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Examining the application of the rules of intestate succession in a culturally diverse society: the position of living customary law

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DECLARATION

I, Masesi Virginia Ngobeni, (student number 2911028), declare that this Research Report is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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Abstract

This study examines whether South Africa's common law of succession, grounded in the Intestate Succession Act, can coexist with the communal and evolving nature of living customary law or whether it compromises cultural authenticity and undermines constitutional pluralism. The research demonstrates that while judicial and statutory reforms most notably *Bhe* and the Reform of Customary Law Succession Act advanced equality and dignity, they frequently did so by subsuming customary principles into rigid statutory categories. This strategy secured individual rights but eroded the communal ethos of succession, weakening African traditions of family continuity and intergenerational responsibility.

The research contributes to knowledge by reframing the debate beyond a binary of common law versus customary law. It argues that the development of customary law of succession, rather than its replacement, offers a path to harmonisation that respects constitutional values while preserving cultural authenticity. Drawing on comparative insights from marriage law reform under the Recognition Customary Marriage Act, it proposes pluralistic models such as dual-choice systems, strengthened ascertainment of living law, and statutory mechanisms of support that ensure succession remains both constitutionally compliant and culturally grounded. In doing so, the dissertation advances a normative framework for genuine legal pluralism in South Africa's succession law.

Keywords: Common law of succession, customary law of succession, living customary law, intestate succession, imposition, culturally diverse society and accommodation.

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1. Introduction

The application of the rules of the Intestate Succession Act 81 of 1987 (ISA) in South Africa exposes a deep structural dilemma: how to reconcile a statutory regime designed for uniformity with the fluid, communal, and culturally embedded rules of living customary law. At its core, the challenge is not merely technical but constitutional and cultural, touching on questions of equality, dignity, and the survival of African traditions within a plural legal system. This research is situated within that tension, interrogating whether the rules of the ISA as currently applied, can respect the values of a culturally diverse society or whether these rules erode the very practices it claims to recognise.

The first dimension of this inquiry lies in the fundamental differences between common law of succession and customary law of succession (systems). Under common law, succession is individualistic, grounded in the ISA, which distributes property along prescribed lines of kinship. This framework assumes that succession is primarily about asset allocation and economic efficiency.¹ Customary law of succession, by contrast, has never been concerned solely with property. It functions to preserve the cohesion of the extended family, allocating not just assets but responsibilities and obligations, and cultural preservation. The successor is a custodian of both property and social order, ensuring continuity of the deceased's role in the community.² This divergence creates a fault line: one system prioritises individual autonomy, while the other safeguards communal stability.

The second layer of the problem emerges when the ISA rules are imposed on culturally diverse communities. By displacing customary practices such as male primogeniture or communal allocation of responsibility, statutory law has often been experienced as an external imposition rather than a tool of reform. Judicial interventions, most notably in *Bhe v Magistrate, Khayelitsha*, struck down discriminatory practices but simultaneously entrenched statutory uniformity at the expense of living customary law.³ While this advanced constitutional equality, it diminished the adaptability of customary systems and weakened African practices that mediated disputes and ensured intergenerational care.

¹ The Intestate Succession Act section; M Paleker, A Van Der Linde & M Wood-Bodley *The Law of Succession in South Africa* 2 ed (2017) 1 & 11.

² Ibid 5&270.

³ *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) paras 136 & 147.

The third and most critical concern is whether there is a space within the current legal framework of intestate succession to accommodate living customary law in its authentic, evolving form. Reforms such as the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 (the Reform Act / RCLSA) attempted harmonisation but often did so by forcing customary law into rigid statutory categories. As a codification of *Bhe*, it substitutes male primogeniture with the ISA, imposing a property-centred framework that fails to capture the flexible nature of customary law.⁴ This approach has not fully captured the living nature of customary law of succession, which is responsive to community consensus and evolving social realities. The question is whether a hybrid framework can be constructed, as such, one that subjects customary law to constitutional scrutiny without erasing its cultural essence, and that upholds equality while preserving the communal logic of African succession practices.

This research therefore examines the balance between uniformity and diversity, individual rights and communal obligations, statutory control and living tradition. Its central problem is whether the rules of the ISA as currently applied can coexist with, rather than override, living customary law and if not, what pathways exist for genuine legal pluralism that is both constitutional and culturally meaningful.

⁴ Ibid, The Reform Act.

2. What are the fundamental differences between the law of succession under common law and the customary law of succession in practice?

In recent years, the interplay between common law of succession and customary law of succession has significantly shaped private law, particularly in the field of intestate succession.⁵ South Africa's intestate succession law operates as a hybrid system governed by various statutes and legal principles. This field reveals a deep and enduring tension between two parallel legal traditions: the common law, rooted in European legal heritage, and customary law, reflective of African indigenous practices. This tension is particularly pronounced in a culturally diverse democratic society where both legal traditions are recognised yet often collide in practice. While the ISA provides a uniform and codified framework for succession under common law,⁶ it reflects the values of individual autonomy and wealth transfer rather than collective obligations, which shows the limits of common law of succession in accommodating the communal responsibilities characteristic of customary law of succession. Customary law of succession, by contrast, raises questions of equality, autonomy, and cultural legitimacy, forcing the legal system to reconcile divergent logics within a constitutional order.

The hybrid framework governing intestate succession law in South Africa is both a strength and a weakness. On the one hand, it acknowledges the country's pluralistic legal heritage; on the other, it often creates uncertainty and inconsistency in application.⁷ Common law of succession rules, such as those relating to the status of heirs, repudiation or adiation, unworthiness to inherit, and collation, provide clarity and predictability but are often criticised for reflecting Eurocentric values which disregard African family structures.⁸ These rules are premised on principles of equality among heirs, limited restrictions on freedom of testation, and individual autonomy in estate planning.⁹ Yet, they privilege Western notions of inheritance that may not resonate with African communities where succession traditionally functions as a relational and collective institution rather than an individualised entitlement.¹⁰

By contrast, customary law of succession, once rigidly codified in the Black Administration Act 38 of 1927 (BAA), was intended to enforce customary law of succession principles but instead entrenched a distorted version that privileged patriarchal hierarchies and excluded

⁵ C Rautenbach *The Law of Succession in South Africa* 2 ed (2012) 1 & 11.

⁶ MM Corbett, G Hofmeyr & E Kahn *The Law of Succession in South Africa* 2 ed (2003) 562.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

women from inheritance.¹¹ Far from reflecting the flexible and evolving nature of living customary law, this codified regime imposed a static model that denied the adaptive and relational character of African customary practices. The result was a discriminatory framework conflicting with the principles of equality in section 9 and dignity in section 10 as enshrined in the Constitution of the Republic of South Africa, 1996. Under this system, movable property allocated to a wife or household devolved according to customary law rules,¹² while land in a tribal settlement under individual tenure had to pass to a single male heir.¹³ The BAA prohibited black persons from making wills in respect of certain property,¹⁴ while the ISA excluded such estates from its ambit,¹⁵ entrenching a dual, racially discriminatory choice of law rules until declared unconstitutional.¹⁶

The Constitutional Court's judgment in *Bhe* marked a watershed moment by striking down the customary law principle of male primogeniture as unconstitutional.¹⁷ This judgment harmonised the succession rules under a single statutory regime of the ISA and demonstrated the Court's willingness to balance cultural recognition with constitutional imperatives of equality. Collapsing customary law of succession into the ISA framework, risked eroding living customary law's autonomy.¹⁸

The RCLSA, read together with the ISA attempted to address this concern by extending freedom of testation to those subject to customary law¹⁹ and repealing section 23 of the BAA through the Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005.²⁰ While these reforms unified succession law under a constitutional framework of equality, they remain partially limited. One of the important developments effected by the RCLSA is the freedom to make a will, which has now been indirectly afforded to everybody subject to customary law. Today, the customary law of succession applies only through freedom of testation, which remains relatively uncommon in African indigenous communities especially in rural areas.²¹ This gap between formal law and lived reality highlights the unfinished task of

¹¹ Black Administrative Act section 23; F Osman 'The ascertainment of living customary law: an analysis of the South African Constitutional Court's jurisprudence' (2019) 51 *The Journal of Legal Pluralism and Unofficial Law* 98, 104.

