

INTESTACY RIGHTS OF WIDOWS IN SOUTH AFRICA: HAS CUSTOMARY LAW BEEN OPPRESSIVE?

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INTRODUCTION

South Africa has a kaleidoscopic variety of races and customs. Following the 'Apartheid' era the South African Constitution¹ created legal dualism in the realm of private law, including the law of intestacy. The first system of intestacy was governed by a hybrid of British Common law and Roman-Dutch law whilst the second system related to the principles of customary law which are practised across many black tribes in South Africa. Since then, the South African judiciary and legislature have shifted their focus from ensuring cultural autonomy towards preserving the rights of women. This is illustrated by the decision in *Bhe & Ors v Magistrate Khayelitsha & Ors* which resulted in male primogeniture being abolished in its entirety because of customary law's alleged discrimination against widows. This thesis will challenge the mainstream western argument that traditional customary law has been oppressive against the intestacy rights of widows. This is illustrated by the fact male primogeniture in African customary law ensures the maintenance and up-keep of widows. The thesis will also demonstrate the development of customary intestacy law to the point where the *Bantu* tribes and *Kwa-Zulu* tribes value the opinion of widows on how an estate should be administered. Furthermore, this thesis will challenge the perception of polygamy as diminishing the value of a widow's share of her deceased husband's estate. It will be shown that polygamy is generally practised by the wealthiest men of a given tribe and this in turn is advantageous for widows' maintenance and up-keep. Throughout this thesis it will be shown that South African common law mechanisms are not best placed to determine whether customary intestacy law is discriminatory towards widows. This is because customary law is based on ensuring the well-being of the tribe or extended family as opposed to the common law which attempts to protect the rights of the individual or immediate family. This thesis will confine itself to heterosexual relationships.

A Brief Explanation and History of Legal Dualism

At this point of time, both tribal and non-tribal people in South Africa are subject to the *Intestate Succession Act 1987*.² This was a result of the *Bhe*

¹ *Constitution of the Republic of South Africa* (Date of Commencement: 4 February 1997).

² M. Meyer, Department of Justice and Constitutional Development, *An Overview on the Distribution of an Estate of Person Dying with or without a Will* (South Africa, 2011), p 8.

decision which abolished customary intestacy law, declaring practices such as male primogeniture as discriminatory against women, particularly widows. Under the *Intestate Succession Act*, the distribution of the estate is determined on a hierarchy in accord with blood status, except if the spouse is still alive, then he or she inherits the estate, along with other blood descendants.³ As will be explained later, this creates a problem for tribal societies where they are expected to adhere to an intestacy system which is concerned with the *distribution* of an estate to different individuals. Rather tribal societies under traditional customary law do not *distribute* the estate but pass it in whole to a male heir who is responsible for ensuring the well being of his whole extended family, especially widows. This thesis will highlight how the *Bhe* decision was misguided and that customary intestacy law was not discriminatory against widows.

It is first important to comprehend historically how customary intestacy law was treated by South African law. This is important because it reflects the ability of the two legal systems to co-exist. From 1806 onwards (since British colonisation) there was recognition of customary law, but it was subservient to the common law.⁴ This is substantiated by Visser who argues that throughout most of the Dutch and British colonial period, customary law was treated as a 'step-child in the South African legal system.'⁵ T W Bennett argues there was the belief amongst non-tribal people that only the Roman-Dutch or Common law was a civilised legal system.⁶ In 1927 (after the end of Colonial rule) the *Black Administration Act* was introduced to apply towards black tribal people, with section 11(1) giving universal recognition of customary law.⁷ The act also led to the introduction of Native Courts that were used to determine customary law disputes.⁸ However, in the 1980s these courts that specialised in customary law were abolished by section 54A(1) of the Magistrates Court Act.⁹ Accordingly, the Constitutional Court was faced with the challenge of interpreting customary law, although the judges in these courts were not trained in analysing customary law. Customary law was formally recognised in 1997 by the implementation of a new Constitution of South

³ Section 1(c)(i), *Intestate Succession Act 1987* (South Africa).

⁴ C. Rautenbach, 'South African Common and Customary Intestate Law of Intestate Succession: A Question of Harmonisation, Integration and Abolition', (May 2008) 12(1) *Electronic Journal of Comparative Law*, p 3.

⁵ D. Visser, 'Cultural Forces in the Making of Mixed Legal Systems', (2003-04) 78 *Tulane University Law Review*, p 74.

⁶ T W Bennett, *The Application of Customary Law in South Africa* (Juta & Co; Cape Town, 1985), p 40.

⁷ Section 11(1) *Black Administration Act 1927* (South Africa).

⁸ C. Rautenbach, 'South African Common and Customary Intestate Law of Intestate Succession', p 3.

⁹ Section 54A(1) *Magistrates Court Act 1988* (South Africa).

