WESTERNIZATION OR
PROMOTION OF THE AFRICAN WOMAN’S RIGHTS?
CUSTOMARY INTESTATE SUCCESSION IN SOUTH AFRICA

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1 Introduction

A prominent feature of pre-colonial African customary laws was male primogeniture, which generally excluded women from succession and inheritance. Changed circumstances since the advent of colonialism, up to modernity’s Bill of Rights, have caused traditional communities as well as the legislature and courts to grapple with the following question: under what circumstances to deviate from traditional law and allow African women to inherit? In a South African context, the Constitutional Court recently pronounced upon this question, by invalidating the statutory provisions governing the application of choice of law rules, as well as the substantive customary law of male primogeniture (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)). In this paper, I will consider the potential impact of the abolition of the male primogeniture rule on the relations within an African family unit, with specific reference to the legal position of the deceased’s dependants, as well as the consequences for the preservation or not of the extended African family.

2 Customary law of succession

The customary rules of intestate succession are primarily designed to perpetuate a bloodline and transmit a deceased’s rights and duties to selected members of his close kin. Therefore, the deceased’s heir, usually his oldest son, does not merely succeed to the assets of the deceased, but also to his status. Succession was thus not primarily concerned with the distribution of the deceased estate. At death an immediate need would arise to select an appropriate person from a pool of the deceased’s relatives to occupy his position so as to cause minimum disruption to the transmission of authority
(Bennett *Customary Law in South Africa* (2004) 335). As property was collectively owned, the family head administered it on behalf of and for the benefit of the family unit as a whole. In this context the customary law of succession operated as integral part of a system which suited the community’s needs and way of life. The system had its own safeguards to ensure fairness in the context of rights, duties and responsibilities. In the customary law of succession, for example, the rights of the widow to maintenance and support were protected through various remedies. From this it is clear that the customary law of succession was designed to preserve the cohesion and stability of the extended family unit and ultimately the entire community.

Central to the customary law of succession is the rule of male primogeniture in terms of which only a male who is related to the deceased qualifies as intestate heir. Generally women were excluded from succession. This exclusion of women from heirship was in keeping with a system dominated by a deeply entrenched system of patriarchy, characterized by the subordination of women to the control of the family head. With succession the heir stepped into the shoes of the family head and acquired all his rights and assumed all the responsibilities of family headship. The rule of male primogeniture prevented the partitioning of the family property and kept it intact for the support of the widows, unmarried daughters and younger sons. Members of the family were thus assured of the heir’s protection and enjoyed the benefit of his maintenance and support.

3  **The problem with male primogeniture**

3.1  **Constitutionality of the rule**

The exclusion of women from inheritance on the basis of gender constitutes a violation of the right to equality as contained in section 9(3) of the Constitution of the Republic of South Africa Act (108 of 1996). Male primogeniture can be regarded as a form of discrimination that entrenches past patterns of disadvantage among a very vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under a constitutional order. Arguably male primogeniture also
violates the right of women to human dignity contained in section 10 of the Constitution in that it implies that women are not fit or competent to own and administer property or assume positions of status (see *Bhe supra* 621E-622B). To hold otherwise, would be in contravention of the international instruments that protect women against discrimination, namely the Convention on the Elimination of All Forms of Discrimination Against Women, the African Charter on Human and Peoples’ Rights and the International Covenant on Civil and Political Rights.

3.2 Changed social context

It is a generally accepted viewpoint that the context within which the male primogeniture rule operated, has changed considerably (see, for example, Mbatha “Reforming the customary law of succession” 2002 *SAJHR* 261; Bekker & De Kock “Adaptation of the customary law of succession to changing needs” 1992 *CILSA* 368; Dlamini “The future of African customary law” in Sanders (ed) *The Internal Conflict of Laws in South Africa* (1990) 5-6). Factors contributing to the changed socio-economic context include westernization, commercialization, industrialization, urbanization, impoverishment, and specifically in a South African context, Apartheid and the migrant labour system. Modern urban communities and families are now said to be structured and organized differently in that nuclear families have largely replaced traditional extended families. Single parent households, or even child-run households, primarily caused by the HIV/AIDS pandemic, seem to be increasing. In this setting the heir does not necessarily live together with the extended family which would include the deceased’s widow/s, as well as other descendants and dependants. In this setting the heir often simply acquires the deceased estate without assuming, or even being in a position to assume, any of the deceased’s responsibilities. In these changed circumstances the succession of the heir to the estate does not necessarily correspond in practice with an enforceable responsibility to provide support and maintenance to the family of the deceased. Compliance with the duty of support is thus frequently more apparent than real (see *Bhe supra* 623B). Reasons advanced for non-compliance with the duty of support are on the one hand poverty, greed, unemployment of the heir and a denial or neglect of the customary concept of
ubuntu, arguably under the influence of the westernization of the way of life. On the other hand, the courts’ neglect to describe the widows’ and other dependants’ rights to the deceased estate in appropriate legal terms, also contributes to difficult enforcement of the maintenance duty. Viewed from this perspective, arguably the heir’s duty to support cannot constitute justification for the violation of the rights to equality and dignity. However, the question remains whether abolition of the customary law of succession is necessarily the only (appropriate) remedial means, and related to this, what the impact of abolition will be on the preservation of the African family unit.

