



South African Common and Customary Law of Intestate Succession: A Question of Harmonisation, Integration or Abolition

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It is no secret that colonialism had a considerable impact on the existence and development of law in South Africa. Modern South African law consists of a conglomeration of so-called transplanted laws made up of a mixture of Roman-Dutch law and English common law, as well as indigenous laws, referred to as customary law. In spite of customary law being the law of the original inhabitants of this country, there has never been parity between the transplanted laws and the indigenous laws. Customary law was initially ignored by the colonials, then tolerated and eventually recognised, albeit with certain reservations and conditions. The situation did not change much over the years until the Constitution of the Republic of South Africa, 1996, finally brought customary law on a par with the common law of South Africa by affording it constitutional recognition, but subject to the Constitution and other legislation. Customary law of succession is one area of customary law which has received considerable attention from the legal arena because of its distinctive patriarchal characteristics such as the rule of male primogeniture. Over the years, the rule of male primogeniture survived numerous attacks from scholarly writers and the judiciary when it finally came under the spotlight in the Constitutional Court in *Bhe v Magistrate, Khayelitsha*

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(*Commission for Gender Equality as Amicus Curiae*); *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC) where it was struck down as being unconstitutional. In the presentation at hand I shall make a few remarks on the legal reform of the customary law of succession in South Africa. This will be done in the context of and with comparison to the South African common law (Roman-Dutch law). I shall conclude the discussion with a few remarks on the influence of the common and constitutional law on customary law with a view to the future of customary law of succession (in its current form) in a mixed legal system such as that of South Africa.

I. INTRODUCTORY REMARKS: THE CONTEXT

It is no secret that colonialism had a considerable impact on the existence and development of law in South Africa. Modern South African law comprises a conglomeration of so-called transplanted laws made up of a mixture of Roman-Dutch law and English common law,¹ as well as indigenous laws, referred to as customary law.²

In spite of customary law being the law of the original inhabitants of this country,³ there has never been parity between the transplanted laws and the indigenous laws. During the First Worldwide Congress on Mixed Jurisdictions in 2002, Visser commented as follows:⁴

[Customary law] has always been treated as a stepchild in the South African legal order and this has obviously disadvantaged the many people who substantively live in accordance with autochthonous law for certain or all purposes.

The unequal relationship between the transplanted and indigenous laws began in 1652 when the Dutch East India Company established a refreshment station in the Cape. As a result of the Dutch colonisation of the Cape, the law applicable to the settlers was Roman-Dutch law,

1. One of the features of the South African legal system is the fact that it is largely uncodified. Every lawyer knows that he or she has to consult various sources to find the law. These sources include legislation, precedent, Roman-Dutch law, custom, customary law, modern legal textbooks and the Constitution. According to S.D. Girvin, *The Architects of the Mixed Legal System*, in *SOUTHERN CROSS: CIVIL AND COMMON LAW IN SOUTH AFRICA* 95 (R. Zimmermann & D. Visser eds., 1996 Kenwyn) the mixed legal system in South Africa owes a great deal to the earlier judges of South Africa.

2. In terms of the Recognition of Customary Marriages Act 120 of 1988 “customary law” is defined as the “customs and usages traditionally observed among the indigenous African people” and in terms of the Black Administration Act 38 of 1927 the term “Black” includes “any person who is a member of any aboriginal race or tribe of Africa”. The Law of Evidence Amendment Act 45 of 1988 defines “indigenous law” as the “Black law or customs as applied by the Black tribes in the Republic or in territories which formerly formed part of the Republic” and the South African Law Reform Commission defines customary law as the “various laws observed by communities indigenous to the country”. Although customary law and indigenous law are used as synonyms in South African law, the first is preferred, since it is also the expression used in the Constitution of the Republic of South Africa, 1996 (hereinafter “the Constitution”).

3. This statement is controversial, since the history books show us that the original inhabitants were Hottentots (Koi) and Bushmen (San). The other black people are immigrants from the north of Africa (at least north of the Zambezi river). They and the white immigrants (colonists) met; the whites moving east and north; the blacks southwards. Both had part in eradicating the Bushmen and Hottentots. The blacks and whites were more or less simultaneous immigrants, each occupying their tract of land. They met and collided in the vicinity of the Kei- and Great Fish rivers. Later, when the whites immigrated inland, northwards over the Orange river and across the Drakensberg and the Vaal river, they fought each other in numerous wars for a long time in order to gain supremacy and territory. For detailed discussions of the early history of South Africa, see, C.F.J. MULLER, *VYFHONDERD JAAR SUID-AFRIKAANSE GESKIEDENIS* (Pretoria 1990).

4. D. Visser, *Cultural Forces in the Making of Mixed Legal Systems*, 13 *TUL. L. R.* 74 (2003-4).

which was the official law of the Netherlands at that stage. The Dutch government was confronted with the existence of indigenous people on Cape soil whose customs and usages were totally different from those it was accustomed to, but there is no evidence that any account was taken of these customs and usages.⁵

It was only after the second British occupation, in 1806, that customary law received some form of recognition. The British confirmed Roman-Dutch law as the basic law of the land⁶ and followed a policy of non-interference with the customs and usages of indigenous people, provided that these customs and usages were not repugnant to public policy and the principles of natural justice.⁷ During this time the various territories⁸ regulated the application of customary law by means of their own legislation.⁹ In 1927, the various territorial laws were finally consolidated in the controversial Black Administration Act,¹⁰ which used to provide (and to some extent still provides) for the management of the affairs of certain black persons. Although subject to severe criticism, portions of this Act are still in operation today.¹¹

Section 11(1) of the Black Administration Act gave universal recognition to customary law for the first time, although customary law's application was limited to the customary courts and special courts established to deal with matters "between Natives involving questions of customs followed by Natives."¹² When the special courts were abolished in the eighties, this section was repealed by section 54A(1) of the Magistrate's Court Act¹³ which extended the application of customary law by any court where people from indigenous communities were involved. Section 54A(1), in turn, was repealed and section 1(1) of the Law of Evidence

5. G.J. van Niekerk, *Legal Pluralism*, in INTRODUCTION TO LEGAL PLURALISM IN SOUTH AFRICA 6-7 (J.C. Bekker, C. Rautenbach & N.M.I. Goolam eds., Durban 2006).

