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**TO DEVELOP OR NOT TO DEVELOP  
THE CUSTOMARY LAW:  
THAT IS THE QUESTION IN *BHE***

## **1 Introduction**

The decision of the Constitutional Court in *Bhe v Magistrate, Khayelitsha, Shibi v Sithole, South African Human Rights Commission v President of the Republic of South Africa* (2005 1 SA 580 (CC)) refers. In this important decision, the Constitutional Court in its majority judgment, delivered by Langa DCJ, struck down the male primogeniture rule in the customary law of succession as unconstitutional. In considering the various remedies available to the court, it chose not to develop the offending customary law rule in terms of section 39(2) of the Constitution. In his minority judgment Ngcobo J, however, did opt for the development of the customary law, as a means to prevent the (permanent?) abolition of the rule. In this discussion the court's different approaches to the question whether or not to develop the customary law of succession will be assessed, with a view to placing into perspective the court's approach to the application of the Bill of Rights to customary law generally. A discussion of the constitutional viability of the male primogeniture rule, as well as the relation between the particular facts of *Bhe* and the rule, falls outside the scope of this discussion. Of particular importance is our viewpoint that, whereas at a cursory glance the decision seems to impact significantly on the constitutionality of a particular customary rule only (that is, the male primogeniture rule), it has more significant and far-reaching implications for the recognition and application of customary law as a system generally.

## **2 Development of customary law as remedy in terms of *Bhe***

### *2 1 Majority decision*

In *Bhe* various courses presented themselves to the court's consideration of an appropriate remedy to the unconstitutionality of the male primogeniture rule. Langa DCJ lists the different options which faced the court as follows:

- (a) whether the court should simply strike the offending provisions down and leave it to the legislature to deal with the gap that would result as it considers fit;
- (b) whether to suspend the declaration of invalidity for a specified period;
- (c) whether the customary rules of succession should be developed in accordance with the "spirit, purport and objects" of the Bill of Rights;

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- (d) whether to replace the offending provisions with a modified version of existing statutory provisions (in this particular case, s 1 of the Intestate Succession Act 81 of 1987); or
  - (e) some other order (*Bhe supra* par 105. See s 172 of the Constitution generally for an exposition of the powers of courts in constitutional matters).

For the purposes of this discussion, option (c) above warrants discussion. *In casu* the court chose not to utilize the remedy of development of the customary law in a manner which would “promote the spirit, purport and objects of the Bill of Rights” for the apparent reason that there was insufficient evidence and material before the court to enable it to ascertain the true content of customary law (the “living” version thereof) (*Bhe supra* par 109). The court pointed out that the difficulty lies not so much in the acceptance of the notion of “living” customary law, but in the *determination of the content* thereof to be tested against the values of the Bill of Rights (emphasis supplied). When urged to do so, the court was not prepared to allow for flexibility in order to facilitate the development of the law by using the exceptions (that is, appointing the spouse as representative of the estate, or allowing females to inherit certain assets) in the implementation of the male primogeniture rule which do occur in the actual practices of estate administration (*Bhe supra* par 110). The following reasons were advocated for this viewpoint:

- (a) Firstly, the court considered development on a case-by-case basis as very slow, whereas the task of preventing ongoing violations of human rights was urgent;
- (b) Secondly, such an approach would create uncertainties and there might well be different solutions to similar problems;
- (c) Thirdly, piecemeal development of customary law would not guarantee the constitutional protection of the rights of the most vulnerable, that is, women and children, in the devolution of intestate estates; and
- (d) Fourthly, what was required is more direct action to safeguard the important rights identified, which constitute the foundational values of the Constitution (that is, equality and human dignity) (*Bhe supra* par 112-113 and 115).

The court opted rather for what it called an “effective and comprehensive order that will be operative until appropriate legislation is put in place” (*Bhe supra* par 116), that is, to strike down the male primogeniture rule and replace the impugned provisions with a modified version of section 1 of the Intestate Succession Act 81 of 1987 (*Bhe supra* par 136). This approach, it is submitted, entails the *direct* application of the Bill of Rights to customary law, the potential far reaching implications of which will be discussed in paragraph 3 below.

