A CRITICAL ANALYSIS OF THE ROLE OF THE JUDICIARY IN THE DEVELOPMENT OF CUSTOMARY LAW IN SOUTH AFRICA

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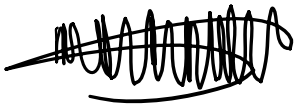
DECLARATION

I, **Siphalali Vuledzani,** hereby declare that this research dissertation for Masters of Laws titled - **A critical analysis of the role of the judiciary in the development of customary law in South Africa** - hereby submitted by me at the University of Venda, has not been submitted previously for a degree at this or any other institution and that it is my own work in design and execution, and that all reference materials contained therein have been duly acknowledged.



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On the **05th** day of **February** **2023**

DEDICATION

This dissertation is dedicated to the life of my late sister, Hulisani Siphalali, (1991-2007), who was very close to my heart but passed on after a long illness. May her soul rest in eternal peace and rise in glory.

I would also like to dedicate this dissertation to my late grand-father, Muligidi Thambatshira, (1935-2018) who played a role in this dissertation by giving me his wise and fruitful advice.

Last but not the least, I would like to dedicate this dissertation to the life of my late grand-mother, Siphalali Tshavhungwe, (1920- 2017) who raised me up and took care of me at all times, may her soul rest in peace.

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ABSTRACT

Customary law refers to both, written and unwritten laws, traditionally observed amongst the indigenous African people of South Africa. These laws ought to be in line with the constitution and the law of general application. Section 39 (2) of the Constitution (that is, the Constitution of the Republic of South Africa Act 108 of 1996) states that "when interpreting any legislation and when developing the Common law or Customary law, courts, tribunal or forum must promote the spirit, purport and object of the Bill of Rights." In other words, the judiciary is duty-bound to develop and promote customary law by interpreting it in conjunction with the Constitution and the Bill of Rights. In developing customary law, however, an issue that remains unresolved is whether, in interpreting the law, the courts are positively developing customary law. Against this backdrop, this research seeks to assess different principles of customary law by critically analysing the manner in which courts are engaging with them, in particular, the implication that their approach has on the status of customary law in South Africa' legal system.

Key words

Customary law, development, Bill of Rights, judiciary, legislature, male primogeniture, the Constitution

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CHAPTER 1

OVERVIEW OF THE RESEARCH STUDY

1.1 INTRODUCTION AND A BACKGROUND TO THE STUDY

Since the inception of the 1996 Constitution (the Constitution),[1] Courts are duty bound to develop customary law (Indigenous law) by ensuring that all its laws are in line with the Constitution. The need for such development is based on the fact that the current Constitution is based upon equality, equal treatment and freedom of religion, belief and culture to which every institution must subscribe to, including customary law. The Recognition of Customary Marriages Act[2] "defines customary law as those customs and practices which are traditionally observed in the midst of the native people of South Africa forming a significant part of those people's culture."

When the 1996 Constitution was adopted, a new era began since, for the first time, both common law and customary law were recognized as acceptable legal systems. The new constitutional regime ensured that customary law would get all the benefits of recognition, including constitutionally mandated interpretation, application, and growth.[3] With the advent of the Constitution, customary law can no longer operate in isolation; for example, there are times when customary law conflicts with the Constitution necessitating scrutiny and reviews. The operations of the Constitution, section 211(3)[4] "enforce a duty upon courts to apply customary law when it is applicable," subject to the Constitution and any legislation which specifically deal with customary law. Similarly, "when developing customary law or indigenous law,

[1] The Constitution of the Republic of South Africa, 1996.
[2] The Recognition of customary marriages Act 120 of 1998, sec 1.
[3] See section 39 and 211 (3) of the Constitution.
[4] As implied in section 211 (3) 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 and section 39 (2) which provides that when interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

section 39 (2) proposes that every court, tribunal or forum must uphold the spirit, purport and object of the Bill of Rights".[5]

The judiciary plays its role by interpreting and applying customary law in a just and equitable manner, hence, since the enactment of the Constitution, courts have been interpreting laws which have a bearing on customary law.[6] This is with a view to ensuring that customary law is in line with the Constitution. In order to examine the role played by the judiciary in the development of customary law in South Africa, this study analysed, through case law amongst other sources, the application and handling of customary law by the South African courts of law In order to assess the reforms brought by the judiciary on the legal status and role of customary law in the Republic of South Africa.

1.2 PROBLEM STATEMENT

The problem statement[7] in this study is built on the premise that the promulgation of the Constitution has led to judicial reform of customary law. Before 1996, South African courts were only required to interpret colonial and apartheid legislation; they were not required to develop customary law. Customary law is guaranteed full rights under the current Constitution, including the ability to be interpreted, used, and developed in a way that is consistent with the Constitution. Therefore, section 39(2)[8] of the Constitution directs the achievement of this development in South Africa; however, there are challenges sometimes. For instance, the Constitutional Court failed to implement a formula for its development when attempting to address the issue of gender discrimination in customary law, as demonstrated in the case of *Bhe v. Magistrate Khayelitsha* (hereinafter referred to as the Bhe case).[9] In the *Bhe*

[5] n 1 above, sec 211 (3).
[6] n 1 above, sec 39.
[7] A problem statement is defined as a clear description of the issues that form the *crux* of the researched work. A problem statement clearly defines or states the problem to be addressed; it provides the evidence to support the existence of the problem and explains why the researched problem is important."
[8] The Constitution of the Republic of South Africa, sec 39(2). The section provides that: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."
[9] 2005 1 SA 580 CC.

case,[10] the Court only developed customary law of succession only with regard to inheritance, although, the Court did engage with development with regard to succession in traditional leadership in the most recent case of *Mphephu-Ramabulana and Another v Mphephu and Others,*[11] it failed to give section 9[12] and section 30[13] of the Constitution the same treatment. The Court in this case made it possible for the equal position of women in traditional leadership; however, it unsuccessfully couldn't define the future of succession with confidence.[14]

1.3 AIM OF THE STUDY

The focal aim of this study is to examine whether the approach employed by courts when developing customary law in terms of section 39(2),[15] are adequate or not.

1.4 OBJECTIVES OF THE STUDY

In order to attain the above aim, the research pursued the following objectives:

- To examine the judiciary's role in customary law development.
- To assess the reforms brought by the judiciary on the legal status and role of customary law in the Republic of South Africa.
- To evaluate the impact of judicial development on customary law in the Republic of South Africa.

[10] T Nhlapho & C Himonga 'customary law in South Africa' (2016) 3 (1) *Modern Law Review* 123. In *Bhe & Others v Khayelitsha Magistrate & Others* 2005 (1) SA 580 (CC), "the court amended the customary law rule of succession by allowing women to inherit from the deceased's estate. See *Shibi v Sithole 2005* (1) SA 580 (CC). In *Mphephu v Mphephu Ramabulana and others* 2019 ZASCA 58, the court confirmed the Bhe decision, *thus*, the primogeniture principle violates the right to equality. In *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC), a woman was appointed to a chieftainship position for which she was previously disqualified by virtue of her gender. The court raised issues about a traditional community's authority to develop their customs and traditions so as to promote gender equality in the succession of traditional leadership, in accordance with the Constitution. The Constitutional Court held that Miss Shilubana is the rightful heir."

[11] 2021 ZACC 43.

[12] n 1 above, sec 9. The section provide that "everyone is equal before the law and has the right to equal protection and benefit of the law."

[13] n 1 above sec 30. The section provide that "everyone has the right to use language and to participate in the cultural life choice but no one exercising these rights may do so in a manner inconsistent with any provision in the Bill of Rights.

[14] n 11 above, para 10, Ms Mphephu also sought an order declaring that, in terms of customary law, she is the sole Queen of VhaVenḓa, alternatively that her uncle, Mr Toni Mphephu Ramabulana, is not the sole King.

1.5 RESEARCH QUESTIONS

This study investigated one broad question:

According to section 39(2) of the Constitution,[16] is the judiciary developing customary law or is it merely distorting it?

To achieve the above objectives, the study shall answer the following sub-research queries:

- What is the legal framework of customary law in the Republic of South Africa?
- Is there an observable judicial effort to develop customary law in recent case law? If so, how?
- What form(s) of development did the court demonstrate in the *Bhe case*? [17]

1.6 LITERATURE REVIEW

A literature review is significant to any research. It is during the literature review that a researcher identifies gaps between what has been written on the topic and what has not been written but should be included along with any possible flaws in the literature.[18] One of the focal aim of a literature review, therefore, is to indicate where the current study will fit into the broader debates, hence, justifying the current research project in the context of previous ones (previous scholars). In the light of the above, a literature review curtails the possibility of duplicating studies, on similar topics, that have already been conducted by other researchers.

Different courts and legal writers have considered the role played by the judiciary in customary law development, since the inception of the 1996 Constitution.[19] The available court decisions and legal publications surrounding customary law development conflict on some points. This has inspired this in-depth study of the

[16] n 1 above, sect 39 (2).
[17] n 8 above, para 14.
[18] M Kobus & C Van der Westhuizen 'Planning a Research Proposal' in Kobus *et al.,* (eds) *The First Steps in Research* (2010) 27.
[19] n 1 above.

situation, so as to develop a clear understanding on whether the current approaches employed by the judiciary in terms of section 39(2) of the Constitution,[20] are adequate in developing customary law without amending it.

The current constitutional dispensation is armed at a principle that "courts are duty bound to develop customary law in a manner which upholds the spirit, purport and object of the Bill of Rights."[21] This principle imposes an obligation upon courts to declare any indigenous law not in compliance with the constitutional values subject to scrutiny. The manner in which courts interpret customary law is the focal point of this dissertation.

Nhlapho[22] opines that the "final Constitution has a great effects on customary law. The Constitution enables the protection of customary law,[23] but the rules of customary law must be in line with the principles entrenched in the Bill of Rights.[24] The implication of this is that courts have the obligation to react to any customary law's rules which treat people unequally; this would be against the rights of people to use their customary laws and cultures. Customary laws that unreasonably restrict other rights and violate the spirit of the Bill of Rights may be deemed unconstitutional. Currently, this is what is referred to as "development" of customary law. Nhlapho[25] has outlined that some customs in contrast with the Bill of Rights ought to be removed. He, however, does not disclose the implications of such developments and the judiciary's role in relation to this, which, then served as the focal point of this dissertation."

"Himonga and Moore[26] differ with Nhlapho's[27] view in that they believe that the courts are not developing customary law, instead the courts tend to amend it. According to the authors, this is based on the knowledge that customary law has

[20] n 1 above, sec 39 (2).
[21] n 1 above, sec 39 (2).
[22] T Nhlapho 'The role of customary law in South Africa' (2014) 5 (2) *Modern Law Review* 123.
[23] n 1 above, sec 39 (2).
[24] n 2 above, sec 2. The section provides that "this Constitution is the supreme law of the Republic: law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled.
[25] Nhlapho (n 22 above) 237.
[26] C Himonga and E Moore 'Reform customary marriage, Divorce and succession in South Africa' 2017 20 (2) *PER* 341.
[27] Nhlapho (n 22 above) 360.

become 'constitutional customary law' and courts are reluctant to develop principles of customary law within the confines of the Constitution. Whenever the courts find conflicting interest, then invalidity of that specific law is declared, without interrogating how that particular law is limiting such a right." These authors maintain that many customary law principles are nullified without disclosing as to how the courts had arrived at that conclusion.

Saymour[28] "holds the view that a court has the power to develop customary law but its power in matters pertaining to legislation is to interpret it in a manner that promotes the objects of the Bill of rights or to have opinions, where appropriate, that are not inconsistent with the Constitution." Saymour[29] adds that courts should be given wider discretion to interpret legislation so that customary law can be properly developed, for without this, the duty to develop customary law seems impossible." The author discusses the court's power to have a wide discretion to develop customary law, however, he does not critically analyse the limitations and purposes of a right which always have great implication on the development of customary law.

Maluleke[30] and Ndulo[31] agree in that there is indeed a relationship between customary law practices. The Constitution's main focus is on "interpretation, application, and alignment of customary law," while the Constitution dictates the scope of the achievement of development. Ntlama[32] and Ndima[33] contend that such interpretation must take place in accordance with its own conditions. Ndulo[34] adds that customary law essentially impacts matters of inheritance, succession and leadership, therefore, courts should play a significant role in reforming problematic issues of customary law through development. Nhlapo[35] emphasize on the

[28] S Saymour *Bantu Law in South Africa* (1970) 122.
[29] Saymour (as above) 150.
[30] MJ Maluleke 'Culture, Tradition, Custom, Law and Gender Equality' (2012) 15 (1) *PER/PELJ*.
[31] M Ndulo 'African customary law, customs, and women's rights' (2011) 18(1) *Indiana Journal of Global Legal Studies*.
[32] N Ntlama '"Equality" Misplaced in The Development of the Customary Law of Succession: Lessons from *Shilubana v Nwamitwa* 2009 2 SA 66 (CC)' *STELL LR* 2009 (2) 333-356.
[33] DD Ndima 'Re-imagining and Re-interpreting African Jurisprudence in the South African Constitution' (2013) 1 (1) *University of South Africa* 268.

[34] M Ndulo (n 31 above) 278.
[35] T Nhlapo '(n 22 above) 126-140.

importance of the court in post-apartheid South Africa, where the recognition of customary law led to an influx of court cases with regards to customary law matters."

The tension between customary law and human rights has recently come into focus. The disagreement arises as a result of the recognition of customary law as an equivalent to common law legal system for the first time. There is no hierarchy of rights because the Constitution recognizes the rights to cultural practices as well as the rights to equality and human dignity, which has led to this. However, the judiciary has consistently ruled in favour of human rights protection when customary law issues are raised in court on the grounds of inequity. This comes at the complete expense of customary law.

The researcher has found that customary law suppresses women and offers men privileges. While women have led matrilineal civilizations throughout South African history, including under Queen Modjadji, "this matriarchal aspect of the African people has been confined," It appears that customary law is being undermined as a result of the court's handling of the equality arguments that were brought before it. African identity is harmed by this strategy since it makes local traditions resemble Western ones.[36]

This work suggests that courts should take a flexible approach and require that any developments they make pass a cultural-feasibility test.[37] To enable the community to take part in the creation of their own legislation in this situation, a cultural feasibility study is conducted, and the court provides assistance. Lehnert[38] says that the best method to identify workable customary law that is followed by its people is through an introspective exercise. According to his way of thinking, there must be communication with the community that the development is intended for. As the case of *Shilubana v Nwamitwa*[39] (herein after referred to as the *Shilubana* case) demonstrated that courts are accustomed to the flexibility and dynamism contained

[36] Ndulo (n 31 above) 102.
[37] www.http://rainqueensofafrica.com/2011/03/modjadji-the-rain-queen/ (Accessed 7 September 2022).
[38] W Lehnert 'The Role of the Courts in the Conflict between African Customary Law and Human Rights' (2005) 21(6) *SAJHR* 252.
[39] 2008 9 BCLR 914 (CC).

in the nature of customary law. The adaptable strategy, which comprises of a three-part plan, will help with judicial development and interpretation.

Du Bois[40] points out that many customary laws violate the right to equality, *thus*, these particular rules conflict with the Constitution. He illustrates this point by the customary law of succession; the principle of male primogeniture violates the right to equality. This is because male persons where given preference over women when it comes to issues of succession. This principle was declared inconsistent with the Constitution in the *Bhe ca*se.[41] Despite the *Bhe* case,[42] there are some cultures which appear to favour primogeniture. The argument that is currently advanced by some groups who are proponents of Vhavenda culture appears to favour the primogeniture principle.

The *Bhe* case was later confirmed by the *Shilubana case*,[43] where the court held that a woman should be instated as queen based on the fact that the primogeniture rule has been nullified. It cannot be overemphasised that despite this fact, some cultures still practice this principle. In 2019, in the case of *Mphephu v Mphephu Ramabulana and others,*[44] (herein after referred to as the Mphephu case) the primogeniture rule was challenged; the first respondent raised a point of law on the basis that a woman cannot be a senior traditional leader based on the Vhavenda culture. The court however ruled that the primogeniture rule has been declared unconstitutional.

In the case of "*Mthembu v Letsela"*,[45] the controversy centred on the legitimacy of the male primogeniture-based customary law principle of succession, which barred women from inheriting in the event of intestacy. The "Supreme Court of appeal" rejected a request to force the court to create customary law in accordance with the interim Constitution without making a distinction between men and women." The judge, however observed as follows:

[40] F du Bois *Introduction to the law of South Africa* (2004) 49.
[41] n 8 above, para 13.
[42] n 8 above, para 14.
[43] n 39 above, 10.
[44] 2019 ZASCA 58.
[45] 2000 3 ALL SA 219 (A).

> "Any development of the rule will be better left to the legislature after a full process of investigation and consultation; such as is currently being undertaken by the law commission."

According to Vermeulen,[46] the Constitution recognizes and permits the application of customary law principles, but they must not in any manner be used to discriminate against any group of people, either directly or indirectly. Rather, they must uphold the Bill of Rights. The author further contends that the right to equality and dignity is violated by the male primogeniture norm. When it becomes impossible to build customary law in a beneficial way, the only choice is to distort them, as is done below.

The court determined that the customary law specified in "section 7 (1) of the Recognition of Customary Marriages Act 120 of 1998"[47] cannot be developed and should be declared invalid for the following reasons in the case of *Gumede v. President of the Republic of South Africa and others*[48] (hereinafter referred to as the Gumede case).

> "Firstly, the first codified customary law was found in KwaZulu-Natal. A competent court may develop customary law but its power in relation to legislation is not to develop the legislation but to interpret it in a manner that promotes the objects of the Constitution or to hold, where appropriate, that it is inconsistent with the Constitution and for that reason invalid.[49]
> Secondly, even if there were good reasons for developing current customary law, it would be ill-advised to do so because parliament appears to have made a conscious election that all 'new' customary marriages should be marriages in community of property and of profit and loss, and that by implication, they are in harmony with the communal ethos that underpins customary law. It has not been shown, nor can it be found, that the legislative choice is constitutionally flawed. This view is fortified by the provisions of section 211(3)[50] of the Constitution."

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[46] A, Vermeulen 'The male primogeniture rule' https://www.vermeulenlaw.co.za (last accessed on 17 April 2021).
[47] n 2 above, sec 7 (1). The section provides that "the proprietary consequences of customary marriages entered into before the commencement of this Act continue to be governed by customary law."
[48] 2009 (3) SA 152 CC.
[49] as above, para 39.
[50] n 1 above, sec 211 (3).

From the above observation, section 2 of the Constitution[51] makes it a peremptory norm that any law or conduct contrary with the fundamental values of the Constitution must be declared inconsistent. The researcher is of the view that this assertion leaves very little room for development of customary law.

On the contrary, "Moore[52] believes that courts are positively developing customary law. He points out that in the *Bhe* case[53] Justice Ngcobo developed the rule of primogeniture by removing the reference to male so that an oldest daughter could succeed to a deceased's estate. Himonga[54] points out that what justice Ngcobo did by removing the reference 'male' thereby making it possible for an 'oldest daughter to inherit or ascend the throne was completely amending customary law. Customary law rules are very clear, that a woman should not inherit and this principle has been practised for generations and generations."

Grenfel[55] contends that customary law ought to be definite and predictable. They must support the spirit, purpose, and goals of the Bill of Rights as well as the ideals of human dignity, equality, and freedom that are enshrined in the constitution. The male primogeniture principle is one of many customary law principles that violates the Constitution. The question to raise right now is how the courts are modifying customary law to make it compatible with contemporary South Africa. Grenfel[56] further argues that "it is vital to note that there are certain instances where courts are able to develop customary law. In the past, specifically with regard to Tsonga tribe, a woman was not allowed to be a queen even if she was the rightful heir-apparent to the throne. In *Shilubana*,[57] the Constitutional Court held that the applicant should be

[51] n 1 above, sec 2.
[52] Moore (n 26 above
[53] n 8 above, para 179 reads : "The rule of primogeniture was challenged on the basis that it discriminates unfairly against younger children of the deceased. It will be recalled that only the eldest male succeeds. The rule, no doubt, limits the right of the younger children to succeed to the status of the deceased."
[54] Himonga (n 26 above) 49.
[55] AO Grenfell *Legal pluralism and the Rule of law* 70.
[56] Grenfell (as above) 57.
[57] n 39 above, para 82 where "the court held that the Valoyi community moved departed from past rules which stated that a woman could never be appointed as a *Hosi*, other aspects of the customs and traditions governing chieftainship are not necessarily affected. For example, to the extent that the principle that a Hosi is born and not elected indeed exists, it is not necessarily changed by this ruling. Ms Shilubana was born as the child of a *Hosi*. She was not elected from a number of candidates who campaigned for the position."

appointed as the rightful heir to the throne despite the fact that she is a woman. When considering development of customary law, the court does consider the limitation clause, however, it did come to the conclusion that it would be unreasonable and unjustified to limit the right to equality, hence, both men and women should be treated the same.