6. Under the 1806 Treaty of Capitulaton, whereby the Netherlands ceded the Cape to Britain. See, T.W. Bennett, *The Conflict of Laws*, in INTRODUCTION TO LEGAL PLURALISM IN SOUTH AFRICA 17 (Bekker, Rautenbach & Goolam eds., 2006).

7. There were four reasons why the English colonials partially recognised customary law. These were: (a) economical considerations; (b) fear of discontent; (c) treaties with certain chieftains; and (d) the belief that English law was too progressive to apply to the indigenous communities. See, A.N. ALLOTT, NEW ESSAYS IN AFRICAN LAW 12-13 (London 1970); N.J.J. Olivier, *Recognition of Customary Law*, in THE LAW OF SOUTH AFRICA 12 Vol 32 (W.A. Joubert *et al* eds., 2004 Durban); T.W. Bennett, *African Land: A History of Dispossession*, in SOUTHERN CROSS: CIVIL AND COMMON LAW IN SOUTH AFRICA 67 (Zimmermann & Visser eds., 1996). The Privy Council echoed the sentiments of the English government. In *Oke Lanipekun Laoye v Amao Ojetunde* 1944 AC 170 it declared: "The policy of the British Government in this and other respects is to use for purposes of the administration of the country, the native laws and customs in so far as possible and in so far as they have not been varied or suspended by Statutes or ordinances. The courts which have been established by the British Government have the duty of enforcing these native laws and customs, so far as they are not barbarous, as part of the law of the land."

8. E.g., the British Colonies (the former Cape and Natal), the Boer Republics (the former Transvaal and Orange Free State) and various indigenous kingdoms (*inter alia*, the Zulu and Basuto).

9. For a general discussion of the earlier position of customary law in South Africa, see, *inter alia*, G.M.B. WHITFIELD, SOUTH AFRICAN NATIVE LAW 1-39 (Cape Town 1948); Van Niekerk, *supra* note 5, at 6-7 and T.W. BENNETT, CUSTOMARY LAW IN SOUTH AFRICA 34-49 (Landsdowne 2004).

10. Act 38 of 1927. Initially it was named the Bantu Administration Act.

11. Especially those sections dealing with land registration and tenure, customary courts, the operation of Code of Zulu law and the definitions.

12. See, N.J.J. Olivier, N.J.J. Olivier & W.H. Olivier, *Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* 610-611 (Durban 1989) for the wording of the relevant section.

13. Act 32 of 1988. See, OLIVIER, OLIVIER & OLIVIER, *supra* note 12, at 611 for the wording of the relevant section.

Amendment Act¹⁴ ensued. In terms of the latter any court may take judicial notice of customary law if it is readily ascertainable and not opposed to the principles of public policy and natural justice. Notwithstanding this Act, customary law was occasionally treated as a subordinate system of law which was often brushed aside to apply the common law (Roman-Dutch law), which was seen as the general law of the land.¹⁵

Although section 1(1) of the Law of Evidence Amendment Act is still in operation, it can safely be accepted that the South African Constitutions¹⁶ removed any doubt as to the status of customary law in the South African legal system; it is part of modern South African law on a par with (and not subordinate to) the common law (Roman-Dutch law).¹⁷ In *Alexkor Ltd v Richtersveld Community*¹⁸ it was stated:

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

Customary law generally deals with private relationships and therefore operates in the private sphere only.¹⁹ It pertains to limited areas of law, such as family law,²⁰ law of property,²¹ law

14. Act 45 of 1988. This section read as follows: "Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy and natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles." See, Olivier, *supra* note 7, at 24-28 for a discussion of the guidelines for exercise of the court's discretion in terms of section 1(1).

15. BENNETT, *supra* note 9, at 43. In a number of cases conflicting views as to which system of law enjoys precedence were expressed. See, N.J.J. Oliver, Regspluralisme in Suider-Afrika 72-74 (Unpublished LLD thesis, University of Pretoria) (on file with University of Pretoria Library) for a discussion of the various viewpoints.

16. The interim Constitution (Constitution of the Republic of South Africa 200 of 1993) made provision for the indirect recognition of customary law by recognising "traditional authority which observes a system of indigenous law" (section 181(1)) and by providing for the application of customary law in the courts in terms of Principle XIII. The new Constitution (Constitution of the Republic of South Africa, 1996) is more explicit and provides for the application of customary law by the courts when applicable. It is, however, subject to the Constitution and other legislation – see, section 211(3). For a general discussion, see, C. Rautenbach, *Comments on the Status of Customary Law*, STELL. L. R. 107-114 (2003).

17. *Bhe v Magistrate, Khayelitsha* (Commission for Gender Equality as Amicus Curiae); *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC) (hereinafter *Bhe v Magistrate, Khayelitsha*) para. 40 and 148. See also, the similar view of BENNETT, *supra* note 9, at 43.

18. 2003 12 BCLR 1301 (CC) para. 51. See also, *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC); 2000 3 BCLR 241 (CC) para. 44; *Mabuza v Mbatha* 2003 4 SA 218 (C); 2003 7 BCLR 743 (C) para. 32; *Bhe v Magistrate, Khayelitsha* para. 43.

