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Reflection on *Bhe v Magistrate Khayelitsha*: In Honour of Emeritus Justice Ngcobo of the Constitutional Court of South Africa

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ABSTRACT

This article highlights the major areas of convergence between Justice Ngcobo's judgment and living customary law as revealed in the findings of recent empirical research. Its purpose is to enhance the confidence of the courts and inform their interpretation of the Reform of the Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 by drawing on the minority opinion. Put differently, the article seeks to vindicate the minority opinion in *Bhe & Others v Khayelitsha Magistrate & Others* with regard to its reflection of the grounded realities of succession under living customary law, using the findings of recent empirical research. In this way, the article highlights the contribution that Justice Ngcobo's constitutional jurisprudence can make to the interpretation of legislation dealing with the reform of the customary law of succession—subject, of course, to the fact that any precedent has inherently limited value for understanding a dynamic and ever-evolving system of law such as living customary law. Needless to say, the courts must continually be alert to this caveat when interpreting and applying any legislation that deals with customary law.

Keywords: customary law; succession; family property; living customary law; Bhe

Introduction

I decided to honour Justice Ngcobo by reflecting on his work in the Constitutional Court of South Africa, to which he was appointed in 1999. This reflection is from the perspective of a scholar in customary law, legal pluralism and private law. From this perspective, *Bhe v Magistrate Khayelitsha*[1] is one of the most important opinions

1 *Bhe & Others v Khayelitsha Magistrate & Others* CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004).

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written by Justice Ngcobo in the Constitutional Court, in two respects. First, this is the second important case the Constitutional Court decided regarding the role of customary law in South Africa's constitutionally entrenched legal pluralism after he was appointed to this Court.[2] Secondly, *Bhe* is part of the jurisprudence of the Constitutional Court most relied upon by courts and scholars regarding various aspects of customary law in the South African legal system. To obtain an impressionistic indication of the influence of this case on jurisprudence and scholarship, in June 2013 I conducted internet-based research entitled 'The miles *Bhe v Magistrate* has travelled: The first landmark decision in customary law in South Africa'.[3] The results of this research were the following: (*a*) Google Scholar showed mention of *Bhe v Magistrate Khayelitsha* in more than 1 700 results; (*b*) further refinement of the search produced 23 reported cases which either referred to (*obiter dictum*) or applied *Bhe*; (*c*) 112 articles or books discussed the case.[4] There is no doubt that, since this research was undertaken, *Bhe* has travelled many more miles in both case law and the works of scholars. In my view, these results indicate the importance and impact of *Bhe* in the field of customary law in the national and international literature and jurisprudence. I therefore found it fitting to honour Justice Ngcobo by reflecting on one of the most important of his opinions during his tenure at the Constitutional Court.

But there is a more substantive reason for reflecting on Justice Ngcobo's minority opinion in *Bhe*: this concerns the contribution it could play in interpreting the current law that regulates succession under customary law: the Reform of the Customary Law of Succession and Regulation of Related Matters Act[5] ('the Reform Act').

The role I advocate for Justice Ngcobo's opinion in interpreting this Act is premised on closing the gap between the written formal law and the grounded and practical reality that it is intended to regulate. An increasing body of empirical research shows significant degrees of divergence between formal law and living customary law (also referred to as informal law in some contexts).[6] This divergence draws attention to the gap between

2 The first important case decided in the field of customary law is *Moseneke v The Master* 2001 (2) SA 18 (CC). Justice Ngcobo was one of the judges who concurred in the unanimous judgment penned by Sachs J.

3 I wish to thank Mathew Hewitson for assisting me with conducting the research for this project.

4 The method of research for the project was as follows: the first search we conducted with the phrase '*Bhe v Magistrate*' came up with more than 1 700 results. We decided to refine this search by placing the exact phrase '*Bhe v Magistrate Khayelitsha*' and this yielded 202 results. Most of the articles and books that we had already found were in this search. We examined all 202 results and compiled a list of all the relevant articles and books that referred to *Bhe*. We decided that the book or article had to refer to *Bhe* at least four or five times because we found that if the case was referred to less frequently than this, then it was merely referred to in passing in a footnote and was not discussed at all.

5 Act 11 of 2009, which came into operation on 20 September 2009.

6 See, for example, Sindiso Mnisi Weeks, 'Customary Succession and the Development of Customary Law: The *Bhe* Legacy' 2015 Acta Juridica 215. See also Chuma Himonga and Elena Moore, *Reform of Customary Law of Marriage, Divorce and Succession in South Africa: Living Customary Law and Social Realties* (Juta 2015), in which a summary of the report of the research on which the book with a similar title is based can be found (<http://jutaacademic.co.za/uploads/SAR/> accessed 13 November

the formal law in question and the living customary law that regulates the day-to-day lives of people. It also draws attention to the questionable usefulness or effectiveness of the formal law in solving problems for the people for whom it was intended. Unless the formal law can effect the good outcome intended, it is practically of little value. The significance of reflecting on the role of the minority judgment in *Bhe* at this stage of the Reform Act's history lies in the fact that, as yet, there is no Constitutional Court jurisprudence pronouncing on this Act.

