

Gender equality in African customary law: has the male ultimogeniture rule any future in Botswana?*

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ABSTRACT

The actual and perceived conflicts between customary law and human rights law, especially in issues dealing with gender equality, have remained a major challenge in Africa. Some of these conflicts are further complicated by the varying and contradictory interpretation of some customary laws by the courts. Different approaches have been adopted at different times and in different places to deal with some of these conflicts. One of the most controversial areas of customary law has been the traditional exclusion of women from property inheritance. This paper takes a critical look at how the courts in Botswana have dealt with the issue of the right to inherit the homestead or family home. It examines this issue in the specific context of the recent case of *Ramantele v Mmusi* in which the Court of Appeal had to consider the customary law rule of male ultimogeniture—which permits only the last-born son to inherit the homestead intestate to the exclusion of other siblings, especially females. It argues that courts need to be more proactive and progressive in their approach to dealing with such issues than they have been in the past in order to recognise the nature and extent of changes that are taking place today. The main lesson that can be drawn from the Botswana case is that if customary law is to survive and develop, more needs to be done to promote research and scholarship in this area and judges also need to take advantage of this research and deal with these customary law disputes with knowledge, understanding and sensitivity.

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Tensions between customary law principles on the one hand and the imperatives of constitutional law, statutory law, common law and international and regional human rights principles, on the other, are not new.¹ The latter impose certain minimum standards in the treatment of marginalised groups such as women, girls and children in our modern society. The fact that many customary law rules continue to perpetuate unacceptable inequalities of gender, age and lineage status is hardly in doubt. The only question is how a judge, when faced with such inequalities, should deal with the matter.

In the headline-grabbing judgment of *Mmusi v Ramantle*² of 12 October 2012, the Botswana High Court declared that a Ngwaketse customary law rule (which provides that only the last-born son is qualified as intestate heir to the exclusion of his female and elder siblings) violates the constitutional principle that provides for equal protection of the law and, to that extent, was *ultra vires* the constitution (BBC News 12.10.2012; Morale 2012). This so-called principle of male ultimogeniture has been challenged in many other jurisdictions, especially in southern Africa, although often under different constitutional principles.³ The High Court judgment was subsequently reversed on appeal. The Court of Appeal for its part ‘declared that the Ngwaketse customary law of inheritance does not prohibit the female or elder children from inheriting as intestate heirs to their deceased parents’ family homestead’.⁴ And to underscore the importance of the case, a full panel of five judges was constituted to hear the appeal in the Court of Appeal.

This case brings to the fore some of the major challenges faced by African judges in their attempts to interpret, adapt and apply customary law. They have to take account of fundamental changes such as commodification, monetarisation, urbanisation, individualisation, the formation of nuclear families, poverty and unemployment on one hand and the imperatives of modern constitutionalism and the minimum standards imposed by international and regional human rights instruments on the other. It is a challenge accentuated by increasing threats to the existence and survival of customary law as a result of the growing problem of lack of adequate expertise and sensitivity to the nature and content of the intricate issues often raised in a customary law dispute. Many judicial officers may not have studied customary law as a subject (Fombad 2014a). Where they have, they may be out of touch with the people who live according to customary law on account of their different

backgrounds and the conditions under which they live and interact. They may thus not easily understand the concepts and underlying values that explain or justify the continuing existence of certain customary law rules.⁵ Largely because of its unwritten nature, proof of customary law will remain a huge problem. Many of the older generation in whose breast the rules of customary law are supposed to repose are dying while the younger generation are moving into urban centres where they have limited contact with the realities of customary law. All these problems have raised the danger of an increasingly Eurocentric approach by judges interpreting and applying customary law, some of whom are infatuated by supposedly progressive concepts from abroad (Fombad 2014a).

The *Mmusi* judgment must therefore be appreciated in the broad context of the numerous challenges that customary law faces and the difficulties that judges encounter in their efforts to adapt and adjust it to the imperatives of contemporary social and legal realities. The paper starts by looking at the issue of the male ultimogeniture rule and how the different courts at different stages dealt with the matter in the *Mmusi* case. It then makes a critical assessment of the approach adopted and its implications for modernising customary law in general. In the conclusion, it is pointed out that the question of how judges deal with controversial customary law rules is of fundamental importance, not only to the continued existence and survival of customary law, but also to general legal development in Africa because of the increasingly progressive and universalising impact of international human rights standards. There is need not just to encourage more research into the living customary law but also for judges to use this research when dealing with the numerous disputes that come before the courts.

