and “relations of the whole-blood were preferred to those who were of the half-blood”.²⁰⁵ In terms of the Marriage Ordinance, a child only included legitimate and posthumous children,²⁰⁶ and according to the Statute of Distribution, a wife meant a wife whose marriage to a man is recognised by the law of domicile as valid.²⁰⁷ The Marriage Ordinance prevented the conclusion of a customary marriage to someone other than the person with whom the Ordinance Marriage was contracted.²⁰⁸

The Marriage Ordinance was introduced into Ghanaian law, to impose English law on the citizens of Ghana and to slowly eradicate customary law. The Ordinance however failed in its purpose as it did not evoke a considerable number of statutory marriages in Ghana.²⁰⁹ In others words, the people of Ghana remained faithful to Ghanaian customary law. Research has shown that marriages under the marriage Ordinance were only concluded because of pressure placed on the parties by their intermixed families,²¹⁰ and it was also concluded for reasons of prestige, marriage stability and for purposes of

²⁰³ *Ibid.*

²⁰⁴ Ollenu (1966) *op cit* 248.

²⁰⁵ Kludze (1988) *op cit* 228.

²⁰⁶ Ollenu (1966) *op cit* 252. See *Bamgbose v Daniel and Others* [1954] 3 All ER 263 at 267-269 where the Court noted that the children in the case could succeed to the intestate estate of the deceased under the Statute of Distribution if they proved that they were in fact the legitimate children of the deceased under the law of their domicil.

²⁰⁷ Ollenu (1966) *op cit* 255.

²⁰⁸ Allott (1960) *op cit* 216.

²⁰⁹ Allott (1960) *op cit* 216.

²¹⁰ See Adinkrah *op cit* 15-17.

satisfying the evidentiary burden in cases requiring proof of marriage and paternity.²¹¹ Although the Marriage Ordinance was an ambitious piece of legislation, it was not without problems. These problems will be highlighted in the next section of this thesis.

4.3.3.3 Criticisms of the Marriage Ordinance

The Marriage Ordinance (in general) contributed to inequality. For example, it allowed a woman to invoke section 48 of the Marriage Ordinance and claim a widow's share in her husband's estate, but prevented a man in the exact same circumstances as the woman from obtaining any benefit from the estate of his deceased wife.²¹²

Another difficulty experienced was the impreciseness of the concepts of "child" and "wife" in the Ordinance.²¹³ These problematic concepts were subsequently ascribed definite meanings by the judiciary. In *Coleman v Shang*²¹⁴ the Court of Appeal held that:

in determining whether a person was a legitimate "child" (my emphasis) under section 48 of the Marriage Ordinance, the applicable law should be the Ghanaian *lex domicilii*, which includes the customary law. Applying that law, the rule in Ghana is that every child, however born, is legitimate provided that his or her paternity was duly acknowledged by the father or on behalf of the father.

The same court referred to the following in their definition of "wife":

under the Statute of Distribution, a "wife" means a "lawful wife" ... The question of "lawful wife" (is a question) of status to be decided by the law of domicile. Therefore if a marriage between a man and a woman is by the law of their domicile a valid marriage, the "wife" is a lawful wife for the purposes of the statute no matter whether or not the marriage is invalid by the law of England or any other place ... In such cases the law of England recognises and acts on the status declared by the law of the domicile, and such persons will be (a) wife for the purposes of the statute of Distribution.²¹⁵

²¹¹ *Id* 17-21.

²¹² Kludze (1988) *op cit* 228.

²¹³ *Id* 215.

²¹⁴ [1959] GLR 390 at 409. See also *In Re Goodman's Trusts* 1881 17 CH D 266 at 280-282.

²¹⁵ *Coleman v Shang* [1959] GLR 390 at 406.

The above definition also included customary wives who were married after the death of the Ordinance wife.²¹⁶

The ascribing of English law rules to African customary law was problematic. For example, the Ordinance failed to consider the degree and descent of the persons that are disallowed from lawfully marrying each other under Ghanaian customary law.²¹⁷ The Ordinance promotes a nuclear family which is contrary to customary law. The rules do not consider “living” customary law. For example, Rule 1 of the Ordinance is contrary to “living” customary law because the property of females usually included things like household utensils, beads and other female paraphernalia, and it was traditionally inherited by females and not males. Secondly, no consent is required from persons who are traditionally expected to give their consent (like the family head) to a union under the Ordinance.²¹⁸ Another undesirable feature of the Ordinance was that the rules which were applicable in 1884 remained the same and were never amended in Ghana, even though the rules in England were changed regularly.²¹⁹ A final frustrating feature of section 48 of the Ordinance was that it created a complicated system of mathematical calculations.²²⁰ In order to eliminate the problems associated with the Marriage Ordinance, the legislature promulgated the Intestate Succession Law, 1985. The researcher focuses on this Law in the next section of this thesis.

4.4 The Intestate Succession Law, 1985²²¹

4.4.1 Background

Prior to the enactment of the Intestate Succession Law, the Constitution of the Third Republic, 1979 further amended the law of intestate succession by providing that:

- (2) No spouse may be deprived of a reasonable provision out of the estate of a spouse whether the estate be testate or intestate.

²¹⁶ *Ibid.*

²¹⁷ Allott (1960) *op cit* 216.

²¹⁸ *Ibid.*

²¹⁹ Kludze (1976) *op cit* 249.

²²⁰ *Ibid.*

²²¹ PNDC Law 111.

- (3) Parliament shall enact such laws as are necessary to ensure – ...
(b) that every child, whether or not born in wedlock, shall be entitled to reasonable provision out of the estate of its parents ...²²²

The introduction of this section into the Constitution however, did not have any significant impact on the provision for spouses and children out of the intestate estates of their deceased husbands or fathers.²²³ The fact that customary law legislation made inadequate provision for intestate wives and children and that the system of inheritance promulgated under the Marriage Ordinance introduced a foreign legal system into Ghanaian law, at the expense of local customary law,²²⁴ prompted the Ghanaian government to issue an investigation into the existing inheritance laws by publishing the Report of the Inheritance Commission of Inquiry (the Ollenu Commission) in 1959. The Ghanaian government proposed reforms in the areas of marriage, divorce and inheritance and in 1961 it issued a White Paper on Marriage Divorce and Inheritance.²²⁵ The legislature subsequently passed three successive Marriage, Divorce and Inheritance Bills in 1961, 1962 and 1963 respectively. The Divorce and Inheritance Bills were unfortunately not enacted as it was not possible to attain sufficient agreement to enact the legislative change.

In 1968, the Law Reform Commission was then set up under the Law Reform Commission Decree, 1968 (NLCD 288), and it was decided that the above-mentioned matters be treated individually.²²⁶ The Law Reform Commission published numerous papers on intestate succession, eventually producing a proposed Intestate Succession Decree, 1975.²²⁷ However no enactment of any legislation ensued.²²⁸ Only in 1983 again, did the Provincial National Defence Council (PNDC) publish a proposed Intestate Succession law which comprised substantially of the 1975 proposed decree plus some amendments.²²⁹ It was only after this intervention, that the Intestate Succession Law²³⁰ was finally promulgated in 1985 after considerable public debate.²³¹

²²² Article 32(2) and (3).

²²³ Woodman GR "Ghana reforms the law of intestate succession" (1985) *Journal of African Law* 119.

²²⁴ *Id* 120.

²²⁵ *Id* 121.

²²⁶ *Ibid*.

²²⁷ Ghana Law Reform Commission Working Paper no 5/75.

²²⁸ Woodman (1985) *op cit* 121.

²²⁹ *Ibid*.

²³⁰ PNDC Law 111.

²³¹ For further background see Ekow Daniels WC "The impact of the 1992 Constitution on family rights in Ghana" (1996) *Journal of African Law* 183-193.

The Intestate Succession Law is now the uniform statute regulating matters concerning intestate succession in Ghana.²³² That means that the law governs all types of marriages, ie, marriages concluded according to the Marriage Ordinance, customary marriages and marriages concluded according to the Marriage of Mohammedans Ordinance.²³³ The new law substantially alters the rules of customary law, especially as it affects members of matrilineal communities.²³⁴ The Law also demonstrates government's commitment to adhere to international law and certain proposals that advocated for a re-examination of laws "relating to the rights of women and children in order to end discrimination against them".²³⁵

4.4.2 General provisions

The Intestate Succession Law, as the name suggests, governs the devolution of intestate estates alone.²³⁶ The Law does however accommodate estates which have been devolved partially by a will. In this regard, section 2(2) provides that:

Any person who dies leaving a will disposing of part of his estate shall be deemed to have died intestate under this law in respect of that part of his estate which is not disposed of in the will and accordingly the provisions of the Law shall apply to such part of his estate.

In respect of the Law the term "property" has a restrictive meaning and excludes "any stool, skin or family property, or the self-acquired property or share of property of the descendant's spouse".²³⁷

²³² The Memorandum to the Intestate Succession Law states that:

This law is aimed at removing the anomalies in the present law relating to intestate succession and to provide a uniform succession law that will be applicable throughout the country irrespective of the class of the intestate and the type of marriage contracted by him or her.

In this regard, section 1(1) provides that:

On the commencement of this Law, the devolution of the estate of any person who dies intestate on or after such commencement shall be determined in accordance with the provisions of this Law subject to subsection (2) of this section and the rules of private international law.

²³³ Section 18 provides that a "spouse" includes "a person married under the Marriage Ordinance (Cap 127), the Marriage of Mohammedans Ordinance (Cap 129), customary law, or a person who is the surviving partner of a customary law marriage where the customary rites were not performed but where the parties lived together as husband and wife and obtained the actual or implied consent of their two families to the marriage". For an exposition on the Marriage of Mohammedans Ordinance see Kludze (1988) *op cit* 229-236.

²³⁴ Kludze (1988) *op cit* 161.

²³⁵ Grant, Bowman C and Kuenyehia A *Women and law in sub-Saharan Africa* (2003) 210.

²³⁶ Kludze (1988) *op cit* 165. See section 1(1) and section 2(1) which provides that:

A person shall be deemed to have died intestate under this Law if at the time of his death he had not made a will disposing of his estate.

²³⁷ Section 1(2).

Prior to the enactment of the Law, customary law governed cases of intestacy with certain exceptions. For example, section 48 of the Marriage Ordinance awarded a surviving spouse a specific portion of the deceased's intestate estate whilst section 10 of the Marriage of Mohammedans Ordinance²³⁸ had the same effect as section 48 of the Marriage Ordinance but applied to spouses who had contracted a marriage in terms of Islamic Law. In order to create and foster uniformity, both sections 10 and 48 of the afore-mentioned Ordinances were repealed by the Intestate Succession Law.²³⁹ This meant that the differentiation based on the form of marriage concluded by the deceased intestate has finally been eradicated.²⁴⁰ The Intestate Succession Law makes provision for the allotment of a specific portion of the deceased's intestate estate to the surviving spouse and children.²⁴¹ In this regard, section 3 of the Law states that:

Where the intestate is survived by a spouse or child or both, the spouse or child or both of them, as the case may be, shall be entitled absolutely to the household chattels of the intestate.

“Household chattel” is defined very broadly by the Law and includes things like:

Jewellery, clothes, furniture and furnishings, refrigerators, television, radiogram, other electrical and electronic appliances, kitchen and laundry equipment, simple agricultural equipment, hunting equipment, books, motor vehicles other than vehicles used wholly for commercial purposes, and household livestock.²⁴²

Section 3 therefore grants spouses and children an “absolute interest” in the household chattels of the intestate estate. This means that each heir takes his or her share as a proprietor and may dispose of it either by a disposition *inter vivos* or by will.²⁴³ Section 4(a) of the Law provides that if the intestate estate comprises of only one house:

the surviving spouse or child or both of them, as the case may be, shall be entitled to that house and where it devolves to both spouse and child, they shall hold it as tenants-in-common.

²³⁸ Cap 129 (1951 Rev).

²³⁹ See section 19. The Law also states that The Statutes of England relating to intestate succession applicable in Ghana immediately before the coming into force of the Law shall cease to apply (see section 20(1)).

²⁴⁰ Kludze (1988) *op cit* 166.

²⁴¹ Kuenyehia (1986-1989) *op cit* 88.

²⁴² Section 18. Please note that this list is not exhaustive.

²⁴³ *Ibid.*

This section seeks to redress past practices which often resulted in the eviction of the spouse and the children from the matrimonial home by members of the extended family upon the death of the intestate.²⁴⁴ By granting a surviving spouse and children a specific right to the matrimonial home, the Law prevents the unjustifiable practice of ejection.

In instances where the intestate estate comprises of more than one house, the Law provides that:

the surviving spouse or child or both of them, as the case may be, shall determine which of those houses shall devolve to the such spouse or child or both of them and where it devolved to both spouse and child they shall hold such house as tenants-in-common.²⁴⁵

Section 4(b) also contains the proviso that in cases of dissension as to which of the houses is to devolve to the surviving spouse and/or children, the entitled parties can approach the High Court to render a decision in this regard.

The Intestate Succession Law makes provision for the sub-division of the intestate estate into specific “fractional entitlements”.²⁴⁶ From what was discussed above it is quite obvious that the surviving spouse and children acquire the biggest portion of the intestate estate in all instances. The manner in which the remainder of the estate is divided is dependant upon the identity of the other survivors and the number of eligible survivors.²⁴⁷ In this regard, section 5 of the Law provides that where the intestate is survived by a spouse and child the residue of the estate is sub-divided as follows: (1) three-sixteenth to the surviving spouse; (2) nine-sixteenth to the surviving child; (3) one-eighth to the surviving parent; and (4) one-eighth in accordance with customary law.

If the intestate is survived by more than one child, each child shares equally in the nine-sixteenth.²⁴⁸ If the intestate is survived by either his or her parents, each parent shares

²⁴⁴ Kludze (1988) *op cit* 169. See also *Swapim v Ackuwa* (1888) Sar FCL 191 at 192 where the Court held that the family of the deceased has a right to eject the wife and children from their matrimonial home, as the wife and her children belong to her family. A wife and her children may only remain in the matrimonial home with the permission of her husband’s family.

²⁴⁵ Section 4(b).

²⁴⁶ Kludze (1988) *op cit* 170.

²⁴⁷ *Id* 170-171.

²⁴⁸ Section 14.

equally in the one-eighth portion of the estate.²⁴⁹ In cases where the intestate is not survived by a parent one-fourth of the remainder of the estate devolves according to customary law.²⁵⁰

Section 6 of the Law provides that where the intestate is survived by a spouse alone, the remainder of the estate is sub-divided as follows: (1) one-half to the surviving spouse; (2) one-fourth to the surviving parent; and (3) one fourth in accordance with customary law. Once again, if the intestate is survived by both parents, each parent shares equally in the one-fourth portion of the estate.²⁵¹ In cases where the intestate is not survived by a parent one-half of the residue of the estate devolves according to customary law.²⁵²

Section 7 of the Law makes provision for the situation where the intestate is survived by a child or children alone. In such cases the residue of the estate devolves as follows: (1) three-fourths to the surviving child; (2) one-eighth to the surviving parent; and (3) one-eighth in accordance with customary law. Section 7 also contains the proviso that where the intestate is not survived by a parent the whole of the one-fourth of the residue of the estate devolves according to customary law. Where the intestate is survived by a parent alone, the residue is sub-divided as follows: (1) three-fourths to the surviving parent; and (2) one-fourth in accordance with customary law.²⁵³ Here, the three-fourths of the intestate estate includes the household chattels and the house as sections 3 and 4 cease to apply for obvious reasons.²⁵⁴ The portion devolving in accordance with customary law will be allotted to either of the parents in accordance with the rules regulating patrilineal and matrilineal succession.²⁵⁵

Section 11(1) of the Law makes provision for the situation where the intestate is not

²⁴⁹ Section 14.

²⁵⁰ Section 5.

²⁵¹ Kludze (1988) *op cit* 172.

²⁵² Section 6.

²⁵³ Section 8. In this regard section 9 also provides that:

Where no customary law is applicable to the devolution of that part of the residue which by virtue of section 5, 6, 7 or 8 of this Law shall devolve in accordance with customary law such part of the residue shall devolve in equal shares to those beneficiaries otherwise entitled to share the residue under the relevant provisions of this Law.

²⁵⁴ Kludze (1988) *op cit* 172.

²⁵⁵ *Ibid.*

survived by a spouse, child or parent. In such instances, the residue of the estate devolves according to customary law; making the customary family the sole successor. Section 10 of the Law defines the term “family” and provides that:

Where the rules of succession under customary law applicable to any portion of the estate provide that the family of the intestate shall be entitled to a share in the estate:

-
- (a) That family shall be the family to which the intestate belonged for the purposes of succession in accordance with customary law in the community of which he was a member;
 - (b) In the case of the intestate who, being a member of two customary law communities belonged to two families for the purposes of succession, that family shall be the two families;
 - (c) In the case of an intestate not being a member of any family, that family shall be the family with which the intestate was identified at the time of his death or, failing that, to the families of his parents or failing that to the Republic.

Sections 12,²⁵⁶ 13,²⁵⁷ 14,²⁵⁸ 15²⁵⁹ and 16²⁶⁰ of the Law require mere mentioning, as they do not affect intestate succession that drastically. Sections 16A and 17 of the Law are very important as they enforce the right of the surviving spouse or child to remain in the matrimonial home before the distribution of the estate of the deceased person. These sections provide that:

²⁵⁶ Section 12 provides that:

Notwithstanding the provisions of sections 4 and 5 to 8 of this Law –

- (a) Where the total value of the residue does not exceed **₪50,000.00** the residue shall devolve to any surviving spouse or child of the intestate or where both the spouse and child survive the intestate to both of them;
- (b) Where the intestate is survived only by the parent and the total value of the estate does not exceed **₪50,000.00** the estate shall devolve to the surviving parent.

²⁵⁷ Section 13 provides that:

The Provisional National Defence Council Secretary responsible for Justice may by legislative instrument vary the maximum value of the residue or estate prescribed under section 12 of this Law.

²⁵⁸ Section 14 provides that:

Subject to the rules of customary law relating to a member's interest in communal property, where two or more persons are entitled to share a portion of an estate under this Law they shall divide it among themselves in equal shares.

²⁵⁹ Section 15 provides that:

Where spouses die in circumstances –

- (a) in which it appears that their deaths were simultaneous; or
- (b) rendering it uncertain which of them survived the other, the older shall for the purposes of this Law, be presumed to have predeceased the younger.

²⁶⁰ Section 16 provides that:

Where a child of the intestate who has predeceased him is survived by a child (being the grandchild of the intestate) the grandchild shall, if he is dependent upon the intestate at the time of his death be entitled to the whole or a portion of the estate which would have otherwise devolved to his parent if he had not predeceased the intestate.

- (1) No person shall before the distribution of the estate of a deceased person, whether testate or intestate eject a surviving spouse or child from the matrimonial home –
 - (a) where the matrimonial home is the self-acquired property of the deceased;
 - (b) where the matrimonial home is rented property unless the ejection is pursuant to a court order;
 - (c) where the matrimonial home is the family house of the deceased, unless a period of six months has expired from the date of the death of the deceased; or
 - (d) where the matrimonial home is public property unless a period of three months has expired from the date of the death of the deceased.²⁶¹
- (2) For the purposes of this section “matrimonial house” means –
 - (a) the house or premises occupied by the deceased and the surviving spouse, or the deceased and a surviving child or all as the case may be, at the time of the death of the deceased; or
 - (b) any other self-acquired house of the deceased occupied by the surviving spouse or child or both at the time of death of the deceased.²⁶²

Any person who before the distribution of the estate of a deceased person whether testate or intestate;

- (a) unlawfully ejects a surviving spouse or child from the matrimonial home contrary to the section **16A** of this Law
- (b) unlawfully deprives the entitled person of the use of –
- (c)
 - (i) any part of the property of the entitled person;
 - (ii) any property shared by the entitled person with the deceased to which the provisions of Law apply; or
 - (iii) removes, destroys or otherwise unlawfully interferes with the property of the deceased person

commits an offence and is liable on summary conviction to a minimum fine of **₱50,000.00** and not exceeding **₱500,000.00** or a term of imprisonment not exceeding one year and the court or tribunal shall make such other orders as it considers necessary for the re-instatement of or reimbursement to the person thus ejected or deprived.²⁶³

The afore-mentioned sections have significantly altered the previous customary law position by restricting the interest of the family in intestate estates²⁶⁴ in favour of protecting the interests of the widow and children.²⁶⁵ This development is commendable indeed. In the section that follows the researcher will highlight some of the advantages

²⁶¹ Section 16A(1).

²⁶² Section 16A(2).

²⁶³ Section 17.

²⁶⁴ Kludze (1988) *op cit* 180.

²⁶⁵ Dowuona-Hammond (1998) *op cit* 157.

and disadvantages of the Intestate Succession Law and investigate whether the revolutionary amendments to Ghanaian customary law have in fact improved the intestate succession rights of both women and children in Ghanaian society or whether it has merely amounted to paper law.

4.4.3 Comments and criticisms

4.4.3.1 General

Women and children represent one of the most vulnerable groups in Ghanaian society.²⁶⁶ The Intestate Succession Law, 1985 boldly endeavours to empower these social groups as far as intestate succession is concerned. In addition to granting widows and children rights to the self-acquired property of their husbands/fathers, the Law also takes cognisance of a wife's involvement in her husband's economic activity; a fact which Ghanaian customary law ignored;²⁶⁷ and also recognises the "growing importance of the nuclear family in the Ghanaian family system".²⁶⁸ The Law creates a homogeneous system of law governing intestate succession in Ghana and also replaces the complicated rules of succession (applicable under the Marriage Ordinance) with simple rules of succession.²⁶⁹ The Law does not make distinctions according to the gender of the deceased and/or the successors as was the case under the Marriage Ordinance.²⁷⁰

Although the Law is commendable, it has nevertheless generated its own novel difficulties because of its adoption of a perfunctory and facile resolution to an intricate problem with profound social implications.²⁷¹ For example, the Law disregards the group

²⁶⁶ See *In re Ackom-Mensah (Decd); Ackom-Mensah v Abosompem* [1973] 2 GLR 18 at 22, where the Court stated that:

In the lifetime of their relative, they cannot vent their spleen on his wife. The opportunity comes when he dies. The poor widow and her children are subjected to a vulgar and humiliating abuse; they are made to pay unreasonable and unjustifiable funeral dues, to incur other liabilities in respect of the funeral which can find no foundation in customary law; and after the funeral are harassed and driven to desperation by unnecessary litigation.

²⁶⁷ Fenrich J and Higgins TE "Promise unfulfilled: Law, culture and women's inheritance rights in Ghana" (2001-2002) *Fordham International Law Journal* 287.

²⁶⁸ *Ibid.*

²⁶⁹ Woodman (1985) *op cit* 126.

²⁷⁰ *Id* 127.

²⁷¹ Kludze (1988) *op cit* 163.

in favour of the nuclear family²⁷² which is contrary to customary law. It applies uniformly amongst all tribes in Ghana and is not cognisant of the fact that the customary rules of intestate succession differ from tribe to tribe.²⁷³ The rules of succession applicable under the Marriage of Mohammedans Ordinance were merely excluded or deleted.²⁷⁴ The Law also fails to recognise the changed role of women in society. Women have become economically active and can produce or possess property of their own.²⁷⁵

4.4.3.2 Specific criticisms

The Intestate Succession Law applies to intestate estates alone. This fact could encourage Ghanaian citizens to draft wills regulating the devolution of their estates, thereby circumventing the consequences of the Law,²⁷⁶ subject only to the restricting article 22(1) provision of the Ghana Constitution, 1992 which states that:

- (1) A spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will.

Secondly, the Law applies to the intestate's self-acquired property alone, and disregards family property entirely.²⁷⁷ This is problematic because what constitutes self-acquired property and what constitutes family property may not always be readily distinguishable and may at times even overlap. For example, Kludze²⁷⁸ notes that there is evidence that any property that has not been disposed of at customary law is family property.²⁷⁹ If that is an accurate reflection of the law, and it seems to be the law in many matrilineal communities, property held allegedly as individual property by successors, as well as refurbishments to such property, may be categorised as family property.

The vagueness of the concept of self-acquired property could create numerous

²⁷² Freeman *op cit* 160.

²⁷³ Woodman (1985) *op cit* 126.

²⁷⁴ *Ibid.*

²⁷⁵ Mikell G "Culture, law and social policy: Changing the economic status of Ghanaian women" (1992) *Yale Journal of International Law* 233. See also Chanock M "Neither customary nor legal: African customary law in an era of family reform" (1989) *International Journal of Law and the Family* 77-78.

²⁷⁶ Kludze (1988) *op cit* 164.

²⁷⁷ Fenrich and Higgins (2001-2002) *op cit* 287-288. Section 18 of the Law defines an estate as: self-acquired property which the intestate was legally competent to dispose of during his lifetime and in respect of which his interest has not been terminated by or on his death.

²⁷⁸ Kludze (1988) *op cit* 165.

²⁷⁹ See also Ollennu NA *Principles of customary land law in Ghana* (1962) 38 and 160.

additional difficulties for surviving spouses and/or children and may even result in their not being able to inherit or claim the entitled property successfully.

The law affects both patrilineal and matrilineal communities. As stated above, in matrilineal communities, the self-acquired property of an intestate becomes family property. Under conventional Ghanaian law, “family” is classified in such a way that it prevents wives and husbands from belonging to each other’s families. Secondly, in both matrilineal and patrilineal communities widows do not belong to their husband’s family nor do they share in his intestate estate upon death.²⁸⁰ The new law effectively alters the order of the family as conventionally understood by patrilineal and matrilineal communities.²⁸¹

The sub-division of the intestate estate into fractions merely complicates the devolution process. The fractional formula used in the distribution of the estate to the successors under the Law inevitably results in the disintegration of the estate, especially where there is more than one spouse and multiple sets of children. In instances where there is one legitimate wife and other illegitimate children, the legitimate wife may find that what was to go to her and her children would have to be re-distributed among her children and the illegitimate children of her husband, some of whom she may never have even been aware of until the demise of her husband. It often happens that different wives and different sets of children have competing interests, thus rendering it impossible for them to control and preserve the property as co-proprietors. In practice, therefore, the parties are forced to convert the property into cash and distribute the return it yields instead of retaining it.

In some instances determining the various shares of the estate which should be distributed to particular heirs is virtually hopeless without converting the property into cash. Where the remainder of the estate consists of one large property only, such as a house or a farm, it is virtually impossible to determine or distribute specific shares as prescribed by the Law without converting the property to cash and thereby decimating the economic worth of the property entirely.

²⁸⁰ Bond J “Pluralism in Ghana: The perils and promise of parallel law” (2008) *Oregon Review of International Law* 406-407.

²⁸¹ Dovlo *op cit* 638-639.

Furthermore, if the intestate is a member of two customary families, the share which has to be distributed according to customary law would have to be divided, requiring that the one-eighth portion be further split into two. When the intestate is survived by both parents, separated or divorced, the share allotted to them would have to be split into two, leading to the further disintegration of the estate.²⁸²

The Intestate Succession Law fails to consider that customary law recognises a system of polygyny.²⁸³ This omission introduces numerous additional problems. In this regard, sections 4(b) and 3(1) of the Law are especially problematic. For example, section 4(b) grants a surviving spouse and/or child a choice of house, if the estate comprises of more than one house. This means that the surviving spouse and/or children could select any house in the estate even if the house belonged to another wife. This situation is intolerable as it could result in the unlawful ejection of another spouse and her children from their matrimonial home.²⁸⁴

In addition to that, where the estate comprises of only one house but more than one surviving spouse with several children, this often results in prolonged conflicts which in most cases can only be resolved by alienating the house and the chattels and dividing the profits.²⁸⁵ These outcomes are contrary to the objectives of the Act and often result in the fragmentation of the intestate estate.²⁸⁶ Although the Law empowers the High Court to resolve such disputes, the Law gives no guidelines on the criteria to be applied by the court in resolving such challenges.²⁸⁷ The Intestate Succession Law creates further problems for polygynous wives as they may now receive as little as 3-5% of their husband's estates if he dies intestate.²⁸⁸

Section 18 defines a child as:

Includes a natural child, a person adopted under any enactment for the time being in

²⁸² Dowuona-Hammond (1998) *op cit* 157-158.