In the South African context, the divergence between the formal law intended to reform customary law post-1994[7] and the living customary law could have serious implications for the protection of rights guaranteed by the Constitution, such as the rights of vulnerable family members regarding the rules governing marriage and succession.[8] In this respect, Mnisi Weeks aptly argues:

> what will ultimately benefit and protect women most effectively is, in large part, bridging this gap and enabling better communication (going both ways) between the formal and informal systems.[9]

One way to close the gap between legislation intended to reform customary law and living customary law is to ensure that the judges who must interpret the relevant legislation, such as the Reform Act, properly understand the living customary law that reflects the grounded reality of the people in a particular area of the formal law. Precedent in case law is generally an inappropriate source of knowledge of the content of living customary law. However, elements of court decisions that reflect the living customary law on a subject in a given period present a reasonable source for promoting an understanding of the living customary law. Such decisions may be used as aids to interpreting the legislation in question, and also to developing jurisprudence that helps to close the gap between the law in the books and the grounded reality. In my view, Justice Ngcobo's minority judgment in *Bhe* provides a reasonable basis for understanding living customary law that may inform the courts in their interpretation of the Reform Act. The reason for this is the substantial convergence of his judgment with living customary law and realities on the ground, as revealed by recent empirical research findings.

The link between *Bhe* and the Reform Act is important to the courts' interpretation of the Reform Act. This is because that Act is the offshoot of *Bhe* in that it largely incorporated the majority decision in its content. The background or contextual history of legislation is often important to its interpretation as it provides the purpose for which it was enacted, and the courts may look to the history when they interpret the legislation. Indeed, there is an established practice in the Department of Justice and Constitutional Development to provide a manual that guides the courts in the application of a new

2017).

7 The current democratic constitutional dispensation took effect in 1994.

8 See, generally, Himonga and Moore (n 6).

9 Mnisi Weeks (n 6).

statute dealing with customary law. This type of manual includes general sections on the history and purpose of the law in question; they may, in turn, provide the courts with a context for interpreting and applying the law.[10]

Because of the close link in the content between the majority decision in *Bhe* and the Reform Act, the courts may be inclined to look to the judgment of the majority in *Bhe* in their interpretation of the Act to the exclusion of the minority decision. However, I submit that if the gap between the formal and the living customary law of succession is to be narrowed, the courts, in their interpretation and application of the Reform Act, should pay close attention to Justice Ngcobo's minority judgment too. This is because it is this decision that better reflects the living customary law or the grounded reality of succession under customary law, rather than the majority decision.

The aim of this article is to highlight the major areas of convergence between Justice Ngcobo's judgment and living customary law, as revealed by the findings of recent empirical research.[11] The intention is to enhance the confidence of the courts in informing their interpretation of the Reform Act by drawing on the minority opinion. Put differently, this article seeks to vindicate the minority opinion in *Bhe* with regard to its reflection of the grounded realities of succession under living customary law, using our research findings. In this way, the article highlights the contribution that Justice Ngcobo's constitutional jurisprudence can make to the interpretation of legislation dealing with the reform of the customary law of succession—subject, of course, to the fact that inherently any precedent has limited value for understanding a dynamic and ever-evolving system of law such as living customary law. Needless to say, the courts must continually be alert to this caveat when interpreting and applying any legislation that deals with customary law.

This article describes the congruencies of the minority judgment with living customary law, as affirmed by recent research, as opposed to providing a critical analysis of either the minority or the majority judgment or the Reform Act. This approach is consistent with the limited and narrow purpose of this article: namely to reveal the aspects of the minority decision that help with the interpretation of the Reform Act for the purposes of developing the jurisprudence that will respond, as closely as possible, to the lived realities of the people to whom that Act is intended to apply.

10 See, for example, Department of Justice and Constitutional Development, *Policy and Procedure Manual: Administration of Intestate Deceased Estates at Service Points* (2002); Justice College, *Customary Marriages Bench Book* (February 2004).

11 For the purposes of this article, 'recent research' refers to empirical research conducted in the last 11 years following the decision in *Bhe.* The major studies are those of Sindiso Mnisi, 'The Interface between Living Customary Law(s) of Succession and South African State Law' (DPhil thesis, University of Oxford 2010) (the research for this work was conducted in 2007–2008—see Mnisi Weeks n 6 at footnote 32) and of Debbie Budlender, Sibongile Mgweba et al, *Women, Land and Customary Law*, completed by the Community Agency for Social Enquiry (CASE) (2011) <http://www.cls.uct.ac.za/usr/lrg/downloads/Women_and_Land.pdf> accessed 18 April 2017; see also Himonga and Moore (n 6).