THE TRADITIONAL EXCLUSION OF WOMEN FROM INHERITANCE AND THE *MMUSI* CASE

Correcting many of the abhorrent customary law rules which perpetuate gender inequality is not something that can simply and easily be done by legislation. Whilst the constitutions of different countries need to lay the foundation, the courts ultimately have a very important role to play. But doing so requires a combination of knowledge and sensitivity. We shall now look at the male ultimogeniture rule as an example of those customary rules which have probably outlived their usefulness and see how the Botswana courts looked at the matter at different stages in the *Mmusi* case.

The male ultimogeniture rule

It is important to start by pointing out that generally, the customary law rule of ultimogeniture is not a single uniform rule but rather a series of rules, the details of which vary in the practices and usages of the different communities and the type of property inheritance in issue. However, the common denominator of the different rules is that they unfairly discriminate on the grounds of age, birth and most importantly, gender. Some have argued that the general rule of ultimogeniture is inextricably linked to the institution of the family homestead and its concomitant family property (Knoetze 2007). Be that as it may be, although this paper is concerned only with the male ultimogeniture rule with respect to intestate succession to the homestead or family home, the conclusions arrived at equally apply to other obnoxious rules of customary law.

The argument put forward by the appellant throughout the *Mmusi* proceedings was that the Ngwaketse custom and practice recognised the ultimogeniture rule according to which only the last-born son was entitled to inherit the parents' homestead to the exclusion of the other children. He went to great lengths to argue that this rule was not as arbitrary as it seemed, serving no better purpose than just to discriminate against women or even other male siblings. He pointed out that the rights of inheritance of the last-born male were usually less favourable than those of the other siblings, bearing in mind that the family home that he was entitled to inherit came attached with a condition that it should be used in certain circumstances by any one of the siblings. Hence, other members of the family, regardless of sex, has the right to use the family home for hosting occasions such as family gatherings, weddings and funerals. The right of the last-born to inherit the family homestead thus goes with a reciprocal obligation to ensure that all other siblings have access to it when necessary and it is not his exclusive possession. Some of the literature on the topic, not only in Botswana but elsewhere, supports this position and even goes further to point out that the family homestead cannot be alienated without the consent of all family members (Knoetze 2007; Rautenbach 2008; Kalabamu 2009: 212; Baker & Koyana 2012: 568–84). In fact, in many African cultures, the family homestead is regarded as a treasured asset (Kalabamu 2009: 212). It provides a secure shelter for family members and thus prevents homelessness. This is especially so for daughters whose marriages break down and then need to return to their natal home or for males who, for one reason or another, have not been able

to succeed in life and acquire property of their own. The male primogeniture rule therefore ensures that there is someone who can take care of the family homestead, take care of ageing parents and assume responsibilities towards the dependants of the deceased. This is clearly not an abstract and meaningless cultural practice but, as we shall soon see, is linked to a so-called 'duty-beneficiary' obligation that was usually associated with male offspring (Kalabamu 2009: 216). Two observations will suffice at this stage. First, if indeed the Ngwaketse customary law of male ultimogeniture intestate succession applied as was asserted by the appellant, the fact that the homestead had now been alienated or exchanged without the consent of the other siblings clearly meant that the rule had been violated to such an extent that it could have cast some doubts on the validity of the transaction. Second, although the Court of Appeal felt that the existence of this custom had not been established by the appellant, the Court nevertheless proceeded to declare that the rule did not prohibit female or elder children from inheriting intestate the homestead. It is now necessary to look at the different conclusions arrived at by the different courts.

The Mmusi case

Although based on the same facts the three main levels of courts, viz. the Customary Courts, the High Court and the Court of Appeal, came to different conclusions. In delivering the final judgment, the Court of Appeal must be commended for drawing attention to numerous procedural and substantive errors committed by the Customary Courts and the High Court. As the highest court in the country, the Court of Appeal had a duty to do this but it could itself be criticised for not going far enough to give clearer guidelines which will prevent some of these errors being repeated in the future. We will start with a brief summary of the facts of the case before looking at the approaches adopted by the different courts.

A brief summary of the facts and the issues raised

According to the facts, the appellant claims to have inherited the family homestead, located in Kanye, from his father, Segomotso whom he alleged had obtained it from his half-brother, Banki in exchange for another piece of land. The four respondents, including Banki, were the children of Silabo who died in 1952, and his wife Thwesane who died in 1988. But the appellant's father, Segomotso, was born to Silabo and

another woman whom Silabo never married. Segomotso never lived in the family homestead. Thwesane lived in the homestead until her death. The first respondent, Mmusi, gave evidence to show that after their father's death in 1952, the family home had collapsed and she and the other sisters had contributed money to build another house in which their mother lived until she died. None of the brothers ever contributed to the numerous improvements that were made to the homestead nor did they ever help their mother. Mmusi had moved back to the family homestead from 1991 when upon her husband's death she had a misunderstanding with her in-laws. There was no clear evidence that the homestead had at any time been given to any of the children. By the time the dispute came before the Court of Appeal, Mmusi was 80 years old and had lived in the homestead undisturbed until 2007 when the dispute started.