In the case of "*Mphephu v Mphephu Ramabulana & Others*,[58]" the "Supreme Court of Appeal" reviewed the decision of the court a *quo* to try and develop customary law. In this case, the court a *quo* held that due to the male primogeniture, the applicant cannot be the queen of the Vhavenda kingdom despite the fact that she was the rightful heir. The High Court, therefore, appointed Toni Mphephu Ramabulana as the king. Later, the supreme court of appeal reviewed the decision, on account that customary law rules should be brought in line with the Constitution and it is the court's duty to interpret and amend rules in a manner which promote the spirit, purport and object of the Bill of Rights.

"Maluleke[59] opines that most customary laws are discriminatory on the ground of gender, such as the principles of male primogeniture, virginity testing, widow's rituals, female genital mutilation, breast sweeping, cleansing after male circumcision, as well as early and forced marriages, known as *ukuthwala.* When it comes, for example, the issue of forced marriages involving children, the right to privacy, human dignity, and freedom of choice are being violated. Malukele[60] continues that it would be in the interest of justice to declare some customs inconsistent with the Constitution, as practices, such as *ukuthwala* cannot be developed to meet the standards of modern day."

[58] n 44 above, para 46. The Supreme Court of Appeal "held that the decisions of Mphephu Royal family council to identify, and that of the president of the Republic of South Africa to recognise Toni Mphephu Ramabulana as King of Vhavenda are grounded on a criteria that advances gender discrimination, and are hereby reviewed and set aside in that the discrimination impedes compliance with the provisions of s 2A(4)(c) of the Traditional Leadership and Governance Framework Amendment Act 23 of 2009,"
[59] Maluleke (n 30 above) 74.
[60] Maluleke (n 30 above) 6.

Himonga[61] touched on multiple customary laws being declared unacceptable. “The author believes that declaring customary law inconsistent with the Constitution does not constitute development in terms of Section 39 (2) of the Constitution.[62] Once a law or customary law rule is declared inconsistent with the fundamental values of the Constitution, it means such a law is no longer applicable, hence, all these declarations of invalidity shall, ultimately, lead to extinction of customary law as a source of law. The author’s study answers one of the questions in the current research, however, the author does not critically analyse the role of the judiciary as provided for by Section 39(2).”[63] The author also failed to interrogate whether the judiciary in its rulings is developing customary law in order to align it with the Constitution, or is just eroding the scope of the former.

In the *Bhe case*,[64] the court ruled that the primogeniture concept in the traditional law of succession was unconstitutional. The court was unable to develop customary law because there was not enough evidence to determine the true nature of that particular customary rule. In *Mabuza v. Mbatha,*[65] the court ruled that the Swazi custom of "ukumekeza," or the ceremony of assimilating the bride into her husband's family, was no longer necessary for the consummation of a customary marriage.

In *Shilubana*,[66] the court ruled that customary law may be created by traditional authority in conformity with the principles and ideals of the Constitution. The central question in the *Mphephu case* was whether a woman could succeed to a conventional leadership position. However, it has emerged that some cultures still seem to favour the primogeniture system, despite the fact that it has been abolished in most cases.

[61] Himonga (n 26 above)
[62] n 1 above, sec 39 (2).
[63] n 1 above, sec 39 (2).
[64] n 8 above, para 103. “paragraphs 1 and 2 of the order given declared section 23(10)(a), (c) and (e) of the Act as unconstitutional and invalid, with the consequence that regulation 2(e) fell away. Section 1(4)(b) of the Intestate Succession Act was also found to be unconstitutional and invalid in so far as it excludes from the application of section 1, any estate or part of any estate in respect of which section 23 of the Act applies.”
[65] 2003 7 BCLR 743 (CC).
[66] n 39 above.

In a unanimous judgment by Judge Mpati, in *Mthembu v Letsela*,[67] the Supreme Court of appeal developed the customary law principle of male primogeniture as follows:

> "The customary law of succession in Southern Africa is based on the principle of male primogeniture. In monogamous families the eldest son of the family head is his heir, failing him the eldest son's eldest male descendant. Where the eldest son has predeceased the family head without leaving male issue, the second son becomes heir; if he is dead leaving no male issue, the third son succeeds and so on through the sons of the family head. Where the family head dies leaving no male issue his father succeeds. Women generally do not inherit in customary law. When the head of the family dies his heir takes his position as head of the family and becomes owner of all the deceased's property, movable and immovable; he becomes liable for the debts of the deceased and assumes the deceased's position as guardian of the women and minor sons in the family. He is obliged to support and maintain them, if necessary, from his own resources, and not to expel them from his home."

Section 9 of the Constitution provides that "everyone is treated equally before the law and is given full access to its protections".[68] However, several of the Venda tribe's laws are in violation of the Bill of Rights. For instance, adulterous children are not entitled to equal inheritance and maintenance rights according to Venda norms. This discrimination violates both the "Reform of Customary Laws of Succession and Regulation of Related Matters Act"[69] and the constitutional right to equality guaranteed by the constitution.

According to Salmond,[70] the court must really implement recognized customary law principles and the Constitution, particularly the Bill of Rights, must support the standards of customary law. If those rules are not consistent with the Constitution, they must be developed or removed according to the extent of the inconsistency. In the case of *Fraser v Children's Court, Pretoria-North and Others,*[71] the court held that "the guarantee of equality lies at the core of the Constitution. Despite that, it is

[67] n 45 above.
[68] n 1 above, sec 9 (1).
[69] Act 11 of 2009.
[70] A Salmond *Jurisprudence in South Africa* (2014) 203.
[71] 1997 2 SA 261 (CC). para 20.

the duty of the court to act as watchdogs in ensuring that customary law complies with the values of the constitution.

In *President of the Republic of South Africa v Hugo*,[72] the court held that an equal society affords its members equal dignity and respect regardless of their membership of particular groups. Rules of customary law, however, allow for inequality among people to continue, especially for women and children who are regarded as economically and socially inferior to men.[73]

Mbatha[74] speculates that "the male primogeniture principle has developed to allow a woman to succeed a deceased family head. Research has vindicated this speculation to the extent that it reveals instances where the norms governing family property as it exists in modern conditions have changed to allow both men and women (sons and daughters) and widows to administer and control family property. It has also revealed instances where both widows and widowers inherit from their respective deceased spouses."

There are some instances where the court favoured customary law over human rights, despite the equality principle. In the case of *Mayelane v Ngwenyama,*[75] Mr. Hlengani Dyson Moyana (dead), allegedly entered into two customary marriages in accordance with Tsonga law, the first of which occurred in 1984 and the second of which occurred in 2008. The legal question was whether the second marriage between the deceased valid, since this would affect how Mr. Moyana's estate would devolve.

The court held that the marriage between the deceased and the second wife was invalid because consent of the first wife was not obtained. This principle later became officially recognised as a customary law requirement with regard to Tsonga customary marriages.

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[72] *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC).
[73] as above, para 41.
[74] L Mbatha 'Reforming the Customary Law of Succession' (2002) 1 (8*) SA Journal on Human Rights* 259.
[75] 2013 8 BCLR 918 (CC).

In "*Ramuhovhi v President of the Republic of South Africa*,"[76] (herein after the Ramuhovhi case), the applicants were the biological children of Mr. Musenwa Joseph Netshituka who died on 4 January 2008. The applicants wanted to inherit from the deceased Mr. Netshituka's estate. According to the Venda customary law the right of ownership and control of marital property is reserved solely for husbands[77]. The court held that section (1) of the Recognition of customary marriages Act is discriminatory on the basis of gender. This Section provided that the proprietary consequences of customary marriages entered into before the commencement of this Act continues to be governed by customary law. The provision of section 7 (1)[78] was declared inconsistent with the Constitution.[79]

Diala[80] concurs with Nhlapho's[81] comment that if we are all to enjoy the rights and freedoms entrenched by the Constitution, then our courts should try to develop a standard that identifies cultural practices which deserve to be protected because they do not discriminate and cultural practices which should be done away with because they do otherwise. In this way, we can ensure that customary rules are in line with the rights of all people. Nhlapho[82] further holds the view that courts are performing their role to develop customary law as required by section 39(2) of the Constitution.[83] This author's study confirms the viewpoint adopted in this research - that courts are duty-bound to develop customary law - the author does not address the focus of this research, which is to critically analyse, how the courts are developing customary law.

1.7 RESEARCH METHODOLOGY

The research methodology is a plan by which a researcher conducts a study in order to gather information on the topic.[84] This study adopted a doctrinal method as the

[76] 2017 (2) SA 1 CC.
[77] as above, para 18.
[78] n 2 above, sec 7 (1).
[79] n 1 above, sec 1.
[80] A Diala *Principles of Customary law* (2017) 77.
[81] Nhlapho (n 22 above) 204.
[82] T Nhlapho 'Customary law in post-Apartheid South Africa: the vexed question of cultural diversity, women's rights, Living law' (1995) 57 (49) *Modern law review* 56.
[83] n 1 above, sec 39 (2).
[84] M Blance & K Durheim 'K Research in practice: Applied methods for the social

literature review includes discussions on constitutional provisions, cases, and journal articles with the hope of unearthing the progress made in the development of customary law.[85] The purpose of this investigation was to gain a deeper understanding of the role of courts in the development of customary law. To achieve this, the researcher critically analyzed different principles of customary law in South Africa.[86]

1.8 CLARIFICATIONS OF KEY CONCEPTS

It is essential to have a common comprehensive understanding, by researchers and readers, of key expressions that are employed in a research. The following are some of the key terms:

Constitution is an aggregate of fundamental principles or established precedents that constitute the legal basis of a policy, organisation or other type of entity and commonly determine how that state/country or organisation is to be governed.[87]

Judiciary is the system of courts that adjudicates legal disputes/disagreements and interprets, defends, and applies the law in legal cases.[88]

Legislature is an assembly with the authority to make laws for a political entity such as a country or city. They are often contrasted with the executive and judicial branches of parliamentary government in the separation of powers model.[89]

Sciences' (2006) 4 (6) *South African law journal* 361.
[85] JW Creswell 'Qualitative inquiry and research design: Choosing among five approaches, (2007) 2 (4) *London Law Review* 463.
[86] Blance (as above) 43.
[87] https://www.bing.com/search?q=is+an+aggregate+of+fundamental+principles+or+established+precedents+that+constitute+the+legal+basis+of+a+policy%2C+organisation+or+other+type+of+entity+and+commonly+determine+how+that+state%2Fcountry+is+to+be+governed.++++&qs=n&form=QBRE&sp=-1&pq=&sc=8-0&sk=&cvid=97EFE90FC4EF433C985EFA09BCB4FE49 (assessed 28 July 2022).
[88] https://www.bing.com/search?q=define+Judiciary&cvid=6b382d0f49204555a4dbe5029e72b406&aqs=edge..69i57j0l8.5793j0j1&pglt=43&FORM=ANNTA1&PC=HCTS. (assessed 26 July 2022).
[89] https://www.bing.com/search?q=legislature+definition&qs=LS&pq=legislature+&sc=8-12&cvid=B897DC0B88494E0AB20B8717B68313D7&FORM=QBRE&sp=1 (assessed 27 July 2022).

Customary law is defined by "the Recognition of Customary Marriages Act" as the customs and usages traditionally observed amongst the native people of South Africa which form part of the culture of those people.[90]

Male primogeniture is a customary rule according to which a person succeeds a deceased by virtue of being the first-born son or senior male member of the family.[91]

Polygamous marriage refers to the form of marriage where a man is married to more than one woman, at the same time.[92]

Hosi is actually a "Xitsonga" word which refers to a traditional leader.

1.9 ETHICAL CONSIDERATIONS

The writer is aware of the plagiarism policy of the University of Venda. For that reason, this study will avoid plagiarism, therefore, the work of other writers will be properly acknowledged and referenced. The researcher will not fabricate information, nor conceal the truth, nor impart misleading information about the true contemporary position of the law, regarding the role of the judiciary in the development of customary law. This study will not contain information which was unethically gathered. The present study will not involve interviews; it will primarily be based on a literature review in which secondary sources of law such as textbooks, legal dictionaries, law reviews and journals will be used to build a sound argument. The study further utilised primary sources of law such as case laws, The Constitution and other Acts of parliament i.e. The Recognition of customary marriages act.[93]

1.10 RESEARCH STRUCTURE

1.10.1 Chapter 1: Introduction and brief background to the study

[90] n 2 above, Sec 1
[91] A Nicholene 'The judicial development of African customary law as per section 39 (2) of the constitution of South Africa: an examination of selected case law' (2018) 9 (3) *Howard College* 300.345.
[92] K Mikuriya 'Illicit wildlife trade and the role of customs' www.Customs///.org.o.za (last accessed on 16 December 2020).
[93] n 2 above, sec 1.

This chapter introduces the research work. It provided - the background to the research, what the researcher aimed to achieve, scope and justification of the study, problem statement, research questions, literature review, proposed research methodology, definition of key concepts, limitations of the study and ethical considerations.

1.10.2 Chapter 2: Recognition and application of customary law in the republic of South Africa

This chapter focused on the recognition and application of customary law. In the process, the nature and legal status of customary law in the Republic of South Africa are explicated. This was done to give the reader the background of customary law.

1.10.3 Chapter 3: The examination on whether there is an observable judicial effort to develop customary law

Chapter three examined whether there is an observable judicial effort to develop customary law. In order to achieve this aim, the researcher analysed different customary law principles and the manner in which courts have contributed in the development of those principles.

1.10.4 Chapter 4: The obligation to develop customary law

The fourth chapter discussed the obligation by courts to develop customary law. The chapter noted the role of the judiciary as provided by section 39 of the Constitution[94] and lastly, the legal theory that underpinned the adjudication in the *Bhe* decision,[95] *Mphephu*[96] and the *Shilubana case*.[97]

1.10.5 Chapter 5: Conclusions and recommendations

[94] n 1 above, sec 39 (2).
[95] n 8 above.
[96] n 44 above.
[97] n 39 above.

The last chapter makes specific recommendations after providing a conclusion on the role of the judiciary in the development of customary law in South Africa.

THE RECOGNITION AND APPLICATION OF CUSTOMARY LAW IN THE REPUBLIC OF SOUTH AFRICA.

CHAPTER 2

2.1 INTRODUCTION

The previous chapter dealt with an overview of the research study which included the research problem, aims and objectives, the research question, the literature review, research methodology as well as clarification of key concepts. The current chapter provides a general overview of the meaning and nature of customary law and its sources before interrogating how the courts have carried out the development mandate after the recognition of customary law.[1]

Before the colonial and apartheid government, customary law was the legal system that regulated the way indigenous people of South Africa lived and interacted with each other.[2] After the 1996 Constitution[3] was enacted, customary law was recognised as a source of law in terms of section 211 (3)[4] of the Constitution while section 39 (2[5]) required courts to develop customary law by ensuring that all customary law principles are brought in line with the Constitution.

2.2 DEFINING CUSTOMARY LAW

There are several legislation which define customary law. Section 1 of "the Recognition of Customary Marriages Act"[6] describes customary law as follows:"

[1] The Recognition of customary marriages Act 120 of 1998.
[2] https://www.sahistory.org.za/article/customary-law-south-africa-historical-development-legal-system-and-its-relation-womens (last accessed 28 October 2022).
[3] The Constitution of the Republic of South Africa, 108 of 1996.
[4] as above, sec 211 (3).
[5] n 3 above, sec 39 (2). The section provides *thus*: "When interpreting any legislation and when developing the common law or customary law, every court, tribunal or fo rum must promote the spirit purport and object of the Bill of Rights."
[6] n 1 above, sec 1.

> Customary law means the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the cultures of those people.

The "Law of Evidence Amendment Act"[7] describes customary law as

> Black Law or Customs applied by the Black communities in the Republic of South Africa.

From the above definitions, it can be presumed that customary law is based on the usages or practices of indigenous people in their communities. According to Matthews,[8] there are two times where the word "customary law" is employed. First, "customary law" refers to the native jurisprudential system that is practiced by several African communities in South Africa. Secondly, customary law applies to legislation which regulate the conduct of African people." This author does not give a clear indication of what customary law is, in that he failed to indicate the fact that it is based on the practices of indigenous African people. Customary law definition implies that African customary law is quite dynamic. According to Olivier[9] the following factors plays a role in the development of customary law:

> i. Adapting to the needs of a changing world and changing community viewpoints;
> ii. Interaction with societies (such as South Africa) operating under different legal systems;
> iii. Contact with and exposure to legal systems outside of one's own; and
> iv. The impact of foreign (non-indigenous) governmental systems both directly and indirectly.[10]

The researcher is of the view that "customary law" is grounded on the practices of indigenous people and it is significant not to ignore the term "practices" whenever definition of customary law is involved. Some customs are generally unwritten laws

[7] The Law of Evidence Amendment Act 45 of 1988.
[8] ZK Matthews *Bantu Law* (2014) 320.
[9] Olivier et al *Indigenous Law* (2016) 5.
[10] Olivier (as above) 100.

and are therefore based on the way people live and interact with each other in an indigenous community (practice).

2.3 FORMS OF CUSTOMARY LAW.

In South Africa, there are two forms of customary law: "official customary law and living customary law," claims Maithufi.[11] Both of these types of customary law are accepted and recognized by the Constitution and are used in courts. They are established on various bases, with the living customary law originating from the daily practices of the indigenous people.

However, as stated in section 15(3)(i),[12] which recognizes customary marriages entered into under any tradition, personal or family law, and system of religion, the acceptable variety of customary law recognized by the Constitution is living customary law. The Constitution's Sections 30 and 31[13] also serve as a framework for the acceptance of customary law.

2.3.1 The living customary law

Living customary law, according to Jobodwana,[14] is a set of traditions and customs that govern the various kinds of relationships between members of a particular community. Living customary law is problematic in the eyes of the new constitutional order for a number of reasons. One is the way that its distorted form has a discriminatory effect on women. With regard to African people's everyday realities, this kind of customary law has lost relevance.

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[11] IP Maithufi *The Constitution and the application of customary family law in South Africa* (2002) (2) 7 *Journal of South African Law*.
[12] n 3 above, sec 15 (3) (a) provides that "This section does not prevent legislation recognising— (i) marriages concluded under any tradition, or a system of religious, personal or family law;"
[13] n 3 above, sec 30 & 31.
[14] ZN Jobodwana 'Customary courts and human rights: Comparative African perspectives' (2000) 15 (26) *SA Public Law* 420.

The researcher adds that the unwritten customary practices that govern people's daily lives also make up living customary law. The does not preclude the writing down of existing customary law, though. It is entirely feasible to record the rules and guidelines of customary law in writing.

The importance of recording current customary law only emerges when it has implications for the nature of customary law. Woodman[15] cites the following scenario as an illustration of this:

> "a written record of customary law becomes an irrebutable statement of customary law, irrespective of the norms observed by the affected population; or if, when a written record has been made, no further developments in customary law can be treated as legal."

These definitions of living customary law demonstrate that custom, or a practice that arises from relatively widespread social practice and acceptance, is where law first emerged.[16] According to the researcher's observations, living customary law is seen as a result of a community's cultural adaptation to shifting social norms. As a result, official customary law is reduced to mere paper law. All indigenous people should be covered by living customary law, as originally intended.