Africa.¹⁰ However, under section 211(3) customary intestate laws were subject to the Constitution.¹¹ It is important to note that customary law is unwritten and was practised well before its codification. This system was followed by all tribes in South Africa prior to the *Bhe* decision.

The *Bhe* decision rendered male primogeniture unconstitutional because of its alleged discriminatory impact upon women, especially widows. This in turn partly contributed to the *Repeal of the Black Administration Act 2005* and laid the foundation for the *Gumede*¹² decision which rendered the *Kwa-Zulu Natal Code* as unconstitutional on the grounds of gender discrimination. Marius de Waal argues that in the interim period (between the *Bhe* decision and the creation of new customary intestacy legislation) the customary succession system has been deemed unconstitutional because of its discriminatory nature, including towards widows.¹³ This is corroborated by the fact The South African Law Reform Commission outlined that section 9 of the Constitution required South Africa to satisfy its obligations under the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).¹⁴ Thus, the South African Government had to amend any of its laws that infringed upon the principle of gender equality. Article 16(1)(h) of the Convention, for instance, obliges states parties to take all appropriate measures to ensure the 'same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property.'¹⁵ In fact, Bennett and Peart advocated that customary law would gradually and inevitably be reformed to fit the received law mould.¹⁶ Despite the fact these legal scholars formed their opinion in 1983, the decision of *Bhe* and the *Repeal of the Black Administration Act* substantiates their view. Nonetheless, it will be illustrated that traditional customary law protected widows in intestacy even if they had no legal right to own property.

Arguably, it was inappropriate for the South African courts to judge customary law matters, particularly when the members of the court could not comprehend tribal culture. South African law is inherited from a hybrid of British Common Law and Roman-Dutch Law. The concept of providing

¹⁰ Section 211 (1), *Constitution of the Republic of South Africa* (Date of Commencement: 4 February 1997).

¹¹ Section 211(1) *Constitution of the Republic of South Africa* (Date of Commencement: 4 February 1997).

¹² *Gumede v The President of South Africa* [2008] ZACC 23.

¹³ South African Law Reform Commission, Report Project 90, *Customary Law of Succession*, (2004), p 24.

¹⁴ South African Law Reform Commission, Report Project 90, *Customary Law of Succession*, (2004), p 24.

¹⁵ South African Law Reform Commission, Report Project 90, *Customary Law of Succession*, (2004), p 24.

¹⁶ T W Bennett & N S Peart, 'Dualism of the Marriage Laws in Africa', (1983) *Acta Juridica*, p 152.

for the widow is derived from Roman law where a widow's stable economic position is ensured through the award of one quarter of her deceased husband's estate (*quarta uxoria*). Roman law also promoted the notion of free testamentary disposition, whereas African customary law generally imposes 'forced succession' or what is commonly referred to as intestacy. Customary intestacy law has the focus of providing for the extended family or community, as opposed to preserving the rights of individuals. The tribal system is based on one person being responsible for the estate to ensure the consistent and fair use of the deceased's estate. Arguably, the Constitutional Court in *Bhe* and then subsequently the legislature in repealing the *Black Administration Act* were misguided in their decision to abolish customary intestacy law.

B What Constitutes a Widow for the Purposes of Intestacy

A significant problem that the Constitutional Court has faced, is determining who can be classified as a widow for the purposes of intestacy. In the case of *Mthembu v Letsela* the eldest male heir (in this case the deceased's father) claimed that he was not obliged to provide maintenance for the deceased's widow and her minor daughters. The deceased's father was customarily obliged to ensure the 'up-keep' and maintenance of the deceased's wife and children. In this case the Constitutional Court of South Africa upheld his claim on the basis that the woman claiming to be the widow of the deceased was not his spouse for the purposes of intestacy because the *lobolo* (bride payment) had not been paid in full.

Common law courts have interpreted customary law marriages to be ambiguous hence arguing that it is relatively simple for people to dispute the existence of a customary marriage.¹⁷ This in turn suggests that widows would not acquire maintenance from their deceased spouse's estate. Although not all tribes follow the same set of customary marriage laws, the general notion is that *lobolo* (sometimes referred to as *lobola*) must be paid for a bride.¹⁸ Traditionally, the husband or the husband's family pay a certain price for the bride- referred to as "*lobolo*" (vaguely similar to Islam and many other cultures). In *Mthembu* it was confirmed that the agreed *lobolo* price was R2000 but only a R900 deposit had been paid.¹⁹ The Constitutional Court's misunderstanding of what constitutes a customary marriage led to the court concluding that there was no valid customary marriage because the full *lobolo* price had not been paid. Ironically, the common law which has opposed customary intestacy law on the ground of discrimination to women has arguably exacerbated discrimination towards

¹⁷ Andrew P Kult, 'Intestate Succession in South Africa: The 'Westernisation' of Customary Law Practices within a Modern Constitutional Framework, (2000-2001) 111 *Indiana International and Comparative Law Review*, p 710.

