The anatomy of African jurisprudence: a basis for understanding the African socio-legal and political cosmology*

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Abstract

An examination of the anatomy of African jurisprudence reveals a thought system whose institutions relied on the convenience of maleness and manhood in the appointment of functionaries. In the context of an agrarian traditional society, this so-called principle of primogeniture provided much needed benefits associated with accountability, responsibility and maturity in the handling of the affairs of vulnerable members. Unfortunately, this principle was compromised by the essence of maleness, which blighted its efficacy. Virtually all leadership positions, including family headship and traditional leadership, were occupied by senior men. Womanhood was a sufficient disqualifying factor regardless of individual qualities and merit. This reality gave indigenous African law the undeniable label of a patriarchal system. As society changed, the shift towards the application of a non-sexist primogeniture principle developed among many families and communities, living mainly in the countryside. This development gained impetus from the advent of the new constitutional dispensation which provided the courts with the opportunity to nullify the discredited male primogeniture, thus paving the way for the adherents of African culture to appoint women as well, where appropriate. Hence sons and daughters now have equal chances to succeed their predecessors to family and traditional leadership positions in the post-apartheid customary law of succession.

INTRODUCTION

The concept of jurisprudence refers to the philosophy of law. It includes all the answers that lawyers give when asked to explain the meaning of law, its origins, its nature and its place among other disciplines.[1] These questions can

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* This article is based on the edited version of Ch 2 of Dial Ndima, 'Re-imagining and Re-interpreting African Jurisprudence under the South African Constitution' (DPhil thesis, Unisa 2013).

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1 See Fidelis Okafor, 'From Praxis to Theory: A Discourse on the Philosophy of Law' 37 Cambrian Law Review 37 at 42. See also Richard Posner, *The Problems of Jurisprudence* (Harvard UP 1990) 1 quoted by Christopher Roederer, 'Mapping the Jurisprudential Terrain in the Search for Truth in Law' in Christopher Roederer and Darrel Moellendorf (eds), *Jurisprudence* (Juta 2004) 1 at 1.

be asked in all legal systems including African law. Hence the indigenous legal thought system is known as African jurisprudence.[2] As part of African law and its culture, African jurisprudence has characteristics that respond to its unique and distinctive features. It does not always necessarily conform to Western jurisprudence, either in content or in methodology.[3] The reason for this is that jurisprudence does not have a life of its own, separate from its cultural context, but is an integral part of the thought system.[4] African jurisprudence, therefore, is a thought system that focuses on the meaning, nature, characteristics and functions of African law and culture.

This article offers a systematic and coherent analysis of the anatomy and ontology of African jurisprudence, and aims at revealing the nature, purpose and characteristics of the social, political and legal cosmology in which its institutions operated during its uncorrupted pre-colonial condition. It does this by examining how African culture functioned within a uniquely African paradigm of discourse premised solely on a distinctly indigenous frame of reference. To achieve this, the article identifies a few essential African cultural principles and establishes their nature, purpose and characteristics as applied in the uncorrupted pre-colonial society.

I am conscious of the fact that as they functioned in their historical context, the institutions of African law discussed hereunder may exhibit features that are patriarchal, sexist, and problematic for a post-1994 South African observer. However, I attempt to explain why concepts such as male primogeniture, family headship, and chieftainship were founded on the basis of manhood, and why those intentions, good as they might have been, cannot be perpetuated today.

The point I am making is to show how a society whose women were transient citizens in their maiden homes *en route* to their permanent sojourn in their marital homes, resorted to the stable institution of manhood that could bring with it socio-political obligations for its adherents and for the nation. Real as this truth is, it must be accompanied by a disclaimer that any seeming justification for the mainstreaming of patriarchy serves only to demonstrate traditional society's quest for accountability and responsibility, without suggesting that such institutions may be sustained in today's environment that is characterised by human rights, freedom and equality.[5]

When the functions, obligations, and responsibilities associated with the leadership positions in the context of the relevant institutions are

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2 Marius Pieterse, '"Traditional" African Jurisprudence' in Christopher Roederer and Darrel Moellendorf (eds), *Jurisprudence* (Juta 2004) 438 at 455.

3 Okafor (n 1) 38.

4 Abiola Ayinla, 'African Philosophy of Law: A Critic' (2002) 6 Journal of International and Comparative Law 147 147. See also Balogun Abiodun, 'Towards an African Concept of Law' (2007) 1 African Journal of Legal Theory 71 at 71–75.

5 S 1(a) of the Constitution reads: 'The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.'

studied and analysed, their value to society emerges. When transposed to the post-apartheid conditions prevailing in the rural environment, where poor communities need communal guidance and assistance, the services of traditional institutions remain necessary, subject to their transformation to accommodate women and children.

Whilst the system had noble foundations, my analysis must take account of the changed socio-economic environment of today where both men and women often eke out their living in the cities, which coincides with the increased status of women that demands their acceptance of the responsibility for family headship in appropriate instances. The changed circumstances also necessitate substitution arrangements in the administration of the rural communities whose women often have to fulfil customary responsibilities at home, whilst their male seniors are engaged in gainful employment elsewhere.

The fact that nowadays women often occupy various positions of power and deliver the associated services, functions, obligations, and responsibilities is proof that maleness was never essential for accession to the reigns of leadership. Hence contemporary African culture must adjust to these realities and submit to the dictates of human rights without necessarily capitulating to the hegemonic influences of westernisation.

Before being contaminated by alien influences, the pillars of Africa's metaphysical orientation, rested on a worldview that was characterised by features of communal living and collective solidarity. This provided a firm foundation for the emergence of African jurisprudence underpinned by concepts moulded on its authentic normative values which should form the basis of the current post-apartheid renaissance of the system. To advance the objects of African renewal, the complexities of pre-colonial indigenous institutions, cultures, and values must be revealed in the image of their life-world which mirrored the interaction between the various organs of African culture.

This is a reflection of the African family home, personified by the family head, as a stabilising factor for family members. To avoid confusion, the relationship between law, custom and culture must now be explained to illustrate their role in unpacking the anatomy of African jurisprudence.[6]

These concepts are closely related and are often used interchangeably in discussions of African law in an endeavour to paint the picture of the indigenous African cosmology. Law refers to the rules and principles that govern the application, administration, and enforcement of the rights, obligations, and responsibilities embodied in the customs; whilst customs themselves are the reference points where the community's good habits are stored as indicators of propriety in society.[7]

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6 See generally Tom Bennett, *Customary Law* (Juta 2004) 1–7.

7 Ibid.

Customs are related to law because the latter reflects the manifestation of the former in social practice. Culture is also related to custom, and therefore to law, because it consists of the traditions and contexts of applying the laws and customs as they impact on the various aspects of social interaction.[8] For example, when the traditions of dressing, singing, dancing, or speaking take particular forms during funerals, weddings, or other traditional festivities, these forms concretise into the cultures of their adherents as they begin to insist on their observance on such occasions.