The article has five sections. A brief factual statement and summaries of the majority and minority decisions of the Court[12] on *Bhe* follow this introduction. The third section provides a link between *Bhe* and the current legislative reform of the customary law of succession. Here, the article underscores the influence of *Bhe*—especially the majority decision—on the content of the Reform Act, to the exclusion of the minority opinion (other than those parts of the majority decision with which Justice Ngcobo agreed). This section is followed by a discussion of the aspects of Ngcobo J's judgment that reveal congruence with recent research. The article concludes by affirming the minority opinion as a reasonable basis for understanding the grounded reality necessary to interpreting the Reform Act if the gap between its provisions and grounded reality is to be narrowed.

Facts and Decisions

Briefly, the cases brought under the name of *Bhe* concerned inheritance rights under customary law. In *Bhe*, the claim was by two minor female extra-marital children of the deceased, whereas that in *Shibi* was by the sister of the deceased. The common denominator standing in the way of these claims was the principle of male primogeniture, as contained in section 23 of the Black Administration Act[13] and its accompanying regulations. In *Bhe*, the deceased's father claimed the right to inherit the assets in the estate, and it was common cause that he intended to sell them off in order to defray funeral costs. This would leave Ms Bhe and her daughters with no inheritance, and they would lose their home, which was one of the assets in the estate.

Ms Shibi, the sister of the deceased, was the only surviving immediate relative of the deceased, but she was disinherited under the official rule of male primogeniture and the estate (money) was inherited by her cousins.

In the Constitutional Court, the majority invalidated the impugned statutory provisions on the ground that they contravened the rights to equality and dignity. It also held that the rule of male primogeniture was contrary to gender equality. According to the majority, until the Legislature enacted legislation that would give adequate effect to the right to equality, the remedy was that section 1 of the Intestate Succession Act[14] (ISA) should apply to the intestate deceased estates which would formerly have been governed by section 23 of the Black Administration Act, subject to the amendment to the ISA aimed at accommodating polygamous marriages under customary law.

The minority *per* Justice Ngcobo agreed with this remedy in principle but disagreed on three major points. First, he held that the rule of male primogeniture did not unfairly discriminate on the basis of age. Secondly, it was possible to develop the primogeniture

12 In some instances after this, these decisions are referred to simply as 'the majority' and 'the minority'.
13 Act 38 of 1927, which is now almost entirely repealed.
14 Act 81 of 1987.

rule and that in doing so a flexible approach was desirable. Thirdly, pending the legislation anticipated by the majority, both the ISA and the customary law of succession (also referred to in his judgment as 'indigenous law') should apply, subject to 'the Constitution and the requirements of fairness, justice and equity, bearing in mind the interests of minor children and other dependants of the deceased family head'.[15] It is necessary to state his reasons for this remedy as they provide a broad context for the discussion of the aspects of his judgment that reveal congruence with living customary law. Justice Ngcobo stated, inter alia:

> It seems to me … that the answer lies somewhere other than in the application of the Intestate Succession Act only. It lies in flexibility and willingness to examine the applicability of indigenous 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 indigenous law subject to the Constitution; and *(c)* protect vulnerable members of the family. Indigenous law is part of our law. It must therefore be respected and accorded a place in our legal system. It must not be allowed to stagnate as in the past or disappear. What is equally important is the fact that the traditional social and economic structures have, to a large extent, been replaced by modern social and economic structures. Poverty and greed have undermined the traditional responsibilities of heirs. These days spouses and children of deceased people are sometimes no longer cared for. There must be a balancing exercise. The respect for our diversity and the right of communities to live and be governed by indigenous law must be balanced against the need to protect the vulnerable members of the family. The overriding consideration must be to do that which is fair, just and equitable. And more importantly, the interests of the minor children and other dependants of the deceased should be paramount.[16]

He then suggested an approach for resolving questions of the application of customary law in succession disputes as follows:

> [W]hether indigenous law is applicable should in the first place be determined by agreement. After the burial, it is common for the family to meet and decide what should happen to the deceased's estate. If an agreement can be reached there seems to be no reason for any interference. Any dispute relating to the choice of law should be resolved by the Magistrate's Court having jurisdiction. In determining such dispute a Magistrate must have regard to what is fair, just and equitable in the circumstances of the case. And in determining what is fair, just and equitable, the Magistrate must have regard to, amongst other things, the assets and liabilities of the estate, the widow's contribution to the acquisition of assets, the contribution of family members to such assets, and whether there are minor children or other dependents of the deceased who require support and maintenance. Naturally, this list is not intended to be exhaustive of all the factors that are to be taken into consideration, there may be others too. The ultimate consideration must be to do that which is fair, just and equitable in the circumstances of each case.[17]

15 At para 139.
16 At paras 236–237.
17 At para 239.

Regarding the petitions of the applicants, he held that the claimants in both cases were the rightful beneficiaries of the respective estates.