19. The traditional public/private divide in western legal systems is unknown to customary law. Even the customary court system deals with the relationship between the offender and his or her community. For a general discussion of the operation of customary courts in South Africa, see, C. Rautenbach, *Therapeutic Jurisprudence in the Customary Courts of South Africa: Traditional Authority Courts as Therapeutic Agents*, S.A.J.H.R. 323-335 (2005).

20. Dealing with the legal principles applicable to marriage and dissolution of marriage. See, R-M. Jansen, *Family Law*, in INTRODUCTION TO LEGAL PLURALISM IN SOUTH AFRICA 29-52 (Bekker, Rautenbach & Goolam eds., 2006).

21. Dealing with legal principles applicable to property rights. See, J.C. Bekker & I.P. Maitshufi, *Law of Property*, in INTRODUCTION TO LEGAL PLURALISM IN SOUTH AFRICA 53-77 (Bekker, Rautenbach & Goolam eds., 2006).

of delict,²² traditional leadership and courts²³ and, finally, intestate succession laws which form part of the main matter of today's presentation.²⁴

The law of succession is one area of customary law which has been subject to severe criticism over the years and even more so since South Africa's new constitutional dispensation and the people's ever increasing awareness of human rights and freedom. It is especially the distinctive feature of male primogeniture of customary law of succession that does not conform with the western notion of equality between the different sexes and statuses. It is therefore not surprising that this aspect has, at regular intervals, been challenged in the courts²⁵ and in the literature²⁶ on especially constitutional grounds. The matter has more or less reached a logical conclusion with the recent decision of the Constitutional Court in *Bhe v The Magistrate, Khayelitsha*,²⁷ but a discussion on its development in a country with a predominantly Roman-Dutch private law sphere will always be of value.

In the article at hand I shall make a few remarks on the legal reform of the customary law of succession in South Africa. This will be done in the context of and in comparison with the South African common law (Roman-Dutch law). Seeing that it is impossible to touch on all relevant aspects, I shall limit the discussion to Allot's observations on the unification of laws in the light of the activities of the South African Law Reform Commission and the recent decision of the Constitutional Court in *Bhe v The Magistrate, Khayelitsha*. Following this, I shall conclude the discussion with a few remarks on the influence of (or interference by) the common and constitutional law on the customary law of succession (in its current form) in a mixed legal system such as that of South Africa.

22. Dealing with legal principles applicable to delictual claims. See, E. Knoetze, J.M.T. Labuschagne & J.A. van den Heever, *Law of Delict*, in INTRODUCTION TO LEGAL PLURALISM IN SOUTH AFRICA 79-89 (Bekker, Rautenbach & Goolam eds., 2006).

23. Dealing with the characteristic indigenous authority system of the traditional communities, including the principles applicable to traditional leaders and traditional courts. See, J.C. Bekker & C.C. Boonzaier, *Traditional Leadership and Governance*, in INTRODUCTION TO LEGAL PLURALISM IN SOUTH AFRICA 113-129 (Bekker, Rautenbach & Goolam eds., 2006) and D.S. Koyana, J.C. Bekker & R.B. Mqoke RB, *Traditional Authority Courts*, in INTRODUCTION TO LEGAL PLURALISM IN SOUTH AFRICA 131-146 (Bekker, Rautenbach & Goolam eds., 2006).

24. Although the term "succession" is used, it must be borne in mind that "succession" and "inheritance" in fact means two different things; inheritance means the transfer of rights in property and succession means the transfer of rights, duties and power pertaining to the deceased's status. See, BENNETT, *supra* note 9, at 334. See, C. Rautenbach, W. du Plessis & A.M. Venter, *Law of Succession and Inheritance*, in INTRODUCTION TO LEGAL PLURALISM IN SOUTH AFRICA 93-111 (Bekker, Rautenbach & Goolam eds., 2006) for a general discussion of the principles applicable to the customary law of succession.

25. E.g., the Mthembu-trio, namely; *Mthembu v Letsela* 1997 2 SA 936 (T); *Mthembu v Letsela* 1998 2 SA 675 (T) and *Mthembu v Letsela* 2000 3 SA 867 (SCA); *Bhe v Magistrate, Khayelitsha*.

26. R.B. Mqoke, Customary Law and the New Millennium 112-3 (Alice 2003); Bennett, *supra* note 9, at 337-62.

27. Three cases came before the Constitutional Court and were heard together because they all concerned customary succession laws. The first two, *Bhe v The Magistrate, Khayelitsha* 2004 (2) SA 544 (C) and *Shibi* (7292/01 (T) 19 November 2003, unreported), came before the Court for confirmation while the third, an application for direct access, was brought jointly by the South African Human Rights Commission and the Women's Legal Centre Trust. The decision of the Constitutional Court and its predecessors elicited numerous responses from legal writers. See, amongst others, E. Knoetze, *End of the Road for the Customary Law of Succession?*, J.C.R.D.L. 515-24 (2004); T. Banda, *The Constitutional Court's Approach to Customary Law in Bhe v Magistrate, Khayelitsha: Has the Baby been Thrown out with the Bath Water?*, RESPONSA MERIDIANA 5-18 (2005); I.P. Maithufi & G.M.B. Moloi, *Customary Law of Succession: Bhe v Magistrate, Khayelitsha Case No 9489/02 (C)*, J.C.R.D.L. 507-15 (2004).