The relationship between custom, law and culture lies in the fact that a custom such as initiation into manhood happens in a particular cultural tradition and is regulated by a set of socio-legal rules which makes it proper for those people who may prefer to call it a custom, culture or law as they deem appropriate.[9] The analysis of the anatomy of African jurisprudence to which the present discussion turns focuses on the broad framework and institutions within which the system functioned rather than the details of particular rules or customs. In this article I limit my discussion to principles governing the selection of incumbents for leadership positions at family, clan, and community levels on the basis of applicable laws, customs, and cultures.

THE FAMILY AS THE BASIC UNIT OF COMMUNAL LIVING AND SOLIDARITY

In African society every family head occupied his customary position by virtue of the principle of primogeniture,[10] which defined how he was selected, appointed, and disciplined in order to serve his constituency. Leadership at family level was the responsibility of senior men and elders whose positions committed them to the service of their families.[11] This is the stable environment of the family home in which the role of leadership was shared between the family head, the elders, and the family collective within the clan.

The indigenous family home was a corporate body with authority over family members and material resources, under the leadership of the head whose duty it was to manage the well-being of the family collective. The position of the family head reveals the primogeniture principle as the mainstream of African jurisprudence, conceptualised as the main organ for the functioning of the family collective. In this sense the primogeniture principle is presented as the repository of the central values of shared authority, communal living, common belonging, and collective ownership – all of which traversed the spectrum of African jurisprudence in which

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8 Ibid at 20–23.
9 Ibid at 1–7.
10 Ibid.
11 Ibid at 20–23.

everyone owed his or her being to others. Around this principle, families were governed as productive units of the clan.

The head of the family had to be selfless in his administration of the family home so as to instil egalitarian values in the production and distribution of resources and benefits to the family collective. Consequently, special qualifications linked to stringent conditions were demanded of candidates for appointment to the office of the family head. The selection process for the candidates was necessarily very flexible, and the order of birth served merely as an entry point.[12] The features of competence, commitment, and capacity in the service of the family collective, were the real requirements for appointment as family head. Mahao sums up the rule as follows

> but a more discerning analysis would reveal that the rule of primogeniture was merely one of the rules – a point of departure – but most certainly not final. The correct interpretation of the rule is that it serves the limited function of providing the order of nomination for high office and nothing more. Accession was always subject to a second rule – the rule of ratification. This rule provided for participative processes through the family council, or the kgotla, and finally through a public assembly.[13]

Ultimately, eligibility for family headship positions was decided on the relevance of substantive qualifications rather than the mere fact of having been born first.[14] So strong were the values of flexibility and adaptability that from the earliest times the rule very often not only led to the selection of junior brothers[15] as family heads, but also accommodated the appointment of women as traditional leaders in deserving circumstances.[16] The principle of primogeniture notwithstanding, African culture fared favourably compared to Western societies when it came to the affirmation of women.[17] The latter societies oppressed women without even having a formal basis – such as the primogeniture rule – for doing so.[18]

In this article the primogeniture rule is seen as the centre around which the corporate family home historically demonstrated its personality through the family head who also managed its affairs and property. In these capacities, the role of the family head transcended the spheres of the law of persons where he personified the home and its collective, the law of property where he was the nominal owner of family resources, the law of succession where

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12 See Nqosa Mahao, 'O se re ho morwa "morwa towe!" – African jurisprudence exhumed' (2010) XLIII 3 CILSA 317 at 321

13 Ibid.

14 See Samuel Mqhayi, *Ityala lamawele* (Lovedale Press 1914) 20.

15 Ibid.

16 See Mahao (n 12) 325.

17 Ibid.

18 Ibid.

he exercised the rights and responsibilities of his deceased parents, and the law of obligations where he paid the debts and prosecuted the claims of the household and its collective.[19]

As such, all the concepts and institutions of African culture dovetail to inform the rule of primogeniture as the pivot of African jurisprudence. The coincidence of these rules in a single transaction makes the divisions of Roman law into the law of persons, family, succession, property, and obligations awkward and inappropriate in African law where this differentiation serves no useful purpose. As suggested by Ngcobo J, there is no reason why the positions of successor and family head should not be equally open to both the son and the daughter of their deceased family heads where either of them is the senior child in the family.[20]

THE PRINCIPLE OF PRIMOGENITURE AND THE CONCEPT OF THE FAMILY HEAD

In the introduction I alluded to the principle of primogeniture as it existed side by side with the concept of the family head. To understand these concepts one needs to realise the uniqueness of the African family unit which was administered by a well-defined collective of members, headed by a leader selected through the primogeniture principle. In terms of this principle, the most senior family member was selected as the head of the family or traditional leader, as the case may be. In this sense, primogeniture provided a structure for organising society at family, community, or national level, by conflating the definition of seniority with that of responsibility. In this context Ngcobo J has this to say about the primogeniture rule

> the primary purpose of the rule is to preserve the family unit and ensure that upon the death of the family head, someone takes over the responsibilities of the family head. These responsibilities include looking after the dependants of the deceased and administering the family property on behalf of and for the benefit of the entire family.[21]

Contrary to the general belief that the principle of primogeniture serves as a means of selecting despotic rulers who oppress women and children, the reality is that it was focused on the selection of a responsible servant to

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19 See Jan Christoffel Bekker, *Seymour's Customary Law in Southern Africa* (Juta 1989) 81.

20 See *Bhe v The Magistrate Khayelitsha*; *Shibi v Sithole*; *Human Rights Commission v President of Republic of South Africa* [2005] 1 BCLR 580 (CC) (hereafter *Bhe-Shibi*). The court held at para 222: 'The defect in the rule of male primogeniture is that it excludes women from being considered for succession to the deceased family head. In this regard it deviates from section 9 (3) of the Constitution. It needs to be developed so as to bring it in line with our Bill of Rights. This can be achieved by removing the reference to a male so as to allow an eldest daughter to succeed to the deceased estate.'

21 See *Bhe-Shibi* (n 20) para 180.

serve a particular constituency.[22] The primogeniture rule was merely a tool for providing the family collective with a leader who would facilitate the participation of the members in the enjoyment of the affairs and resources of the home.

In this sense the operation of the principle of primogeniture served as an assurance that the head would not act alone in administering the affairs of the family. This phenomenon shows how the powers of the family head were severely circumscribed by custom. In essence, the family head was the mouthpiece of the council of elders and seniors who were the real owners of family decisions. This view is confirmed by Bekker as follows:

> A family head is by no means a despot in law, as is sometimes supposed; he has control of each house, but its members have a collective interest in its affairs and property.[23]

This is a far cry from the current dominant, pejorative trivialisation of the concept of primogeniture as 'the organising principle of male primogeniture which allows succession from father to firstborn son only'.[24] This description springs from 'official' customary law, which ignores the leadership responsibilities imposed by the rule and trivialises it as a rule that 'discriminates unfairly on the grounds of age, birth and most conspicuously, gender'.[25] This is a narrow view which exposes a deep-seated alien metaphysics that seeks to juxtapose man's powers against the very interests of family, women, and children with whose welfare his position entrusts him.[26] This very limited view defines the rule in terms of its potential for abuse.