²⁸³ Fenrich (2005) *op cit* 439. See also *Baindall (Orse Lawson) v Baindall* [1946] 1 All ER 342 at 346 and *Official Solicitor v Yemoh and Others* [2011] 4 All ER 200 para. 14.

²⁸⁴ Dowuona-Hammond (1998) *op cit* 155.

²⁸⁵ *Ibid.*

²⁸⁶ *Id* 157.

²⁸⁷ Kludze (1988) *op cit* 170.

²⁸⁸ Schnier D and Hintmann B "An analysis of polygyny in Ghana: The perpetuation of gender based inequality in Africa" (2001) *Georgetown Journal of Gender and the Law* 803.

force or under customary law related to adoption and any person recognised by the person in question as his child or recognised by law to be the child of such person.

This broad definition creates numerous implementation problems. The Intestate Succession Law presupposes that each and every child of the deceased is “equally dependant on him and thus makes no distinction between dependant children and those who are self-supporting adults, who in no way are dependant on the intestate”.²⁸⁹ Although the Memorandum to the Law claims to safeguard the entitlement rights of both widows and young children in the deceased’s intestate estate “its provisions do not allow for fluidity in the devolution of the estate to guarantee that the surviving widow and dependent children are given priority (above all others) with regards to maintenance and care. A situation is, therefore, created where an independent adult child of the deceased could claim equally as a minor child who is fully dependant on the intestate. Also under the Law, such independent adult children are entitled to a bigger share of the estate than a dependant and old surviving parent. Although all the children of the deceased should be allotted a share in the estate, greater fairness would be achieved if the Law made adequate provision, first of all, for the widow and minor children before the distribution of the residue of the estate to others”.²⁹⁰ Lastly, many rural and urban women may be totally unaware of the existence and benefits of the Law or its effect or their entitlement rights to the intestate estate of a deceased spouse, due to the high rates of illiteracy in Ghana.²⁹¹

The promulgation of a uniform law regulating intestate succession in Ghana is indeed admirable. Sadly though, the Law itself hasn’t achieved its objectives entirely and has had little effect on improving the position of women in Ghana. In the section that follows, the researcher examines the Report of a yearlong research study conducted by the Joseph R Crowley Programme in International Human Rights at Fordham Law School²⁹² which focused on women’s inheritance rights in Ghana post 1985 generally. The Report is important because it assesses the effectiveness of the Intestate Succession Law by engaging in or conducting interviews with lawyers, judges, legislators, government

²⁸⁹ Dowuona-Hammond (1998) *op cit* 156.

²⁹⁰ *Ibid.*

²⁹¹ *Ibid.*

²⁹² The report is contained in Fenrich J and Higgins TE “Promise unfulfilled: Law, culture and women’s inheritance rights in Ghana” (2001-2002) *Fordham International Law Journal* 259-341.

officials, academics, local leaders and ordinary Ghanaian women and men.²⁹³

4.4.4 Evaluating the Intestate Succession Law, 1985 through the Report of the Joseph R Crowley Programme in International Human Rights

One of the first things the research group observed was that the implementation of the Intestate Succession Law presented new impediments for women realising their rights of succession. They noted that the family of a deceased Ghanaian man would often thwart the efforts of his widow in claiming a share of the estate by asserting that she was not a legal wife but rather a girlfriend or a “concubine”.²⁹⁴ This places an unjustifiable burden on the widow to prove the existence of her customary marriage to the deceased.²⁹⁵ In such instances, the burden of proof may not be readily discharged as registration is not a legal requirement for the validity of a Ghanaian customary marriage.²⁹⁶ Requiring a wife to provide evidence of the existence of a customary marriage also has the negative result of obstructing the administration of the estate.²⁹⁷

Another technique employed by the intestate’s family to frustrate a wife’s entitlement would be to claim that the customary marital rituals were not fully completed at the time of the intestate’s death.²⁹⁸ The failure to perform the customary marital rights timeously, could be attributed to one of the following facts: (1) it was merely an oversight on the part of the intestate;²⁹⁹ (2) it was a calculated omission by the intestate in order to

²⁹³ Fenrich and Higgins (2001-2002) *op cit* 261.

²⁹⁴ Fenrich and Higgins (2001-2002) *op cit* 304. This was confirmed by some of the interviewees viz Mrs Ellen A Sweetie Asiedu Akrofi Sowa, Regional Director, Legal Aid Board, Western Region, Takoradi (8 June 2001); Hilary Gbedemah, Legal officer, SNV/WiLDAF Legal Awareness Programme, Ho (7 June 2001); Mrs Patience Diaba, SNV/WiLDAF Legal Awareness Programme, Takoradi (8 June 2001); and High Court Justice Mariama Owusu, Kumasi (7 June 2001) footnote 227.

²⁹⁵ Fenrich and Higgins (2001-2002) *op cit* 306.

²⁹⁶ *Ibid.* Section 1 of the Customary Marriage and Divorce (Registration) Law, 1985 states that:
On the commencement of the Law any marriage contracted under customary law before or after such commencement may be registered in accordance with the following provisions.

²⁹⁷ Fenrich and Higgins (2001-2002) *op cit* 307.

²⁹⁸ *Id* 308. See also the interviews with The Very Reverend Kofi Ampansah, Wesley Methodist Church, Kumasi (7 June 2001) and Dorothy Holbrook, Wesley Methodist Church, Kumasi (7 June 2001) at footnote 248.

²⁹⁹ Fenrich and Higgins (2001-2002) *op cit* 308-9.

continue exerting dominion over the women;³⁰⁰ (3) the intestate's family declined to complete the requisite rites;³⁰¹ or (4) it was too expensive to perform the customary rites fully.³⁰² In such cases the court could be of assistance to such a wife as they have in fact recognised putative customary marriages.³⁰³

In addition to the evidentiary problems experienced, a widow could also be expected to authenticate the nature of the property in the intestate's estate before she is able to derive benefit from the Intestate Succession Law.³⁰⁴ In order to qualify for the benefit under the Intestate Succession law, a widow must establish that the "property is self-acquired property rather than family property".³⁰⁵ A widow's ability to prove the two points mentioned immediately above, may often be circumvented by the family members of the intestate. Such family members may usually contend that they contributed to the acquisition of the property in question and for that reason alone, claim that the property should not be classified as self-acquired property but rather family property, and therefore falls out of the scope of the Law.³⁰⁶ In one of the research group's interviews, a High Court Justice approximated that in nearly sixty percent of the cases she had to adjudicate upon, relating to matters of intestate succession, the family made such claims.³⁰⁷ A widow's capacity to contest the nature and scope of the contributions of family members may also be frustrated by the simple fact that she may be ignorant "about the acquisition of property or the conduct of her husband's business".³⁰⁸

The law of Ghana only recognises a system of total or complete separation of

³⁰⁰ *Id* 309. See interviews with Hilary Gbedemah, Legal Officer, SNV/WiLDAF Legal Awareness Programme, Ho (7 June 2001); Mrs Betty Adunyame, Regional Director, National Council on Women and Development ("NCWD"), Kumasi (7 June 2001); and The Very Reverend Kofi Ampansah, Wesley Methodist Church, Kumasi (7 June 2001) footnote 250.

³⁰¹ *Ibid.* See interview with Hilary Gbedemah, Legal Officer, SNV/WiLDAF Legal Awareness Programme, Ho (7 June 2001) footnote 251.

³⁰² Fenrich and Higgins (2001-2002) *op cit* 309. See Interview with Faustina Quaye, Kwanfifi (6 June 2001) footnote 252.

³⁰³ Fenrich and Higgins (2001-2002) *op cit* 310.

³⁰⁴ Fenrich and Higgins (2001-2002) *op cit* 314.

³⁰⁵ *Ibid.* See also section 1(2) of the Intestate Succession Law PNDCL III (1985).

³⁰⁶ See also Fenrich and Higgins *op cit* 314 and section 2 of the Intestate Succession Law PNDCL III (1985).

³⁰⁷ Fenrich and Higgins (2001-2002) *op cit* 315 where they interviewed High Court Justice Mariama Owusu, Kumasi (7 June 2001-2002) at footnote 272.

³⁰⁸ *Id* 316. See also Kuenyehia A and Ofei-Aboagye E "Family law in Ghana and its implications for women" in Kuenyehia A (ed) *Women and law in West Africa: Situational analysis of some key issues affecting women* (1998) 33.

property³⁰⁹ before and after marriage.³¹⁰ This rule makes it virtually impossible for spouses to benefit from property they jointly acquired or contributed to the acquisition of during the subsistence of the marriage. Women are especially at a disadvantage here as marital property is generally considered as belonging to a man.³¹¹ There is in fact an old Akan saying that, *if a wife buys a gun, it is a man who keeps it.*³¹² The following case discussions exemplify this crucial point.

“In Kpando, the Crowley Programme interviewed Comfort Bribinti Ayeduvor, the second wife of her late husband. Early in their customary marriage, her husband had been the owner of a school and an educator. During that time he was rich and supported four wives and several concubines and fathered sixteen children, including Ms Ayeduvor’s three surviving children. When the school began to face pecuniary problems, the other wives and concubines deserted him. Ms Ayeduvor was the only wife who remained, and the family counted on her salary as an educator during this period. According to Ms Ayeduvor, the family of her husband refused to provide him with any financial assistance.

After her husband retired, they survived on his pension and her salary. On the basis of this income, they were able to construct a house in which they resided for several months before he died. Ms Ayeduvor also purchased a piece of land next to the house, from her own means. When her husband died, his family for the first time discovered that they owned a house and promptly sought to remove her from both the house and the adjacent piece of land. Ms Ayeduvor had legal documents proving that she was in fact the owner of the adjacent property; however, the house had been registered in the sole name of her husband. The family banished her from the matrimonial home during the widowhood ceremonies, thereby transgressing the Intestate Succession Law, 1985. At the time of her interview, ie, as at June 7, 2001, Ms Ayeduvor, had completed the widowhood rights but the house was still bolted. She had expected that the family would

³⁰⁹ Similar to South Africa’s ante-nuptial contract.

³¹⁰ Fenrich and Higgins (2001-2002) *op cit* 316.

³¹¹ *Ibid.* See interviews with Mr Kwaku Frimpong, Director, Legal Aid Board, Ashanti Region Kumasi (5 June 2001-2002) and Rosaline Obeng-Ofori, Actionaid, Accra (4 June 2001) footnote 284. To add to the problem, most women are reluctant to register properties on their own names in order to avoid marital conflicts.

³¹² Fenrich and Higgins (2001-2002) *op cit* 318. See interview with Betty Adunyame, Regional Director, National Council on Women and Development (“NCWD”), Kumasi (7 June 2001) at footnote 291.

fulfil its undertaking to unlock the house by April, but, as of June, they had still not”.³¹³

“Ms Mercy Dixon, who was interviewed in Kpando in the Volta Region, persuaded her husband to construct a house for them after their marriage. Although she did not buy the building materials, she purchased food and other household items while her husband entrusted his funds to the building of the house. Her husband later became sick, and she continued to support him and sustain the household. After her husband died, his mother demanded that Ms Dixon evacuate the house. In Ms Dixon’s case, the establishment of her contribution and share of ownership in the property was absolutely vital because she was the second wife of her husband, and they did not procreate any offspring. If she failed to prove part ownership, she would be compelled to share the house equally as tenants- in-common with her husband’s first wife and her four children, despite the fact that they made no monetary contribution to the property”.³¹⁴

In addition to the problems of proving ownership, widows also face problems of administration of the intestate estate.³¹⁵ In Ghanaian Law, if a person wants to administer an intestate’s estate, he or she must acquire a grant of letters of administration.³¹⁶ In terms

³¹³ Fenrich and Higgins (2001-2002) *op cit* 319. See interview with Ms Comfort Bribinti Ayeduvor, Kpando (7 June 2001) footnote 298.

³¹⁴ Fenrich and Higgins (2001-2002) *op cit* 320. Interview with Ms Mercy Dixon, Kpando (7 June 2001) footnote 300.

³¹⁵ Intestate estates are administered according to the Administration of Estates Act 63 of 1961.

³¹⁶ Fenrich and Higgins (2001-2002) *op cit* 323. See also sections 19 and 20 of the Administration of Estates Act 63 of 1961 which provides that:

Section 19 – Uncertainty as to Succession

(1) Whenever: –

(a) any person dies leaving assets in Ghana and the court is not satisfied that there is any person immediately available who is legally entitled to succession to the assets, or that danger is to be apprehended of misappropriation, deterioration, or waste of the assets before the succession thereto can be determined, or whether the Administrator-General is entitled to a grant of probate or of letters of administration of the estate of the deceased in respect thereof, or

(b) the agent in charge of any assets in Ghana belonging to any person not residing in Ghana or belonging to a company not incorporated in Ghana dies without leaving any responsible person in charge thereof, the court may, upon the application of the Administrator-General or any person interested in the assets or in the due administration thereof, direct the Administrator-General to collect and take possession of the assets and to hold, possess, realise, and dispose of them according to the direction of the court, and in default of any such directions, to the provisions of this Act so far as applicable to the assets.

(2) Any order of the court made under this section shall entitle the Administrator-General –

(a) to maintain any suit or proceedings for the recovery of the assets; and

(b) if he thinks fit to apply for a grant of probate or of letters of administration of the estate of the deceased; and

(c) Subject to section 54 of this Act, to retain out of the assets of the estate any fees chargeable under rules made under this Act and to reimburse himself for all payment made by him in respect of the assets which a private administrator might lawfully have made. [As Substituted by Administration of Estates (Amendment) Law, 1985 (PNDCL 113) s 1].

of the law, only certain individuals qualify for a grant of letters of administration and they are ranked as follows: (1) a spouse; (2) children; (3) a parent of the intestate; and (4) a customary successor. Despite this hierarchical list, the courts have generally regarded the lineage of the deceased as the most suitable party to administer the property of the intestate.³¹⁷ In fact, courts will often deny letters of administration to a widow without an affidavit from the family backing the application.³¹⁸ For example, “in the case of Mrs. Cecilia Ackah, the family of her husband forestalled the application for the letters of administration for over a year. Such delays place excessive burdens and adversity on widows whose financial livelihood is often dependent upon property within the intestate estate”.³¹⁹

This practice could result in serious administrative delays if the family fails or refuses to support the widow in her application.³²⁰ Sometimes the family may even make the application for the letters of administration without the knowledge of the widow.³²¹ Such a situation ensued “in the cases of Beatrice Avorkliyah and Bernice Segbawu”. In Ms Avorkliyah’s case, the oldest son from a previous marriage of her husband filed for letters of administration without her. M. Avorkliyah acquired legal assistance from the SNV/WiLDAF Legal Awareness Programme in Ho and filed a caveat in the Circuit Court to obstruct the grant of the letters of administration. The case was still pending at the time of the interview.³²² In Ms Segbawu’s case, her husband’s family secretly endeavoured to acquire the letters of administration. However, Ms Segbawu became aware of their attempts, and WiLDAF filed a caveat on her behalf. The High Court Justice presiding over the case ruled that Ms Segbawu and her two elder sons be included in the letters of administration. Since this judgment, however, the family has declined to move forward with the administration of the estate.³²³

³¹⁷ Fenrich and Higgins (2001-2002) *op cit* 323. See interviews with Charles Gyamfi Danquah, Commission on Human Rights and Administrative Justice, Kumasi (5 June 2001) and Justice Kwadwo Owusu, Community Tribunal Chairman, Accra (14 June 2001) footnote 310.

³¹⁸ *Ibid.*

³¹⁹ *Id* 324. See Interview with Mrs Cecilia Ackah, Client of SNV/WiLDAF Legal Awareness Program, Takoradi (7 June 2001) at footnote 314.

³²⁰ *Id* 323-324. See interview with Justice Kwadwo Owusu, Community Tribunal Chairman, Accra (14 June 2001); Mrs Ellen A Sweetie Asiedu Akrofi Sowa, Regional Director, Legal Aid Board, Western Region, Takoradi (8 June 2001); John Bosco Nabarese, Court Registrar, Takoradi (8 June 2001) and Mrs Patience Diaba, SNV/WiLDAF Legal Awareness Programme, Takoradi (8 June 2001) footnote 313.

³²¹ Fenrich and Higgins (2001-2002) *op cit* 323-324.

³²² *Id* 324. See interview with Ms Beatrice Avorkliyah, Ho (5 June 2001) footnote 316.

³²³ Fenrich and Higgins (2001-2002) *op cit* 324. See interview with Ms Bernice Segbawu, Ho (5 June 2001) footnote 317.

When drafting a list of property in the intestate estate, the family may falsify this information in order to overvalue family property thereby giving them a greater portion or share of the estate.³²⁴ Such a situation ensued “when Ms Regina Papawu’s husband died in 1999 following a long illness. According to Ms Papawu, her husband’s family failed to take care of him and neither did they ask about his health. Nevertheless, after he died, the family compelled her to participate in the ceremonies associated with widowhood which was supervised by her husband’s older brother. Another brother of the deceased undertook to obtain the administration of the estate. He drafted an application for a grant of letters of administration making an inventory of all of their property and household chattels with the exception of the house in which she had resided with her husband. Ms Papawu declined to sign the application unless the house was incorporated. She later received a duplicate of the letters of administration with her name removed. She then solicited assistance from the WILDAF”.³²⁵ From the above, we can conclude that the Intestate Succession Law, 1985 has created numerous practical problems for spouses, especially the wife of the intestate. As a result of these difficulties, the Ghana legislature drafted a new Intestate Succession Bill in 2009. The provisions of that legislation will now be examined.

4.5 The Intestate Succession Bill³²⁶

The Intestate Succession Bill applies to the distribution of the estate of a person who has died intestate and which shall be determined according to the Act and the rules of private international law.³²⁷ Clause 1(2) stipulates that the Act will also be applicable to matters pending before a court at the time of its commencement. Clause 1(3) restricts the application of the Act to the self-acquired property of the intestate and excludes stool, skin or family property from its application. Clause 2 distinguishes between intestacy and partial intestacy by providing that:

- (1) A person dies intestate under this Act if at the time of death, the person had not

³²⁴ *Ibid.*

³²⁵ *Id* 324-325. See interview with Ms Regina Papawu, Kpando (7 June 2001) footnote 318.

³²⁶ The Intestate Succession Bill is referred to as the Intestate Succession Act, 2009, in the draft legislation.

³²⁷ Clause 1(1).

made a will disposing of the estate of that person.

- (2) A person who dies leaving a will disposing of part of the estate of that person shall be deemed to have died intestate under this Act in respect of that part of the estate which is not disposed of in the will and accordingly this Act shall apply to that part of the estate.

Under clause 3, the spouse and the children of the deceased are entitled absolutely to the household property of the intestate. In terms of clause 4(1), if the intestate estate comprises of one house only and the surviving spouse made a contribution to the acquisition of the house, the surviving spouse is entitled to more than fifty percent of the deceased's estate (this clause is subject to the provisions of clauses 8 and 9). According to clause 4(2), if the intestate estate comprises of more than one house, the surviving spouse is entitled to one house and the children are entitled to another (this clause is subject to the provisions of clause 8). However, in cases of opposition as to which of the houses is to be devolved to the surviving spouse or child, the surviving spouse takes precedence over the child and has the exclusive right to select any one of the houses.³²⁸ If any of the spouses, or a spouse and child are incapable or averse to rendering a selection, the court will determine which of the houses should be devolved to the surviving spouse or child on application made to it by the administrator of the estate.³²⁹

Clause 5(1) makes provision for the distribution of the remainder of the estate of an intestate in instances where the intestate is survived by both a spouse and a child. In such cases the residue of the estate is distributed as follows:

- (a) thirty-five percent to the surviving spouse,
- (b) forty percent to the surviving child,
- (c) fifteen percent to the surviving parent, and
- (d) ten percent in accordance with customary law.

Clause 5(2) makes provision for the distribution of the remainder of the estate of an intestate in instances where the intestate is not survived by a parent. In such cases the residue of the estate is distributed as follows:

³²⁸ Clause 4(3).

³²⁹ Clause 4(4).

- (a) forty-five percent to the surviving spouse,
- (b) forty-five percent to the surviving child, and
- (c) ten percent in accordance with customary law.

Clause 6 deals with the distribution of the remainder of the estate of an intestate in instances where the intestate is survived by more than one spouse. In such cases the residue of the estate is distributed as follows:

- (a) fifty percent to the surviving spouses,
- (b) forty percent to the surviving child,
- (c) five percent to the surviving parent, and
- (d) five percent in accordance with customary law.

Clause 7 gives a discretion to a judge when regarding the percentage of the estate to award to a surviving spouse who has been estranged or separated from the intestate for three years or more. The percentage awarded in this regard shall not be less than thirty percent on the death intestate of one of the spouses.

In terms of clause 8(1), the surviving spouse will have a fifty percent interest or share in the matrimonial home. In cases where the surviving spouse contributed to the acquisition of the matrimonial home, the surviving spouse's interest or share in such shall be more than fifty percent.³³⁰ If the surviving spouse contributed to the acquisition of a house, and the intestate estate comprises of that house alone, the surviving spouse may choose to buy out the other heirs.³³¹ Clause 10 makes provision for instances in which the surviving spouse corporately owns property (excluding the matrimonial home) with the intestate; such surviving spouse shall be entitled to an extra twenty-five percent share of the said property by virtue of being a spouse and in addition to the fifty percent entitlement obtained in the jointly owned property. Clause 11 considers the sale or redemption of a mortgaged estate.³³² Clause 12 makes provision for the needs of dependent children and for the educational training of the

³³⁰ Clause 8(2).

³³¹ Clause 9.

³³² Clause 11 provides that:

- (1) Where the estate includes property which is subject to a mortgage, the surviving spouse or a surviving child, may make an application to the court for the sale or redemption of the property.
- (2) On application to the court, the court shall make an order for the sale or redemption of the property subject to the mortgage.

children of the intestate.³³³ A person that fails to fulfil their obligations of providing for the reasonable needs and education of the deceased's children is guilty of an offence and may be punished with either the imposition of a fine not exceeding five hundred penalty units or to a term of imprisonment not exceeding four years or to both, and a court may make any orders that it deems necessary for the restoration of the child or repayment of the education charges.³³⁴

Clause 13(1) makes provision for the distribution of the remainder of the estate of an intestate in instances where the intestate is only survived by a spouse. In such cases the residue of the estate is distributed as follows:

- (a) seventy percent to the surviving spouse,
- (b) twenty-five percent to the surviving parent, and
- (c) five percent in accordance with customary law.

Clause 13(2) makes provision for the distribution of the remainder of the estate of an intestate in instances where the intestate is not survived by either a child or a parent. In such cases the surviving spouse is entitled to eighty percent of the estate and the remaining twenty percent devolves according to customary law. Clause 14(1) makes provision for the distribution of the estate of an intestate in instances where the intestate is only survived by a child. In such cases the estate is distributed as follows:

- (a) seventy-five percent to the surviving child;
- (b) twenty percent to the surviving parent; and
- (c) five percent in accordance with customary law.

Clause 14(2) makes provision for the distribution of the estate of an intestate in

³³³ Clause 12 provides that:

- (1) Before the estate of the intestate is distributed, provision shall be made for the needs of dependant children of the intestate.
- (2) Where the intestate is survived by children who are still pursuing education courses, provision shall be made
 - (a) for the payment of the educational fees for the children, and
 - (b) for the provision of other necessities for the children out of the deceased's estate before the distribution of the estate.
- (3) For the purpose of this section, a dependant child is
 - (a) a child who depends on the intestate for the payment of education fees and provision of other necessities, or
 - (b) a child who is incapacitated and who depends on the intestate.

³³⁴ Clause 12(4).

instances where the intestate is not survived by a parent. In such cases the children of the intestate are entitled to ninety percent of the estate and the remaining ten percent devolves according to customary law. Clause 15 makes provision for the distribution of the estate of an intestate in instances where the intestate is survived by a spouse and children procreated with another woman. In such cases the estate is distributed as follows:

- (a) fifty percent to the surviving spouse;
- (b) thirty-five percent to the surviving children;
- (c) ten percent to the surviving parent; and
- (d) five percent in accordance with customary law.

Clause 16 entitles a surviving parent to ninety percent of the estate in cases where the intestate is not survived by a child or a spouse and the residue of the estate is distributed according to customary law. Clause 17 accommodates foreigners or aliens residing in Ghana and makes the Act applicable to them in certain scenarios.³³⁵ Clause 18 sets out the rules for the determination of the family which is to be regarded for the purpose of succession to the property of an intestate. The rules provide:

- (a) that family is the family to which the intestate belonged for the purpose of succession in accordance with the customary law of the community of which the intestate was a member;
- (b) in the case of an intestate who, being a member of two customary law communities belonged to two families for the purposes of succession, that family shall be the two families;
- (c) in the case of an intestate who is not a member of a family, that family is the family with which the intestate was identified at the time of death or, failing that, to the families of the parents of the intestate or failing that to the Republic.

Clause 19(1) makes provision for the distribution of the estate of an intestate in instances where the intestate is not survived by either a spouse or child or a parent. In such cases the estate devolves according to customary law. If customary law does not apply to the distribution of an estate as referred to in sub-clause 1, the estate devolves

³³⁵ Clause 17 provides that:

Where customary law is not applicable to the devolution of that part of the residue which by virtue of sections 5, 13, 14 or 16, devolves in accordance with customary law, that part of the residue devolves in equal shares to those beneficiaries otherwise entitled to share the residue under the relevant provisions of this Act.

to the Republic.³³⁶ In such cases, the court may award maintenance to or rule that a portion or the whole of the intestate estate be distributed to a person that has been maintained by the intestate or with whom the intestate was closely identified.³³⁷

Clause 20 deals with the distribution of small intestate estates³³⁸ and clause 21 allows the Minister responsible for Justice to vary (through legislation) the maximum value of the estate as stipulated under clause 20. Where two or more persons are eligible to share a part of an intestate estate, such heirs will separate it among themselves in equal proportions.³³⁹ Clause 23 deals with situations where the spouses die simultaneously.³⁴⁰ Clause 24 makes provision for the distribution of the estate of an intestate in instances where the intestate is only survived by a grandchild. In such cases the grandchild is entitled to the entire estate or to a portion thereof, provided that he or she was dependent on the intestate at the time of death. Clause 25(1) forbids the ejection of a surviving spouse or child from the matrimonial home before the distribution of the estate of a deceased individual whether testate or intestate and subject to certain qualifications.³⁴¹ Clause 25(2) defines the term “matrimonial home”.³⁴²

³³⁶ Clause 19(2).

³³⁷ Clause 19(3).

³³⁸ Clause 20 provides that:

Despite sections 4, 5, 13, 14 and 16

(a) where the total value of the residue does not exceed one thousand Ghana cedis, the residue shall devolve to a surviving spouse or child of the intestate or both where the spouse and the child survive the intestate;

(b) Where the intestate is survived only by a parent and the total value of the estate does not exceed one thousand Ghana cedis the estate shall devolve to the surviving parent.

³³⁹ Clause 22.

³⁴⁰ Clause 23 provides that:

Where spouses die in circumstances

(a) in which it appears that their deaths were simultaneous, or

(b) rendering it uncertain as to which of them survived the other,

The older shall, for the purposes of this Act, be presumed to have predeceased the younger.

³⁴¹ Clause 25(1) provides that:

(1) A person shall not eject a surviving spouse or child from the matrimonial home before the distribution of the estate of a deceased person whether testate or intestate

(a) where the matrimonial home is the self-acquired property of the deceased;

(b) where the matrimonial home is rented property, unless the ejection is pursuant to a court order;

(c) where the matrimonial home is the family house of the deceased, unless a period of six months has expired from the date of the death of the deceased; or

(d) where the matrimonial home is public property, unless a period of three months has expired from the date of death of the deceased.

³⁴² A matrimonial home means:

(a) the house or premises occupied by the deceased and the surviving spouse, or the deceased and a surviving child or all of them at the time of the death of the deceased; or

(b) any other self-acquired house of the deceased occupied by the surviving spouse or child or both at the time of the death of the deceased.

Clause 26 makes it an offence to (a) unlawfully eject a surviving spouse from the matrimonial home before the distribution of the estate of a deceased individual whether testate or intestate, and (b) unlawfully deprive beneficiaries of the use of a part of the property, property to which the Act applies, and which is, shared by the beneficiary with the intestate, or confiscates, demolishes or unlawfully interferes with the property of the intestate, before the distribution of the estate of a deceased individual whether testate or intestate. The guilty party here may be sanctioned either with the imposition of a fine not exceeding five hundred penalty units or to a term of imprisonment not exceeding four years or to both. In this regard, a court may make any orders that it deems necessary for the restoration or repayment of the person who was ejected or deprived.