II. COMMENTS ON THE DEVELOPMENT OF THE CUSTOMARY LAW OF SUCCESSION

A. *Harmonisation, integration and unification*

In the sixties, Allott²⁸ made the observation that unification of laws on the African continent proceeded along three lines; harmonisation, integration and unification. By harmonisation he “meant the removal of discord, the reconciliation of contradictory elements, between the rules and effects of two legal systems which continue in force as self-sufficient bodies of law.”²⁹ Integration, according to him, is a step further; it is “the making of a new legal system by the combining of separate legal systems into a self-consistent whole.” The combined legal systems are no longer autonomous, but they retain “a life of their own as sources” of law.³⁰ The final step, he says, is unification, which entails the “creation of a new, uniform, legal system entirely replacing the pre-existing legal systems, which no longer exist” as autonomous systems or as bodies of laws. The unified legal system may, however, still draw its rules from the systems it has replaced.³¹

In line with developments on the African continent, he points out that harmonisation, integration and unification may be brought about by the indirect intervention of judges and the direct intervention of the legislator.³² He foresaw that the reconciliation of juridical concepts, rules and institutions, which may vary between two legal systems, could present a technical problem, but was of opinion that one has to find “an alternative new law which reconciles and unifies the old”, even if they are as different as unwritten customary law on the one hand and sophisticated written common law on the other hand.³³

B. *Indirect intervention of the judiciary*

Allot’s explanation can more or less be applied to recent developments in the South African customary law of succession. As mentioned above, the current position of the customary law of succession has been brought about by a judgement of the Constitutional Court.³⁴ It is important to understand that different intestate succession rules applied to different people, depending on a person’s skin colour. Section 23 of the Black Administration Act³⁵ contained conflicting rules indicating the circumstances when the customary law of succession will be applicable to a deceased estate, usually the case when the deceased was a member of an

28. A.N. Allott, *Towards the Unification of Laws in Africa*, INT’L & COMP. L. Q. 366-89 (1965).

29. The existing legal systems stay in force, but incompatible results of applying one or another of the two systems are eliminated – see, Allott, *supra* note 28, at 377.

30. This method boils down to a fusion of laws. There is an “outline” law which regulates a specific area of law, e.g. succession, but which allows for the continued existence, within that structure, of different types of succession, namely common law and customary law – see, Allott, *supra* note 28, at 377.

31. Allott, *supra* note 28, at 377-88.

32. *Id.* at 386.

33. *Id.* at 386-7.

34. *Bhe v The Magistrate, Khayelitsha*.

35. The repealed section 23 contained rules pertaining to customary succession and indicated when the customary law and when the common law had to be applied. Section 23 was declared invalid by the Constitutional Court in *Bhe v The Magistrate, Khayelitsha* and also repealed on 12 April 2006 by the Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005.

indigenous community, whilst the Intestate Succession Act³⁶ applies to deceased estates where the customary law was not applicable. Using race as a determining factor to decide which law is applicable, more often than not gives rise to accusations of unfair discrimination and the discussions surrounding these issues are always laden with tension and coupled with emotional arguments. It is therefore not surprising that the legal consequences flowing from the different application rules often formed the subject matter in a few court cases.³⁷ In October 2004 the Constitutional Court in *Bhe v The Magistrate, Khayelitsha* struck down section 23 in the Black Administration Act and the customary rule of male primogeniture as being unconstitutional and, since this judgement brought about what may be called a unification of laws by means of integration, it can be seen as an indirect intervention of judges. In order to understand the conclusion reached by Langa D.C.J., who delivered the majority judgement, it is necessary to provide a brief explanation of the development of the common and customary succession laws in South Africa.

Until recently, legislative initiatives to develop succession laws in South Africa were confined to the common law (Roman-Dutch law). The common law of intestate succession used to be a “rather complex legal mosaic”,³⁸ but nowadays the rules are set out in the Intestate Succession Act³⁹ which produced a much simpler, logical and equitable product in this area of law. The Act follows the modern notion of drawing the circle of intestate beneficiaries as small as possible; a notion which does not necessarily correspond with the indigenous communities’ idea of extended families.⁴⁰

Not much was done to keep customary law of succession in line with socio-economic changes and human rights. It has escaped major legislative reform and was uncodified to a large degree.⁴¹ Its application used to be regulated in terms of the ill-fated Black Administration Act in which section 23 (conflict rule) prescribed the conditions under which a deceased’s estate had to devolve according to the customary law of succession and when not. The succession rules themselves are uncodified and differ from community to community. To complicate matters even further, there are *official*⁴² and *living* (unofficial) versions of customary intestate succession laws, which usually mean that expert evidence will have to be led regarding the existence or non-existence of a succession rule in a particular indigenous community.⁴³

36. Act 81 of 1987.

37. See, e.g., the court cases where the differences in the administration of estates depending on the colour of a person were successfully challenged as discussed by C. Rautenbach, *The Administration of Black Estates: Life Before and After 5 December 2002*, J.C.R.D.L. 216-28 (2004) and L. Kotzé & C. Rautenbach, *Bereddering van Intestate Boedels van Swart Persone: Van Toeka tot Nou*, J.C.R.D.L. 43-64 (2007).

38. In the words of Kahn in M.M Corbett, G.Y.S. Hofmeyr & E. Kahn, *The Law of Succession in South Africa* 566 (Landsdowne 2001).

39. For a discussion of the historical development, see, N.J. VAN DER MERWE, C.J. ROWLAND & M.B. CRONJÉ, *DIE SUID-AFRIKAANSE ERFREG* 21-89 (Pretoria 1990).

40. M.J. de Waal, *The Law of Succession and the Bill of Rights*, available at <http://www.mylexisnexis.co.za> (last visited 20 Jun. 2006).

41. In the KwaZulu-Natal province, customary law of succession is regulated in terms of the KwaZulu Act on the Code of Zulu Law 16 of 1985.