¹² Ibid section 23(1).

¹³ Ibid section 23(2).

¹⁴ Ibid section 23.

¹⁵ Intestate Succession Act (note 1 above) section 1(4)(b).

¹⁶ Paleker et al (note 1 above) 7-8.

¹⁷ *Bhe* (note 3 above) para 97.

¹⁸ Ibid para 230.

¹⁹ The Reform Act (note 4 above) long title of the Act; Paleker et al (note 1 above) 25.

²⁰ The Repeal of the Black Administration Act long title of the Act.

²¹ Paleker et al (note 1 above) 8.

integrating customary law in a manner that respects both constitutional values and indigenous practices.

While legislative and judicial interventions such as *Bhe* and the RCLSA have advanced equality, they have simultaneously narrowed the space for living customary law to evolve independently. The challenge is to develop a framework that neither subordinates customary law to common law, nor shields it from constitutional scrutiny but rather allows for a dynamic coexistence in which customary principles can adapt without compromising the rule of law.

2.1 Common law of succession

Common law refers to the law common to South Africa, which originates from a wide range of sources of law that have not been systematically recorded. The sources include the Constitution, legislation, judicial precedent, common law (in the sense of uncodified law), indigenous laws (customary law), custom, modern textbooks, as well as foreign, international and regional law.²²

The rules of common law of succession codified in the ISA, aim to provide clarity, predictability, and fairness in the distribution of estates of a deceased person where no valid will exists (intestate estate).²³ A central principle of the ISA is equality among heirs who are close family members, such as spouses, descendants, parents, and other relatives, following a specific order.²⁴ Codification entrenched a structured and individualised approach to inheritance, designed to ensure orderly transfer of wealth only to close family.²⁵ However, in a culturally pluralistic society, this codification freezes succession rules, limiting adaptability²⁶ and failing to accommodate broader familial obligations present in African communities.²⁷

Courts have sought to ensure constitutional compliance of the ISA. In *Bhe*, the Constitutional Court extended the application of the ISA to all South Africans.²⁸ While this advanced gender

²² C Rautenbach *Mixing South African common and customary law of Intestate Succession: "Potjiekos" in the making' Mixed Legal Systems at New Frontiers* (2010) 222; L Kotze, A du Plessis & J Barnard-Naude *Sources of law and legal authority' Introduction to Law and Legal Skills in South Africa* (2012) 124-147.

²³ Ibid 25.

²⁴ Ibid 33 – 42.

²⁵ MJ De Waal & MC Schoeman-Malan *Introduction to the Law of Succession* 3 ed (2003) 32.

²⁶ *Bhe* (note 3 above) para 175.

²⁷ Paleker et al (note 1 above) 270.

²⁸ *Bhe* (note 3 above) paras 136.

equality and children's rights, it imposed a Western model of common law of succession on African communities, effectively displacing living customary law.²⁹

As the ISA prioritises equitable distribution among heirs, irrespective of gender or birth order,³⁰ this marks a decisive break from Roman-Dutch and customary traditions privileging male heirs. While this guarantees formal equality, it limits protection to a narrow circle of heirs, excluding wider kin and dependants recognised in customary practice.³¹ This system simplifies estate administration and reduces disputes but fails to capture real dependency relationships outside the nuclear family.³² From a constitutional perspective, the challenge is reconciling individual property distribution with the social and familial obligations inherent in living customary law. Historically, under common law of succession, children born out of wedlock, including those from extramarital, adulterous, and incestuous relationships, were unfairly excluded from inheriting from their parents' intestate.³³ In taking the efforts to reconcile the differences between succession under the common law and succession under customary law, the unconstitutional principle of both systems had to be aligned with the principles of the Constitution. Preceding the Constitution, succession under common law was primarily altered by the ISA, which provides that a person's illegitimacy does not prevent them from inheriting from a blood relative who dies intestate.³⁴ Following this, is the constitutional interpretation, and judicial intervention,³⁵ where developments were aimed at dismantling historical patterns of discrimination while promoting equality and dignity as emphasised in *Bhe*.³⁶ Together, they reflect an evolving framework that seek to harmonise common law practices with constitutional imperatives, which if successful, will harmonise the differences between the two systems. The Interim Constitution,³⁷ and section 9(3) of the Constitution, both prohibit unfair discrimination, including on the ground of birth. The statutory change through the Law of Succession Amendment Act 43 of 1992 (Succession Act/ LSAA) preceded the Interim Constitution but aligned with its equality ethos. However, preceded the Interim Constitution, the Succession Act extended intestate succession rights to all children,³⁸ which later entrenched in the Constitution and enforced in *Bhe*, also affirmed in *Fraser v Children's Court, Pretoria North* by the

²⁹ Ibid para 168; Paleker et al (note 1 above) 270.

³⁰ Intestate Succession Act (note 1 above) section 1(1) (a) & (b); Ibid para 173; Paleker (note 1 above) 34-35.

³¹ Ibid section 1; Paleker et al (note 1 above) 34.

³² *Bhe* (note 3 above) para 229.

³³ Ibid para 59; Paleker et al (note 1 above) 29.

³⁴ Intestate Succession Act section (note 1 above) 1 (2); Ibid.

³⁵ *Bhe* (note 3 above) the judgment.

³⁶ Ibid para 233.

³⁷ Constitution of the Republic of South Africa, Act 200 of 1993 (Interim Constitution) section 8(2).

³⁸ Succession Act purpose of the Act.

Constitutional Court.³⁹ Similarly, the definition of a “spouse” under the ISA has evolved. While it originally referred to spouse under the Marriage Act 25 of 1961, this definition now includes a partner in a customary marriage that is recognised in terms of the Recognition of Customary Marriages Act 120 of 1998 (Recognition Act/ RCMA).⁴⁰ The RCMA provides that a spouse includes a woman, other than the spouse of the deceased, whom he married for the purpose of providing children for his spouse’s house (a substitute wife).⁴¹

Following, are the decided cases showing the Courts’ effort to correct the unconstitutional principles under common law of succession. In *Daniels v Campbell*, the Constitutional Court addressed the discriminatory effects of the common law of succession rule on surviving spouses in Muslim marriages. In *Daniels*, the Court extended the meaning of the term ‘spouse’ in the ISA and the meaning of ‘survivor’ in the Maintenance of Surviving Spouses Act 27 of 1990 to partners in a monogamous marriage, thereby ensuring equal succession rights.⁴² In *Gory v Kolver* the Court ruled that a surviving spouse who was in a civil union with a deceased person, whether of the same or opposite sex, whether in the form of a marriage or civil partnership, will be considered a spouse for the purpose of intestate estate.⁴³ Similarly, in *Govender v Ragavayah*, the Court held that a surviving spouse in a Hindu marriage should also be recognised as a spouse under the ISA, reinforcing the principle of equality and non-discrimination in matters of inheritance.⁴⁴ In *Hassam v Jacob* (hereinafter referred to as *Hassam*), the Court further extended this principle by recognising widows in polygynous Muslim marriages as spouses under the ISA, ensuring that they too could inherit intestate estates, thereby affirming their constitutional rights to equality and dignity.⁴⁵ Finally, in *Bwanya v Master of the High Court* the Constitutional Court declared unconstitutional the exclusion of opposite-sex permanent life partners from the definition of “survivor” in the Maintenance of Surviving Spouses Act 27 of 1990 (MSSA),⁴⁶ and “spouse” in the ISA.⁴⁷ The Court held that permanent heterosexual partners in life partnerships, in which the partners undertook reciprocal duties of support, must be entitled to claim benefits under both the MSSA

³⁹ *Fraser v Children’s Court, Pretoria North* 1997 (2) SA 261 (CC) para 20.