Clause 27 makes provision for other offences and includes locking up the property of the deceased or taking ownership of household property within the matrimonial home, before the distribution of the estate of a deceased individual whether testate or intestate. Here, the guilty person will be punished with either the imposition of a fine not exceeding five hundred penalty units or to a term of imprisonment not exceeding more than four years. In this regard, a court may make any orders that it deems necessary for the restoration or repayment of the spouse or child. Clause 28 makes provision for regulations that may be enacted by the Minister responsible for Justice and clause 29 in entitled “interpretation”, but serves as a definitions clause for the Bill. Clause 30(1) repeals the Intestate Succession Act, 1985 (PNDCL 111) but maintains that the notices, order directions, appointments or any others acts made lawfully under the Intestate Succession Act, 1985 and still in force immediately prior to the commencement of this Act shall be regarded as having been made or prepared under this Act and remains enforceable until reviewed, cancelled or terminated.³⁴³

In general, the Intestate Succession Bill is laudable because it creates a uniform system of intestate succession law that will operate throughout Ghana, irrespective of the system of inheritance applicable to the intestate (ie, matrilineal or patrilineal succession) and the kind of marriage concluded.³⁴⁴ The Bill is a step in the right direction as it affords both women and children (“child” includes legitimate, illegitimate and adopted

³⁴³ Section 30(2).

³⁴⁴ Memorandum to the Bill *op cit* 1.

children in clause 29) rights of succession to property – rights which were not recognised under traditional matrilineal succession and rights which were only partially recognised under traditional patrilineal succession. The Bill remedies some of the problems associated with the Intestate Succession Law, 1985, by for example making provision for polygamous marriages and dependent parents and is reflective of the changes that have occurred in the Ghanaian family system.³⁴⁵ The problems of the Bill include that its clauses are phrased too broadly, for example clause 19 refers to “a person that has been maintained by the intestate or with whom the intestate was closely identified”. These categories of persons are not defined in the Bill and could actually cast the net of persons eligible for succession too wide. It is regrettable though that the Act excludes stool, skin or family property as the inclusion thereof would have given women an entitlement to more property.

4.6 The Constitution of the Republic of Ghana, 1992

Since independence, Ghana has enacted four Constitutions.³⁴⁶ The first three Constitutions virtually made no reference to human rights and were very brief documents. However, in 1992, Ghana adopted a supreme³⁴⁷ Constitution (Fourth Constitution) which includes a chapter on fundamental human rights and freedoms.³⁴⁸

Article 11(1) ranks the law of Ghana as follows:

The laws of Ghana shall comprise –

- (a) this Constitution;
- (b) enactment made by or under the authority of the Parliament established by this Constitution;
- (c) any Orders, Rules and Regulations made by any person or authority under a power conferred by this Constitution;

³⁴⁵ *Id* 1-3.

³⁴⁶ The First Republican Constitution became effective on 1 July 1960 and which was subsequently abrogated by a military junta on 24 February 1966. The Second Republican Constitution became effective on 22 August 1969 and which was abrogated by a military junta on 13 January 1972. The Third Republican Constitution became effective on 24 September 1979 and which was subsequently abrogated on 31 December 1981. The Fourth Republican Constitution became effective on 6 January 1993 and remains in force as the current law of Ghana. See Asare SK and Prempeh HK “Amending the Constitution of Ghana: Is the imperial president trespassing?” (2010) *African Journal of International and Comparative Law* 196.

³⁴⁷ Article 1(2) provides that: “This Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of the Constitution shall, to the extent of the inconsistency, be void”.

³⁴⁸ Chapter 5.

- (d) the existing law; and
- (e) the common law.³⁴⁹

The Constitution specifically defines customary law as: “the rules of law which by custom are applicable to particular communities in Ghana”.³⁵⁰ The Constitution also makes provision for the rights to equality,³⁵¹ personal liberty,³⁵² dignity³⁵³ and to own property,³⁵⁴ just to name but a few. The Constitution also makes provision for the establishment of a National House of Chiefs and a Regional House of Chiefs and necessitates that these institutions “undertake an evaluation of the traditional customs and usages with the view to eliminating those customs and usages that are outmoded and socially harmful”.³⁵⁵ It also mandates the Houses to embark on “a progressive study, interpretation and codification of customary law with a view to evolving, in appropriate cases, a unified system of rules of customary law, and compiling the customary laws and lines of succession applicable to each stool or skin”.³⁵⁶ The role

³⁴⁹ Section 11(2) states that: “the common law of Ghana shall comprise the rules of law generally known as the common law, the rules generally known as the doctrines of equity and the rules of customary law including those determined by the Superior Court of Judicature”.

³⁵⁰ Article 11(3).

³⁵¹ Article 17 provides that:

- (1) All persons shall be equal before the law
- (2) A person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status.
- (3) For the purposes of this article, “discriminate” means to give different treatment to different persons attributable only or mainly to their respective descriptions by race, place of origin, political opinions, colour, gender, occupation, religion or creed, whereby persons of one description are subjected to disabilities or restrictions to which persons of another description which are not granted of persons of another description are not made subject or are granted privileges or advantages which are not granted to persons of another description.
- (4) Nothing in this article shall prevent Parliament from enacting laws that are reasonably necessary to provide –
 - (a) for the implementation of policies and programmes aimed at redressing social, economic or educational imbalance in the Ghanaian society;
 - (b) for matters relating to adoption, marriage divorce, burial devolution of property on death or other matters of personal law;
 - (c) for the imposition of restrictions on the acquisitions of land by persons who are not citizens of Ghana or on the political and economic activities of such persons and for other matters relating to such persons; or
 - (d) for making different provision for different communities having regard to their special circumstances not being provision which is inconsistent with the spirit of this Constitution.
- (5) Nothing shall be taken to be inconsistent with this article which is allowed to be done under any provision of this Chapter.

³⁵² Section 14.

³⁵³ Section 15(1) provides that: “The dignity of all persons shall be inviolable” and section 15(2)(a) provides that: “No person shall, whether or not he is arrested, restricted or detained, be subjected to torture or other cruel, inhuman or degrading treatment or punishment”.

³⁵⁴ Article 18(1) provides that: “Every person has the right to own property either alone or in association with others”.

³⁵⁵ Article 272(c).

³⁵⁶ Articles 272(b) and 274(3)(f).

these Houses will play with regards to abolishing outdated and destructive customs and usages and codifying the law will be imperative for the improvement of the rights of women and children. In order to be effective, such determinations must however be made taking into consideration the provisions of the Constitution as the “constitutional provisions in general, and any rights guaranteed therein in particular, are superior to anything customary law dictates”.³⁵⁷ .

With particular reference to the rights of spouses to inherit marital property, article 22 provides that:

- (1) A spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will.
- (2) Parliament shall, as soon as practicable after the coming into force of this Constitution, enact legislation regulating the property rights of spouses.
- (3) With a view to achieving the full realization of the rights referred to in clause (2) of this article –
 - (a) spouses shall have equal access to property jointly acquired during marriage;
 - (b) assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriageAdministrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court or other tribunal.

In 2009 the legislature drafted the Property Rights of Spouses Bill which was to give effect to Ghana’s constitutional obligations in terms of articles 22(2) and (3) of the Constitution. This Bill will be discussed in detail in the next section of this chapter.

4.7 The Property Rights of Spouses Bill³⁵⁸

The purpose of the Property Rights of Spouses Bill is to make provision for and regulate the property rights of:

³⁵⁷ Kuenyehia A “Women, marriage, and intestate succession in the context of legal pluralism in Africa” (2006) *University of California Davis Law Review* 400.

³⁵⁸ The Property Rights of Spouses Bill is referred to as the Property Rights of Spouses Act, 2009 in the draft legislation.

- (i) spouses during the subsistence of or upon the termination of a marriage; and
- (ii) cohabiting couples and for matters related thereto.³⁵⁹

Clause 1 of the Bill, complies with article 22 of the Constitution and provides for equal access to property jointly obtained during the subsistence of marriage,³⁶⁰ and also permits the equitable distribution of property that is jointly obtained during marriage, upon the dissolution of the marriage.³⁶¹ Clause 2 defines the term “spouse”.³⁶² This is imperative because the Constitution does not define the term in any of the sections pertaining to spouses. Clause 3 makes provision for situations of cohabitation, ie, where people merely reside together as husband and wife without completing any formal marriage rites.³⁶³ The clause also caters for circumstances where customary marriage ceremonies have begun, but have not been fully concluded. Clause 4 allows cohabitees and marriage partners to make marital property agreements regulating their property rights.³⁶⁴ Clause 5 outlines the prerequisites for the marital property agreement.³⁶⁵

³⁵⁹ See the long title of the Bill.

³⁶⁰ Clause 1(a).

³⁶¹ Clause 1(b).

³⁶² For purposes of the Bill,

- (1) a spouse means a man married to a woman or a woman married to a man under the marriages Act, 1884 to 1985 which includes:
 - (a) the Marriage Ordinance (Cap 127);
 - (b) Marriage of Mohammedans Ordinance Cap 129); and
 - (c) Customary marriage.
- (2) A marriage under the Marriage Ordinance (Cap 27) is a monogamous union.
- (3) A marriage under Parts One and Two of the Marriages Act 1884 –1985 may be actually or potentially polygamous.
- (4) A marriage is actually polygamous if there is more than one wife.
- (5) A marriage is potentially polygamous if there is currently on wife but there could be others in the future.

³⁶³ Clause 3 provides that:

- (1) Cohabitation refers to a situation in which a man and woman hold themselves out to the public to be man and wife.
- (2) Persons who have cohabited for a period of five years or more shall be deemed to be spouses and have the rights of spouses for the purpose of this Act.
- (3) The rights conferred by this section on cohabitees are available only to persons who
 - (a) have the capacity to be married to each other under a marriage recognised under this Act,
 - (b) are eighteen years and above, and
 - (c) have held themselves out as husband and wife for a period of not less than five years.

³⁶⁴ Clause 4 provides that:

- (1) A man and a woman in contemplation of marriage or cohabitation or who are married or cohabitating may make an agreement with respect to
 - (a) the ownership of the separate property of each spouse,
 - (b) property acquired during the marriage or cohabitation, and
 - (c) the distribution of property acquired during the marriage or cohabitation.
- (2) Spouses may make an agreement during marriage or cohabitation as regards the ownership and distribution of property on dissolution of the marriage or termination of the cohabitation.
- (3) The agreement may be for the settlement of any differences that may arise in relation to property owned by either or both spouses.

³⁶⁵ Clause 5 provides that:

- (1) An agreement under section 4 may
 - (a) define the share of the property, or any part of the property to which each spouse is entitled on separation, dissolution of marriage, or termination of cohabitation, or

Clause 6(1) charges each individual party to acquire independent legal advice before drafting or concluding a marital property agreement, so as to avoid future disputes. Clause 6(2) makes it compulsory for the legal practitioner to explain the legal repercussions of the agreement to the relevant party and certify that this has actually been done. Clause 7 provides the court with the authority to not enforce the agreement.³⁶⁶ Clause 8 allows the court to probe the agreement³⁶⁷ and also permits a spouse, party or any other person having an interest in the subject matter of the agreement, to make an application to the court for an investigation to be made where there are reasonable grounds to believe that the court may vitiate the agreement.³⁶⁸ Clause 9 outlines the grounds that may be considered or proved to set aside or modify and agreement.³⁶⁹ Clause 10(1) defines the term “joint property of spouses”. In this regard and subject to section 11 (4), the joint property of spouses means:

property however titled, acquired by one or both spouses during the marriage and may include:

(a) the matrimonial home, and other immovable property;

(b) provide for the calculation of the share and the method by which the property or part of the property may be divided.

(2) The agreement may be oral or in writing.

(3) Each party to an oral agreement shall have a witness and if an oral agreement is to be used in court, it shall be confirmed by affidavit.

(4) The written agreement shall be signed by both parties and witnessed by one person each for each party and may be filed in court.

(5) Where the agreement is filed in court, it may be amended or terminated only by an order of court on application by the parties witnessed by two persons chosen by the parties.

(6) If a third party will be affected by the amendment or termination, the application shall be on notice to the third party.

³⁶⁶ Clause 7 provides that: “Subject to section 9, a marital property agreement is not enforceable where the court is of the opinion that it would be unjust to give effect to the agreement”.

³⁶⁷ Clause 8(1) provides that: “A court has jurisdiction to enquire into an agreement made under subsection (1) of section 4 during cohabitation or marriage or on the termination of cohabitation or dissolution of the marriage”.

³⁶⁸ Clause 8(2).

³⁶⁹ Clause 9 provides that:

(1) Where a party to an agreement alleges that there was no intention to enter into the agreement or that the agreement

(a) is illegal,

(b) was entered into under

(i) duress,

(ii) undue influence,

(iii) fraud,

(iv) misrepresentation, or

(v) any other vitiating factor such as the unequal bargaining position of a spouse, the court may set aside the agreement and make another order for the distribution of the property.

(2) An agreement may be set aside by the court for illegality or lack of full disclosure of assets by a party to the agreement.

(3) The Court may set aside or modify an agreement on the ground of unconscionability where it is satisfied that the purpose and effect of the agreement is contrary to conscience or that the agreement exploits the unequal bargaining position of a spouse”.

- (b) household property;
- (c) any property other than separate property acquired during the marriage;
- (d) property which was separate property but which a spouse has made a contribution towards except where this relates to the sale of family land; and
- (e) a business for which seed money was provided by a spouse for its establishment.

In terms of clause 10(2), a court is authorised to prevent a spouse or a third party from sanctioning the disposal of joint property³⁷⁰ and may also make an order to protect or preserve joint property while judicial proceedings about joint property are still imminent in court.³⁷¹ Clause 11 makes provision for the acquiring and maintenance of separate property during the course of the marriage³⁷² and prohibits separate property from distribution, unless there is an agreement in the converse.³⁷³ Clause 11(2) will not be applicable in cases where a spouse can show that he or she has contributed (monetarily or in kind) to the acquisition and preservation of the separate property.³⁷⁴

Clause 11(4) describes separate property as:

- (a) self-acquired property and the proceeds and profits from the self acquired property;
- (b) property acquired before marriage or property acquired by bequest, devise, inheritance or gift from a person other than the spouse;
- (c) property that was acquired by gift or inheritance from a third party after the date of the marriage;
- (d) income from property referred to in paragraph (c) if the giver or testator has expressly stated that it is to be excluded from the spouse's joint property;
- (e) damages or a right to damages for personal injuries, nervous shock, mental distress or loss of guidance, care and companionship, or the part of a settlement that represents those damages;
- (f) a lump sum payment provided under a personal or similar plan;
- (g) proceeds or right to proceeds of an insurance policy payable on the death of the insured person;
- (h) property that the spouses have agreed is not to be included in the joint property;
- (i) property which the spouses by agreement regard as separate property;
- (j) trust property except where the trust is a sham in which event the court may set the trust aside in the best interest of the vulnerable spouse; and
- (k) any other property that a spouse can prove is separate property.

³⁷⁰ Clause 10(2) specifically provides that: "The court may by order restrain a spouse or a third party from permitting the disposition of joint property and the court may rescind a disposition of joint property made with the intention of defeating the financial provision of a spouse except if the disposition is to a purchaser for value in good faith".

³⁷¹ Clause 10(3).

³⁷² Clause 11(1).

³⁷³ Clause 11(2).

³⁷⁴ Clause 11(3).

In clause 12 of the Bill, spouses are granted equal access to joint property³⁷⁵ and clause 13 of the Bill makes provision for the equitable distribution of property where a marriage is dissolved or where cohabitation ends. The relevant provision provides that:

- (1) Where a marriage is being dissolved, the court that determines the property rights of the spouses, may make an order to equitably distribute property jointly acquired during the marriage without regard to the reasons for the breakdown of the marriage.
- (2) Where cohabitation terminates, a cohabitee may apply to the court for an order for the distribution of their joint property.
- (3) The court may make an order for the distribution of property jointly acquired during the cohabitation.
- (4) The distribution of the property shall generally be in equal shares but a spouse may on notice to the other spouse apply to the court to give not more than one third of the value of the jointly acquired property to the other spouse.
- (5) The court shall take into consideration the particular circumstances of each case when distributing the property and shall take into consideration:
 - (a) the length of the marriage;
 - (b) the age of the spouse;
 - (c) the contribution of each spouse to the acquisition, maintenance or improvement of the property including the contribution of a spouse towards the upkeep or maintenance of the property in cash or kind;
 - (d) the contribution of the immediate family or any contribution
 - (i) to the maintenance of the matrimonial home, or
 - (ii) which facilitated the acquisition of the property or matrimonial home by a spouse;
 - (e) the economic circumstances of each spouse at the time of the distribution of the property including the desirability to award the matrimonial home to a particular spouse or the right of a spouse who has custody of a child to live in the matrimonial home for a reasonable period of time;
 - (f) the need to make reasonable provision for other spouses and their children as regard joint property after another marriage where the marriage is polygamous;
 - (g) the period of cohabitation;
 - (h) whether there is an agreement related to the ownership and distribution of the property in the best interest of a vulnerable spouse;
 - (i) financial misconduct or the wasting of assets; and

³⁷⁵ Clause 12 provides that:

- (1) Spouses shall have equal access to joint property under the following circumstances where each spouse:
 - (a) is entitled to the possession of the property;
 - (b) has the same interest in the property;
 - (c) has the same title; or
 - (d) has the property for the same time.
- (2) Equal access includes the right to the use of, the benefit of and to enter the joint property and where there is agreement between spouses, to the disposal of the joint property.

- (j) any other fact which in the opinion of the Court requires consideration.
- (6) A monetary contribution shall not be presumed to be of greater value than a non-monetary contribution.
- (7) The non-monetary contribution shall not be proved in monetary terms.

Under clause 14, the consent of a spouse is required before a transaction regarding the matrimonial home (ie, joint property) can be concluded.³⁷⁶ In cases where the matrimonial home is not joint property but was acquired by one spouse in his or her individual capacity, six months notice of a transaction concerning such matrimonial home must be given to the non-owning spouse.³⁷⁷ Clause 14(3) prevents a *bona fide* purchaser from being prejudiced for reasons of lack of consent,³⁷⁸ and clause 14(4) makes provision for the circumstances under which a court may dispense with the requirement of spousal consent.³⁷⁹ The remaining sub-clauses deal with instances where one of the spouses enters into a transaction regarding the jointly acquired matrimonial home without obtaining the necessary consent and the relief available to a spouse whose interests have been defeated in that regard.³⁸⁰ Clause 15 makes provision for property settlement where a court is authorised to effect an order for the amendment of a spouse's interest in property, if it is just and equitable to do so. A spouse's interest in the matrimonial home is excluded from such amendment.³⁸¹ Clause

³⁷⁶ Clause 14(1).

³⁷⁷ Clause 14(2).

³⁷⁸ Clause 14(3) provides that: "Despite section 1, the interest of a purchaser for value in good faith without notice shall not be prejudiced on account of the absence of consent of the other spouse to the transaction".

³⁷⁹ Clause 14(4) provides that:

The Court may dispense with the consent of a spouse required under subsection (1) where it is satisfied that the consent cannot be obtained because of

- (a) the mental incapacity of the spouse which has been determined by a mental health professional or psychiatrist,
- (b) the unknown whereabouts of the spouse for seven years as declared by the court in which case the rules of the Administration of Estates Act 1961, (Act 63) shall apply to the spouse presumed dead, or
- (c) any other good reason for which consent should be dispensed with.

³⁸⁰ In this regard sub-clauses (5), (6) and (7) provide that:

- (5) Subject to subsection (3), where a spouse enters into a transaction that relates to the jointly acquired matrimonial home without the consent of the other spouse, that transaction may be set aside by the court on an application by the other spouse.
- (6) Where the court does not set aside a transaction, the spouse whose interest is defeated is entitled to claim out of the proceeds of the transaction, the value of that spouse's share in the matrimonial home.
- (7) Where a transfer of the jointly acquired matrimonial home is ordered by the court and a spouse ordered to make the transfer or conveyance is either unable or unwilling to do so, the court may order the registrar of the court to execute the appropriate transfer or conveyance on the part of that spouse.

³⁸¹ Clause 15 provides that:

- (1) In a proceeding related to property, the court may make an order to alter the interest of either spouse in the property including an order
 - (a) for a settlement of property in substitution for an interest in the property, or
 - (b) requiring either or both spouses to make, a settlement or transfer of property determined by the court for the benefit of either or both spouses.

16 permits a court to set aside an order made in clause 15 if the order was attained through fraud, duress, the giving of false evidence or the suppression of evidence.³⁸²

The Bill in clause 17 makes provision for the giving of property as a gift by one spouse to another bearing the rebuttable presumption that the property belongs to the receiving spouse. Clause 18 stipulates that a spouse is not liable for any debts incurred by the other spouse before the conclusion of the marriage, unless there is an agreement to the contrary. Under clause 19, where a spouse incurs a liability (with the consent of the other spouse) during the course of the marriage for necessities of life for the nuclear family, the debt shall become a family liability with both spouses being accountable for it. Where a spouse incurs a liability (without the consent of the other spouse) during the course of the marriage for necessities of life for the nuclear family, the spouse that incurred the liability will be solely accountable for it, unless there is an agreement to the contrary. Clause 20 makes provision for the distribution of property between spouses in polygamous marriages as follows:

- (1) Where a husband has more than one wife in a polygamous marriage, the ownership of the property shall be determined as follows:
 - (a) joint property acquired during the first marriage and before the second marriage was contracted is owned by the husband and the first wife; and
 - (b) any joint property acquired after the second marriage is owned by the husband and the co-wives and the same principle is applicable to a subsequent marriage.
- (2) Despite subsection (1) (b), where it is clear either by agreement or through the conduct of the parties of the polygamous marriage that each has separate matrimonial property, each wife owns that separate matrimonial property separately without the inclusion of the other wives.
- (3) A husband in a polygamous marriage who takes a subsequent wife or wives shall together with the existing wife or wives make a declaration as prescribed of their respective interest in the joint property.
- (4) The provisions of section 5 shall apply to the declaration.

(2) The court shall not make the order unless it is satisfied that it is just and equitable to do so.

- (3) Where the court makes an order under subsection (1) it shall have regard to
- (a) the effect of the proposed order on the earning capacity of either spouse, and
 - (b) any other order that has been made under this Act in respect of a spouse.

³⁸² Clause 16 provides that:

- (1) Where the court is satisfied on an application made by a person affected by an order, that the order was obtained by fraud, duress, the giving of false evidence or the suppression of evidence, the court may set aside the order and make another order.
- (2) The court shall have regard to the protection of the interest of a purchaser in good faith for value without notice in exercising its power under subsection (1).

Clause 21 makes provision for situations in which the matrimonial home is rented property.³⁸³ Under clause 22 where a spouse obtains property either prior to the conclusion of a marriage or during the subsistence of the marriage and such property is not joint property, but the other spouse made a contribution to the preservation and enhancement of the property, that other spouse shall attain a beneficial interest in the said property equal to the contribution made by that spouse. The Bill in clause 23 highlights the presumptions related to property obtained during the subsistence of marriage.³⁸⁴ In addition to or apart from the property distribution mentioned under clause 13, a court may award a spouse maintenance for the reasonable necessities of the spouse until death or re-marriage, according to clause 24(1) of the Bill. The maintenance order in clause 24(1) may be in the form of a lump sum disbursement or periodic imbursements over a particular time, and must (according to a court) be just, after careful consideration of a number of factors.³⁸⁵ Clause 24(3) stipulates that maintenance acquired under sub-

³⁸³ Clause 21 provides that:

- (1) Where the parties to a marriage or cohabitantes live in rented premises, the court may order the premises to be assigned to one of the parties on dissolution of the relationship even though that party is not a party to the tenancy agreement and shall take into consideration the best interest of any children of the marriage.
- (2) Where an assignment is made under subsection (1) the party to whom the assignment is made shall be deemed to be a party to the tenancy agreement in replacement of the original tenant and shall attorn tenancy to the owner, despite the presence in the tenancy agreement of a covenant against non-assignment.
- (3) After the assignment, the original tenant may be ordered to continue to pay the rent for the premises for a period of at least six months and the owner of the rented premises shall be given notice of the order of the court.

³⁸⁴ Clause 23 provides that:

Where during the subsistence of a marriage any property is acquired

- (a) in the name of a spouse, there shall be a rebuttable presumption that the property is joint property with the onus on the person who claims that the property is separate property to prove that it is separate property; or
- (b) in the names of the spouses jointly, there shall be a rebuttable presumption that the beneficial interests of the spouses are equal.

³⁸⁵ Clause 24(2) provides that:

The maintenance order may be a lump sum or in specified amounts and for periods of time that the court considers just after the court has considered.

- (a) the financial resources of the spouse seeking maintenance, including property apportioned to that spouse, under section 13;
- (b) the ability of the spouse to satisfy that spouse's needs independently;
- (c) the present and future earning capacity of both spouses including the time necessary to acquire sufficient education or training to enable the spouse who seeks maintenance to find appropriate employment;
- (d) the reduced or lost earning capacity of the spouse seeking maintenance because that spouse gave up or delayed education, training employment or career opportunities during the marriage;
- (e) the duration of the marriage;
- (f) the standard of living established during the marriage;
- (g) the age, physical and mental condition of the spouse who seeks maintenance;
- (h) the financial needs, obligations and responsibilities which each spouse has or is likely to have in the foreseeable future;
- (i) the children of the marriage in the custody of the spouse who seeks or needs maintenance;
- (j) the contribution and services
 - (i) as a spouse, parent, wage earner,
 - (ii) as a manager of the home, and

clause (1) is not subject to tax. Clauses 25-28 provide for various miscellaneous matters like the jurisdiction of courts in matters arising under the Act,³⁸⁶ applications to the Legal Aid Scheme for assistance in cases where the spouses cannot afford to pay for legal expenses,³⁸⁷ the provision for the settlement of disputes via alternative dispute resolution,³⁸⁸ and offences which includes the disposal of joint property or household property without the sanction of the other spouse, disallowing the other spouse the use of the profits from the sale of joint property and the demolition of joint property in order to frustrate the purpose of the Act.³⁸⁹ With regards to the last mentioned matter, the penalty for such an offence is a fine not exceeding four hundred and fifty penalty units or a term of imprisonment not exceeding three years or both. The court may additionally grant an order for the restitution of property to the deprived spouse and if restitution is unattainable, the court may make an order for a right of recourse for the sum total of the income of the joint property upon the termination of the marriage.³⁹⁰ Clause 29 repeals sections 19, 20 and 21 of the Matrimonial Causes Act 367 of 1971. Clause 30 makes provision for regulations that may be enacted by the Minister responsible for Justice and

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- (iii) to the career or career potential of the other spouse of the person who is seeking maintenance;
 - (k) the wasteful dissipation of joint property by a spouse;
 - (l) a transfer or encumbrance made by a spouse in contemplation of a suit for divorce without fair consideration; and
 - (m) any other factor which the court may find to be just and equitable.

³⁸⁶ Clause 25 provides that:

- (1) A District or Circuit Court or the High Court may hear and determine a matter that arises under this Act.
- (2) A matter arising under this Act shall be heard by the court in chambers.

³⁸⁷ Clause 26 provides that:

- (1) The Legal Aid Scheme Act, 1997 (Act 542) applies for the purpose of providing representation by a lawyer for a spouse who cannot afford the payment of legal fees.
- (2) A lawyer provided by the Legal Aid Scheme shall take the spouses through mediation.

³⁸⁸ Clause 27 provides that:

- (1) Spouses may agree to use alternative dispute resolution methods for the distribution of property acquired during a marriage before or after the institution of legal proceedings for the dissolution of a marriage but the agreement shall not oust the jurisdiction of the court.
- (2) A mediator shall attempt to resolve a dispute through mediation thirty days after referral by a spouse and a spouse may be represented at the mediation by a representative of the spouse's choice.
- (3) Upon resolution of the dispute by the mediation, the agreed terms shall be reduced to a written mediation agreement.