The approach of the customary courts

At the customary court level, the matter started at the Customary Court of First Instance, and then went to the Higher Customary Court before reaching the Customary Court of Appeal. However, before it was brought before the Customary Court of First Instance, the parties had first taken it to the Headman of the ward from which the respondents and their late parents originated, in 1999. He had advised that the family should meet and resolve the matter. It was only when they had failed to reach an amicable settlement that the headman had taken it before the Customary Court of First instance. The Court was presided over by the Headman of Kanye who was assisted by three other court members. The hearing was attended by the parties, elders, relatives and the ward Headman. It was the latter who presented the facts of the dispute before the court and explained in detail how he had tried unsuccessfully to mediate. The Court ignored all the evidence and in a rather arbitrary manner, stated that since the Ngwaketse custom dictated that the last-born male child is entitled to inherit the family homestead where the father died intestate, the appellant was entitled to the homestead. The respondent appealed to the Higher Customary Court.

The Higher Customary Court after reviewing the evidence presented to the lower court declared that the homestead belonged to all the children born to Silabo and Thwesane and they all had a right to use it for common events. It however directed the elders in the family to convene a meeting during which they would appoint a child to look after the home on behalf of all the others. The appellant then appealed

the decision to the Customary Court of Appeal. It upheld the first finding that according to Ngwaketse customary law and culture, it is the last-born who inherits the parents' homestead as intestate heir. It ordered the first respondent, who it must be repeated was 80 years old, to vacate the property with all her belongings within three months.

Botswana is one of the few African countries that have since independence not only maintained but also developed a fairly sophisticated system of customary courts.⁶ Some countries, sometimes with the complicity of the former colonial powers, dismantled or sidelined their customary courts quickly after independence.⁷ Botswana maintained its customary courts which now play an important role in settling disputes in an inexpensive, expeditious and informal manner. The description of the different stages through which the dispute went at the three tiers of the customary law system eloquently attests to its sophistication. The Court of Appeal was very critical of the way both the Customary Court of First Instance and the Customary Court of Appeal had handled the dispute but ultimately agreed with the approach adopted by the Higher Customary Court. It was clear from the facts that the conclusions arrived at by both the Customary Court of First Instance and the Customary Court of Appeal, had no bearing with the actual facts that were presented. These two courts appeared to have based their conclusions on assumptions and preconceptions of what they felt customary law was supposed to be rather than what it actually was. As such, their conclusions were merely a reflection of the deep-rooted patriarchal biases that still exist in some communities. It will be shown shortly that the patriarchal system in issue in this case had changed much faster than the courts, especially the Customary Courts, realised. Perhaps a contributory cause to the distorted interpretation and application of customary law here may lie in the fact that there was hardly any evidence that any woman was part of the panel of local court members who decided the case. As will shortly be seen, the growing influence of women in all aspects of social, economic and political life can no longer justify their exclusion from active participation in traditional dispute resolution processes. It is no longer tenable or consistent with modern principles of due process, fairness and justice that the voices of women can be heard only in an indirect manner when they are represented by male relatives or that they must rely on the sense of objectivity and fair play of the community elders and chiefs. An important aspect of the proceedings, which should not be overlooked or taken for granted, is the fact that the records of the customary proceedings were kept, even if, as the Court of Appeal noted, there were

irregularities in some of these records (Court of Appeal para 82–98). These records were extremely useful in the subsequent appeals. However, the most serious criticisms by the Court of Appeal were directed at the High Court judgment.

The approach of the High Court

In many respects, the High Court judgment of Dingake J is an excellent example of how modern courts should not deal with an issue of customary law. Perhaps the main flaw of the judgment is the fact that the learned judge transformed the whole issue into a constitutional one, and in what bordered on judicial arrogance declared that ‘... the time [had] now arisen for the justices ... to assume the role of the judicial midwives and assist in the birth of a new world struggling to be born ...’ (High Court para 217). On the basis of this, he declared the Ngwaketse customary law rule unconstitutional. As the Court of Appeal rightly pointed out, ‘a court should not be too quick to consider the constitutionality of a customary law unless it is possessed of sufficient evidence regarding the existence and content of such custom ...’ (Court of Appeal para 37). Two comments which serve as important lessons on the interpretation and application of customary law need to be made about the approach adopted by the learned Judge in the High Court.