⁴⁰ Recognition Act section 1; Paleker et al (note 1 above) 39.

⁴¹ The Reform Act (note 4 above) section 2(2)(c) read with section 3(1).

⁴² *Daniels v Campbells* 2004 (5) SA 331 (CC) para 40. Paleker et al (note 1 above) 31 & 137.

⁴³ The Reform Act (note 4 above) section 2(2)(c) read with section 3(1); *Gory v Kolver* NO 2007 (4) SA 97 (CC) para 19.

⁴⁴ *Govender v Ragavayah* 2009 (3) SA 178 (D) para 44.

⁴⁵ *Hassam v Jacob* 2007 (11) BCLR 1148 (CC) para 19, 47 & 57.

⁴⁶ Maintenance of Surviving Spouses Act section 1; *Bwanya v Master of the High Court* 2021 (5) SA 323 (CC) para 2.

⁴⁷ Intestate Succession Act (note 1 above) section 1(1); Ibid paras 7-8.

and the ISA.⁴⁸ This decision confirmed that opposite-sex life partners should be recognised for purposes of intestate estate, thereby aligning the ISA with the constitutional values of equality and dignity. This decision corrected a major inconsistency: while *Gory* had extended rights to same-sex partners, opposite-sex life partners were still excluded until *Bwanya*.

These cases collectively challenged discrimination based on different grounds, ensuring equality rights in inheritance of intestate estate. The ruling in these cases illustrate how the ISA, in its previous form unfairly discriminated on these grounds, infringing the principles of the Constitution. The Courts, through these rulings, progressively interpreted the ISA to align with the constitutional mandate of non-discrimination, ensuring equality for all under common law of succession.

Despite these progressive reforms, the ISA remains formally unamended, leaving a gap between statutory text and judicial interpretation that generates doctrinal uncertainty. Codifying these developments through legislative amendment would enhance clarity, reduce litigation, and improve accessibility for vulnerable heirs. While the Constitutional Court has embedded equality and dignity into intestate succession, the RCLSA remains tied to the ISA's individualised, property-centric framework, raising the unresolved question of whether the RCLSA adequately accommodates the communal and obligation-based nature of succession under customary law.

2.2 Customary law of succession

Customary law refers to the customs and usages traditionally observed by indigenous African communities and is understood to refer to living customary law.⁴⁹ Historically transmitted orally, it is inherently flexible and adaptive, evolving with community practices.⁵⁰ Central to the customary law of succession, lies the principle of male primogeniture, which means that the deceased's eldest son succeeds to the position of the head of family.⁵¹ This system is currently governed by the ISA read together with the RCLSA for the deceased who lived under

⁴⁸ Ibid paras 10-11.

⁴⁹ Recognition Act (note 40 above) section 1(ii).

⁵⁰ *Bhe* (note 3 above) para 175; *Alexkor Ltd v Richtersveld Community* 2003 12 BCLR 1301 (CC) para 53 & *Shilubana v Nwamitwa* 2009 2 SA 66 (CC) paras 19 & 46; TW Bennett *Customary law in South Africa* (2004) 2 & 337-345.

⁵¹ Paleker et al (note 1 above) 270.

the customary law system.⁵² The RCLSA, attempts to reconcile living customary law with constitutional imperatives while correcting historical inequities.⁵³ The main purpose of customary law of succession is to preserve the family unit and the community after the death of the deceased,⁵⁴ with the eldest son or designated male heir responsible for dependants and household obligations.⁵⁵ Codification under the BAA entrenched male primogeniture, excluding women and non-biological dependants.⁵⁶ The RCLSA recognises a broader spectrum of heirs, including non-biological descendants accepted by the deceased person as his or her children under customary law.⁵⁷ The RCLSA further acknowledges the inheritance rights of a woman in terms of a substitute marriage⁵⁸ or a woman in a woman-to-woman marriage,⁵⁹ ensuring that they are not unfairly excluded from succession aligning with the constitutional equality principle as section 9(3) provides.

The RCLSA, while advancing equality, has the unintended effect of reducing living customary law to the ISA's individualised, property centred model.⁶⁰ This was evident in *Bhe*, where the principle of gender equality was upheld,⁶¹ but the communal and duty based character of succession was replaced with statutory rights filtered through the repugnancy clause.⁶² The paradox is clear: the RCLSA eliminated discrimination, yet in doing so it risks erasing the very essence of customary law, which emphasises obligations and responsibility towards dependants, widows, and the extended family.⁶³ To address this, statutory reform should move beyond merely extending property rights to incorporate the social and cultural obligations central to succession in customary communities. Hybrid models, combining community-based practices with constitutional oversight, could provide a more authentic reconciliation of equality and cultural legitimacy. This unresolved tension between individualised legal reforms and communal traditions sets the stage for a comparative analysis, where examining other

⁵² Ibid 25.

⁵³ Ibid 5 & 25.

⁵⁴ Ibid 270; TW Bennett *A Sourcebook of African Customary law for Southern Africa* (1991) 382 - 383; PD Bekker and JC De Kock 'Adaptation of the customary law of succession to changing needs' (1992) 25 *Comparative and International Law Journal of Southern Africa* 366, 366.

⁵⁵ Ibid; C Himonga, M Taylor & A Pope *Post-Apartheid and Living Law Perspectives* (2015) 173; JY De Koker *Proving the existence of an African customary marriage* (2001) TSAR 263; M Olivier, J Bekker & C Rautenbach *Indigenous Law* (1995) 147-148.

⁵⁶ Black Administrative Act (note 11 above) section 23.

⁵⁷ The Reform Act (note 4 above) section 1(a).

⁵⁸ Ibid section 2(2)(b).

⁵⁹ Ibid section 2(2)(c).

⁶⁰ *Bhe* (note 3 above) para 119; Paleker (note 1 above) 5&27.

⁶¹ Ibid paras 60-68.

⁶² Ibid paras 108-115.

⁶³ Ibid para 162.

jurisdictions' approaches to succession can illuminate possible pathways for South Africa to balance constitutional imperatives with cultural integrity.

2.3 Comparative analysis: Fundamental differences

Comparing common law and customary law succession reveals substantive divergences in philosophy, purpose, and practice. The ISA emphasises wealth transfer and orderly devolution of property, prioritising the nuclear family.⁶⁴ Customary law prioritises family continuity, social obligations, and collective welfare, with succession functioning as a relational and duty-bound institution with a senior male descendant taking up the responsibilities⁶⁵ for the welfare of the dependants⁶⁶ as opposed to individual rights.⁶⁷ Codification in the ISA provides certainty but limits flexibility,⁶⁸ whereas customary law, though adaptive,⁶⁹ is subject to judicial notice⁷⁰ through the Law of Evidence Amendment Act 45 of 1988.⁷¹ Where customary law cannot be readily ascertained, expert evidence may be adduced to establish its ascertainment,⁷² a Court may consult text books and case law⁷³ and finally, it must be compatible with the Constitution.⁷⁴ While the common law of succession has been progressively reformed to eliminate discrimination on grounds of birth, gender, marital status, or sexual orientation, customary law of succession has been reconstituted under the RCLSA, often at the cost of assimilation into the ISA framework.⁷⁵

These divergences manifest most clearly in the challenges of application of the two systems. The ISA rules ensure predictability through codification, however it is rigid and lacks cultural sensitivity, while customary succession reflects community values, but its dynamic nature leads to inconsistency and judicial uncertainty.⁷⁶ The Courts struggle to balance constitutional equality with communal obligations and cultural rights practices as section 31(1)- (2) of the

⁶⁴ Ibid para 229.