³⁸⁹ Clause 28(1) provides that:

- (1) A spouse who
 - (a) denies the other spouse an equal right to stay in the matrimonial home and to use the household property when a court has not determined the status of both spouses in relation to the use of the matrimonial home or household property;
 - (b) disposes of joint property or household property
 - (i) in order to pre-empt the decision of the court on a matter that relates to the spouse, or
 - (ii) without the consent of the other spouse;
 - (c) denies the other spouse use of the proceeds from the sale of joint property; or
 - (d) destroys joint property in order to defeat the purpose of this Act or the Matrimonial Causes Act, 1971 (Act 367), commits an offence and is liable on summary conviction to a fine of not more than four hundred and fifty penalty units or a term of imprisonment of not more than three years or both.

³⁹⁰ Clause 28(2).

clause 31 in entitled “interpretation”, but serves as a definitions clause for the Bill.

In general, the Property Rights of Spouses Bill is admirable because it creates rules and practical standards for the courts to determine the property rights of spouses in furtherance of the provision in the Constitution and it is anticipated that the promulgation of the Bill will guarantee fairness and equitability when dealing with matters that relate to the property rights of spouses.³⁹¹ Some of the praiseworthy features of the Bill are that it recognises (a) polygamy; (b) that women can acquire separate property; (c) both the monetary and non-monetary contributions made by a wife to the family’s welfare;³⁹² and (d) that the matrimonial home falls into the joint property of the spouses thereby frustrating the right of the husband’s family to eject a widow from her matrimonial home. The Bill is also consistent with the provisions³⁹³ of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which was actually the inspiration for the Property Rights of Spouses Bill. The Bill would also facilitate a shift towards a sincere appreciation for women’s economic labour by amending the rules so that such labour can be converted into enforceable rights. This could be achieved because the Bill establishes a legal presumption in favour of community of property in marriage.³⁹⁴

³⁹¹ Memorandum to the Bill *op cit* 1.

³⁹² Duwuona-Hammond C “Ensuring equity in the distribution of matrimonial property upon divorce: Preparing the path for legislation” (2005) *University of Botswana Law Journal* 117-119. See also *Bentsi-Enchill v Bentsi-Enchill* [1976] 2 GLR 303 at 306, where the court stated that:

In recent years the wife is very often the wage earner and makes contribution towards to common expenses by buying for and running the home. Judicial opinion today shows that the trend is to give credit to the wife for her services in kind as housekeeper or for the use of her own income or savings in such a way as to enable her husband to use his for the purchase of a house.

³⁹³ In this regard article 2 provides that:

State parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination.

Article 16(1)(h) of the Convention also provides that:

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women ...

- (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

³⁹⁴ Higgins TE and Fenrich J “Legal pluralism, gender and access to land in Ghana” (2011-2012) *Fordham Environmental Law Review* 21.

4.8 Conclusion

Ghana has taken some positive steps towards the attainments of equal rights for all its citizens. The promulgation of the uniform Intestate Succession Law represents one of these outstanding achievements. However, although the statute seeks to improve the rights of both women and children with regard to intestate succession, it is rather unfortunate that it has merely contributed to the continued discrimination of women and has simultaneously created neoteric problems for women especially. The problems associated with this piece of legislation far outweigh its benefits. The Constitution, 1992 has further sought to advance the rights of women with its various enactments.³⁹⁵ Although both these enactments are a step in the right direction in the sense that they provide homogeneity of laws in Ghana and “offer a standard against which all subsidiary laws are to be judged”,³⁹⁶ they have not made significant inroads into improving the status and rights of women in general; and they also highlight the pertinent fact that when customary law is involved, legislation may not be a suitable tool to bring about change or to eliminate traditional western ideals of discrimination.

The introduction of both the Intestate Succession and the Property Rights of Spouses Bills are commendable and will significantly improve the rights of both women and children if they are adopted and promulgated by the Ghanaian Parliament. It is unfortunate though that to date, Parliament has yet to pass these pieces of draft legislation. Pressure is mounting from women’s groups for Parliament to pass the two Bills.³⁹⁷ As of January 2012, the report on the Intestate Succession Bill was with the Constitutional, Legal and Parliamentary Affairs and Gender Child Committees for a second reading, whilst the Property Rights Bill still had to be reviewed by both the aforementioned committees. It is therefore uncertain as to when the Bills will become law.

³⁹⁵ See section 3.4 of this chapter.

³⁹⁶ Kuenyehia (2006) *op cit* 399.

³⁹⁷ MYJOYONLINE.COM at <http://politics.myjoyonline.com/tgpolitics/print/index.php?url=http://politics.myjoyonline...page 1> published on 17/01/2012 (accessed 08/11/2012).

4.9 Summary of chapter

Chapter 3 begins with a general overview of the current law in operation in Ghana. Because of colonialism, and Ghana's diverse "ethnic mix"³⁹⁸ various legal systems currently function in Ghana, ie, English law, African customary law and Islamic law. The law of intestate succession in Ghana originates primarily from two sources, ie, African customary law and statutory law.³⁹⁹ As a result thereof, attention is firstly given to the general principles of intestate succession under customary law in Ghana and thereafter the legislation governing intestate succession in Ghana is discussed. Amongst the pieces of legislation discussed are the Courts Act, 1971 and its predecessor the Courts Act, 1960 which both contained the choice of law rules governing the intestate succession of Ghanaian estates; the Marriage Ordinance which changed the existing rules of African customary law to incorporate English law rules when distributing the estates of persons who had married according to the Ordinance and who had died intestate; and the Intestate Succession Law, which is now the uniform statute regulating matters concerning intestate succession in Ghana. The advantages and disadvantages of each of the afore-mentioned pieces of legislation are discussed at length at the various intervals at which they are each considered. The Intestate Succession Law is specifically evaluated with reference to a research study conducted by the Joseph R Crowley Programme in International Human Rights at Fordham Law School. The proposed Intestate Succession Bill is discussed thereafter. The Constitution of the Republic of Ghana, 1992 has also effected changes to the law of intestate succession. The provisions of the Constitution together with the proposed Property Rights of Spouses Bill which give effect to articles 22(2) and 22(3) are also discussed at length. In conclusion, the researcher assesses whether these new enactments have had any significant impact on intestate succession in Ghana, in general, and whether they have improved the lives of Ghana's citizens, especially its women and children.

³⁹⁸ Kuenyehia A (ed) *Women and law in West Africa: Situational analysis of some key issues affecting women* (1998) xi.

³⁹⁹ Dowuona-Hammond (1998) *op cit* 132.

CHAPTER 5

INTESTATE SUCCESSION IN THE KINGDOM OF SWAZILAND

5.1 Introduction

Swaziland is one of the smallest countries in Africa bordering South Africa and Maputo.¹ Like many of the countries in Africa, Swaziland was a British colony for a long period of time.² However, on 6 September 1968, Swaziland acquired its independence from Britain.³ In its first post-independence elections which were held in 1972, the Imbokodvo National Movement (the party of the then monarch King Sobhuza II),⁴ won almost 75% of the votes.⁵ On 12 April 1973, King Sobhuza II issued a proclamation⁶ “declaring that he had assumed supreme power in the Kingdom of Swaziland and that all legislative, executive and judicial power vested in him”.⁷ The sole purpose of the proclamation was to “transform Swaziland into an absolute monarch with the King wielding absolute powers”.⁸ As a result thereof, Swaziland remains one of the last surviving absolute monarchs on the African continent.⁹ King Sobhuza II¹⁰ became the king of Swaziland in 1921 and ruled the country from 1972 until his death in August 1982.¹¹ He remains one of the most revered kings in Swaziland’s history. King Sobhuza II was succeeded

¹ Armstrong AK and Nhlapo RT *Law and the other sex: The legal position of women in Swaziland* (1985) 1.

² See generally Matsebula JSM *A history of Swaziland* (1976) 147-160.

³ Armstrong and Nhlapo *op cit* 1.

⁴ King Sobhuza II belonged to the Dlamini clan and was referred to as “Ingwenyama” (head of the clan). For a history of the Dlamini clan see Bonner P *Kings, commoners and concessionaries: The evolution and dissolution of the nineteenth-century Swazi state* (1983) 9-26.

⁵ See Potholm CP *Swaziland: The dynamics of political modernization* (1972) 129.

⁶ King’s Proclamation to the Nation no 12 of 1973. The purpose of this proclamation was endorsed by the current monarch King Mswati III in Decree no 1 of 1981 and Decree no 1 of 1987.

⁷ Gumedze S “Human rights and the rule of law in Swaziland” (2005) *African Human Rights Law Journal* 269. See also Booth AR *Swaziland: Tradition and change in a southern African Kingdom* (1983) 73-74.

⁸ Fombad CM “The Swaziland Constitution of 2005: Can absolutism be reconciled with modern constitutionalism?” (2007) *South African Journal on Human Rights* 95.

⁹ Mzizi JB “The dominance of the Swazi monarchy and the moral dynamics of democratization of the Swazi state” (2004) *Journal of African Elections* 94.

¹⁰ See generally Matsebula (1976) *op cit* 161-178.

¹¹ Global Investment and Business Center, USA *Swaziland foreign policy and government guide* (2010) 63.

by his son Prince Makhosetive in 1986, when he was publicly crowned King Mswati III.¹² King Mswati currently serves as the absolute monarch of Swaziland.

5.2 Swazi customary law

In Swaziland, customary law may be defined as:

All legally binding customary practices which are not repugnant to natural justice (and which have been developed from time immemorial and such proclamations, decrees, orders and other enactments, passed by the *Ngwenyama* (the King) in consultation with his *Libandla* (national council), which are intended to apply to Swazis¹³ and to be enforced by Swazi courts.¹⁴

Swazi law and custom is unwritten¹⁵ and uncodified and therefore materialises from what the Swazi people do, or – more correctly so – from what they think they should do; rather than from what a group of legal experts deem they should do and believe.¹⁶ The king (who is referred to as *umlomo longacali manga*, which literally means, “the mouth that never lies”) and the royal family are the principal guardians of Swazi law and custom. The king’s proclamations became Swazi law when they were publicly announced to the nation and such public announcement took place at the cattle byre¹⁷ as that is where all national meetings are convened.¹⁸

¹² *Ibid.*

¹³ The term “Swazi” is not defined in any Act, however Khumalo argues that we can infer from the Swazi Courts Act 80 of 1950 and the Swazi Administration Act 79 of 1950 that it means: “a member of an indigenous population of Africa who is a Swazi citizen attached to a chief appointed under section 4 of the Swazi Administration Act 79 of 1950” (Khumalo JAM *Swazi customary law Courts* (1976) 1).

¹⁴ Khumalo *op cit* 1

¹⁵ Adjetey FNA “Reclaiming the African woman’s individuality: The struggle between women’s reproductive autonomy and African society and culture” (1994-1995) *American Law Review* 1365.

¹⁶ Whelpton FPvR “Swazi law and custom (*emasiko nemi esiswati*): Law (*lesiko*) or custom (*umhambo*)” (2004) *Codicillus* 27.

¹⁷ The cattle byre is usually built at the eastern end of the kraal and it is the place where the domestic animals reside at night. It is also believed to be the place where the ancestors reside and is therefore considered the most sacred place in Swazi traditional religion (Kasenene P *Religion in Swaziland* (1993) 31-32.

¹⁸ Whelpton (2004) *op cit* 27.

5.3 The Swazi legal system

Like South Africa, Swaziland's legal system is dualistic in nature.¹⁹ It comprises Roman-Dutch law, which is the common law of Swaziland and Swazi customary law.²⁰ This status quo has been confirmed by section 252 of the Constitution of the Kingdom of Swaziland Act 101 of 2005 which provides that:

- (1) Subject to the provisions of this Constitution or any other written law, the principles and rules that formed, immediately before the 6th September, 1968 (Independence Day), the principles and rules of the Roman-Dutch Common Law as applicable to Swaziland since 22nd February 1907 are confirmed and shall be applied and enforced as the common law of Swaziland except where and to the extent that those principles or rules are inconsistent with this Constitution or the a statute.
- (2) Subject to the provisions of this Constitution, the principles of Swazi customary law (Swazi law and custom) are hereby recognized and adopted and shall be applied and enforced as part of the law of Swaziland.²¹

Comparable to South Africa, the application of Swazi customary law is also subject to a repugnancy clause²² found in section 252(3) of the Constitution of the Kingdom of Swaziland which provides that:

- (3) The provisions of subsection (2) do not apply in respect of any custom that is, and to the extent that is, inconsistent with a provision of this Constitution or a statute or repugnant to natural justice or morality or general principles of humanity.

¹⁹ For further in this regard see Pain JH "The reception of English and Roman-Dutch law in Africa with reference to Botswana, Lesotho and Swaziland" (1978) *Comparative International Law Journal of South Africa* 167.

²⁰ Rautenbach C "Comments on the constitutional protection of religion in Swaziland" (2008) *African Human Rights Law Journal* 433.

²¹ See also *Thembinkosi v Ntombi and Another* [2011] SZHC 129 at para. 30.

²² A similar repugnancy clause is also contained in section 11(a) of the Swazi Courts Act 80 of 1950 which provides that: "The Swazi courts are to apply the Swazi law and custom prevailing in Swaziland as far as it is not repugnant to natural justice or morality or inconsistent with the provisions of any law in force in Swaziland". This provision seeks to regulate the choice of which system of law to apply and also serves to limit Swazi law and custom "in the name of 'natural justice or morality'" (see Whelpton FPvR "Swazi law and custom in the Kingdom of Swaziland" (1997) *South African Journal of Ethnology* 148).

According to Armstrong and Nhlapo,²³ there is a difference in the applicability of each system of law to the populace of Swaziland. The general law of the land applies to all citizens of Swaziland whilst Swazi customary law applies only to citizens who are ethnically Swazi.²⁴ There is also some dualism with regards to the way in which the law is administered.²⁵ Magistrate's courts, High courts and Courts of Appeal apply the general law of the land,²⁶ whilst customary courts known as Swazi National Courts apply customary law.²⁷ In *Magagula v Mabuza and Others*,²⁸ the court held that:

... the Constitution does not oust the jurisdiction of the High Court in marriages solemnised in terms of Swazi Law and custom. Section 151(8)²⁹ of the Constitution ousts the jurisdiction of this court in matters relating to the office of the *Ingwenyama*, the office of *Indlovukazi* (the Queen mother), the authorisation of a person to perform the functions of Regent in terms of section 8, the appointment, and revocation and suspension of a chief; the composition of the Swazi National Council and procedure of the Council; and the *Libutfo* (regimental) systems.

In *Thomo v Vilakati*,³⁰ the court held that:

²³ Armstrong and Nhlapo *op cit* 3.

²⁴ Adinkrah KO "Folk law is the culprit: Women's 'non-rights' in Swaziland" (1990-1991) *Journal of Legal Pluralism and Unofficial Law* 11.

²⁵ *Ibid.*

²⁶ Nhlapo RT "Legal duality and multiple judicial organization in Swaziland: An analysis and a proposal" in Takirambudde PN (ed) *The individual under African law* (1982) 67. Also see *Mdluli v Ngwenya and Others* [2007] SZHC 103 paras 8 and 9 and *Shabangu and Others v Shabangu and Others* [2008] SZHC 39 para 14-16, in which the High Court of Swaziland has been especially reluctant to be a court of first instance when deciding issues of customary law.

²⁷ Khumalo *op cit* 4. See also section 3 of the Swazi Courts Act 80 of 1950, which provides for the establishment of Swazi courts, to exercise jurisdiction over members of the Swazi nation and section 11 which provides that:

A Swazi court shall administer –

- (a) The Swazi law and custom prevailing in Swaziland in so far as it is not repugnant to natural justice or morality or inconsistent with the provisions of any law in force in Swaziland;
- (b) The provisions of all rules or orders made by the *Ngwenyama* or chief under the Swazi Administration Act 79 of 1950 or any law repealing or replacing the same, and in force within the area of jurisdiction of the court;
- (c) The provision of any law which the court is by or under such law authorised to administer.

See also *Dladla v Dlamini* (1977-1978) SLR 15 (CA) at 18B-C.

²⁸ [2011] SZHC 13 para 9.

²⁹ Section 151(9) provides that: "Notwithstanding subsection (1), the High Court has no original or appellate jurisdiction in matters relating to the office of the *Ingwenyama*, the office of *Indlovukazi* (the Queen mother), the authorisation of a person to perform the functions of Regent in terms of section 8, the appointment, and revocation and suspension of a chief; the composition of the Swazi National Council and procedure of the Council; and the *Libutfo* (regimental) systems, which matters shall continue to be governed by Swazi law and custom".

³⁰ [2012] SZHC 125 para 21.

The Constitution gives the High Court unlimited original jurisdiction in civil and criminal matters as well as appellate and review jurisdiction over Subordinate Courts and Swazi Courts. However, the High Court has no original jurisdiction in matters in which a Swazi Court has jurisdiction in terms of section 151(3)(b)³¹ of the Constitution.

The current status quo means that the Swazi legal system makes provision for two different systems of intestate succession: succession under the general law (which is governed by the Roman-Dutch common law) and succession under customary law.³²

5.4 Intestate succession under Swazi customary law

The fact that the Swazi legal system is dualistic in nature means that there are two different sets of laws available for the regulation of intestate succession in Swaziland. The legal system implemented will depend upon the type of marriage concluded by Swazi persons.³³ If a customary marriage is concluded, then intestate succession is regulated by Swazi customary law. However, if a civil marriage³⁴ is concluded, then intestate succession will be regulated by the general law of the land which is Roman-Dutch common law and its statutes.³⁵ In addition to the customary rules preventing a woman from inheriting property, women's access to land is additionally frustrated where she and her husband have contracted a marriage in community of property, as the husband is automatically the administrator of the joint estate (which includes all property).³⁶ In the next section of the thesis the researcher will be discussing the Swazi

³¹ Section 151(3)(b) provides that: "Notwithstanding the provisions of subsection (1), the High Court- has no original but has review and appellate jurisdiction in matters in which a Swazi Court or Court Martial has jurisdiction under any law for the time being in force".

³² Rubin NN "The Swazi law of succession: A restatement" (1965) *Journal of African Law* 94.

³³ In this regard, sections 24, 25(1) and (2) of the Marriage Act 47 of 1964 were applicable. These sections provided that:

24 The consequences flowing from a marriage in terms of this Act shall be in accordance with the common law as varied from time to time by enactments of the legislative authority unless both parties to the marriage are Africans in which case, subject to the terms of section 25, the martial power of the husband and the proprietary rights of the spouses shall be governed by Swazi law and custom.

25 (1) If both parties to a marriage are Africans, the consequences flowing from the marriage shall be governed by the law and custom applicable to them unless prior to the solemnisation of the marriage the parties agree that the consequences flowing from the marriage shall be governed by the common law.

(2) If the parties agree that the consequences flowing from the marriage shall be governed by the common law, the marriage officer shall endorse on the marriage certificate the fact of the agreement, and the production of a marriage certificate so endorsed shall be evidence of that fact unless the contrary is proved.

³⁴ In terms of the Marriage Act 47 of 1964.

³⁵ See generally, Armstrong and Nhlapo *op cit* 15-18.

³⁶ Armstrong A, Beyani C, Himonga C, Kabeberi-Macharia J, Molokomme A, Ncube W, Nhlapo T, Rwezaura B and Stewart J "Uncovering reality: Excavating women's rights in African family" (1993)

customary law of intestate succession together with the provisions of Swaziland's Intestate Succession Act 3 of 1953, which currently regulates intestate succession for the general population of Swaziland.

5.4.1 General principles of the Swazi customary law of intestate succession

5.4.1.1 The Swazi family and property

According to Swazi law and custom, the family is the most fundamental institution and it is they who make the important decisions relating to the inheritance of status and property.³⁷ The Constitution of the Kingdom of Swaziland Act 101 of 2005 makes the State accountable for the protection and preservation of the family and its values.³⁸ "The family group specifically, and the community at large, therefore, constitute the framework within which individuals exercise their political, economic and social rights and freedoms".³⁹ It is therefore not surprising at all that a right protecting the family was included in Swaziland's Constitution.

In traditional Swazi societies, families reside together within an *umuti* (a homestead), headed by a man (*umnumzane*).⁴⁰ Because of the potentially polygynous nature of Swazi marriage,⁴¹ the homestead may consist of numerous homesteads (*tindlu*), with each individual wife having a separate *indlu* (home).⁴² It is also customary for the following people to occupy an *umuti*: (a) "the *umnumzane*, and his wives and children, (b) the male

International Journal of Law and the Family 345.

³⁷ Women and Law in Southern Africa Research and Education Trust (WLSA) *Inheritance in Swaziland: The law and practice* (1994) 32. See also *Mariah Dlamini v Augustine Dlamini* [2012] SZHC 66 para 27 where the court stated that: "after the divorce, the question of the property was left to be determined under Swazi law and custom".

³⁸ In this regard sections 3 and 5 provide that:

(3) The family is the natural and fundamental unit of society and is entitled to protection by the State.

(5) Society and the State have the duty to preserve and sustain the harmonious development, cohesion and respect for the family and family values.

³⁸ See also *Dlamini v Dlamini* [2012] SZHC 10 at para 13.

³⁹ Van Schalkwyk *op cit* 21.

⁴⁰ Armstrong A, Chuulu M, Himonga C, Letuka P, Mokobi K, Ncube W, Nhlapo T, Rwezaura B and Vilakazi P "Towards a cultural understanding of the interplay between children's and women's rights: An eastern and southern African perspective" (1995) *The International Journal of Children's Rights* 351.

⁴¹ See *Maziya v Bhiya and Others* [2008] SZHC 183 at para 14.

⁴² Women and the Law in Southern Africa Research and Education Trust *op cit* 33.

children and their families, (c) the mother and grandmother of the head of the homestead, and (d) the sisters and daughters of the head of the homestead who are single or who have returned from marriage, and their children”.⁴³ The *umnumzane* (and his successor after his death) bears the sole responsibility for the care of the people in the homestead.

There is also a dual property system in Swaziland, ie, Swazi property comprises of Swazi Nation Land and Title Deed Land.⁴⁴ Swazi Nation land is collectively owned and held in trust for the people by the King.⁴⁵ Access to Swazi Nation Land is limited for women though as they may only access land through a male member of the family.⁴⁶ However, the United Nations in Swaziland has proof of an up-and-coming practice where some chiefs avoid the traditional rules of customary law and apportion land to women if a male person is not available.⁴⁷ A widow is also disqualified from inheriting Swazi Nation land as such land must be disposed of in terms of Swazi law and custom and is excluded from the community of property envisaged in section 2(4) of the Intestate Succession Law 3 of 1953. Additionally, women married in community of property are prohibited from registering land in their own name and can only acquire land through registration in the names of their husbands.⁴⁸ The fact that only men are allowed to own land means that women are automatically precluded from inheriting land.⁴⁹ Under Swazi law and custom, property is controlled communally and is “exercised through consultation” through the male kinsmen.⁵⁰

5.4.1.2 Primogeniture

The Swazi customary law of succession is based on the principle of primogeniture.⁵¹ According to that principle, the eldest son of a man who has concluded a monogamous

⁴³ *Ibid.*

⁴⁴ See Davies RH, O’Meara D and Dlamini S *The kingdom of Swaziland: A profile* (1985) 40.

⁴⁵ Section 211(1) of the Constitution of the Kingdom of Swaziland Act 101 of 2005 provides that: “From the date of commencement of this Constitution, all land (including any existing concessions) in Swaziland, save privately held title-deed land, shall continue to vest in *iNgwenyama* in trust for the Swazi nation as it vested on the 12th April, 1973”.

⁴⁶ Women and the Law in Southern Africa Research and Education Trust *op cit* 33.

⁴⁷ Social Institutions and Gender Index “Swaziland” at http://genderindex.org/country/swaziland#_ftn42 (accessed 15/11/2012).

⁴⁸ *Ibid.* See also section 16(3) of the Land Act No 37 of 1968.

⁴⁹ Women and the Law in Southern Africa Research and Education Trust *op cit* 53.

⁵⁰ *Ibid.*

⁵¹ See generally Iya PF “Women, law and development in Swaziland: An overview of the impact of *de jure* discrimination against women” in Forster PG and Nsibandé BJ (eds) *Swaziland: Contemporary social and economic issues* (2000) 42.

marriage and the eldest son of each house in a polygynous household⁵² will acquire a considerable share of any estate left by their father.⁵³ Younger sons will receive a share in the estate of their deceased father; however that share will be considerably less than the share afforded to older sons.⁵⁴

Under Swazi customary law, the principle of primogeniture therefore makes women ineligible for intestate succession. The fact that women are ineligible for succession is unfair, as both men and women contribute to the acquisition of property, not just men alone.⁵⁵ In fact, under Swazi law and custom, widows and daughters have no claim to the estate of their deceased husband or father.⁵⁶ Women are however entitled to certain items of property for example, the *liphakelo* a head of cattle given to her by her husband's father or the *tinsulamnyembeti* which she receives for each daughter that is married.⁵⁷ A woman can however not dispose of such cattle unilaterally but must seek the permission of her legal guardian, ie, her husband.⁵⁸

Women were traditionally regarded as perpetual minors under Swazi law and custom.⁵⁹ Before marriage a Swazi woman was subject to the guardianship of her father and after marriage, she was subject to the guardianship of her husband. Upon the death of her husband she fell under the guardianship of her husband's successor and upon divorce, she reverted back to being under the guardianship of her father.⁶⁰

5.4.1.3 The distributable estate

When a man dies, the following items comprise his distributable estate:

⁵² As a result thereof, there is thus the matter of a general successor and a house successor in each house. For a distinction of these terms please refer to chapter 2 of this thesis.

⁵³ Armstrong (*et al*) (1995) *op cit* 355. See also *Maseela v Maseela* (1954) HCTLR 48 (B) at 54C-D.

⁵⁴ Rubin *op cit* 97.

⁵⁵ Matashane K and Letuka P "The role and concept of heir: A case of confusion" in Ncube W and Stewart J (eds) *Widowhood, inheritance laws, customs and practices in southern Africa* (1995) 57.

⁵⁶ See generally Marwick BA *The Swazi: An ethnographic account of the natives of the Swaziland Protectorate* (1966) 66-67.

⁵⁷ Marwick *op cit* 44.

⁵⁸ Women and Law in Southern Africa Research Trust *Family in transition: The experience of Swaziland* (1998) 110.

⁵⁹ See *Meesedoosa v Links* 1915 TPD 357 at 360, where Mason J stated that: "I do not think there is any doubt that under Zulu and Swazi custom a native woman is a minor".

⁶⁰ Armstrong (*et al*) (1993) *op cit* 342.

- (a) Property, which includes:
 - (i) Land rights, ie, such rights to occupy and cultivate land and houses as were granted to him by a Chief, or which he inherited, but not lesser rights of use, or tenancies at will. Preferential rights to reoccupy land are inheritable.
 - (ii) Livestock, including cattle, goats, sheep, pigs, fowls, dogs, donkeys and horses.
 - (iii) Movable, including furniture, weapons, jewellery, and other personal possessions.
 - (iv) Modern movable property, including modern furniture and utensils, machinery, motor cars, money, bank accounts, safe deposit accounts, post-office savings accounts, shares.
- (b) Claims arising out of contracts or delicts; these are transmissible both negatively and positively.
- (c) Guardianship over minors (including widows, unmarried daughters, male and female dependants).
- (d) Offices, including titles to political offices, and certain religious offices.⁶¹

From the above, we can thus conclude that succession in Swazi customary law is of a universal nature, ie, the successor succeeds to both the assets and liabilities of the deceased.⁶²

5.4.1.4 The powers and duties of successors

The general and house successors of the deceased have the same duties in relation to those estates as the deceased.⁶³ The powers and duties of the house successor include the following:

- (a) He must maintain the widow and all other family members of the house. The estate must be administered in consultation with the widow and she has recourse against him if he misuses the estate.
- (b) He must make provision for *emalobolo* (ie, cattle delivered as marriage goods to the father of the bride and his family by the groom and his family) for the first wives of each son of the house, and he must receive and

⁶¹ Rubin *op cit* 99.

⁶² Whelpton FPvR "The indigenous Swazi law of succession: A restatement" (2005) *Tydskrif vir die Suid-Afrikaanse Reg* 838.