2.3.2 The official customary law

Official customary law is defined as a body of written rules that are used in courts in compliance with regulations like "The Recognition of Customary Marriages Act."[17] The concepts of official customary law and living customary law coexist, according to the courts. For instance, the majority judgment in the *Bhe case* recognized the distinction between these types of customary law by saying the following:

[15] G Woodman 'Legal Pluralism in Africa: The Implication of State Recognition of Customary Laws Illustrated from the Field of Land Law' (2012) 3 (6) *constitutional court review* 241.
[16] T Nhlapho 'The role of customary law in South Africa' (2014) 5 (2) *Modern law review* 305.
[16] Act 120 of 1998.
[17] n 1 above, sec 1.

> "The official rules of customary law are sometimes contrasted with what is referred to as 'living customary law', which is an acknowledgment of the rules that are adapted to fit in with changed circumstances. The problem with the adaptations is that they are ad hoc and not uniform. However, magistrates and the courts responsible for the administration of intestate estates continue to adhere to the rules of official customary law, with the consequent anomalies and hardships as a result of changes which have occurred in society."

The researcher opines that the official version of customary law as stated above is primarily found on statutes, in contrast to living customary law, which is found in people's practices and customs. The researcher has observed that the introduction of written customs in statutes is a westernised custom which was not there in the past. These practice resulted into conflicting versions of customary law. Despite the forms of customary law mentioned above, it is important to discuss their nature, which is described in more detail below.

2.4 THE NATURE OF CUSTOMARY LAW

Customary law is a distinct legal and cultural framework that individuals with the desire to do so may freely choose. In a multi-cultural society where various other legal systems are observed, it is a "parallel system, different in concept and effect," to put it another way. According to Myburgh,[18] the traditional legal systems (i.e public law and private law) are the divisions that can be distinguished in customary law. These divisions include a number of subdivisions. It is important to note that customary law is regarded as underdeveloped and ill-defined, as will be demonstrated later.

The common law is a recognized legal system in South Africa that is governed by its own collection of laws, categories, concepts, and principles. It is a hybrid law that does not exclude any particular group of South Africans from its application.[19] Customary law, on the other hand, has its own salient characteristics and a distinct area of application. The key difference is that common law applies to everyone,

[18] Myburgh Indigenous Law (2014) 2.
[19] Bekker and Rautenbach *Application of African Customary Law* (2015) 54.

regardless of tribe or community of origin, whereas customary law is made up of various legal systems that each govern a specific indigenous community.

In "*Pharmaceutical Manufacturers Association of South Africa; In re: Ex Parte Application of President of RSA*"[20] the court held that "all laws derive their force from the Constitution and such laws are made subject to constitutional control." The study has shown that this strategy damages African people's sense of identity by making their traditions resemble Western culture. When courts consistently invalidate traditions, which consequently invalidates culture, the identity of customary law is lost.

Customary law has the following salient features which makes it distinct from any other law in South Africa:

i. Customary law as a non-specialised system of law

A non-specialized legal system is like customary law. It lacks immutable rules and is typically unwritten. The common law is an example of a specialized legal system because each system of common law does not apply to a specific community but rather to every citizen of South Africa.[21] Each system of customary law is unique to the community it is found in and only pertains to that group. This is a well-developed legal system, and most of its regulations can be easily ascertained from legislation, court precedents, textbooks, and, in some nations, codes of law.

ii. Language as a medium of description

Culture is transmitted largely through language. A language that is widely used reflects how superior its cultural foundation and environment are. A language's teaching and learning are always accompanied by the explicit or implicit teaching

[20] 2000 2 SA 674 (CC) para 44.
[21] (Bekker and Rautechbach (n 19 above) 120.

and learning of the culture it belongs to. Therefore, marginalizing a language also means marginalizing the embodied culture.[22]

English and Afrikaans served as South Africa's official languages for a very long time. Their official status ensured their supremacy in the political and economic arenas. Afrikaans is the native language of the Afrikaners and some coloured groups in South Africa, despite the fact that English is relatively spoken by all races. Many educational institutions, especially former black universities and schools, use English as their primary language of instruction.[23]

For obvious reasons, the official versions of customary law are written in English and Afrikaans. Two of them are as follows:

i. For generations, the main ethnic groups in South Africa have been those who speak English and Afrikaans.
ii. The majority of the original researchers in customary law speak either English or Afrikaans.

The researcher is of the view that both English and Afrikaans are western customs which became rooted into customary law as a result of colonialism and the arrival of Jan Van Riebeeck into the Cape in 1652. That's how the process of transplantation and amendment of the then customary laws began.

Iii African government and administration

The legislature, executive branch, and judicial branch are the three separate branches of government that make up the Western democratic system of government.[24] The doctrine of separation of powers led to the establishment of the three branches. There is no separation of powers in the traditional African form of government. According to Mandela, a traditional community system is as follows:

[22] https://www.theliteracybug.com/journal/2014/6/10/language-is-the-carrier-of-the-human-culture. (last assessed 28 October 2022).
[23] as above.
[24] C Thornhill. 'Spheres of government: Contributions to Sustainable Service Delivery' (2011) 1 (4) *University of Pretoria press* 365.

> "The land, then the main means of production, belonged to the whole tribe, and there was no individual ownership whatsoever. There were no classes, no rich or poor and no exploitation of man by man. All men were free and equal and this was the foundation of government. Recognition of this general principle found expression in the constitution of the council, variously called *Imbizo*, or *Pitso,* or *Kgotla,* which governs the affairs of the tribe. The council was so completely democratic that all members of the tribe could participate in its deliberations. Chief and subject, warrior and medicine man, all took part and endeavoured to influence its decisions. It was so weighty and influential a body that no step of any importance could ever be taken by the tribe without reference to it."

In the society, roles were given to individuals (men, women, and children). Traditional leaders and common citizens alike had to abide by the law, and any violations were subject to censorship. According to Myburgh,[25] the chief needs the assistance of his council in order to enact laws, carry out judicial duties, or convene a people's meeting. In other words, it was crucial that the general public participate in local affairs. The court's ruling in *Bangindawo v. Head of Nyanda Regional Authority*[26] busts the myth that the separation of powers as it is understood in the West is the only model for democracy that works well.

iv. Traditional authority courts and procedure

In accordance with common law, the Magistrates' Court, High Court, Supreme Court of Appeals, and constitutional court all have fully trained personnel working for them. Pattern and consistency are imposed by the legal precedent system. A presiding judicial officer oversees the proceedings and grants legal representatives the right of audience. Only those with a direct and substantial interest in the matter at issue, or their witnesses, are permitted to attend the proceedings, and they are conducted in a controlled, orderly manner.[27]

[25] Myburg (n 18 above) 230
[26] See, *Bangindawo v Head of Nyanda Regional Authority* 1998 3 SA 262 (Tk); *Mhlekwa and Feni v Head of the Western Tembuland Regional Authority & Anorther* 2001 1 SA 574 (Tk).also, *Mhlekwa and Feni v Head of the Western Tembuland Regional Authority & Anorther* 2001 1 SA 574 (Tk).
[27] *Hyde v Hyde & Woodmansee* (1886) LR 1 P.

In traditional courts, decisions regarding disputes between members of one family and those of another are firstly made by the family.[28] For instance, if a family member seduces a member of another family, the family that was wronged will send an intermediary to alert the other family to the wrongdoing of their member. The accused's family council will discuss the situation. The boy and girl's attendance may be requested, if necessary. They'll both have a chance to share testimony from their respective perspectives. If the disagreement isn't resolved, the aggrieved party may take it up with the local traditional.[29]

The community's assembly will be called together by the traditional leader to act as a court for resolving the conflict between the two families. In a traditional authority court, neither professional judges nor legal representatives of the parties are present. Participation in the proceedings is open to all attendees of the assembly. In the past, the only men who were qualified to serve on the traditional authority court were adult circumcised married men. On the grounds of gender, culture, and age, women, uncircumcised men, and young children were all disqualified, respectively.[30] The researcher has observed that this selection procedure is discriminatory and also violates amongst others, Human dignity. Despite that, some cultures like Vhavenda still practice this selection procedure.

2.4.1 The Black Administration Act as an explanation on the nature of customary law

As was mentioned above, section 22 (1) of the Black Administration Act initially regulated customary marriages signed between 1929 and 1988 and granted them limited legal recognition. Having said that, the Black Administration Act contained provisions that discriminated against women based on their age, gender, and marital

[30] n 3 above, sec 9. The section provides that “Everyone is equal before the law and has the right to equal protection and benefit of the law.”

status. Legislative change was therefore crucial in South Africa to address the inequality in customary unions that disproportionately affects women and children. It is crucial to first take into account the primary causes of the injustices and discrimination that existed in customary marriages before the current constitutional framework before analysing the legislative reform that was implemented in this area.

Women in customary unions did not have the same status and power as men under the Black Administration Act.[31] These women were subject to the marital authority of the men and were given the same status as minors. Women in customary unions were subject to limitations on their contractual rights and obligations as a result of this provision. This clause undercut the status and ability of women to serve as wives in traditional unions by discriminating against them based on their age. Since then, this clause has been eliminated.

2.4.2 The constitutional supremacy in relation to the nature of customary law

According to the constitution, all other laws and conduct that conflict with it are unconstitutional, and any duties that are imposed by it must be upheld.[32] This opens the door for the growth of customary law. Courts should therefore make sure that customary law is made comparable to the constitution. The Constitution requires state courts to uphold the rights outlined in the Bill of Rights by advancing fundamental ideals based on respect for human dignity, equality, and freedom.

Despite all the legislative and judicial reform brought about to promote gender equality, South Africa is still healing from the injustices of the past, including the discrimination and inequalities that are seen in the principles of customary law. The Constitution has been a crucial tool in bringing the country out of the negative effects of minority privilege and into the balance of a country where everyone has equal

[31] Act 38 of 1927.
[32] n 3 above, sec 2.

rights.[33] The general idea is to steer the nation in a direction where it will work to maintain its unity despite its vibrant diversity. Courts have the authority to create customary law due to the question of constitutional supremacy. This is true because the constitution subject all laws.

2.5 CUSTOMARY LAW IN THE CURRENT CONSTITUTIONAL DISPENSATION

Nelson Mandela became “South Africa's first black president in 1994” after all races (Blacks, Whites, Coloreds, and Indians) were granted voting rights for the first time. The African National Congress won that election. This administration oversaw the adoption of the 1996 Constitution, which paved the way for South Africa's recognition, use, and interpretation of customary law.

In comparison to the situation before 1994, the legal status of customary law is different in the present. As previously mentioned, sections of the current Constitution that recognized customary law as a legitimate and binding legal system went into effect in 1996. The courts previously disapproved of customary unions on the grounds that they were polygamous unions and did not recognize them as valid unions. This position improved and played a role in the development of customary law; similarly, this dissertation analysed how courts have created customary law.

Section 39 (2) of the constitution[34] provides as follows:

> Every court, tribunal, or forum shall uphold the spirit, aim, and goal of the bill of rights when construing any legislation and when establishing any common law or customary law.

This provision allows for the recognition of customary law, but it also obliges courts to ensure that the guiding principles of customary law are in line with the fundamental ideals and principles of the Constitution.

[33] n 3 above, sec 9, provides that “everyone is equal before the law and has the right to equal protection and benefit of the law”.
[34] n 3 above, sec 39 (2).

Section 211(3) of the constitution[35] provides that:

> "Subject to the Constitution and any legislation that specifically deals with customary law, the courts shall apply customary law when such law is applicable.

The researcher has analysed that this provision is subject to the supremacy clause which states that "any law in conflict with the Constitution is invalid and the obligations imposed by the constitution must be accomplished." One must take into cognisance that it is the court's duty to develop/amend customary law whenever there are conflicting values. The implications of section 211(3)[36] can be summarised as follows:

i. All courts must apply and therefore also recognise customary law. Recognition and application of customary law are subject to the Bill of Rights.
ii. Recognition and application of customary law are subject to legislation that specifically deals with the matter.

The Constitution acknowledge customary law as a source of law. In terms of section 211(1) of the Constitution,[37] the role of traditional leadership are recognised and is subject to the Constitution. Section 211(2)[38] provides that "a traditional authority observing a system of customary law may function subject to any applicable legislation and customs." Section 211(3)[39] reads:

> "The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."

In essence, section 211(3) plays four critical roles in the "recognition of customary law" as explained by Nhlapho and Himonga.[40] These roles include "recognition, application, ascertainment and the alignment of customary law with the Constitution."

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[35] n 3 above, sec 211 (3).
[36] n 3 above, sec 211 (3).
[37] n 3 above, sec 211 (1).
[38] n 3 above, sec 211 (2). Provides that "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."
[39] n 3 above, sec 211 (3).
[40] T Nhlapho & C Himonga "African Customary Law in South Africa. Post-Apartheid and Living Law Perspective' (2015) 10 (2) *Oxford University Press Southern Africa* 256.

The key purpose for alignment is to ensure that customary law is in line with the constitution.

i. The recognition role

Regarding the recognition role, section 211(3)[41] commands courts to apply customary law in imperative terms by making it a recognition clause. By so doing, the Constitution has put an end to a protracted period during which common law predominated as the dominant legal system and customary law was not recognized.

In contrast to the previous situation under section 1(1) of the "Law of Evidence Amendment Act,"[42] which merely gave the courts the mandate to apply customary law merely in the interest of justice, the "recognition of customary law" relates to the injunction directed at the courts that they "must" apply it as a matter of law. Only the current version of customary law that is followed by its adherents should be recognized under Section 211(3),[43] not the official version that served as a tool of state oppression. Sections 30 and 31 of the Constitution,[44] which simultaneously acknowledge culture, support this viewpoint. The requirement to uphold the value of living customary law is actually a mandate to apply living customary law.

ii. The application role

The phrase "when that law is applicable" in section 211(3)[45] denotes that it serves as an application clause. This may be in reference to a potential conflict situation where the common law (or another accepted system of law) and customary law must be chosen as the applicable system.

[41] n 1 above, 211 (3).
[42] n 7 above, sec 1 (1).
[43] n 1 above, sec 211 (3).
[44] n 1 above, sec 30 & 31.
[45] n 3 above, sec 211 (3).

In terms of section 211,[46] customary law "is protected by and subject to the Constitution in its own right." As a result, customary law may need to be modified and developed in order to bring its provisions into compliance with the Constitution or to advance the "spirit, purport, and objects of the Bill of Rights," as required by section 39(2).[47] There has been no removal of Parliament's ability to pass laws addressing customary law.

iii. The alignment role

The purpose of Section 211(3)[48] is to harmonize customary law with the Constitution and other relevant laws. Customary law is not exempted from the application of the Bill of Rights in terms of conformity with the Constitution.

One of the relevant issues with regard to the application of the Bill of Rights is whether these apply to customary law, directly or indirectly. "*Du Plessis v De Klerk*"[49] explained the difference between direct and indirect application as follows:

> a wholesale striking down of customary law because of violation of the equality clause in Chapter 3 of the Bill of Rights. The indirect approach would permit courts closer to the ground to develop customary law in an incremental, sophisticated and case-by-case way so as progressively, rapidly and coherently to bring it into line with the principles of Chapter 3,

The researcher has observed that the Bill of Rights apply directly to customary law as section 2[50] of the Constitution provides that "the constitution is supreme and all laws should be subject to it." The researcher further depict that this provision promotes the issue of development of customary law.

iv. The ascertainment role

[46] n 3 above, sec 211.
[47] n 3 above, sec 211 (3).
[48] n 3 above, sec 211 (3).
[49] 1996 5 BCLR 658 CC.
[50] n 3 above, sec 2.

The court must ascertain the applicable principle of customary law before they can comply with the recognition imperative. Similarly, the courts can only comply with the application clause on the following grounds:

> "when that law is applicable" once they have ascertained what that law is, that is, after measuring it "subject to the Constitution and any legislation that specifically deals with customary law"

The issue of ascertainment is called into question, first and foremost, by the mandate that courts "must apply customary law" and, second, by the provision, "when that law is applicable. The ascertainment of customary law in terms of the Constitution includes determining the form of customary law which is recognised by the constitution. The researcher has observed that the injunction requiring the courts to apply customary law refers to the living version of customary law and not official customary law.

Customary law is a separate source of legal standards that gives rise to specific rights like property ownership and resource access. As a result, the Constitutional Court determined in "*Alexkor Ltd v. The Richtersveld Community & Others*"[51] that the Richtersveld Community had a right of communal ownership under customary law to the pertinent land, including the right to use and occupy the land as well as the right to use its water and exploit its natural resources on top of and below the surface.

2.5.1 The Recognition of customary marriages Act 120 of 1998 in the current constitutional dispensation

The Recognition of customary marriages Act[52] was enacted with the aim of recognizing customary unions (later called customary marriage) as valid and legally binding marriages. It is noted above that the Black administration Act[53]had

[51] 2004 (6) SA 460 (CC).
[52] n 1 above, sec 1.
[53] n 1 above, sec 1.

discriminatory provisions which hamper the promotion of gender equality in customary unions. The purpose of the Recognition of customary marriages Act is to improve the position of women in customary unions by using measures that brought customary law in line with the provisions of the Constitution. However the Recognition of customary marriages Act still has contradictions and reservations with regards to the position of women in customary marriages.

The Recognition of customary marriages Act recognizes existing valid customary marriages concluded under customary law before its commencement. Section 2 (3)[54] of the Recognition of customary marriages Act further recognizes a polygamous marriage, where a husband had more than one wife under customary law, concluded before its commencement.

2.6 SOURCES OF CUSTOMARY LAW

2.6.1 Customs and practices

In principle, customs and practices are regarded as the primary source of customary law, hence, the living customary law is founded on these. Customs and practices are basically binding social practices and apply to a specific community. These customs may differ from tribe to tribe and one community to the next. In the case of *Van Breda v Jacobs*,[55] the court listed the following requirements for custom to be recognised as law:

i. It must be certain.
ii. Uniformly observed for a long period of time.
iii. It must be reasonable and just.
iv. It must also be consistent with the Constitution and applicable legislation.

Matthews[56] "points out that before customs are considered to be a part of a community's laws, they must reach a certain standard of widespread acceptance, utility, and obligation. The last requirement for a custom to be recognized as a valid

[54] n 1 above, sec 2 (3).
[55] 1921 AD 330.
[56] ZK Matthews *Bantu Law* (2014) 325.

law plays a crucial role in the development of customary law. This requirement stipulates that the custom must be consistent with the constitution and applicable legislation." The researcher is of the view that this requirement imposes a duty upon courts to ensure that all customs complies with the constitutionality foreseeability test by ensuring that no right enshrined in the Constitution is violated or undermined.

"Matthews[57] opines that most customary law principles are in conflict with constitutional values, such values include the right to equality and dignity. The researcher aims at analysing how courts are handling such conflicting interests and making them compatible with each other." In the *Shilubana case*,[58] the constitutional court held that the authenticity of customary law must be determined by reference to the history and usage of the community concerned.

Mofokengi[59] is of the view that the community is entitled to have a better understanding on their history and usage. They are also the most qualified persons to classify their law as being obligatory or otherwise. The author further clarifies that the court should rely on the community in order to establish whether a particular customs still exists, has fallen into disuse or whether such custom is binding or merely optional to the community concerned. The researcher suggests that the use of living customary law when faced with a customary law dispute help in assisting the presiding officer to have a better understanding on the law in question. As such, the presiding officer would be able to fairly develop customary law.[60]

Insofar as it can be easily established, a court may take judicial notice of the customary law that governs a specific community under Section 1(1) of "the Law of Evidence Amendment Act."[61] According to the Law of Evidence Amendment Act,[62]

[57] Matthews (as above) 238.
[58] 2008 9 BCLR 914 (CC).
[59] LL Mofokeng "The agreement as the 'silent' prerequisite for the validity of a customary marriage in terms of the Recognition of Customary Marriages Act" (2005) 68 (2*) THRHR review* 277.
[60] Mofokeng (as above) 300.
[61] n 7 above, sec 1 (1).

customary law must not be interpreted as being incompatible with the principles of natural justice. Therefore, just as living law evolves to meet the needs of new communities, a court must apply the most recent iteration of the custom or usage. Customary law cannot be substituted for the relevant legislation by the court; however, the applicable legislation itself must be constitutional.

