

SUCCESSION, LIVING INDIGENOUS LAW AND *UBUNTU* IN THE CONSTITUTIONAL COURT*

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SUMMARY

In *Bhe v Magistrate Khayelitsha; Shibi v Sithole; SA Human Rights Commission v President of the Republic of South Africa* 2005 1 BCLR 1 (CC), the Constitutional Court by a majority declared as unconstitutional legislation regulating intestate succession in indigenous law which violated rights of equality and dignity. On the same grounds it struck down the traditional rule of male primogeniture as it applies in relation to the succession of property. In a dissenting judgement, Ngcobo J found that the rule of male primogeniture should be developed in line with the Constitution. In this article it is argued that abolition of a rule that goes to the core of indigenous law will be a theoretical exercise and will deepen the divide between living and official indigenous law. Deep legal pluralism is a reality in South Africa. Indigenous law and western law should be brought together in a relationship of equality through a process of harmonisation. The Constitution could be used as meta standard to achieve this. But a state of accord or consonance will only be realised if the key values of *ubuntu* are not disregarded in the process.

1 INTRODUCTION

In a recent decision by the Constitutional Court the focus fell once more on the relationship between dominant state law and “other laws”. In *Bhe v Magistrate Khayelitsha; Shibi v Sithole; SA Human Rights Commission v President of the Republic of South Africa*,¹ the highest court of the land put to rest the long-ranging dispute about the constitutionality of a principle which underlies the indigenous law of succession.² In this case, the Constitutional Court had to decide on the constitutionality of the rule of male primogeniture as it applies in the indigenous law of succession. It also had to determine the constitutional validity of section 23 of the Black Administration Act 38 of 1927 and regulations promulgated in terms of that section, as well as that of section 1(4)(b) of the Intestate Succession Act 81 of 1987. This discussion will focus mainly on the rule of male primogeniture and, more generally, on the continued existence of indigenous law in the light of the

* This article is in memory of Professor JMT (Lappies) Labuschagne, mentor and colleague.

¹ 2005 1 BCLR 1 (CC) (hereinafter “Bhe”).

² Bennett *Customary Law in South Africa* (2004) 358ff gives an overview of attempts to reform the indigenous law of intestate succession and its application by the courts.

Constitutional Court's response in this decision to issues of conflict between indigenous law and the Constitution.

2 THE CASE(S)

The cases of *Bhe* and *Shibi* were applications for the confirmation of orders of the High Court of the constitutional invalidity of the legislation in question. In both cases the relevant legislative provisions, which entrench the indigenous rule of male primogeniture, prevented the applicants in the courts *a quo* from inheriting. They were respectively the two daughters of a deceased father, and the sister of a deceased brother. In addition, the South African Human Rights Commission and the Women's Legal Trust were granted direct access to the Constitutional Court to bring a class action in the public interest and on behalf of all women and children excluded from inheriting by this legislation and the relevant rule of indigenous law.

3 LEGISLATION AND STATE LAW PLURALISM

The court considered section 23 of the Black Administration Act in its historical context as part of legislation promulgated to "fit in with notions of separation and exclusion of Africans from the people of 'European' descent".³ Against this background the court, by a majority, found that section 23, as well as regulation 2(e) of the Regulations of the Administration and Distribution of the Estates of Deceased Blacks of 1987, issued in terms of the Black Administration Act, were anachronistic, ossified official indigenous law, violated the rights of equality and dignity, and consequently had to be struck down. Also section 1(4)(b) of the Intestate Succession Act was struck down on the basis that it violated the rights of equality and dignity. The court found that until new legislation is promulgated to regulate intestate succession in indigenous law, the Intestate Succession Act would regulate the matter.

In his minority judgment, Ngcobo J too agreed that section 23 of the Black Administration Act, the relevant regulations, and section 1(4)(b) of the Intestate Succession Act were "manifestly racist in [their] purpose and effect"⁴ and, being an offence to the dignity of African people, should be abolished.

The decision marks the end to discriminatory legislation which entrenched inequality, and which fossilised indigenous law. For that it must be welcomed. Moreover, the decision should be hailed for eradicating legal pluralism based on inequality. However, this does not mean that there should be a drive for the complete elimination of legal pluralism. In South Africa, state law pluralism is the result of colonialism and apartheid. The legislation referred to above, together with other pieces of legislation, some of which did not survive the transition to a non-racial democracy, established legal pluralism based on inequality. One piece of legislation which, to refer to

³ *Bhe supra* par [61]-[68].