⁶³ *Ibid.*

safeguard the *emalobolo* received for daughters.⁶⁴

- (c) He can be held accountable for the delicts of the family members of the house.⁶⁵

In addition to the powers and duties listed immediately above, the general successor functions as the new family head (*umnumzane*) and manages the general estate in the place of the deceased. As stated previously, he is responsible for the liabilities of the deceased, even if the liabilities surpass the amount of the assets. Despite having equivalent functions to the deceased, the general successor has less authority over the members of the family.⁶⁶ The general successor is also entitled to:

- (a) the rights of guardianship over widows, minor children and other dependents;
- (b) such offices as the deceased may have held;
- (c) such land, or interests in land, as belonged to the deceased: except such land as had been attached to other houses for cultivation and occupation by wives and their children;
- (d) all cattle attached to the main house (*indlunkulu*);
- (e) such cattle as are received for *emalobolo* paid in respect of the oldest daughter in each minor house (and all the *emalobolo* received for his uterine sisters;
- (f) all other livestock, traditional and modern movables; and
- (g) such crops as are not produced by minor houses.⁶⁷

5.4.1.5 The general order of succession

Under Swazi customary law, the eligibility of the surviving members of the family group to succeed to the intestate estate of the deceased, is determined by three important factors namely “death, primogeniture and succession by males in the male line of descent”.⁶⁸ Swazis also practice polygyny and as a result thereof, we may thus distinguish between succession in a monogamous household and succession in a polygynous household.

⁶⁴ Matashane and Letuka *op cit* 52.

⁶⁵ Whelpton (2005) *op cit* 838.

⁶⁶ *Ibid.*

⁶⁷ Rubin *op cit* 104-105.

⁶⁸ Rautenbach C, Mojela K, du Plessis W and Vorster LP “Law of succession and inheritance” in Bekker JC, Labuschagne JMT and Vorster LP *Introduction to legal pluralism in South Africa Part 1 Customary law* (2002) 111.

5.4.1.5.1 Succession in a monogamous household

In a monogamous Swazi household, the eldest son succeeds as the head of the house and to the general estate of the deceased and he assumes responsibility for the family and manages the family property.⁶⁹

If the deceased had no surviving sons to succeed him, the order of succession proceeds as follows:

- (a) the deceased's younger brother who was next after him in seniority, or if such younger brother did not survive the deceased;
- (b) by the eldest son of such younger brother. Where such younger brother has died prior to deceased and leaves no male issue, deceased's successor will be –
- (c) a younger brother of deceased, next in seniority after those brothers already deceased. In the case of each younger brother, if he has died before the deceased, his eldest son will become successor to the deceased. Only where such brother dies without male issue, does succession pass to the next senior younger brother of the deceased;
- (d) where deceased is not survived by younger brothers or their sons, the inheritance passes to the elder brothers of deceased in order of seniority;
- (e) where any such older brother fails to survive the deceased, his oldest surviving son will become the successor; only where the most senior brother is not survived by male issue does the succession pass to the next most senior brother;
- (f) where the deceased is not survived by any of his brothers or their male issue, deceased's senior male agnatic relative will become his successor. Where none survives the deceased;
- (g) the senior male grandchild of the deceased becomes the successor; where there are no male grandchildren who survive the deceased,
- (h) the successor will be the oldest son of the deceased's oldest married sister; or, if he has died prior to the deceased,
- (i) his eldest son. Where no persons in categories (h) and (i) are available to succeed, then,
- (j) the successor will be the oldest sons of the deceased's other married sisters, in order of seniority of such sisters. In each case, where such nephew has not survived the deceased,
- (k) the oldest son of the deceased nephew will become the successor (and, failing male issue of such nephew, the succession will then pass to the oldest sons of

⁶⁹ Whelpton (2005) *op cit* 839.

the next most senior married sister of the deceased). In the absence of such persons, the successor will be –

- (l) the male children (in descending order of age) of the sisters of the deceased's father.
- (m) where no persons in categories (a)-(l) are available to succeed the deceased, his wife may become his heir. In such a case she will revert to the guardianship of her father (or his successor) and it is he who will control property inherited by her.
- (n) where there are no persons in categories (a)-(l) to succeed the deceased, and he is not survived by his wife, the estate becomes the property of the King.⁷⁰

Another option available to the family of the deceased for the procreation of a successor, in cases where the deceased has no surviving issue, is the institution of the levirate (*ukungena*) custom.⁷¹ Because death does not dissolve a customary marriage, the wife (or widow) of the deceased (who is still capable of bearing children) may be asked to enter into a union with the brother of the deceased for the purpose of producing a successor for the deceased.⁷² Under Swazi customary law, a wife was not forced to enter into such an arrangement. She had to give her consent as “to her participation in the arrangement and to the identity of the man chosen for her”.⁷³ The first male child born of such a union is regarded as the successor of the deceased.⁷⁴ Under Swazi law and custom, only a deceased's younger brother is qualified to enter into an *ukungena* custom with the deceased's wife. In order to be eligible the younger brother must already be married.⁷⁵ The sororate custom or the marrying of seed-raisers in order to produce a successor is also practiced amongst the Swazis.⁷⁶ In this regard, only a younger sister of the deceased's wife may substitute her.⁷⁷

⁷⁰ Rubin *op cit* 97-98. Please note that the words “heir” and “inheritance” were replaced with the words “successor” and “succession” respectively in categories (a)-(l) because the term “inheritance” is distinguishable from “succession” according to customary law (see chapter 2 of this thesis).

⁷¹ For a detailed discussion of the levirate custom, please refer to chapter 2 of this thesis.

⁷² Adjetey *op cit* 360.

⁷³ Armstrong (*et al*) (1993) *op cit* 348.

⁷⁴ Whelpton *op cit* 839.

⁷⁵ Mokobi K and Kidd P “Marriage and inheritance: The chameleon changes its colours” in Ncube W and Stewart J *Widowhood, inheritance laws, customs and practices in southern Africa* (1995) 23.

⁷⁶ For further information in this regard please see chapter 2 of this thesis and the findings of field research conducted in Swaziland at section 5.7 of this thesis, as well as Adjetey *op cit* 360-361.

⁷⁷ Mokobi and Kidd *op cit* 23.

5.4.1.5.2 Succession in a polygynous household

In a polygynous Swazi household, the eldest son in each house succeeds in each individual house.⁷⁸ If the eldest son in a house is deceased, succession will proceed along the following lines: first all his male descendents will be considered and thereafter his younger brothers and their descendents.⁷⁹

5.4.1.6 Succession to the estates of various categories of persons

5.4.1.6.1 The estate of an unmarried Swazi man

In instances where a man dies before getting married, his father or the person appointed as administrator of his estate, ie, the *umpatseli* may utilise cattle from the deceased's estate (for the payment of *emalobolo*) to enter into a levirate union with a person chosen to do so by the deceased's family council (ie, *lusendvo*)⁸⁰ in order to produce a successor for him. The first male child born of such a union is regarded as the successor of the deceased.

If the afore-mentioned process is not implemented, then the unmarried man is succeeded by his father; unless his father has predeceased him, in which case he will be succeeded by his oldest uterine brother. If the oldest uterine brother is unavailable for succession, the oldest son of the deceased's father by another wife will succeed the unmarried man.⁸¹ Should the previously mentioned relationships fail to produce a successor for the deceased, then the general principles of succession will be considered in order to find a successor for the deceased.⁸²

⁷⁸ Bekker JC *Seymour's customary law in southern Africa* (1989) 275. See also *Molungoa B Khatala v FB Khatala* (1963-1966) HCTLR 97 (CA) at 100D-E and *Lekaota Ralienyane v MR Lekaota* (1963-1966) HCTLR 38 (B)

⁷⁹ Whelpton (2005) *op cit* 839.

⁸⁰ Rubin *op cit* 105.

⁸¹ *Ibid.*

⁸² *Ibid.* Succession to the estates of married Swazi men will be dealt with at a later stage in this chapter.

5.4.1.6.2 The estate of a Swazi woman

Here we may distinguish between the estate of an unmarried woman, the estate of a married woman and the estate of a widow.

5.4.1.6.2.1 An unmarried woman

In cases where a woman dies before concluding a marriage, her father or his successor (if he has predeceased her) will acquire all the property in her estate.⁸³ Here it is also possible for the *lusendvo* to elect to leave her property in the custody of her elder brother to be held as house property.

5.4.1.6.2.2 A married woman

The property of a married woman (who dies during the lifetime of her husband) will be distributed between her eldest and youngest son/s.⁸⁴ Her eldest son will succeed to the following property: (a) the *liphakelo* cattle;⁸⁵ (b) other domesticated animals (known as *timfuyo tekhaya*); (c) property of the household (known as *timphahla tendlu*); and (d) mats used for sleeping (known as *emacansi*).⁸⁶

Property belonging to the house of the deceased married woman will remain in that particular house and will continue to remain in the custody of her husband if he is still alive.⁸⁷ The *tinsulamnyembeti* cattle⁸⁸ will be inherited by the youngest son of her house on the death of her husband; unless she has specifically designated any of her other sons as heir (prior to her death) and with the consent of the family council.⁸⁹

⁸³ Rubin *op cit* 105.

⁸⁴ Whelpton (2005) *op cit* 839.

⁸⁵ A head of cattle given to her by her husband's father.

⁸⁶ *Ibid.*

⁸⁷ Whelpton (2005) *op cit* 839 and Rubin *op cit* 105.

⁸⁸ Which a wife receives for each daughter that is married.

⁸⁹ Rubin *op cit* 105-106.

5.4.1.6.2.3 A widow

If a widow dies, the *tinsulamnyembeti* cattle are automatically inherited by the youngest son in her house, and property allotted to her by *iphakela* or property acquired in any other way, is inherited by the eldest son in her house.⁹⁰ The property listed immediately above remains the property of the widow, but is subject to the custodianship of her father (or his successor) unless she remarries. If the widow remarries, her estate will fall under the custody of her husband and the first-born son of such a marriage will inherit the property of her estate. If the widow dies without marrying again, her father or his successor inherits the property of her estate, failing which it becomes the property of the King.⁹¹

5.4.1.7 Disposition of property prior to death (disposition *inter vivos*)

Swazi women may only dispose of property prior to death if they obtain the consent of their husband and the family council.⁹² Swazi men may also dispose of certain property prior to death and such dispositions are referred to as *iphakela*.⁹³ An example of such a disposition is the allotment of property owned by the man in his personal capacity, to a particular house or son.⁹⁴ In order to be valid, such allotment must comply with certain formalities and all allotments made by the man must be attested to by the entire family.

A Swazi man is however prohibited from allotting property belonging to the main household and customary property like his traditional garments and spears as these belong to his successor in title. Family members must support the wishes of the Swazi man regarding the allotment of his property, however if the allotment is unjust, the family council may review and overrule the desires of the deceased.⁹⁵

⁹⁰ Rubin *op cit* 106.

⁹¹ *Ibid.*

⁹² Rubin *op cit* 106.

⁹³ Donzwa B, Ncube W and Stewart J "Which law? What law? Playing with the rules" in Ncube W and Stewart J *Widowhood, inheritance laws, customs and practices in southern Africa* (2005) 98.

⁹⁴ Whelpton (2005) *op cit* 840.

⁹⁵ *Ibid.*

5.4.1.8 A dying declaration (known as *kuyaleta*)

If an old person has a premonition that he is about to die, he may stipulate conclusive instructions on how things should be conducted when he dies. Such instruction must be given in the presence of members of the family, who act as witnesses.⁹⁶ Upon the death of the elderly person, the family has to decide whether it is going to adhere to the instructions given or whether it is going to disregard them completely. Each instruction is considered very carefully and if the family finds that it is in keeping with custom, they may choose to follow it, for example, if the person gave instructions on the procedure or protocol to follow at his funeral that would be acceptable.⁹⁷ The male person is however precluded from issuing instructions contrary to custom, for example he may not stipulate where and in which wife's kraal his body should lie in state.⁹⁸

5.4.1.9 Disinheritance

The practice of disinheritance is also known amongst the Swazi.⁹⁹ A Swazi family head may disinherit a future successor if he can show good cause for doing so. If his reasons for wanting to disinherit a future successor are justifiable, then he must convene a meeting of the family council; and in their presence and the presence of his son; outline his burden of proof to them and then make a proclamation to the effect that he disinherits him.¹⁰⁰ The rules of natural justice also apply here as the son is given an opportunity to state his side of the case in an attempt to refute the claims of his father.¹⁰¹ After hearing all the facts, the family council will then arrive at a decision.¹⁰²

Some of the reasons given for disqualification include: there is evidence proving that his mother practices witchcraft or is an adulteress; that his mother has already mothered a child prior to the conclusion of her marriage; or if the house successor is incessantly disobedient or cruel to his family members, or is generally deficient of respect for them.¹⁰³

⁹⁶ Whelpton (2005) *op cit* 840.

⁹⁷ *Ibid.*

⁹⁸ Whelpton (2005) *op cit* 840.

⁹⁹ Kuper H *The Swazi, a South African Kingdom* (1963) 89.

¹⁰⁰ *Ibid.*

¹⁰¹ Whelpton (2005) *op cit* 840.

¹⁰² *Ibid.*

¹⁰³ *Id* 841.

5.4.2 The process of intestate succession under Swazi law and custom

Under Swazi law and custom, there are two important family structures which play key roles in the process of succession, ie, the *lusendvo* (the family council) and the *umphatseli* (administrator).¹⁰⁴ In this section of the chapter, the researcher discusses the roles played by each of the afore-mentioned structures in the choosing of the successor, their role in administering the estate of the deceased and the various ways in which the successor is appointed following the death of the family head or a married man.

Once the family group has received confirmation of a Swazi man's death or the death of a family head, the onus rests with the mother of the deceased or a senior paternal uncle to inform the relatives and convene the family council for the purpose of making important decisions like burial arrangements, the selection of an administrator, the appointment of a successor and other selected issues.¹⁰⁵ The surviving wife or wives are also involved in making the necessary arrangements for the burial of the deceased.¹⁰⁶

5.4.2.1 Death, burial and periods of mourning

Death is a significant event in Swazi customary law because not only is it regarded as a passage to the spiritual world of the ancestors but it affects the continuity of the family lineage. The events that take place after the death and burial of a Swazi man and the sequence in which they occur are relevant for purposes of succession. Each of these important events will be discussed individually hereunder.

Traditionally, a family head is buried on the third day following his death¹⁰⁷ and he is buried adjacent to the cattle byre (*sibaya*).¹⁰⁸ Other family members are buried in the clearing at the back of their place of residence.¹⁰⁹ The *umnumzane* is buried with his head facing his

¹⁰⁴ Iya PF "The law of inheritance in Swaziland" in Women and Law in Southern Africa Research Project *Working Papers on Inheritance law in Southern Africa* (1992) 68.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Dludlu v Dludlu and Another* (1982-1986) SLR 228 at 230C-D.

¹⁰⁷ Rubin *op cit* 100.

¹⁰⁸ Whelpton (2005) *op cit* 832.

¹⁰⁹ *Ibid.*

residence and that symbolises that he is still looking out for the family.¹¹⁰ Prior to his body being taken to the place of burial, the family head's body is taken into the cattle byre to bid farewell to the ancestors.¹¹¹ Thereafter the body proceeds to the burial site. After the burial of the *umnumzane*, all attendees of the funeral proceed to a stream (which is in close proximity to the site of the grave) in order to partake in a cleansing ritual. Each person washes their entire body in the stream in order to cleanse themselves from the death; as death is regarded as a bad omen and which should not return to the family of the deceased.

The completion of the burial service marks the beginning of the mourning period for the wives of the *umnumzane*.¹¹² Mourning for widows is symbolised by the wearing of mourning garments and the performance of numerous ceremonies.¹¹³ The first mourning period (known as *ukufukama*) begins immediately after the burial of the Swazi male and lasts for one month.¹¹⁴ The second period of mourning usually spans two planting seasons (ie, at least two years); but is dependent on the time at which the deceased passed on.¹¹⁵ The mourning period of two years is known as *gwetwala tinsamo mbo*. These two periods of mourning are extremely important because it is at any time between the *ukufakama* and the *gwetwala tinsamo mbo* (or no later than 25 months after the death of the deceased), that the family council will assemble for the purpose of electing a successor.¹¹⁶ If a widow refused to "mourn" her husband, that act alone could disinherit her child.¹¹⁷ Some of the customs practiced during the periods of mourning will also give the husband's family an indication as to which of the wives will be selected or considered as the main wife.¹¹⁸ Until a successor is chosen, the deceased's estate is placed under the care or custody of an administrator. The selection, duties and role of the administrator will now be discussed in detail.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.* See also *Nxumalo NO v Ndlovu and Others* [2010] SZHC 150 at 171, where the court noted that in cases where a married couple are estranged, the family of the husband may still require the wife to mourn him after his death.

¹¹³ Women and Law in Southern Africa Research and Education Trust (WLSA) *op cit* 63.

¹¹⁴ *Id* 64.

¹¹⁵ Whelpton (2005) *op cit* 834.

¹¹⁶ *Ibid.*

¹¹⁷ Armstrong (*et al*) (1995) *op cit* 357.

¹¹⁸ Aphane D, Manzini N, Mthembu L, Vilakazi P, Dlamini T, Magwaza M and Mkhonta F "Widow: Status or description?" in Ncube W and Stewart J *Widowhood, inheritance laws, customs and practices in southern Africa* (2005) 37.

5.4.2.2 The administrator of the estate (*umphatseli*)

The administrator is chosen by the family council. He (in the interim) obtained powers of guardianship over everyone in the household, including the wife/wives of the deceased.¹¹⁹ The estate of a deceased Swazi man or family head is administered by his eldest son (referred to as *lisokanchanti*) or failing him, by his eldest brother.¹²⁰ The estate of a deceased man or family head is administered by the oldest of his younger brothers or if he is unavailable for whatever reason, by his oldest brother; or failing him, by the oldest son of the latter.¹²¹ If there are no male family members to act as administrator of the deceased's estate, a paternal aunt may be selected.¹²² If the person selected as administrator by the family council, refuses to be appointed to such office for various reasons, the family council will have to nominate someone else to fulfil this important task.¹²³ The term of office of the *umphatseli* is terminated by the institution or appointment of the successor. If a successor is a minor, the *umphatseli* may be entreated to continue his term of office until the successor obtains majority status.¹²⁴

5.4.2.2.1 The rights, duties and liabilities of the administrator

In the interim, the *umphatseli* has the following obligations towards the estate of the deceased:

- (a) he acts as guardian of all minors and widows; and of other dependents of the deceased who live within the deceased's homestead;
- (b) he assumes control of all property in the estate;
- (c) he represents the estate in all legal proceedings, and, as guardian of the persons enumerated in (a) *supra* may institute and defend legal proceedings on their behalf;
- (d) he may settle any minor debts owing by the deceased, after consultation with, and after receiving the consent of, the deceased's widow(s). In respect of major debts, however, he may not act. Settlement of these must wait the appointment of the heir;
- (e) he must recover any debts due to the estate;

¹¹⁹ Armstrong (*et al*) (1993) *op cit* 348.

¹²⁰ Whelpton (2005) *op cit* 835.

¹²¹ Rubin *op cit* 100.

¹²² *Ibid.*

¹²³ Rubin *op cit* 101.

¹²⁴ Women and Law in Southern Africa Research and Education Trust (WLSA) *op cit* 40.

- (f) as the person controlling the property of the deceased, he may terminate tenancies on the deceased's land, but only after consultation with the deceased's widow(s);
- (g) he must distribute the estate amongst the heir(s) once the main heir has been appointed.¹²⁵

The rights of the administrator include the obligations mentioned immediately above and also extend to the rights required to fulfil those obligations effectively. With the permission of the widow(s) of the deceased, the administrator may purchase, dispose of or lease property in the deceased's estate.¹²⁶

The *umpatseli* will still be responsible for the maintenance¹²⁷ of the deceased's widow(s), children and other dependents even in cases where the deceased's estate is unable to bear that burden due to a lack of resources.¹²⁸ However, once the successor has been appointed, the administrator may claim a refund for all expenses incurred in relation thereto.¹²⁹

Where an administrator acts without being authorised to do so (ie, without seeking or obtaining the permission of the widow(s)) and incurs a loss against the deceased's estate; he must reimburse the loss sustained.¹³⁰ It is not common for an administrator to receive compensation for managing the estate in the absence of the successor; however, it is customary for the successor to present him with a beast as a token of appreciation for what he has done.¹³¹

5.4.2.2.2 The removal of an administrator

The family council may remove an administrator from office if: he was unsuccessful in performing his duties; or has abused or squandered the property of the estate.¹³²

¹²⁵ Rubin *op cit* 100-101.

¹²⁶ Rubin *op cit* 100.

¹²⁷ According to Rubin *op cit* 101, this type of maintenance refers to the provision of food, clothing, and paying for the education of children still at school.

¹²⁸ *Ibid.*

¹²⁹ Rubin *op cit* 101.

¹³⁰ See *Shongwe v Shongwe and 11 Others* [2012] SZHC 170 para 56.

¹³¹ *Ibid.*

¹³² Rubin *op cit* 101.

5.4.2.2.3 The termination of the responsibilities or duties of the administrator

The administrator's duties will come to an end when: he dies; he is removed from office by the family council and when the successor is appointed.¹³³

5.4.2.3 The choosing of a successor (*inkhosana*)

The rationale behind the appointment of a successor is to guarantee that all family members are taken care of.¹³⁴ The family council is responsible for the selection and appointment of a successor.¹³⁵

5.4.2.3.1 The composition of the family council

The family council comprises each and every adult member of a particular family group.¹³⁶ This usually includes the siblings of the deceased (both male and female); his maternal cousins (both male and female; the deceased's father (if he is still alive); eminent neighbours, the Chief, or other persons requested to participate; the wives of the deceased and their respective children (both male and female).¹³⁷ A special family council is constituted for purposes of the appointment of the eldest son as successor or to select the wife from whose house the successor will be appointed.¹³⁸ This special council consists of elected senior members of the family; both the deceased's grandmothers (if they are alive); the eldest son; senior aunts (known as *bobabe labasikati*) and uncles.¹³⁹

Before the successor is selected, the family council must also make a determination as to whether a surviving wife is a widow or not. Although widowhood is a natural consequence of marriage, under Swazi customary law, a surviving wife must be

¹³³ Rubin *op cit* 101.

¹³⁴ Whelpton (2005) *op cit* 835.

¹³⁵ Matashane and Letuka *op cit* 49.

¹³⁶ *Ibid.*

¹³⁷ Rubin *op cit* 103. See also Women and Law in Southern Africa Research and Education Trust (WLSA) *op cit* 33.

¹³⁸ Whelpton (2005) *op cit* 835.

¹³⁹ *Ibid.*

confirmed as a widow by the family of her husband. In such cases, a widow may be disqualified from being designated as the main wife if: (a) it was established that she committed adultery or witchcraft, without her natal family reconciling for her transgression through the payment of a fine; (b) she gave birth to an illegitimate child, and (c) consequently married a man who was not the father of that child; or if she failed to treat her in-laws with respect.¹⁴⁰

In cases where the husband's family desired to deprive a widow of her status as "widow", the family had to approach a chief. If the chief was convinced that the surviving wife is in fact a widow of the deceased, he was compelled to certify that she is treated in accordance with the tenets of Swazi customary law and that her rights are protected. However, it is not uncommon for chiefs to refuse to protect the rights of the widow because they feel compelled to abide by the decision of the husband's family. If a woman is disregarded as a widow, it is possible that her children might be prohibited from succession.¹⁴¹

5.4.2.3.2 The procedure involved in the selection of the successor

The brother of the deceased or the *umpatseli* assembles the family council for the purpose of selecting the successor.¹⁴² The rank of the deceased's wives¹⁴³ plays an important role in the determination of the successor.¹⁴⁴ In other words, the family council chooses which widow is to be regarded as the main wife and the eldest son of that wife will be the deceased's successor.¹⁴⁵ The following factors (relating to the history of how the wives were married into the family) are taken into consideration when ranking the wives for purposes of appointing a successor:

- (a) Whether she was born of royal blood;
- (b) Whether she is the daughter of a chief;

¹⁴⁰ Whelpton (2005) *op cit* 836.

¹⁴¹ Aphane (*et al*) *op cit* 32-33.

¹⁴² Rubin *op cit* 103-104.

¹⁴³ For an explanation of ranking amongst wives in African customary law see chapter 2 of this thesis. See also *R v Fakudze and Another* (1970-1976) SLR 422 (HC) at 423F-H, where the court held that the wife was not considered as being married because she was not anointed with the red ochre (*libovu*). As a result thereof, the wife was also not ranked as a wife.

¹⁴⁴ Kuper H *The Swazi* (1952) 21.

¹⁴⁵ Rubin *op cit* 104.

- (c) Whether she bears the surname of a grandmother (known as *umfati longugogo*);
- (d) Whether she is a wife from a favoured marriage (referred to as *umfati lokhiwe*);
- (e) Whether she is a wife from an arranged marriage (known as *umfati lowendzisiwe*); or
- (f) Whether she is a wife who was married after the normal process of courting".¹⁴⁶

The order of preference for the ranking of the deceased's wives is as follows: (a) women of royal blood; (b) women of the same clan name as the deceased's mother (such a wife is referred to as the deceased's *gogo*); (c) a women married by way of an arranged marriage; (d) any wife who is the daughter of a chief (*sikulu*) or a governor (*induna*); and (e) if the deceased did not leave a wife in any of the categories listed above, any of the deceased's wives may be considered.¹⁴⁷

When determining which of the wives will be designated as the main wife, the family council will also consider a woman married as a seed-raiser (*inhlanti*) in precisely the same way as if she had been married as a wife. In fact amongst the Swazi, a son born by a seed-raiser has a higher status (with regard to succession) than a son born subsequently to a widow who has been substituted through the *ukungena* custom.¹⁴⁸

In addition to the factors highlighted above, when making their decision, the family council will also consider the character of each wife and the character of each of their eldest sons.¹⁴⁹ If the family council selects a wife with no sons as the main wife, it is possible for the eldest born son of the deceased to be placed in the house of such a widow, and he will become the successor.¹⁵⁰

5.4.2.3.3 The appointment of the successor

Swazi customary law dictates that once the family council has chosen or appointed the main wife, her eldest son becomes the successor of her husband's deceased estate.

¹⁴⁶ Whelpton (2005) *op cit* 835. See also Kuper (1952) *op cit* 21 and Women and Law in Southern Africa Research and Education Trust (WLSA) *op cit* 43-44.

¹⁴⁷ Rubin *op cit* 104.

¹⁴⁸ *Ibid.*

¹⁴⁹ Rubin *op cit* 104. Kuper (1952) *op cit* 21 says that the character of each wife is the primary consideration in the determination of the main wife.

¹⁵⁰ Rubin *op cit* 104.

A ceremony is conducted to install or appoint the successor. All relatives together with the chief's kraal are notified of the day on which the ceremony will be held. The ceremony takes place at the most senior household (known as *indlunkhulu*) and is conducted in the format of a meeting.¹⁵¹ Each house is seated according to its rank and its order of seniority and the widows are also seated in their particular order of rank.¹⁵² The children of the deceased are not present at such a meeting, but may be called in when the son who is to be appointed as successor is requested to come in. Upon entering the meeting, the children are traditionally seated next to their mother.¹⁵³

At this ceremony and according to Rubin,¹⁵⁴ the successor is officially pointed out as such by the administrator of the deceased's estate and is presented with the spear and wristlet of the deceased and is adorned with the deceased's traditional attire (known as *imvunulo*). According to Whelpton¹⁵⁵ however, it is the deceased's sister who makes the declaration of who the successor is. After such pointing out or declaration, the property of the deceased is handed over to the successor to manage on behalf of his father.¹⁵⁶ The successor is also introduced to the relatives whom he will be compelled to care for, whilst making use of the property previously shown to him.¹⁵⁷ It is possible for an illegitimate child to be chosen as the successor. This is usually conducted through the process known as *kufaka esisweni* which means "putting a child in the women's womb". This practice occurs where a wife or the main wife of the deceased has no male children. As a result thereof, her interests will be considered and a type of "fictitious fulfilment" occurs.¹⁵⁸

The successor assumes control of the family's property and holds the property in trust for them. He is not the owner of the property, but is merely a manager, who manages the property in consultation with other members of the family, especially the main

¹⁵¹ *Ibid.*

¹⁵² Whelpton (2005) *op cit* 837.

¹⁵³ *Ibid.*

¹⁵⁴ Rubin *op cit* 104.