4 Effect of abolition of the male primogeniture rule

In Bhe (supra 633G-634E) in its majority decision the Court struck down the choice of law rules as well as the rule of male primogeniture and ordered the application of the South African Intestate Succession Act (81 of 1987) in amended form (primarily to accommodate polygamous marriages within the ambit of the Act) also to Black deceased estates. In terms of this approach the customary law of succession may not be appointed as appropriate system to regulate succession in particular cases. Moreover, the application of the Intestate Succession Act seems to assume that African communities have been transformed from their traditional settings into modern and urban communities. Although this may be the case for some, it is submitted that it is not true of all communities. There are approximately 800 traditional communities in South Africa, each under its traditional leader/s, living subject to customary law. Approximately 18 million South Africans, which constitute about 40 per cent of the population, are subject to traditional rule (see Bennett Customary Law in South Africa 111). It has to be recognized that a majority of Africans have not forsaken their traditional cultures, often transformed to meet changing circumstances (see, for example, Church “Constitutional equality and the position of women in a multi-cultural society” 1995 CILSA 289 300). It is submitted that the law should take cognizance of this reality.

In its minority judgment the Court in Bhe (supra) identified various reasons that militate against the universal application of the Intestate Succession Act. In essence, the minority
approach is founded upon the recognition of legal pluralism as an important feature of the South African constitutional order. It does not envisage the application of the Intestate Succession Act in all circumstances, but emphasizes the viability of the application of customary law in some circumstances.

- Firstly, the Intestate Succession Act is premised on a nuclear family system. By contrast, customary law is premised on the extended family system. In its present form the provisions of the Act are inadequate to provide for the social context that the customary law of succession was designed to cater for (Bhe supra 659H).

- Secondly, the primary objective of the customary law of succession was the continuation and preservation of the family unit. The system of succession to the deceased’s status ensured the preservation of the family unit in that in terms of this system there is always someone to assume the obligations of the family head to maintain and support the deceased’s dependants. The welfare of surviving dependants has been described as the “guiding principle for customary succession” (Bennett Customary Law in South Africa 335). Obviously this is not the object of the Intestate Succession Act which is aimed at securing the inheritance of individuals irrespective of the socio-economic context within which the individual lives (see De Waal “The social and economic foundations of the law of succession” 1997 Stellenbosch Law Review 162. According to De Waal inheritance viewed from a Western perspective is reconcilable with the notion of capitalism). Arguably the consistent application of the Act (as founded in the notion of capitalism) may lead to the disintegration of the family unit that customary law seeks to preserve and perpetuate (Bhe supra 659I-660A).

- Thirdly, the abolition of the male primogeniture rule potentially infringes on people’s right to be governed by customary law. Allegedly there are a substantial number of people whose lives are governed by customary law. The South African Constitution recognizes the right to the application of customary law (Bhe supra 660D). It could be argued that those who want to arrange their lives according to
custom can make wills to regulate the devolution of their estates accordingly. However, it must be noted that the concept of wills is foreign to most customary systems and often those who need the protection of the law are not conversed with westernized systems.

- It is also contended that the application of the Intestate Succession Act may lead to injustices in certain circumstances. This is illustrated by the scenario where both parents die simultaneously leaving behind minor children. Where the major asset in the estate is the family home, in terms of the Intestate Succession Act each child will be entitled to an equal share in the estate. Where heirs insist on their particular shares, the asset would have to be realized and the proceeds divided equally among the children. Once the family home is sold, there will neither be shelter for the minor children, nor a duty on any of the family members to provide such shelter (Bhe supra 660D-G). The rule of primogeniture is inextricably linked to the institution of a family home and its concomitant family property. Abolition of the male primogeniture rule may well deny that despite westernization, the typical African family home still exists; that in polygamous marriages the distribution of assets is often quite impractical; and that frequently family homes constitute the only means of livelihood and shelter for family members (Bhe supra 660I-661A). Similar hardship may result in circumstances where a deceased is survived by dependants but leaves nothing for their maintenance and support. In this scenario children and other dependants may be left destitute with no one to assume responsibility for their support and maintenance. The male primogeniture rule ensures that there is always someone to assume responsibilities towards the dependants of the deceased. Where there are minor children in certain circumstances it may be in their best interests that customary law applies. It may serve to prevent the disintegration of the family unit and prevent members of the family from being rendered homeless. Similarly, where the deceased is survived by dependants but leaves no assets to maintain his minor children and other dependants, the application of customary law may indeed serve to protect the dependants (Bhe supra 661D-F). It is in this respect
that the law of succession, as contained in the Intestate Succession Act, cannot in an African context fulfill the object of promoting the welfare of surviving dependants.