¹⁸ *Mthembu v Letsela* (2000) 3 SA 867 at [17].

¹⁹ Isabel Moodley, 'The Customary Law of Intestate Succession', *Doctoral Thesis at the University of South Africa*, (November, 2012), p 80.

women in this case. If customary law was left to its own devices the case of *Mthembu* may have been decided differently. The court decided that the marriage was not a customary marriage because the full price of the agreed *lobolo* had not been paid.²⁰ This meant that the widow and her daughters were not eligible to claim maintenance from the deceased's estate, including living in the family home. Despite this, customary law specialist, Janse van Rensburg argues that the mere *agreement* to pay *lobola* constitutes a customary marriage.²¹ This is corroborated by the 1950s case of *Ngcongolo*²² and by *Bhe*. Both cases suggest that *lobolo* does not have to be paid before the consummation of the marriage. However, the cases are not clear about at what point after consummation the full amount of *lobolo* has to be paid. Nonetheless, T Venter and J Nel argue that often the *lobolo* is paid in full when the eldest daughter of the couple is "*loboloaed*" or agreed to be paid by for a suitor or his family.²³ The Constitutional Court's ill founded view of customary marriage actually resulted in discrimination towards widows of intestates, as opposed to customary law itself being discriminatory. Although *Bhe* was decided after the case of *Mthembu* the concept of what constituted a marriage was discussed in obiter.²⁴ Accordingly, the court's view in *Bhe* on *lobolo* should not be binding upon subsequent Constitutional courts.

MALE PRIMOGENITURE: CONSULTATION WITH WIDOWS

Most tribes in South Africa have a customary law that succession can only continue through the male line, what is referred to in Western Civilisation as 'male primogeniture.' AJ Kerr assessed and defined male primogeniture as:

'On the death of a Native, his estate on his eldest son or his eldest son's eldest male descendent. If the eldest son has died leaving no male issue, the next son, or his eldest male descendent inherits, and so on through the sons respectively.'²⁵

In 2008 the Constitutional Court of South Africa declared that the customary prohibition of widows' owning of property contradicts the South African Constitution. Essentially, it declared that primogeniture was not a permissible form of intestacy. Although the Constitution prevents any

²⁰ *Mthembu v Letsela* (2000) 3 SA 867 at [18].

²¹ Janse van Rensburg, '*Mthembu v Letsela*: The Non-Decision', (2001) 4 *Potchefstroom Electronic Law Journal*, pp 9- 10.

²² *Ngcongolo v Parkies* (1953) NAC 103 at [104-105].

²³ J Nel & T Venter, (2005) 98 '*African Customary Law of Intestate Succession and Gender in Equality*', *Tydskrif vir die Suid-Afrikaanse Reg*, p 86.

²⁴ *Bhe & Ors v Magistrate Khayelitsha & Ors* (2005) (1) BCLR 1 at [551].

²⁵ *Nzimande v Nzimande and Another* [2005] 1 All SA 608 at [631 E-F].

type of gender discrimination, South Africa's Bill of Rights (which is located in Chapter Two of the South African Constitution) outlines that all cultures and their customs must be preserved.²⁶ Primogeniture is embedded in many tribal cultures. Western culture has characterised any society practising male primogeniture as discriminatory against women. However, anthropological research demonstrates that this is a simplistic perspective to adopt and that men have a significant burden placed upon them to ensure the well being of their family.

It is necessary to observe and assess anthropological field research because customary law is unwritten. Seymour's research revealed that the family head is solely responsible for the support and maintenance of the entire family, including any debts or damages awarded against them.²⁷ In the case of *Gumede*, Moseneke DCJ presented a simplistic view of a customary intestacy law, suggesting there was unfair discrimination towards women because the family head (who is generally a male) under the *Kwa-Zulu Natal Code* and *Natal Code of Zulu Law* has complete ownership of all family property.²⁸ The honourable judge did not take into account the significant burden imposed upon men in tribal South Africa. In addition, the codified version of customary law is not necessarily an accurate depiction of how intestacy matters are administered. A widow under customary law does not bear the burdens of the male heir in ensuring that all debts are paid but could demand to be looked after in terms of shelter and basic necessities by the deceased husband's estate. This is substantiated by Bekker's anthropological research conducted in 2011 which revealed that the monetary needs of widows and children dictated what was to be done with the assets of the deceased.²⁹ Similarly, the Kwa-Zulu Natal tribes practise male primogeniture, but widows are still entitled to maintenance from their deceased husband's estate.³⁰ Moreover, the successor had to consult the widow prior to the sale of a property within the deceased husband's estate.³¹ The consultation was required by African customary law in many Kwa-Zulu tribes. The male heir could not simply disregard what the widow said, as he had to satisfy the widow's basic needs.³² It reveals that although the male heir has legal ownership over a deceased's estate, significant consultation with the widow(s) must take place concerning the

²⁶ Section 31, *Constitution of the Republic of South Africa* (Date of Commencement: 4 February 1997).