First, as the Court of Appeal rightly pointed out, in dealing with customary law, a court must not easily or hastily rush to the conclusion that it is invalid merely because it appears to be inconsistent with modern law—whether this be the constitution, statutory law, common law or even international human rights instruments. Unlike modern law where an invalid law can be replaced by the legislature, customary law does not have the benefit of such an organised law-making process. By invalidating a rule of customary law, as the judge purported to do in this case, gaps could be created. There is a risk that such an approach would result in an inherently self-contained customary law tapestry of interrelated and interdependent rules being replaced by a weak, disjointed and incoherent system with gaps in it. But what is more, there seems to be a contradiction in terms to state that a certain rule is a valid rule of customary law but that it however violates the constitution and therefore needs to be invalidated. The existence of a rule of customary law and its enforcement are two different but interrelated things. If a rule of customary law is clearly established, it will be enforced by the courts, according to section 2 of the Customary Law Act (Cap.16:01) only if it is not incompatible with the provisions of any

written law or contrary to morality, humanity or natural justice. The court should have declared the rule invalid on any of these grounds with no need to resort to the constitution. However, since this was a situation where the exact rule was uncertain, section 10(2) of the Customary Law Act directs the courts in such situations to ‘determine the matter in accordance with the principles of justice, equity and good conscience’. This gives judges some discretion but one that has to be exercised with caution, sensitivity, knowledge and understanding of the judicial role. While it gives them an enormous opportunity to radically mitigate some of the harshest and unacceptable customary law practices, the role of judges however is essentially mediatory. This requires that the judge adopts a non-confrontational and non-destructive approach, especially when it involves a customary law rule which conflicts with human rights. Ultimately, the judge must be willing to listen to the parties and try to arrive at a conclusion which reflects the dominant views of the members of that community. It may thus be suggested that courts, when interpreting a rule of customary law, should, where it appears to conflict with – or actually conflicts with – the fundamental rights provisions in the constitution, strive to interpret and develop rather than strike down the rule of customary law.⁸

The second issue worth commenting upon, and which the Court of Appeal inexplicably glossed over, was the extensiveness of the references made by the judge to foreign laws and international instruments. There is growing excitement about the potential uses of foreign law to enrich national law, especially in the context of the internationalisation of constitutional law (Fombad 2012: 439–74). As much as the recourse to foreign legal materials, especially those from other African countries, is very desirable and necessary, case law and literature on the topic abound with good examples of its use and bad examples of its misuse (Kommers 2002: 61–70; Markesinis & Fedtke 2006; Saunders 2006: 37–76; Junior 2014). The use of foreign material, whether as a guide or even stimulus to legal development and change, especially of a radical nature as occurred in this case, warrants a lot of care. To underscore the point that the Court of Appeal should not have ignored the approach adopted in this case, one commentator on the High Court judgment ‘lauds the Court for its extensive use of comparative human rights jurisprudence and international human rights law in the determination of the claim’ (Jonas: 2013: 229). Yet, as stated above, this was an excellent example of how not to use foreign legal material.

To support the conclusions arrived at, the Judge in the High Court had cited at least 22 cases from nine different jurisdictions and made

references to the Constitutions of Ghana, India and South Africa. An analysis of the foreign authorities cited shows that most of them were not only unnecessary and unhelpful, but in many instances were misleading. It is beyond the scope of this paper to go into the details of this, but a few examples will suffice to illustrate this point.

First, the Judge cited the equality and non-discrimination provisions in the constitutions of Ghana, India and South Africa. In none of these constitutions were the wordings of the relevant provisions, the nature of the rights recognised, or even their scope, similar in any way to that in the 1966 Botswana Constitution. Besides this, the Judge made no attempt to show such a link. Second, the number of foreign judgments cited was equally impressive but, as in the case of the foreign constitutional provisions cited, their relevance was at best dubious. In some of the cases cited, the rationale for the decision was either hardly made clear, or it was misunderstood or misapplied. For example, he cited the Kenyan case of *Re Wachokire* (High Court para 133). The impression conveyed was that the Court in this case had declared the impugned customary law rule invalid. In reality, what happened was that the Magistrate in this case, instead of awarding the whole piece of land to the petitioner's brother in reliance on the Kikuyu customary law which denied unmarried women like her equal inheritance because of the expectation that they would marry, changed the rule and awarded the land in equal shares to both the petitioner and her brother.⁹ This reflects both the contemporary reality that not all women will marry and also the customary law adjudicatory philosophy whose primary objective is to reconcile members of the community or family. Finally, the judge in rejecting the respondent's attempt to rely on the constitutional provision prohibiting discrimination and its exceptions in favour of the applicant's reliance on the provision dealing with equal protection, sought support for this approach in a number of foreign authorities. The main authority relied upon was section 9 of the South African Constitution dealing with equality and which essentially prohibits discrimination. The scope of this provision is much broader than the corresponding provision, section 15, in the Botswana Constitution, hence there was clearly no reason why this and some of the cases explaining how this provision is to be interpreted needed to be cited. The use of foreign authorities could thus hardly be justified – and, if anything, was a futile attempt to display legal erudition which only obscured the issues which should have been addressed.