⁴ *Bhe supra* par [143].

but one example, still entrenches the subordinate position of indigenous law *vis-à-vis* western law is the Law of Evidence Amendment Act.⁵

Unfortunately the subtle nuances of legal pluralism are often disregarded: On the one hand there is deep legal pluralism which is not based on relations of inequality and exists irrespective of state recognition. This type of legal pluralism is a fact of South African society and cannot be eradicated. By contrast, there is state law pluralism which may, as in the present context, be based on inequality of the applicable legal systems (the western law⁶ and indigenous law). This is not true legal pluralism and it is not surprising that academics who interpret legal pluralism narrowly as comprising no more than this type of state law pluralism root for the unification of the South African legal system.⁷ Legal pluralism in this sense is founded on positivism, and affords indigenous law the status of law only when it has been authorised by the state. Its recognition is in accordance with practical rules, contained in the legislation above, which determine when indigenous law may be applied, when it should be regarded as acceptable (generally, when it is not repugnant to western perceptions of what is moral and in the public interest), how it should be ascertained, and what should happen when there is a conflict with the national law.⁸

4 MALE PRIMOGENITURE IN SUCCESSION: DEVELOP OR DISCARD?

The Constitutional Court found the traditional rule of male primogeniture as it applies in relation to the succession of property unconstitutional and invalid because it discriminates unfairly against women and extra-marital children. This rule had become stagnated through legislation and court decisions.⁹ The majority opined that since the rule is fundamental to indigenous law, it

⁵ 45 of 1988. See Iya "Culture as a Tool of Division and Oppression: Towards a Meaningful Role for Culture and Customary Law in a United South Africa" 1998 31 *CILSA* 228 236. The imposed western law or national law, is perceived to be the superior, dominant system, while official indigenous law is the servient law. This means that national law may abolish indigenous law at any given time; that national law usually prevails when there is a conflict or clash of legal obligations; and that the classifications and descriptions of the national legal system are used to explain the indigenous system. See generally Van Niekerk "State Initiatives to Incorporate Non-state Laws into the Official Legal Order: A Denial of Legal Pluralism?" 2001 34 *CILSA* 350 for an analysis of the different concepts of legal pluralism and the historical emergence of legal pluralism in South Africa. See also Merry "Legal Pluralism" 1970 *ICLQ* 868 879ff; and Hooker *Legal Pluralism. An Introduction to Colonial and Neo-colonial Laws* (1975) 4.

⁶ The common law in South Africa is characterised as "western law" because it shares a basic intellectual and jurisprudential tradition with other legal systems belonging to the Romano-Germanic and Common-law legal families. For a more detailed discussion of the characteristic features of western and indigenous law in South Africa and its classification as such, see Van Niekerk "The Convergence of Legal Systems in Southern Africa" 2002 35 *CILSA* 308.

⁷ See eg Pieterse "It's a 'Black Thing': Upholding Culture and Customary Law in a Society Founded on Non-racialism" 2001 17 *SAJHR* 364ff. On 402 he states: "It is possible to respect and protect the multicultural nature of South African society without the continuation of legal dualism."

⁸ See Hooker 1; Griffiths "Legal Pluralism in Botswana" 1998 *Journal of Legal Pluralism* 2ff; and Prinsloo "Regsppluralisme" 1994 *TSAR* 696ff.

⁹ *Bhe supra* par [82].

could not be developed on a case-by-case basis. Although it took cognisance of the fact that there exist “living” versions of indigenous law which have adapted to meet the changing needs of society, it pointed out that these adaptations are not uniform.¹⁰ A case-by-case development of indigenous law would consequently be unacceptable; it would create uncertainty and would take place too slowly.¹¹

By contrast, Ngcobo J dissented on this point in his minority judgment. He held that although the rule is inconsistent with the constitutional guarantee of gender equality,¹² it should not be scrapped but developed to allow women to succeed the deceased. He pointed out that the approach in *Carmichele v Minister of Safety and Security*,¹³ in which it was stressed that the courts do not have a discretion but are obliged to develop the common law to bring it in line with the Constitution, applies equally to indigenous law. What makes this developmental obligation of particular importance for indigenous law is that “[o]nce a rule of indigenous law is struck down, that is the end of that particular rule”.¹⁴

Of course, one has to bear in mind that striking down a rule that goes to the core of indigenous culture merely widens the chasm between living indigenous law¹⁵ and official indigenous law. Holistically viewed, only a small percentage of succession cases come before the courts and the rule will, irrespective of judicial activism, certainly continue to be applied unofficially – predominantly in the rural areas. But this should not be taken to mean that the traditional rule still applies unaltered everywhere. One must guard against the fallacy of viewing the traditional law as the true, living indigenous law currently applicable. That would be to deny indigenous law its inherent flexibility and adaptability to accommodate change.

Ngcobo J¹⁶ mentioned two instances in which indigenous law should be developed. The first is where indigenous law should be brought into line with

¹⁰ *Bhe supra* par [87].

¹¹ *Bhe supra* par [111]. According to Knoetze and Olivier “To Develop or Not to Develop the Customary Law: That is the Question in *Bhe*” 2005 26(1) *Obiter* 126ff the majority of the court followed an approach of direct application of constitutional rights to indigenous law, striking down the rule of male primogeniture, while the minority followed an approach of indirect application. In terms of the former approach the values which underlie indigenous law are negated. This approach enhances the possibility that over time indigenous law may be eradicated. See also Currie and De Waal *The Bill of Rights Handbook* (2005) 32ff for an in-depth discussion of the direct and indirect application of the Bill of Rights. At 50 they conclude that in the light of the developments in the 1996 Constitution (s 8(2), s 39(2)), much of the debate regarding direct and indirect application has become irrelevant. See further Bennett 94 who is of the opinion that “[f]or purposes of reviewing existing customary law ... there may be little difference between direct and indirect horizontal application of the Bill of Rights”. Ultimately it is the *outcome* of judicial activity rather than the methods employed by the courts which will direct the future development and continued existence of indigenous law.