The customary rule of succession applied in *Bhe* was that previously applied by the Supreme Court of Appeal in *Mthembu v Letsela.*[18] The rule was stated as follows:

> The customary law of succession in Southern Africa is based on the principle of male primogeniture. In monogamous families the eldest son of the family head is his heir, failing him the eldest son's eldest male descendant. Where the eldest son has predeceased the family head without leaving male issue, the second son becomes heir; if he is dead leaving no male issue, the third son succeeds and so on through the sons of the family head. Where the family head dies leaving no male issue his father succeeds ... Women generally do not inherit in customary law. When the head of the family dies his heir takes his position as head of the family and becomes owner of all the deceased's property, movable and immovable; he becomes liable for the debts of the deceased and assumes the deceased's position as guardian of the women and minor sons in the family. He is obliged to support and maintain them, if necessary from his own resources, and not to expel them from his home.

This was the rule under constitutional challenge and upon which both the majority and the minority pronounced. When I refer to the official customary rule of male primogeniture, it is substantially the same rule, because the courts have continued to apply it in its ossified form as it was developed in the traditional setting. However, although there is evidence of this rule having been adapted in living customary law, as will be shown later, there are instances where the rule still features in this living customary law. This provides evidence that sections of the population cling to the traditional version of succession, notwithstanding the social and economic changes that motivate other sections of the population to change or adapt this version of succession. What this shows is that the transformation and evolution of living customary law is neither uniform nor even.[19] The Constitutional Court has identified this aspect as a difficulty in determining the content of living customary law.[20]

The Link between *Bhe* and the Reform Act

The background or history of legislation often gives a broad context for its interpretation by the courts. In this section, I link the origin and content of the Reform Act to *Bhe*, especially the majority pronouncement. *Bhe* was explicitly an interim measure and intervention by the Court until parliament enacted legislation to reform the customary law of intestate succession. In 2009, the Customary Law of Succession and Related Matters Act was enacted and it came into operation in 2010. The grand scheme of this Act is the same as the approach in *Bhe*—that is, the application of the ISA, which in

18 [2000] 3 All SA 219 (A) para 8.
19 See also *Bhe* para 87.
20 ibid para 109.

the context of this article represents the common law, to customary law. In essence, the Reform Act is a legislative reincarnation of the majority view in *Bhe*.

Because of this close link in the history and content between the majority in *Bhe* and the Reform Act, the courts may feel justified to look to this decision for guidance in interpreting the Reform Act to the exclusion of the minority finding. I submit that the majority did not interpret the issues but merely used the ISA. If subsequent courts see the Reform Act as the reincarnation of the majority, therefore, they will similarly not interpret the Reform Act. Instead, they will apply it exactly as the majority applied the ISA without any consideration of the grounded reality. Worse still, the courts might be tempted to view the Reform Act as just another *Bhe*, thereby perpetuating the distance the majority put between grounded reality and the new rules of succession by adopting the ISA as the remedy.

For these reasons, I argue that, for the purposes of narrowing the gap between the theory of the law and the grounded reality, the courts should look to the minority finding, which reflects the living customary law and is vindicated by recent empirical research. In the next section, I delve into the congruence of Ngcobo J's judgment with living customary law.

A minority judgment has intrinsic value as a source to help with understanding the majority decision of a court. In South Africa, which adopted (fait accompli[21]) a deep pluralistic legal system that includes living customary law, the minority opinion of Justice Ngcobo is critical to the proper interpretation and application of the Reform Act. Furthermore, whereas empirical research alone should be sufficient to provide the courts with the knowledge necessary to help with interpreting legislation that deals with customary law, the Constitutional Court has shown reluctance at times to rely on such research when it has been presented as evidence of living customary law. An example is *Bhe* itself, where the majority declined to accept affidavit evidence, based on Mbatha's empirical research,[22] about the failure of formal rules of customary law to keep pace with changing social conditions.[23] The reason was that the majority doubted that the changes described in the empirical study represented sufficiently widespread practice in living customary law. In entertaining this doubt, the Court drew support from Kerr's argument against isolated incidents observed in research being accepted as a manifestation of widespread change in customary norms.[24] This argument has clear merit as a general

21 That is, through the constitutional recognition of customary law, which has been interpreted as living customary law.

22 L Mbatha, 'Reforming the Customary Law of Succession' (2002) 18 SA Journal on Human Rights 259.

23 See para 84.

24 See para 109. The argument by Kerr was framed in the form of a question: Is there 'a sufficient basis for the declaration by a court of a new legal rule to be applied in all future cases if a few learned authors state that a divergence from an existing rule has been observed in a few instances in practice, and the only evidence on the point before the court is that of one of the parties to the case who is, even though sincere and not dissembling in any way, by virtue of being a party to the case vitally interested

proposition but it should not be seen as a sufficient reason for rejecting evidence of change where properly conducted empirical research supports that evidence.