5 An alternative approach

It seems as if the answer to succession in an African context lies somewhere other than in the application of a system of succession premised on and designed for the western principles of individualism and capitalism. In Bhe (supra 662C/D-E) in the minority judgment Ngcobo J explained this alternative answer as follows:

“It lies in flexibility and willingness to examine the applicability of [customary] law in the concrete setting of social conditions presented by each particular case. It lies in accommodating different systems of law in order to ensure that the most vulnerable are treated fairly. The choice of law mechanism must be informed by the need to: (a) Respect the right of communities to observe cultures and customs which they hold dear; (b) preserve [customary] law subject to the Constitution; and (c) protect vulnerable members of the family.”

Particular care must be exercised to balance on the one hand respect for diversity and the right of communities to live by and be governed by customary law, and on the other the need to protect the vulnerable members of the family against exploitation and neglect. In a South African context it is trite law that in history Black women have been the most disadvantaged group, most prone to exploitation and abuse. From this it follows that they need particular protection against abuse. It may well be that protection is expressed in a way other than the equal application of a particular legal institution or rule (that is, in casu the uniform application of the Intestate Succession Act). Ideal protection is founded upon an equalization of the setting within which the institution or rule applies. From a current perspective in a South African context this is unrealistic. Mention has already been made to the adherence to custom in the various traditional communities, particularly in rural areas. It should also be remembered that the format of a rule (that is, the way in
which it is expressed) should be distinguished from the *substance* thereof (that is, its inherent value and function). With this distinction in mind, often rules that appear to be designed for the subjection of women tend to operate to ensure their security, when viewed from the perspective of functionality. Applied to the male primogeniture rule, its format obviously suggests that women are excluded from succession, but, on the other hand, its function strives to protect the very same group.

The question as to an appropriate system of succession remains. In its minority judgment the court in *Bhe* (*supra* 663A/B-D) opined that the application or not of customary law should rather be determined by agreement at a family council meeting after the death of a family head. Also in the majority judgment Langa DCJ noted that the relevant provisions of the Intestate Succession Act are not fixed rules that *must* be applied regardless of any agreement by all interested parties, provided that the agreement does not adversely affect the children’s interests (*Bhe supra* 631I-632B). Redistribution agreements are not foreign to South African law. In fact, this method of liquidation is utilized most frequently in the distribution of intestate estates. By analogy in Zimbabwe the executor of a deceased estate is appointed by agreement by the family group. The nominated person must then compile an inheritance plan, to provide for the conservation of the estate, for its distribution, for the sale of any property for the benefit of the beneficiaries and for the maintenance of any beneficiary (see s 68 of the Administration of Estates Act, Chapter 6:01).

Any dispute relating to the choice of law in the law of succession should be resolved by the court/official having jurisdiction. In resolving such dispute it must have regard to what is fair, just and equitable in the particular circumstances of the case. It could well be that the application of the Intestate Succession Act is just in circumstances where the widow/s occupy positions as primary caregivers themselves and where there are enough assets to be distributed among all the beneficiaries. In other circumstances the application of customary might be fair in order to protect economically vulnerable widow/s and other dependants and where the heir is both capable and willing to assume the maintenance responsibility towards the dependants. However, particular care must be taken that such
agreements are genuine and not the result of the exploitation of the weaker members of the family by the strong. In this regard a special duty rests on the officials responsible for the administration of estates to ensure that no-one is prejudiced in the discussions leading to the purported agreement (see Langa DCJ in the majority judgment of Bhe supra 632 A-B).

6 Conclusion

In the modern era culture contact between the traditional African and Western societies seems to be ever-increasing. In the domain of civil law there tends to be an increasing individualization of the responsibilities of members of the average African household towards each other. In this regard, rights of female and younger male members of the family often appear latent when compared to the practical operation of the sanction of enforcement against an owner-heir. It has been suggested that the urban African often tends to ignore his accustomed kinship obligations by neglecting or refusing to maintain the deceased’s dependants. This is perhaps inevitable in communities where the pressure of new economic needs is working a relentless disintegration of the communality of property and responsibility. In this wave of modernization and westernization it is pertinent to enquire what the future of African customary law is. Law has to be expressive of the value system of the society in which it is found. Accordingly, it is submitted that customary law is often best suited to African society and civil law is often best suited to Western society. For that reason choice of law rules relating to succession should be retained and not abolished. However, it is necessary to admit the need for adaptation of customary law to the requirements of a society which is characterized by social, economic and constitutional development. The process of modification is not foreign to the customary law. It is not a dormant system; it is a living organism which has in the past shown its ability to evolve in relation to changing conditions. In consideration of this point of view, it is worth while to bear in mind that people are often deeply attached to personal law as this embodies most of the cultural values of society. Consequently customary law will be retained long in matters concerning status, marriage and succession. Whereas change is desirable and will in fact always take place, there is
little merit in being overly anxious to bring about change just for the sake of making it. In that event there is always the danger of disruption and of destroying the balance of interests in society (concluding remarks based on Koyana Customary Law in a Changing Society (1980) 156-159).