¹² Ngcobo J found that the rule of primogeniture (succession by *eldest* child) is reasonable and justifiable under s 36(1) of the Constitution. See *Bhe supra* par [183].

¹³ 2001 4 SA 938 (CC).

¹⁴ *Bhe supra* par [215].

¹⁵ See Himonga and Bosch “The Application of African Customary Law Under the Constitution of South Africa: Problems Solved or Just Beginning?” 2000 117 *SALJ* 306 319ff for an in-depth theoretical discussion of “living” indigenous law v “official” indigenous law.

¹⁶ *Bhe supra* par [216], [218].

the Constitution. The second is where the changing needs of society demand development. In this regard the Constitution may be regarded as an external stimulus, flowing from the prevailing cultural pluralism, which induces change; the changing needs of society, again, constitute an internal stimulus which induces change.

Internal change first manifests itself in the living law. Official law reform is always a step behind natural, internal reform at grass-roots level. It is therefore essential that the living law be used as a directive in law reform.¹⁷ Judge Ngcobo's idea of retaining the rule of male primogeniture whilst adapting it to changing needs, will not lead to black-letter law and will close the gap between the law applied in rural areas and that followed in urban areas. It requires no special insight to realise that it would be impossible to halt the application of the male-primogeniture rule. An adapted rule, which is still based on the underlying values of indigenous law, will be in harmony with the rule as it is still applied in the deep rural areas. Empirical studies of current practice evidence the natural development of this rule without sacrificing its original justification, namely the preservation of the group or family. As will be explained below, a characteristic feature of indigenous culture, including indigenous law, is its ability to accommodate change without substituting original rules or practices.

The living law that is currently applied has grown and developed to meet the demands of new communities. Therefore, although some rules of the indigenous law that have been entrenched in legislation may be characterised as "pure" indigenous law which is in conformity with traditional indigenous law, more often they are instances of a petrified law which has not kept pace with change. In *Mabuza v Mbatha*¹⁸ it was pointed out that indigenous law has always been flexible in application and has evolved over the years. This natural evolution is a continuing process and takes place within the framework of the underlying basic principles of indigenous law.

4 1 The traditional rule: The reason for its existence

In order to determine how to reform a rule such as that of male primogeniture, it has to be established why the rule came into being in the first place and what the basic principles were upon which it was founded.¹⁹

¹⁷ Mqoke *Customary Law and the New Millennium* (2003) 113 states that in the reform of the law of succession a "full-scale investigation on what takes place on the ground is the way to go".

¹⁸ 2003 4 SA 218 (C). In that case the court remarked that it is inconceivable that ceremonial marriage customs can be elevated into something so indispensable that without them there could be no valid marriage. See also Nkosi "The Extent of the Recognition of Customs in Indigenous Law of Marriage: A Comment on *Mabuza v Mbatha* [2003] 1 All SA 706 (C)" 2004 18(2) *Speculum Juris* 325. In this regard see also *Gladstone (Ramoitlhek) v Liberty Group Ltd* 2005 JDR 0762 (WLD); and *Mateza v Mateza* 2005 JDR 0764 (Tk). In *Bhe supra* par [81] the court referred also to *Alexcor Ltd v Richtersveld Community* 2003 12 BCLR 1301 (CC) in which the adaptability of indigenous law to changing circumstances was underlined.

¹⁹ Ncgobo J discusses the indigenous law position regarding succession in detail in par [99]-[177]; see also Taylor "Where There is a Will: How Traditional African Homesteads Reflect the Legal Consequences of Succession" in Falola and Salm *Urbanization and African Cultures* (2005) 417 for a discussion of traditional law and the conflict between living and official indigenous law.

The reason for the emergence of the rule was to ensure the continued existence of the family or the group. It is obvious that the primary goal of the rule of male primogeniture could not have been to prejudice certain members of the community. After all, in line with *ubuntu* which is the foundation of the basic principles underlying indigenous law, the individual and the community are two sides of the same coin.²⁰ The essence of *ubuntu* is encapsulated in the belief that the welfare of the individual is inextricably linked to the welfare of the group or family; that, in turn, is linked to a harmonious relationship with the ancestors and with nature. The welfare of *all* members of the community guarantee the equilibrium and welfare of society.²¹ The group, family or collectivity cannot be seen as an entity separate from its component members.

Harmonious co-existence within the group and between it and the super human, and the ability to accommodate change,²² are essential postulates underlying indigenous law. It is the ability to accommodate change that becomes of particular importance when dealing with the evolution of indigenous law. A rule such as that of male primogeniture is inherently susceptible to change without sacrificing its fundamental premise, namely the harmony of the collectivity and, in essence, the preservation of the group. In African culture, change is not perceived as substitutionary. It is this ability to accommodate change without sacrificing the fundamental postulates which underlie indigenous culture and law, that has made indigenous law so resilient to the impact of western jurisprudence. Interestingly the Constitutional Court, in the majority decision, acknowledged the “inherent flexibility” of indigenous law as one of the “valuable aspects of customary law” which justify the protection of that law by the Constitution. But then it promptly abolished this pivotal rule of indigenous law rather than developing it. Is this one more manifestation of legal positivism, namely that rules are rewritten where law reform is required and where organic evolution should rather be permitted?