42. Also referred to as the textbook version.

43. See, BENNETT, *supra* note 9, at 337-45 for a discussion of the two versions of customary law of succession. See also, J.C. Bekker & I.P. Maithufi, *The Dichotomy between ‘official customary law’ and ‘non-official customary law’*, J.J.S. 47-60 (1992); *Mabena v Letsolo* 1998 2 SA 1068 (T) 1074 H-I.

Another problem is the judiciaries' awareness of the constitutionally entrenched cultural rights which make them careful not to infringe on the rights of indigenous communities by adapting their laws to typically western norms and values. As an example, one can refer to the *Mthembu v Letsela*⁴⁴ cases where a mother unsuccessfully approached the courts three times to contest the rule of male primogeniture in order to save their family home from her husband's father. The Court was reluctant to declare the rule of male primogeniture unconstitutional, because of the male heir's concomitant maintenance duty.⁴⁵ The matter did not advance to the highest courts⁴⁶ of South Africa, but two and a half years ago, the rule of male primogeniture was again, and this time successfully, challenged in the Constitutional Court in *Bhe v The Magistrate, Khayelitsha*.

The Constitutional Court also tested the constitutionality of section 23 of the Black Administration Act and found it to be unconstitutional on the basis that it discriminates on grounds of race, colour and ethnic origin. The Court described it as "a comprehensive exclusionary system of administration imposed on Africans", "specifically crafted to fit in with notions of separation and exclusion of Africans from the people of 'European' descent" and with the result of ossifying customary law.⁴⁷ The violation of equality and human dignity caused by section 23 were so serious that it could not be justified;⁴⁸ accordingly it was struck down.⁴⁹

The court's striking down of section 23 did not render the customary law of succession inapplicable; the latter was still relevant in terms of the general imperative to apply customary law when applicable.⁵⁰ This meant that the constitutionality of the customary rule of male primogeniture still had to be assessed, but after careful consideration it suffered the same fate in the hands of the Court; it found the rule to be out of pace with changing social conditions and values and against the notion of equality and it was accordingly struck down.⁵¹ By striking down the rule of male primogeniture, the Court brushed the application of customary law of intestate succession aside with one stroke of its pen.

The customary law of succession can now only be applied if so chosen by means of freedom of testation;⁵² a freedom which is fairly unpopular and unknown to most indigenous communities.⁵³ If a deceased opts for the customary law of succession in his or her will, it

44. *See, supra* note 24.

45. *See, Mthembu v Letsela* 1997 2 SA 936 (T). Le Roux J. pointed out that "the devolution of the deceased's property onto the male heir involves a concomitant duty of support and protection of the woman or women to whom he was married by customary law and of the children procreated under that system and belonging to a particular house. ... I find it difficult to equate this form of differentiation between men and women with the concept of "unfair discrimination" as used in section 8 of the [1993] Constitution (945-947)". He compared this form of differentiation between men and women to other methods of differentiation, such as separate toilet facilities.

46. Supreme Court of Appeal or the Constitutional Court.

47. *See*, paras. 61 and 72.

48. In terms of section 36 of the Constitution.

49. *See*, para. 72.

50. *See*, section 211 of the Constitution.

51. *See*, paras. 81-100.

52. This is also the option proposed by the Master of the High Court. *See*, the Information Leaflet distributed by the Department of Justice and Constitutional Development entitled "Customary Law: The Way Forward".

53. There is also the notion that wills (or testate inheritance) were not known in customary law of succession. However, it was accepted that a family head could make certain allocations of property to houses and individuals and that his deathbed wishes should be respected. These remarks serve to indicate that the idea of wills may well

could lead to interesting issues. What happens with the eldest male's concomitant duty to support? Will the dependants be able to compel him or her on the basis of his customary duty to support or will they have a common law claim for maintenance against the estate of the deceased?⁵⁴ The Court also reiterated that the rules in the Intestate Succession Act should not be seen as fixed rules; the beneficiaries should be allowed to conclude a family agreement⁵⁵ which could be in accordance with the customary rules of intestate succession.⁵⁶ Although this is true, it is doubtful whether beneficiaries would yield their potential possession of property just to satisfy the customary succession rules.

It was not so much the Court's striking down of section 23 and the rule of male primogeniture that deserves our attention today. What is significant is the path the Court followed to fill the *lacuna* created by its invalidation of the customary law of succession. The Court acknowledged the fact that there is a considerable number of people whose lives are governed by customary law and whose affairs need to be regulated in terms of an appropriate norm.⁵⁷ The remedies the Court considered were:⁵⁸ (a) to simply strike down the impugned provisions (section 23, its regulations⁵⁹ and the customary rule of male primogeniture) and then to leave it to the legislature to deal with the gap; (b) to suspend the declaration of invalidity of the impugned provisions for a specified period; (c) to develop the customary rules of succession in accordance with the Bill of Rights; (d) to replace the impugned provisions with a modified Intestate Succession Act which governs all intestate estates (including those of polygamous unions) in South Africa.⁶⁰

The Court opted for the last-mentioned remedy and decided to modify the Intestate Succession Act to apply to all estates, irrespective of the skin colour of a deceased.⁶¹ In its order, the Court also formulated a number of rules that need to govern instances where a deceased is survived by more than one spouse, thus providing for polygamous households.⁶²

Although the customary law of succession in its current form was replaced by the Intestate Succession Act, which is western by nature, the Court made sure that it did not prevent future development of the customary law of succession by means of future enactment of legislation.⁶³ The court order resulted in the emergence of a unique uniform code⁶⁴ for

have been known to customary law, albeit not in the Western legal sense. *See*, Rautenbach, Du Plessis & Venter, *supra* note 24, at 93.