¹⁵⁵ Whelpton (2005) *op cit* 837.

¹⁵⁶ *Ibid.*

¹⁵⁷ Whelpton (2005) *op cit* 837.

¹⁵⁸ Matashane and Letuka *op cit* 51.

wife.¹⁵⁹ A widow is not eligible to succeed to the property in her husband's estate.¹⁶⁰ The successor has a duty to support the widow(s) and her dependent children. A widow and her children were also entitled to maintenance¹⁶¹ provided that the widow continued to reside with the family group of her husband. If she left the family group, she would forfeit her right and the rights of her children to maintenance.¹⁶² The property of the separate houses, ie, property amassed through the wife's hard work, is left in the possession of each individual wife but may not be alienated at their own free will because such assets are controlled by each individual house successor.¹⁶³

At the time of his appointment, a successor not only succeeded to the property of the deceased, but also succeeded to his obligations.¹⁶⁴ The successor is advised of all the liabilities owing by the deceased and is thereafter officially taken to be introduced to the chief who will provide him with sound counsel regarding the future affairs of the family.¹⁶⁵ The decision of the family council regarding the choice of successor is binding and is generally not disputed or amended, and a successor is also prohibited from repudiating his appointment.¹⁶⁶

5.5 Intestate succession under the general law of the land

The common law of intestate succession in Swaziland was gleaned from an old Holland law entitled the Political Ordinance of 1580, which provided that intestate inheritance (or succession) was based primarily on "consanguinity, ie, blood relationships to the deceased, in accordance with establishment rules".¹⁶⁷ The Roman-Dutch common law therefore made provision for the "equal distribution of the assets in the estate of the deceased person among his descendents (male and female); or, failing them, to an

¹⁵⁹ Women and Law in Southern Africa Research and Education Trust (WLSA) *op cit* 42.

¹⁶⁰ Mokobi and Kidd *op cit* 18.

¹⁶¹ See *Mantsebo Seeiso v Mabereng Seeiso* (1926-1953) HCTLR 212 (B) at 214D-E and *Bereng Griffith v Mantsebo Seeiso Griffith* (1926-1953) HCTLR 50 (B) at 54D-E.

¹⁶² Armstrong (*et al*) (1993) *op cit* 353.

¹⁶³ Mokobi and Kidd *op cit* 22-23.

¹⁶⁴ Armstrong (*et al*) (1995) *op cit* 355.

¹⁶⁵ Rubin *op cit* 104.

¹⁶⁶ *Ibid.*

¹⁶⁷ Iya (1992) *op cit* 64.

ascendant male or female; and, failing them, to brothers or sisters or both, sharing the estate equally".¹⁶⁸ The Political Ordinance has however gone through numerous changes and has subsequently resulted in the Intestate Succession Law 3 of 1953 which now regulates certain aspects of intestate succession in the kingdom of Swaziland. The provisions of this very short piece of legislation will be discussed immediately hereunder.

The Intestate Succession Law makes provision for the surviving spouse of every person who dies intestate (either wholly or partially) after the coming into operation of the Act, shall be declared to be an intestate heir of the deceased spouse.¹⁶⁹ The Act makes specific provision for stipulated conditions and/or portions of inheritance (or succession) which are expressed as follows:

- (a) If the spouses were married in community of property and if the deceased spouse leaves any descendant who is entitled to succeed *ab intestato*, the surviving spouse shall succeed to the extent of a child's share or to so much as, together with the surviving spouse's share in the joint estate, does not exceed one thousand two hundred rand in value (whichever is the greater);
- (b) If the spouses were married out of community of property and the deceased spouse leaves any descendant who is entitled to succeed *ab intestato* the surviving spouse shall succeed to the extent of a child's share or to so much as does not exceed one thousand two hundred rand in value (whichever is the greater);
- (c) If the spouses were married either in or out of community of property and the deceased spouse leaves no descendant who is entitled to succeed *ab intestato* but leaves a parent or a brother or sister (whether of the full or half blood) who is entitled so to succeed, the surviving spouse shall succeed to the extent of a half share or to so much as does not exceed one thousand two hundred rand in value (whichever is the greater);
- (d) In any case not covered by subsections (2), (3) or (4), the surviving spouse shall be the sole intestate heir.
- (e) For the purposes of (the) Act any relationship by adoption under the Adoption of Children Act No 64 of 1952, or any other law, governing the adoption of children shall be equivalent to blood relationship.¹⁷⁰

The Act only exempts two classes of Africans from its application viz unmarried Africans

¹⁶⁸ *Ibid.*

¹⁶⁹ Section 2(1).

¹⁷⁰ Section 2(2)-2(5).

and illegitimate persons who are unmarried.¹⁷¹ In regard thereto, section 4 of the Act provides that:

This Act shall not apply to any African if the estate of such African is required to be administered and distributed according to the customs and usages of the tribe or people to which the African belonged by virtue of section 68 of the Administration of Estates Act.

According to section 68 of the Administration of Estates Act:

- (1) If any African who during his lifetime has not contracted a lawful marriage, or who, being unmarried, is not the offspring of parents lawfully married, dies intestate, his estate shall be administered and distributed according to the customs and usages of the tribe or people to which he belonged; and if any controversies or questions shall arise among his relatives, or reputed relatives, regarding the distribution of the property left by him, such controversies or questions shall be determined by a Swazi Court having jurisdiction.
- (2) The Master may not be called upon to interfere in the administration and distribution of the estate of any such African.
- (3) For the purpose of this section, "African" shall mean any person belonging to any of the aboriginal races or tribes of Africa south of the Equator, or any person one of whose parents belong to any such race or tribe.

From the above, it is apparent that section 68 of the Administration of Estates Act deals exclusively with the distribution of an African's estate,¹⁷² and that the estates of all Africans falling out of the ambit of section 68 must therefore be administered according to the general law of the land.¹⁷³ The modifications brought about by the Intestate Succession Law are commendable in that it makes specific provision for a widow and her children in cases of intestacy and also accommodates legally adopted children for purposes of inheritance.

The Act is however problematic in that it fails to take cognisance of the fact that marriage in Swazi customary law is polygynous and that a man may actually leave behind more than one widow. The Act also fails to consider the inheritance rights of

¹⁷¹ Rubin *op cit* 94-95.

¹⁷² *Id* 95.

¹⁷³ *Ibid*.

illegitimate children¹⁷⁴ and also excludes all other possible relatives (except parents, a brother or sister) from inheritance (or succession) which is contrary to “living” Swazi customary law in particular and African customary law in general.¹⁷⁵

5.6 The impact of constitutionalism on the customary law of intestate succession in the Kingdom of Swaziland

5.6.1 The Constitution of Swaziland no 1377 of 1968

As has already been stated, the Kingdom of Swaziland was a former British colony from 1902, until it gained its independence on 6 September 1968. One of Swaziland’s first efforts at constitutional reform was taken in April of 1960 when Sobhuza III invited a small group to hear his views on the subject and on the general way in which reform should be introduced.¹⁷⁶ The First Swaziland Constitutional Committee resulted from this meeting and that Committee submitted its proposals for a Constitution for Swaziland in the end of 1961.¹⁷⁷ One of the first enacted constitutions in Swaziland was the Constitution of Swaziland No 1377 of 1968¹⁷⁸ (hereafter referred to as the Independence Constitution) which was established under The Swaziland Independence Order of 1968. The Independence Constitution was a Westminster Constitution¹⁷⁹ and was traditionally the type of constitution that Britain bestowed on most of its colonies in Africa.¹⁸⁰

The Independence Constitution was adopted after numerous constitutional conferences were held in London between 1960 and 1967.¹⁸¹ Some of the distinct features of the

¹⁷⁴ See *Dlamini v Dlamini and Others* [2007] SZHC 55 para 6 and *Dlamini v Dlamini* [2012] *op cit* para 11.

¹⁷⁵ Iya (1992) *op cit* 65.

¹⁷⁶ Cowen DV *Swaziland report on constitutional reform: Made on behalf of the Swaziland Progressive Party and Euroafrican (Coloured) Welfare Association* (1961) 7.

¹⁷⁷ See Government of Swaziland *Proposals for a Swaziland Constitution* (1962) 5-45.

¹⁷⁸ For a detailed account of this Constitution see Baloro J “The development of Swaziland’s Constitution: Monarchical responses to modern challenges” (1994) *Journal of African Law* 19-34.

¹⁷⁹ Kuper H *Sobhuza II, Ngwenyama and King of Swaziland: The story of an hereditary ruler and his country* (1978) 338. See also *Gwebu and Another v Rex* (2002) AHRLR 229 (SwCA) at para2

¹⁸⁰ Fombad *op cit* 94.

¹⁸¹ Baloro *op cit* 21.

Independence Constitution included: recognition of the supremacy of the monarchy,¹⁸² the recognition of Sobhuza II as the King of Swaziland¹⁸³ and as the Head of State,¹⁸⁴ the Queen Mother or the *Ndlovukazi* was held in as high regard as the King as both of them were exempted from taxation and legal proceedings,¹⁸⁵ the prohibition on Parliament from legislating on the following: (a) matters relating to the offices of *Ngwenyama* and *Ndlovukazi* (the Queen Mother), (b) appointment of persons as Regents, (c) the appointment, rescission and suspension of Chiefs, (d) the composition of the Swazi National Council, (e) the *Ncwala* ceremony and the *Libutfo* (regimental) system.¹⁸⁶ All these matters had to be regulated by Swazi law and custom.¹⁸⁷ The Constitution also made provision for succession to the throne of Swaziland¹⁸⁸ and for the installation of a Regent until the King was able to assume his functions and responsibilities.¹⁸⁹ Rights to land¹⁹⁰ and minerals¹⁹¹ were exercised exclusively at the discretion of the monarchy. In Chapter I, the Constitution also made provision for the protection of various fundamental rights and freedoms of the individual which included the rights to life,¹⁹² personal liberty,¹⁹³ and protection from slavery and forced labour,¹⁹⁴ protection from inhuman treatment,¹⁹⁵ protection from deprivation of property,¹⁹⁶

¹⁸² See Chapter 5.

¹⁸³ And no longer as the supreme chief.

¹⁸⁴ Section 28 of Chapter IV provided that:

(1) The King of Swaziland is the Head of State.

(2) The King shall do all things that belong to his office in accordance with the provisions of this Constitution and of all other laws for the time being in force.

¹⁸⁵ See sections 33-35.

¹⁸⁶ See section 62(2) and Schedule 3.

¹⁸⁷ *Ibid.*

¹⁸⁸ Section 29 of Chapter IV provided that: "When an announcement is made to the Swazi nation in accordance with Swazi law and custom that the King is vacant by reason of the death of the holder thereof or any other cause, such person as, in accordance with Swazi law and custom, is declared to be King shall become King".

¹⁸⁹ Section 30 of Chapter IV provided that:

(1) Until the King has been installed, that is to say, until he has publicly assumed the functions and responsibilities of King in accordance with Swazi law and custom, or during any period where he is by reason of absence from Swaziland or any other cause unable to perform the functions of his office, those functions shall be performed, save as otherwise provided in this section, by the *Ndlovukazi* acting as Regent.

(2) If the Regent is unable for any reason to perform the functions of such office, a person shall be authorised, in accordance with Swazi law and custom (hereinafter referred to as an "authorised person"), to perform on her behalf her functions under subsection (1).

¹⁹⁰ Section 94.

¹⁹¹ Section 95.

¹⁹² Section 4.

¹⁹³ Section 5.

¹⁹⁴ Section 6.

¹⁹⁵ Section 7.

¹⁹⁶ Section 8.

protection against arbitrary search or entry,¹⁹⁷ freedom of conscience,¹⁹⁸ expression,¹⁹⁹ assembly and association,²⁰⁰ movement²⁰¹ and protection from discrimination.²⁰²

However, on 12 April 1973, King Sobhuza II, issued a Proclamation which repealed the Constitution,²⁰³ (save the provisions relating to the judicature, public servants, the monarchy, the offices of the Prime Minister and other Ministers, and the Attorney-General) dissolved Parliament, placed an embargo on political parties and prohibited trade unions from operating.²⁰⁴ The main reasons put forward by the King for the repeal of the Constitution were that the Constitution was unsuccessful in laying down the structure for good government and that it was instead a hindrance to peace and progressive development in all aspects of life; that it had endorsed the introduction of highly distasteful political practices foreign to and incongruous with the way of life of Swazi society and was constructed to disturb and dismantle their tranquil, practical and inherently democratic procedures for political activity; that there was no constitutional way of rectifying it since the procedures prescribed by the Constitution itself were not feasible (and) that he and his people after a protracted constitutional battle longed for complete independence under a constitution created by and for themselves in full freedom without external influence, in order that as a nation they might push forward progressively under their own constitution which would ensure them peace, order, good government and happiness.²⁰⁵

The impact of the Proclamation thereby revolutionised Swaziland into an absolute monarchy in which the King exclusively wielded all legislative, executive and judicial powers.²⁰⁶ In September 1973, however, Sobhuza II again attempted to promote the quest for a constitution for Swaziland by appointing a Royal Constitutional

¹⁹⁷ Section 9.

¹⁹⁸ Section 11.

¹⁹⁹ Section 12.

²⁰⁰ Section 13.

²⁰¹ Section 14.

²⁰² Section 15.

²⁰³ The King's Proclamation to the Nation, Decree 11 of 1973.

²⁰⁴ Matsebula JSM *A history of Swaziland* (1988) 256 and 260-261.

²⁰⁵ Wanda BP "The shaping of the modern Constitution of Swaziland: A review of some social and historical factors" (1990) *Lesotho Law Journal* 169.

²⁰⁶ Langwenya SM "Recent legal developments – Swaziland" (2005) *University of Botswana Law Journal* 168.

Commission.²⁰⁷ The Commission was authorised to travel throughout Swaziland and conduct interviews with the Swazi people on the type of Constitution they desired.²⁰⁸ However, contrary to King Sobhuza's promises and efforts, no "own" constitution was ever enacted for the people of Swaziland during the rest of the period of his reign.

5.6.2 The Constitution of the Kingdom of Swaziland Act 101 of 2005

5.6.2.1 Background

Like his predecessor, Mswati III continued to rule Swaziland by issuing laws and proclamations and without any constitutional enactment. However, his lavish lifestyle²⁰⁹ and dictatorial style of rulership attracted considerable reproach, and after many years of delaying the inevitable, he finally gave permission for the drafting of a new constitution for Swaziland.²¹⁰ From 1992 onwards, Mswati III appointed various committees and commissions as pressure for constitutional reform intensified.²¹¹ These various committees and commissions included the Tinkhundla Review Commission (TRC) 1992,²¹² the Constitutional Review Commission (CRC) 1996,²¹³ (whose initial mandate was to develop a draft Constitution for Swaziland, but which was subsequently downgraded to the development of a mere report which was produced as the Swaziland Constitutional Review (Amendment) Decree 1 of 2000),²¹⁴ and finally the Constitution Drafting Committee (CDC) 2002.²¹⁵ The Constitution Drafting Committee (CDC) 2002 consisted of King Mswati's brother, Prince David Dlamini, as chair, and a few other selected members.²¹⁶ The composition of the Committee met with much criticism

²⁰⁷ Barker D *Swaziland* (1965) 133-135.

²⁰⁸ Matsebula (1988) *op cit* 265.

²⁰⁹ See *City Press* "King Mswati spends millions on twenty Mercs" (2009-04-19); *The Times* "Surrounded by destitute subjects, Swaziland's King lives royally" (2008-09-12) 3; *The Star* "Rich Swazi King unlikely to heed calls for reform" (2008-09-18) 6; and *The Citizen* "Swazi King just another despot" (2006-11-15) 12.

²¹⁰ Fombad *op cit* 95.

²¹¹ Maseko T "The drafting of the Constitution of Swaziland, 2005" (2008) *African Human Rights Law Journal* 323.

²¹² *Id* 323-324.

²¹³ *Id* 324-326.

²¹⁴ *Id* 325.

²¹⁵ *Id* 326-327.

²¹⁶ *Id* 326.

particularly for being “undemocratically elected”. As a result thereof, people at variance with the composition of the Committee, clamoured for a more transparent and democratically-appointed, all inclusive, broad-based structure. Organisations insisted on, among others, that all barriers and obstacles to free political participation and activity be expunged; that the CDC be democratised and extended to accommodate all stakeholders on agreed ground rules and terms of reference ...”.²¹⁷

The CDC developed its first draft Constitution and presented it to the King on 31 May 2003.²¹⁸ Before the adoption of the document, time was afforded for public comment and input.²¹⁹ The Swaziland Constitution Bill 8 of 2004 was subsequently presented and tabled before parliament in October 2004.²²⁰ After much debate, consultation, negotiation and various legal challenges, the Constitution of the Kingdom of Swaziland was adopted on 26 July 2005. In the sections that follow, I highlight some of the important sections of Swaziland’s Constitution²²¹ as they pertain to the customary law of intestate succession.

5.6.2.2 Specific provisions

Like South Africa’s and Ghana’s Constitutions, Swaziland’s Constitution is the supreme law of the country.²²² The 2005 Constitution contains some similar features to those found in the 1968 Constitution.²²³ For example the 2005 Constitution recognises the King and *iNqwenyama* of Swaziland as a hereditary Head of State,²²⁴ and exempts both the Queen Mother (or the *Ndlovukazi*) and the King from taxation.²²⁵ The Constitution also makes provision for succession to the throne of Swaziland²²⁶ and for the installation of a Regent until the King is able to assume his functions and responsibilities.²²⁷

²¹⁷ *Ibid.*

²¹⁸ *Id* 327.

²¹⁹ *Ibid.*

²²⁰ *Id* 330.

²²¹ The Constitution of the Kingdom of Swaziland Act 101 of 2005.

²²² Section 2(1) provides that: “This Constitution is the supreme law of Swaziland and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void”.

²²³ See Van Schalkwyk A *The indigenous law of contract with particular reference to the Swazi in the Kingdom of Swaziland* (Unpublished LLD thesis Unisa) (2006) 17.

²²⁴ Section 4.

²²⁵ See sections 7(a) and 10.

²²⁶ Section 5.

²²⁷ Section 7(2)-7(9).

The Constitution also contains a chapter²²⁸ on the protection and promotion of fundamental rights and freedoms. Chapter III applies to all law and binds the legislature, the executive, the judiciary, and all organs of state as well as natural and legal persons.²²⁹ This section is silent on whether the King is included in any of these categories. Swaziland's history has clearly shown that the King may pose the greatest threat to the fundamental rights and freedoms included in Chapter III, which are the rights of the people of Swaziland.²³⁰ It is for this very reason that the Constitution should

²²⁸ Chapter III.

²²⁹ Section 14(2) provides that: "The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, the Legislature and the Judiciary and other organs or agencies of Government and, where applicable to them, by all natural and legal persons in Swaziland, and shall be enforceable by the courts as provided in this Constitution".

²³⁰ Fombad *op cit* 101. See also *Lawyers for Human Rights v Swaziland* (2005) AHRLR 66 para 58, where the Court held that the King's Proclamation to the Nation 12 of 1973 (in which the King declared that he had assumed supreme power in the Kingdom of Swaziland and that all legislative, executive and judicial power vested in him, and in which he repealed the democratic Constitution of Swaziland that was enacted in 1968), to the extent that it allowed the head of state to dismiss judges and exercise judicial power, was in violation of article 26 of the African Charter. The reasons given by the court for their judgment were as follows:

Article 26 of the Charter provides that states parties shall have the duty to guarantee the independence of the courts. Article 1 of the UN Basic Principles on the Independence of the Judiciary states that "[t]he independence of the judiciary shall be guaranteed by the state and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of judiciary". Article 11 of the same Principles states that "[t]he term of office of judges, their independence, security ... shall be adequately secured by law". Article 18 provides that "[j]udges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties". Article 30 of the International Bar Association (IBA)'s Minimum Standards of Judicial Independence also guarantees that "[a] judge shall not be subject to removal unless, by reason of a criminal act or through gross or repeated neglect or physical or mental incapacity he/she has shown himself/herself manifestly unfit to hold the position of judge" [article 30], and article 1(b) states that "[p]ersonal independence means that the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control".

By entrusting all judicial powers to the head of state with powers to remove judges, the Proclamation of 1973 seriously undermines the independence of the judiciary in Swaziland. The main *raison d'être* of the principle of separation of powers is to ensure that no organ of government becomes too powerful and abuses its power. The separation of powers amongst the three organs of government – executive, legislature and judiciary – ensures checks and balances against excesses from any of them. By concentrating the powers of all three government structures into one person, the doctrine of separation of powers is undermined and subject to abuse.

In its Resolution on the Respect and the Strengthening on the Independence of the Judiciary adopted at its 19th ordinary session held from 26 March to 4 April 1996 at Ouagadougou, Burkina Faso, the African Commission recognised "the need for African countries to have a strong and independent judiciary enjoying the confidence of the people for sustainable democracy and development". The Commission then called upon all state parties to the Charter to

repeal all their legislation which are inconsistent with the principle of respect of the independence of the judiciary, especially with regard to the appointment and posting of judges ... refrain from taking any action which may threaten directly or indirectly the independence and the security of judges and magistrates.

Clearly, retaining a law which vests all judicial powers in the head of state with possibility of hiring and firing judges directly threatens the independence and security of judges and the judiciary as a whole (at paras 55-58).

The Court also found that the King's Proclamation to the Nation 12 of 1973 "outlawed the formation of political parties or any similar structure. Political parties are one means through which citizens can participate in governance either directly or through elected representatives of their choice. By

have clearly stated that the King is subject to it to prevent the probability that he may infringe upon the rights and freedoms of others without the possibility of having to face any sanction or consequences.

Section 14(3) is of particular interest as it makes provision for every person, irrespective of gender, race, place of origin, political opinion, colour, religion, creed, age or disability to be entitled to the rights contained in Chapter III, but subject to respect for the rights and freedoms of others and for the public interest. This would mean that “a right or freedom could be limited to the extent that it infringes the rights and freedoms of others and the public interest.”²³¹ This “limitation” sounds similar to the general limitations clause found in the South African Constitution²³² and may be invoked to “justify the infringement of rights or freedoms where the exercise of such rights or freedoms would disrespect the

prohibiting the formation of political parties, the King’s Proclamation seriously undermined the ability of the Swaziland people to participate in the government of their country and thus violated article 13 of the Charter” (at para 63). The Court’s reasons therefore were:

Article 10 of the African Charter provides that “every individual shall have the right to free association provided that he abides by the law”. Article 11 provides that “every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law...” In communication, the African Commission, quoting its Resolution on the Right to Freedom of Association, held that the regulation of the exercise of the right to freedom of association should be consistent with states’ obligations under the African Charter and in regulating the use of this right, the competent authorities should not enact provisions which would limit the exercise of this freedom and that the competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international standards. The Commission reiterated this in communications 147/95 and 149/96 and concluded that this principle does not apply to freedom of association alone, but also to all other rights and freedoms enshrined in the Charter, including the right to freedom of assembly.

Admittedly, the Proclamation restricting the enjoyment of these rights was enacted prior to the coming into effect of the Charter. However, the respondent state had an obligation to ensure that the Proclamation conforms to the Charter when it ratified the latter in 1995. By ratifying the Charter without taking appropriate steps to bring its laws in line with the same, the African Commission is of the opinion that the state has not complied with its obligations under article 1 of the Charter and in failing to comply with the said duty, the prohibition on the establishment of political parties under the Proclamation remained effective and consequently restricted the enjoyment of the right to freedom of association and assembly of its citizens. The Commission therefore finds the state to have violated these two articles by virtue of the 1973 Proclamation.

The complainant also alleges violation of article 13 of the African Charter claiming that the King’s Proclamation of 1973 restricted participation of citizens in governance as according to the complainant the import of sections 11 and 12 of the Proclamation is that citizens can only participate in issues of governance only within structures of the Tinkhundla. In communications 147/95 and 146/96 *Jawara v The Gambia* [(2000) AHRLR 107 (ACHPR 2000)_paras 67-68] the Commission held that:

The imposition of the ban on former ministers and members of parliament is in contravention of their rights to participate freely in the government of their country provided for under article 13(1) of the Charter ... Also the banning of political parties is a violation of the complainants’ rights to freedom of association guaranteed under article 10(1) of the Charter (at paras 60-62).

²³¹ Rautenbach *op cit* 445.

²³² See section 36.

exercise of other individual rights and freedoms and the public interest”.²³³

Some of the specific rights protected in Chapter III include: the rights to life,²³⁴ personal liberty,²³⁵ and of persons with disabilities,²³⁶ a fair hearing,²³⁷ protection from slavery and forced labour,²³⁸ protection from inhuman and degrading treatment,²³⁹ protection against arbitrary search or entry,²⁴⁰ freedom of conscience or religion,²⁴¹ expression,²⁴² assembly and association,²⁴³ and movement.²⁴⁴ Like most Constitutions the Constitution of the Kingdom of Swaziland also makes specific provision for a right to equality. In this regard section 20 provides that:

- (1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.
- (2) For the avoidance of any doubt, a person shall not be discriminated against on the grounds of gender, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion, age or disability.
- (3) For the purposes of this section, “discriminate” means to give different treatment to different persons attributable only or mainly to their respective descriptions by gender, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion, age or disability.
- (4) Subject to the provisions of subsection (5) Parliament shall not be competent to enact a law that is discriminatory either of itself or in its effect.
- (5) Nothing in this section shall prevent Parliament from enacting laws that are necessary for implementing policies and programmes aimed at redressing social, economic or educational or other imbalances in society.

This section does not include sexual orientation and marital status as possible grounds of discrimination. As stated above, the type of marriage contracted determined the law applicable to the regulation and administration of intestate estates in Swaziland. This

²³³ Rautenbach *op cit* 445-446.

²³⁴ Section 15.

²³⁵ Section 16.

²³⁶ Section 30.

²³⁷ Section 21.

²³⁸ Section 17.

²³⁹ Section 18.

²⁴⁰ Section 22.

²⁴¹ Section 23.

²⁴² Section 24.

²⁴³ Section 25.

²⁴⁴ Section 26.

meant (especially for women), that the choice of marriage or a women's marital status would either grant her rights of inheritance (or succession) or exclude her totally from the group of persons eligible for succession (or inheritance). The fact that the Swazi Constitution prohibits discrimination and at the same time recognises Swazi law and custom means that it generates conflict between two opposing principles, namely the right of an individual to equal treatment and the right of the group to practice the culture of their choice.²⁴⁵ This fact points to the following: that with human rights attention is given to individuals, whereas with Swazi law and custom, attention is placed on the group or community, or the individual in the context of the group; that human rights focuses on rights, whereas Swazi law and custom focuses on duties.²⁴⁶ However, if the constitutional mandate to Parliament to "enact laws that are necessary for implementing policies and programmes aimed at redressing social, economic or educational or other imbalances in society"²⁴⁷ is implemented, such policies and programmes could significantly improve the status and property rights of women in Swaziland.

The Constitution also provides that: "a person has a right to own property either alone or in association with others".²⁴⁸ This means that anyone (ie, male or female) can own property jointly or solely. This was confirmed by the Swazi Court in *Aphane v Registrar of Deeds and Others*.²⁴⁹ The dispute in this case arose in 2008, when Mary Joyce and her husband entered into a deed of sale to buy title deed land in Mbabane, Swaziland and wanted both of their names registered as purchasers on the title deed.²⁵⁰ Their request was denied as it contravened section 16(3) of the Deeds Registry Act.²⁵¹ Mary Joyce challenged the Act on the basis of sections 20 and 28²⁵² of the Constitution of the Kingdom of Swaziland. The court held that women married under the regime of community of property are now entitled to register "immovable property, bonds and other real rights" in their names.²⁵³ The court also called for Parliament to urgently

²⁴⁵ Whelpton (1997) *op cit* 150.

²⁴⁶ Van Schalkwyk *op cit* 20-21.

²⁴⁷ Section 20(5).

²⁴⁸ Section 19(1).

²⁴⁹ [2010] SZHC 29. See also Dlamini-Ndwandwe NF "The Constitution and women's property rights in Swaziland: *Mary-Joyce Aphane v The Registrar of Deeds*" (2011) *Southern African Public Law* 408-428.

²⁵⁰ *Aphane v Registrar of Deeds op cit* para 5.

²⁵¹ 37 of 1968.

²⁵² See below.