Moreover, by equating the primogeniture rule with a facile preference for males in matters of inheritance, the narrow view displays a fundamental ignorance of the nature of the rule, and overlooks that the rule was a tool for transmitting responsibilities from earlier to succeeding generations through the instrumentality of seniority and manhood. The narrow view also undermines the corporate nature of ownership of family assets by ascribing private ownership to the family estate as an asset that passes from father

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22 Ibid.

23 See Bekker (n 19) 70. In this regard Dial Ndima, 'African Law of the 21st Century in South Africa' (2003) XXXVI 3 CILSA 325 at 332 writes: 'All property was owned by the home and the head (only one male) merely exercised the rights in the property for and on behalf of other members and himself. Even the head would not take important decisions without consulting the other members of the home, especially the mother of the family.'

24 See Obeng Mireku, 'Customary Law and the Promotion of Gender Equality: An Appraisal of the *Shilubana* decision' (2010) 10 African Human Rights Law Journal 515 at 517.

25 Ibid at 516.

26 See *Mthembu v Letsoalo* [2000] 3 SA 867 (SCA) (hereafter *Mthembu* 3) for the manner in which the distorted narrow view that primogeniture meant that the senior man owned family property was endorsed by the courts.

to son.[27] This view overlooks the fact that family headship as underpinned by the primogeniture rule was primarily designed to ensure the protection and safety of women and children by responding to the need to leave them in the safe hands of a strong leader. More importantly, the adaptability and flexibility of customary law and the imperatives of human rights under the democratic Constitution makes it possible for community members to adapt their laws to accommodate the appointment of women.[28]

To counter the narrow view, a broader view sees the former as a distortion of the principle's communitarian conception. In fact, the principle of primogeniture and family headship displays the position occupied by the institution of manhood as the site of obligations and responsibilities, rather than merely serving the narrow interests of patriarchy. These attributes focus on issues of competence as opposed to gender, hence the availability of women to take leadership positions has improved possibilities for legal transformation towards equality. The broader view does not look at the difference between men and women merely through gendered lenses. Rather, it appreciates the role played by the principle of primogeniture in the social, political, and legal organisation; and is amenable to transformation.

Stripped free of its patriarchal stigma, the rule's role is to advance the rights and interests of vulnerable members of the family in accessing their benefits in the assets and resources of the family by providing them with an agent for facilitating access. The rights and entitlements of weaker family members are secured by the notion of communal sharing and common belonging, which they could enforce against an irresponsible family head through the family collective.[29] Opening the primogeniture principle to both men and women on the basis of equality can only enrich it, particularly in communities that are organised as extended families and clans which often have to meet to take collective decisions.

To this end the powers of the family head were inherently geared towards promoting the welfare of the entire household, especially its most vulnerable members. More importantly, as already alluded to, the broad view appreciates the concept of the family head as the agency through which the family collective protects its vulnerable members. Seen in this light, the principle of primogeniture is an institution for allocating accountability within the household, and for distributing socio-economic goods and services on the domestic, community, and social levels. In these circumstances primogeniture provides leadership and maturity in guiding the youth from extended families where the children of deceased parents have to fend for themselves. In these contexts, the presence of a central

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27 See *Sigcau v Sigcau* [1944] AD 67 at 79.

28 See *Shilubana v Nwamitwa* [2008] 9 BCLR 914 (CC) (hereafter *Shilubana*) para 45.

29 See *Bhe-Shibi* (n 20) para 180.

figure could be a source of reassurance, bolstered by feelings of common belonging and solidarity. Women could excel in such roles.[30]

As a reminder for family heads the primogeniture principle committed them to rededicate themselves to the very sources of their powers by connecting every exercise of authority to responsive purposes, through advancing the interests of collectivity, communality, and common belonging.[31] Indeed, the principle sought to remind family heads that their job was to administer goods belonging to others, namely, the family collective, as opposed to belonging to themselves.

Clearly this article does not attempt to deny the concept of primogeniture's historical close association with the institution of manhood. Rather it insists that the latter institution never existed for its own sake, but was saddled with the obligation of serving others. This could be explained by the magnitude of society's investment in the development of men.[32] Manhood was, therefore, a handy administrative tool by which to provide stability and continuity in society in order to preserve the identity of communities. At the risk of repetition, it needs to be emphasised that this is not to say that women could not do this in a free and democratic society founded on freedom, human rights, and equality.[33]

To Africans the presence of men in a family or clan meant that society was assured of socio-economic stability for vulnerable groups in the unit. These values demanded that a man's sons should succeed him so as to perpetuate the home as a permanent entity for the collective survival of the members. Furthermore, the virilocal or patrilocal[34] nature of the indigenous marriage ensured that sons remained in their homes to perpetuate the legacy of the family, whilst daughters could not be considered for those responsibilities as they were always potentially about to leave their maiden homes for their marriage homes.

The centrality of the primogeniture rule as an administrative, political, and leadership institution directed the psyche of Africans towards establishing an appropriate education system to equip men to assume and advance the responsibilities of their fathers in line with the dictates of indigenous

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30 Ibid at para 221 the court held: 'The role and status of women in modern urban, and even rural, areas extend far beyond that imposed on them by their status in traditional society. Many women are de facto heads of their families. They support themselves and their children by their own efforts.'

31 Mahao (n 12) 322 observes: '[l]eaders were always at pains to stress the pedigree of their appointment as they understood this was the deciding and legitimising factor of their appointments. [I]t was customary for leaders to declare publicly that they (the leaders) were the most humble servants of those whose place they occupied. An understanding of the relationship between the leader and the people influenced the way in which leaders behaved. Humility, fairness and empathy had to be the stock-in-trade qualities of leadership.' See also Gabriel Setiloane, *The Image of God Among the Sotho-Tswana* (AA Balkema 1976) 40.

32 See Nelson Mandela, *Long Walk to Freedom* (Abacus 1994).

33 See South Africa's Founding Values in s 1 of the Constitution.

34 See Tom Bennett, *Customary Law in South Africa* (Juta 2004) 213.

metaphysics. The latter philosophy's import is that the current generation does not own the world it occupies as it had received it from the previous generation, but rather holds it in trust for onward transmission to future generations.[35]

An appreciation of their position as transient caretakers of their responsibilities was vital to understanding why men were always preferred over their sisters in the appointment of successors to family headship. The successor had to remain at the family home to look after women and children,[36] whilst their sisters moved on to their marriage homes. Hence these historical back-locks must now be factored in if the empowerment of women is to release the full potential of girl children to climb to leadership on the social ladder. The legitimacy of the principle of primogeniture in the present constitutional dispensation to ensure the socio-economic security and stability of vulnerable groups, depends on its transformation to accommodate gender equality. This view is bolstered by the reality that in social practice large numbers of women are already functioning as family heads.[37]

Whilst the constitutionality of the official version of the primogeniture rule as practised under colonial and apartheid legislation was found to be unconstitutional in the *Bhe-Shibi* judgment, and was declared invalid,[38] in the same case the application of the rule in social practice as described in this article was found to be justifiable in terms of section 36 (1) of the Constitution in a free and democratic society characterised by equality and human dignity.[39] Because of its emphasis on the lofty values of responsibility and accountability, the rule justifies the preference it gives to seniors in a non-sexist society on the basis of competence and capacity. This neutralises the apparently unfair nature of its discrimination against juniors and the youth.[40]

It appears from the above analysis that the patriarchal application of the primogeniture rule has had its fair share of problems in legal practice. Before it was struck down as unconstitutional in the *Bhe-Shibi* case, section 23 of the Black Administration Act[41] provided for the administration of estates for black people. Over the years this provision was interpreted as the statutory recognition of the male primogeniture principle and was applied to mean that senior men were preferred over women, children, and junior people.