54. In terms of the common law, a needy child has a claim against a deceased parent's estate. *See*, Corbett, Hofmeyr & Kahn, *supra* note 38, at 41-42 for a discussion of the principles pertaining to redistribution agreements.

55. Such an agreement is nothing other than the redistribution agreement available to the common law beneficiaries. *See*, N.J. WIECHERS & I. VORSTER ADMINISTRATION OF ESTATES 1.9, 5.15-5.18 (Durban 2006).

56. *See*, para. 130.

57. *See*, para. 107.

58. *See*, para. 105.

59. Regulations for the Administration and Distribution of the Estates of Deceased Blacks (R.200) published in *Government Gazette* 10601 of 6 February 1987.

60. Section 1 of the Intestate Succession Act had to be modified to include estates that have formerly been governed by section 23 of the Black Administration Act. *See*, para. 136 for the order of the Constitutional Court.

61. *See*, para. 136.6.

62. *See*, para. 136.7. Polygamy is another controversial subject which has been discussed by M. Herbst & W. du Plessis, "Customary law v Common law marriages: a hybrid approach in South Africa", paper delivered at the *Second Worldwide Congress on Mixed Jurisdictions*, 27-30 June 2007, Edinburgh.

63. *See*, para. 124 where the court declared: "This will ensure that their interests [women and children] are protected until Parliament enacts a comprehensive scheme that will reflect the necessary development of the customary law of succession."

intestate succession made up of essentially western elements, mixed with unique indigenous elements, which applies to all South Africans, irrespective of race or colour. Against this background, it is not entirely wrong to conclude that the Constitutional Court arranged the intestate succession laws of South Africa into a systematic code and as such it codified the succession laws into one code, the Intestate Succession Act, which applies to all persons irrespective of their race or colour. The judgement of the Court seems to satisfy Allot's definition of *integration* rather than *harmonisation*; the effect of the judgement appears to have created a new separate system of intestate succession, but with the former succession laws retaining "a life of their own as sources of rules". In other words, there was a fusion of laws into an "outline" law which regulates the area of succession, but which allows for the continued existence of common law and customary law of succession under certain circumstances.⁶⁵

The Court's decision to strike down customary law instead of developing it in accordance with constitutional rights and values could be queried. The Court pointed out that there was not enough evidence before it to allow it to determine the true content of *living* customary law to develop it. In addition, the Court held that the difficulty lies not so much in the recognition of the notion of *living* customary law, but in the determination and testing of its content.⁶⁶ The difficulty to determine *living* customary law may be the downfall of customary law in many instances; it is often easier to opt for the application of the common law rather than to try to determine what the applicable customary rules are.⁶⁷ The question can also be posed whether the abolishment of a customary rule, such as the rule of male primogeniture, can be regarded as *development* as required by section 39(2) of the Constitution or merely a *rejection* of customary law.

C. Direct intervention of the legislator

In making its order and commenting on future development of customary law of succession, the Constitutional Court also had in mind the earlier recommendations made by die South African Law Reform Commission regarding the legislative reform of customary law of intestate succession.⁶⁸ It also foresaw that its order, namely to include the customary law of succession under the umbrella of the Intestate Succession Act, would act as an interim measure until the legislature deals with the customary law of succession in a new or amended statute.

The Commission's recommendations boiled down to the enactment of a unified code of succession which would result in the codification of the customary law of succession. Codification is the reduction or arranging of laws into a systematic code.⁶⁹ It does not necessarily mean a codification of an entire legal system, but codification of certain areas (in

64. Knoetze, *supra* note 27, at 524 refers to it as a "(partial) unification of the customary and common law".

65. *See, supra* note A above.

66. *See*, para. 109.

67. *See*, e.g., the discussion by W. Lehnert, *The Role of the Courts in the Conflict Between African Customary Law and Human Rights*, S.A.J.H.R. 241-77 (2005).

68. *See*, para. 121.

69. *See*, J.A.H. Murray et al., eds., *The Oxford English Dictionary* (Oxford 1978) under the lemma "codification" and C. Soanes & A. Stevenson, eds., *Oxford Dictionary of English* (Oxford 2005) under the lemma "codify".

this instance succession laws) by means of piecemeal legislation. In a mostly uncodified legal system such as South Africa, piecemeal legislation, except for open-minded court judgements,⁷⁰ is the only other way to effect legal reform.⁷¹

In 1998, the South African Law Reform Commission commenced with its investigation into the harmonisation of the common and customary law. They published various *Issue Papers*⁷² in this regard to illicit responses from the general public. *Issue Paper 12*⁷³ dealing with the customary law of succession posed various questions concerning the substance of customary law in the area of succession which was regarded as being important. However, before the investigation could reach a conclusion, the Department of Justice and Constitutional Development responded to the mounting pressure for action by developing and submitting to Parliament the Customary Law of Succession Amendment Bill in 1998. The Bill was the result of the government's attempts to harmonise the common and customary law, and also to resolve some of the problems caused by the dual marriage system. The purpose of the Bill was to extend the common law of testate and intestate succession embodied in the Wills Act⁷⁴ and Intestate Succession Act to all persons, to repeal section 23 of the Black Administration Act and to enact new provisions that will be consistent with the provisions of the 1996 Constitution.⁷⁵ The Bill was, however, met with so much hostility from traditional leaders that its enactment was not pursued further. It is ironic that the order of the Constitutional Court in *Bhe v The Magistrate, Khayelitsha* effectively gave effect to this Bill four years later without the house of traditional leaders making use of its opportunity to provide submissions.⁷⁶

The Commission's investigation revived in 1999 and as a result *Discussion Document 93* was published in 2000. *Discussion Document 93* contains various recommendations and a draft Bill similar to the one proposed in 1998. The Commission's initial approach was to revisit the whole of customary law with a view to propose a comprehensive statute codifying the relevant aspects of customary law. However, they soon realised that it would be a very difficult task and decided to consider a second option, which was to determine which areas of

70. In *Bhe v The Magistrate, Khayelitsha* the court refused to leave the customary law of intestate succession to be developed by the courts on an *ad hoc* basis. It held as follows (para. 112): "The problem with development by the courts on a case by case basis is that changes will be very slow; uncertainties regarding the real rules of customary law will be prolonged and there may well be different solutions to similar problems. The lack of uniformity and the uncertainties it causes is obvious if one has regard to the fact that in some cases, courts have applied the common law system of devolution of intestate estates. Magistrates and courts responsible for the administration of intestate estates would also tend to adhere to formal rules of customary law as laid down in decisions such as *Mthembu* [see note 24] and its predecessors."