²⁷ JC Bekker, *Seymour's Customary Law in Southern Africa*, (Juta Legal & Academic Publishers; Cape Town, 1989), pp 112-113.

²⁸ *Gumede v The President of South Africa* [2008] ZACC 23 at [17]; Section 20, *Natal Code of Zulu Law 1987* (South Africa).

²⁹ JC Bekker & DS Koyana, 'The Judicial and Legislative Reform of the Customary Law of Succession', 2012 45 (3) *De Jure*, p 570.

³⁰ JC Bekker, NJJ Olivier, NJJJ Olivier & WH Olivier, *Indigenous Law* (Butterworths; Durban, 1995), p 161.

³¹ Bekker et al, *Indigenous Law* (1995), p 161.

³² Bekker et al, *Indigenous Law* (1995), p 162.

affairs of the estate. The WLSA and other women advocacy groups may argue that mere consultation with widows does not ensure that the male heir will exercise their views. However, the views of the widow(s) had to be followed to the extent that basic necessities were provided for the widow(s) and any minor children they had.³³

It is important at this point to also take into account the view of Aninka Claassens who argues that her own study of various field researches revealed that:

“There is a range of historical and ethnographic accounts that indicate that women, as producers, previously had primary rights to arable land, strong rights to the property of their married houses within the extended family, and that women, including single women, could be and were allocated land in their own right. Furthermore there are accounts of women inheriting land in their own right. However, Native Commissioners applying racially based laws such as the Black Land Areas Regulations and betterment regulations issued in terms of the South African Development Trust and Land Act repeatedly intervened in land allocation processes to prohibit land being allocated to women.”³⁴

This suggests that common law mechanisms actually deprived widows and other women of their proprietary rights. Codified customary law in the form of the Kwa-Zulu Natal Code actually did this, failing to provide for a communication between the male heir and the widow on how the estate should be administered.

Arguably, a system of male primogeniture does give a male significantly more power than a female. For example the male head is entitled to any earnings of widows under his family and the *lobolo* paid for a woman in his family.³⁵ However, Seymour makes the argument that the house successor is to consult the widow in all matters concerning the administration of the house property.³⁶ This was established in quite an old South African case, *Kumalo v Estate Kumalo*³⁷ where the court argued that if the widow remained in the homestead of her deceased husband she was entitled to support out of the estate for the rest of her life.³⁸ Under customary law the widow can prevent the successor from impoverishing the house or estate.³⁹ Admittedly, Seymour conducted his research primarily on the Bantu tribes in the late 1960s. However, if such an obligation exists in the Bantu tribe in the 1960s, it could very well exist in many tribes today. This is corroborated

³³ Bekker et al, *Indigenous Law* (1995), p 162.

³⁴ A. Claassens “Women, Customary Law and Discrimination: The impact of the Communal Land Rights Act”, (2005) *Acta Juridica*, p 42.

³⁵ Bekker et al, *Indigenous Law* (1995), p 148.

³⁶ S M Seymour, *Bantu Law in South Africa* (Sweet & Maxwell & Juta & Co Ltd; Cape Town, 1970), p 277.

³⁷ *Kumalo v Estate Kumalo*, 1942 NAC (N&T) 31.

³⁸ *Kumalo v Estate Kumalo*, 1942 NAC (N&T) 31 at [46].

³⁹ Seymour, *Bantu Law in South Africa*, p 277.

by the fact that anthropological research by Tracey Higgins in 2007 revealed that the sub-headmen of the Ncengane community as well as the Chief of the Keermont Village were required to discuss intestacy matters with widows.⁴⁰ Clearly widows are not entirely discriminated against in the affairs of their deceased husband's estate.

A Purpose of Intestacy

A Department of Provincial and Local Government Report revealed that the family home in customary law is not perceived as having any monetary value.⁴¹ Especially, if the deceased was the head of a tribe, meetings between elders would have been held in his house.⁴² It suggests that although the house is lived in by the tribal head and his family, the property has a significant communal value independent of money. Arguably, the legislature and judiciary do not have an adequate understanding of the meaning of property in tribal areas and are perhaps not in the best position to pass judgment on whether customary intestacy law is discriminatory towards widows. In common law intestacy every asset of the deceased is given a monetary value and is attached solely to the person who owns the property. Thus, the estate can be transferred more easily to a widow who lives in a common law society as opposed to a customary law community.