## 2.2 Minority decision

In his minority judgment Ngcobo J referred with approval to the decision in *Carmichele v Minister of Safety and Security* (2001 4 SA 938 (CC); 2001 10

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BCLR 995 (CC)) where the court considered the obligation to develop the common law. (*Carmichele v Minister of Safety and Security supra* par 39. See also the judgment of Ngcobo J in *Daniels v Campbell* 2004 5 SA 331 (CC) par 56 where he states that “common law and indigenous law should be developed” to create a “coherent system of law built on the foundations of the Bill of Rights”). Ngcobo J pointed out that this obligation to develop is “especially important in the context of customary law” as once a rule of customary law is struck down, that signifies the demise of that particular rule. This might be despite the fact that many people still observe the particular rule, and will continue to do so:

“[W]hat is more, the rule may already have been adapted to the ever-changing circumstances in which it operates [that is, internal modification of the rule]” (*Bhe supra* par 215).

Furthermore, because the Constitution guarantees the survival of customary law, courts should *develop rather than strike down* a rule of customary law (*Bhe supra* par 215). It is our submission that the view that the Constitution *guarantees the survival* of customary law appears to be an over-statement of the future application of customary law (emphasis supplied). This view may be interpreted to imply that customary law is exempted from the provisions of the Bill of Rights, which, of course, is not the case. In so far as Ngcobo J referred to the constitutional recognition of the institution, role and status of traditional leadership, according to customary law, in terms of section 211(1) of the Constitution, read with section 211(3) which confirms the courts’ power to apply customary law when that law is applicable, it would appear correct to say that customary law is afforded protection by the Constitution, provided that it is consistent with the provisions of the Bill of Rights. However, the “survival” of customary law is probably more dependent on the adherence or not to the customs underlying it, by members of the community it serves.

Ngcobo J distinguished between two instances in which the need to develop customary law might arise. Firstly, where it is necessary to adapt customary law to changed circumstances in order to meet the needs of the community in which it operates (*Bhe supra* par 216). An illustration of this instance is to be found in the case of *Mabena v Letsoalo* (1998 2 SA 1068 (T)) where the court accepted evidence of a modified practice of *lobolo* negotiation and acceptance as a development of the law in accordance with the spirit, purport and objects of the Bill of Rights. Secondly, it may be necessary for a court to develop customary law in order to bring it in line with the rights and values in the Bill of Rights. In this instance, the court does not rely primarily on evidence of the changed social context within which a particular rule operates, but must develop the law in a manner that promotes the spirit, purport and objects of the Bill of Rights, including compliance with obligations under international law. *In casu* the court was concerned with the development of the rule of male primogeniture so as to bring it in line with the right to equality. According to Ngcobo J, if tested against the right to equality and found deficient, the rule had to be developed so as to remove such deficiency (*Bhe supra* par 218-220). In effect, this approach will, similar to the approach in the majority decision, achieve the purpose of allowing a daughter to succeed to the deceased estate of her father. However, in

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manner this approach differs from that followed in the majority decision, as in our view it entails the *indirect* application of the Bill of Rights to customary law. It is submitted that in terms of this approach the “development” of the customary law will not go as far as to completely abolish the customary rules of succession. These implications will be discussed in paragraph 3 below.

### 3 Evaluation

It is clear from the provisions of the 1996 Constitution that customary law is subject to it. Section 8(1) of the Constitution applies the Bill of Rights to “all law”, which would include both common and customary law. Moreover, in terms of section 211(3) courts must apply customary law, when that law is applicable (see s 1(1) of the Law of Evidence Amendment Act 45 of 1988), “subject to the Constitution”. What is not so clear, is the extent to which the Bill of Rights applies to customary law, that is, whether it applies directly or indirectly, and more pertinently, what the implications of such application for the future recognition and application of customary law are. As earlier stated, it is submitted that the approach of Langa DCJ represents the direct application of the Bill of Rights to customary law, whilst Ngcobo J’s approach represents the indirect application of the Bill of Rights to customary law.

In the majority judgment of *Bhe (supra)* Langa DCJ commented on the place customary law occupies in the South African constitutional system as follows: In the first place, customary law should be accommodated, “not merely tolerated”, as part of South African law, “provided the particular rules or provisions are not in conflict with the Constitution” (par 41). This is evidenced by the provisions of sections 30, 31 and 39(3) of the Constitution. Secondly, section 39(2) specifically requires a court interpreting customary [and common] law to promote the spirit, purport and objects of the Bill of Rights. Finally, section 211 protects institutions unique to customary law, that is, the “institution, status and role of traditional leadership, according to customary law” in terms of subsection (1). From these provisions it then follows that whereas customary law is protected by the Constitution in its own right, it is also subject to it. Thus, when customary law is interpreted by the courts, it must first and foremost answer to the provisions of the Constitution (par 41) in the sense that, as with all law, the constitutional validity of customary rules and principles depends on their consistency with the Constitution and the Bill of Rights (par 46).