2.6.2 Legislation

The parliament is responsible for making laws and enacting legislations through the national assembly and the national council of provinces. The legislature derives its power from the Constitution. Bekker and van Niekerk[63] outline the following concerning the development of customary law in conjunction with legislation:

> "Although the process to codify customary law by means of legislation has been criticized as an ossification of customary law, which is in essence a flexible, ever-changing legal system, it is still one of the methods to find at least the official version of customary law. It is also a means to change or develop customary legal rules which are regarded as unconstitutional. One example is the Recognition of Customary Marriages Act that regulates customary marriages in South Africa."

Legislation is one of the sources of official customary law. To add on the above, it may also be applied to amend, repeal and review customary law. Bekker and Rautenbach[64] are of the view that legislation is a means to develop customary law. This is so because some legislations, like "the constitution of the Republic of South Africa," places a duty on courts to develop customary law in line with the spirit, purport and object of the Bill of Rights.

There are variety of legislations which deals with customary law, such as, "the Recognition of customary marriages Act," "Traditional Leadership and Governance

[62] J Bekker and G van Niekerk 'Gumede v President of the Republic of South Africa: Harmonisation, or the creation of new marriage laws in South Africa?' 2009 https://repository.up.ac.za/handle/2263/11811 (Accessed 28 November 2021).
[63] Bekker and van Niekerk (n 19 above) 135.
[64] Bekker and van Niekerk (n 19 above) 139.

Framework Act,[65]" and "Reform of Customary Law of Succession and Regulation of Related Matters Act."[66] The researcher has observed that the introduction of the above statutes has made it easier for courts to successfully interpret customary law in comparism with the constitution and the principles in question.

2.6.3 Precedents (Case law, court decisions)

Precedent refers to a previous case or legal decision that may be a binding precedent, thus, must be followed in subsequent similar cases. The process of judicial precedent means that lower courts are bound by the decisions of the higher courts and furthermore, that a court is also bound by its own decisions, unless they are wrong. This implies the following:

i. There is a hierarchy of courts.
ii. Judgements must be reported in law reports so that precedents are easily accessible.

According to Hosten[67] et al., the doctrine of *stare decisis* is the cornerstone of judicial adjudication that is orderly and systematic, so a higher court's decision is binding on lower courts. In other words, all the courts below a High Court within a certain jurisdictional division are bound by its ruling. Although the decisions of horizontal courts in other divisions are only persuasive, it is authoritative. A High Court may deviate from previous rulings when necessary; in fact, the entire bench may overturn a single judge's decision. The Constitutional Court's decisions are binding on all courts in the nation, whereas the Supreme Court of Appeal's decisions are only binding on that court. One of the landmark case is the *Bhe case.*[68] This constitutional court decision struck down the primogeniture principle; hence, other courts are bound to follow the approach employed in this *case.*[69]

[65] Act no 41 of 2003.
[66] Act 11 of 2009. The Act aims: to modify the customary law of succession so as to provide for the devolution of certain property in terms of the law of intestate succession; to clarify certain matters relating to the law of succession and the law of property in relation to persons subject to customary law; and; to amend certain laws in this regard."
[67] WJ Hosten et al *Introduction to South African Law and Legal Theory* (1995) 430.
[68] 2005 1 BCLR 1 CC.
[69] as above, para 18.

The study has observed that precedent serve a significant role in the development of customary law. This is so because constitutional court decisions compel incumbent disputes to follow what has been decided by previous justices. Alternatively, this plays a significant role in relation to development of customary law.

2.6.4 Writings of scholars (textbooks, commentaries)

A single authoritative version of the code of rules for courts has been sought after for decades by successive South African government, legal, and anthropological scholars. The Natal Administration, for instance, commissioned research into Zulu laws, which led to the compilation and adoption of a single code of Zulu laws.

Textbooks can be used to determine the statutory and common law taught in universities. The Constitution and the Bill of Rights may still be found to be at odds with the customary law practiced in the safe haven of the villages, despite the fact that one may have studied countless law textbooks, cases, and laws addressing customary law. Prior to 1988, according to Bennett, customary law was treated by courts in the same manner as common law.

Journal articles as a form of writing of scholars are also a source of customary law. A journal refers to a newspaper or magazine that deals with a particular subject or professional activity. The Oxford Dictionary[70] defines"a journal as a collection of articles (like a magazine) that is published regularly throughout the year. Many customary law practices are found in journal. All these information sources concerning the application of customary qualifies as a source of law." [71]

Commentaries also form part of writings of scholars. They refer to an expression of opinions or offering of explanations about an event or situation. In this context, commentaries on case law aid in giving a full evaluation of cases bringing out and their merits and demerits. These commentaries are useful in this desk-based study

[70] AS Hornby Oxford advanced learner's dictionary of current English (2005) 965.
[71] T W Bennett, 'Ubuntu - An African equity' http://www.nwu.ac.za/webfm(last accessed 25 May 2022).

as they assist the researcher to establish whether or not there is an observable judicial effort to develop customary law.[72]

2.6.5 The Constitution

One of the sources of customary law is the Constitution. It gives parliament and provincial legislatures the authority to pass laws, such as the Recognition of Customary Marriages Act or Acts that deal specifically with customary law.

The Constitution accords common law equal standing with customary law. It allows a court, forum, or tribunal the power to develop customary law in a way that furthers the spirit, purpose, and objectives of the Bill of Rights, to the extent that it is consistent with the Bill of Rights. Any other rights or liberties recognized or bestowed by common law, customary law, or other legal systems are not negated by this. The purpose of this work is to critically evaluate the ways in which courts have I developed customary law.

Therefore, it is crucial to determine the extent and application of customary law standards as well as how they developed in relation to the fundamental ideals of human dignity, equality, and freedom.

2.7 INTERPRETATION OF CUSTOMARY LAW

Courts have the authority to create customary law. The courts are tasked with interpreting and creating customary law in conformity with the letter, spirit, and goals of the Bill of Rights, as stated in Section 39 (2).[73] The scholar contends that customary law ought to be created and applied in a way that is consistent with the Constitution.

[72] Bennett (as above) 125.
[73] n 3 above, sec 39 (2).

When customary law violates the Bill of Rights, the constitution must be applied and interpreted. In *Gumede v. President of the Republic of South Africa and others,*[74] the court fought to decide how customary law should be read. Sections 20 and 22 of the Natal Code of Zulu Law,[75] in particular, gave the husband complete ownership of all family assets and total control over all family members who were under his care. These provisions were in doubt in this case. The Court wasn't meant to alter the status of customary law, but it didn't. The replacement of customary law has, however, frequently resulted from attempts to correct discriminatory faults in customary law.

2.8 APPLICATION OF CUSTOMARY LAW

Every system of customary law is specific to a local community and regulates the interactions amongst people. There are times when a person of a certain race, ethnicity, or community migrates to another community. In this case, the immigrant gains membership in the host community along with all of its associated rights, obligations, and responsibilities. In such a case, the member would be subject to the customary law of the receiving community in an equal manner. A different situation might be one in which a non-member decides to submit to the law and custom of another community in order to settle a disagreement with a member of that community.

According to the Constitution, a court must follow customary law when it is relevant. Himonga[76] suggest that when deciding when it is suitable for a customary law to be applied, South African courts use the choice of law principles as a guide. These principles grant the freedom to choose the applicable law to any party in the dispute. The courts are urged to take an objective stance in identifying relevant elements, such as the nature of the case that can influence a party's decision to apply such a statute.

[74] 2009 3 SA 152 CC.
[75] Natal Code of Zulu law.
[76] C Himonga 'Application of African customary law under the Constitution of South Africa: Problems solved or just beginning?' *Southern.African Law Journal* (2000) (1) 17.

The *S v. Dalindyebo*[77] case brought to light the practicalities of applying customary law. The case involved the abaThembu King, who was tried and found guilty of crimes including kidnapping, assault with intent to cause great bodily harm, and culpable homicide. Even though King Dalindyebo had been rightfully found guilty and sentenced by the court, there was debate over whether the proper legal standards were applied when the case was decided. He was given permission to appeal this ruling to the Supreme Court of Appeal. Some academics believed that customary law should have been used in this case, but the court reached a different conclusion. The court "may" apply customary law where it is appropriate, according to the literal interpretation of Section 211 (3).[78] This leaves it up to the court's discretion to examine whether it would be appropriate to do so or not.

Ntlama[79] criticizes the use of common law to prove King Dalindyebos' guilt. She claims that the courts could have gone farther by inviting the existing tribunals, even if only as friends of the court. This might have been a collaborative attempt to create a system of criminal behaviour-specific customary law. Because the study discovered that the importance of customary law was not taken into consideration in this case, it can be argued that the court wasted a significant chance to collaborate with customary law to develop it. As a result, this was a chance for the formal and conventional court systems to collaborate to make the law.

2.9 THE IMPORTANCE OF THE RECOGNITION OF CUSTOMARY LAW

The adoption of the interim Constitution and the Constitution of 1996 was a landmark event because it was the first time that customary law was recognized as a legitimate

[77] 2015 ZASCA 144.
[78] n 3 above, sec 211 (3).
[79] N Ntlama 'The Colonial and Apartheid snake is still alive: *Dalindyebo v S (*090/2015) [2015] ZASCA 144' College of Law and Management Studies Newsletter (2015) (8) (3), 15-16. https://clms.ukzn.ac.za/wpcontent/uploads/2018/06/Newsletter_Oct2015.pdf (Accessed 05 January 2022).

legal system on par with common law. Customary law was able to continue to exist as a legal system for its indigenous people thanks to this recognition.

Customary law has developed into a separate legal structure that can control the people it governs and adapt to their changing needs and lived experiences. The following four (4) aspects of this development are listed:

I. The supreme moral standard

In essence, the Constitution is crucial for determining the legitimacy of a customary law system's guiding principles, traditions, or laws. Its goals act as a perimeter around which the formal recognition of the rights to culture and cultural association of choice is ensured.[80] As a result, the Constitution provides guidelines for the purposeful interpretation of customary law and ensures that it will be applied when necessary through Section 211 (3).[81]

II. Regulation

By setting a standard that ignores individual differences, regulation's primary objective is to ensure that all citizens receive equal treatment. This is consistent with the right to equality as defined by the Constitution. By passing national and international human rights laws, South Africa has promised to defend the rights of women. Several of them include the African Charter on Human and Peoples' Rights, “the Maputo Protocol on the Rights of Women in Africa, the Universal Declaration of Human Rights (UDHR), and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).” In light of South Africa's commitment to attaining gender equality, the African Union raised concern on the enforcement of laws permitting cultural practices that violate women's rights.

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[80] [80] n 3 above, sec 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.”
[81] n 3 above, sec 211 (3).

III. South African courts

The most important example of the acceptance of customary law occurred in South African courts, which were given a lot of power in the new constitutional democracy. The following courts have the power to develop customary law:

- The high Court,
- Supreme Court of Appeal, and
- The Constitutional Court

Ndima[82] Is of the view that, this task to develop customary law must entail changing how interpretive institutions operate from their pre-constitutional culture of demeaning African culture under the alienating repugnancy dispensation to reshaping customary law with western values envisioned in transformation. The most important influence on the judiciary was unquestionably the formal recognition of customary law. Judges were given the duty to uphold the moral vigilance of the Constitution at all times, as well as to apply and create customary laws when appropriate. Additionally, living customary law is supported by the Constitution because it has the potential to be in line with the values which underpins the constitution.

IV. Accountability

Through the requirement for recognition, the Constitution makes sure that customary law is held accountable for its discriminatory practices. The detrimental effects on women and children of an underdeveloped customary law as a legal system, under the influence of Apartheid Legalism, are one of its worst flaws. However, the Constitution's provisions for the development of customary law ensure that the rights of women and children will be preserved and protected against any unfavourable African custom or

[82] DD Ndima 'Re-imagining and Re-interpreting African Jurisprudence in the South African Constitution' (2013) 1 (1) *University of South Africa* 268.

law. Ndulo[83] suggest that those customary laws which are discriminatory against women and children should be declared inconsistent in the event those who practice such practice fail to account.

2.10 CUSTOMARY MARRIAGES

2.10.1 Brief Background of customary law (the Black Administration Act Era)

In a customary marriage, the parties are traditionally the man's and woman's families, unlike in common law, where marriage is a contract between two individuals, a man and a woman, to the exclusion of others. Bennett puts it *thus:*

> "Traditionally, customary law treated marriage as an agreement between families, to be negotiated by senior males and sealed by payment of '*lobola*."

During the marriage negotiation, each family has delegates who are assigned to conduct and conclude the validity of the marriage on behalf of their respective families. A newlywed couple's home typically exists within their married family group. The family patriarch might later give the couple pots. This ritual represents the couple's release from patria-local guardianship. The man is then given permission to create his own homestead.

Before the "Recognition of Customary Marriages Act," section 22(6) of the Black Administration Act[84] governed customary unions. Such traditional unions that were formed prior to 1988 were invariably excluded from community of property. A spouse would need to jointly declare this before a magistrate or marriage officer if they wanted to change the matrimonial property system to be in community of property. Only in cases where a husband was not already a participant in a customary union with another woman could this be done.

[83] M Ndulo 'African customary law, customs, and women's rights' (2011) 18(1) Indiana Journal of Global Legal Studies 33.
[84] n 31 above.

The "Black administration Act" did not accord customary unions the same legal standing as civil unions. Under the Black Administrative Act, customary unions, as they were formerly known, received partial or limited recognition for the purposes of some legislation and common law. Section 22(1)[85] permitted a party married in a customary union to enter a valid civil marriage over the subsistence of his customary union, on condition that he supplies the name(s) of his customary spouse(s) and children. The outcome was that the current customary marriages would be dissolved by the subsequent civil marriage.

In the case of *Netshituka v. Netshituka*,[86] the deceased, Mr. Netshituka, had three customary marriages to different women. In accordance with his civil rights, he was also wed to the first respondent on January 17, 1997. The appellant and her former co-applicants made the decision to challenge the validity of the deceased's marriage to the first respondent as well as the will after the deceased passed away. [87] In response to the appellant's application, the first respondent contended that the deceased's customary unions with the appellant's former coapplicants were nullified by the deceased's civil union with Martha Mosele Netshituka, which was later terminated by divorce on July 5, 1984. The deceased "resumed" his traditional marriage relationships with his traditional wives, which were previously established when he formally married Martha Mosele Netshituka, after the divorce. Therefore, many couplings persisted even after the divorce. The court determined that the civil marriage was invalid since the deceased was already married to another person in a customary marriage at the time he entered the civil union.[88]

The "Marriage and Matrimonial Property Law Amendment Act's"[89] provision that stated that "a party to a customary union will not be competent to conclude a valid civil marriage during the subsistence of his customary marriage" corrected the

[85] n 1 above, sec 22 (1)
[86] 2011 5 SA 453 SCA.

[88] as above, para 10.
[89] Act 3 of 1988.

aforementioned situation. This meant that a civil marriage would be deemed invalid if a party entered into it while his customary union was still in effect.

The researcher is of the view that the nature of customary law has gradually been changing due to the fact that courts have a duty to ensure that customary law is brought in par with the constitution. The constitution is aimed at promoting equality which is one of the rights being violated. The researcher further observed that all forms of marriages should be weighed and treated on an equal footing. This must be done to ensure that everyone enjoys equal protection and benefit of the law.

2.10.2 The constitutional dispensation on customary marriage

In comparison to the situation before 1994, the legal status of customary law is different in the present. The principles of the current Constitution, which permit the application of customary law, went into effect in 1996. Customary marriages were previously not recognized by the courts, which did so on the grounds that such unions were inherently polygamous. This research aimed to analyse how the courts have developed customary law by analysing how this position changed favourably and represented the development of customary law.

Section 39 (2)[90] of the constitution states that

> "every court, tribunal, or forum must uphold the spirit, purpose, and object of the Bill of Rights when interpreting any legislation and developing common law or customary law; this clause thus permits the recognition of customary law.

The researcher has observed that the current situation requires courts to make sure that the fundamental values and principles of the Constitution are upheld by customary law principles.

[90] n 3 above, sec 39 (2).

The Constitution's Section 211(3) states that, "subject to the Constitution and any legislation that specifically deals with customary law, the courts must apply customary law when that law is applicable." The supremacy clause, which states that actions or laws that conflict with the Constitution are invalid and must be obeyed, however, applies to this provision. One must be aware that whenever there are opposing values, it is the responsibility of the court to create customary law.

2.10.3 Legal status of customary marriages in South Africa

Customary weddings were not recognized as valid unions prior to the recognition of such unions going into effect. They did not provide a barrier to getting engaged in a civil marriage while they existed because they were not recognized as legally binding unions. The Black Administration Act governed customary unions.

In 1998, the Recognition of Customary Marriages Act was implemented and it enabled the recognising of customary marriages as valid ones. In the past, a civil marriage automatically dissolved a customary marriage, however, in *Netshituka v Netshituka*,[91] the deceased was married to Tshinakaho Netshituka (who has since died) in terms of customary rites on 01 December 1956. Mrs Tshinakaho in her founding affidavit averred that the deceased was also married to three other wives by virtue of customary rites namely Diana, Masindi and Martha Netshituka. All these marriages were likely not registered. Joyce Munyadziwa Netshituka was married to the deceased in 1997 under civil rites. The Supreme Court of Appeal held that the civil marriage between the deceased and Joyce Netshituka is invalid. Also, In *Thembisile v Thembisile*[92] Bertelsmann J held that a civil marriage contracted while the man was a partner in an existing customary marriage with another woman was invalid.

[91] n 86 above, para 25.
[92] 2002 2 SA 209 T

2.11 CRITICAL AREAS WHERE CUSTOMARY LAW FINDS APPLICATION IN SOUTH AFRICA

It goes without saying that colonialism significantly influenced the existence and growth of law in South Africa. The so-called transplanted laws that make up modern South African law are a combination of indigenous laws known as "customary law," as well as English common law and Roman-Dutch law. The native laws and the imported laws have never been equal, despite the fact that customary law is the law of the country's original inhabitants. The colonialists initially disregarded customary law, but they later tolerated it and eventually recognized it, albeit with some caveats and restrictions.[93]

Over time, little changed, but in 1996, the Constitution of the Republic of South Africa granted constitutional recognition to South African customary law, bringing it at *par* with the country's common law but subject to other laws and the Constitution.

2.11.1 Customary Marriages as an area where customary law finds application

Prior to the coming into operation of the Recognition of Customary Marriage Act, customary marriages did not enjoy full recognition; the reason was the fact that customary marriages, unlike civil marriages, are polygamous in nature. Women in customary marriages were only recognised as spouses for purposes of inheritance.

A customary marriage is one where the spouses are married in terms of custom as opposed to the laws of a country where the latter is, usually, referred to as a “civil marriage”. Civil marriages are registered with home affairs and usually the couple are provided with a marriage certificate. Civil marriages are not the only types of

[93] *Mpanza v Qonono* 1978 CC.

marriages recognised in our law in South Africa as customary marriages are also given recognition provided certain requirements are met with.[94]

The "Recognition of customary marriages Act" has set out requirements in section 3 to all the customary marriages concluded or to be concluded after its commencement, to be recognized as marriages. This applies also to concluded or future polygamous marriages. The realization of equal status and capacity between spouses was evident in the promulgation of the Recognition of customary marriages Act, as section 6 expressly provides for equal status and capacity between the parties in a customary marriage. The above provision is supported by section 9 of "the Recognition of customary marriages Act" which stipulates the application of Age of Majority Act. As a result, this dealt away with the position of women under "the Black administration Act" which discriminated against them based on age as they were deemed as minors. Generally, these sections seem to eliminate the inequality to some degree. The challenge underlying the promotion of gender equality is the fact that enacting a law which stipulates that the husband has equal status with wife and actually obtaining this in practice are not a matter of simplicity in regard to implementation.

Section 3 of the "Recognition of Customary Marriages Act"[95] lays out the requirements for all customary marriages that have been consummated or are about to be consummated after the Act's inception. This also holds true for current and upcoming polygamous unions. The Recognition of Customary Marriages Act, which expressly provides for equal status and capacity between the parties in a customary marriage in section 6,[96] demonstrates the realization of equal status and capacity

[94] *Fanti v Boto* 2008 5 SA 405 (CC).
[95] n 3 above, sec 3. provides that for a customary marriage entered into after- the commencement of this Act to be valid- "the prospective spouses-
(i) must both be above the age of I8 years; and
(ii) must both consent to be married to each other under customary law: and
the marriage must be negotiated and entered into or celebrated in accordance with customary law."
[96] n 3 above, sec 6. provides that "a wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law."

between spouses. Section 9 of the Recognition of Customary Marriages Act,[97] which specifies the application of the Age of Majority Act, supports the aforementioned provision. This changed the way that women were treated under the Black administration Act, which prohibited age-based discrimination against them.