B The Need to Acquire the Opinions of Widows

Perhaps, the Constitutional Court needed to acquire the perception of a wide range of women from the tribe of *Bhe* as well as other tribes before abolishing customary intestacy law. If the women generally were of the opinion that male primogeniture did not preserve their best intestacy interests, then there may have been a basis to transform the law. However, the perception of these women may have been heavily influenced by men in the tribes, as Moodley argues that tribal societies are quite patriarchal.⁴³ Nonetheless, the court should not have radically changed intestate customary law on the basis of one case. This is because the case did not analyse how in customary law, male primogeniture is aimed at preserving the well being of the whole family. It did not explore the issue of how a tribal leader's property could be needed by the community and for this reason should not be solely owned by the widow. Common law intestacy is based on a 'nuclear' family with two parents and a few children,⁴⁴ but in customary law, property is often community owned and thus the family is

⁴⁰ Tracy E. Higgins, 'Constitutional Chicken Soup', (2006-2007) 75 *Fordham Law Review*, p 718.

⁴¹ Bekker & Koyana, 'The Judicial and Legislative Reform of the Customary Law of Succession', p 576.

⁴² Bekker & Koyana, 'The Judicial and Legislative Reform of the Customary Law of Succession', p 576.

⁴³ Moodley, 'The Customary Law of Intestate Succession', p 102.

⁴⁴ Moodley, 'The Customary Law of Intestate Succession', p 102.

generally larger than a nuclear family. This is summarised quite well by Mbithi who outlines that the male heir was not purely responsible for his immediate family but may also be responsible for his extended family.⁴⁵ This is similar to Indigenous communities in Australia and Islamic tribes in the Middle East.

Before human rights scholars pass judgment on the intestacy rights of women under customary law, it is imperative to acquire the opinion of females in these tribes and inquire whether they feel discriminated against. Organisations in South Africa including the WLSA and the Commission of Gender Equality have conducted studies on the premise of what they believe constitutes gender equality. However, in all of their research they have not directly asked a considerable number of widows in these tribes whether they are unhappy that their sons or other male heirs inherit the estate as opposed to themselves. Of course, the fact that certain matters are brought to court suggests that some widows are disgruntled with customary law. Despite this, it is unclear whether these disgruntled women represent the sentiments of the majority of widows. Arguably, widows would be content with an arrangement of primogeniture because they would not acquire the responsibility of managing the affairs of their deceased husband's estate. The decision in *Bhe* suggests that when there is a clash between the two laws, the common law will always prevail. This is not an adequate interpretation method to maintain the rights of women in African tribes. Arguably, the Constitutional Court should not have made such a monumental decision as abolishing customary inheritance law on the basis of one case. Perhaps, in the aftermath of this decision the South African Government should have encouraged public discussion on the issue of male primogeniture. This discussion should have included women from various tribes across South Africa. Perhaps this would have stimulated a comprehensive parliamentary discussion where experts in African customary law such as Marius de Waal and JC Bekker would have had an opportunity to highlight the benefits of customary inheritance law for widows and the wider tribal community. This may have ensured a decision that was favourable and justifiable in the eyes of most tribal people.

POLYGAMOUS MARRIAGES IN SOUTH AFRICAN TRIBES

Many South African tribes practice polygamy. 'Polygamy' is the term used to describe a person entering into a marriage with more than one spouse simultaneously.⁴⁶ Anthropologists have made distinctions between two

⁴⁵ Bekker & Koyana, 'The Judicial and Legislative Reform of the Customary Law of Succession', p 569.

⁴⁶ LP Vorster, "Kinship" in A C Myburgh (ed.,) *Anthropology for Southern Africa* (Juta & Co Ltd; Cape Town, 1981), p 94.

types of polygamous practices, namely 'polygyny' and 'polyandry'.⁴⁷ The latter refers to a woman having multiple husbands at the same time, such as in the tribes of Irigwe in northern Nigeria.⁴⁸ However, this thesis will focus on 'polygyny' which refers to one man having multiple wives at the same time.

Contrary to the perspective of many western societies, polygynous relationships are not entirely discriminatory against widows. There is very little evidence to suggest that an organisation from a western society or any society for that matter has conducted an anthropological study on polygamy (or specifically polygyny) and how it impacts intestacy rights for widows. The study would have to interview a wide range of widows from different tribes and inquire on the impact of polygyny on their intestacy rights. Arguably, the possibility of holding such research may be very difficult, as the women may be influenced by men in the tribe to support the institution of polygyny. Also, widows brought up in a tribal society would not have been exposed to any other legal system. As a result, their perception on whether their intestacy rights are hindered because of polygyny would be unbalanced. Nonetheless, it is too simplistic for human rights organisations to characterise polygyny as discriminatory against widows' intestacy rights. An in-depth study of polygyny would reveal that such marriages generally occur when the husband is wealthy.

Vaughan argues that 97% of African tribes champion polygynous relationships.⁴⁹ Perhaps such widespread support for this system of marriage has resulted in *The Recognition of Customary Marriages Act 1998* recognising polygynous marriages as legal.⁵⁰ The people interviewed included a mix of tribal chieftains, men and women.⁵¹ It suggests that women in polygamous relationships may not oppose African customary law. However, one could argue that having experienced nothing else other than African customary law, this information may be inaccurate. Nevertheless, polygyny ensures the protection of a woman if her first husband passed away unexpectedly at a young age. Polygyny can occur because a brother passed away, thus the remaining brother may be expected to marry the widow(s) of the deceased. This practice is labelled as

⁴⁷ LP Vorster, "Kinship", p 94.