The approach of the Court of Appeal

The judgment of the full bench of the Botswana Court of Appeal was to a large extent more thorough and thoughtful. As noted above, the Court clearly felt that it was questionable whether the rule of male ultimogeniture was part of Ngwaketse customary law. Nevertheless, it declared that the Ngwaketse customary law of inheritance did not prohibit the female or elder children from inheriting as intestate heirs to their deceased parents' family homestead. It had not invited evidence for the contrary to be argued. The only way one can resolve this apparent contradictory position is to suggest that the Court meant that even if the rule existed, it was not formulated in the manner in which the appellant claimed it was.

This was a very important matter that all three tiers of the customary courts and the High Court had grappled with and on which they had all come to fairly contradictory decisions. Although the Court of Appeal can be commended for carefully pointing out the numerous errors that had been committed at the different levels, one could criticise its own decision for failing to give clear guidance to the lower courts on how to deal with these matters in the future.¹⁰ After five years in the courts, the Court referred the matter back to the family members and, failing agreement between them, to the elders and uncles, and again failing their agreement, to the Customary Court of First Instance. It is really doubtful if this was necessary. Whilst it is certainly true that customary courts are best placed to undertake the consultations and negotiations required to reach consensus, this certainly was a case where the Court of Appeal should have drawn the attention of the lower courts to some of the factors that need to be considered in arriving at such a consensus. Because of the Court of Appeal's ambivalent conclusion, the question that needs a clear answer is whether the male ultimogeniture rule has any future in Botswana.

IS THIS THE END OF THE MALE ULTIMOGENITURE RULE?

How to develop customary law in a way that it can respond to contemporary challenges, especially in dealing with issues of marginalised groups like women, will remain a thorny issue for years to come. The actual practice or living customary law may not often coincide with what the elders and traditional leaders assert is customary law. Women, in particular, are often not able to easily challenge and influence a change in the deeply entrenched patriarchal roots of customary law,

especially at the level of the customary courts.¹¹ When such disputes get to the modern courts, the urge to suppress a rule of customary law on grounds that it perpetuates gender discrimination and inequality, as Dingake J in the High Court did, is usually very strong especially since this can easily transform a judge's reputation into that of a hero and defender of women rights. However, in spite of its inadequacies, extreme measures such as suppressing certain aspects of customary law without considering the consequences are unhelpful, especially in those rural communities where the peoples' lives are almost entirely regulated by it. Judicially imposed restrictions on the scope of application of customary law that overlook the realities of the people will simply be ignored or, where they are enforced, will promote rather than prevent conflict in the community. Active development of the living customary law by judges in close consultation with the parties and the community provides the best way in which its basic principles can be adjusted to eliminate some of its deleterious anomalies. It is suggested here that the Court of Appeal should have dealt with the matter more decisively than refer it back and risk prolonging the dispute but failing this, should have given more precise guidelines on how the lower courts should deal with the matter. As we noted earlier, the courts were dominated by men.¹² Perhaps the major surprise of the Court of Appeal's decision is how little use was made of the extensive research material published on the advances made in Botswana on the issue of customary law inheritance for women. It cited a number of old, well-known authorities but curiously missed some of the most recent literature with well-researched empirical evidence on the precise issues that arose in this case (Court of Appeal para 77). There are a number of factors, many of which came up in the *Mmusi* case itself, but also others based on recent empirical studies which suggest that some of the customary law rules, such as the male ultimogeniture rule can no longer be applied automatically as a rigid and inflexible rule of customary law.