²⁵³ Paras 31 and 36.

initiate the process of law reform so that provisions like section 16(3) of the Deeds Registry Act, which are an affront to the rights of women, be completely eliminated from Swaziland's statute books.²⁵⁴

The drafters of the Constitution also saw fit to include a number of special rights that pertain specifically to the protection of the family,²⁵⁵ freedoms of women,²⁵⁶ the rights of the child,²⁵⁷ and the rights of spouses.

Section 28 provides that:

- (1) Women have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities.
- (2) Subject to the availability of resources, the Government shall provide facilities and opportunities necessary to enhance the welfare of women to enable them to realise their full potential and advancement.
- (3) A women shall not be compelled to undergo or uphold any custom to which she is in conscience opposed.

Although not stated explicitly, section 28(3) of the Constitution is a compromise between two competing rights namely the rights of women and cultural rights. The right actually has the effect of suspending age-old Swazi customs in favour of equality for women.²⁵⁸ Section 29(4) provides that: "Children whether born in or out of wedlock shall enjoy the same protection and rights". This section is given further emphasis by section 31 which abolishes the status of illegitimacy.²⁵⁹ Section 7(b) provides that: "Parliament shall enact laws necessary to ensure that – a child is entitled to reasonable provision out of the estate of its parents". If such laws are actually enacted, they will definitely improve the rights of children with regards to the inheritance of their parent's property. Section 233(9) provides that: "in the exercise of the functions and duties of his office, a chief enforces a custom, tradition, practice or usage which is just and not discriminatory". In this regard, chiefs could play a pivotal role in eradicating male

²⁵⁴ Para 32.

²⁵⁵ See footnote 38 of this chapter.

²⁵⁶ Section 28.

²⁵⁷ Section 29.

²⁵⁸ Fombad *op cit* 100.

²⁵⁹ Section 31 provides that: "For the avoidance of doubt, the (common law) status of illegitimacy of persons born out of wedlock is abolished".

primogeniture and thereby promoting the equal rights of succession to status and to property for Swazi women.

5.7 Field research

Because of the unwritten nature of Swazi law and custom, and the fact that this study seeks to gauge the “living” or “unofficial” law of the Swazi people with regards to the law specifically relating to intestate succession; fieldwork was an indispensable component of this thesis. As explained in chapter 1 of this thesis field research was conducted in the Kingdom of Swaziland by holding interviews with experts. In this section of the thesis, the researcher reports on the findings of her field research in this regard. This section of the thesis will be structured by first stating the question posed to the interviewees and thereafter recording their responses.

Question 1

How is the Swazi family constituted?

According to the respondents, the act of marriage creates a Swazi family. A Swazi family comprises of a group of people who are related to each other and is therefore characteristic of an extended family. As a result thereof, individual family members must only exercise rights within the context of the wider family group. Each person in the family has his or her own room or hut and the family is headed by the husband (or his father should he still be alive). The hut of the husband’s mother (*kagogo*) is the centre of all family discussions and is also the place where the family meets or congregates to have their meals.

Question 2

Which family member is the rightful successor upon the death of an intestate in terms of Swazi law and custom?

All the interviewees confirmed that the deceased’s eldest son was his successor and that he took over all the responsibilities of and managed the assets of the intestate after his death. Illegitimate children are not eligible for succession.

Question 3

Does the wife or do the wives of a deceased have to perform any rituals following the death of the husband.

The wife or wives of a deceased have to mourn the death of the husband. The whole process of mourning takes two years. At the outset, a widow or widows (*bafelakati*) are confined to their matrimonial homes for a month. After the period of confinement, they are free to go to a secluded place where they will then have a bath. A widow's head will be shaven using a knife and she will have to wear special attire for the period of mourning. The special attire usually comprises of a string (known as *umuzi*) which must be worn across the stomach or waist of the widow, a hat (made of *umuzi*) must be worn on her head, a skirt made of goat skin that has been well softened must be worn around her waist and another piece of goatskin is worn across her breast. All these items indicate that she is a widow. Specific periods of time are allocated for the shedding of these clothes and these periods occur from May to August (in the third year after the death of the husband).

Question 4

What are the procedures invoked by the family when appointing or selecting a successor?

In cases of monogamous succession, the election of the successor is simple, in that the family will merely appoint the oldest son as successor as there is only one wife and one house. However, in instances of polygamy, a family must first choose the wife that will be regarded as the main wife for purposes of succession. An important requirement here is that the mother of the potential successor must have been legally married to the deceased for the successor to qualify for intestate succession.

Once the main wife is chosen, the family then hold a meeting to deliberate on the matter. At this meeting, the family investigates whether the person eligible for succession is capable of ruling the family. If it is found that the prospective successor is capable of ruling the family, a beast will be slaughtered and an elder member of the family will announce that the oldest son of the deceased is now the leader and the rest of the family would accept that.

If a successor is young, he must be assisted and advised by the older councillors on how to rule.

Question 5

What property does a successor normally succeed to?

The respondents indicated that the successor succeeds to duties first, ie, he must maintain all the deceased's wives and he must treat them equally. He is also responsible for the maintenance and care of the entire family and is universally liable for all debts incurred. He becomes the sole breadwinner or custodian of the family. With regards to property, the successor obtains family cattle which he also must look after and is also entitled to the spear/s of his predecessor.

Question 6

In South African customary law, and for purposes of succession, a distinction is made between general, house and personal property. Does Swazi law and custom make such distinctions?

Yes, Swazi law does make a distinction between general, house and personal property. General property is property belonging to the whole family, whilst house property refers to property belonging to a specific house. Personal property is property belonging to an individual. In this regard, the interviewees noted that a Swazi women may have her own property like fields and chickens, however she exercises control over this property through the family head or through her husband.

The respondents confirmed that Swazi law and custom made a distinction between general and special succession. General succession meant that the successor obtained the general property together with the house property of the house that he was now the head of, whilst special succession meant that the successor only acquired the house property of the house that he was now in charge of.

The interviewees also insisted that testate succession is unknown in Swazi law and custom.

Question 7

What happens in cases where there is no successor? In other words, what would happen if the deceased had no children that could succeed him or what would happen if the wife/wives of the deceased were unable to produce a successor?

Here the respondents stated that if a wife is unable to reproduce and she has been fully *labolaed*, a younger girl (*inhlanti*) would be brought into the house to reproduce children for her. The young girl must be selected from the family of the wife and need not be her maternal sister, but could be any other female relative. There were certain procedures that needed to be fulfilled in this regard:

- (a) The husband's family must determine why the wife is unable to produce children.
- (b) The wife's family must also determine why the wife is unable to procreate.
- (c) After those determinations are made, both families meet at a place where the wife's family will bring the substitute.

A future substitute is identified by the wearing of an arm ring (known as *inyongo-bile*). The future substitute must abide by the decision of her family and is not allowed to refuse to engage in the practice of substitution. The children born out of such an agreement belong to the wife who could not have children. The substitute becomes part and parcel of the family into which she has been placed as a substitute. The husband cannot choose the substitute, but must abide by the decision of his family.

The respondents also mentioned the *kungena* custom as being applicable here.²⁶⁰ They stated that the *kungena* custom was applied when the husband died before he could procreate a successor. The family of the husband would then select a brother of the deceased to procreate children for the deceased with the deceased's wife. The selected brother is usually the brother that will take control of the husband's affairs (ie, the administrator). He must ensure that cattle are looked after for the benefit of the children

²⁶⁰ Please note that the respondents mentioned the practice as *kungena* and not *ukungena* as stated in chapter 2 of this thesis. This practice is however referred to as *ukungena* in South Africa.

and he does not have a right to use such cattle. The children that are borne of the *kungena* custom remain with their mother and belong to the deceased.

Question 8

What would happen if the deceased only had daughters? Would the family immediately engage in the practice of substitution to produce a successor or are there other methods employed here to produce a successor.

The family would first look to the broader family circle for a male heir to appoint as a successor in this regard. The family also engages in extensive consultation and discussion regarding the finding of a successor. If an eligible male is identified from the broader family circle, that person will be chosen as the successor.

Question 9

Would it be possible in Swazi law and custom for a woman to succeed to the property of a male intestate?

Here the interviewees accepted and stated that it was permissible for women to be equally represented in Parliament, but it was not acceptable under Swazi law and custom for a woman to be a successor. The female interviewees were adamant about this, and even went as far as stating that Swazi customary law is correct in this regard. I found their stance rather fascinating.

The interviewees ironically mentioned that Swazi customary law should not remain stagnant, but should be adapted and amended to keep abreast of modern development. However, they still maintained that women were ineligible to succeed because they would take the property of the inheritance and use it for the benefit of the family into which they married. The respondents however mentioned that it was possible for a woman to identify someone to take her place as successor. The person so identified could not act independently with regards to the property in the intestate estate, but had to report to the woman. I found this novel situation contradictory to what the respondents had previously stated and it is therefore uncertain as to whether such a practice exists in Swaziland or not.

Question 10

Would you be in favour of or opposed to woman inheritance or succession?

The respondents vehemently stated that they would be opposed to women inheritance or succession. The reason given for such a resounding response was that women leave their families and become part of another family. Therefore, if a woman were to succeed, this would create obvious practical and economic problems for the intestate's family. For example she could deprive them of their rights to certain entitled property, or she could squander the property for the benefit of her husband's family, or she could leave them destitute after failing to maintain and provide for them. Another reason given for avoiding women inheritance, was that it would be impossible to determine who would succeed the woman upon her death, ie, would it be the women's male child or the women's female child.

Question 11

What would happen if the daughter of the intestate remained single or never married? Would this change your position?

The interviewees stated that their position would not change. They maintained that a female is merely part of the wider family and it would therefore be impossible for her to succeed because it is still probable that she might marry at anytime in the future. They also maintained that the family would find a suitable male successor even in such a situation.

Question 12

Are you aware of any local legislation affecting or governing the customary law of intestate succession?

The respondents stated that Swazi law and custom was usually passed down orally from one generation to the next, however, they were generally aware of the fact that certain aspects of the Swazi law of intestate succession had been codified. They were however unable to state the names of the local laws or legislation that had amended

or codified the customary law of intestate succession, nor were they able to state any of their provisions. I also found it remarkable that even though the research was conducted in 2008, none of the interviewees mentioned the Constitution of the Republic of Swaziland or its provisions as they relate to the Swazi law of intestate succession and to the rights of women in general.

Question 13

Are you aware of the fact that Swaziland has international obligations under various pieces of international legislation and that these obligations could result in women being able to succeed to the intestate estate of males?

None of the respondents were aware of Swaziland's obligations in international law. They were ignorant in this regard.

Question 14

Would you be in favour of harmonising Swazi customary law with western law in an attempt to accommodate women for intestate succession? Wouldn't this bring about equity?

The interviewees stated that Swazi customary law and western law are completely different and cannot be harmonised. They noted that bringing these two distinct laws together would actually create more conflict. Swazi law and custom is sufficient to regulate intestate succession.

5.8 Conclusion

Like Ghana and South Africa, Swaziland has used legislation as a tool to improve the rights of its citizens. The enactment of the Intestate Succession Law which seeks to afford a surviving spouse a share in the estate of a deceased spouse is laudable, albeit with its associated problems. The Intestate Succession Law is however outdated and was also enacted prior to the adoption of Swaziland's Constitution and Swaziland's. The Law also needs to be consonant with Swaziland's obligations at international law. The

Law is therefore in dire need of reform so as to bring it into line with the values and objects of the Constitution, especially those pertaining to women and children.

One of Swaziland's most noteworthy achievements thus far however, has been its adoption of a final Constitution for the people of Swaziland. The Constitution is an important document as it creates a standard against which all other laws may be tested. One of the best features of Swaziland's Constitution is its Chapter on the Protection and Promotion of Fundamental Rights and Freedoms²⁶¹ as it takes cognisance of the fact that Swaziland is a traditional customary society.²⁶² The Constitution also aims to "blend the good institutions of traditional law and custom with those of an open and democratic society so as to promote transparency and the social, economic and cultural development of (the) Nation".²⁶³ In the future, it will be interesting to see how Swaziland achieves the afore-mentioned goal especially with reference to the impact of customary law on the rights of women. The recent case of *Mary Joyce Doo Aphane v The State* is however a step in the right direction.

5.9 Summary of the chapter

Chapter 4 begins with a brief political history of Swaziland and its emergence as an independent State from Britain in 1968. Mention is made of the fact that Swaziland remains one of the last surviving absolute monarchies in Africa. Attention is then given to the meaning of Swazi customary law and the magico-religious conceptions prevalent amongst the people of Swaziland. Reference is then made to the fact that the Swazi legal system is a dual legal system comprising of Roman-Dutch law which is the common-law of Swaziland and Swazi customary law (the application of which is subject to a repugnancy clause).

The law of intestate succession in Swaziland originates primarily from two sources, ie, Swazi customary law and statutory law. At this stage, the general principles of the Swazi customary law of intestate succession are then set out. The various topics

²⁶¹ Chapter 3.

²⁶² See section 27 which recognises the Swazi family.

²⁶³ The preamble of the Constitution.

discussed are the Swazi family and property, primogeniture, the distributable estate, the powers and duties of successors, the general order of succession, succession to the estates of various categories of persons, dispositions *inter vivos*, dying declarations and disinheritance. Attention is then given to the process of intestate succession under Swazi law and custom. Certain procedures or rituals have to be performed before a successor is finally appointed. For example, the Swazi observe certain death, burial and mourning rituals; an administrator is appointed to manage the estate of the deceased family head or Swazi man in the interim period (ie, between the time of the death and the election of the successor); the family council is responsible for choosing the successor; the rank of the deceased's wives plays an important role in the determination of the successor; and once the successor is appointed, a ceremony is held to install him.

In the next section of the chapter intestate succession under the general law of the land is discussed, with particular reference to the Intestate Succession Law 3 of 1953. Some of the advantages and disadvantages of that piece of legislation are also discussed in brief. Attention is then given to the impact of constitutionalism on the customary law of intestate succession in the Kingdom of Swaziland. In this section reference is made to the Constitution of Swaziland No 1377 of 1968 and the Constitution of the Kingdom of Swaziland Act 101 of 2005 (Swaziland's current Constitution) and their various provisions. In the next section of the chapter, the researcher reports on the field research conducted in Swaziland. In conclusion, the researcher highlights some of the benefits of the current Constitution and assesses whether it will be able to meet the needs of Swazi traditional society and also achieve its enacted aims.

CHAPTER 6

CONCLUSIONS AND RECOMMENDATIONS

6.1 Introduction

The African customary law relating to intestate succession has always been known to discriminate against women. In an attempt to deal with this dilemma, the countries of South Africa, Ghana and Swaziland have all enacted legislation as a means of alleviating some of the difficulties faced by African women in this regard. South Africa has enacted the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009, Ghana has enacted the Intestate Succession Law, 1985¹ (and has yet to pass the Intestate Succession Bill, 2009 and the Property Rights of Spouses Bill, 2009) and Swaziland has enacted the Intestate Succession Law 3 of 1953. In this chapter, the researcher assesses the successfulness of these pieces of legislation and the case law that has brought about the enactment of such legislation (with particular reference to South Africa) to effectively improve the rights of women and their rights of access to intestate property. The researcher also evaluates whether these laws have generally had any significant impact on the lives of the African women living in these countries. Each assessment and comments on the pieces of legislation will be dealt with under specific headings.

6.2 Changing the traditional concept of the African family

As stated previously, the family is the most important social construct in all African societies. Traditionally, the African family was usually composed of a group of people “descended through the male line from a common ancestor” who lived together in a village.² Although urbanisation has contributed to the creation of an increased number

¹ PNDCL 111.

² Bekker JC *Seymour's customary law in southern Africa* (1989) 69.

of nuclear African families, the African family still continues to remain community orientated where for example family disputes and decisions (be it between Africans living in urban and rural areas) are usually resolved or taken by the extended family and not by the nuclear family in isolation.³ For example, the appointment of the intestate successor at customary law is a determination that is generally undertaken by the extended family group.⁴ The extended family structure of the African family was confirmed by the interviewees in KwaZulu-Natal and Swaziland.

All the statutory laws of South Africa, Ghana and Swaziland that amend the customary law of intestate succession clearly perceive the African family as a nuclear family,⁵ as opposed to being an extended family: a perception contrary to the traditional concept of the family as understood in living customary law. This may be attributable to the fact that colonisation resulted in two distinct systems of family law namely: the laws of the coloniser and the laws of African traditional communities.⁶ Legislators have therefore opted for a diluted version of African customary law, when attempting to redress some of the problems associated with the African law of intestate succession.

In Ghana and South Africa, the indigenous tribes or traditional leaders were antagonistic towards the legislator's approaches to dealing with customary law matters. For example, the Akan reacted negatively to the Intestate Succession Law, 1985⁷ as they felt that "their system of inheritance was under siege and the organic family structure faced destruction by an alien system considered by traditionalists to be mechanical and individualistic".⁸ In South Africa, the Customary Law of Succession Amendment Bill⁹ met with much opposition from Contralesa for being Eurocentric and for not reflecting the principles of living customary law¹⁰ with regards to the structural composition of the African family. The statutory laws adapting the customary law of

³ See Higgins TE, Fenrich J and Tanzer Z "Gender equality and customary marriage : Bargaining in the shadow of post-apartheid legal pluralism" (2007) *Fordham International Law Journal* 1698-1703.

⁴ See generally chapters 2, 4 and 5 of this thesis.

⁵ See Freeman MDA "Ghana: Legislation for today" (1988-1989) *Journal of Family Law* 160.

⁶ Luckham Y "Law and the status of women in Ghana" (1976) *Columbia Human Rights Law Review* 69.

⁷ PNDC Law 111.

⁸ Dvilo E "Religion in the public sphere: Challenges and opportunities in Ghanaian lawmaking 1989-2004" (2005) *Brigham Young University Law Review* 639.

⁹ B109 of 1998.

¹⁰ Himonga C "The advancement of African women's rights in the first decade of democracy in South Africa: The reform of the customary law of marriage and succession" (2005) *Acta Juridica* 98.

intestate succession is therefore not an accurate reflection of living customary law and has the resultant effect of unfairly imposing western concepts, norms and ideals on African communities,¹¹ which is wrong.

6.3 The non-recognition of tribal differences

African societies are pluralistic in nature: that means that they comprise of different tribal communities (some of the various tribal groupings prevalent in South Africa and Ghana have already been mentioned in Chapters 1 and 4 of this thesis). The customary laws pertaining to intestate succession may therefore vary from tribe to tribe.¹² The revised enacted laws of intestate succession in both South Africa and Ghana fail to take cognisance of these ethnic differences and make the incorrect assumption that customary law is the same throughout the whole of South Africa and Ghana, and is practiced in the same manner in all the various tribal groupings.

The courts in their interpretation and application of African customary law have also adopted this apparent false *modus operandi*. In fact, when cases of African customary law are placed before the courts, courts have the innate predilection to apply official rather than living customary law as a rule.¹³ This is problematic because official customary law is often distorted and may not accurately reflect the law or customs actually practiced in traditional communities.¹⁴ It is therefore recommended that customary law would be more comprehensible if the courts based their decisions on comprehensive and sufficient research rather than relying on oversimplified generalisations not true of all tribal societies.¹⁵ The type of research envisaged should not only be devised to provide reliable description and evaluation, but it should also be cognisant of the problems associated with social change.¹⁶ Presiding judges and magistrates also

¹¹ See Church J “Constitutional equality and the position of women in a multi-cultural society” (1995) *Comparative International Law Journal of South Africa* 300.

¹² See generally Bekker (1989) *op cit* 273-279 and Bankas EK “Problems of intestate succession and the conflict of laws in Ghana” (1992) *International Lawyer* 438.

¹³ Lehnert W “The role of the courts in the conflict between African customary law and human rights” (2005) *South African Journal on Human Rights* 270.

¹⁴ Cornell D “The significance of the living customary law for an understanding of law: Does custom allow for a woman to be Hosi?” (2009) *Constitutional Court Review* 401.

¹⁵ Bankas *op cit* 439.

¹⁶ Luckham *op cit* 91.

often lack the necessary skills and knowledge to deal with matters pertaining to African customary law in general.¹⁷ It is therefore imperative that legal professionals such as judges and judicial officers receive adequate training in the subject.¹⁸

6.4 The disregard of African society as community orientated

African customary law is a community-based system of law in which rights do not belong to individuals per se, but rights are exercised through or shared by the family group or the community at large.¹⁹ This was confirmed by the interviewees in KwaZulu-Natal and Swaziland. Constitutions, however, tend to focus on the rights of the individual and guarantee specific individual human rights like the rights to life, human dignity, equality and freedom from discrimination. This is true of the constitutions of South Africa, Ghana and Swaziland. South Africa's Constitution is unique however, in that it makes provision for a group right to practice its culture.²⁰ The International Covenant on Civil and Political Rights (ICCPR), 1966²¹ also makes provision for minority groups to enjoy their culture.²² The Universal Declaration of Human Rights (UDHR), 1948 also makes provision for a group right to enjoy its culture.²³ This situation thus presents us with the following question: how do we find an acceptable balance between the group's right to practice its culture and the right of the individual (woman) to equality and to be free from discrimination especially in regard to intestate succession? Another way in which we could ask this question is how do we enforce foreign constitutional principles or ideals onto traditional communities?

¹⁷ Lehnert *op cit* 263-264.

¹⁸ *Id* 263.

¹⁹ Wicomb W and Smith H "Customary communities as 'peoples' and their customary tenure as 'culture': what we can do with the *Endorois* decision" (2011) *African Human Rights Law Journal* 427. See also Oquaye M "Human rights and the transition to democracy under the PND C in Ghana" (1995) *Human Rights Quarterly* 559-560.

²⁰ Section 31 provides that:

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, practice their religion and use their language; and

(b) to form, join or maintain cultural, religious and linguistic associations and other organs of civil society.

²¹ Adopted on 16 December 1966 and entered into force on 23 March 1976.

²² Article 27 provides that: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language".

²³ Article 27 provides that: "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits".

One of the most effective ways of finding an acceptable balance is to give traditional communities an opportunity to adapt and change the discriminatory laws themselves.²⁴ As was seen in the South African case of *Shilubana v Nwamitwa and Others*²⁵ a woman was confirmed as the traditional leader of the Valoyi, a community where succession to traditional leadership was based on the rule of male primogeniture: the court held that she was correctly appointed by the traditional authorities of the community as it was their right to develop their customary law under the Constitution.²⁶ Unlike western law, African customary law is not static, but dynamic, and is constantly evolving to deal with the changing needs, circumstances and practices of traditional communities.²⁷ *Shilubana* is a good example of the interplay between living law and the supreme law of the Constitution, and demonstrates that change that is brought about by the community is an influential mechanism for harmonising gender equality and customary law.²⁸ If change is brought about by the community itself, it would also ensure that the amended rules and or practices of customary law are received more readily by members of the community; and would also secure the smooth implementation of the laws in the affected customary communities: which is a positive step in the right direction and which could improve the intestate succession rights of women more effectually.

Women themselves could also play a big role in improving their own circumstances. They should educate themselves on their standing, position, rights and role in society.²⁹ Negative stereotypes about women should be discouraged by educating African men, in particular, on the positive role of women in traditional communities. Women need to appreciate the fact that culture and tradition are mutable³⁰ so that they can organise themselves to investigate and impugn established practices of inequality and gender discrimination.³¹

²⁴ Bekker JC and Boonzaaier CC "Succession of women to traditional leadership: Is the judgment in *Shilubana v Nwamitwa* based on sound legal principles?" (2009) *Comparative and International Law Journal of Southern Africa* 459.

²⁵ 2008 (9) BCLR 914 (CC).

²⁶ *Shilubana* (2008) *op cit* paras 50-75.

²⁷ See Women and Law in Southern Africa Research and Education Trust (WLSA) *Inheritance in Swaziland: The law and practice* (1994) 23 and *Shilubana* (2008) *op cit* para 35.

²⁸ Albertyn C "The stubborn persistence of patriarchy? Gender equality and cultural diversity in South Africa" (2009) *Constitutional Court Review* 208.

²⁹ Agyei JA "African women: Championing their own development and empowerment- case study Ghana" (2000) *Women's Rights Law Reporter* 128.

³⁰ See Woodman GR "Legal pluralism and the search for justice" (1996) *Journal of African Law* 156.

³¹ *Ibid.*

Thirdly, seeking an acceptable balance between the group's right to practice its culture and the right of the individual to equality may be a misnomer because as many Africans leave the rural communities in search of employment in the urban areas or the cities or leave to attend school or go to university or college, they may renounce traditional customary practices³² in favour of western ideals altogether. The instruction received at the various educational institutions they attend, together with their personally held religious beliefs, and changes in the social structure of society may in fact contribute to a decline in their interest in customary law tradition.³³

6.5 Replacing customary law with the common law

The laws³⁴ that have been enacted to ameliorate the adversity caused by the customary law rules of intestate succession are inconsistent with living customary law. In this regard, it has also been common practice by the legislatures in South Africa, Ghana and Swaziland, when reforming the customary law of intestate succession to merely replace the existing customary law with the rules of the common law.

The mere replacement of customary law with the common law has or could have various negative repercussions for customary law as a system of law as a whole. The first consequence of substitution is that it results in the total corrosion of customary law as a body of law. Secondly, it could lead to situations whereby traditional or community leaders (who are "there to uphold the people's norms and values")³⁵ could hinder the reception and implementation of the new laws in the customary communities in which they serve,³⁶ as the common law does not reflect living customary law:³⁷ this could frustrate the rights of women even further. Thirdly, changes to living customary law brought about by the legislature and the judiciary assume that the traditional communities will readily adopt those amendments. However that is seldom the case

³² Davies J and Dagbanja D "The role and future of customary tort law in Ghana: A cross-cultural perspective" (2009) *Arizona Journal of International & Comparative Law* 326.

³³ *Ibid.*

³⁴ That is South Africa's Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009, Ghana's Intestate Succession Law, 1985 and Swaziland's Intestate Succession Law 3 of 1953.

³⁵ *Shilubana* (2008) *op cit* para 39.

³⁶ Himonga *op cit* 99.

³⁷ *Id* 98.

and can be easily proved with reference to the field research conducted in Swaziland. The fact that common law rules are unfamiliar to customary communities could lead to situations whereby people may simply disregard the relevant legislation if they cannot identify with it thereby minimising it to simple paper law that has no significance to their lives or the lives of those it is designed to safeguard.³⁸ Fourthly, it has been historically proven in Ghana that when a country legislates for a drastic departure from customary practice, the legislation is almost always ignored.³⁹

It is therefore recommended that the legislature rather engage in a “proper” development of customary law rather than opting for a ‘substitutionary’ development all the time, as the common law is not an acceptable mechanism for change and can actually paint an exaggerated picture of what customary law actually entails. In this regard, sections 39(1) and (2) of South Africa’s Constitution may prove to be helpful. These sections provide that:

- (1) When interpreting the Bill of Rights, a court, tribunal or forum –
 - (a) must promote the values that underlie and open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and
 - (c) must consider foreign law.
- (2) 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.

From the above, we can therefore infer that development by the legislature should involve actual drafting of legislation that is consonant with the culture or customs practiced by traditional communities and the values of the Constitution. For example, according to Mbatha,⁴⁰ in South Africa it is common practice for women to inherit in customary law, converse to the principle of male primogeniture: in fact traditional communities are actually quite open to allowing women to inherit property. However, in Swaziland the panel of respondents were adamant that women are never entitled to inherit in practice in customary communities.

³⁸ Himonga *op cit* 103.

³⁹ Woodman GR “Ghana reforms the law of intestate succession” (1985) *Journal of African Law* 127.

⁴⁰ Mbatha L “Reforming the customary law of succession” (2002) *South African Journal of Human Rights* 259, 261-263, 282.

The values of an open and democratic society means that “the values of all sections of society must be taken into account and given due weight”.⁴¹ We can thus extrapolate that when the South African Constitution is interpreted, the values of customary communities must also be considered in the interpretative process. If this is done, the legislature will be able to enact laws and the judiciary will be able to hand down judgments that are culturally sensitive and that “encourage change in socio-cultural patterns of behaviour which would bring such behaviour into line with the underlying values of the Constitution”.⁴² The constitutions of both Ghana and Swaziland do not contain any such interpretation clause guiding the interpretations of their chapters on fundamental rights and freedoms. However, that being said, the fact that customary law is specifically listed as a law or as a source of law in the constitutions of these countries, means that it should be treated with the respect it deserves and its amendment should be done through proper development of customary law and not through the substitution of existing law for customary law.