⁴⁸ W H Sangree, 'The Persistence of Polyandry in Irigwe, Nigeria', (1980) 11 (3) *Journal of Comparative Family Studies*, p 335.

⁴⁹ Z Mfono, Organisation for Social Science Research in Eastern and Southern Africa, *Analysis of Rural Women's Changing Reproductive Behaviour Patterns in South Africa* (Addis Ababa, 2009), p 40.

⁵⁰ Sections 2(3) and (4), *Recognition of Customary Marriages Act 1998* (South Africa).

⁵¹ Mfono, *Analysis of Rural Women's Changing Reproductive Behaviour Patterns in South Africa*, p 40.

levirate.⁵² The practice includes assuming conjugal and economic responsibility for the widows.⁵³ The practice of levirate does not change whether a widow assumes maintenance from the deceased's estate but presumably provides them with companionship and an opportunity to have more children. Of course, there are cases where this companionship may not be provided, and husbands may be oppressive towards women. Despite this, monogamous relationships could lead to this as well.

Legislation has ensured that women in polygamous marriages are not disadvantaged in intestacy compared to women in monogamous marriages. The introduction of the 'Reform of Customary Law of Succession' in 2010 inserted a clause in the *Intestate Succession Act 1987* which directly addresses the distribution of the deceased's estate to his multiple wives. The clause provides that a deceased's estate must be divested equally between all three spouses.⁵⁴ This is an area where the common law have accepted this customary practice and in turn have protected the rights of widows. As alluded to earlier in the thesis, the great challenge is translating to the tribal chieftains the effect of this legislation and the fact that it has jurisdiction over them.

The Women's Charter argues polygamy is discriminatory to women and is incompatible with human rights discourse.⁵⁵ There seems to be a mainstream belief that those women who engage in polygamous relationships are uneducated and do not comprehend that they may not be well looked after by their deceased spouse's estate because he has to ensure the maintenance of multiple wives.⁵⁶ Nonetheless, the South African President, Jacob Zuma (who is culturally a Zulu) has four wives.⁵⁷ Some of these women, such as his former wife Nkosazana Dlamini-Zuma were well educated and were in no way forced into the marriage. This is illustrated by Dlamini-Zuma being a Minister in the African National Congress Government at one time. Thus, it should not be presumed that women are forced into polygamous marriages. It must be comprehended that polygamy does not necessarily result in wives having very little of the deceased husband's estate. Often only the more wealthy men in tribes have

⁵² Mfono, *Analysis of Rural Women's Changing Reproductive Behaviour Patterns in South Africa*, p 41.

⁵³ Mfono, *Analysis of Rural Women's Changing Reproductive Behaviour Patterns in South Africa*, p 41.

⁵⁴ Section 40(1), *Intestate Succession Act 1987* (South Africa).

⁵⁵ Likhapa Mbatha, 'Reflection on the Rights created by the Recognition of Customary Marriages Act in South Africa,' (2005) *Gender, Culture and Rights*, p 44.

⁵⁶ Mfono, *Analysis of Rural Women's Changing Reproductive Behaviour Patterns in South Africa*, p 41.

⁵⁷ J C Mubangizi, 'Building a South African Human Rights Culture in the Face of Cultural Diversity: Context and Conflict', (2008) 5(1) *African Journal of Legal Studies*, p 15.

many wives. For example, the King of the Zulu people has five wives as of 2012.⁵⁸ All the wives assented to the marriage and are all well-educated. Once more, it challenges the misconceived perception that women who enter into polygamous marriages are vulnerable and uneducated.⁵⁹ Most other men in the tribe do not have more than two wives.⁶⁰ Of course there have been instances where widows have been disadvantaged in intestacy because of polygamy. In Nnu Ego's family, her husband had four wives, despite the fact that she and her children could only live in one room.⁶¹ It illustrates that the man was not wealthy and upon his death, it would be difficult to use his estate to maintain a comfortable lifestyle for all of his wives. Despite this, in instances where one of the wives passes away before the husband, the remaining wives are at an advantage. This is because the remaining wives would be maintained better as there are fewer wives that have to be looked after by the estate. However, Mfono's research does reveal that in most cases polygamy is a practice that protects women and gives them an opportunity to be looked after well after their husband passes away. This is evident in tribes where there are significantly more women than men.

If polygamy were to be abolished, the intestacy rights of widows would be hindered significantly. This would certainly be the case in tribes that have a greater number of women than men. Polygamy enables wealth to be distributed amongst different widows. It ensures that women and their children are protected financially after their husband has passed away. If only monogamous marriages were permitted, women may only have the option of entering into a monogamous marriage with a husband who is not particularly wealthy. This in turn would limit the widow's maintenance and up-keep. Evidently, polygamy plays a critical role in ensuring that multiple women are adequately looked after through intestacy once their husband has died.