⁶⁵ Ibid para 168.

⁶⁶ Ibid para 229.

⁶⁷ Ibid para 162.

⁶⁸ TW Bennett *Human Rights and African Customary Law under the South African Constitution* (1995) 23.

⁶⁹ *Bhe* (note 3) above para 175.

⁷⁰ Ibid para 150.

⁷¹ The Amendment Act section 1(1).

⁷² *Alexkor* (note 50 above) para 52.

⁷³ Ibid para 54.

⁷⁴ *Paleker et al* (note 1 above) 5.

⁷⁵ *Bhe* (note 3 above) paras 92–97; C Himonga & C Bosch 'The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning?' (2000) 117 *South African Law Journal* 306, 323–328; Bennett (note 49 above) 334–339.

⁷⁶ Bennett (note 50 above) 75.

Constitution guarantees cultural, religious, and linguistic communities the right to practice and preserve their traditions collectively, provided such practices do not violate the Bill of Rights. As illustrated in *Bhe*, where gender rights displaced traditional duties,⁷⁷ codification of customary law of succession risks freezing its evolution,⁷⁸ potentially stifling its evolution and responsiveness to societal changes, while reliance on living law is limited by the repugnancy clause and leaves gaps in enforcement.⁷⁹

Oral tradition plays a central role in this context, as it is through oral transmission that customary norms adapt to new realities and remain rooted in community practices.⁸⁰ However, once codified, this organic process of development is constrained, reducing the law's ability to evolve through lived experience. Therefore, it is crucial for legislation to strike a balance, providing legal certainty while allowing customary law of succession to evolve organically.

Harmonising the two systems through judicial guidelines that integrate constitutional values with community practices supported by reform commissions and judicial training offers a pathway to equality that does not erode cultural legitimacy. The core divergence lies not in technicalities but in opposing logics: individual rights and wealth transfer under the ISA versus communal responsibility and family continuity under customary law of succession. This section demonstrated how the ISA rules risk displacing these communal purposes. The failure by the RCLSA and the ISA to harmonise these differences, leads to examining the imposition of the ISA rules to see if they can capture the uniqueness of customary law of succession.

⁷⁷ *Bhe* (note 3 above) para 91.

⁷⁸ MO Hinz *The Shade of New Leaves: Government in Traditional Authority- A South African Perspective* (2008) 45.

⁷⁹ *Bhe* (note 3 above) paras 108-115.

⁸⁰ C Rautenbach *Introduction to legal pluralism in South Africa* (2018) 30-32.

3. Does imposing the rules of intestate succession in a culturally diverse society that includes living customary law compromise African cultural practices relating to succession?

South Africa's constitutional framework recognises and protects the country's cultural diversity, while simultaneously subjecting all legal norms, including customary law, to the supremacy of the Constitution provided by section 2. Section 30 of the Constitution guarantees the right to language and culture, while section 31 safeguards the rights of cultural communities to practice their traditions collectively. Furthermore, section 211(3) requires the Courts to apply customary law when it is applicable, subject to the Constitution, while section 39(2) obliges the Courts to develop customary law in a manner consistent with the spirit, purport, and objects of the Bill of Rights. These provisions collectively reflect a deliberate constitutional choice to place African cultural practices, including cultural succession norms, within the legal order, provided they comply with the foundational values of equality provided by section 9, dignity provided by section 10, and freedom provided by section 12. This creates a pluralistic legal system where the ISA and living customary law are intended to coexist, but the real challenge emerges when the ISA rules are imposed on living law that is communal, adaptive, and not property focused.

At the same time, statutes such as the ISA and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) set out rules and norms that seek to modernise and align succession laws with constitutional imperatives of non-discrimination.⁸¹ Again, the tension arises when these statutory rules are imposed on living customary law, which operates according to principles rooted in kinship, communal responsibility, and the economic and social preservation of families rather than individualised notions of property distribution.⁸² This is where the central issue arises: what does it mean to impose the ISA onto living customary law, and does this process secure constitutional rights at the cost of obliterating cultural authenticity and practices, or can a balance be achieved?

⁸¹ Prevention of Unfair Discrimination Act section 7.

⁸² *Bhe* (note 3 above) para 118.

3.1 Living customary law

Living customary law (the living law) is not a static set of rules but a dynamic and adaptive system of norms and practices that reflect the lived realities of African communities.⁸³ Unlike official customary law, which has often been codified and filtered through Western legal frameworks,⁸⁴ living customary law develops organically from actual community practices and beliefs. Its legitimacy lies in consensus and accountability rather than formal codification.⁸⁵

Unlike common law of succession codified by ISA, the living law's primary purpose is not simply to allocate property but to preserve the cohesion and welfare of the extended family, to ensure continuity of lineage, and to promote social harmony within the community.⁸⁶

3.2 The imposition of intestate succession rules in a culturally diverse society that includes living customary law

Having examined the position of living customary law in the Constitution, its nature and purpose, as well as the principles of the ISA, the next step is to determine whether the imposition of the ISA in a diverse society that includes living customary law compromises African cultural practices relating to succession. Before assessing the positive and negative implications of such imposition, it is important to first consider the decided cases both those resolved through the application of the ISA and those developed through customary law outside of its imposition.

The coexistence of the ISA and living customary law highlights tensions between formal legal systems and African cultural practices. The ISA seeks uniformity but often conflicts with living customary law, which evolves through community norms. Rooted in Western traditions, the ISA struggles to accommodate African cultural nuances.⁸⁷ Its nuclear family model contrasts with indigenous law's extended family structure, leaving little space for settings such as

⁸³ *Alexkor* (note 50 above) para 53; Himonga & Bosch (note 75 above) 306; Rautenbach (note 80 above) 31.

⁸⁴ *Ibid* Himonga & Bosch 2000 328; *Ibid* Rautenbach 30. See also Proc R151 of 1987; see KwaZulu Act on the Code of Zulu Law 16 of 1985 for example.

⁸⁵ *Ibid* Rautenbach 30-31.

⁸⁶ *Bhe* (note 3 above) para 167.

⁸⁷ *Ibid* para 45.

polygynous unions.⁸⁸ Customary law of succession prioritises preserving the family unit and dependants' welfare, while the ISA risks fragmenting family structures.⁸⁹

The Constitutional Court confronted this tension directly in *Bhe*.⁹⁰ While the decision in *Bhe* advanced the principle of equality, it also marked a decisive shift away from the communal orientation of living law. Ngcobo J's minority judgment warned against this approach, noting that indiscriminate substitution could destabilise family property arrangements and undermine the welfare functions that customary succession performed.⁹¹ This illustrates the broader policy dilemma, how to achieve gender equality without erasing the cultural logics of communal care and dependency that sustain African families. In this sense, the Court opted to impose the intestate succession rules to the living customary law of succession, privileging statutory uniformity over the development of living law.

By contrast, in *Shilubana v Nwamitwa*, the Court upheld a community's decision to allow a woman to succeed to traditional leadership, recognising living law as a dynamic evolving source that can adapt to constitutional equality without statutory replacement.⁹² The Valoyi community within the Vatsonga ethnic group had developed the rules of succession and inheritance to include female children. The Court recognised and upheld the developed customary law of succession and held that a daughter could succeed her father and become Hosi (a chief). However, the rule did not apply to the whole Vatsonga group but only to that particular community in which it was practiced.⁹³

In *Mabena v Letsoalo*, the Court broke from rigid patriarchal interpretations by recognising that a mother could negotiate and receive *lobolo* on behalf of her daughter, rejecting the father's exclusive authority.⁹⁴ The Court drew on the RCMA, affirming that living law must evolve with community practices and constitutional equality.