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35 See Prophet Landwandwe, *"Akusiko Kwami, Kwebantfu" Unearthing King Sobuza II's Philosophy* (Umgangatho 2009) 178.

36 See *Bhe-Shibi* (n 20) para 180.

37 s 6 of the Recognition of Customary Marriages Act 120 of 1998 provides that the spouses in a customary marriage have equal legal status.

38 Ibid at para 97 per Langa DCJ.

39 Ibid at para 183 per Ngcobo J who believes that primogeniture should rather be extended to include women who should also be appointed as heirs.

40 Ibid.

41 Act 38 of 1927.

Section 8 of the interim Constitution, 1993, brought an end to this untenable position by entrenching the principle of equality between men, women, and all people in South Africa. Section 9 of the 1996 Constitution confirmed this position, essentially burying the principle of male primogeniture.

However, old habits die hard. The *Mthembu* cases presented the earliest opportunity to confirm the death of the principle of male primogeniture. Regrettably both the Gauteng High Court[42] and the Supreme Court of Appeal[43] missed this golden opportunity. It was not until the *Bhe-Shibi* case that the Constitutional Court found an opportunity to sound the death knell for the principle of male primogeniture in the customary law of succession once and for all. In a detailed judgment the court confirmed the demise of this principle on the basis of its inconsistency with section 9 of the Constitution. Thereupon the value of equality became entrenched in customary- law adjudication. The resolution of this intractable question paved the way for the legislature to enact the Reform of Customary Law of Succession and Regulation of Related Matters Act which in essence implemented the *Bhe-Shibi* judgment.[44]

Similarly, in the *Shilubana* case the Constitutional Court affirmed the decision of the Baloyi Traditional Authority to amend its customary law of succession to allow for the appointment a woman as a *hosi* (traditional leader).[45] Pursuant to the amendment, the traditional authority appointed Shilubana, the daughter of the traditional leader who died in 1968. At the time she (being a woman) was not allowed to succeed her father – although she was the *hosi's* only child – due to the unfair discrimination immanent in the application of the principle of male primogeniture. Instead, her father's brother, Richard, was appointed *hosi.* On Richard's death in 2001 his son, Nwamitwa*,* challenged Shilubana*'s a*ppointment relying on the principle of male primogeniture. In both the Gauteng High Court[46] and the Supreme Court of Appeal,[47] Nwamitwa won the case on that basis. The Constitutional Court was called upon to vindicate the Constitution by invalidating the principle of male primogeniture and confirming Shilubana's appointment as *hosi*.

In its judgment the court stressed that the equality clause meant that Nwamitwa'*s* maleness did not give him a stronger right to the traditional leadership position than the woman, Shilubana*,* who had been appointed.[48] Thus, the official principle of male primogeniture as entrenched in section 23 of the Black Administration Act was struck down even in the

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42 See *Mthembu v Letsela* [1997] 2 SA 936 (T) and *Mthembu v Letsela* [1998] 2 SA 675 (T).
43 See *Mthembu* 3 above (n 26).
44 Act 11 of 2009.
45 See *Shilubana* (n 28) para 75.
46 *Nwamitwa v Philia* [2005] 3 SA 536 (T).
47 See *Shilubana* (n 28).
48 Ibid at para 86.

public law sphere of traditional leadership. In addition to this section which applied country-wide, two more codes entrenching this principle applied in the KwaZulu-Natal Province. This arose in the *Gumede* case where the Constitutional Court struck them down for conflicting with the Constitution.[49] These codes had laid down that all matrimonial property belonged to the husband and the wife owed him a duty of respect.

This article hails these developments as correctly reflecting the current position in South African law. In all three cases the Constitutional Court was asked to invalidate the principle of male primogeniture for its inconsistency with the Constitution, which it did. There is nothing in these judgments to indicate that a gender-neutral principle of primogeniture is in conflict with the Constitution. This legal framework does not prevent communities at living law from applying their customary law, including their law of succession, in a non-racial and non-sexist fashion.[50]

Indeed, the Constitutional Court held in the *Mayelane* case that communities may apply their living law provided that it conforms to the values of human dignity and equality.[51] In addition, according to the *Shilubana* case, living law applies in a community as past practice until it is established that a new practice has developed to replace it, or the law has been amended to accord with the Constitution. In that event the later practice or development prevails over past practice. Until then, a constitutionally compliant community practice remains valid customary law for the people concerned.[52]

The marriage institution has also contributed to the development of the customary law of succession. An important part of the marriage agreement entailed the transfer of the woman together with her reproductive capacity[53] from her maiden family to the husband's family so as to provide the latter with a successor who would be charged with the responsibility of perpetuating that family's legacy. This is in accordance with the African tradition which directed that when a daughter married she bore children who 'belonged' to her marital family.[54] For this reason African culture could not imagine a marriage entered into for a purpose other than the provision of children. A childless marriage, therefore, was regarded as the most abysmal thing that could befall an African family.[55]

When viewed from the reality that most African women necessarily married away from their maiden families and were actually integrated

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49 KwaZulu and Natal Codes of Zulu Law. See also *Gumede v President of the Republic of South Africa* [2009] 3 SA 152 (CC) para 27.

50 See the judgment of Ngcobo J in *Bhe-Shibi* (n 20).

51 *Mayelane v Ngwenyama* [2013] 8 BCLR 918 (CC).

52 See *Shilubana* above paras 44–46.

53 See Bekker (n 19) 150.

54 See Tiyo Soga, *Intlalo kaXhosa* (Lovedale Press 1937) 72. See also Bekker (n 19) 234.

55 See Balogun Abiodun, 'Towards an African Concept of Law' (2007) African Journal of Legal Theory 71 at 74.

into their marital homes, family headship meant that women would not ordinarily be available to provide their maiden homes with the requisite stability and continuity associated with the nature of the position of family head. As alluded to earlier, the primogeniture principle centred around the values of accountability and responsibility, which reveals the purpose of the family head's life as the 'advancer' of the lives of other family members.[56] In a democracy such a noble purpose cannot be allowed to be tarnished by associating it with patriarchy.