COMMON LAW INTESTACY IS NOT BEING APPLIED IN THE TRIBES

The Constitutional Court's decision to abolish male primogeniture in the case of *Bhe* coupled with the *Customary Law of Succession and Regulation of Related Matters Act* amendments suggests that widows in tribal

⁵⁸ J C Mubangizi, 'Building a South African Human Rights Culture in the Face of Cultural Diversity: Context and Conflict', p 15.

⁵⁹ J C Mubangizi, 'Building a South African Human Rights Culture in the Face of Cultural Diversity: Context and Conflict', p 15.

⁶⁰ J C Mubangizi, 'Building a South African Human Rights Culture in the Face of Cultural Diversity: Context and Conflict', p 17.

⁶¹ Mfono, *Analysis of Rural Women's Changing Reproductive Behaviour Patterns in South Africa*, p 40.

communities have greater intestacy rights than before. In response to the *Bhe* decision, the legislature has introduced section 2(a) of the reforms to the *Customary Law of Succession Act* outlines that a widow is to absorb part of the estate and can also claim the part of the estate which would have been devolved to a minor child.⁶² Despite this, Himonga has argued that the decision in *Bhe* may only be 'paper law' which is not necessarily followed in tribal areas. This is a concern, as many people living in tribes may not believe that the Constitutional Court has jurisdiction to govern its practices. Furthermore, there are no enforcement agencies provided by the government that can ensure that the intestacy rights of widows are protected. Also, over one hundred interviews were held with an array of tribes throughout South Africa. All the tribes rejected the constitutional court's decision on the abolishment of male primogeniture.⁶³

South African lawyers, Professors Galizzi, Powell, Tanzer and Higgins conducted field research which illustrated that the *Bhe* decision was not being implemented in South African tribes.⁶⁴ Patrick Pringle, who was the director of Queenstown Rural Centre agrees that tribal leaders still dictate what happens to the deceased's estate on intestacy.⁶⁵ Accordingly, Higgins argues that it is entirely dependent on the male heir whether a widow acquires access to the deceased's estate.⁶⁶ She even claims that the male heir can evict the widow.⁶⁷ Arguably Higgins is influenced by her agenda to highlight the alleged discrimination towards women in customary intestacy law in South Africa. Most tribes have embedded in their intestacy law that the male heir is *obliged* to ensure the maintenance of the widows if they remain in the deceased's property. This actually significantly protects widows. However, now under the *Bhe* decision widows are given legal rights to property of their deceased spouse, due to the fact that tribes are expected to follow the *Intestate Succession Act*. Nonetheless, they have to rely on the deceased's estate to ensure their maintenance and protection. Contrary to this, under customary law the male heir must do all that he can to maintain the 'up-keep' of widows even if the estate left by the deceased is inadequate.⁶⁸ This illustrates that it is too simplistic to argue that widows have no intestacy rights under customary law. Despite this, Mbatha argues that customary succession law enriches the heir and his spouse greatly.⁶⁹ Although the heir is enriched financially, as explained above, he is obliged to provide for all members of the family under customary law. This is not a

⁶² Section 2(a), *Reform of Customary Law of Succession and Regulation of Related Matters Act 2009* (South Africa).

⁶³ Higgins, 'Constitutional Chicken Soup', p 718.

⁶⁴ Higgins, 'Constitutional Chicken Soup', p 714.

⁶⁵ Higgins, 'Constitutional Chicken Soup', p 715.

⁶⁶ Higgins, 'Constitutional Chicken Soup', p 715.

⁶⁷ Higgins, 'Constitutional Chicken Soup', p715.

⁶⁸ Bekker, *Seymour's Customary Law in Southern Africa*, p 70.

⁶⁹ Mbatha, 'Reflection on the Rights created by the Recognition of Customary Marriages Act', p 45.

choice for the heir, rather under customary law he is required to provide for all members of his family.⁷⁰ Gender equality organisations approach the issue of widows and intestacy with a common law background that promotes the rights of the individual. Perhaps people who work in these organisations need to comprehend that the purpose of intestacy in tribal South Africa is to protect the interests of the greater family and community as opposed to the individual.

'LIVING' CUSTOMARY LAW

Arguably, the decision to abolish male primogeniture was made in *Bhe* because the judiciary felt that customary law was backward and non-adaptable. The justices did not interpret the anthropological research into many tribes that reflected the need to consult widows in intestacy related matters. The Constitutional Court made no attempt to harmonise customary intestate law with common intestate law. As a result, it ironically contravened section 39(2) of the Constitution which outlines matters such as international law must be taken into account.⁷¹ International law advocates the protection of all cultures.⁷² The court could have used section 36 which is a limitations provision to customary law. This provision justifies the violation of a human right embedded in the Bill of Rights if there are other more important constitutional values that need to be upheld.⁷³ Justice Ngcobo in his minority judgment in *Bhe* was the only judge who assessed anthropological research which revealed the evolving nature of customary intestacy law.⁷⁴ It reveals that widows are being consulted by men on intestacy matters and that arguably there was no need for the judiciary to make tribes subject to the *Intestate Succession Act*.