71. A third method of legal development is by means of custom. In *Van Breda v Jacobs* 1921 AD 330 the court held that the requirements for proving assertion of a custom are the following: (a) the custom must have been in existence for a long period; (b) the relevant community must generally observe the custom; (c) the custom must be reasonable; and (d) the content of the custom must be certain and clear. See also, A.J. Kerr, *Role of Courts in Developing Customary Law*, OBITER 50 (1999).

72. E.g., South African Law Reform Commission Issue Paper 4 on The Application of Customary Law: Conflict of Personal Laws Project 90 (1996 Pretoria); Issue Paper 3 on the Harmonisation of the Common Law and the Indigenous Law (Customary Marriages) Project 90 (1997 Pretoria); and Issue Paper 12 on the Harmonisation of the Common Law and the Indigenous Law: Succession in Customary Law Project 90 (1998 Pretoria).

73. See, previous note.

74. Act 7 of 1953.

75. Preamble to and memorandum of the Law of Succession Bill.

76. They were invited by the registrar of the Constitutional Court to do so. See, *Bhe v The Magistrate, Khayelitsha* para. 4.

customary law of succession raised serious constitutional issues that need to be addressed. The Commission acknowledged that many customary rules of succession are in conflict with the western notion of equality and out of step with social practice and that it should be substituted or developed in order to give more secure rights to the deceased's immediate family.⁷⁷

As explained before, the Commission saw in the Intestate Succession Act a convenient solution for most of the problems in the customary law of succession. This way out, is not necessarily wrong. However, using a statute which used to serve the common law of intestate succession might be seen as a take-over by the common law instead of a harmonisation between the common and customary law. From the onset, the purpose of the South African Law Reform Commission was to *harmonise* the common and customary law of South Africa. The dictionary meaning of "harmonisation" is "reduction to harmony or agreement; reconciliation"⁷⁸ and to "produce harmony" or to "make consistent".⁷⁹ Also Allot's description of harmonisation⁸⁰ makes it clear that harmonisation⁸¹ does not mean the abolition or take-over of one legal system (customary law), by replacing it with another legal system (common law) and that care should be taken that the one is not perceived to be or in reality dominant over the other.

Du Bois⁸² points out that there are fundamental differences between the common and customary law of South Africa which may hamper efforts to harmonise both these systems. These differences include: (a) the legal range of customary law is narrower than that of the common law; (b) customary law is based on the ethos of reconciliation and solidarity, rather than vindication and individuality, which are salient features of the common law; (c) a single unified system of customary law does not exist, whilst the common law (although largely uncodified) consists of unified legal rules; and (d) customary law is "living" law which depends for the most part on social practices, whilst the common law can be found in written authorities (old authorities, statutes, judicial decisions and custom). In taking these variations into consideration, one should guard against the temptation to simply use the common law to take over certain areas of customary law. If harmonisation, integration or unification is the way to go, there should be *agreement* and *consistency* even if we have to sacrifice our common law heritage in order to develop a new legal system.

77. South African Law Reform Commission *Discussion Paper 93 on Customary Law: Succession* xvi, 38-40, 70-73. For a discussion of the Commission's proposals, see, C. Rautenbach & W. du Plessis, *South African Law Commission's Proposals for Customary Law of Succession: Retrogression or Progression?*, DE JURE 20-31 (2003).

78. Murray, *supra* note 69, under the lemma "harmonization".

79. Soanes & Stevenson, *supra* note 69, under the lemma "harmonize".

80. *See*, para. 2.1.

81. *See*, para. I above for the topics included in customary law.

82. F. du Bois, *Introduction: History, System and Sources*, in INTRODUCTION TO THE LAW OF SOUTH AFRICA 49 (C.G. van der Merwe & J.E. du Plessis. eds., 2004 The Hague).

III. CONCLUDING REMARKS: “POTJIEKOS”⁸³

Thus far the idea of mixed legal systems has mainly concentrated on “mixing” the common and civil law in certain legal orders, one of them being that of South Africa.⁸⁴ In their 1996 publication, Zimmermann and Visser⁸⁵ prophesied that customary law’s newly acquired status⁸⁶ might lead to the “africanisation of the Roman-Dutch law in twenty-first century South Africa”. When the recent developments in the field of the common and customary law of succession are considered, their prediction seems to be spot on. The Constitutional Court’s⁸⁷ use of the Intestate Succession Act as interim measure brought about uniformity in the South African laws of succession. Although the Act was initially the product of modified Roman-Dutch law, it is now infused with indigenous elements to apply to all South Africans. The desire of the Court to grant immediate relief to litigants that appear before it is understandable. However, one should be cautious not to confirm allegations that the common law is being used to undermine the survival of customary law in spite of constitutional guarantees as to its continued existence on par with the common law of South Africa.⁸⁸

The Constitutional Court’s robust approach to fulfil its developmental function when it comes to changing the common and customary law, contributes to the judiciaries’ current label of “judicial law-making” which is in contrast with the courts previously being labelled as mere organs of the executive. This also signifies South Africa’s transition from parliamentary sovereignty to it being a constitutional state.