The Recognition of Customary Marriage, came into operation on 15 November 2000, and set certain legal requirements for a valid customary marriage.

I. Legal Capacity to enter into a customary marriage

Section 3 of the Recognition of Customary Marriages Act[98] lays out the requirements for all customary unions that have been consummated or are about to be consummated after the Act's inception. This also holds true for current and upcoming polygamous unions. The Recognition of Customary Marriages Act, which expressly provides for equal status and capacity between the parties in a customary marriage in section 6, demonstrates the realization of equal status and capacity between spouses. Section 9 of the Recognition of Customary Marriages Act, which specifies the application of the Age of Majority Act,[99] supports the aforementioned provision. This changed the way that women were treated under the Black administration Act,[100] which prohibited age-based discrimination against them.

II. Consent

One of the prerequisite of a valid customary marriage is the consent of the first wife in the event the husband intends marrying another wife. The *Mayelane v. Ngwenyama[101] and Others* case played a significant role in extending the need for consent in traditional weddings. This results from the Constitutional Court's

[97] n 3 above, sec 9.
[98] n 3 above, sec 3.
[99] Act No. 57 of 1972, sec 9 provides that despite the rules of customary law, the age of majority of any person is determined in accordance with the Age of Majority Act, 1972
[100] n 31 above.
[101] 2013 4 SA 415 CC.

formulation of the requirement for the first wife's agreement to join into a subsequent Tsonga traditional marriage. In this case, the court came to the conclusion by using constitutional principles of equality and human decency.

This consent does not have to be given formally but can be implied from their conduct; where there is no consent between spouses, there shall be no marriage. There were customary practices such as 'Ukuthwala' where a woman was forced into a marriage, however, and the marriage still becomes valid. Such practices violate freedom of choice, right to dignity and equality of women. The case of *Jezile v S*[102] is authority in that forced marriage now constitutes a criminal offence and is, therefore, punishable by law. This research has discovered that it is very complicated to work with two conflicting laws by trying to merge them together; the superior law shall always take precedent over the inferior law.

III. Consent of the father (or guardian) of the bride

The consent of the father of the bride is essential, although this requirement is not expressly stated in "the Recognition of Customary Marriages Act," it can however be read into section 3(1)(b)[103] which states that: the marriage has to be negotiated and entered into in accordance with customary law. In the case of *Mabena v Letsoalo,*[104] where the father of the bride had abandoned the family, the consent of the mother had to be sufficient. It was also decided in the same case that the consent of the parents of the bridegroom was not necessary. Women were, in terms of customary law, not allowed to negotiate issues of marriage but due to the changing values of the society, the principle is being scrutinised to accommodate both genders.

2.11.2 Traditional leadership as an area were customary law finds its application

According to customary law, there were strict hereditary customs along only male lines, and the appointment or recognition of a traditional leader was done primarily

[102] *Jezile v S* unreported case no 127/2014, 23-3-2015).
[103] n 3 above, sec 3 (1) (b).
[104] 1998 2 SA 1068 (T).

through various laws of succession. There are numerous laws and procedures that are still in effect in contemporary South Africa and are used by the various provincial governments to appoint traditional leaders to various positions of authority. As previously mentioned, the supreme chieftaincy originally held the authority to name traditional leaders. However, the Black Administration Act later transferred that authority to the Governor General, who then transferred it back to the President of South Africa in 1961.

Traditional leadership succession was and is still gender-specific. With the exception of the Modjadji Clan, where succession is inherited through the female linage, only the male linage is hereditary. The pertinent customary laws of the tribe or community in question typically determine who the successor is. If the chosen successor is still a minor, a temporary acting chief is appointed to hold power until the minor is old enough to assume control on his own.

2.11.3 Family principles as an area were customary law finds its application

In South African societies, traditionally, the head of the household was and is still a man. On the contrary his wife (wives if any), and children, were subject to his authority. In tribal relationships, the wives were in charge of the overall welfare of the family, which included child rearing and organizing rituals and family functions.

The National Party and colonial governments, as well as the tremendous challenges and demands of modern urbanization, drastically changed the role that women played in traditional communities. Many women are now on their own and responsible for many of the duties that were previously handled by their husbands as a result of the establishment of African reserves and, more specifically, migrant labour practices. Due to the current situation, many women in traditional communities are challenging contemporary norms that continue to be based on gender inequality. Age and seniority also played a big role in traditional African

culture, in addition to male dominance. The young people were brought up to respect and honour their elders.[105]

Most kids were left to fend for themselves, save from carrying out minor home chores. Minors were regarded as belonging to their family and then to the community overall in traditional communities. In the event that parents were unable to look after their kids, the community would step in. Traditional law forbade children from ascending to traditional leadership roles, and regents were frequently chosen to represent the minor until he reached the age of majority. This was the position in the case of *Mphephu Ramabulana and another v Mphephu and others.*[106]

2.11.4 Male primogeniture

By virtue of being the first-born son or the oldest male member of the family, a person is considered to succeed the deceased under the customary principle of male primogeniture. Before the Recognition of Customary Marriages Act was passed, women who were part of customary unions were uncertain of their positions and status as equals. The “Black Administration Act,” which had discriminatory provisions against women and created gender inequality to the detriment of women, governed such marriages. Customary unions that were finalized before 1988 were not considered community properties. A customary marriage could be annulled under the Black Administration Act because customary unions did not have the same legal protections as civil unions. In addition, women were automatically ineligible to inherit a decedent's estate.

A traditional law known as the principle of male primogeniture states that a person inherits the deceased’s estate by virtue of being the first-born son or the oldest male relative in the family. Before the enactment of Recognition of Customary Marriages Act,[107] women in customary unions were faced with uncertainty regarding equal status and their positions. Such marriages were governed by the Black

[105] n 68 above, para 27.
[106] 2021 ZACC 43.
[107] n 1 above.

Administration Act which had discriminatory provisions concerning women including the creation of gender inequality which was disadvantageous for women. Customary unions concluded before 1988 were out of community of property. Under the Black Administration Act, customary unions did not enjoy the same status as civil marriages and could nullify a customary marriage. Furthermore, females were automatically disqualified from inheriting a deceased's estate. One of the objectives of this dissertation is to critically analyse the manner in which courts have developed customary law in instances where a custom violates certain rights in the Bill of Rights.

The most recent Constitutional Court judgment of *Mphephu-Ramabulana and Another v Mphephu and Others,*[108] dealt with Venda customary law of succession. The Constitutional Court ruled that the criteria applied by the Royal Family Council in making the 'Identification Decision', as set out in the minutes of the selection meeting, endorsed gender discrimination, in that they prescribed that in the Mphephu-Ramabulana family, in particular, the Chief or King must be a man (sons). The Court declined to declare the criteria itself unconstitutional and invalid, or to review and set it aside.

In *Shilubana*,[109] the Court respected the Valoyi community's autonomy by allowing them to decide what their own living customary law should contain. It would make sure that its citizens' best interests are served in this way. The Valoyi community was given the task of discussing the rule of primogeniture as it currently applied to the selection of the community "hosi" and determining the true meaning and nature of the rule of primogeniture in that context. The Valoyi community was tasked with creating the rule in a way that would not discriminate against women and would thus be consistent with the Constitution's goals. According to the flexible strategy, Miss Shilubana was appointed.

[108] n 107 above, para 35.
[109] n 54 above, para 40.

The researcher has observed that discriminatory principles of succession are unconstitutional. The principles of equality enshrined in section 9 of the constitution,[110] the "Promotion of Equality and Prevention of Unfair Discrimination Act"[111] and "the Recognition of Customary Marriages Act" have left the courts with no alternative but rather to develop customary law in a manner which promote the values of the constitution.

2.12 CONCLUSION

This chapter discussed the legal framework of customary law in South Africa. The recognition of customary law was an essential tool towards its legitimacy. The procedure was partaken with constitutional effects, such as interpretation, application, and development of customary law. Naturally, the court's utmost responsibility with regards to customary law recognition, is upholding the values of the Constitution. This is accomplished through the application of appropriate constitutional provisions. The South African legal system recognizes the value of customary law. The researcher suggests that in order for courts to properly develop customary law, they ought to thoroughly trace the history of that particular principle.

[110] n 3 above, sec 9.
[111] Act 4 of 2000.

CHAPTER 3

THE EXAMINATION OF WHETHER THERE IS AN OBSERVABLE JUDICIAL EFFORT TO DEVELOP CUSTOMARY LAW

3.1 INTRODUCTION

Chapter two discussed the legal framework of customary law in South Africa. As mentioned in chapter two, the recognition of customary law was a significant tool towards legitimacy. It had constitutional implications such as interpretation, application, and development of customary law. The challenge for South African courts has been to develop customary law in a way that is consistent with the Bill of Rights without eroding or amending African standards and norms. This chapter shall discuss whether or not there is an observable judicial effort to develop customary law in South Africa. In this way the chapter analysed different cases which have been adjudicated over the years.

3.2 JUDICIAL EFFORTS TO DEVELOP CUSTOMARY LAW BY THE COURTS

First and foremost, it is crucial to deal with the issue of inheritance specifically with regard to traditional leadership. According to the primogeniture principle, a woman was not allowed to ascend the throne. The customary law principle only qualified men as traditional leaders.

In the Shilubana case,[1] On February 24, 1968, Hosi Fofoza went away without ever having a son. Despite being of legal age in 1968, Ms. Shilubana who is Hosi Fofoza's eldest daughter was not given consideration for the role because male

[1] 2008 9 BCLR 914 CC. In para 3, the court stated that "On 16 September 2002 Mr Nwamitwa instituted proceedings in the Pretoria High Court seeking a declaratory order that he, and not Ms Shilubana, is heir to the chieftainship of the Valoyi and thus entitled to succeed Hosi Richard. He also sought an order that the third to sixth applicants withdraw the letters of appointment regarding Ms Shilubana, and issue letters of appointment to himself. The High Court and thereafter the Supreme Court of Appeal held in Mr Nwamitwa's favour. Both courts reasoned that even if the traditions and customary law of the Valoyi currently permit women to succeed as Hosi, Mr Nwamitwa, as the eldest child of Hosi Richard, is entitled to succeed him. Ms Shilubana applied to this Court for leave to appeal against the decision of the Supreme Court of Appeal"

primogeniture regulated succession to Hosi at the time (the Chieftainship). Hosi Fofoza's younger brother Richard succeeded him as Hosi of the Valoyi community. After Hosi Richard passed away on October 1st, 2001, the dispute in this case got underway.

From the very beginning, the Court indicated that the legal issue was whether or not the community has the power to return the traditional leadership position to the rightful family which was disqualified due to gender discrimination, even if this discrimination occurred before the existence of the Constitution.[2] The study has observed that there has been a dilemma as a result of the desire to ensure that customary law is brought in line with western laws. Most customary laws are discriminatory and undermine the rights of women and children. Despite that, the researcher suggests that the limitation of right should be practised to ensure that customary law shouldn't just be a tool awaiting decolonisation.

Both the High Court and the Supreme Court of Appeal determined that it was improper for the traditional authorities to refer to Ms. Shilubana as Hosi. The Court took two issues into account when determining whether the earlier judgments were correct. The first concern was the Royal Family's ability to create laws that would forbid gender discrimination in the transfer of traditional leadership within the Valoyi community. The second topic was the Royal Family's right to reinstate the chieftainship to the house from which it had been removed due to pre-constitutional gender discrimination.

In response to an appeal, the supreme court of appeal ruled that this was not only unfavourable but also unconstitutional. The Court reaffirmed that Section 211(2)[3] expressly grants traditional communities the right to operate under their own system of customary law, including the right to amend or repeal laws. According to the

[2] The Constitution of the Republic of South Africa, 108 of 1996.
[3] as above, section 211 (2) provides that "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."

Court, a community must have the authority to take action in order to bring its traditions in line with the standards and ideals of the Constitution. Any other outcome would be disrespectful of the close ties that bind a customary community, its leaders, and its laws, in violation of section 211(2).[4] The Court argued that if the traditional authority only has the authority granted to it by such a limited view, then it would be

In response to an appeal, the supreme court of appeal ruled that this was not only unfavourable but also unconstitutional. The Court reaffirmed that Section 211(2)[5] expressly grants traditional communities the right to operate under their own system of customary law, including the right to amend or repeal laws. According to the Court, a community must have the authority to take action in order to bring its traditions in line with the standards and ideals of the Constitution. Any other outcome would be disrespectful of the close ties that bind a customary community, its leaders, and its laws, in violation of section 211(2).[6]

The Constitutional Court as the court of last resort ruled against the decision of the "High Court and Supreme Court of Appeal." These two courts held that the fact that traditional authorities had no power to act as they did were incorrect. Alternatively, the female daughter of Hosi fofoza Nwamitwa was appointed as the senior traditional leader.

The study has observed that despite the development of customary law to enable a woman to qualify for the position of traditional leadership, the male primogeniture can no longer fully serve its purposes. One of the version of the positive version of the male primogeniture is to ensure that power remains in the hands of the very same royal family. The researcher has further observed that once a woman ascends the throne, there is a high likelihood that the chieftaincy moves to another royal family. For example, that woman's child, bearing a different surname or rather

[4] n 2 above, sec 211 (3).
[5] n 2 above, sec 211 (2). Provides that "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."
[6] n 2 above, sec 211 (2).

bearing a different surname, becomes the traditional leader at the death of the mother.

The researcher therefore puts it *thus, in the shilubana case,*[7] the court did developed customary law. The court did not just simply try to distort it. However, it should be taken into account that the form of development employed in this case has led to amendment of the primogeniture principle in an effort to try and fit in customary law with western laws. The researcher further acknowledge that the shilubana judgment is evidence that the principle which stipulates that a Hosi is born and not elected indeed exists.

3.3 ARE COURTS DOING ENOUGH TO ENSURE AFRICAN CUSTOMARY LAW'S DEVELOPMENT?

One of the benefits of the formal recognition of customary law is that customary law is currently subject to scrutiny. This is so because Section 39 (2) of the Constitution[8] empowers courts' to development. Before the coming into operation of the Constitution, judges were not required to develop customary law and there was no guide to help interpret its provisions. Regarding this clause:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

The court was hesitant to consider the option of development in the case of *Mthembu v. Letsela and Others,*[9] where development had failed, as they needed more evidence that living customary law could be identified and distinguished from official customary law. Sadly, it still seems impossible that the three Mthembu cases consistently ignored constitutional changes based on the right to equality. As a result, attempts to develop the official rule of customary law embedded in legislation failed miserably.

[7] n 1 above, para 1.
[8] n 2 above, sec 39 (2).
[9] 1998(2) SA 675 (T).

The researcher has observed that despite there being an observable judicial effort to develop customary law, courts still find its challenging to develop customs in circumstances which involves the right to equality. The researcher has discovered that it is very challenging to simply say courts are distorting customary law based on the fact that most customs violate the right to equality, *thus,* declaring them valid will be sort of promoting inequality and the injustices of the past.

The complete and equal enjoyment of all rights and liberties is a component of equality. It may be restricted as long as the recourse is constitutionally acceptable and reasonable. The Constitution forbids unfair discrimination against anyone, so only justified and fair discrimination is permitted. There is no such thing as an absolute right, as stated in Section 36 of the Constitution.[10] It offers the following:

> "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".

The above provisions entails that all rights in the Bill of rights, including equality, may be limited. The researcher has observed that in order for customary law not to lose its values and purposes, the court should be a bit reluctant when it comes to development of customary law. Currently, the right to culture is protected in the Constitution which provides that people belonging to a cultural community may not be denied their right to practice their own culture.

Legal changes related to equality have an impact on how women are treated in relation to property and recognize and protect women's property rights. The right to equality and the absence of discrimination without regard to a person's gender or marital status are guaranteed by the Constitution. As a result, provisions in customary law that discriminated against women are deemed invalid and unconstitutional. The discriminatory provisions of customary law that denied women

[10] n 3 above, sec 36.

the right to own property and inherit property in their customary marriages were invalidated in a number of cases handled by the Constitutional court.

The process of changing the matrimonial system is faced with challenges for the following reasons: first, the spouses must apply jointly, and the husband will resist giving up control of the marriage. Second, only those with financial means could afford to go through the application process. Marriages contracted after the Recognition of Customary Marriages Act[11] are allowed to be in community of property with loss and profit under Section 7(2).[12] In the *Gumede* case[13] sections 7(1) and (2)[14] were discussed because the latter did not guarantee the same property regime for unions formed prior to the Recognition of Customary Marriages Act.[15] The aforementioned provisions were ruled to be unconstitutional and invalid. Section 7(2)[16] made a distinction between marriages contracted before and after "the Recognition of Customary Marriages Act went into effect, the court ruled that it was invalid because the distinction was unjustly discriminatory. Since only women in customary marriages are subject to these unequal proprietary consequences, Section 7(1)[17] was ruled to be invalid because marriages consummated prior to the Recognition of Customary Marriages Act[18] were not communities of property. The case described the discrimination women experienced on the basis of their marital status, age, and gender.

The foundation of the just joint inquiry a divorce court must conduct in accordance with section 8(4)(a)[19] is the invalidation of sections 7(1) and (2)[20] of "the Recognition

[11] The Recognition of Customary marriages Act 120 of 2000.
[12] n 11 above, sec 7 (1) provides that "the proprietary consequences of customary marriages entered into before the commencement of this Act continue to be governed by customary law
[13] (CCT 50/08) 2008 ZACC 23.
[14] n 11 above, sec 7 (1).
[15] n 11 above.
[16] n 11 above, sec 7 (1).
[17] n 11 above, sec 7 (1).
[18] n 11 above.
[19] n 8 (4) (a).
[20] n 11 above, sec 7 (2). A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically

of Customary Marriages Act and the assertion that the wife and husband are joint owners of the matrimonial property in equal shares.

The *Gumede case*[21] established a precedent that, unless the parties agree otherwise in the ante-nuptial agreement, all monogamous marriages contracted before and after the Recognition of Customary Marriages Act are all communities of property with loss and profit. The only disagreement that still exists is between a polygamous marriage and the equal status clause. This conflict was addressed in the case of *Ramuhovhi v. President of Republic of South Africa*[22] because while polygamous marriages are still subject to customary law's proprietary rules, monogamous customary marriages are automatically community of property.

In order to give women full equality with men in the customary law of succession, women's rights should be upheld. As mentioned above, gender equality is guaranteed by case law and "the Recognition of Customary Marriages Act,"[23] but there is still room for improvement in terms of how it is actually enforced to guarantee that men and women are treated equally and with the same status in customary marriages. The inconsistencies in the cases below demonstrate that not even the Recognition of Customary Marriages Act itself adequately promoted gender equality.

The court developed customary law with regard to *Ukumekeza* and *Imvume* as discussed below. "In the case of *Mabuza v Mbatha*[24] the court held that a customary marriage cannot be invalidated on the ground that *ukumekeza* was incomplete. It is significant to note that '*ukumekeza'* requires a cattle kraal in order for the practice to be performed. However it can be said that some people living in the current urbanization would not allow this practice to be carried out in the same fashion. The

excluded by the spouses in an ante-nuptial contract which regulates the matrimonial property system of their marriage.

[21] n 13 above, para 16.

[22] *Ramuhovhi and Others v President of the Republic of South Africa and Others* (CCT194/16) [2017] ZACC 41.

[23] n 11 above.

[24] 2003 4 SA 218 CC.

court held that there was evidence that an agreement was made by both parties for the practice not to be completed. Based on that, the other party acted *mala fide* by contesting. The practice of imvume was not used, as in *Malukele v. The Minister of Home Affairs and Radebe*[25] although a date for the practice was set, the other party passed away before this agreement could be fulfilled. The court correctly determined that the two parties in this case were already acting as though they were married and therefore were married; the absence of an *imvume* did not change that.