²⁰ Kaunda *A Humanist in Africa* (1966) 22-28 traces the historical roots of the concept of *ubuntu* back to small-scale societies in Africa which were characterised as *mutual communities* (resources were communally owned and administered to satisfy the needs of every person as member of society; the only perception of life was life-in-community); as *accepting communities* (members were valued not for what they could achieve but because they were *there*); as *inclusive, participatory communities* (relationships and responsibilities were seen within the context of the extended family; emphasis on acceptance of wide responsibilities towards and care for others). For a more detailed discussion of *ubuntu* see English “*Ubuntu: The Quest for an Indigenous Jurisprudence*” 1996 4 *SAJHR* 641; Van Niekerk “A Common Law for Southern Africa: Roman Law or Indigenous African Law?” 1998 31 *CILSA* 158 162ff; De Kock and Labuschagne “*Ubuntu as a Conceptual Directive in Realising a Culture of Effective Human Rights*” 1999 62 *THRHR* 114; and Mbigi and Maree *Ubuntu. The Spirit of African Transformation Management* (1995). See Kroeze “Doing Things with Values II: The Case of *Ubuntu*” 2002 13 *Stell LR* 250 for a critique of the interpretation and use of the concept both in academic writing and by the courts.

²¹ See Ngcobo J par [163]ff for a discussion of the concept of *ubuntu* and its application in succession. See also par [45] in which Langa J refers to *ubuntu* as one of the “healthy communitarian traditions” of indigenous law.

²² Kaunda 29-30; Fabian “Religion and Change” in Paden and Soja (eds) *The African Experience* Vol I (1970) 384.

4 2 Accessing the living law

Bearing in mind that indigenous law is in essence adaptable to the needs of the society it serves, it is necessary to determine to what extent the rule under discussion has changed over time. But this is easier said than done.²³

Because indigenous law is so closely linked to linguistic expression,²⁴ the narratives of the people who live by indigenous law are the obvious starting point in any endeavour to ascertain how the rule is interpreted in present-day circumstances. Narratives are important to counter the stock stories on indigenous law as well as the perceptions that the only true law is the inveterate, traditional law.²⁵

In view of time constraints, courts find it difficult to access the narratives of people who abide by indigenous law,²⁶ and motion proceedings which are often resorted to in litigation involving indigenous law, are not conducive to the use of such narratives. Moreover, in true positivistic fashion, the courts, as a rule, tend to rely on legislation, judicial precedent and rule-centred literature studies when ascertaining indigenous law. It is common cause that the *corpus* of existing text-based material on indigenous law does not always reflect the true, living indigenous law. Expert evidence, which is sometimes adduced to ascertain indigenous law, is usually given by academics who invariably confirm the stock stories on indigenous law; they rarely give true meaning to the rules and posit them in their social context, as they do not live by that law.

Although the common-sense point of departure to access narrative information would be interviews with the people who live by the law, one should not lose sight of the fact that some indigenous law narratives have been captured in writing.²⁷ These publications, in the form of monographs, theses, articles and books, are valuable sources and are readily accessible.

4 3 The living law

There is an increasing discrepancy between the living indigenous law and official indigenous law.²⁸ In its majority decision, the Constitutional Court emphasised the importance of interpreting the rule of male primogeniture in

²³ See the discussion of Ngcobo J in *Bhe supra* par [153]-[155].

²⁴ See generally Ndima "The African Law of the 21st Century in South Africa" 2003 36 *CILSA* 325 328.

²⁵ This was practically illustrated in *Mabena v Letsoala* 1998 2 SA 1068 (T) where the court gave effect to the living Pedi law regarding *lobolo*. See generally the discussion of Fishbayn "Litigating the Right to Culture: Family Law in the New South Africa" 1999 13 *International Journal of Law, Politics and the Family* 147 163ff.

²⁶ Academics, too, generally refrain from employing narratives for much the same reason.

²⁷ A recent publication is Ndima *The Law of Commoners and Kings* (2004). His work is a rich source of information on the living indigenous African law in practice. The author was for two decades a magistrate in the former Transkei. There are many other publications of interviews which yield interesting information on how indigenous law is applied nowadays. The Centre for Applied Legal Studies at the University of the Witwatersrand has done much in this regard. Also the Centre of Indigenous Law at the University of South Africa may be accredited with similar publications. See also Watney "Customary Law of Succession in a Rural and Urban Area" 1992 25 *CILSA* 378.