Bekker argues that the perception of the customary intestacy law was shaped by the rendition of colonial administrators in the nineteenth century.⁷⁵ Rautenbach argues that now systems of ultimogeniture as opposed to primogeniture have emerged giving widows' greater intestacy

⁷⁰ Bekker JC et al, *Indigenous Law*, p 161.

⁷¹ Section 39(2), *Constitution of the Republic of South Africa* (Date of Commencement: 4 February 1997).

⁷² Article 15, *International Covenant on Economic, Social and Cultural Rights* (signed by South Africa in 1994).

⁷³ Wieland Lehnart, 'Role of the Courts in the Conflict Between Customary Law and Human Rights', (2005) 21 *South African Journal of Human Rights*, p 248.

⁷⁴ Bekker & Koyana, 'The Judicial and Legislative Reform of the Customary Law of Succession', (2012) p 572.

⁷⁵ Bekker & Koyana, 'The Judicial and Legislative Reform of the Customary Law of Succession', (2012) p 570.

rights than customary law from a century ago.⁷⁶ Her perspective is corroborated by the anthropological research of W. Leherter which revealed that not all tribes prohibit widows from inheriting from their deceased husband.⁷⁷ Admittedly, this is a rarity in African customary law, but it reflects that it is naïve to believe that only common law is evolving and adaptable. Nevertheless, many South African scholars including, Himonga and Kult argue that customary law is dynamic and adapts to social changes and conditions. This is epitomised in the case of *Shilubana*⁷⁸ where a female was made Chieftain of her tribe. Admittedly, this was not an intestacy case but the fact that a woman was appointed Chieftain of her tribe after her husband passed away would have permitted her to inherit the estate from her husband. It illustrates that customary law is evolving and progressing in a manner which promotes the intestacy rights of widows. The case also reflected how 'official' customary law was left unreformed by static rules and judicial precedent, which had little to do with the lived experience of spouses and children within customary marriages.⁷⁹ Customary law has been undermined by common law mechanisms. The legislature and judiciary have not comprehended that estates in tribal communities serve different functions to those in common law societies. Accordingly, they have formed a simplistic and ill found judgment that customary intestacy law is discriminatory towards widows.

CONCLUSION

In the final analysis, the intestacy rights of widows under the customary law are growing in tribal areas of South Africa. Male primogeniture and polygamy are not mechanisms which necessarily quash the rights of widows. The fact that women may not have legal rights to inherit from their deceased spouse under customary law does not mean they are rendered mute in intestacy matters. Although the WLSA and other gender equality agencies have argued that primogeniture is discriminatory, customary law and even the Constitutional Court uphold that the male heir is required to maintain the up-keep of widows. Although the decision of *Bhe* abolished male primogeniture, field research has revealed that this has

⁷⁶ JC Bekker, NMI Goolam, C Rautenbach & W van der Westhuizen, *Introduction to Legal Pluralism* (3rd ed.,) (LexisNexis; Durban, 2010), pp 28-30.

⁷⁷ Lehnert, 'Role of the Courts in the Conflict Between Customary Law and Human Rights', p 256.

⁷⁸ *Shilubana v Nwamitwa* (2008) ZACC 9.

⁷⁹ *Shilubana and Others v Nwamitwa* [2008] ZACC 9, 4 June 2008; See also Himonga & Bosch "The Application of African Customary Law Under the Constitution of South Africa: Problems Solved or Just Beginning?" (2000) 117 *South African Law Journal*, pp 328-9; and Van der Meide "Gender Equality v Right to Culture" (1999) 116 *South African Law Journal*, pp 101 & 105-6.

had very little impact on reducing the practice of primogeniture anyway, and it continues ad hoc as opposed to being technically permitted. Despite the United Nations Women's Charter advocating the abusive and discriminatory nature of polygamy, it must be understood that often only wealthy males enter into polygamous marriages, and abuse in these marriages is not common. Arguably the interpretation of customary law by the common law judiciary has resulted in widows being deprived of intestacy rights, as was highlighted in the case of *Mthembu*. In any case, anthropological research has revealed that most tribes are oblivious to the Constitutional Court's decision in *Bhe* or the repeal of codified customary law. Human rights and gender equality advocates have narrowly interpreted the intestacy rights of widows in tribal culture. They must understand that intestacy laws in tribal culture aim to protect the *extended family* as opposed to the *individual*. Contrary to mainstream opinion, this thesis has advocated that the practice of male primogeniture and polygamy are not necessarily oppressive towards widows. They provide the necessary maintenance and protection for widows.