First, as the Court of Appeal pointed out very clearly, and as noted above, the recognition and enforcement of a rule of customary law depends on it satisfying the so-called repugnancy test, that is, that the rule is 'not incompatible with the provisions of any written law or contrary to morality, humanity or natural justice'.¹³ Surely, a mechanical application of a customary law rule which allows an 80-year-old lady to be sent packing from a family home which has been her home for more than twenty years and to the construction of which she had substantially

contributed in favour of a person who had made no contribution towards it, cannot by any stretch of imagination be said to accord with 'morality, humanity or natural justice'. Hence, even if the rule existed, it is argued here that the Courts should refuse to enforce it because of the harsh and unconscionable consequences that will result from its application.

A second factor, also alluded to somewhat, by the Court of Appeal (para 77–80), is the importance of the changing circumstances brought about by westernisation, commercialisation, industrialisation and urbanisation. As we have noted above, there might well have been good reasons in the past for a rule that the family homestead should only be inherited intestate by the last-born male child.¹⁴ The appellant argued that other members of the family, regardless of sex, had the right to use the homestead for hosting occasions such as family gatherings, weddings and funerals. It was thus a right which went with the reciprocal obligation to ensure that all other siblings have access to it when necessary (High Court para 39–40). This is an argument which, we will submit, did not help the appellant. If indeed the heir of the family home is considered to hold it as trustee for the beneficial enjoyment of all the other siblings, the fact that the homestead in question in this case is supposed to have been alienated by way of exchange suggests that the customary rule had been violated and therefore could not be relied upon.¹⁵ Besides this, modern urban communities and families are now structured and organised differently and the nuclear family is fast replacing extended family arrangements. In this setting, as was the situation in this case, the males may spend most of their lives in the urban centres, acquire their own homes or for a variety of reasons lack the desire or ability to fully discharge the responsibilities that go with inheriting the family home.

It is perhaps the failure to refer to and utilise some of latest and well-researched empirical evidence of the changing attitude in customary practices towards women in Botswana society that is one of the major weaknesses of the Court of Appeal's decision in the *Mmusi* case. At the forefront of this research is the work of Griffiths (2011: 229–60; 2013: 213–38) and Kalabamu (2000: 305–19; 2006: 237–46; 2009: 209–23; and also Comaroff & Roberts 1981: 79–81; Molokomme 1990). For a long time the Botswana courts have relied on the work of the renowned anthropologist, Schapera (1955), one of whose works on customary law in Botswana has been cited with almost monotonous regularity as if it was a code of Botswana customary law. The value of the work of others such as Anne Griffiths and Faustin Kalabamu is that they provide

a useful update to Schapera's research, which dates back to the 1930s, and thus offer an invaluable link between the past and the present living customary law and in many respects indicate the direction of future developments.

Griffiths (2011: 254), based on her field work, demonstrates that 'women in Botswana today are in a much stronger position regarding acquisition of resources, including land, than they were twenty-five years ago'. The transformation in inheritance attitude has also come as a result of women acting as carers or investors in the family homestead, very much like Mmusi did, which gives them a stake in it. Studies now show that even where women do not normally inherit the family homestead, there seems to have emerged a duty-beneficiary principle which suggests that where women, especially unmarried women or those who return to the natal home after their marriages have broken down, are allowed to inherit the family homestead if there is evidence that such women cared for their ageing parents or contributed to the development and growth of the homestead (Kalabamu 2009; Griffiths 2011). Whilst the literature clearly shows that there is a positive change towards egalitarian inheritance, especially with regard to the family homestead in cases of intestate inheritance, the final decision is usually taken after discussions within the family. Although there remains resistance from many conservative sections of the community with vested interests, changing attitudes influenced by several interrelated and interconnected factors are beginning to influence the release of women from dependence and lifelong subordination. Some of these factors are:

- The empowerment of women through education and economic prosperity through formal and informal employment opportunities – which have enhanced their self-esteem and independence and given them the confidence to be proactive and to stand up for and speak for and defend their interests.
- The growing awareness in many communities of human rights standards which frown at customary practices that marginalise women, even if this is mostly so in urban centres.
- Democratic institutions, globalisation and feminist campaigns which have given women a platform on which to challenge issues of gender inequalities and exclusions. In fact, empirical evidence shows that 'democracy' and 'women's rights' have repeatedly emerged as one of the factors that have contributed to increasing women's opportunities (Kalabamu 2006: 242–4; Budlender *et al.* 2011: 141).

It would seem from all these studies – and this too was also evident from the facts of the *Mmusi* case – that welfare considerations rather than a blind moral obligation to uphold patriarchal practices are beginning to influence the basis for recognising and enforcing customary law rules.