6.6 Transformative constitutionalism

The manner in which both the judiciary and the legislature have gone about reconceptualising and developing the African customary law of intestate succession in South Africa, leaves a lot to be desired. The approach of the majority of the Court in the South African case of *Bhe*⁴³ and the approach of the Court in *Shilubana*⁴⁴ are both indicative of ‘transformative constitutionalism’. “Transformative constitutionalism” entails:

a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country’s political and social institutions and power relationships in a democratic, participatory, an egalitarian direction. “Transformative constitutionalism connotes an enterprise of inducing large scale social change through non-violent political processes grounded in law.”⁴⁵

⁴¹ *S v Makwanyane* 1995 (3) SA 391 (CC) *op cit* para 368.

⁴² Pieterse M “Killing it softly: Customary law in the new constitutional order” (2000) *De Jure* 47.

⁴³ *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae; Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC).

⁴⁴ *Shilubana and Others v Nwamitwa* (2008) 9 BCLR 914 (CC).

⁴⁵ Klare K “Legal culture and transformative constitutionalism” (1998) *South African Journal on Human Rights* 146, 150. See also Davis DM and Klare K “Transformative constitutionalism and the common

In other words, law provides the mechanism for transformation in society, and “this is how the law was used by the Constitutional Court when it abolished the customary rule of male primogeniture in *Bhe*”.⁴⁶ The aim in the preamble of the Reform of the Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 is also in harmony with the idea of “transformative constitutionalism”. The Courts in *Bhe* and *Shilubana* attempted to transform the South African public into a just society by applying the values of the Constitution such as human dignity, equality and freedom to differentiating customary practices.⁴⁷ We are now left with a situation where the customary law of intestate succession has been developed to such an extent “that it does not exist in its ‘old’ form anymore, because its rules have been amalgamated with the rules of the common law of intestate succession”⁴⁸ thus creating a “new system” of the African customary law of intestate succession, which might be an utter and complete misrepresentation of “living” customary law.

The approach of the minority of the Court in *Bhe* was more reconciliatory in nature and was an attempt to develop the rule of male primogeniture thereby accommodating the African community and keeping “living” African customary law in tact.⁴⁹ It was a form of “conciliatory transformation”. In the researcher’s opinion such an approach is more acceptable in our constitutional democracy as it does not abolish customary law completely nor does it substitute customary law with the common law. In fact, it still exhibits African values and promotes African, not Western culture and ideals.⁵⁰ It also acknowledges that law is a restrictive instrument in initiating constructive social change.⁵¹ The development brought about by the judiciary and legislature regarding the customary law of intestate succession, would have had far more reaching consequences if social transformation had been driven by the customary communities themselves instead of by the ideals of “transformative constitutionalism”. Furthermore

and customary law” (2010) *South African Journal on Human Rights* 403-509.

⁴⁶ Rautenbach C and Du Plessis W “Reform of the customary law of succession: Final nails in the customary law coffin” in Fenrich J, Galizzi P and Higgins T (eds) *The future of African customary law* (2011) 345.

⁴⁷ *Ibid.*

⁴⁸ *Id* 359.

⁴⁹ *Id* 345.

⁵⁰ Pieterse (1999) *op cit* 635.

⁵¹ Kok A “The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Court-driven or legislature driven societal transformation” (2008) *Stellenbosch Law Review* 122.

the fact that customary law is merely abolished without consulting the customary communities affected, in order to accommodate the values of the Constitution is once again indicative of the way in which customary law was treated under colonialism and apartheid and is opposed to the principles of democracy as it promotes the preference of one group of persons over the majority of the South African population.⁵²

It is hoped that the countries of Ghana and Swaziland will not fall prey to the notion of “transformative constitutionalism” when their courts are called upon to adjudicate on important matters involving the interaction between African customary law and the rights entrenched in their constitutions. In this regard, the researcher recommends that the judiciary in both Ghana and Swaziland adopt a more “conciliatory transformation” that will still accommodate customary law and its values within their respective constitutional democracies.

6.7 People are ignorant of the law

Traditional communities are often ignorant of the law as they traditionally reside in rural communities where access to legal resources is basically non-existent or they are simply illiterate or they rely solely on community leaders to tell them the rules and customary laws which does not often happen. For example, after the *Bhe*⁵³ decision was given, many South African lawyers and representatives of non-governmental organisations noted that as of May 2006, the case had had very little effect on the “adjudication of disputes concerning inheritance rights, as most estates were still being administered unofficially by family members or traditional leaders”.⁵⁴ In the informal interviews conducted with the people in KwaZulu-Natal, most participants had no knowledge of the recent legislative or judicial developments undertaken in the field of intestate succession. In Swaziland, the respondents were aware that codification of the laws relating to intestate succession had taken place, but were ignorant of its

⁵² Sacks V “Multiculturalism, constitutionalism and the South African Constitution” (1997) *Public Law* 688-689.

⁵³ *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae; Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC).

⁵⁴ Higgins (*et al*) (2007) *op cit* 1696.

provisions. In Ghana, fifteen years after the enactment of the Intestate Succession Law, many Ghanaians, specifically those residing in rural communities, are ignorant of the law and are therefore incapable of using its provisions to their advantage.⁵⁵

6.8 The changing role of women in African society and the rule of primogeniture

The rule of primogeniture was devised to safeguard the structure and stability of the extended family unit and ultimately the entire community. This served an assortment of rationales, not least of which was the maintenance of obedience within the clan or extended family. Everyone, individual had a role to play in the community and each role, directly or indirectly, was devised to add to the communal good and welfare. The successor did not merely succeed to the assets of the deceased; but succeeded to the deceased's duties as well. Property was owned communally and the family head, who was the titular possessor of the property, managed it for the benefit of the family unit as a whole. The successor stepped into the shoes of the family head and acquired all the rights and became subject to all the obligations of the family head. The affiliates of the family who were under the guardianship of the deceased fell under the guardianship of his successor. The successor also attained the duty to maintain and support all the members of the family who were guaranteed his security and benefited from the successor's maintenance and support. He succeeded to the property of the deceased only in the sense that he assumed power over and managed the property subject to his rights and obligations as head of the family unit.⁵⁶

Traditional customary law believed that only a man could fulfil the obligations of a successor. However, customary communities that insist on the implementation of the rule of primogeniture when electing a successor fail to consider the truth that the role of women in African traditional societies has changed drastically. Because of development and industrialisation, no longer are women staying at home, but they are

⁵⁵ Dovlo *op cit* 641.

⁵⁶ *Bhe and Others* (2005) *op cit* paras 75-76.

becoming actively engaged in the economy.⁵⁷ Women residing in rural areas are involved in agricultural labour and frequently have to maintain and support their households at their own expense due to the fact that their husbands are often migrant labourers. It has therefore become common for women to own their own property⁵⁸ and to maintain and support their children and the wider family with the salaries earned from their own labour. Ghana has made some positive inroads in this regard with the drafting of the Intestate Succession Bill, 2009 and the Property Rights of Spouses Bill, 2009. These two Bills recognise that women may contribute to the acquisition of joint property and to the matrimonial home and may also own their own property. It is unfortunate though that these Bills have yet to be promulgated. The reasons for appointing a male as a successor no longer holds water as women are indeed capable of fulfilling the rights and obligations expected of a successor. In fact in some instances women may even be more capable than men in executing such obligations.

6.9 Final comments and conclusions

In conclusion, the question that needs to be asked is: is the enactment of new laws a suitable way of improving the intestate succession rights of women in African societies? My answer to this question is an emphatic no! The recently developed laws of intestate succession (which have been highlighted in this thesis) to protect human rights particularly the rights of women, has had little or no effect on the progression of women's rights of intestate succession in South Africa, Ghana and Swaziland in general and has failed to improve the daily lived experiences of women as well.⁵⁹

One of the main reasons for the failure of these laws is that "even when the laws are introduced to remove inequalities under the customary system, the customary system continues to operate".⁶⁰ This can be demonstrated by the research of the WLSA in Swaziland,⁶¹ the researcher's own field research in Swaziland, the research of Fenrich

⁵⁷ Musanya P and Chuulu M "Widowhood: Problems and more problems" in Ncube W and Stewart J *Widowhood, inheritance laws, customs and practices in Southern Africa* (1995) 59.

⁵⁸ Musanya and Chuulu *op cit* 69.

⁵⁹ Himonga *op cit* 160.

⁶⁰ Mikell G "African structural adjustment: Women and legal challenges" (1995) *St John's Law Review* 19.

⁶¹ Women and Law in Southern Africa Research and Education Trust *Inheritance in Swaziland: The law and practice* (1994) 51-54.

and Higgins in Ghana⁶² and the research of Higgins, Fenrich and Tanzar in South Africa.⁶³ These research reports clearly show that the respective pieces of legislation were rendered ineffective in their respective countries as succession was regulated by the family or its relevant family structures which often thwarted the rights of women to succeed to the property of their deceased spouses. Additionally, Higgins, Fenrich and Tanzar's research on customary marriage have shown that men in South Africa refuse to acknowledge the constitutional right to gender equality and have even perceived the right as a threat to their authority and also to the ethical foundations of the organisation of their communities.⁶⁴ thereby posing a further threat to the intestate succession rights of women. The fact that no case law (in the mainstream courts) was found challenging the rules of intestate succession in Swaziland is also evidence of the fact that customary law is still largely controlled and administered by the customary communities and their various structures.

Another reason for the possible failure of these laws to improve the rights of women is that African women have a tendency to blindly accept cultural practices or customs as law without question. This fact was quite apparent from the interviews conducted in Swaziland and KwaZulu-Natal. Most of the interviewees were adamant that men were the only persons eligible for intestate succession under customary law – a fact they genuinely accepted and were not prepared to challenge as the afore-mentioned rule has been part of their customary way of life for centuries.

So the final question that needs to be asked is how do we ensure the successful empowerment of women and the improvement of their rights of intestate succession under African customary law? One way in which we could ensure such rights for women is to make reference to the rights afforded to women in international human rights instruments. Most African countries have ratified various international treaties or agreements that compel them to promote the rights of women and guarantee equality. In this section, the

⁶² Fenrich J and Higgins TE "Promise unfulfilled: Law, culture and women's inheritance rights in Ghana" (2001-2002) *Fordham International Law Journal* 259-341 (see chapter 4 of this thesis).

⁶³ Higgins (*et al*) (2007) *op cit* 1696-1697.

⁶⁴ *Id* 1704.

international agreements ratified by South Africa,⁶⁵ Ghana⁶⁶ and Swaziland, as they affect or relate to the customary law of intestate succession, will be discussed in brief.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979⁶⁷ censures all types of discrimination against women. Discrimination against women is defined as:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.⁶⁸

The Convention compels all states that are party to it, to eliminate customary rules and practices that discriminate against women. In this regard, article 5 provides that:

State parties shall take all appropriate measures:

- (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of inferiority or the superiority of either of the sexes or on stereotyped roles for men and women; ...

This article is reinforced by article 2(f) which obliges States parties who denounce discrimination against women in all its forms; to consent to pursue by all appropriate means and without postponement a policy of eliminating discrimination against women and, to this end, undertake: “to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women”. The Convention is particularly sensitive to the challenges faced by rural women⁶⁹ and compels all State parties to eliminate discrimination against women in rural areas.⁷⁰

⁶⁵ See Dugard J “International law and the South African Constitution” (1997) *European Journal of International Law* 77-92.

⁶⁶ See Mwinda KK and Omusu SG “Human rights law in context: The case of Ghana”(1998-1999) *Tilberg Foreign Law Review* 263-298.

⁶⁷ Adopted on 18 December 1979 and entered into force on 3 September 1981.

⁶⁸ Article 1.

⁶⁹ In this regard Article 14 provides that: “State Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas”.

⁷⁰ In this regard article 14(2) provides that: “States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas ...”

In order to attain *de facto* equality between men and women, CEDAW allows ‘positive discrimination’.⁷¹ In this regard, article 4 of the Convention provides that:

- 1 Adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.
- 2 Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

The African Charter on Human and People’s Rights (ACHPR), 1981⁷² provides that:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status.⁷³

Article 3 makes provision for equality by stating that: “every individual shall be equal before the law⁷⁴ and shall be entitled to equal protection of the law”.⁷⁵ The African Charter also accentuates the place of the family, women and the duties and responsibilities of state parties. In this regard, Article 18 provides that:

- (1) The family shall be the natural unit and basis of society. It shall be protected by the State, which shall take care of its physical health and moral.
- (2) The State shall have the duty to assist the family, which is the custodian of morals and traditional values recognised by the community.
- (3) The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions.

The Charter also makes provision for a right to property which may only be infringed

⁷¹ Ebeku KSA “A new dawn for African women? Prospects of Africa’s Protocol on women’s rights” (2004) *Sri Lanka Journal of International Law* 102.

⁷² Adopted on 27 June 1981 and entered into force on 21 October 1986.

⁷³ Article 2.

⁷⁴ Article 3(1).

⁷⁵ Article 3(2).

upon “in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws”.⁷⁶

The International Covenant on Civil and Political Rights (ICCPR), 1966⁷⁷ also makes provision for rights to equality. In this regard article 26 provides that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In a similar fashion to the ACHPR, the ICCPR protects the family by stating that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State”.⁷⁸ The Universal Declaration of Human Rights (UDHR), 1948⁷⁹ is also concerned with the preservation of the family structure and its provision⁸⁰ relating to the family is phrased in exactly the same terms as those of the ICCPR. The UDHR also grants everyone a right to own property jointly or on their own and prohibits the arbitrary removal of individual property in this regard.⁸¹ Equality is also made provision for in the UDHR. In this regard article 7 provides that:

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

The Protocol of the African Charter on Human and People’s Rights of Women in Africa, 2003⁸² provides that:

States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public information, education and communication

⁷⁶ Article 14.

⁷⁷ Adopted on 16 December 1966 and entered into force on 23 March 1976.

⁷⁸ Article 23(1).

⁷⁹ Adopted on 10 December 1948.

⁸⁰ Article 16(3).

⁸¹ In this regard article 17 provides that: “Everyone has the right to own property alone as well as in association with others”.

⁸² Which came into force on 25 November 2005 and is available at <http://www.africa-union.org>.

strategies with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.⁸³

The Protocol recognises that culture limits the rights of women and makes it abundantly clear in article 17 “that women have a right to live in a positive cultural context and be involved in the determination of cultural policies”.⁸⁴ In terms of the Protocol, African values are to be “based on the principles of equality, peace, freedom, dignity, justice, solidarity and democracy”.⁸⁵ With regards to polygamy, the Protocol provides that:

Monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family including in polygamous marital relationships are promoted and protected.⁸⁶

Article 13(h) also provides that “States Parties must take the necessary measures to recognise the economic value of the work of women in the home”. In regards to intestacy, Article 21 provides that a widow:

shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or if she has inherited it.

The courts and the legislature should be mindful of these international provisions when deciding cases and enacting laws as these international instruments could be of great assistance to improve the rights of women as far as the customary law of intestate succession is concerned. However one problem with the application of international law in the jurisprudences under consideration in this thesis is that the treaties that have been ratified are not self-executing. In other words, in all of the countries under discussion, when international treaties are ratified, individuals cannot rely on such treaties to enforce their rights in the national law. In this regard, all of the countries under discussion are only obliged to abide by a ratified treaty in its international

⁸³ Article 2(2).

⁸⁴ Banda F “Blazing a trail: The African Protocol on Women’s Rights comes into force” (2006) *Journal of African Law* 75.

⁸⁵ The Preamble.

⁸⁶ Article 6(c).

relations with State parties. In order to be able to enforce international obligations in the national law of South Africa,⁸⁷ Ghana⁸⁸ and Swaziland⁸⁹ the provisions of the treaties must be drafted by Parliament as legislation that forms part of the statutes of the country.⁹⁰ With regards to the customary laws affecting intestate succession, South Africa has only enacted two pieces of legislation⁹¹ and Swaziland has only enacted one piece of legislation giving effect to their international obligations. Ghana on the other hand has been more progressive in this respect. Ghana first enacted the Intestate Succession Law, 1985⁹² and has subsequently drafted the Intestate Succession Bill, 2009 and the Property Rights of Spouses Bill, 2009. The afore-mentioned Bills will give effect to Ghana's international obligations once they are passed by Parliament.

⁸⁷ In this regard section 231 of the Constitution of the Republic of South Africa (Act 108) of 1996 provides that:

- (1) The negotiating and signing of all international agreements is the responsibility of the national executive.
- (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
- (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
- (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
- (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

⁸⁸ In this regard article 75 of the Constitution of the Republic of Ghana, 1992 provides that:

- (1) The President may execute or cause to be executed treaties, agreements or conventions in the name of Ghana.
- (2) A treaty, agreement or convention executed by or under the authority of the President shall be subject to ratification by –
 - (a) Act of Parliament; or
 - (b) a resolution of Parliament supported by the votes of more than on-half of all the members of Parliament.

⁸⁹ In this regard section 238 of the Constitution of the Kingdom of Swaziland Act 101 of 2005 provides that:

- (1) The Government may execute or cause to be executed an international agreement in the name of the Crown.
- (2) An international agreement executed by or under the authority of the Government shall be subject to ratification and become binding on the government by:
 - (a) an Act of Parliament; or
 - (b) a resolution of at least two-thirds of the members at a joint sitting of the two Chambers of Parliament.
- (3) The provisions of sub-section (2) do not apply where the agreement is of a technical, administrative or executive nature or is an agreement which does not require ratification or accession.
- (4) Unless it is self-executing, an international agreement becomes law in Swaziland only when enacted into law by Parliament.
- (5) Accession to an international agreement shall be done in the same manner as ratification under sub-section (2).
- (6) For the purposes of this section, "international agreement" includes a treaty, convention, protocol, international agreement or arrangement.

⁹⁰ Kludze AKP "Constitutional rights and their relationship with international human rights in Ghana" (2008) *Israel Law Review* 679.

⁹¹ That is the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 and the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

⁹² PNDCL 111.

Although South Africa's statutory enactments may improve the rights of women and could promote the realisation and enforcement of their rights at international law, Swaziland requires more recent legislation in order for individual women to be able to realise and enforce their rights at international law.

Another way in which we can secure the intestate succession rights of women is through the concept of "participatory democracy". South Africa's,⁹³ Ghana's⁹⁴ and Swaziland's⁹⁵ constitutional democracies are representative and participatory in nature.⁹⁶ A participatory democracy is also encouraged in the various international human rights instruments.⁹⁷ Participatory democracy may be defined as "a vision of

⁹³ The following sections of the Constitution of the Republic of South Africa, 1996 make provision for participatory democracy. In this regard section 1(d) provides that: "The Republic of South Africa is one, sovereign, democratic state founded on the following values: universal adult suffrage, a common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness". Section 57(1) provides that: "The National Assembly may – (a) determine and control its internal arrangements, proceedings and procedures; and (b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement". Section 59(1)(b) provides that: "The National Assembly must – conduct its business in an open manner, and hold its sittings, and those of its committees, in public...". Section 70(1)(b) provides that: "The National Council of Provinces may – make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement". Section 72(1)(b) provides that: "The National Council of Provinces must- conduct its business in an open manner, and hold its sittings, and those of its committees, in public...". Section 116(1)(b) provides that: "A provincial legislature may – make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement". Section 118(1) provides that a provincial legislature must – (a) facilitate public involvement in the legislative and other processes of the legislature and its committees; and (b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public...". Section 160(7) provides that: "a municipal council must conduct its business in an open manner".

⁹⁴ Section 21(3) of the Constitution of the Republic of Ghana provides that: "All citizens shall have the right and freedom to form or join political parties and to participate in political activities subject to such qualifications and law as are necessary in a free and democratic society and are consistent with this Constitution".

⁹⁵ Section 79 of the Constitution of the Kingdom of Swaziland Act 101 of 2005 provides that: "the system of government for Swaziland is a democratic, participatory, *tinkhundla*-based system which emphasizes devolution of state power from central government to *tinkhundla* areas and individual merit as a basis for election or appointment to public office". According to the Constitution, an *inkhundla* (ie, a single *tinkhundla*) "consists of one or more chiefdoms which act as nomination areas for the elected members of the House" (section 80(2)(b)).

⁹⁶ Nyati L "Public participation: What has the Constitutional Court given the public?" (2008) *Law, Democracy and Development* 102.

⁹⁷ Article 21 of the UDHR provides that:

- (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
- (2) Everyone has the right of equal access to public service in his country.
- (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 25 of the ICCPR provides that:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2

governance that allows for maximum and active public involvement in all aspects of public decision-making”.⁹⁸ Ideally, participatory democracy envisages a country where all citizens are given an equal opportunity to share or engage in the “making of decisions that affect them”⁹⁹ and their rights.¹⁰⁰ Participation includes the right to be heard¹⁰¹ and may also involve influencing legislative processes and decisions.¹⁰² If active tribal community participation is involved during the review of discriminatory customary laws like those pertaining to intestate succession, we would not only produce laws that are more reflective of the living law in customary communities but we would also be able to generate changes to existing laws more successfully and ensure the positive reception and implementation of laws in the various customary communities. However, it must be noted that this will only work if women play an active role in the proceedings and if community structures are not male dominated in their representation.

and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in the country.

Article 13 of the ACHPR provides that:

- (1) Every citizen shall have the right to participate freely in the government of his country, either directly, or through freely chosen representatives in accordance with the provisions of the law.
- (2) Every citizen shall have the right of equal access to the public service of his country.
- (3) Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

⁹⁸ Quinot G “Snapshot or participatory democracy? Political engagement as fundamental human right” (2009) *South African Journal on Human Rights* 397.

⁹⁹ *Ibid.*

¹⁰⁰ See Govender K “An assessment of section 4 of the Promotion of Equality and Prevention of Unfair Discrimination Act 2000 as a means of advancing participatory democracy in South Africa” (2003) *SA Publiekreg/Public Law* 406.

¹⁰¹ See *Merafong Demarcation Forum and Others v President of Republic of South Africa and Others* 2008 (5) SA 171 (CC) *op cit* para 27 where the court intimated that “citizens must have a meaningful opportunity to be heard and that in the process of considering and approving a proposed constitutional amendment regarding the alteration of provincial boundaries, a provincial legislature must at least provide the people who might be affected a reasonable opportunity to submit oral and written comments and representations” (as quoted by Quinot at 398).

¹⁰² See *Doctors for Life International v The Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC) *op cit* para 235 where the court mentioned that: “All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion. The objective is both symbolical and practical: the persons concerned must be manifestly shown the respect due to them as concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws” (as quoted by Nyati at 104).

Southall¹⁰³ takes this argument a step further by postulating that “the act of decision making should be removed from the bureaucratic government and should be entrusted to smaller communities as that will facilitate the creation of laws and policies by individuals and groups that are directly related to their needs”. In this regard, it is therefore recommended that the governments of South Africa and Ghana should institute (or re-institute in the case of South Africa) *izimbizo* forums which will facilitate frequent communication and discourse between government and customary communities.¹⁰⁴ An *imbizo* may be defined as “a gathering of senior community members for purposes of addressing matters of mutual and community interests”.¹⁰⁵ *Izimbizos* however, will only be effective if the senior community members are equally representative of both sexes, can be impartial, objective and incorrupt, and will consider the imperatives of their respective Constitutions in all their decisions. The successfulness of the *izimbizos* will also be dependant on whether each and every member enjoys an equal freedom to air their views independent of their status in the community and that resolutions are rendered on the sole basis of agreement.¹⁰⁶ Discriminatory laws of intestate succession could therefore be transformed through negotiation in the various *izimbizos*; and not merely imposed on by the legislature as has been the case.

In this regard, a valuable lesson can be learnt from the Kingdom of Swaziland. In Swaziland, customary law is created by the King, the Royal Family, Swazi National Courts, the High Court, chiefs and their councils and family councils.¹⁰⁷ The creation of customary law is a consultative process at all the afore-mentioned levels. The King and the Royal Family are the chief guardians of Swazi law and custom. It is therefore the King, together with Queen Mother and “in consultation with his or her council who (ultimately) decides customary law”:¹⁰⁸ a type of *izimbizo* forum. The only concern the researcher has with the Swaziland structure is that the councils of the King or the

¹⁰³ Southall R “Public participation: The political challenge in Southern Africa” (2010) *Journal of African Elections* 10.

¹⁰⁴ See Kondlo K “Making participatory governance work – re-inventing *izimbizo* forums in South Africa” (2010) *Journal of Public Administration* 385.

¹⁰⁵ *Id* 387.

¹⁰⁶ *Ibid.*

¹⁰⁷ Women and Law in Southern Africa Research and Education Trust (WLSA) *Inheritance in Swaziland: The law and practice* (1994) 24.

¹⁰⁸ *Ibid.*

Queen Mother must comprise of an equal representation of both men and women, who must be objective and impartial and who must not be able to be bought or coerced into making decisions in a certain way. Hopefully that is the case.

One way in which the legislature could assist in the improvement of the intestate succession rights of women is to not merely enact superficial laws, but to “put teeth into the legislation so that women’s ownership rights will be reinforced at all levels – domestic, local, community and national”.¹⁰⁹ This can be done through the holding of public information forums with communities (especially rural communities), traditional or community leaders, chiefs and their councils, family councils and headmen. It is however vital that women be present and not excluded from such discussion forums and they should be encouraged to actively participate in them.

Another way of improving the rights of women in regard to intestate succession is through positive education and communication. Women should receive education on their rights and men should receive education on the positive roles of women in society and should be encouraged to change their incorrectly perceived ideologies of women as the inferior gender. Such educational strategies could be conducted or facilitated through the various Human Rights Commissions¹¹⁰ of the countries under discussion. In South Africa, the Commission for Gender Equality¹¹¹ could also assist in this regard.

CEDAW states that:

States Parties (who) condemn discrimination against women in all its forms, agree to pursue by *all appropriate means* (my emphasis) and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (e) To take *all appropriate measures* (my emphasis) to eliminate discrimination against women by any person, organization or enterprise;
- (f) To take *all appropriate measures*, (my emphasis) including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.¹¹²

¹⁰⁹ Mikell *op cit* 21.

¹¹⁰ Created by section 184 of the Constitution of the Republic of South Africa, section 163 of the Constitution of the Kingdom of Swaziland and section 216 of the Constitution of the Republic of Ghana, 1992.

¹¹¹ Created by section 187 of the Constitution of the Republic of South Africa.

¹¹² Article 2.

The phrase “all appropriate means or measures” requires a much broader undertaking from States Parties than a mere enactment of law when eliminating discriminatory practices. It is therefore submitted that *anything* that will eliminate discrimination must be done to improve the rights of women. Finally, “in the long term, creative ways must be found of reconciling the practical needs of a modern legal system, the cultural heritage of the society it serves and the observance of internationally recognised human rights norms”.¹¹³ It is only then that we will achieve societies in which the rights of everyone (including women) are adequately respected and protected as intended.

6.10 Summary of the chapter

In this chapter, the researcher assesses the effectiveness of the laws enacted in South Africa, Ghana and Swaziland to improve the intestate succession rights of women in general. The researcher argues that the enacted laws have firstly changed the traditional concept of the family which does not accurately reflect living customary law. Secondly, the laws fail to take cognisance of the fact that the customary laws pertaining to intestate succession may vary from tribal community to tribal community. Thirdly, African customary law is a community based system of law where rights are exercised through or shared by the community at large. Constitutions however focus on individual rights – a concept foreign to African customary law. Fourthly, the legislatures, when transforming the customary laws of intestate succession have habitually replaced customary law with the common law. That is problematic as common law does not precisely reflect the true nature of the living customary law or its practices. Fifthly, the laws are inadequate because people are generally ignorant of the new laws affecting the customary law of intestate succession due to illiteracy, inaccessibility to legal resources or a failure by community leaders to communicate new developments to them.

In conclusion, the researcher brings the thesis to a meaningful end by making a few recommendations on how to improve the succession rights of women. In this regard, attention is given to the role of international law and its ability to empower African

¹¹³ Grant E “Human rights, cultural diversity and customary law in South Africa” (2006) *Journal of African Law* 22.

women, the concept of “participatory democracy”, giving effect to the enacted laws by the holding of public information forums and the implementation of various educational programmes.

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