It is hoped that the courts will be more inclined to recognise the development of living customary law on the ground when there is congruence between a court decision including the minority and the living customary law revealed in the findings of research. In other words, it is hoped that in view of the clear congruence of the minority view with living customary law, as revealed by empirical research, subsequent courts will more easily be persuaded than was the case with the majority to consider the relevance of *scientific*[25] empirical customary-law research in the interpretation of legislation that deals with customary law.

Evaluation of the Minority in *Bhe* against the Backdrop of Recent Research and the Majority

Bhe has inspired a variety of studies, as was noted in the Introduction. In this section, I focus on empirical studies on *Bhe* and related subjects that vindicate selected aspects of the minority decision.[26] I evaluate three aspects of this decision that show congruence with living customary law as revealed by recent empirical research, against the backdrop of the majority judgment on which the Reform Act is based: the concept of family property; the rights of women in customary succession; and the *Bhe* remedy.

Family Property

The majority acknowledged the importance of the concept of family property in the customary law of succession. However, this acknowledgement merely pointed out how distortion of this concept in colonial contexts disadvantaged the women and children in the family of which the deceased man had been head. Quoting *Nhlapo*, the majority stated:[27]

> Customary law has, in my view, been distorted in a manner that emphasises its patriarchal features and minimises its communitarian ones. As *Nhlapo* indicates:

in the outcome? With respect, I suggest that it is not sufficient.' See Alastair Kerr, 'Role of Courts in Developing Customary Law' 1999 Obiter 49–50.

25 The emphasis here is intended to call the attention of the courts to the importance of evaluating the scientific soundness of the literature they rely on in adjudicating living customary law. The sources of this law are the communities who are subject to customary law, and it is these communities that must be consulted scientifically in determining the content of living customary law.

26 It is not feasible within the scope of this article to discuss all the topics covered by this decision, such as the evolving nature of customary law, the ascertainment of customary law, and detailed aspects of the development of customary law—all of which have degrees of relevance to the topic of this article.

27 At para 89.

> 'Although African law and custom has always had patriarchal bias, the colonial period saw it exaggerated and entrenched through a distortion of custom and practice which, in many cases, had been either relatively egalitarian or mitigated by checks and balances in favour of women and the young. ... Enthroning the male head of the household as the only true person in law, sole holder of family property and civic status, rendered wives, children and unmarried sons and daughters invisible in a social and legal sense. The identification of the male head of the household as the only person with property-holding capacity, without acknowledging the strong rights of wives to security of tenure and use of land, for example, was a major distortion. Similarly, enacting the so-called perpetual minority of women as positive law when, in the pre-colonial context, everybody under the household head was a minor (including unmarried sons and even married sons who had not yet established a separate residence), had a profound and deleterious effect on the lives of African women. They were deprived of the opportunity to manipulate the rules to their advantage through the subtle interplay of social norms, and, at the same time, denied the protections of the formal legal order. Women became "outlaws".'[28]

> *Nhlapo* concludes that protecting people from distortions masquerading as custom is imperative, especially for those they disadvantage so gravely, namely, women and children.

The majority then pertinently observed that, in comparison to Roman-Dutch law—from which patriarchal features were progressively being removed by legislation during the colonial and apartheid periods—customary law was stripped of its inherent capacity to evolve in keeping with the changing life of the people it served, particularly women. Consequently,

> customary law as administered failed to respond creatively to new kinds of economic activity by women, different forms of property and household arrangements for women and men, and changing values concerning gender roles in society.[29]

The result was a 'formalisation and fossilisation of *a system which by its nature should function in an active and dynamic manner*' (my emphasis).[30]

In the light of this observation about the evolving capacity of customary law and its ability to adapt, one might have expected that, instead of simply focusing on the distortion of customary law, the majority could have enquired how customary law evolved regarding family property, which is central to the protection of vulnerable family members in traditional society. Had it done so, it might have found a basis for not applying the ISA as the remedy. This would have been preferable because, ironically, the ISA further advances the distortion of the concept of family property.

Furthermore, instead of seeking to restore or develop the institution of family property, which (in the quoted statements) is implicitly recognised as a good concept, the Court

28 Thandabantu Nhlapo, 'African Customary Law in the Interim Constitution' in Sandra Liebenberg (ed), *The Constitution of South Africa from a Gender Perspective* (Community Law Centre, University of the Western Cape in association with David Philip 1995) 162.

29 At para 90.

30 At para 90.

completely ignored this concept in its ISA remedy, thereby bringing the category of family property into the inheritable estate of the deceased. In contrast, it was the consideration of this and related concepts that partly led Justice Ngcobo to the remedy that, in my view, more adequately responds to the good and bad elements of this concept in living customary law, as identified in recent studies.