²⁸ Indigenous law fixed in legislation or judicial precedent.

its social context.²⁹ It is not surprising that the original rule has undergone changes. Altered circumstances in urban areas, such as the predominance of nuclear families as opposed to traditional extended families, have rendered the rule in its original form inadequate and its application in this form has caused great hardship. Outside the extended family structure, it is often impossible, both logistically and financially, to provide for the family of the deceased. The onslaught of poverty and unemployment, and not least of western jurisprudence and judicial interpretation, has in some cases resulted in a distortion of the rule so that individuals have appropriated estates which should in fact have remained that of the group as a whole and which should merely have been administered in the interest and on behalf of the group as a whole.

The fact that the general application of the rule in its original form is no longer in synchronisation with present-day needs, is evidenced by the increase in litigation involving indigenous succession. If indigenous law had naturally adapted to the changing demands of the society it serves, and if the interests of all members of the group or family had been safeguarded, the need would not have arisen to approach western courts to resolve issues which had in the past been resolved internally. Moreover, the seminal decisions³⁰ on the issue have produced unsatisfactory results. The courts simply do not seem to entertain the possibility that indigenous law is capable of development to bring it in line with the Constitution. The only option recognised is to retain the original rule, or to scrap it.

Yet there are numerous examples of how communities have adapted traditional practices to safeguard the welfare of all the members of the group. This has been verified by recent empirical research undertaken by the Gender Research Project of the Centre for Applied Legal Studies.³¹

According to these research projects, indigenous families rarely allow property that is used by needy members to be reallocated.³² In these communities the rule of male primogeniture has been extended so that everyone in need of care was indeed catered for. This was usually accomplished not by making a will, but by leaving appropriate instructions with chiefs or councillors.³³

However, one should not too readily jump to the conclusion that a particular rule is an adapted version of a rule of traditional indigenous law. On an analysis of some of these examples, it may appear that the traditional rule has in fact not been extended but merely correctly applied. For example, the fact that a needy family member is allowed to continue using the property that she had been using before the death of the head of the family, is in line with the principle of indigenous law that all members should be cared for. In accordance with traditional law, succession to the position of the head of the family should not alter the position of the rest of the family.

²⁹ *Bhe supra* par [80].

³⁰ The present case (in which the rule was glibly scrapped) and *Mthembu v Letsela* 1998 2 SA 675 (T); 2000 3 SA 867 (SCA) (in which the rule was strictly applied).

³¹ Mbatha "Reforming the Customary Law of Succession" 2002 18 *SAJHR* 259 269.

³² Mbatha 2002 18 *SAJHR* 271.

³³ See generally Mbatha 2002 18 *SAJHR* 260-261 267ff.

A recent discussion of a succession case that served before a magistrate's court in the 1980s in the district of Butterworth, illustrates how easily the reality of indigenous culture may be misunderstood.³⁴ In that case the attorneys of the deceased's civil-law wife asked the magistrate, as the administrator of black estates in terms of the Black Administration Act 38 of 1927 and the regulations issued in terms of it, that indigenous law not be applied and that the estate be dealt with in terms of the common law. The reason for their request was that under indigenous law the proceeds of the estate would have devolved on the deceased's father so that the wife and young son would have been prejudiced. The request was refused and the court held that the successor to the deceased's estate was his young son. However, since the deceased's father was still alive at that stage, the family continued to have one communal estate, under the control of the father, which was at the disposal of the deceased's father, mother, siblings, wife and son. The fact of the matter was that in terms of indigenous law this was no estate dispute!³⁵

It should be borne in mind that the needs of communities differ and that different communities have coped differently with changing needs. In many, the principle of ultimogeniture has evolved while in others females have succeeded the deceased.³⁶ In most, the widow plays an important role. Importantly, the distribution of the estate is the concern of the family and decisions concerning such distribution are taken by the family. Although in terms of the principle of male primogeniture the heir plays a decisive role in family meetings, he does not inherit the property to the exclusion of the rest of the family.³⁷

The best recorded instances of the adaptation of the rule of male primogeniture involve the evolution of the rule of ultimogeniture and the rules relating to the position of the widow. It is important in the indigenous law of succession to distinguish between house property and family property. The house is the smallest political and social unit in indigenous law. The general principle is that the eldest son succeeds to the position of the head of the family. The house property must remain intact and the successor – the eldest son – administers such property in consultation with the widow. However, there is evidence that the youngest son is responsible for the maintenance of the widow and her dependants. After the death of the widow, the youngest son succeeds to the house, household property and agricultural lands of the house.³⁸ This is known as the principle of ultimogeniture.

³⁴ Ndimba 25ff.

³⁵ Ndimba 2003 36 *CILSA* 338ff discusses *Mthembu v Letsela* in similar vein.

³⁶ See Judge Ngcobo's discussion in par [175] and the reference to *Mabena v Letsoala supra* in which the court found that there was an increase in female family heads. See also Pauw *Xhosa in Town. The Second Generation* (1969) 136; and Mbatha 2002 18 *SAJHR* 269: It has been established that daughters rather than other extended family members or customary heirs succeeded where there were no sons.

³⁷ See Maithufi "The Law of Property" in Bekker, Labuschagne and Vorster (eds) *Introduction to Legal Pluralism in South Africa* (2002) 61 64-65; and Maithufi "The Constitutionality of the Rule of Primogeniture in Customary Law of Intestate Succession" 1998 *THRHR* 142 147.