While men's responsibility was to advance the interests of their families, women were transferred through the *lobolo/bogadi* agreement to their husband's families to enrich them with children, particularly successors to headship positions.[57] This explains why women were not selected as successors. In order to provide the services demanded by her married condition, a woman relinquished all her succession rights within her maiden family,[58] since '[s]uccessorship also carries with it the obligation to remain in the family home for the purposes of discharging the responsibilities associated with heirship'.[59] This was particularly so in the case of succession to traditional leadership as a princess who married a commoner outside of her maiden heritage could not demand to succeed to the position of her deceased father.[60] The court should have explained that the *Shilubana* case was an exception to this rule. However, it was silent as to how a woman who was married away from the royal family could conduct her important leadership duties.

The functions of traditional leadership are required to be exercised from the royal family and not from some family of commoners into which the princess may have married.[61] In the latter event, the princess could be seen as having abdicated her royal heritage and assumed the status of a commoner, and thus could not claim the traditional leadership position. For this reason, under the South African Constitution, an unmarried maiden who meets the primogeniture qualification should have no difficulty in succeeding her

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56 In this sense primogeniture functioned to advance the philosophy of *ubuntu*.

57 Bekker (n 19) 150.

58 The case of *Shilubana* above discusses a daughter of a traditional leader who married a commoner outside the royal household but came back to claim succession rights to the traditional leadership position at her maiden home. As she had left the Nwamitwa lineage when she joined the Shilubana one, the appointment is unusual. One has to wonder how she was going to fulfil her obligations and responsibilities away from the royal household. The court would have done well to explain this.

59 See *Bhe-Shibi* (n 20) para 180.

60 CRM Dlamini, 'The Clash Between Customary Law and Universal Human Rights' (2002) 1/1 Speculum Juris 26 at 39.

61 In *Shilubana* above the Constitutional Court overlooked the rule that '[s]uccessorship also carries with it the obligation to remain in the family home for the purposes of discharging the responsibilities associated with heirship' and appointed the princess who had married into a commoner family and could not satisfy the requirement of remaining at the royal family and discharging her duties.

deceased father as a traditional leader if the relevant traditional authority recognises the legitimacy of her claim.[62]

A married woman and her children acquired succession rights within her marital family, while the marriage itself established a secure economic entity known as the house.[63] One of the most important consequences of the indigenous marriage was the duty of the husband to provide such an estate, to enable the wife and her children to prosper in accordance with the principle that upon marriage the wife and her children's welfare became the responsibility of the corporate home of her husband which they accessed through its head. This ensured that the husband established and headed the house as a unit for the wife and her children. After the husband's death the house remained under the protection of the family head.[64]

For these reasons, I cannot accept the narrow view that the primary purpose of the concept of primogeniture is to promote the interests of males and to oppress women in society. The relegation of women to a seemingly subordinate position is the natural adjunct of a culture where common survival and shared belonging are more greatly prized than individual autonomy. This must be viewed against the reality that marriage changed women's family relations and made them members of the marital family.

This broad view of the primogeniture rule rejects its pejorative equation with mere patriarchy in the sense that conflates the relationship between manhood and womanhood with the Western liberal 'contest' between feminism and male chauvinism. This is rejected as part of Euro-Western liberalism which tends to impose its hegemonic features on the definition of indigenous institutions in order to undermine the African life-world and its underpinnings.

THE AFRICAN FAMILY AND THE CONCEPT OF THE CORPORATE HOME

The indigenous African home was a corporate legal entity which enjoyed the right to own property and incur obligations in respect of wrongs committed by family members through the agency of the family head. Every family home owned the collective family estate through the head.[65] This much is conceded by Bekker, who otherwise ascribes family property to the ownership of the head.[66] He writes:

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62 See *Bhe-Shibi* (n 20) para 180.

63 See Bekker (n 19) 135.

64 See the *Mthembu* cases (n 26, n 42) for a family head who repudiated his customary obligations by contesting the validity of his daughter-in-law's marriage and thus the legitimacy of his grandchildren.

65 Bekker (n 19) 74 states: 'Although the property of the house is commonly spoken of as belonging to the family head, because this is a brief and convenient way of describing the matter, it belongs in law to his family as a unit, under his supervision and control; it has also been described as belonging in communal ownership to the family, which, of course, includes the family head'.

66 Ibid at 82.

> The family home was not owned outright by the family head, but was held in communal ownership by the family as a unit, under his administration and control.[67]

Bekker's admission that the family owned the estate as a unit, is at odds with his simultaneous insistence that the goods of other family members vested in the family head.[68] In fact, it is the juristic personality of the family home that capacitated it to sue and be sued through the family head and a council of elders. The family head prosecuted claims due to the home and defended those against it. In this sense the corporate legal personality of the indigenous home was predicated on the principle of primogeniture through which it functioned.[69]

As the personification of the communal home, the family head was the nominal manager of its estate and the nominal guardian of the entire corporate family.[70] In respect of the estate, the head was the accounting officer bearing obligations to settle claims against the family home.[71] With regard to the family collective, the head enjoyed paternal powers to maintain discipline and instil good behaviour. In both capacities, the head executed his functions together with family elders and seniors who had the experience to preserve the identity and the legacy of the family.[72]

The position of the family head was, therefore, that of the servant of the corporate home as opposed to its owner.[73] This accounts for the severely circumscribed manner in which he exercised his powers and capacities. Contrary to popular belief regarding the apparently expansive extent of his powers, the true position is that the family head, like everyone else in the family, never had the capacity to own major assets such as livestock and farms, which were in fact owned by the corporate home itself for the benefit of the family collective.[74] Consequently, ownership of such items as the cattle was always expressed in inclusive terms with connotations of a shared access to their enjoyment.[75]

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67 Ibid.

68 Ibid.

69 Ibid at 297.

70 See Chukwuemeka Ebo, 'Indigenous Law and Justice: Some Major Concepts and Practices' in Gordon R Woodman and Akintunde Olusegun Obilade (eds), *African Law and Legal Theory* (New York UP 1995) 139 at 143.

71 See Bekker (n 19) 297.

72 Ibid at 298 refers to the 'official' version of customary law when he presents the heir as having the sole interest in family property and cannot be required to account by family elders and seniors.

73 See Prophet Landwandwe, *"Asiko Kwami, Kwebantfu" Unearthing King Sobuza II's Philosophy* at para C of the 'Foreword' by Prince Mabandla.

74 See Bekker (n 19) 72.

75 See Johannes Seema, 'The Significance of BaSotho Philosophy of Development as Expressed in their Proverbs' (2012) 11 1 Indilinga African Journal of Indigenous Knowledge Systems: Africa Indigenous Systems: An Account 128 at 129.

This explains why people always referred to family assets in non-possessive language such as *inkomo yakuthi* (translation – 'our cow' or, literally, 'the cow of our home'),[76] which located the ownership of the beast at the behest of the corporate home whose resources were shared by every family member. Corporate ownership ensured that every family member, including the women and children, was a shareholder in the family estate proportionate to his or her rank and status.

The family head maintained and supported the other family members as the nominal manager of the family resources. Yet he was not dispensing his own generosity to the family. Instead, for accountability purposes, he merely controlled the distribution of the shares to the real owners.[77] His position as a family agent demanded that he be accountable for the welfare of even the most vulnerable family member.[78] It also belies the representation of the family head as the owner of the family estate[79] with powers to evict other members from the family home.[80] The request for goods and services by family members from the family head was, in fact, a demand to him to make their shares accessible for use. He, therefore, had no discretion to refuse that to which they were entitled by custom.