In order to appreciate this argument better, detailed discussion of the minority judgment on the concept of family property is necessary.

As his point of departure, Justice Ngcobo noted that, in the setting of the traditional society and economy within which the rule of male primogeniture had developed, the inheritance of property and succession to status were not always linked; that is, the successor did not necessarily inherit the family property. Instead, he stepped into the shoes of the deceased (the family head/father) by taking over control of the family property that remained in the family and provided the whole family with a source of livelihood and a residence. As head of the family, the father held the property on behalf of and for the benefit of the family. He was responsible for the maintenance of the family through the use of the property. Most importantly, the family property belonged to the whole family, not to individual members. As family head, the father acted as caretaker and manager of the family property. Upon his death, the family property was kept in the family to enable the successor to the deceased family head to carry out the duties and obligations of the deceased.[31]

The preservation of the family unit and its continuity were ensured by transferring the responsibilities of the family head to his senior male descendant, usually the oldest son, referred to as the *indlalifa* or successor. The difference between the *indlalifa* and the heir under common law is that the former takes over the powers and responsibilities of the deceased family head. The powers relate to the right to control and administer the family property on behalf and for the benefit of the family members. The responsibilities relate to the duty to support and maintain all the dependants of the deceased in the same way as the deceased family head had.[32]

On the other hand, under the common law, the intestate succession heir inherits the entire estate due to him or her in terms of the ISA. In other words, the inherited property is for his or her exclusive ownership, and he or she has no responsibility to maintain or support anyone from the estate on the basis of the rules of succession alone. Thus, under the common law, the heir can be said to take the place of the deceased person with regard to the ownership of the inherited property only.

An important element of customary law succession in traditional society was the exclusion of women from succession or headship of the family, thereby depriving them of the opportunity to control and manage family property on behalf of their families:

31 At para 167.
32 At para 169.

> [W]omen were always regarded as persons who would eventually leave their original family on the payment of *roora/ lobola*, to join the family of their husbands. It was reasoned that in their new situation – [as] a member of the husband's family – they could not be heads of their original families, as they were more likely to subordinate the interests of the original family to those of their new family. It was therefore reasoned that in their new situation they would not be able to look after the original family.[33]

The *indlalifa* was required to consult with the widow when dealing with family property, and she had the right to restrain him from dissipating the family assets. He was also required to use his own resources to maintain the family when there were insufficient assets.[34]

The legal position presented here corresponds to the findings in recent research. The latter confirm the continued existence of the concepts of family property and of a family unit that is more broadly structured and inclusive than that reflected in the majority judgment (and the Reform Act), which focuses only on the immediate (nuclear) family of the deceased (the spouse and children).[35] According to research, in some cases, the family property is referred to as the '"umbrella" whose radius covers family members' needs across generations'.[36] The metaphor of the umbrella underscores the point that family property belongs to the family as a unit to be used to support family members in need. It cannot be shared among members of one generation (as expected by the remedy adopted by the majority in *Bhe*) because this would deprive future generations of the benefit of the family property.[37] Some research participants expressed the view that people did not report family property even in estates administered under the formal law represented by *Bhe*. Expressing this view, and explaining how the youngest brother of the family would take over control and management of their family house after the death of the last surviving parent,[38] one research participant stated:

> There is no estate that requires to be administered where family property is concerned. So this type of property cannot be reported and does not get reported at the Master's Office when the current holder or occupier is dead. And so *Bhe* cannot be applied to this type of property.

Thus, there are cases in which the ideas of family unit and family property and the mutual obligations that attach to these notions as conceived in their traditional setting continue to this day. In cases where it still applies, family property functions to protect

33 At para 174.
34 At para 172.
35 See Himonga and Moore (n 6) 254–266; Mnisi Weeks (n 6) 238ff, 249.
36 Himonga and Moore (n 6) 254.
37 ibid.
38 See Himonga and Moore (n 6) 256. The father was dead, and the mother, who had remained in the family house with her youngest son, was now very old. The participant was living in another town and was employed as a judicial officer in a town away from the family home.

the interests of a broad class of [extended] family members, including by securing livelihoods and preventing homelessness.