⁸⁸ Ibid para 229.

⁸⁹ Ibid para 229.

⁹⁰ Ibid para 136.

⁹¹ Ibid para 229.

⁹² *Shilubana* (note 50 above) paras 19 & 46.

⁹³ Ibid para 140.

⁹⁴ *Mabena v Letsoalo* 1998 (2) SA 1068 (T) para 1070.

Similarly, in *Mayelane v Ngwenyama*, Ms Mayelane and Ms Ngwenyama subsequently sought registration of their respective marriages under the RCMA as they both claimed to be validly married to Mr Moyane.⁹⁵ The Court held that a person married under the Marriage Act cannot contract a valid customary marriage because the Act prohibits polygamy,⁹⁶ distinguishing it from marriages under the RCMA, which expressly validates both monogamous and polygynous customary marriages.⁹⁷ Importantly, this affirmed that customary marriages enjoy equal recognition with civil marriages and must be interpreted in line with constitutional values entrenched in section 9 and 10. In its reasoning, the Court emphasised that consent by first wife⁹⁸ and human dignity are foundational to the validity of customary marriages,⁹⁹ thereby rejecting perceptions that such unions are inferior.¹⁰⁰ The judgment thus developed Tsonga customary law, while recognition remains, its evolution is necessary upholding both communal tradition and constitutionally mandated equality.

The *Shilubana* and the *Mayelane* cases illustrate the advantage of judicially supporting internal reforms of living law and the constitutional principles rather than the ISA imposition. They further suggest that customary law has an adaptive capacity which, if nurtured, could align with constitutional imperatives without displacing its communal logic. The *Shilubana* and the *Mabena* cases also emphasise the women's leadership in a democratic society with equal opportunities for all, cultural activities and political spaces that could be advanced through living law in a democratic South Africa. While the developments in the *Mayelane* case, enhance protection of women from gender-based violence and giving them a decisive voice in matters that affect their marriage lives.

Taken together, these cases reveal two distinct judicial approaches: one that imposes the ISA's uniform framework, as in *Bhe*, and another that allows living law to evolve internally, as in *Shilubana*, *Mabena*, and *Mayelane*. The former risks displacing communal traditions in the name of equality, while the latter demonstrates that living customary law has the capacity to adapt to constitutional imperatives without erasing its cultural foundations. This tension underscores the core question: Will the development of living law offer a more context-

⁹⁵ *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC) para 4.

⁹⁶ Recognition Act (note 40 above) section 7(6); *Ibid* para 47.

⁹⁷ *Ibid* section 2(1) & (3).

⁹⁸ *Mayelane* (note 95 above) para 75 & Annexure A.

⁹⁹ *Ibid* paras 75 & 141.

¹⁰⁰ Recognition Act (note 40 above) section 3(1)(a).

sensitive path to reconciling constitutional values with African succession practices than the ISA imposition that erase the authenticity of living law. It is against this backdrop that the positive and negative aspects of the ISA's imposition must now be assessed further.

Fatima Osman cautions against idealising living customary law as inherently aligned with human rights. In reality, it often entrenches patriarchal authority, marginalising women and children, while codification into official law distorts its dynamic nature into rigid norms. Thus, even a developmental model of living law must be critically assessed to avoid reinforcing inequities under the guise of cultural legitimacy.¹⁰¹

The benefits of the imposition should nonetheless be acknowledged. Through the ISA and the RCLSA's expansion of rights to women including those in polygynous marriages, in *Ramuhovhi v President of the Republic of South Africa*, the Court struck down discriminatory provisions of the RCMA, extending inheritance rights to wives previously excluded.¹⁰² These interventions illustrate that the ISA can be an effective tool for correcting entrenched gender inequalities. Yet the drawback is that often equality is treated synonymously with uniformity, collapsing the plural legal order into a single statutory framework. This dual reality shows that statutory reform may be effective in addressing exclusion, but can undermine pluralism by erasing the communal welfare logics of living law if imposed.

The RCLSA thus produces a double-edged outcome. On one hand, it brings about uniformity in the administration of intestate estates for all races. On the other, it sidelines the adaptive capacity of living customary law, which could be developed to achieve equality without entirely supplanting cultural practices. Living law, for instance in *Bhe*, could have been judicially evolved to include women in succession while retaining its communal and welfare-based logic as it was developed in *Shilubana*. The ISA imposition signals a shift toward individualistic property transfer, potentially misaligned with the collective ethos of living law.¹⁰³ Thus, the policy dilemma is not only about women's rights but about how to protect

¹⁰¹ F Osman 'The ascertainment of living customary law: an analysis of the South African Constitutional Court's jurisprudence' (2019) 51 *The Journal of Legal Pluralism and Unofficial Law* 98, 101.

¹⁰² *Ramuhovhi v President of the Republic of South Africa* 2018 (2) SA 1 (CC) paras 35, 36 & 71.

¹⁰³ *Bhe* (note 3 above) para 134.

them without reducing living law to an atomised transaction divorced from community obligations.

However, the jurisprudence reveals inconsistency. The *Bhe* case affirms that the ISA imposition does compromise African cultural practices relating to succession as it eliminated the male primogeniture principle.¹⁰⁴ While the *Shilubana* demonstrates judicial willingness to protect the adaptive potential of living law without the ISA imposition.

This oscillation between developing and displacing living law undermines predictability and coherent pluralism. A more nuanced approach would allow living law to remain the starting point of succession, subject to constitutional scrutiny. Rather than imposing the ISA indiscriminately, the Courts or the legislature could develop a hybrid framework where community-based customary rules are recognised, provided they do not infringe constitutional rights. Such a hybrid would legitimise customary practices while embedding constitutional safeguards, bridging pluralism and equality rather than forcing a choice between them.

The purpose of living customary law is not to resist change but to enable culturally authentic evolution. When the ISA is imposed without regard to this, it risks reducing succession to mere property transfer, ignoring African values of family cohesion and communal support. If properly balanced, recognising living law could enrich constitutional jurisprudence by advancing substantive equality in a culturally contextualised way. In this way, equality could be redefined not as uniformity, but as fairness embedded within cultural frameworks.

As *Ex parte Chairperson of the Constitutional Assembly* highlighted, rigid application of the ISA could undermine indigenous law despite its constitutional recognition.¹⁰⁵ The Constitution affirms the survival and evolution of customary law,¹⁰⁶ yet imposing the ISA risks eroding the right of those who wish to uphold their cultural heritage.¹⁰⁷ The imposition of ISA rules in *Bhe*,¹⁰⁸ expanded the rights of women and children, but disrupted living practices. Without legislative intervention to create tailored intestate succession laws, or judicial development of living law, imposition risks fossilising customary law into outdated norms and widening the

¹⁰⁴ Paleker et al (footnote 1 above) 7.

¹⁰⁵ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC)* para 202. *Bhe* (note 3 above) para 230.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid* para 19.

gap between lived practices and statutory rules. The danger of fossilisation is turning dynamic practices into frozen relics by overlaying rigid statutory rules.