The family head's designation made him the first servant of the corporate home and not the owner of family assets. To assure family elders and seniors of his loyalty to the corporate home, the head would often rededicate himself to the status of his position in family council meetings. As his normative referent he emphasised his commitment to the responsibility of serving his father's family.[81] He demonstrated his unwavering commitment to the service of the corporate home by calling his house *motse wa borra* (the household of my fathers).[82]

This customary convention ensured that humility was the main characteristic of a competent head of the family who respected and showed regard for order in society.[83] Commitment to a fair and equitable service to the family members, particularly women and children, was a prerequisite for the application of the principle of primogeniture. Ngcobo J has this to say in this regard:

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76 See Dial Ndima, 'The Place of Customary Law in the General Law of South Africa' (2002) 1 2 Speculum Juris 233 at 334–335.

77 See Seema (n 75) 129.

78 See Soga (n 54) 72.

79 Bekker (n 19) 72 refers to the 'official' version of customary law by presenting the family head as the owner of family property.

80 See the *Mthembu* and the *Bhe-Shibi* (n 20) cases above.

81 See Mahao (n 12) 322.

82 See Setiloane (n 31) 40.

83 See Mahao (n 12) 322.

> Two points need to be stressed here. First, indlalifa [the heir] does not inherit as that term is understood in common law. What happens is best conveyed by the expression that 'indlalifa steps into the shoes of the family head'. Far from getting any property benefit, the indlalifa assumes the responsibilities of a family head. He is required to administer the family property for the benefit of the entire family ... where there are insufficient assets in the family, indlalifa must use his own resources. Second, the selection of the eldest child must also be seen against the flexibility of the rule and the fact that he may be removed from office.

If the eldest child considers that he cannot perform the responsibilities, the next eldest [child] takes over the responsibility. What is more, the *indlalifa* may be held to account by the family if he does not perform his responsibilities. The family may, if he fails to perform his duties, remove him.[84]

SHARED BELONGING AND GUARDIANSHIP IN AFRICAN LAW

Guardianship over children was a communal activity which involved the participation of the family collective. This included the position of a child who was a ward[85] from another family who had joined the family collective to be raised by them. Through the head, the ward became a member of the latter's extended family and of the entire clan. When the time came for him or her to return home,[86] the ward's group had to deliver one female beast known as the *isondlo/dikotlo* beast,[87] to the host family as a way of registering the ward's transfer home.

Like marriage, *isondlo* was an affirmation of the relationship between two groups which were connected through an individual whose membership of the host family could only be terminated by the transfer of a communal asset such as a cow.[88] The purpose of *isondlo* was to account for the termination of the ward's membership of the host family.[89] *Isondlo* had spiritual connotations because it was a procedure by which to transfer the ward from the ancestral traditions of the host family to those of his or her biological family. This ritual symbolised his or her transfer from the one family's religious cult, and amounted to a licence for re-integration to the biological family for protection by its gods through the transfer of the cow.[90]

For this reason, *isondlo* was different from the common-law concept of maintenance because the delivery of the cow was not aimed at providing

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84 See *Bhe-Shibi* (n 20) para 182.
85 A ward is a child living under a guardian who is not its parent. See Bekker (n 19) 343.
86 Ibid at 242.
87 See Soga (n 54) 93.
88 See Bekker (n 19) 242–246.
89 See Bennett (n 6) 282.
90 See Bekker (n 19) 243.

support for the ward, and remained payable even if the ward was the one who sustained the host family financially. In this scenario the latter would have gained, rather than lost, assets whilst staying with the ward, yet *isondlo* was deliverable for his or her transfer. It was, therefore, unrelated to compensation for any losses incurred by the host. The delivery of the cow merely served to smooth the transition of the ward from one spiritual belief system to another.[91]

This explains why *isondlo* was always deliverable in one cow, regardless of the amount of resources expended or the length of time spent in looking after the ward. The amount of one cow rather represented a token of appreciation for the assistance given, than compensation for the expenses incurred. *Isondlo* can therefore not be properly compared to maintenance, which could properly be claimed even if *isondlo* had been paid. It was rather a record used by an oral society as a collective signature to release the ward from the communal guardianship of the host clan.

The transfer of the cow was not without its own challenges, not least of which was that it happened to have an economic value. Cultural outsiders often, erroneously, equated *isondlo* with the western concept of maintenance.[92] The latter concept relates to the actual expenses incurred for the sustenance and upbringing of the child of another.

COLLECTIVE OWNERSHIP AND GROUP SOLIDARITY IN AFRICAN LAW

African law recognised categories of property which were classified by the nature of the object and of the transaction through which it was acquired.[93] The individual could only own personal items such as clothes, tobacco, cash, smoking pipes, cell phones, books, poultry, and pets.[94] The other members did not have a direct interest in such items, although the latter also fell under the protection of the group.[95]

However, communal ownership applied in respect of major assets such as land, livestock, farming implements, vehicles, investments, or weapons of war. The entire family exercised corporate ownership through the living-dead as the source of the assets, via the living as the trustees of the unborn who were the ultimate beneficiaries. In other words, major forms of property such as cattle and farms belonged to the home as a corporate entity and

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91 Bennett (n 6) 282.

92 See also Witness Tamsanqa, *Ithemba liyaphilisa* (Lovedale Press 1979) 125 who shows how the rituals associated with initiation usually produced humble, generous and resourceful men.

93 See Jan Christoffel Bekker and Ignatius Maithufi, 'Law of property' in Jan Christoffel Bekker, Christa Rautenbach and Nazeem Goolam (eds), *Introduction to Legal Pluralism in South Africa* (Lexis Nexis 2006) 55.

94 See Juanita Pienaar, 'Customary Law of Property' in Rautenbach, Bekker and Goolam (eds), *Introduction to legal pluralism in South Africa* (2010) 75 at 78–79 and Bennett (n 6) 259–260.

95 Ibid Pienaar 78–79.

were collectively owned by the family as its heritage from the living-dead for onward transmission by the living to the unborn.[96] Consequently, the ownership of these major family assets was always expressed in inclusive terms with a collective connotation, for example, *intsimi yakuthi* (our land), or *inkomo zakuthi* (our cattle).[97]

The effect of using inclusive language was to limit the power of the seniors and elders who were thereby constantly reminded of the ancestral pedigree of their heritage.[98] This language served to encourage the head to consult other participants in their dealings with property rights. It must, however, be emphasised that the claims to collective ownership were solidarity claims aimed at bolstering the claims of the family in times of need, and not beneficial claims aimed at personal consumption.

Whilst all the means of production belonged to the family, the extended family shared the claim to their ownership. When members of the extended family asserted the ethos of common belonging among one another, they actually pledged solidarity to cooperate with each other, and if need be, to die together in protecting group property. By extension of this principle, family assets such as land and farms did not exclude the claims of the rest of the clan. These were also not beneficial claims but claims of belonging and pledging solidarity to protect family property from possible outside threat.[99] Communal ownership differed from beneficial ownership because its purpose was group cooperation if protection was needed.