The researcher is of the view that courts, while in the process of developing customary law, are actually distorting or amending it. This is so because some practices like Umvume, as they have been then practised for years, are no longer a compulsory requirement for the validity of a customary marriage.

The distortion leads to a situation wherein customary law lose its identity along the process. It can further be stated that courts missed an opportunity to develop customary law.

3.4 THE COURT'S EFFORT IN RELATION TO THE DEVELOPMENT OF THE MALE PRIMOGENITURE PRINCIPLE

In the majority of African societies, customary law is without a doubt the oldest form of law.[26] As a result, it has a big impact on how most Africans live their personal lives and has developed a reputation for discriminating against women and treating them like second-class citizens. The principle of male primogeniture plays a crucial role in how customary law is applied. The rule at the centre of this debate tends to discriminate against women in matters like guardianship, inheritance, appointment to traditional positions, use of traditional authority, and age.[27]

[25] 2008 ZAGPHC.
[26] CB Soyapi "Regulating traditional justice in South Africa: A comparative analysis of selected aspects Traditional Courts Bill" (2014) 1 (14) *PER* 1441.
[27] M Ndulo 'African customary law, customs, and women's rights' (2011) 18 (1) *Indiana Journal of Global Legal Studies* 187.

Land and chieftaincy are examples of property and inheritance under customary law. In customary marriages, the division of land and inheritance has resulted in gender inequality, with women and children being disadvantaged by inheritance and land ownership from a deceased husband or father due to the patriarchal principle of male primogeniture. Previously, according to customary law, the husband was given complete control over all of the family's assets, which was unfair to women and violated their right to dignity.[28]

This situation was described by the court in the *Bhe case* because female children were not permitted to inherit property following the dissolution of the traditional marriage or the passing of their father. This case briefly addressed the constitutionality of the principle of male primogeniture and section 23 of the Black Administration Act,[29] which only recognized male children as the heirs of a deceased person's property. The constitutional court determined that the clause violates sections 9[30] and 10[31] of the Constitution because it unfairly discriminates against people based on their gender, race, and ethnicity.

The idea of male primogeniture, which barred women and children from extramarital relationships from inheriting a deceased person's property, was also declared to be unconstitutional and invalid. The two problems disadvantaged women and female children and further weakened their rights to property and even dignity. In essence, the court intended to provide full protection of women's and children's rights in all facets of life, and the reform of traditional marriages included the inheritance rights of female children, who would not have any right to the property after the dissolution of the marriage or the death of their father.

[28] *Bhe & Others v Khayelitsha Magistrate & Others* 2005 (1) SA 580 CC.
[29] n 31 above, sec 23.
[30] n 3 above, sec 9.
[31] n 3 above, sec 10.

3.5 SHOULD CUSTOMARY LAW OF SUCCESSION AND COMMON LAW OF SUCCESSION BE HARMONISED TO PROMOTE WOMEN'S RIGHTS?

Although their identities are no longer wholly entwined with that culture, many Africans continue to practice some aspects of traditional culture. It is now widely acknowledged that cultural adherence in contemporary societies has changed, and more people, particularly women, do not feel obligated to strictly abide by traditional customs, especially those that oppress them. Even though that is the case, this study maintains that customary law itself, rather than common law views, should be used to frame how customary law has evolved.

In "*Alexkor Ltd v Richtersveld Community*,"[32] the following was stated:

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

It is important to view customary law as a crucial yet independent component of our legal system that is governed by the Constitution. In support of this, the Constitution stipulates that courts must apply customary law when appropriate, subject to the Constitution and any applicable legislation. This encourages the use of customary law as a separate legal system that must abide by the Constitution.[33]

As a result, it is essential to view customary law as a crucial but separate component of our legal system that is governed by the Constitution. To support this, the Constitution stipulates that courts must apply customary law when appropriate, subject to the Constitution and any applicable legislation, thereby encouraging the use of customary law as an independent legal system that is subject to the Constitution.

[32] 2004 5 SA 460 CC.
[33] n 3 above, sec 211(3).

The researcher, therefore, suggest that traditional courts should be more involved in cases relating to customary law practices, such as male primogeniture. This recommendation is made in light of the fact that traditional courts already exist and are utilized by millions of people to settle disputes in accordance with customary law in a way that promotes justice. These laws emphasize the application of restorative justice while offering communities mechanisms for resolving conflicts.

The Traditional Courts Bill[34] explains its role as:

> "Traditional courts –
>
> are intended to promote the equitable and fair resolution of certain disputes, in a manner that is underpinned by the value system applicable in customary law and custom; and
> (b) Function in accordance with customary law, subject to the Constitution.
> (2) Traditional courts, recognising the consensual nature of customary law, must be constituted and function under customary law and customs in a manner that promotes restorative justice, Ubuntu, peaceful co-existence and reconciliation, in accordance with constitutional imperatives and the provisions of this Act".

The majority of indigenous people relate to and understand traditional courts much better than the common law, which was largely imported, or the statutory law used in state courts. For this reason, the researcher contends that traditional council-derived solutions will be more valuable and trustworthy to customary law cases, and that they will readily give their consent when local leaders and the community at large are involved in discussions about the creation of rules like male primogeniture. Therefore, it is hypothesized that traditional courts or royal councils will be better able to implement solutions than Western state courts.

3.6 THE MANNER IN WHICH LIVING CUSTOMARY LAW IS DEVELOPED

[34] The Traditional Courts Bill no. 30902 of 2008.

The "law observed by African communities" is referred to as living customary law. It is the unwritten law that is ingrained in the community's culture and traditions and is passed down from one generation to the next.[35] Although it changes as society does, legislative action is frequently, if not always, necessary to change written law in general and legislation in particular. Ndima[36] says the following:

> "When it comes to the pervasive problem of developing African customary law, the judiciary faces the additional challenge of determining the living version of customary law for the community concerned. One of the injustices of the past, which our constitutional interpreters must reject in striving to heal our historical divisions, is the distortion caused to African law by the application of the interpretive technique of repugnancy. This method removed the philosophical underpinnings (which the colonial officials perceived to be in conflict with Western morality) from African customary law."

The evolution of law is a global phenomenon. Hahlo,[37] for instance, describes the three stages of development of western European marriage law. The first stage of marriage was a private matter between the couple and their families; the second stage married was governed by the church; and the third stage married was governed by the state.

The researcher has observed that there are times wherein customary law overrides common law. In *Rolfes, Nebel and Co v Zweigenhaft,*[38] *the following was stated:*

> This court would be loath to upset a contemporary practice that had become a general custom of South Africa, even if it were somewhat different from the Roman-Dutch legal practice". In the case under discussion, a principle of Roman-Dutch law in question had fallen into disuse and an indigenous customary legal principle had come into effect. The court accepted that the law had developed and that the established contemporary legal custom overrode the Roman-Dutch legal practice which had fallen into disuse. The legal development was not legislated but had evolved in response to the changing circumstances of society.

[35] Du Plessis *Introduction to Law* (2010) 67.
[36] DD Ndima 'Re-imagining and Re-interpreting African Jurisprudence in the South African Constitution' (2013) 1 (1) *University of South Africa* 268.
[37] H R Hahlo (n 32 above) 200.
[38] 1903 TS 185 206.

In "*Blower v Van Noorden,"*[39] the court held that there are certain moments wherein the customary law must be amended in an attempt to expand legal ideas, and to keep pace with the requirements of changing conditions. The applicant, during the proceedings, argued that the law is outpaced by the requirements of the changing conditions of a given society, the courts' must develop customary law and ensure consistent with those requirements of a changing society in order to avoid a probable irrelevance of the law. The people should be served by the law, not the other way around. A rule of law turns into a misrule of law when it ceases to be useful or serve its intended purpose, and people may disregard it consciously or unconsciously.[40]

There are some areas of the nation where ukuthwala marriages are performed according to custom. According to legal scholars, ukuthwala is "a culturally-legitimated abduction of a woman whereby a young man will forcibly take a girl to his home prior to a customary marriage." The South African Law Reform Commission looked into this practice because of worries about its recent resurgence and distortion." It was discovered that ukuthwala was being practiced in harmful ways, such as by permitting older men to sexually assault young girls.

The case of *Jezile v. State*[41] marked the first conviction in the Western Cape based on ukuthwala. It was centred on the kidnapping of a 14-year-old girl from her Eastern Cape home after negotiating and paying her family R8, 000 in lobolo. The girl was coerced into traveling with the defendant to Cape Town, where she was physically assaulted and held against her will. The accused appealed the 22-year sentence he received for rape, assault, and trafficking on the grounds that the lower court had not adequately taken into account his culturally based motivations and that his actions should have been interpreted in the context of ukuthwala and customary marriage.

[39] 1909 TS 890 905.
[40] as above, para 15.
[41] *Jezile v S* unreported case no 127/2014, 23-3-2015).

3.7 THE ROLE OF THE JUDICIARY IN THE DEVELOPMENT OF CUSTOMARY LAW

The doctrine of separation of powers categorises the functions of the government into three broad spheres - the executive, the judiciary and the legislature. The executive, execute laws and make them binding and enforceable; the legislature makes laws and the judiciary interprets such law and ensures that they are in conformity with the Constitution. The role played by the judiciary with regard to customary law is in respect to section 39 (2) of the Constitution[42] which provides thus:

> "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."

First, every court that interprets the law is brought immediately and solely before the judiciary. Second, it places a duty on courts to interpret all laws in accordance with the spirit, purport and object of the Bill of Rights. This obligation extends to the Recognition of Customary Marriages Act.[43] In other words, the results of any interpretive process must show how the Bill of Rights' spirit, intent, and purpose were advanced. The question that should arise here, is whether the courts are successfully developing customary law.

There are various cases that dealt with how section 39(2) of the Constitution should be interpreted. In *Carmichele v Minister of Safety and Security*[44] the court held that section 39 (2)[45] imposes a duty upon courts of law to make a determination as to whether there is a need to develop customary law to bring it in par with the Constitution and. The court further held that would, however, respect and enforce any development that happened within the community to the extent that such development was in line with the protection of rights. The above contention would

[42] n 2 above, sec 39 (2).
[43] n 11 above.
[44] 2001 4 SA 938 CC.
[45] n 2 above, sec 39 (2).

help determine whether or not courts are developing customary law or they are simply just abolishing it.

In the *Bhe case*,[46] the Constitutional Court determined that preventing the piecemeal and occasionally slow development of the customary law of succession would protect women and children. The court must be aware of its responsibilities under section 39(2) of the Constitution[47] to balance the development of customary law with the rights guaranteed by the Bill of Rights when making a decision on a customary law issue. Reforms like those discussed below may result from the development of customary law.

3.8 REFORMS ON CUSTOMARY LAW

3.8.1 Property rights in customary marriages

One of the major challenges in addressing gender equality in customary marriages, was the inability or limiting women from either acquiring or owning property during the subsistence of a customary marriage and also in the dissolution of such customary marriage. The landmark case dealing with women's right to property in a customary marriage was the *Gumede case.*[48] The case dealt with the invalidation of section 7(1) and in 7(2)[49] which states as follows:

> "(1) The proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law. (2) A customary marriage entered into after the commencement of this Act in which one spouse is not a partner in any other existing customary marriage is a marriage in community of property and of profit and loss between the spouses, unless such. Consequences are specifically excluded by the spouses in an ante nuptial contract which regulates the matrimonial property system of their marriage."

[46] n 28 above, para 54.
[47] n 2 above, sec 39 (2).
[48] n 13 above, para 20.
[49] n 11 above, section 7 (1) and 7 (2).

The wording "entered into after the commencement of this Act" was held to be inconsistent with the constitution. The implication of this case is that monogamous customary marriages are currently regarded as marriages in community of property with loss and profit, regardless of whether such a marriage was entered into before or after the commencement of Recognition of Customary Marriages Act.

The denial of the right to property has serious impact because it affects women's day-to-day lives. Customary marriages entered into before 1998 have been freed from any form of discrimination, especially, the exclusion of women from property rights. This is after the court in *Ramuhovhi case*,[50] said that women in pre-polygamous marriages will have joint and equal ownership, management and control over marital property. The impact of the reform gives women in customary marriages the freedom and the ability to support themselves and their children and to confront poverty, since they are the most socio-economically disadvantaged, with limited access to justice.[51] The researcher believes that in a process of courts developing customary law, they are completely changing it to what it was before. This is due to the fact that according to custom, there is no equality between a male and a female, this position has been applied for centuries. The Constitution provides for equality and non-discrimination for all citizens of the republic and development ought to be made in common law to reflect this.[52]

The previous position was that only a woman in polygamous marriage entered after the Recognition of Customary Marriages Act could only claim her husband's property after death or dissolution of such a marriage. The decision of the Constitutional court meant that the wives in customary marriages were entitled to joint and equal share of the ownership, management and control over the marital property. The ruling by the Constitutional court also meant that the children, who were also the first and second applicants in this matter, were entitled to the benefit of their father's property.

[50] n 22 above, para 45.
[51] n 22 above, para 30.
[52] n 2 above, sec 9.

In the past, a customary marriage could be declared valid only when *lobolo* has been paid in full. Development of this principle shall be dealt with later, taking into account different precedents. It is necessary, however, to first identify the requirements which constitute a valid customary marriage as provided for in section 3 of the Recognition of Customary Marriages Act.[53]

There are several requirements for a valid customary marriage. These requirements include the following:

> "The partners must be consenting adults aged above 18.
> The prospective parties must both consent to be married to each other
> The marriage must be negotiated and entered into or celebrated in accordance with customary law."

Two matters in 2016 added to the complications surrounding customary marriages. In EXN v SRD,[54] the court accepted evidence of one of the parties who asserted that lobola negotiations only form part of a process of a customary marriage. A similar decision was reached in *Mkabe v Minister of Home Affairs and Others,*[55] where the court held that customary law has progressed over the years in such a way that payment of '*lobola*' in full cannot be an essential requirement for a valid customary marriage.

In *Mabena v Letsoalo,*[56] the court held that in order for a valid customary marriage to exist, an agreement between the two families is required, '*lobola*' negotiations, handing over and the incorporation of the bride into the groom's family home. The court inferred from the facts in *Maloba v Dube that* if parties live together then the bride had been handed over. Customary marriages comprise of two distinct legal actions: there is, on the one hand, the marriage itself, on the other hand, there is the *lobolo* agreement with the handing over of the bride. For the first, the consent of the bride, the bridegroom and the 'guardian' of the bride is required. For the second,

[53] n 2 above, sec 3.
[54] 2016 ZAGPP HC.
[55] 2016 ZAGPPHC 460.
[56] 1998 2 SA 1068 (T),

where the father of the bridegroom is not involved, the consent and agreement of the bridegroom and the guardian of the bride are required; the bride is not involved in the *lobolo* agreement.

In the case of *Mkabe v Minister of Home Affairs and Others*[57] the court held that the full payment of '*lobolo'* and the handing over of the bride by her family to the groom's family is not a requirement for the legal conclusion of a customary marriage in South Africa. All the authorities on customary law accept that only the father of the bride or another male guardian could validly enter into a contract for and receive lobolo. According to traditional customary law the mother of the bride could not be the guardian of her daughter; she was herself under the guardianship of her husband or of her own father or of their successors.

The researcher acknowledges that the granting of permission for women to act as guardian during *lobolo* negotiation constitutes a positive development, since women are now given equal treatment, same as men. The researcher has also observed that there is an observable judicial effort when developing customary law and is mostly based on Section 9, constitutional right to equality.

3.8.2 The practice of Ukuthwala

In South Africa, '*ukuthwala'* is the practice of abducting young ladies, thereafter force them into marriage, usually without parental consent. The practice occurs mainly in rural parts of South Africa, in particular the Eastern Cape and KwaZulu-Natal. The Basotho call it '*Tjhobediso'*. Among the Xhosa and Zulu people, *ukuthwala,* or bride abduction, was once an acceptable way for two young people in love to get married when their families opposed the match. Certain requirements must be met to qualify the custom as '*Ukuthwala'*, namely:

That there must be consent between the parties.
Sexual intercourse is prohibited during this period.
The woman must be of marriageable age.

[57] n 55 above.

> The father of the man must be informed of the presence of the woman in his home and of his son's desire to marry her.
> The man's family must then inform the woman's family that they intend to start marriage negotiations by sending them a message.

According to Nhlapo,[58] a genuine ukuthwala already requires the assent of both the man and the woman under customary law. Major representatives of traditional leadership in the Eastern Cape have offered their own critiques of recent cases of *ukuthwala.* Xhanti Sigcawu, differentiated between *ukuthwala* properly practised and kidnapping. The proper practice, he said, is when the families of the young man and the girl would meet and negotiate and reach an arrangement but it is 'kidnapping' when a man takes a woman without interaction with her parents. In these critiques, the problem outlined about *ukuthwala* is not the young woman or girl's lack of consent, but rather the men's family's failure to gain the consent of the family or the breaching of the culturally appropriate lower boundary on the age of marriage.

In the case of *Jezile v S*[59] *and others,* the court decided that any form of *ukuthwala* that did not satisfy these requirements were invalid and therefore constituted criminal acts. The observance of customary law is important in the South African context and it is important that customary law be preserved, nurtured and respected. The court further held that *ukuthwala* is no defence for crimes of rape, human trafficking and assault with the intent to do grievous bodily harm. This judgment can be applauded as an example of where the experience of a black girl sensitised judges to the harm that can be caused by a cultural practice. Oppression is an act with many faces and is a classic example of different forms of oppression on the grounds of age, race, gender and culture. Black women are uniquely situated at the focal point where these exceptionally powerful and prevalent systems of oppression come together, resulting in gender-specific, and race-specific harm. It is this, multi-layered harm that is highlighted by the concept of inter-sectionalism.

The researcher has observed that the traditional and accepted form of *ukuthwala* is a collusive tactic used by willing lovers to secure marriage discussions. It has been

[58] T Nhlapho 'The role of customary law in South Africa' (2014) 5 (2) *Modern Law Review* 123.
[59] n 41 above, para 10.

regarded as a sweet, romantic, and endearing old tradition in its current form. The researcher further observed that some indigenous people abused this practice to a point where women were taken into forced marriages without their freedom of choice.

The experts emphasized that under customary law, a marriage cannot take place without the approval of the woman's parents. If her family declined the offer, she had to be sent back to her house and compensation for the unsuccessful *ukuthwala* had to be paid. Unfortunately, over time, the practice has changed and adopted a harmful form in blatant disdain for the girl's fundamental rights. Young women or girls are kidnapped and subjected to violence, including sexual abuse and assault, in what the court described as *ukuthwala* in its "aberrant" form; this is criminal behavior covered up as custom. The Constitutional Court in *Mayelane v Ngwenyama*[60] *and another* has already held that consent, albeit in the context of a polygamous marriage, is a necessary requirement for a valid customary marriage, and the court remarked as follows:

> "Given that marriage is a highly personal and private contract, it would be a blatant intrusion on the dignity of one partner to introduce a new member of that union without obtaining that partners consent."

[60] 2013 8 BCLR 918 (CC).

The researcher has observed that the court in the *Jezile case*[61] must be commended for clarifying the principle of ukuthwala. The researcher has further observed that some indigenous people were committing crimes while hiding under the umbrella of ukuthwala. The following discussion focuses on different customary law principles.

3.9 CUSTOMARY LAW PRINCIPLES

3.9.1 Appointment of women to the throne - development in the male primogeniture principle.

The judiciary is duty bound to provide remedies in an attempt to rectify the injustices of the past and promote significant values that underlie democratic society. There have been several objections against the appointment of women to positions of traditional leadership. Current trends indicate that the 1996 Constitution is progressively harmonising customary practices with constitutional values in enabling women to occupy traditional chieftaincy thrones. The examples provided below indicates the changing trends in relation to viewing women as equally capable leaders as men.

In the *Shilubana case*,[62] Ms. “Shilubana, of the Valoyi traditional community,” which is located in the “Limpopo Province of South Africa,” was appointed as chief of her people contrary to the past practice of the eldest son of the previous ‘Hosi’ succeeding his father as the new ‘Hosi’. The resolution that was adopted to confirm her appointment clearly mentioned the constitutional guarantee of gender equality as one of the reasons the community decided to change its laws. Mr. Nwamitwa sought to dispute Ms. Shilubana's appointment based on his purported right as the eldest son of the previous ‘Hosi’. The case ruled in favour of Mr. Nwamitwa in both the “High Court and the Supreme Court of Appeal,” Based on the fact that Ms Shilubana did not welcome the decision of these two courts, An appeal was lodged to the

[61] n 41 above,
[62] n 1 above, para 15.