In his consideration of the place of customary law in the constitutional dispensation, Ngcobo J in the minority judgment of *Bhe (supra)* also referred to the status bestowed upon customary law as “the same ... that other laws enjoy under it” by the provisions of section 211 (par 148). Ngcobo J then opined that “[i]n addition, courts are required to develop indigenous law so as to bring it in line with the rights in the Bill of Rights” (par 148), relying as authority on the provisions of section 39(2). Whereas the correctness of Ngcobo J’s exposition of the objectives of development of the law in terms of section 39(2) cannot be questioned, we submit that he was incorrect in the utilization of section 39(2) as authority for the court’s power to develop. It is submitted that section 39(2) contains an exposition of the *mode* of development, but it does not authorize courts generally to develop customary law. Compare in this respect the provisions of section 8(3) of the

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Constitution in so far as it relates to the development of the common law: In terms of this provision, when applying a provision of the Bill of Rights a court must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1). No similar enabling provision is made in respect of the development of customary law (see the discussion below. See also Himonga and Bosch "The Application of African Customary Law Under the Constitution: Problems Solved or Just Beginning?" 2000 *SALJ* 306 316).

It is submitted that the presumption of constitutionality entails that a court should endeavour to interpret a rule of law in such a way that it is compatible with the Constitution by using various interpretation techniques rather than invalidating the rule (see Joubert 5 *LAWSA* 2ed (2004) par 183). As a matter of judicial principle, therefore, indirect application should first be attempted in order to remedy any inconsistency. Direct application should function as a last resort only in the event of development of the customary law rule not being possible.

We submit that there are several problems that arise from the direct application of the Bill of Rights to customary law:

- Firstly, the outcome of direct application would be inimical to the different functions of the arms of government in terms of the *trias politica*. The primary responsibility for the enactment of legislation is that of the legislature. Legislation is judicially invalidated by a court in the case of direct application because the defect in question cannot be remedied by the courts. Only the legislature can remedy the defect by amending the legislation. In the case of common law, a defect can and must be remedied by the courts through development. The courts are under a general obligation to do so (see s 8(3); s 39(2); *Carmichele v Minister of Safety and Security supra*). It is submitted that the same principle should apply to customary law. Customary law is similar to common law in some respects, most notably in its progressive evolution over a long period of time. It is not a creature of statute, meaning that the legislature is not primarily involved in its creation or development. Customary law does not lend itself to invalidation like legislation; rather, like common law, any rule that is in conflict with the Bill of Rights should be reformulated to remedy any inconsistency with the Bill of Rights. The omission of customary law in the provisions of section 8(3) is problematic in this respect. It is our submission that if the common law and customary law have an equal status in terms of the Constitution, the omission of customary law in the provisions of section 8(3) constitutes a *lacuna*, to be rectified by the necessary legislative intervention.
- Secondly, it is unlikely that the Constitutional Court would have certified the Constitution if the implication of the application provisions would have been the virtual decimation of most of the body of customary law, and the resulting creation of a legal vacuum (see generally Kerr "The Bill of Rights in the New Constitution and Customary Law" 1997 *SALJ* 346).
- Thirdly, the different treatment of common law and customary law in respect of direct and indirect application could be considered