In this regard, the interest of family members in the property, including that of the head, amounted to shareholding.[100] Whilst African law always embodied the notion of individual property ownership, it did not couch it in exclusive terms, as even in respect of personal items, individual property merely weakened, but did not oust, the collective interest of the group in regard to the protection of the assets from claims emanating from outsiders.[101]

TRADITIONAL LEADERSHIP AND GOVERNANCE

Traditional communities consisting of the various families led by their family heads were the constituent parts of a system of traditional leadership. Such communities were organised into lineage clans which, in turn, were led by clan heads. This is the hierarchy that administered the affairs of the community from the lowest to the highest levels. Each extended family had

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96 Bekker (n 19) 70 writes: 'This mutual interest is difficult to define, but it is most real; it is attributable to the idea of collective right and responsibility which pervades customary law'.

97 See Ndima (n 23) 334–335. See also Seema (n 75) 129.

98 See Mahao (n 12) 322.

99 Ibid. See also AJ van der Walt and GJ Pienaar, *Introduction to the Law of Property* (Juta 1977) 388; and Bekker (n 19) 69.

100 See Bekker and Maithufi (n 93) 55.

101 See Ndima (n 76) 234.

the authority to finalise the matters it handled in its council consisting of the various heads of families. In turn, extended families met in a council chaired by the head of their clan who shared a common ancestor with them.

In the domestic sphere the clan council was the highest authority that finalised disputes and administrative matters among kinsmen.[102] A number of these clans formed a village with its own council headed by clan heads chaired by the headman[103] (*usibonda*/*induna*). Headmanship is the lowest rung in the official (public) hierarchical structure of traditional leadership recognised by the state today. More serious inter-clan disputes were handled by the village council and adjudicated upon by the village headman.

Clans were the main organs of the village scheme. For that purpose the village was modelled as a 'mega-clan' under the leadership of the village headman (*usibonda*). The family head, clan head, and the village headman were so called because of their positions as leaders of their respective units and were related to one another through their common ancestor.[104] The jurisdiction of the clans was very extensive in matters that were quite intimate to council members and it overlapped with most of the village responsibilities.[105] Consequently, village authorities did not have many socio-political functions and served mostly as an appeal body.

The first level in the exercise of participatory democracy in the public sphere was the village forum where ordinary men participated fully without interference from the traditional leader. Hence Ade Ajayi observes from the Nigerian perspective, that 'participation could be at village assemblies in which every adult had a right to speak and be listened to, and decisions were taken by consensus'.[106]

The next level was the chiefdom (a 'mega-village') comprising several interrelated villages headed by the *inkosi*/*kgosi* (senior traditional leader,[107] previously known as the chief) who was the incumbent of the position that

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[102] See Nomthandazo Ntlama and Dial Ndima, 'The Significance of South Africa's Traditional Courts Bill to the Challenge of Promoting African Traditional Justice Systems' (2009) 4 1 IJARS 6 at 8–9.

[103] See Jeff Peires, *The House of Phalo – a history of the Xhosa People in the Days of Their Independence* (Univ of California Press 1981) 32–34.

[104] See Ntlama and Ndima (n 102) 8–9.

[105] Ibid. Ntlama and Ndima note: 'The lowest level of governance was the head of the household. The person who occupied this position was connected to every member of his lineage through his grandfather and his brothers, his father and his brothers, [his brother and their sons], his sons and their sons, with whom he formed a powerful patrilineage (Pereis 1981). The group managed its own economic production and security, settled domestic quarrels and performed its religious functions (*ibid*). 37 ... The head of the household presided over the first level of the traditional justice system, to which every member of the lineage had access, before a matter could proceed to the ruler and further to the court of the king for final determination (Mqhayi 1914) 3'.

[106] See Ade Ajayi, 'Social Justice in Traditional African Societies' in Toyin Falola (ed), *Tradition and Change in Africa* (Africa World Press 2002) 3 at 3–8.

[107] See Traditional Leadership Framework and Governance Act 41 of 2003.

he inherited from his ancient ascendant who was the common ancestor of all the headmen in the chiefdom. The decisions of village councils (headmen's courts) were appealable and reviewable before the forum of the chiefdom (*inkundla/lekgotla*) where *inkosi/kgosi*, sitting with his *isigqeba* (council) led the discussions concernng matters arising from the villages under their jurisdiction.

The chiefdom was usually named after the common ancestor of the interrelated clan leaders and was led by the *inkosi/kgosi* who was related to all the heads of the clans through their common ancestry, such as the amaNqabe Chiefdom. *Inkosi/kgosi* pronounced on all the political decisions made by the *imbizo/pitso* (assembly) or judicial decisions made by the *lekgotla/inkundla* consisting of all the headmen, councillors, and the people in the forum of his chiefdom. In most smaller polities the chiefdom was the highest authority and the jurisprudence generated from its proceedings defined the chiefdoms' value system and concept of justice as they impacted on social organisation, public administration, education, economics, law, religion, agriculture, and war.

The various chiefdoms such as amaQwathi, amaQiha, amaHegebe, to mention a few from the Thembuland Kingdom of the Eastern Cape, were distinct and autonomous authorities, each of which was famous for its unique sense of justice in various fields. The jurisprudence produced by the various chiefdoms was similar because it developed from the same broad, binding principles of the kingdom, but there were fine distinctions between groups on certain matters of detail.

In bigger polities all related chiefdoms shared the collective identity as constituent parts of their kingdom, for example, the Thembuland Kingdom. For many groups the chiefdom was the highest level of African sovereignty. Whilst the various chiefdoms maintained their individual identities, at the same time they had to harmonise with the design of their kingdom (a mega-chiefdom) headed by the king (*ukumkani*), whose position was transmitted through his ascendants from the ancestor he shared with his subordinate traditional leaders. Such subordinate chiefdoms reported to the king who presided with them as members of his council over the highest judicial, political, and social decisions.

The king was the most senior descendent of their common ancestor and was respected by all traditional leaders as the father of the nation.[108] He was the mouth-piece for the entire kingdom which consisted of all the various levels of traditional leaders, *isigqeba* (councillors),[109] and the people, who freely participated in the discussions which culminated in the

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[108] Peires (n 103) 32.

[109] John Solilo, 'Izinto zeKomkhulu lamaXhosa' (author's translation: Xhosa royal institutions) in John Bennie (ed), *Imibengo* (Lovedale Press 1935) 219 at 220 uses this term to include the place where the councillors sit and deliberate on issues regarding their royal advisory functions. See also Soga (n 54) 154.

kingdom's royal decisions that were reached by consensus. The kingdom's jurisprudence was distinct from that of other kingdoms, and distinguished between the law of the amaZulu and that of the Batswana, and so on. In all clans, communities, and kingdoms the main objective of dispute resolution was the attainment of consensus, restorative justice, conciliation, and mediation.