Constitutional Court. The Court held that Ms. Shilubana should be legitimately appointed as 'Hosi'. The Court indicated the fact that customary law is a living system of law and is not bound by historical precedent. Because of this, it set aside a series of prior decisions that had set tests for determining the content of customary law by referencing to long-standing and historical practices.[63] This court came to the conclusion that the main purpose of indigenous law is to reflect the practices of a particular community. The process of developed of customary law is performed while taking into account constant evolving practices that indicate the current system of norms by which that community has chosen to live.

The researcher has concluded that in the process of developing the above principle of primogeniture, courts are actually completely abolishing it. It should be noted that if females are now allowed to ascend the throne due to principles of equality, it means principles of customary law no longer really exists; they are just 'tools' awaiting decolonization within the confides of the law. It is crucial to enquire, at this stage, whether the abolishment of the customary rule of male primogeniture can be regarded as development as required by "section 39(2)" of the Constitution[64] or merely a rejection of customary law.

3.9.2 The Principle of *Dzekiso* wife in Venda culture

In many communities, like the Venda tribe, only a descendant born from the '*dzekiso* wife' is allowed to ascend the throne. In instances where a child is the eldest son but was not born from the "*dzekiso* wife', such a child is exempted from ascending the throne. In the case of *Mphephu and another v Mphephu and others*, one of the legal questions was whether a child born before his or her parents became king or queen could be recognised as a successor. The argument raised by the first respondent was that Masindi had been born before her father, Dimbanyika, became king. The only requirement is that the successor must be born from a '*dzekiso* wife'. The court

[63] n 1 above, para 28.
[64] n 2 above, sec 39 (2).

held that the applicant's mother, Fhulufhelo, was the official '*dzekiso* wife' and she was married to Dimbanyika according to all the required customs."

The issue of the eldest son failing to ascend the throne because his mother was not a '*dzekiso* wife' was successfully applied in the constitutional court judgement of *Tshivulana Royal Family v Neshivhulana,*[65] where the late Mr. Rasilingwani Piet Netshivhulana was the Headman of Tshivhulana Village. He died in 1976. In 1978, he was succeeded by his son, Mr. Mugoidwa Mutheiwana Wilson Netshivhulana (deceased), who died on 8 September 1992. Immediately after the deceased's burial the Tshivhulana Royal Family convened a meeting and resolved that Mr. Davhana Elias Mulaudzi, the deceased's brother, should be the Acting Headman. According to the Tshivhulana Royal Family, Mr. Mulaudzi was appointed acting headman as the deceased died without an heir because he did not have a '*dzekiso'* wife', or 'great wife'. The firstborn son of a '*dzekiso'* usually succeeds the headman. The court held that only a male child birthed by a *dzekiso* wife qualifies to be an heir to the headman. It can be deduced that a '*dzekiso* wife' has more rights than the so-called commoner wife, therefore, even if commoner wife bares the eldest son, such a son can never ascend the throne. Section 9 of the constitution[66] allows for inequality provided such inequality purports justification and reasonableness.

In this context, a wife who is not from a royal bloodline cannot bear the chief an heir to the throne. Only a descendent born from the '*dzekiso* wife' can become king or queen. In the case of *Mphephu and another v Mphephu Ramabulana and others*,[67] one of the submissions raised by the respondent (Toni Mphephu Ramabulana) was that the applicant is older than the throne and that her mother was not a 'dzekiso wife'.

3.9.3 Consent of spouse to validate second wife's marriage

[65] 2013 8 BCLR 918 (CC).
[66] n` 2 above, sec 9.
[67] 2021 ZACC 43.

It is not a statutory requirement that the first wife's consent is required in an attempt to validated the second marriage, however, it should be noted that, customary marriage differs from tribe to tribe and it always evolve over time.

In *Mayelane v Ngwenyama,*[68] The applicant, in her founding papers, deposed that she concluded a valid customary marriage with Hlengani Dyson Moyana (herein after referred to as the deceased) in the year 1984. The deceased passed away on 28 February 2009. Both Ms. Mayelane and Ms Ngwenyama subsequently sought registration of their respective marriages under "the Recognition of Customary Marriages Act,"[69] although, each disputed the validity of the other's marriage. The applicant's application, at the High court, was aimed at declaring the second marriage between the deceased and the first respondent invalid. Despite the first wife's absence of consent, the court ruled that the deceased's customary marriage to the second wife is legal.[70]

The researcher is of the view that in an attempt to develop the above principle, the court has actually distorted it without over-looking the purpose of the customary law principle. The cultural inequality on this basis is that, it is fair for a wife in a customary marriage to decide whether or not the marriage should be polygamous by way of consent requirement to validate second marriage. The researcher has observed that the main aim of seeking consent of the first wife to validate second marriage is to protect her rights in the marriage.

3.10 CUSTOMARY MARRIAGE IN COMPARISM WITH CIVIL MARRIAGE

A civil marriage refers is defined as follows:

> a legally recognised life-long voluntary union between one man and one woman to the exclusion of all other persons".

[68] 2013 8 BCLR 918 (CC).
[69] n 11 above.
[70] n 68 above, para 26.

On the one hand, a customary marriage refers to a marriage concluded in terms of customary law. In South African law, civil marriages are monogamous in nature, *thus*, as a rule, a party to an existing civil marriage may not enter into another marriage regardless of whether the subsequent marriage is a civil marriage, a customary marriage or a marriage (or civil partnership) under the Civil Union Act.[71] Any marriage (or civil partnership) concluded is in violation of this rule. The position as regards the capacity of a party to an existing customary marriage to conclude a civil marriage, the validity of such civil marriage and the fate of the customary marriage once the civil marriage has been concluded are much less straightforward, inter alia, because of different legislative provisions having applied at different times in the past.

In *Netshituka v Netshituka*,[72] the deceased concluded a civil marriage with M at a date which is not indicated in the judgment of the court. The marriage had to have taken place by 1984, as the spouses were divorced in that year. In 1997, the deceased concluded a civil marriage, this time with the first respondent 'N'. At the time, he was married to four other women in terms of customary law. One of these customary marriages had already been concluded in 1956, which was apparently before the deceased concluded a civil marriage with 'M'. In 2008, the deceased passed away leaving behind a will in which he appointed N as the executrix.[73] One of the deceased's wives whom he was married to under customary marriage and his daughter disputed the validity of the deceased's civil marriage to 'N' as well as the validity of his will.

The appellants alleged that the deceased's civil marriage with 'N' violated section 22 (1) and (2) of the Black Administration Act read with the amendments effected by the Marriage and Matrimonial Property Law Amendment Act. They contended that, by virtue of section 22, a husband in a subsisting customary marriage was incompetent to enter into a civil marriage unless he was marrying his only customary wife. In the

[71] Act 17 of 2006.
[72] 2018 2 SA 1 CC.
[73] as above, para 32.

past, the position was that a civil marriage automatically dissolved a customary marriage, however, in *Netshituka v Netshituka*,[74]

> the first respondent argued that the deceased's customary marriage had automatically been dissolved when he and his first wife (Martha) had entered into their civil marriage. The deceased, therefore, was not married when she entered into a civil marriage with him after the dissolution of the civil marriage to his first wife.

The researcher has observed that in the case of *Netshituka v Netshituka*, there was an observable judicial effort to develop customary law. The issue of a customary marriage being automatically dissolved by a civil marriage was simply because customary marriages were not recognised. "Section 211 of the Constitution"[75] provides that customary law, including customary marriages are recognised. The researcher further suggests that the *Netshituka decision* to decline automatic dissolution of a customary marriage is a judicial effort to develop customary law on the basis that customary marriages are now recognised.

3.11 CONCLUSION

This chapter answered the following question*: Is there an observable judicial effort to develop customary law in recent case law? If so, how?* From the discussions, the researcher concludes that the courts are fulfilling their duties in the development of customary law.

Indigenous people understand and relate to traditional courts much better than the largely imported statutory law used in state courts, as has been stressed 0ut throughout this chapter. For this reason, the researcher contends that traditional council-derived solutions will be more valuable and trustworthy to indigenous people, and that obtaining their consent will be simple when rules like male primogeniture are developed by their local authorities and the community at large. It is implied in

[74] n 72 above, para 38.
[75] N 2 above, sec 211.

this context that traditional courts or royal councils will be better able to implement solutions than Western state courts.

“Customary law has been distorted by highlighting the negative application of the rule of primogeniture while ignoring the fact that this rule emerged with the primary purpose of ensuring that the continued existence of families and groups, prevails.” This distortion highlights the patriarchal features of customary law and minimizes its communitarian ones.

CHAPTER 4

THE OBLIGATION TO DEVELOP CUSTOMARY LAW

4.1 Brief introduction

The previous chapter focused on whether there is an observable judicial effort to develop customary law. As stated in chapter three, courts are more focused on ensuring that both men and women should be treated and receive equal recognition and status. The current chapter will interrogate the legal theory that underpinned selected landmark cases discussed throughout this chapter.

Following the Constitutional Court's judgement of the case of "*Mphephu-Ramabulana and Another v Mphephu and Others,*[1]*"* delivered in 2021*,* the Court set aside the decision to appoint him as king of the Vhavenda traditional council. The Court stayed the withdrawal of certificate of recognition of Mphephu Ramabulana as king of Vhavenda pending the final determination of legal proceedings against Mphephu. On 05 March 2022, the Royal family appointed Mavhungu David Mphephu (better known as 'Japan') as the Regent King of the Vhavenda until such time as the court would declare a final determination regarding the kingship.

4.2 The obligation to develop Customary Law

Section 39 (2) of the Constitution's[2] mandate is highly illuminating because it states:

> "When interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

The preservation of customary law is envisioned as a recognized legal system with parity with common law, but the over-all obligation does not compel the court to develop each and every common law case brought before it. In the case of "*Carmichele v. Minister of Safety and Security and Others*,"[3] the court reiterated this duty by stating that if the common law deviates from the Bill of Rights' goals, the

[1] 2021 ZACC 43.
[2] The Constitution of the Republic of South Africa, 108 of 1996.
[3] 2005 1 SA 580 CC.

court must remedy the situation by modifying the common law.[4] Given that common law and customary law are accorded equal standing, this obligation follows.

4.3 The court's capacity to develop customary law

Using the adaptable nature of existing customary law, South African courts are competent to carrying out the development mission. "The law which is practised by African people in their communities is contrary to western laws stipulated in the constitution. Himonga[5] opines that courts are duty bound to develop customary law, this is in line with section 39 (2) of the constitution[6] which states as follows:"

> "When interpreting any legislation and when developing the common law and customary law, every court, tribunal or forum must promote the spirit purport and objects the Bill of rights"

The researcher has observed that section 39 (2) of the constitution[7] creates a statutory duty upon the court to interpret and develop customary law in alignment with the rights enshrined in the Bill of Rights. The researcher has further observed that some-times development of a principle leads to a situation wherein a principle no longer serve its purpose. For example, with regard to the principle of primogeniture in relation succession of traditional leadership, one of the main purpose for only allowing male persons to be traditional leaders is to ensure that the chieftaincy may not pass to another royal dynasty. The researcher has further observed that cases like the *Shilubana case*[8] has defeated the purpose of the male primogeniture principle.

The researcher concurs with the idea of Ndulo[9] who states that:

> "The guiding principles should be that customary law is living law and cannot, therefore, be static. It must be interpreted to take into account the lived experiences of the people it serves."

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[4] as above, para `6.
[5] C Himonga and E Moore 'Reform customary marriage, Divorce and succession in South Africa' 2017 20 (2) *PER* 341.
[6] n 2 above, sec 39 (2).
[7] n 2 above, sec 39 (2).
[8] 2009 2 SA 66 CC.
[9] M Ndulo 'African customary law, customs, and women's rights' (2011) 18 (1) Indiana Journal of Global Legal Studies 187 (Accessed 25 September 2021).

There are times where customary law goes against the rights in the Bill of Rights that is when interpretation must be applied. "In *Gumede,"*[10] the court was faced with a legal issue to interpret customary law in relation to customary marriages. In particular, the that where in dispute included "Sections 20 and 22 of the Natal Code of Zulu Law"[11] which entitled a close male family member in a customary marriage to have full control of all family properties and all members of the family under his care at the death of the husband. The Court was tasked to modify the position of customary law which was left unchanged. However, efforts to remedy discriminatory defects from customary law have often resulted in distorting it."

4.4 Mphephu-Ramabulana and Another v Mphephu and Others 2021 ZACC 43

Unlike the *Bhe case*,[12] the Mphephu case[13] dealt with succession regarding a traditional leader. Succession in the Vhavenda tribe is led by the male primogeniture principle and despite the fact that the rule has been declared invalid in the *Shilubana case*,[14] there are some groups in the Vhavenda tribe who still believe that a woman cannot be a queen.

The Mphephu case[15] involved the male primogeniture rule, and Clementine Masindi Mphephu was the deceased Chief Dimbanyika's next-of-kin. Her uncle, Mr. Toni Mphephu Ramabulana, would be the most suitable heir according to the official customary law, which called for a male heir. Because she was ineligible to succeed to traditional leadership under the rule of primogeniture, Ms. Masindi Mphephu filed this application under the equality clause.

Ms. Masindi's appearance before the Constitutional Court was solely based on her gender because she was prevented from exercising her birth right as a "Khosi-Khulu." The Constitutional court was tasked with determining whether Mr. Toni was entitled to claim the title of Vhavenda kingship and whether the Vhavenda traditional

[10] 2009 3 BCLR 243 CC.
[11] The Natal Code of Zulu Law.
[12] 2005 1 SA 580 CC.
[13] N\n 1 above, para 15.
[14] n 8 above.
[15] n 13 above, para 13.

authorities' ruling was actually legal. For development purposes, the Court identified three crucial factors to take into account when determining the content of customary law. It placed a strong emphasis on the rules of the community, their history, how they have been applied in the past, and finally the circumstances in which they are used. The Court made it abundantly clear in the case of Mr. Mphephu Ramabulana that although previous practice of.

When deciding whether the Vhavenda traditional community's choice to designate Ms. Masindi Mphephu as "Khosi-Khulu," the Court took into account the legal developments in the community, the institution of traditional leadership being recognized by the constitution, and the right of traditional authorities to amend and develop their own law.

It is important to recognize the progress made for women by the Constitutional Court. "It displayed boldness when it ventured into the 'passive development' of customary law in the *Bhe case*[16] using the flexibility feature, stepping outside of the judicial adjudication in *Bhe.* The Court didn't use flexibility in a conservative manner; instead, it expanded its operational scope beyond what is typically understood by scholars of customary law. The procedure stretched the bounds of customary law well into actual application. For the first time after the Constitution's recognition, such initiatives have advanced the development of customary law. As a result, gender will no longer be a barrier to a traditional leadership position in Vhavenda culture.

The researcher has observed that the Constitutional Court showed bravery when it stepped outside the shadows of the judicial decision in *the Bhe case*, and undertook the ‘passive development’ of customary law using the flexibility approach. The Court was not conservative in the use of the concept flexibility as it prolonged the operation of development via flexibility, beyond its abstract sense.

[16] n 12 above, para 28.

4.5 The Bhe decision

It is crucial to note that the *Bhe case,*[17] focused only on the development of the primogeniture rule only with regard to inheritance. However, the case fell short of fully developing the male primogeniture rule altogether. In what was nothing short of a turning point in the history of customary law, the Constitutional Court rendered two opposing rulings in this case. Nontupheko Bhe, acting on behalf of her young daughters, approached the court seeking a declaratory order that her daughter inherit from their father's estate, Mr. Vuyo Mgolombane.

The researcher has observed that the male primogeniture rule prevented Miss Bhe's children from inheriting because they were juniors and females, as stated in Section 23 of the Black Administration Act.[18] The position of indigenous law with regard to this rule is still unknown. In its majority judgement, the court laboured to establish a balance between the common law principles and the norms of customary law in order to give redress for African women. According to the majority judgement, societal change is evidence that the primogeniture rule in its formal form is irrelevant. The history, character, and importance of the rule, as well as whether or not it constituted discrimination, were all properly taken into account by the court.

The court in the *Bhe case*[19] also held that it was even more difficult to meet the requirements for inheriting. Children born from the marriage typically receive inheritance. Given that such a child is essentially considered to belong to the mother's family, this resulted in immediate ineligibility from inheriting from the father's side. The court further held that in terms of Zulu customary law, the child would adopt the surname of the mother. "Likewise succession of Zulu customary law dictates that extra-marital children are unlikely to inherit. The Court had to address the position of such children. On the subject of the position of female children under succession rules of customary law, both the majority and the minority decisions were in consensus that gender discrimination is unconstitutional.

[17] n 12 above, para 14.
[18] The Black Administration Act 38 of 1927.
[19] n 12 above, para 19.

The Court protected the position of women and children which was safeguarded by the constitutional right to equality and human dignity. The constitutional court acknowledged that the rule of primogeniture was blatantly discriminatory, degrading and unlawful. It is crucial to indicate that this was the only subject where the Constitutional Court judges were all in agreement, as the reform of the male primogeniture became the point of departure. The majority elected not to develop the official rule of succession and proceeded to replace it with common law.[20]

A choice must be made that takes into account the distinction between succession and inheritance if women are to advance in society. Mbatha[21] agrees with Ngcobo J. In light of this, development was the best option for updating the official rule of succession to make it compliant with the Bill of Rights. Ngcobo J. insists that the Court had a general obligation to create the official rule of succession in accordance with the discussion mentioned above. His first argument was that this change would allow the rule to adjust to the community's circumstances, indicating a shift in the context. The Court's lack of this desire was criticized by Ngcobo J, especially because it suggested that the Court was unconcerned.[22]

Ngcobo J. contends that fixing the official rule of succession's flaw rather than eliminating it altogether would be much simpler and have fewer negative consequences. “In particular, because there was a clear opportunity to develop, the Court's decision to abolish the male primogeniture rule was harsh and failed to recognize the constitutional aspirations to preserve the customary law legal system. The main problem, according to Ngcobo J, is that the rule of primogeniture discriminates on the basis of gender, a problem that the court would probably fix by getting rid of the word man.

Despite the *Bhe case*, there was another case which touched on primogeniture with regard to traditional leadership. The case dealt with Tsonga customary law and is discussed in detail below.

[20] n 12 above 26-28.
[21] L Mbatha ‘Reforming The Customary Law of Succession’ (2002) (1) 18 *SAJHR* 259.
[22] n 12 above, para 34-35.

4.6 SHILUBANA V NWAMITWA 2008 9 BCLR 914 (CC)

This case involved the primogeniture rule (a rule which gives preference t/o males). The circumstances which gave rise to this application was that Philia Shilubana (female), was the only descendent of the deceased. Her uncle Mr. Sidwell Nwamitwa would be the most qualified according to succession as the Tsonga people's formal customary law required a male successor. Because she was ineligible to succeed to traditional leadership under the primogeniture concept, Ms. Shilubana filed her claim under the equality clause.[23]

The applicant's Constitutional Court case was grounded on the issue of gender discrimination and equality. The Court identified three significant elements to be considered when determining the concept of customary law for purposes of development. The court focused more on the community's customs and traditions, the historical background of the rule and the manner in which such rule has been practised in the past. In the instance of Mr. Nwamitwa, the court made it plain that while practices in the community was crucial in demonstrating the application of the male primogeniture rule, it was not the only determining factor.[24]

In determining whether the Valoyi traditional community's decision to name Ms. Shilubana as hosi was legal, the Court took into account that the institution of traditional leadership is recognized by the Constitution and that traditional authorities have the right to create and amend their own laws.[25] When the Royal family decided to give the original house its chieftaincy title back, this development was the result.