The imposition also introduces complex, foreign legal procedures alien to customary dispute resolution. This renders the law inaccessible, particularly in rural areas.¹⁰⁹ The imposition causes confusion in which legal framework should govern intestate succession disputes. As such, scholars like Antony Nicolas Allot propose harmonisation to avoid confusion and protect cultural values.¹¹⁰ Traditional Courts, by contrast, offer accessible¹¹¹ and inexpensive¹¹² justice in local languages,¹¹³ preserving oral traditions and cultural meaning.¹¹⁴ The ISA, written in Western legal language, threatens this mechanism of cultural transmission.¹¹⁵ The use of African language is one of the many ways that preserve culture¹¹⁶ and that defines living customary law as it is passed orally from one generation to another.¹¹⁷

Many rural women remain unaware of their rights under the Constitution or the ISA.¹¹⁸ The imposition without effective education risks perpetuating confusion and alienation. At the same time, cultural adherence has shifted:¹¹⁹ while some communities still follow traditional norms, many, particularly women, reject customs that oppressed them.¹²⁰ African societies have transformed from traditional rural settings into modern and urban communities.¹²¹ Developing living law would be preferable to the ISA imposition, as it would align with the Constitution while preserving adaptability and maintaining customary law's equal status alongside common law. Reform must therefore account for social change: while some communities embrace

¹⁰⁹ C Himonga *The advancement of African women's rights in the first decade of democracy in South Africa: The reform of the customary law of marriage and succession* (2005) 83 *Acta Juridica* 83 2005(1) 82-07.

¹¹⁰ Allot *Towards the unification of laws in Africa* 1965 *International and Comparative Law Quarterly* 366.

¹¹¹ The South African Law Commission *Discussion Paper 82 Project 90 The Harmonisation of the Common Law and Indigenous Law: Traditional Courts and the Judicial Function of Traditional Leaders* (May 1999). https://www.gov.za/sites/default/files/gcis_document/201409/dp82prj90tradl1999.pdf

See also C Himonga *Constitutional Rights of Women under Customary Law in Southern Africa: Dominant Interventions and 'Old Pathways Feminist Constitutionalism: Global Perspectives* (2012) 317-335.

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ Bennett (note 68 above) 23.

¹¹⁷ *Alexkor* (note 50 above) para 53.

¹¹⁸ C Benninger *Women's Property Rights under Customary Law: Women's Legal Centre* (2010) 11.

¹¹⁹ *Bhe* (note 3 above) para 80

¹²⁰ *Ibid*

¹²¹ *Ibid*

statutory equality, others seek cultural authenticity, requiring flexible solutions rather than rigid uniformity.¹²²

As emphasised in *Alexkor*, ‘customary law is no longer subordinate to common law but must be recognised as an integral part of the legal system,¹²³ interpreted in its own context’.¹²⁴ By allowing customary law to evolve naturally, it can adapt to societal changes and remain relevant.¹²⁵ This principle was reinforced in *Shilubana*, where the Constitutional Court affirmed that customary law is dynamic and must evolve with constitutional values.¹²⁶ Similarly, the minority judgment in *Bhe* recognised living customary law as a dynamic system capable of aligning with constitutional values.¹²⁷ Yet the ISA rules continue to clash with communal traditions, underscoring the fragility of living law’s recognition in the face of statutory uniformity.

The neglect of dependants illustrates this tension most markedly. By shifting succession from responsibilities to individual entitlement, the ISA disregards the welfare of heirs and dependants,¹²⁸ particularly children, whose best interests should be paramount.¹²⁹ Living law evolves democratically within communities; ignoring this risks alienating rural populations. Urban communities may embrace statutory equality, but rural communities may resist it as a foreign system. The duality underscores the complexity of imposing the ISA rules in a culturally diverse society.¹³⁰ The ISA also creates practical issues. It fails to accommodate variations in customary practices and excludes heirs recognised under tradition,¹³¹ leading to family disputes and prolonged litigation. The *Shilubana* shows that living law can adapt to gender equality without ISA imposition, a decision the Court upheld as both culturally authentic and constitutionally compliant.¹³² In some communities, daughters are now permitted to inherit property, reflecting organic integration of gender equality into customary norms.¹³³ This illustrates that internal reform, not external imposition, best preserves cultural essence while promoting equality.

¹²² Ibid paras 189-190.

¹²³ *Alexkor* (note 50 above) para 51.

¹²⁴ Ibid para 51.

¹²⁵ *Bhe* (note 3 above) para 42; TW Bennett *Human Rights and African Customary Law under the South African Constitution* (1997) 63.

¹²⁶ *Shilubana* (note 50 above) para 27; 35 & 65.

¹²⁷ *Bhe* (note 3 above) para 153.

¹²⁸ Ibid para 163.

¹²⁹ Ibid para 23.

¹³⁰ MJ De Waal & MC Schoeman-Malan *Law of Succession* 5ed (2015) 125.

¹³¹ Intestate Succession Act section 1.

¹³² *Shilubana* (note 50 above) para 33.

¹³³ JC Bekker & CG Van der Merve *Introduction to South African Law* (2010) 56-58.

The ISA's imposition upon living customary law reveals not merely a technical conflict of succession regimes, but a deeper contest over constitutional identity, cultural legitimacy, the meaning of equality in a plural legal order, and the protection of children. Ultimately, the debate is about which vision of equality South Africa chooses to prioritise: one grounded in uniform rules or one contextualised in communal responsibilities.

While the ISA's imposition is commendable for addressing discriminatory injustices embedded in living customary law, risks producing outcomes misaligned with community values: heirs without duties, estates fragmented, dependants neglected, and indigenous languages and oral traditions eroded. Such dissonance risks eroding both the protective and cultural functions of customary law of succession, replacing them with sterile uniformity.

The solution lies in legislative and judicial reforms that take *Shilubana's* model seriously. Parliament should enact bespoke legislation recognising living law as valid, provided it aligns with constitutional rights. Courts should prefer developing living law in context rather than importing statutory frameworks indiscriminately. Traditional Courts should be given space to adjudicate succession disputes in culturally resonant ways, subject to constitutional safeguards. Such an approach could transform reform from a top-down imposition into a participatory project of constitutional pluralism.

The ISA in its current form, compromises the purpose of living customary law by imposing individualistic property rules on a communal diverse and adaptive system. However, this compromise is neither necessary nor inevitable. Pluralist constitutionalism is possible in one that protects equality and dignity while respecting African cultural integrity. The choice before South African law is not between modernity and tradition, but between imposition and dialogue. By choosing dialogue, the constitutional promise of diversity under sections 30, 31, and 211 can be realised.

The task now is to move beyond identifying the problem of imposition, toward exploring constructive models of coexistence and accommodation of living customary law within the legal framework of intestate succession.

4. Is there a place for living customary law rules of succession to be accommodated within the frameworks of intestate succession rules?

The question of whether living customary law rules of succession can find meaningful accommodation within the frameworks of intestate succession rules goes to the heart of South Africa's constitutional project of legal pluralism. On the one hand, section 211(3) of the Constitution recognises customary law as an independent and binding source of law, while section 39(2) places it alongside the common law as part of the legal system. On the other hand, landmark judgments such as *Bhe* imposed the ISA as the default law of intestate succession, effectively subordinating living customary practices to a codified statutory regime.¹³⁴ The more pointed challenge is whether the constitutional promise of legal pluralism has been hollowed out by judicial assimilation, such that the living law is tolerated only when it mirrors the ISA. In effect, the law faces a legitimacy deficit: equality gains are secured, but the cultural logic of kinship obligations is eroded, raising questions about whether the "living" character of customary law has any meaningful space in the ISA.

The problem is not abstract. For many communities, succession disputes are not merely about property distribution but about preserving kinship ties, sustaining households, and maintaining the continuity of family responsibilities.¹³⁵ Living customary law embodies these functions by operating through consensus, accountability, and oral traditions that evolve over time.¹³⁶ This is in contrast to the ISA, with its individualised focus on heirs and beneficiaries.¹³⁷ This paradox shows that while the Constitution mandates the eradication of discriminatory practices, it simultaneously commands respect for cultural diversity. Thus, the challenge is not whether reform should occur, but how it should occur: in such a way that secures women and children's rights while preserving the communal ethos that succession under customary law seeks to protect.

We now examine whether living customary law can be accommodated within the ISA rules without undermining constitutional values or cultural integrity. Having already considered the relationship between common law succession and customary law of succession which differ in

¹³⁴ *Bhe* para 136.