However, research also vindicates another aspect of Ngcobo's judgment:[39] the concept of family property does not serve the interests of all members of the family in changed social and economic conditions. According to the learned Justice, conditions of poverty and unemployment, together with the failure to look after the interests of the deceased's dependants, 'have distorted the customary law of succession, undermined its protective value to family members, and forced other family members to assume the heir's responsibilities for looking after the needy, the sick and the aged.'[40]

Himonga and Moore show that the 'umbrella' idea of family property 'does not work for some female members of the family who are chased out of the family property by male heirs to the deceased's estate.'[41] These authors argue that for 'these women, the concept of family property masks disadvantage and unfairness while it protects the interests of male members of the family who succeed to the property.'[42]

Furthermore, consistent with other literature, Himonga and Moore show the decreasing relevance of marriage to women's status in law, with the result that the marriage of women can no longer be used as a basis for denying them the right to succeed to family property. An added aggravating finding of the study is that households headed by women 'are far more likely to be poor than male-headed ones'.[43]

The changes that have transformed the concept of family property led Himonga and Moore to conclude that

> [T]he social changes regarding the non-prevalence of marriage, the phenomenon of women as heads of households and the actual experiences of people, challenge some of the fundamental notions of family property … It is therefore important that the affirmation in the literature[44] of the role of family property in sustaining livelihoods, and judicial pronouncements, such as that of the minority decision in *Bhe*, do not overshadow the need to engage critically with the reality of social change and the lived experiences of different categories of family members, especially women, in relation to the inheritance[45] of family property. Put differently, social changes challenge the cherished traditional norms and values of control of family property and men should not be permitted to hold to them to the disadvantage of female members of the family in appropriate cases. To the extent that these norms linger on, they must be developed to align

39 Based on pre-*Bhe* literature.

40 At para 173, citing Mbatha (n 22) 261.

41 Himonga (n 6) 258.

42 ibid.

43 ibid, citing Dorrit Posel and Michael Rogin, 'Women, Income and Property: Gendered Access to Resources in Post-apartheid South Africa' (2009) 23 Agenda 31.

44 The authors make reference to Mnisi (n 11) and Mbatha (n 22).

45 It should be noted that both that and the present study use the terms 'succession' and 'inheritance' interchangeably, even though, in the context of customary law, these mean different things; Ngcobo J appropriately distinguishes them from each other (see paras 156–161).

> with the objects, purport and spirit of the Bill of Rights to promote more effective protection of vulnerable family members in changing conditions.[46]

However, in fairness to Justice Ngcobo, these authors should also have highlighted his pronouncement on the limitations of the concept of family property in the changing conditions mentioned above. This would have given a more balanced picture of his judgment in their statement. Moreover, it was partly because of the unsuitability of some aspects of customary law, including the bad elements of the concept of family property as they played out in some cases, that Justice Ngcobo developed the principle of male primogeniture. In the next section, I show how he engaged with the limitations of the concept of family property and how family property is closely linked to the principle of male primogeniture.

Discrimination of Women in Customary Succession

Ngcobo J devoted a good amount of his judgment to discrimination against women in customary succession, about which he agreed with the majority's view. In this section, I show how recent empirical research has confirmed the problem of discrimination against women in succession that Justice Ngcobo identified.

Justice Ngcobo recognised customary law's dynamism and its capacity to adapt to changing conditions. He furthermore acknowledged the literature[47] that shows the development of the rule of primogeniture to allow women to be appointed as heads of families. On this basis, he speculated that the male primogeniture principle had also developed to allow a woman to succeed to a deceased family head. Research has vindicated this speculation to the extent that it reveals instances where the norms governing family property as it exists in modern conditions have changed to allow both men and women (sons and daughters) and widows to administer and control family property. It has also revealed instances where both widows and widowers inherit from their respective deceased spouse.[48]

It is noteworthy that the existence of more egalitarian norms of succession that recognise the inheritance rights of men and women has been confirmed by research with relatively wide geographical coverage.[49] This shows the widespread representation of the developments in question, in addition to vindicating the position taken by the minority on this issue. Arguably, had the majority known how widespread the development was, it might have been persuaded to adopt the same flexible approach that the minority adopted as a remedy. In turn, this might have influenced the Reform Act to adopt the same flexible approach as was taken by the minority. For these reasons, the minority

46 Himonga and Moore (n 6) 259–260.
47 See Mbatha (n 22).
48 Himonga and Moore (n 6) 253, 266–270; Mnisi Weeks (n 6) 241, 249.
49 ibid.

decision should not be ignored by the courts in their interpretation of the Reform Act: to ignore it would result in the emergence of jurisprudence that bears little or no relation to grounded reality.

However, despite Justice Ngcobo's recognition of some egalitarian norms in the living customary law of succession, he did not spare this system of law from scrutiny regarding the status of women. As already noted, he found the principle of male primogeniture to be unfairly discriminatory against women. He held that the rule unfairly limited the rights of women to be considered for succession to the position and status of the deceased family head. He remarked:

> They are excluded regardless of their availability and suitability to acquit themselves in that position. They are overlooked in circumstances where they may be the only child of the deceased. Nor does it matter that they may have contributed to the acquisition or preservation of the family property.[50]

In his enquiry about whether this discrimination was reasonable and justifiable in terms of section 36(1) of the Constitution, he held that the rule might have been justified by the structure and economy in which it developed originally, but that the rule had lost its vitality as a protective mechanism for vulnerable members of the family in changing social and economic contexts.[51] Accordingly, he held that the exclusion of women could no longer be justified and that the rule had outlived its usefulness:[52]

> In the present day and age the limitation on the right of women to succeed to the position and status of the family head cannot be said to be reasonable and justifiable under section 36(1) of the Constitution.[53]

In sum, the problems Justice Ngcobo identified with regard to discrimination against women arose from the rule of primogeniture. The defect in the rule was that it unjustifiably excluded women from consideration for succession to the position of family head. It therefore violated section 9(3) of the Constitution.