³⁸ See generally regarding ultimogeniture Rautenbach, Mojela, Du Plessis and Vorster "Law of Succession and Inheritance" in Bekker, Labuschagne and Vorster (eds) *Introduction to Legal Pluralism in South Africa* (2002) 107 115. The house property is sometimes divided

The existence of the principle of ultimogeniture should not be seen as an abandonment of the principal rule of primogeniture.³⁹ It should also not be regarded as the allotment of land in accordance with the ordinary rules of indigenous law⁴⁰ but rather as a case of priority in succession. Rules of succession exist to secure the continued existence of the family. The evolution of the rules to include the youngest male in specific circumstances is a natural adaptation to the changing needs of society.⁴¹ This tendency should be an indication that the inclusion of females should also not be regarded as too remote.

The very simple reason why daughters were originally excluded from succession, is that, all things being equal, they would get married and become members of the group of their husbands' families. Succession by a daughter could therefore jeopardize the continued existence or well-being of the family or group. Widows, on the other hand, were not likely to move away from their husband's family – in indigenous law, death does not dissolve a marriage. The marriage is continued through the levirate custom which is still practised amongst many tribes.⁴² That explains why house property remained intact on the death of the husband and was administered in consultation with his widow.⁴³ There are in fact cases where the successor had been evicted from the house because he had made the widow's position intolerable, failed to support her, or generally abused the trust placed in him to support the family.⁴⁴

Importantly, though, is that in all these instances where change has occurred, the reason for the adaptations to the rule remains the collective good. In other words the *raison-d'être* for the rule of male primogeniture has remained unaltered. Therefore, it is crucial that the reformulation of the rule should not be rigid but allow for fluid interpretation to suit individual needs and to accommodate change.

But one must be realistic. For centuries indigenous law has shown a remarkable resilience to imposed western influences. That is not to say that it has not or should not evolve. On the contrary, it merely means that any reform should be undertaken sensitively. Reform that sacrifices the indigenous African identity, that is not rooted in an African value system, will be a theoretical exercise. There are ample examples from African history

among the brothers and sisters of the successor upon the death of their mother. See also Maithufi 65; Watney 1992 25 *CILSA* 380; Bennett *A Sourcebook of African Customary Law for Southern Africa* (1991) 400ff; Prinsloo *Inheemse Publiekreg in Lebowa* (1983) 136; Pauw 9; and Koyana *Customary Law in Changing Society* (1981) 80ff refers to another custom, amongst the Xhosa, that also makes provision for children other than the eldest. In terms of this custom the father donates a female beast to his wife. Upon his death the beast and its progeny passes to his youngest, or among some tribes the second eldest son.

³⁹ As Bennett (1991) 400 indicates.

⁴⁰ As Prinsloo *Indigenous Public Law in KwaNdebele* (1985) 40 indicates.

⁴¹ See eg Bekker and De Kock "Adaption of the Customary Law of Succession to Changing Needs" 1992 25 *CILSA* 367 368-369 who regard this as an adaption of the indigenous law rule of male primogeniture.

⁴² Koyana 81-85.

⁴³ This further explains the finding of the *Cape Commission on Native Laws and Customs 1883 (Minutes of Evidence)* in par 7079 395 that chiefs took over the administration of the estate where there was neither a male heir, nor a surviving widow.

⁴⁴ *Selela v Selela* 1940 NAC (C&O) 68. See Bekker and De Kock 368; and see Maithufi 65.

where foreign institutions replaced indigenous institutions, regarded as too backward and primitive for the successful development of Africa, but ultimately disintegrated because they were founded on foreign values.⁴⁵

4 4 Living law in the courts: Two decisions

In *Mabena v Letsoala*⁴⁶ the adaptability of indigenous law was practically illustrated when the court gave recognition to the fact that it had changed to such an extent that a woman could be head of the family and receive *lobolo*. Fishbayn⁴⁷ lauds this as an example of how the courts may give effect to the Constitutional guarantee of equality by honouring the present-day attempts of those who live by indigenous law “to produce a coherent narrative of the continuity between past practices and new commitments to gender equality”.

In stark contrast, in *Nwamitwa v Phillia*,⁴⁸ where a woman’s right to succeed to the chieftainship of a Tshonga/Shangaan tribe – the Valoyi – came under scrutiny,⁴⁹ the court regarded attempts by the community to align their traditional law to the Constitution as “a bout of constitutional fervour”. It further rejected the decision of the royal family-in-council, supported by the tribal authority, to institute the deceased chief’s daughter as successor, as an evolution or adaptation of existing custom, since there had been some indication of a difference of opinion amongst the Valoyi people. Nevertheless, the court did not deny the ability of the applicable indigenous law to adapt or naturally evolve to fit the needs of society.