Although the Constitutional Court took measures to develop the customary law of succession by integrating it into the Intestate Succession Act, it was of the viewpoint that the legislature is in the best position to “make the adjustments needed to rectify the defects identified in the customary law of succession”.⁸⁹ This point of view has been criticised in that it does not take heed of some of the effects of codification, namely that it would change the flexible and

83. Potjiekos (“pot food”) is uniquely South African, and is a friendly food, to be enjoyed by rich or poor, young and old, city-dwellers and country folk. It is the ideal food to serve to a crowd of friends. It is traditionally made around an open fire, preferably in the company of good friends, and with a mixture of meats and vegetables, packed in layers. At the end, all the food has a delicious meaty flavour. In this heading, potjiekos refers to South Africa’s mixed legal system, consisting of common, civil and customary law layers which blend with each other as it simmers along. See, <http://www.3men.com/Potjiekos.htm> (last visited 20 Jun. 2007).

84. K.G.C. Reid, *The Idea of Mixed Legal Systems*, 13 TUL. L. R. 5-40 (2003-4); R. Zimmermann & D. Visser, *South African Law as a Mixed Legal System*, in SOUTHERN CROSS: CIVIL AND COMMON LAW IN SOUTH AFRICA 2 (Zimmermann & Visser eds., 1996). True to the nature of legal academics they have attempted to define and characterise the phenomenon of mixed legal systems. See, e.g., Palmer’s explanation of the three core characteristics of a mixed legal system, namely: (a) it is a hybrid system consisting of common law and civil law elements which forms the main building blocks of the mixed system; (b) the duality of the mixed system is obvious and qualitative and is recognised as such by the observers within and outside such a system; and (c) within a mixed legal system, private law is predominantly civil law and public law is predominantly common law. V.V. Palmer, *Introduction and Comparative Overview*, in MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY 1-80, 7-11 (Cambridge 2001).

85. R. Zimmermann & D. Visser, eds., *Southern Cross: Civil And Common Law In South Africa* 6, 12-15 (Kenwyn 1996).

86. In terms of the interim Constitution and later the final Constitution.

87. *Bhe v Magistrate, Khayelitsha*.

88. See the criticisms raised by Banda, *supra* note 27, at 14-17.

89. *Bhe v Magistrate, Khayelitsha* para. 115. This was also the viewpoint of previous decisions, e.g., *Mthembu v Letsela* 2000 3 SA 867 (SCA) 883 H-J.

dynamic nature of customary law.⁹⁰ Vorster also cautioned against thoughtless codification of customary law by saying:⁹¹

Codification entails a complete enactment, a substitute for all the former law. To achieve success, it should be ... effective and it should be generally accepted by the people whose lives it envisages regulating. If these minimum requirements are not met, the contemplated reform may meet [sic] with rejection, and even conflict. It may also lead to social perturbation when the new codified law is not understood properly by the very people it seeks to serve.

These are some of the viewpoints and warnings the South African Law Reform Commission and the legislature have to take heed of when legislating in the area of succession.

The debate and issues pertaining to the content and future of the South African law (with its mixture of common, civil and customary law) is not new.⁹² Although the Roman-Dutch law in reality denied all forms of discrimination and sought to protect rights and freedoms, legal history shows that it was transformed to do quite the opposite, and thus it obtained the reputation of being the law of the oppressors.⁹³ It will be difficult, if not impossible, to escape this labelling and one has to echo the words of Du Bois⁹⁴ that “there is no turning back”. During his address on the future of Roman-Dutch law in Southern Africa (especially in Lesotho) Chief Justice Mahomed indicated that the influence of Roman-Dutch law and customary law works both ways. Roman-Dutch law will undoubtedly influence the values and content of customary law, and the values and content of Roman-Dutch law will, in turn, be influenced by customary law. He foresaw that the dualism of Roman-Dutch and customary law on Southern African soil might mix gradually into a more integrated system and declared, *inter alia*, that:⁹⁵

... Southern Africa will be poorer without the sound discipline, effectiveness and historical experience of Roman-Dutch law ... [and] will also be poorer without the spiritualising, humanistic and bonding values of Customary law.

By putting all the different laws into one big pot, letting it simmer and infuse with all the different flavours, we might eventually have a wonderfully integrated “potjiekos” mix, distinctly South African, and enjoyed by all.⁹⁶

Seen against this background, there is much value in the view of Sachs J. that, what is developing in South Africa should be called South African law.⁹⁷ He comments as follows:

... Roman Dutch law will survive in the future by fusing itself with African law, shedding its name, and becoming an integral part of a new South African law.

90. Banda, *supra* note 27, at 17.

91. L. Vorster, *Legislative Reform of Indigenous Marriage Laws*, CODICILLUS 38-39 (1998).

92. Legal academics have been debating the issues for a long time. *See, e.g.*, W. du Plessis, *Afrika en Rome: Regsgeskiedenis by die Kruispad*, (inaugural lecture delivered on 27 September 1991 at the North-West University).

93. Du Bois, *supra* note 82, at 15-16.

94. *Id.* at 18.

95. I. Mahomed, *The Future of Roman-Dutch Law in Southern Africa, Particularly in Lesotho*, LES. L. J. 363 (1985). *See also*, Du Bois, *supra* note 82, at 18-19.

96. This process, if it is going to happen at all, will definitely not happen in a short period of time and it is unlikely that we will see it happen in our time.

97. A. Sachs, *Protecting Human Rights in a New South Africa* 91 (Oxford 1990).

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