There was thus empirical evidence to support the arguments of the respondents and also strengthen the Court of Appeal's judgment. Without evidence of living law provided by such empirical research, there is a danger that courts, particularly customary courts, will continue to uphold the patriarchal version of customary law which subjects women, especially those living in the rural areas, to the full brunt of the sometimes harsh and demeaning excesses of customary law practices. Thus, research results based on empirical evidence are of utmost importance to counter many of the self-serving assertions that some elders and traditional leaders are likely to prefer in order to perpetuate the status quo and protect their patriarchal powers and dominance over women. In fact, a recent report that investigated the nature of women's rights in three rural communities in South Africa came up with important evidence which could not have been obtained by merely reading the standard literature on customary law and practices, suggesting that women have a greater degree of access to land today than had ever been imagined (Budlender *et al.* 2011: 141).

There is no reason to believe that the radical changes taking place in Botswana, and as the report mentioned above shows, in South Africa too, are not happening elsewhere in Africa. Although customary law differs from community to community within and outside the different countries, the general treatment of women as inferiors or minors in the different countries has been very similar. For example, the situation in Lesotho is aptly and colourfully captured by this statement by the Lesotho National Council of Women: 'before marriage, women were children of their fathers, after marriage they were children of their husbands, and during widowhood they were children of their heirs or sons' (Molapo 1994).

What seems to be emerging is that the customary law rules of succession, particularly those which limited the rights of succession of women, are changing. The *Mmusi* case and the researches carried out in Botswana confirm other studies which show that the process of succession in many African countries today is being adapted to the social, economic and other needs of the community (Comaroff & Comaroff 2003: 445–73). One can now conclude that the male ultimogeniture rule is no longer a strict, inflexible rule of thumb which must be mechanically applied regardless of the consequences. In

fact, some studies on the issue (Maithufi 1998: 142–7) show that not only sons other than first-born sons, but even illegitimate children, now inherit property to the extent that one writer suggests that there is now a clear shift from the principle of primogeniture, which is the dominant approach followed in most countries in Southern Africa, to the principle of ultimogeniture (Lehnert 2005: 241).

Customary law remains a living reality. For it to continue to exist and apply in a manner that will positively contribute to resolve societal disputes, more research needs to be encouraged. The advantage of such research, using as examples the research of Griffiths and Kalabamu, is that it links up and connects with the earlier research carried out during the colonial period and immediate post-independence period by Schapera and others. Such research helps not just to keep customary law relevant but also reduce the uncertainties that go with trying to ascertain its contents. Courts have a critical role to play in ascertaining, interpreting, applying and developing customary law but in doing so, they need to use the evidence collected and analysed by researchers. It can be argued that rather than resorting to codification of customary law in an attempt to purge it of some of its archaic and abhorrent rules, more research needs to be encouraged to understand and record the fundamental changes that are taking place.

Perhaps more than in the past, courts today will need the field-work and empirical studies of sociologists, anthropologists and other social scientists in order properly to understand the dynamics of customary law.

CONCLUDING REMARKS

In every part of Africa, customary law co-exists with imported modern law. Conflicts between the two still persist and will not disappear soon. With the growing importance of customary law and customary courts, it is now imperative for more imaginative ways to be found to deal with the underlying conflict between the two systems of law. The easy option of suppressing a rule of customary law is certainly not the best way to address the matter.

Perhaps the most important lesson that can be drawn from the *Mmusi* case is that all courts, whether customary or modern, have a duty to investigate and give effect to the living customary law that best reflects the present realities of the people and not some abstract and archaic rule supported by self-serving conservative community elders. As a result of its flexible nature, customary law could be made less oppressive