¹³⁵ Paleker et al (note 1 above) 5 & 270.

¹³⁶ Bennett (note 50 above) 2.

¹³⁷ Paleker et al (note 1 above) 5.

practice and application, what does it mean when the rules of the ISA are imposed on living customary law? Could alternative models give fuller effect to living law without simply entrenching the codified ISA framework that has been treated as the fairest system? The central inquiry is not only whether living law has a place in the ISA framework. It also asks what form such accommodation should take. It considers whether mechanisms such as trust-based arrangements, dual systems of choice, or strengthened traditional Courts might better align with constitutional imperatives while giving fuller effect to living law and ensuring practical enforceability. This article suggests that the imposition of the ISA, read together with the RCLSA, does not fully give effect to living customary law within the constitutional framework.

4.1 Accommodation of living customary law through reforms: Lessons from marriage law

The primary legislative action for aligning customary of succession law with the Constitution and integrating it within the broader legal framework, includes the implementation of the RCMA, which provides for the recognition of customary marriages, and the RCLSA, which seeks to accommodate living customary law of succession within the ISA rules. Through its validation of marriages entered under customary law,¹³⁸ the RCMA demonstrates that it is possible to create a statutory framework that respects both constitutional principles and the evolving nature of living customary law. However, the RCMA does not explicitly codify the customary law of succession, since its codification of the aspects of customary marriage preserves the practices of living customary law. The RCMA ensures that customary marriages are in equal standing with civil marriages,¹³⁹ in contrast with the RCLSA, which allows the replacement of living customary practices with the ISA. However, the RCLSA represents a significant attempt to integrate living customary law into intestate succession while upholding the principles of equality and non-discrimination. One of its commendable aspects is its broad definition of descendants,¹⁴⁰ an extension that was absent in the ISA prior to the implementation of the RCLSA. It acknowledges distinctive customary practices such as seed-raiser arrangements, woman to woman marriages, and customary adoption,¹⁴¹ which are not explicitly recognised under the ISA.

¹³⁸ Recognition Act (note 40 above) section 2(3)-(4).

¹³⁹ Ibid section 2.

¹⁴⁰ The Reform Act (note 4 above) 1(a) & (b).

¹⁴¹ Ibid section 1(a) 2(2)(b) & (c).

Given that the RCMA successfully accommodated customary marriage law into the broader legal framework while respecting living customary law, a similar approach could be considered when accommodating the living law within the ISA frameworks. The question that arises is whether the issues in living customary law of succession, can be addressed in the same manner as issues in customary marriages under the RCMA? One key issue is gender discrimination in living customary law of succession.¹⁴² If the head of the family' position is traditionally determined by gender, can the living law allow for the firstborn, regardless of gender, to succeed as the head of the family? Another critical question is whether the framework of the ISA gives full effect to the living law? Currently, the structure of the ISA does not give full effect to the living law. One of the key issues is succession to the status and responsibilities of the deceased, which includes authority over the estate, management of assets and liabilities, the well-being of family members, and the performance of familial rituals.¹⁴³ The ISA does not enforce these principles as a means of integrating living customary law within its framework, nor does it adequately address the fundamental differences between customary law of succession and common law intestate succession.

The minority judgment in *Bhe* highlighted concerns about the application of the ISA in a customary law context. Justice Ngcobo expressed concerns that applying the Act might disrupt family property arrangements, particularly in cases where parents die leaving minor children and dependents.¹⁴⁴ In addition, Chuma Himonga also argues that reforms have often translated living customary law into statutory categories that resemble common-law concepts more than customary law practices.¹⁴⁵ This reveals a structural bias in favour of common law concepts, undermining the “equal status” promised to customary law under section 211(3) of the Constitution.

A better balance would involve legislative mechanisms that, like the RCMA, provide constitutional safeguards while explicitly leaving space for families and communities to shape and articulate their living customary law of succession. Such reforms could include statutory recognition of family councils in succession decisions or provisions that give legal effect to recorded community practices. Such an approach could preserve cultural integrity, protect women and children from marginalisation, and maintain the communal values central to succession, while ensuring that customary law remains dynamic and constitutionally

¹⁴² Paleker 269-270.

¹⁴³ Ibid 270.

¹⁴⁴ *Bhe* para 231.

¹⁴⁵ Osman (note 11 above) 7.

compliant. To move forward, is to examine the judicial interpretations to assess whether the Courts have reinforced or undermined this delicate balance between statutory reform and living customary law.

4.2 Judicial approaches and their implications

The jurisprudence reveals striking inconsistencies in the Courts' treatment of living customary law. In *Mthembu v Letsela*, the Court upheld the primogeniture rule, preserving cultural integrity but leaving women without meaningful protection.¹⁴⁶ The decision in *Mthembu* is in contrast with the decision in *Bhe*, while the decisions such as *Mabena*¹⁴⁷, *Mayelane*¹⁴⁸ and *Shilubana* show a more nuanced approach, where Courts were prepared to recognise the evolving character of living law and its capacity to align with constitutional principles. Yet, this fragmented judicial trajectory leaves uncertainty as to whether living customary law is being accommodated or is progressively displaced. The recommendation here is for the judiciary to adopt a principled interpretive framework for succession disputes: (a) ascertain the living rule through community evidence, (b) test it against equality and dignity, and (c) develop it to dismantle the discriminatory effect. Implementing this would require judicial training, the creation of customary law expert panels, and procedural rules mandating engagement with family councils. The outcome would be less assimilation, greater doctrinal coherence, and more genuine recognition of customary law's autonomy.

These tensions require a more closely examination by considering whether a hybrid or alternative framework could better secure both constitutional guarantees and the cultural distinctiveness of living succession practices.

¹⁴⁶ *Mthembu v Letsela* 2000 3 SA 867 (SCA) para 31-32.

¹⁴⁷ *Mabena* (note 94 above) paras 1074H-1075B.

¹⁴⁸ *Mayelane* (note 95 above) para 1.

4.3 Alternative frameworks for accommodation

If the ISA's assimilationist framework fails to capture the essence of living customary succession, other alternatives may better achieve constitutional pluralism. Two promising models merit exploration: reform of trust law and the creation of a dual system of choice.

One proposal is to reimagine succession through a trust-based framework. Instead of distributing property individually under the ISA, the estate of a deceased family head could be placed in a family trust, with the eldest child whether male or female or another appointed member acting as trustee. This trustee would be obliged to manage the estate for the benefit of all dependants, including all those recognised under customary law. This model will align more closely with the communal ethos of living customary law of succession, which views inheritance as the continuation of family responsibilities and obligations rather than the transfer of private wealth.¹⁴⁹ The Trust Property Control Act 57 of 1988 already regulates trusts by imposing fiduciary duties on trustees¹⁵⁰ and requiring accountability to the Master of the High Court.¹⁵¹ By adapting these statutory safeguards to the succession context, statutory reform could embed principles of accountability and collective management, transforming the trust into a mechanism that both reflects the cultural logic of customary succession, and ensures transparency and protection against abuse. Legislative reform could amend the ISA to provide for family trusts and establish procedures for registering community rules as they evolve to fairly accommodate living customary law.

The second option is a dual system of choice, allowing families to opt into customary succession rules provided these comply with constitutional principles. Communities could record their living rules of succession through family councils, traditional authorities, or community registers, which would then be recognised by the Courts, subject to constitutional safeguards. This will preserve cultural autonomy while preventing discriminatory practices. Incorporating the trust mechanism could enhance enforcement by ensuring that community-recorded rules are not only recognised, but administered through trustees bound by statutory duties, thereby bridging the gap between living law, the ISA and constitutional oversight.

¹⁴⁹ Paleker et al 5.