discriminatory and in apparent violation of Constitutional Principle XIII of the Interim Constitution which provided for common law and customary law to be on an equal footing in respect of their being subject to the Constitution. It is submitted that the Bill of Rights should not apply directly to the common law and that “development” should be the only available judicial remedy (see Rautenbach “The Bill of Rights Applies to Private Law and Binds Private Persons” 2000 *TSAR* 304 who opines that s 8(3) does not prohibit a court from invalidating a common law rule in terms of ss 8(1) and 172(1)(a)). It is conceded that section 8(1) read with section 172 is capable of an interpretation allowing for the invalidation of a rule of common law (see *NCGLE v Minister of Justice* 1998 12 BCLR 1517 (CC) where the common law crime of sodomy was invalidated). However, the Constitutional Court has acknowledged that legislation and the common law should be treated differently and, by implication, that the common law can only be developed (see *Thebus v S* 2003 10 BCLR 100 (CC)). It would also appear that in practice the courts have generally opted for the development option in terms of section 8(3), rather than invalidation. Development is not the same as invalidation (see *NCGLE supra* par 90). Recently, in *Fourie v Minister of Home Affairs* (2005 3 BCLR 241 (SCA)), the Supreme Court of Appeal held that “an imperative normative setting [is created] that obliges courts to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights. Doing so is not a choice. Where the common law is deficient, the courts are under a general obligation to develop it appropriately” (par 5).

- Fourthly, it is submitted that direct application would not require a consideration of the values and spirit of customary law. It is submitted that such a consideration in the process of development would reveal that the spirit and values of customary law are not necessarily inimical to the spirit, purport and objects of the Bill of Rights (see s 39(2)). It is conceded that there are differences. Ideologically, customary law is communal, whereas human rights based on the Western legal tradition are individualistic (see generally Bekker “How Compatible is African Customary Law with Human Rights? Some Preliminary Observations” 1994 *THRHR* 440). Also, in customary law, the group provides protection to the individual; in the Western legal tradition, the individual is autonomous with individual rights separate from that of the group. However, it is submitted that it might be possible to reconcile the values of the two systems by following an interpretation of Western human rights within the traditional, African context. In this regard, the concept of *ubuntu* plays an important role. In *Bhe* (*supra* par 163) Ngcobo J described this concept as one “encapsulat[ing] communality and the inter-dependence of the members of a community”. The concept has been expressed as *umuntu ngumuntu ngabantu* (translation: a person is a person because of other people). In the context of the customary law of succession the concept would ensure that in this system of reciprocal duties and obligations, every family member had access to basic necessities of life such as food, clothing, shelter and healthcare (*Bhe supra* par 163 per Ngcobo J). Thus, the African social and legal system assured human dignity in all material respects, as within extended families the “powerful ethic of generosity towards all kinfolk assured

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[women and children] of nurture and protection” (see Bennett *Human Rights and African Customary Law* (1995) 5). In *S v Makwanyane* (1995 3 SA 391 (CC)) the Constitutional Court afforded *ubuntu* the status of a legal value which was taken into consideration in the court’s decision to abolish the death penalty (par 308):

“While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality.”

*Ubuntu* is thus equated with the right to human dignity, which is one of the foundational values of the Constitution (see also Langa J (as he then was) in *S v Makwanyane supra* par 224).

#### 4 Conclusion

In this note an attempt has been made to put into perspective the judgments of Langa DCJ and Ngcobo J in the case of *Bhe (supra)*, with specific reference to the implications thereof for the future recognition and application of the customary law as a system generally. It is submitted that the approach of Langa DCJ invalidating the rule of male primogeniture constitutes the direct application of the Bill of Rights to customary law. In terms of this approach the prominent question is merely whether or not the offending rule is consistent with the Constitution; thus, there seems to be no prominent consideration for the underlying nature, functions and particularly the *values* of customary law. On the other hand, the approach of Ngcobo J of rather developing the customary law of succession, seems indicative of the indirect application of the Bill of Rights to customary law. In terms of this approach the underlying values of customary law are relevant, in order to develop the system in accordance with the spirit, purport and objects of the Bill of Rights. In so far as section 39(2) of the Constitution cannot be regarded as the provision *enabling* courts to develop the customary law (but merely indicates that *when* it is done, it has to be in accordance with the spirit, purport and objects of the Bill of Rights), we submit that section 8(3) should be amended to equally apply to the development of customary law.

It is our submission that the approach of Ngcobo J to the development of the customary law of succession is to be preferred. Essentially the approach of the direct application of the Bill of Rights to customary law creates the impression that the African indigenous jurisprudence with its values of *ubuntu* is either negated, or subservient to the individualistic (Western?) values of the Constitution. In his minority judgment Ngcobo J warns against the dangers of the approach of construing customary concepts in the light of common law concepts or concepts foreign to customary law (par 156). We submit that when dealing with issues of customary law every attempt should be made to avoid this tendency. If heed is not taken of the warning, we submit that *Bhe* in fact meant the demise of customary law.

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