Confirming these problems of discrimination against women in customary succession, Himonga and Moore found patterns of succession on the ground that included outright denial of inheritance rights to women. Other less harsh denials of women's rights granted them conditional rights based on their having borne children to the deceased family head.[54] Thus, research vindicates the judgment of Ngcobo J about the existence of pockets of discriminatory practices or rules on the ground.

50 At para 185.
51 At paras 188–190.
52 At para 212.
53 At para 210.
54 Himonga and Moore (n 6) 254–266; Mnisi Weeks (n 6).

The Remedy: Development of Customary Law

The last aspect of the minority judgment vindicated by empirical research is the remedy proposed as the solution to customary succession issues pending the enactment of legislation. Having explained the constitutional mandate to develop customary law to bring it in line with the Constitution in terms of section 39(2), and the manner in which this development should be undertaken,[55] Justice Ngcobo developed the rule of primogeniture. He did this by removing the reference to 'male' so that an eldest daughter could succeed to the deceased estate.

In his reasoning, Ngcobo J reiterated the changed conditions in which the rule of primogeniture applies today. He summarised the relevant conditions in the following words:

> [T]he circumstances in which the rule applies today are very different. The cattle-based economy has largely been replaced by a cash-based economy. Impoverishment, urbanization and the migrant labour system have fundamentally affected the traditional family structures. 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. Many contribute to the acquisition of family assets. The official traditional version of indigenous law does not therefore reflect nor [does it] accommodate this changed role and function.[56]

The main point about the remedy for the purposes of this article is that its content mirrors the grounded reality revealed by empirical research. Of particular interest is the flexible approach adopted. As already indicated, this approach

> lies somewhere other than in the application of the ISA only. It lies in flexibility and willingness to examine the applicability of indigenous law in the concrete setting of social conditions presented by each particular case.[57]

This flexible approach of the minority is vindicated by the lack of uniformity in the patterns of succession on the ground, as revealed by empirical research. As described in the preceding sections, the picture of succession presented by the research findings is a mosaic in which the principle of male primogeniture as developed in traditional society exists together with a variety of other patterns of succession emerging from adaptations of customary law in its evolution on the ground.

Mnisi's argument, based on research post-*Bhe*, also comes close to affirming the flexible approach adopted by Ngcobo J when she states:

> [T]he data and weight of existing scholarship on this subject suggests that a solution should be fashioned in each case according to the particular needs of the family. It should take into account

55 At paras 212–222.
56 At para 227.
57 At para 236.

> whether the surviving family (and deceased) are rural or urban, indigent or affluent, women or men, married or unmarried or separated or divorced, elderly or young, … or in some other way vulnerable, active participants in family affairs and whether there are extant 'legitimate expectations' of maintenance by the various claimants of dependency.[58]

Concluding Remarks

In honouring Justice Ngcobo, this article has attempted to show that the congruence between his judgment and living customary law—as revealed by recent empirical research and with special reference to selected aspects—positions the minority judgment in *Bhe* to contribute to the appropriate interpretation of the Reform Act. Within the selected aspects, congruence has been shown to exist with regard to (*a)* the continued existence of the concept of family property, with its good and bad elements; (*b*) the rule of male primogeniture in its traditional state continuing to deprive women of their inheritance rights while, at the same time, responding to adjustments in changing conditions; and (*c*) the remedy adopted reflecting the picture of living customary law characterised by a lack of uniformity and the variety of patterns of succession practices that result from the adaptation of the male primogeniture rule to changing conditions. The remedy furthermore responds to the variety of circumstances that exist in living customary law that cannot be dealt with by a single uniform approach such as adopted by the majority and the Reform Act.

These congruencies stand to contribute to the understanding of living customary law to inform the interpretation of the Reform Act. The majority gave the Reform Act its content, but this alone cannot furnish the required understanding to interpret that Act in a manner that closes the gap between its provisions and the grounded reality. Instead, judges should pay attention to the minority when interpreting and applying the Act. In particular, the courts should be wary of imposing the strictures of the common-law concept of succession, which the Reform Act has inherited from the majority in *Bhe*. The evidence of living customary law on the ground, as revealed by empirical research, reflects a considerable degree of flexibility rather than uniformity. It therefore converges with the minority opinion. This gives the courts a reasonable basis for interpreting the Reform Act in order to develop jurisprudence that is not divorced from living customary law.

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