¹⁵⁰ The Trust Property Control Act section 9.

¹⁵¹ Ibid section 16-19.

Critics may argue that these alternatives risk inconsistency and complexity. However, pluralism necessarily entails diversity, and the Constitution explicitly recognises customary law as binding under section 211(3). A trust-based succession framework, supplemented by a dual-choice model, could institutionalise family responsibilities, strengthen accountability, and give communities genuine agency in shaping their inheritance practices. Both approaches require careful legislative design, but they offer more authentic avenues for accommodation than the blunt imposition of the ISA. The likely outcome could be a system that protects women and children, preserves communal values, and operationalises constitutional principles through a legally supervised yet culturally sensitive model.

4.4 Ascertainment of living customary law and its constitutional position

The meaningful accommodation of living customary law of succession also depends on the ability of the Courts to ascertain its content, which is a complex process especially in a diverse society.¹⁵² The Constitution's requirement of the courts to apply customary law when applicable, has little value if Courts are unable or unwilling to ascertain what the living customary law is in practice. The LEAA, empowers the Courts to admit evidence of customary law through oral testimony and expert opinion,¹⁵³ confirming that ascertainment is not only possible but also legally supported. Case law reveals both the risks and potential of this process. There are landmark decisions by the Constitutional Court in which the Court differently approached the ascertainment of customary law. In *Bhe*, the Court failed to undertake the crucial task of ascertaining the content of living customary law, opting instead for a statutory substitution model. While acknowledging that "Black law and custom" was a flexible and evolving system, the Court sidestepped the principle of male primogeniture altogether.¹⁵⁴ In *Shilubana* the Constitutional Court laid down explicit guidelines for the ascertainment of customary law, marking a pivotal step in reconciling living law with constitutional values. The Court stressed that reliance on past practice, while important for establishing context, cannot alone determine the existence of a customary rule.¹⁵⁵ By rejecting the common law requirement of consistent historical application,¹⁵⁶ it prevented the ossification of customary law and

¹⁵² Osman (note 11 above) 19.

¹⁵³ Amendment Act (note 71 above) section 1(1).

¹⁵⁴ *Bhe* (note 3 above) para 2.

¹⁵⁵ *Shilubana* (note 49 above) para 51.

¹⁵⁶ *Ibid* paras 55-56.

affirmed its character as an evolving system. This approach rightly avoided trapping communities in outdated traditions inconsistent with their present practices or with the Constitution. At the same time, the Court highlighted that communities retain the right to develop their own law,¹⁵⁷ a corrective to the distortions produced by colonial and apartheid interventions and thus required Courts to respect and facilitate this autonomy. Yet, by placing the evidentiary burden on parties to demonstrate contemporary custom,¹⁵⁸ the Court risked privileging resourceful litigants and leaving marginalised groups excluded from shaping the recognition of their own living law. Its insistence on balancing flexibility with legal certainty, vested rights, and constitutional guarantees¹⁵⁹ was constitutionally prudent but also revealed an enduring tension: overemphasis on predictability which may dilute the organic evolution of custom. In this way, *Shilubana* advanced a framework that foregrounds the dynamism of customary law while simultaneously constraining it through procedural demands, leaving unresolved the challenge of aligning communal agency with the constitutional order.

In grappling with the role of ascertainment in customary law, the Constitutional Court adopted markedly different approaches in *Mayelane* and *Ramuhovhi*. In *Mayelane*, the Court did not agree about its role and powers in ascertaining customary law. However, the majority requested further evidence as to whether Tsonga customary law required consent of a first wife for a subsequent customary marriage.¹⁶⁰ They explained this evidence as necessary to regard customary law as a source of law.¹⁶¹ By contrast, in *Ramuhovhi*, the Court did not rely on ascertainment to legitimise the rule in question; instead, it acknowledged the prevailing customary practice that denied women in polygynous marriages rights to matrimonial property but struck this down as unconstitutional.¹⁶² This contrast reveals the dual role of Courts: while *Mayelane* exemplifies the Court's willingness to ground its reasoning in evidence of community practices, *Ramuhovhi* underscores the constitutional ceiling beyond which ascertainment cannot operate. Thus, ascertainment can facilitate the integration of living law into formal jurisprudence, but it cannot shield practices that conflict with the fundamental rights enshrined in the Constitution.

¹⁵⁷ Ibid para 45.

¹⁵⁸ Ibid para 46.

¹⁵⁹ Ibid para 47.

¹⁶⁰ *Mayelane* (note 95 above) para 47.

¹⁶¹ Ibid.

¹⁶² *Ramuhovhi* (note 102 above) paras 52-56.

The contrasting approaches in these cases highlight a critical tension in accommodating living customary law within formal legal frameworks. While *Mayelane* and *Shilubana* demonstrate that Courts can meaningfully ascertain and apply community driven practices, *Bhe* and *Ramuhovhi* show that constitutional imperatives can override customary norms, limiting the scope of living law. This illustrates that, in the context of the ISA, meaningful space for living customary law exists only where it aligns with constitutional values; courts can facilitate its application through careful ascertainment, but they cannot permit practices that perpetuate discrimination or violate equality and dignity. Consequently, the integration of living customary succession into statutory frameworks of the ISA requires both judicial engagement with community norms and strict constitutional oversight.

5. Conclusion

At its core, the research problem asked whether the imposition of the common-law based ISA adequately reflects South Africa's pluralistic reality or whether it compromises African cultural practices and undermines constitutional recognition of customary law. The inquiry revealed that the answer lies not in choosing between common and customary succession but in reimagining a system capable of accommodating both within constitutional bounds. The path to reconciling the differences does not lie in replacing customary of succession with the rules of the ISA, but in developing customary law itself, so that it aligns with constitutional principles. This is crucial, as customary law is equally bound by the Constitution and recognised as a binding source of law on par with the common law.

The analysis further demonstrated that the indiscriminate replacement of customary law principles undermines the constitutional vision of legal pluralism. It weakens the recognition of living customary law as a legitimate and dynamic system, and risks reducing South Africa's cultural diversity to a single, imposed model of succession. The two systems exist in parallel, each reflecting a different worldview and social logic. For this reason, imposing one framework upon the other does not create harmony but instead compromises the integrity of both.

To resolve this tension, a careful balancing exercise is required. Respect for cultural diversity and the right of communities to live under and be governed by their indigenous law must be weighed against the need to protect vulnerable family members. The overriding aim should always be to achieve outcomes that are fair, just, and equitable, with the protection of minor children and dependants of the deceased as the paramount concern. Such an approach does not collapse customary law into statutory models but instead seeks to nurture it within constitutional boundaries, ensuring that succession remains both culturally authentic and constitutionally sound.

The analysis shows that while statutory and judicial reforms have advanced constitutional equality, they have often done so by assimilating customary law into intestate succession models, thereby eroding its communal ethos. *Bhe* epitomises this tension, securing rights at the cost of cultural authenticity, whereas cases such as *Shilubana* demonstrate that genuine engagement with living practices is both possible and constitutionally required.

The way forward lies not in repeating past assimilationist strategies but in exploring pluralistic frameworks that respect both constitutional principles and cultural practices. Mirroring of the RCMA, reform of trust law, a dual system of choice, and robust mechanisms for ascertainment

all offer pathways to genuine accommodation. Each proposal requires institutional support and statutory reform, but each also promises a succession system that reflects the lived realities of South African families rather than imposing abstract legal categories.

Living customary law's position as a binding source of law means that its exclusion is not simply a matter of preference but a constitutional shortcoming. To accommodate it within intestate succession rules is to take seriously the Constitution's vision of a pluralistic legal order: one in which equality and dignity coexist with cultural integrity, and where succession and inheritance is understood not only as the transfer of wealth but as the sustenance of families and communities.

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