The court in *Nwamitwa v Phillia* adhered to the rule that traditional leadership in indigenous Tsonga law is limited to the oldest male offspring of the principal house,⁵⁰ thus entrenching a rule which seems unjust and discriminatory. It has to be borne in mind, though, that succession to status and succession to property are distinguishable and should not be equated. Significant in this case is the fact that acceptance of the community’s

⁴⁵ Ayittey *Indigenous African Institutions* (1991) 423-431; and Sanders “Towards a People’s Philosophy of Law!” 1988 *Journal of African Law* 37 41. See also Mqoke 120ff for a discussion of the tenacity of chieftainship in Africa.

⁴⁶ *Supra*; also referred to by Ngcobo J in par [217]; see further Mbatha 2002 18 *SAJHR* 278; and Mbodla “Customary Law in Search of Development” 1999 116 *TSAR* 742ff.

⁴⁷ Fishbayn 165.

⁴⁸ 2005 JDR 0203 (T).

⁴⁹ For the past five generations, succession to the chieftainship of the Valoyi tribe had taken place in accordance with the rule of male primogeniture. The last chief in the direct line was Fofeza Nwamitwa. He died in 1968, leaving only a daughter of the principal house (the respondent in this case). His brother Richard first acted as chief but his position as chief was later confirmed. The applicant in this case is the eldest son of Richard Nwamitwa who died in 2001. Prior to his death, Chief Richard, the royal family-in-council of the Valoyi tribe, as well as the tribal authority, supported the institution of Fofeza’s daughter as chief. Her chieftainship was conferred by the Provincial authority. At her request Chief Richard was not removed and he stayed on as chief until his death.

⁵⁰ This rule has evolved over the years. Today many women are found in chiefly positions. The book of TV Bulpin was used as authority on this point but was rejected as evidence. See in this regard Bulpin *Lost Trails of the Transvaal* (1965) 293: Selati Gold Fields was named after the reigning chieftainship of the MaThebula tribe in 1890. Today it is common practice that women act as rulers where the successor is still under age. See Vorster “The Institution of Traditional Leadership” in Bekker, Labuschagne and Vorster (eds) *Introduction to Legal Pluralism in South Africa* (2002) 131.

endeavour to adapt their law⁵¹ and, generally, the court's knowledge of the living law, may have influenced the ultimate decision.

The court pointed out that should a female succeed as chief and become married, it will be impossible to adhere to the rule that a chief must be fathered by a chief. Interestingly, the respondent in this case maintained that she had married a so-called "candle-wife" of her mother's line and that a close relative, chosen by the royal family, would father the next chief.⁵² As authority for this practice an anthropological work of Hartman⁵³ was relied upon but it was rejected as evidence by the court as it had not been put to witnesses.⁵⁴

In *Nwamitwa v Phyllia* the court did not have the benefit of considering the living law. Although seniority and sex are primary considerations in Tsonga law in determining the successor to the chieftainship, the senior members of the ruling family are responsible for designating the actual successor after thorough deliberation and consultation.⁵⁵ The rule that *vuhosi byo velekeriwa* ("chieftainship is born") is subject to the suitability of the person. Strict mental, physical and other requirements have to be met and the succession of the eldest son of the chief's principal wife is thus not automatic. The important feature of succession to chieftainship is that the successor must be born to the principal wife. Should she be barren, or bear daughters only, a supplementary wife may be requested to bear a successor. The sororate is commonly known amongst the Tsonga. In addition to this institution, the levirate provides that at the request of the family a supplementary wife be married on behalf of the deceased to provide a successor.⁵⁶ These principles of the traditional Tsonga law seem by analogy to strengthen the daughter's case and render her claims less far-fetched than the court apparently thought.

5 CONCLUDING REMARKS

In *Bhe* the majority of the Constitutional Court condemned an approach which denounces indigenous law rules merely because they differ from the general law of the land. It pointed out that the courts recognised indigenous law as part of South African law in its own right, not merely as a secondary legal system,⁵⁷ affirming the Constitution as the only yardstick against which indigenous law should be judged.⁵⁸

⁵¹ The respondents averred that in the framework of a new constitutional democracy women's position and status have changed. This was confirmed by a resolution accepted at a meeting of the royal family-in-council that under the new "constitution it is now permissible that a female child be heir since she is also equal to a male child". See *Nwamitwa v Phyllia supra* 17.

⁵² A traditional healer denied the existence of woman-to-woman marriages in Tsonga law other than in the case of traditional healers.

⁵³ *Aspects of Tsonga Law* (1991).

⁵⁴ This illustrates again how unsuitable motion proceedings are for the resolution of indigenous law issues, especially issues as important as succession to chieftainship.

⁵⁵ Hartman 188ff.

⁵⁶ Hartman 181.

⁵⁷ *Bhe supra* par [41], [43]. See also *Alexkor Ltd v Richtersveld Community* par [51].

⁵⁸ *Bhe supra* par [42].

Yet, in spite of these sentiments, the Constitutional Court, in a disappointingly contrived manner, abolished an indigenous law rule which goes to the heart of indigenous law, instead of adapting it to conform with the constitutional principles of equality and dignity. Notwithstanding the fact that it acknowledged the existence of a living law and a discrepancy between the living law and official law, the court incomprehensibly disregarded the reality of deep legal pluralism and followed a route which can only deepen this divide.