The current condition of traditional leaders has been ameliorated by the Traditional Leadership and Governance Framework Act (the Act).[110] The Act seeks to restore the status and dignity of traditional leaders as understood in African society through the reaffirmation of the participation of royal families and traditional authorities in the identification and appointment of traditional leaders.[111]

The Act takes account of the imperatives of the Constitution and transforms the traditional leadership institution to accommodate democratic changes and the dictates of human rights. Whilst retaining some indigenous aspects such as the identification of the traditional leader by the royal family before he or she can be appointed by the government, it also introduces some novel statutory features such as the participation of women, the contribution of the national and the provincial houses of traditional leaders, as well as the royal and traditional councils. All these structures serve at least two purposes – to shed the traditional leadership's lingering apartheid hang-over that continues to haunt its image; and to promote its concordance with the Constitution.

CONCLUSION

As a system which embraced communal living, a shared belonging and group solidarity, African culture developed the principles of primogeniture, the family head and a corporate home to ensure a collective administration of, and equitable access to, family resources. These principles ran as a golden thread through all the structures of society in selecting leaders such as heads of families, clans, villages, and the community as a whole, to ensure that each department had a responsible and accountable manager to facilitate equitable access to resources that belonged to all members collectively.[112]

The selection of these leaders by the relevant councils and the need for them to rededicate themselves to that process as the source of their powers, insulated the resources they presided over from personal abuse by powerful individuals who might otherwise wish to appropriate them for their own selfish purposes.[113] Although social and cultural factors linked the selection process to patriarchy, the principles underlying the role of the institutions themselves were noble and praiseworthy. Some of such lofty attributes,

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110 Act 41 of 2003.
111 s 11 of Act 41 of 2003.
112 See Ndima (n 23) 234–235.
113 See Mahao (n 12) 322.

obligations, and responsibilities associated with the indigenous structures were the advancement of group survival, service delivery, and development. However, as I have pointed out, their close association with maleness tarnishes whatever they might have succeeded in achieving.

As the *Shilubana* case demonstrates, the Baloyi community who still adhered to their traditional leadership institution, took advantage of the Bill of Rights and amended their law to accommodate gender equality. This means that whilst they were comfortable with their traditional leadership institution in South Africa's democracy, they no longer wished to see their cherished institution being tarnished by patriarchy. Indeed, the Constitutional Court has developed a jurisprudential basis for communities to continue maintaining their socio-cultural institutions provided that the values of human dignity and fundamental equality are upheld.[114]

To facilitate social change, section 9 of the Constitution sets gender equality as a pre-requisite for ensuring fair participation by men and women without prejudice. As shown in the discussion of the *Bhe-Shibi* case above, the imperative of gender equality also brought the application of male primogeniture to an end.[115] At this point it becomes significant to note that the court was cautious to ensure that it is the male primogeniture rule as practised under section 23 of the Black Administration Act that was invalidated. Based on the Constitutional Court's decision in the *Mayelane* case that communities can continue to apply their living law subject to respect for the Bill of Rights, it is possible for willing families and communities who subscribe to the values of mature guidance and leadership to maintain a non-sexist version of family headship. As Ngcobo J found in the *Bhe-Shibi* case, some communities who still lead communal lives and need the guidance, support, and leadership of their senior members can continue to enjoy these services in a way that is consistent with the Bill of Rights.[116] Indeed, a constitutionally compliant rule that is practised by the community continues in that role until changed by that community.[117]

As nominal managers rather than owners of the resources belonging to their constituencies, the indigenous leaders were customarily obliged to support members of their constituency by affording them access to the latter's own customary shares as opposed to the former dispensing their own generosity. To care for, support, and defend vulnerable constituency members, especially women and children, was the duty the leaders inherited from their predecessors in title. In any dispute involving allocation of resources council members would inquire whether the impugned family head, clan head, or village head, as the case might be, handled the matter

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114 See *Shilubana* (n 28).
115 See *Bhe-Shibi* (n 20).
116 Ibid.
117 See *Shilubana* (n 28).

as required by the position they occupied, rather than their own personal whims and idiosyncrasies.[118]

As a culture that favoured stability and continuity in the family and harmony in the community, the African tradition developed the principle of primogeniture which relied on seniority as the criterion for appointing responsible and accountable leaders to preserve the corporate home as a primary unit of society.[119] This method ensured that the enormous responsibilities necessary to keep family resources intact were entrusted to a mature family head, to ensure healthy families, clans, communities and the society at large. The entry of women as participants should enhance these lofty objectives.[120]

The purpose of the rule was the perpetuation of the family legacy, using the stable institution of primogeniture that was unfortunately tainted by the stigma of patriarchy. This compromise stuck to of this principle because its focus was not only towards finding a responsible and accountable family head, but also one who would remain permanently available at the family home.[121] This entailed identifying someone with the capacity to personify the family home by bearing the characteristics of the collective identity of all its members at all times.

As such the family head would sue or be sued together with, and on behalf of, other family members whose collective resources he administered. By so doing he would foster communal living through an equitable sharing of the resources without necessarily receiving any personal gain from these activities.[122] As such, primogeniture operated within a tradition where women often married away from their maiden homes and became members of their marital families to enrich them with children.

Considerations of survival and self-preservation also pressured African society to choose men for appointment to leadership positions in the family and in the community because the primogeniture rule demanded that that position be occupied by someone who was always available to administer the daily affairs of the family home, as opposed to someone who would be married away to another family. That principle was replicated at clan and community level where it was equally compulsory to have focused and dedicated leadership. As discussed above, the necessity for every woman to marry no longer exists. In fact, many women choose to remain single. Their continued exclusion from holding leadership positions is therefore neither desirable nor necessary.

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118 See Chuma Himonga, 'The Right to Health in an African Cultural Context: The Role of Ubuntu in the Realization of the Right to Health with Special Reference to South Africa' (2013) 52 2 Journal of African Law 165 at 179.

119 See *Bhe-Shibi* (n 20).

120 Mahao (n 12) 324.

121 Ibid.

122 Bekker (n 19) 161.

In summary, Ngcobo J's famous observation in the *Bhe-Shibi* case is particularly apposite:

> The rule of male primogeniture might have been justified by the social and economic context in which it developed. It developed in the context of a traditional society which was based on a subsistence agricultural economy characterised by a self-sufficient family organisation. Within this system, an elaborate network of reciprocal obligations between members of a family existed which ensured that the needs of every member for food, shelter and clothing were provided for. The roles that were assigned to men and women in traditional African society were based on the type of social structure and economy that prevailed then…
>
> The role that women play in modern society and the transformation of the traditional African communities into urban industrialised communities with all their trappings, make it quite clear that whatever role the rule of male primogeniture may have played in traditional society, it can no longer be justified in the present day and age. Indeed, there are instances where in practice women have assumed the role of the head of the family. [T]he rule has therefore lost its vitality to a certain degree.
>
> Jurisprudence from African courts, which have considered the position of women in the context of succession, further demonstrates that the rule in its present form no longer has any place in modern times.[123]

[123] See *Bhe-Shibi* (n 20) paras 188–191.