and harsh towards traditionally marginalised groups in African societies more easily than may be supposed. Many of the controversial rules that still exist provide judges with great opportunities to progressively and creatively modernise this law in line with contemporary social, legal and economic imperatives. Although the project of reforming African customary law is so big that it cannot be left in the hands of judges alone, they nevertheless have an important role to play. In doing so, however, they must take advantage of some of the empirical research that is being carried out. With renewed interest in customary courts, as a way of addressing the huge backlog of cases, delays, high cost and other problems associated with litigation in most African modern courts,¹⁶ the revival of research and scholarship in customary law holds the key to future progress. It is because of such empirical research that the radical transformation of the position and status of women over the past several decades has occurred, resulting in some of the old rules such as the male ultimogeniture rule now being seen to have outlived their usefulness. From this, it is clear that courts are better placed than the legislature to actively adapt and adjust customary law to contemporary needs as well as take account of constitutional and human rights imperatives. The legislature does not normally enact customary law as it does other sources of law. In this age of globalisation and regionalisation, both of which threaten to undermine legal diversity, judges have a special duty to consider all cases involving customary law with great caution and sensitivity. Their ability to do this will certainly depend upon more funding being made available for research into and the teaching of customary law than is presently done. It can be argued that the continuing existence of customary law and its ability to adapt to the modern demands of gender equality, as well as principles of fairness and non-discrimination, deserve equal attention as other 'big' issues such as constitutionalism, rule of law and good governance. In the final analysis, many customary law rules, like the male primogeniture rule, are merely dynamic social constructs which are subject to changing societal values, norms, needs and aspirations. Looked at from this perspective, with the active participation of the courts, customary law could progressively develop into a more egalitarian and inclusive system without necessarily inviting drastic legislative reforms. Most of the conflicts today are caused not by outdated customary law rules per se but rather conservative-minded community elders and leaders who are stubbornly refusing to accept gender equality and the positive changes that are taking place in society in this direction.

NOTES

1. For example, Lehnert (2005: 241) points out that some proponents of customary law regard the Constitution and its Bill of Rights as largely western documents foreign to Africans and a threat to the continued existence of customary law.

2. (MAHLB-000836-10)[2012] BWHCI (12 October 2012). Judgment delivered by the Honourable Justice Dr Dingake. However, all references to the case in this paper are based on the judge's manuscript that was made available on 12 October 2012.

3. See the South African cases of *Mthembu v Letsela* 1997 (2) SA 936(T); *Mthembu v Letsela* 1998 (2) SA 675(T); *Mthembu v Letsela* 2000(3) SA 867(SC) (these cases revolved around the constitutionality of the customary law rule of succession which was based on male primogeniture preventing women from inheriting upon intestacy) and the discussion by Mqoke (2003: 112–13) and Rautenbach & Du Plessis (2011: 336–49).

4. See *Ramantele v Mmusi and Others*, CACGB-104-12 (Unreported) judgment of the Botswana Court of Appeal delivered on 3 September 2013. All references to this case are taken from the manuscript made available on the date of delivery of the judgment.

5. For example, in Botswana, until fairly recently, the Magistrates and High Courts which heard and dealt with appeals from all customary courts in the country were staffed mostly by expatriates who hardly understood these customary laws and therefore had to rely on assessors (Fombad 2004: 166–92).

6. There are currently 429 customary courts in Botswana (<www.gov.bw/en/Ministries-Authorities/Ministries/Ministry-of-Local-Government-MLG1/FAQ/Tribal-Administration/>, accessed 28.2.2014). Fombad (2004: 166–92) provides an explanation of the structure of these courts.

7. In some countries, such as Burundi and Zambia, customary courts have no official links with the formal judicial system but are tolerated. Others such as Swaziland have subjected these courts to minimal regulations. But some countries, such as Cameroon and South Africa, are examples of countries that have fully integrated them in the formal judicial system (Fombad 2014b).

8. As Ngcobo J. said in the *Bhe v Magistrate Khayelitsha* 2005 (1) BCLR 10 at paragraph 215, '... courts should develop rather than strike down a rule of indigenous law'. Meanwhile, in *S v Mhlungu* 1995 (3) SA 867 (CC) at paragraph 59, Kentridge A.J. had even gone further to state: 'I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.'

9. See details at <<http://wrcaselaw.wordpress.com/2012/12/04/using-international-law-to-counter-gender-discriminatory-inheritance-practices-in-kenya/>>, accessed May 2014.

10. For example, Kalabamu (2009: 211–13) suggests that one out of every three cases reported to customary courts in Botswana is about property-grabbing following parents' death.

11. Women are often excluded from traditional institutions such as tribal and village council meetings where important decisions about land and other property rights are taken.

12. Generally, women are often excluded from traditional institutions such as tribal and village councils as well as customary courts. The customary courts which decide family and land disputes are generally dominated by elderly men, conservative in outlook and often perceived as tending to favour men over women (Budlender *et al.* 2011).

13. See section 2 of the Customary Law Act and paragraph 47 of the judgment of the Court of Appeal.

14. A study by Scholz & Gomez (2004: 44–6), although decrying the negative aspects of the male ultimogeniture rule in Botswana, also highlights the obligations that go with inheritance of the family home.

15. The family homestead could not have been legitimately alienated without the consent of all the family members (Kalabamu 2009: 212).

16. One study actually shows that in many African countries, a significant number of citizens prefer to report crime to community groups rather than the police, who normally take this before the formal courts (Human Rights and Rule of Law 2014: 179).

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