In *Ryland v Edros*⁵⁹ the court held that two important values which underlie the Constitution are equality and tolerance of diversity, values which include the recognition and accommodation of the plural nature of our society. Law reform in this country should be aimed at the establishment of state law pluralism which is based on equality of the legal systems. This cannot happen where conflict between legal systems, conflict with the Constitution, and ultimately conflict in values are managed not through adaptation, but through elimination. A single, uniform system of law is unattainable, not because it is impossible to create a uniform system of law applicable to all, but because history has taught that state law which is too far removed from the living law will be disregarded. Rather, the two worlds should be brought together through a process of harmonisation.

Law reform should be consistent with the natural evolution of law. It is meaningful only if it is responsive to the "organic nature"⁶⁰ of law, in other words, if it is sensitive to the fact that law is an entity with a past, present and future, on a theoretical and practical level. Scrapping a rule as fundamental as that of male primogeniture in the indigenous law of succession, is not inevitable in a process of harmonising indigenous law and common law. One cannot help but wonder whether the Constitutional Court has now paved the way for a new direction in addressing issues of culture and customary law.

In its investigation of the institution of polygyny, the Law Reform Commission⁶¹ reported that the emerging constitutional jurisprudence on issues of culture, customary law and religion evidenced that the courts were not prepared to strike down a customary practice merely because it is controversial or is under attack from various interest groups. The cases referred to were those of *Ryland v Edros*,⁶² *Mthembu v Letsela*,⁶³ and *Nyanisile Bangindawo v The Head of the Nyanda Regional Authority (TK)*.⁶⁴ It pointed out "that it is now unsafe to assume that a kind of hegemonic western orthodoxy will prevail over African customs which do not fit comfortably within the dominant cultural frame".

⁵⁹ 1997 2 SA 690 (C) 707B-C and D-E, 708 -J and 709A-B.

⁶⁰ Boodman "The Myth of Harmonization of Laws" 1991 39 *The American Journal of Comparative Law* 699.

⁶¹ *The Harmonisation of the Common Law and Indigenous Law: Report on Customary Marriages* Project 90 (1998) par 6.1.22 and 6.1.23. The Law Commission is engaged in an ongoing project on the harmonisation of indigenous law and the South African common law.

⁶² *Supra*.

⁶³ *Supra*.

⁶⁴ 1998 2 SA 262 (Tk).

Harmonisation preserves the diversity and individuality of the legal systems that are harmonised. The relationship between the various legal systems should be one of accord, consonance and complementarity rather than similarity. Harmonisation has been described as a process of modification or adaptation of diverse elements to each other or to a meta standard.⁶⁵ In South Africa, this meta standard is the Constitution. In fact, in *Daniels v Campbell NO*⁶⁶ Ngcobo J stated that:

“[O]ur Constitution contemplates that there will be a coherent system of law built on the foundations of the Bill of Rights, in which common law and indigenous law should be developed and legislation should be interpreted so as to be consistent with the Bill of Rights and with our obligations under international law. In this sense the Constitution demands a change in the legal norms and the values of our society.”

On the one hand, it may be argued that the Constitution is a typical western instrument which entrenches mainly western values and that by advancing the Constitution as the meta standard, indigenous law will disappear.

On the other hand, it may be contended that although western law and indigenous law are founded on diverse jural postulates, there exists some measure of commonality. In fact, Mokgoro J⁶⁷ argues that some aspects of *ubuntu* are universally inherent to South Africa's various cultures and that it would be anomalous to hold that dignity, humaneness and respect are foreign to South Africa's different cultural groups. What is uniquely African of *ubuntu*, are methods, approaches, emphases and attitudes. If, as she pointed out, “at least key values of *ubuntu (-ism)*” converge with the values entrenched in the Constitution, the Constitution as meta standard could eventually be a means of harmonising the laws of South Africa. But a state of accord or consonance will only be realised if the key values of *ubuntu* are not disregarded.

Kerr⁶⁸ observed that if one

“credits the negotiators of the interim and new Constitutions with good faith, they must have intended the words ‘customary law’ to mean the system of law in existence at the time subject to the normal process of change, without requiring 85 per cent of the whole system [law of inheritance and most of the law of marriage and of property] to be substituted by rules deducible from the Bill of Rights”.

The majority decision of the Constitutional Court in *Bhe* does not bear out a commitment to honour the status of indigenous law as entrenched in the Constitution.

⁶⁵ See Boodman 702. He discusses the concept of harmonisation, within a comparative law perspective, with reference to federated states with a view to the facilitation of transactions between the citizens. But his insights are also pertinent to harmonisation in a single state where legal pluralism prevails.

⁶⁶ 2004 5 SA 331 (CC); 2004 7 BCLR 735 (CC) par [56].

⁶⁷ “*Ubuntu* and the Law in South Africa” 1998 *Potchefstroom Elektroniese Tydskrif* (<http://www.puk.ac.za/lawyer/> 1998 vol 1).

⁶⁸ Kerr “Inheritance in Customary Law Under the Interim Constitution and Under the Present Constitution” 1998 *SALJ* 267 268.