[23] n 8 above.. "The High Court ruled in favour of Mr. Nwamitwa primarily because the Valoyi tribe did not adhere to African customary law in appointing Shilubana. The SCA decided differently stating that the rule should stand as is and a resolution should be found within the rule. The CC found in Shilubana's favour citing the reasons "official customary law is not fossilized to the point that it is unchangeable and it is not immune to the equality claim." Van der Westhuizen J reiterates. He goes on to mention that South Africa is a signatory of international human rights, this created an obligation to protect the rights of women. Among other reasons he mentions that culture is hostile towards woman's equality, and therefore one must be sacrificed in favour of the other. The practice of culture is subject to the Constitution. Of all the critiques of the case, the most significant was that of the protection of culture by the constitution, should not be done at all costs. It is not absolute."

[24] n 8 above, para 2.

[25] n 8 above, sec para 2.

The Valoyi traditional authorities' actions were deemed to be reasonable, fair, and just by the court.

4.6.1 Difficulties faced in the Shilubana case

Despite the successes achieved by the Shilubana judgement, there were some challenges associated with it. On the contrary, the Court was unsuccessful to show equal treatment of rights and as such Sections 9, 30, and 31,[26] are all equal as there is no hierarchy of rights. The duty to develop customary law primarily belongs to the courts in terms of section 39 (2).[27] This provision imposes that customary law development must consider the objectives of the Bill of Rights, and such objectives include both cultural rights and the right to equality." In addition, Section 39(1)[28] requires the Court to render transparent and understandable value judgments which promote the spirit, purport and object of the Bill of Rights.

The Royal family is an important player in the succession process. It meets as soon as a vacancy arises to choose the next qualified applicant to fill the position. This is due to the fact that the Royal family has a thorough awareness of the family tree, particularly with regard to ancestry, which may go beyond the disputing parties. Following Hosi's demise Richard, The Royal family met and decided that Philia should take over as the future senior traditional leader. This was in accordance with the following Tsonga cultural principles that govern the appointment of a chief: Richard. The Royal family met and decided that Philia should succeed the current chief. This was in accordance with the following Tsonga cultural principles that govern the appointment of a chief:

> "With regard to the Tsonga tribe, a hosi is not democratically elected but is born as a *hosi,*
> The institutions which are responsible for the appointment of a *hosi* are the royal family which are composed of all members of royal family irrespective of gender. The members are introduced into the institution of the royal family gradually as they develop to majority in age. It is the royal family which chooses the *hosi* or acting *hosi*. It then sends the name of the chosen person to the royal council."

[26] n 2 above, sec 9, 30 and 31.
[27] n 2 above, sec 39 (2).
[28] n 2 above, sec 39 (1).

The chances of achieving the development of customary law have changed as a result of the *Shilubana decision*. As a result of the inclusion of another institution during development proceedings, the role of the courts has grown increasingly complex. The two methods for achieving passive development do exist, though. The first method is through the court, as was seen in the *Bhe case*,[29] and the second is by giving the affected community the authority to create their own laws, as was seen in the Shilubana case.[30]

Even though development can also be done in the community, Ntlama[31] insists that the court's role must remain distinct. In light of the mandate in Section 39 (2),[32] it could be argued that the court's role following the development of the traditional authority was the most important. This is based on the idea that, while the community has the right to create its own laws, only the courts have the authority to bring those laws into compliance with the Bill of Rights.

An investigation was conducted in order to determine whether the development of customary law by traditional authorities' could be recognized as law. As was already mentioned, the disagreement arose because Miss Shilubana's nomination by the Royal family was not accepted by all parties. Thus, those who supported the development were vindicated by the Valoyi traditional authorities' decision, which was reached in accordance with Section 211(2).[33]

The Court’s role post development was significant. This is so that the right to equality will be reflected "equally alongside African values," as was intended by the development mandate. The balancing act included the requirement that the African value system not be disregarded when modernizing customary law in terms of equality. The African value system emphasizes the importance of lineage in this situation.

[29] n 12 above, 14-20.
[30] n 8 above, para 8.
[31] N Ntlama ‘“Equality” Misplaced in The Development of the Customary Law of Succession: Lessons from *Shilubana v Nwamitwa* 2009 2 SA 66 (CC)’ *STELL LR* 2009 (2) 375.
[32] n 2 above, sec 39 (2).
[33] n 2 above, sec 211 (2).

In the on-going discussion between collective rights and individual rights, customary law takes centre stage. According to Sachs J's explanation in "*Christian Education SA v. Minister of Education of the Government of SA:*"[34]

> "The rights protected by Section 31 are significant both for individuals and for the communities they constitute. If the community as community dies, whether through destruction or assimilation, there would be nothing left in respect of which the individual could exercise associational rights. Moreover, if society is to be open and democratic in the fullest sense it needs to be tolerant and accepting of cultural pluralism the protection of diversity is not effected through giving legal personality to groups as such. It is achieved indirectly through the double mechanism of positively enabling individuals to join with other individuals of their community, and negatively enjoining the state not to deny them the rights collectively to profess and practice their own religion (as well as enjoy their culture and use their language)."

According to the researcher, the court deserves praise for recognizing Ms. Shilubana's individual right to advance to a leadership position free from gender discrimination. In an effort to prevent lineage erosion, it was necessary to pay equal emphasis to the safeguarding of groups' rights. This is because the institution of traditional leadership cannot continue to exist without bloodline. In light of the chieftaincy title being returned to the legitimate line through Ms. Shilubana, a brief mention of lineage is made. The chieftaincy title and the significance of ancestry to the Royal family, however, are significantly more significant. The Court committed to preserving this institution, which is rooted in lineage, when it recognized traditional leadership as a special institution. Because "kings are born and not elected," it is crucial to understand that there are no elections organized for the community to choose a hosi. So, it's important to introduce women as hosi in a responsible manner.

Ntlama[35] contends that in order to preserve the importance of the chieftaincy, the male primogeniture rule in the succession to traditional leadership should be changed. Primogeniture must be given significance in order to be changed in a way that recognizes and accommodates women.

[34] 1998 12 BCLR 1449 (CC).
[35] Ntlama (n 31 above) 250.

The study has found that the Valoyi community's historical practices put the male primogeniture rule at the centre of succession. Understanding the nature and operation of the rule within its original context was made possible in large part by this prior practice. The patrilineal succession system thus served a variety of functions. These consist of:

i. The maintenance and defence of the chieftaincy title.
ii. The male heir made sure the royal bloodline, which gave them their identity, remained intact.
iii. It promoted marriage values by enticing young women to have families of their own by encouraging them to have children and pass down their surname.
iv. The continuation of lineage would always be certain, making the future of succession predictable.

The researcher has also noted that, according to the primogeniture principle, the problem of determining future lineage did not exist in the past. The progress of a king or queen was ensured by the male heir. The "next qualifying male" rule was used to determine eligibility. Despite the problem of a suitable male, the communities' legal reforms made it possible for a woman to be chosen as a king or queen. As it would be simple for the chieftaincy title to move to another family by virtue of marriage, the introduction of a woman as a traditional leader introduced uncertainty for the future of succession.

The court did not change the importance of lineage despite the changes in the community that recognized women as equal successors. "Ntlama[36] contends that the way in which development took place, which left the succession's future unclear, undermined the value of lineage in Africa. As a result, the Court's actions did not demonstrate a desire to protect this institution. In the *Bhe case,*[37] Ngcobo J. advised that courts must take into account the positive elements of the official rule when developing customary law. The installation of a female traditional leader had caused doubt about future succession, thus the Court wanted to find a beneficial aspect that can be changed.

[36] Ntlama (n 31 above) 60.
[37] n 12 above.

However, the court did not define gender neutral in a precise manner. Hosi Philia Shilubana effectively possesses all the authority and responsibilities that a senior male traditional leader would be entitled to. As a result, the next qualifying Nwamitwa is the standard for establishing lineage with regard to a female senior traditional leader in line with development. Such a standard takes into account the highly regarded lineage in the African value system. Additionally, it complies with the rule that kings are born, not chosen. So, using the "next qualifying Nwamitwa" as a benchmark, at the conclusion of Miss Shilubana's term.

4.7 Limitations to development

As discussed above, there are judicial restrictions which endanger the "passive development" of official customary law after recognition. These restrictions include rigid judicial attitudes, a lack of judicial knowledge of customary law, and its replacement with common law.

i. Inflexible judicial attitudes

In accordance with the “Constitution's normative vision,” Sections 8 (3)[38] and 39 (2)[39] should both account for the emergence of customary law; however, the former is silent and only refers to common law emergence. Ozoemena[40] suggests that because this unilateral reference to common law establishes its supremacy, the judiciary must be purified of such judicial attitudes in order to realize the Constitution's intended goals. To make official customary law "readily ascertainable," it used to be partially codified in the past. This procedure might be said to have set off the official version's distortion. The majority of the Court's decision in the *Bhe case*[41] argued against development by making the following points:

> “There is however insufficient evidence and material to enable the Court to do this. The difficulty lies not so much in the acceptance of the notion of “living” customary law, as distinct from official

[38] n 2 above, sec 8 (3).
[39] n 39 above, sec 39 (2).
[40] R Ozoemena ‘Living customary law: A truly transformative tool?’ (2016) http://www.saflii.org/za/journals/CCR/2016/8.pdf (Accessed 07 May 2022).
[41] n 12 above.

> customary law, but in determining its content and testing it, as the Court should, against the provisions of the Bill of Rights."

The Court was unable to acknowledge that the present version of customary law was dynamic and flexible in nature rather than possessing the 'readily ascertainable' feature that the official version did. Despite their warm embrace of the living customary law, the courts had been trained to accept formal law that could be readily tested, and because of their unwillingness to accept the invitation to develop, they were unable to trust the spontaneous developments that had taken place in the communities. The majority decision in the *Bhe case*[42] was supported by conventional beliefs and attitudes regarding the treatment of customary law, which made the judiciary's legal conservatism clear.

ii. Inadequate judicial understanding

The judges of the constitutional court in the majority decision exhibited lack of sufficient understanding of customary law. "Himonga[43] claims that the efforts of the majority judgment in the *Bhe case*[44] did not amount to an interpretation of the issues before the court, rather "the Intestate Succession Act"[45] was brought in as a solution without due consideration of the grounded reality". The researcher has examined that the Court failed to consider whether the in-fighting law was based on customary law of succession or inheritance. Mnisi-Weeks notes in agreement as follows:

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[42] n 12 above.

[43] C Himonga (n 5 above). ".The objective was to discover the gap between the law of the state and the living law of the people, practised on the ground post the *Bhe* decision. The results of this study agree with the minority judgement by Ngcobo J. She details an encounter with a polygamous family where the husband is deceased. When she enquired who owns the deceased's property, the widows positively replied that it was them. They also added that the male primogeniture (the eldest son) still existed in his oversight role, without diminishing its ownership. The wives admitted that this right to property did not exist in isolation, that rather it was coupled with the responsibility to care for all the children, in the absence of their father. The safeguard was that should the wives wish to leave their marital home at any point, they were free to do so provided that the inheritance is left behind, as the children would also remain. In contrast, the impact of the importation of the Intestate Succession Act showed varying results. The rule related to distributing the inheritance to intestate beneficiaries proved problematic. It insisted that for estates smaller than R125 000, all beneficiaries including the spouse and the children will receive equivalent child portions. Mnisi-Weeks notes how this rule is applied blindly, regardless of the uniqueness of the polygamous family, since most of the estates in the rural communities are less than R125 000. She explains how a wife with one child, receives the same amount as a wife with several children, and depending on the number of wives and children altogether, the child portions received by everyone are undignified."

[44] n 12 above.

[45] Act 81 of 1987.

> *"Likewise, it shows the need for improved tools for state courts to understand and give expression to what is happening in terms of living customary law so that they can develop official customary law with reasonable understanding."*

The majority ruling erred in confusing succession and inheritance, which not only revealed the judges' ignorance of the subject but also was erroneous. Ngcobo J took the opportunity to refute this notion early in his argument. Contrary to the Western understanding of the "heir," he continued, the indalifa cannot choose to claim the right to inherit property, apart from all other obligations. It is extremely worrying that a judiciary that still views customary law through the lens of common law controls the future of the development of customary law.

The Court's decision in Bhe to replace common law with customary law was regrettable and limited. "The majority judgment neglected to take into account that, after a protracted period of judicial marginalization, customary law is still being restored to health. The Bhe decision runs counter to transformation and seriously calls into question the constitutionally guaranteed parity between common law and customary law.

The "Intestate Succession Act"[46] was clearly not the best option in this case for the reasons listed below. An unprepared society was subjected to the Western policy known as "the Intestate Succession Act." It's interesting that the statute had to be changed in order to accommodate African estates because it was initially designed to suit "all" intestate estates but excluded those of Black Africans. It could be argued that the Court would have done better to invest in creating the formal succession rules, which were already tailored to the lived circumstances of Africans. Regarding the importation, Mbatha state the following:

> *"Although the amendment will play an important role in improving the property rights of individuals under customary law, it will not address all succession problems under customary law. Its enforcement will interfere with working practices on the ground, which cannot translate easily into legislation, but which reflect positive cultural values."*

[46] Act 81 of 1987.

"Himonga[47] heavily relied on Mnisi-Weeks's research, which revealed how "the Intestate Succession Act" operated. She contends that succession patterns at the local level exhibit uniformity in their influence on people's lived experiences. These results support Ngcobo J's judgment that it was reasonable and advantageous for a diverse legal society. The transplantation of the Intestate Succession Act presents a difficult conundrum, but Mnisi-Weeks suggests that in an ideal world, the courts should assist the community's agency in its efforts to accomplish its goals, provided that it does so within constitutional bounds. Despite the shifting dynamics of the family, Mbatha argues for the inclusion of all family members because "the broad definition of 'family' in terms of African values has not changed.

The transplantation of the Intestate Succession Act presents a difficult conundrum, but Mnisi-Weeks suggests that in an ideal world, the courts should assist the community's agency in its efforts to accomplish its goals, provided that it does so within constitutional bounds. Mbatha[48] supports the inclusion of all family members because, "the broad understanding of 'family' in terms of African values has not changed, despite the changing circumstances of the family unit, but such appreciation was not reflected in the majority decision of the Court."

A strictly traditional alternative might have been best suited to the particular case of customary law when evaluating the options available to the Court, but it would have also faced difficulties taking into account the context of a hybrid modern society. The general dispute resolution procedure that existed within the family structure could be explored, and Ngcobo J had noted that parties could only turn to the courts after that procedure had been used up or been shown to be ineffective. He acknowledges that this course of action has drawbacks of its own.[49]

The foundation of Ngcobo J's argument comes from the Intestate Succession Act's[50] implementation "only," after deciding that the male primogeniture rule's development was not ideal. The operative word here is "only," which seems to imply a hierarchy of

[47] Himonga (n 5 above) 105.
[48] Mbatha (n 21 above) 283.
[49] n 12 above.
[50] n 45 above

importance where the Intestate Succession Act[51] is given priority and is the only appropriate response to the situation. Furthermore, given the distinctions and differences between the two legal systems, it should not be possible to simply replace one with the other if common law and customary law are truly on an equal footing following the Constitution's formal recognition of customary law. In his judgment, Ngcobo J. considered the majority's order for a substitution.

4.8 CONCLUSION

This chapter covered the forms of development used in the case of *Mphephu-Ramabulana and Others v. Mphephu and Others.*[52] The researcher draws the conclusion that South African courts have a choice between two types of development and are aware of their general obligation to advance customary law. The alternative of development in the passive sense has caused unrest in the judiciary. The reason for this is that in order to determine the content of a development that complies with the people's living customary law, an investigation of the affected community is required. The *Mphephu-Ramabulana v. Mphephu and Others*[53] case was crucial in demonstrating the contradiction between the law of the courts and what is written in statutes.

[51] n 45 above.
[52] n 1 above.
[53] n 1 above.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 CONCLUSION

Customary law is legitimately recognized as a legal system in South Africa under the current constitutional framework, but the conflict between customary law and the Constitution has not yet been resolved by the courts. The court's function is therefore more important than ever because it is mandated to ensure the interpretation and development of customary law in addition to its dissection. The *Shilubana case*[1] helped to finally bring the Constitution's vision to life, but there have been obstacles along the way. The development of customary law has been hampered by legal conservatism and the requirement to import the Constitution and its core principles.

To sum up, chapter one served as a brief introduction of the research study which was intended to give an overview of the role played by the judiciary in the development of customary law in South Africa. The research is based on the premises that, since the recognition of customary law, courts are faced with a huge duty to ensure that customary law rules are in line with the Constitution. As a result of this, it is not clear whether courts are developing customary law or they are simply just distorting it.

This research answered the following research questions: firstly - What is the legal framework of customary law in the Republic of South Africa? Secondly - Is there an observable judicial effort to develop customary law in the recent case law? If so, how? Lastly - What are the forms of development employed in the *Bhe case*[2] *and* other selected cases?

Briefly, chapter two discussed the past and present position of customary law, the nature of customary law, sources of customary law, among others. The research discovered that, unlike the current version of customary law after the coming into

[1] 2009 2 SA 66 CC.
[2] 2021 ZACC 43.

effect of the 1996 Constitution,[3] previous customary law operated independently and was not subject to any scrutiny. Only after the enactment of Section 39 (2)[4] which empowers the courts to develop customary law that the option of removing customary law principles has been practiced for many years.

The third chapter examined whether there is an observable judicial effort to develop customary law. The researcher examined different customary law principles and tried to single out the court's contribution in the development of customary law.

The conclusion of this chapter is that courts have missed opportunities to develop customary law. This is because traditional courts are much easier for indigenous people to understand and relate to than the common law, which was largely imported, or the statutory law used in the High court. For this reason, the researcher contends that traditional council-derived solutions will be more valuable and trustworthy to indigenous people, and that obtaining their consent will be simple when rules like male primogeniture are developed by their local authorities and the community at large. Therefore, it is suggested that traditional courts or royal councils will be better able to implement solutions than the Western High Court.

The fourth chapter discussed the obligation to develop customary law in relations to forms of development employed in selected cases. The researcher concluded that courts are duty bound to develop customary law. This is to ensure that customary law is brought in aligned with the constitution. The researcher came to the following conclusion, that customary law has become 'constitutional customary law'. The *Bhe case* which discussed the male primogeniture principle revealed that it is unconstitutional and creates disequilibrium for males to be preferred over females, therefore, such a principle violates the right to equality. This case, although, it involved Tsonga customary law, that a female shall never be a queen (Hosi), the approach in the *Bhe case* was followed in the *Shilubana case*[5] where a female was inaugurated as senior traditional leader. The intervention by the courts to fully recognize women's rights led to the evolving of the customary law and closing the

[3] The Constitution of the Republic of South Africa, 108 of 1996.
[4] as above, sec 39 (2).
[5] 2008 9 BCLR 914 CC.

gaps that undermined women's rights and exposed the Recognition of Customary Marriages Act[6] in its limited enforcement of gender equality.

Chapter five, the current chapter focuses solely on conclusions for the whole study as well as making recommendations. From the findings the researcher came to the following conclusion:

Having discussed the role played by the judiciary in the development of customary law in South Africa, it is safe to admit that section 39 (2) of the Constitution[7] makes it peremptory for courts to develop customary law in a manner which conforms with the Constitution. The researcher has discovered that the courts have missed an opportunity to develop customary law. Courts are just simply declaring laws and conduct inconsistent to section 2 of the 1996 constitution.[8] These are based on the fact that the High court has limited knowledge of the different sets of customary laws rather than the workings of traditional council courts. This has created a dilemma that the High court will not be in a position to take informed decisions as they do not have enough resources as well as a comprehensive understanding of the customs themselves.

5.2 Recommendations

The researcher recommends that customary law related matters should be dealt with by traditional council courts as courts of first instance when dealing with traditional matters. The reason is because these courts have a better understanding of different sets of customary law principle and they are in a better position to take a just and informed decision. It should however be taken into cognisance that traditional council courts have jurisdiction over people who stay within the court's area of jurisdiction. The exception to this recommendation should apply in instances where customary law users do not reside within the jurisdiction of any traditional council court. In such instance, the High court would be a court of first instance. In such dealings, it is

[7] n 3 above, sec 39 (2).
[8] n 3 above, sec 2.

advisable for the High court to consult a traditional council court of the involved people's particular council for better understanding.

The study also recommends intense incorporation of customary law in legal education to equip legal practitioners.

WORD COUNT (FOOTNOTE AND CONTENT): 37 283

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