

Succession of women to traditional leadership: is the judgment in *Shilubana v Nwamitwa* based on sound legal principles?

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Abstract

This note is a lego-anthropological commentary on the Constitutional Court case *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC). The authors assess the judgment in the light of the essential principles and practices governing succession to traditional leadership. While they are in general agreement that women should not be excluded entirely from the office of traditional leadership, they submit that women's inclusion should be achieved by an evolutionary process rather than by rigid judicial or legislative decree. Succession by women can in fact take place within the ambit of current customary usage and law.

Introduction

Succession disputes form an integral part of the history of traditional leadership in southern Africa. In the past, succession has been a source of community divisions, the best known of which are probably the divisions between the followers of Gcaleka and Rarabe in the Eastern Cape,¹ the division between the Usuthu-Zulu and the Mandlakazi,² and between the Bamangwato and Bangwaketse.³

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¹ JD Omer-Cooper (plse supply initials of authors to comply with CILSA style). Also in following footnotes *The Zulu aftermath: a nineteenth century revolution in Bantu Africa* (1974) 19ff.

² JE Bradley *Die Mandlakazi: 'n ondersoek na enkele kultuuraspekte*. 1970 (MA-dissertation, Potchefstroom University for CHE). 45ff.

³ RD Coertze *Bafokeng family law and law of succession* (1988) 19; Schapera *Ditirafalô tša merafe ya Batswana* (1940) 32.

Wiid⁴ and Els⁵ make valuable contributions to our understanding of the complexities of succession disputes with their descriptions and analyses of several traditional communities. They studied the population of the former self-governing territory of Lebowa, and the abakwaMadlala in the former self-governing territory of KwaZulu respectively. An analysis of these disputes shows that there can be numerous causes, such as attempts by regents to usurp the position of traditional leadership, attempts by a traditional leader to divorce the principal wife on his own accord, the appointment of wives of a deceased traditional leader as regents and subsequent attempts to usurp the position of traditional leadership on behalf of their minor sons, the ranking of the wives of a traditional leader, the re-ranking of wives when a supplementary or substitute wife is married in a case where the principal wife is barren or dies early, and subsequent opinions about the status of children born out of these sororal practices, biological fatherhood (especially in cases where a traditional leader dies without an heir and his brother fathers an heir on his behalf with the deceased's principal wife in accordance with the practice of levirate), and even witchcraft.⁶

The frequency of these disputes and deviations from what is generally presented as the customary law of succession, raises the question of whether or not these rules are the sole criteria for determining succession. The customary law of succession in fact displays remarkable flexibility and it can therefore frequently accommodate different solutions when succession disputes arise. With reference to the Barolong boo Ratshidi (Tswana), Comaroff⁷ remarks that 'ascriptive rules ... represent a code through which the complexities of political competition are ordered and comprehended'. As the case that Comaroff cites concerns succession by a woman to the position of traditional leader, it is important to re-assess the nature of the rules of succession with regard to the case of *Shilubana v Nwamitwa*.

Our main problem with the judgment in the recent case of *Shilubana v Nwamitwa* is the judge's repeated insistence that there was a customary law, as opposed to a customary rule, of succession that had to be amended to permit succession by a woman. To quote but one paragraph:

⁴ 'Opvolging: teorie en praktyk in Lebowa' (1982) 5/1 *South African Journal of Ethnology (SAJE)* 7–18.

⁵ 'Succession dispute amongst the abakwaMadlala of Emzumbe' (1989) 12/2 (*SAJE*) 50–59.

⁶ See also JD van Warmelo 'The Bakoni ba Maake' 1944 *Ethnological Publications* 12 at 22; D Ziervogel *A grammar of Northern Transvaal Ndebele* 1959 193; Koyana 'Chieftainship and headmanship are not hereditary' (2002) 1/1 *Speculum Juris* 144–160.

⁷ 'Rules and rulers; political processes in a Tswana chiefdom' 1978 *Man* 13 abstract.

I cannot conclude that the customary law of the Valoyi community, without amendment, permitted the installation of Ms Shilubana. It is certainly possible that customary law permits this sort of action by the Royal Family or other traditional authorities and this judgment in no way rules out this possibility. However, it has not been established in respect of the present community on the evidence in this case. The arguments suggesting that the traditional authorities were acting in order to bring their customary **law** in line with the Constitution must therefore be addressed.’ (emphases added)⁸

The judge also refers to development of customs and traditions,⁹ but implies that this is of secondary importance. He says, for instance,¹⁰ that ‘the appointment of Ms Shilubana accordingly represents a development of customary law’. His insistence on a legal norm of succession, induces us to ask the same question as that raised by Allott:

Can we say that a High Court’s or a Supreme Court’s formulation and modification of the customary law in terms perhaps borrowed from a western legal system can be brought within the definition of customary law in terms of the practices habitually followed by the people subject to that law?’¹¹

What indeed are the practices ‘habitually followed by the people’ in the case of succession to traditional leadership? While male primogeniture is the point of departure, there are a number of other requirements which cannot be formulated as legal rules. Myburgh¹² describes a number of them, including:

- mental and physical inability;
- character and competence;
- maturity, for example, having undergone initiation or being married;
- training or induction into the office of king;
- the choice of nomination of a ‘chief’ wife on the grounds of virginity, nobility, membership of another royal family; and
- deviation from the rules without provision.

(Myburgh mentions the case of a king who was deposed by the Portuguese authorities. His place was taken by his sister, whose son, contrary to patrilineal succession, was seen as the future king.)

⁸ *Shilubana v Nwamitwa & Others* 2008 9 BCLR 914 (CC) at par 66.

⁹ Note 8 at par 68.

¹⁰ *Id* at par 75.

¹¹ *New essays in African law* 1970 147.

¹² *Die inheemse staat in Suider Afrika* 198650–162.

To this day, succession to traditional leadership consists of a ‘flexible repertoire of rules’.¹³ Our contention is that under these circumstances it was not necessary to conclude that Ms Shilubana could succeed because the Valoyi rules of succession had been changed. If the law had indeed been changed, who would in turn succeed Ms Shilubana?

Background

In the case of *Shilubana v Nwamitwa & Others*,¹⁴ the Constitutional Court was called upon to decide whether the Valoyi community had the authority to restore the position of traditional leadership to the house from which it had been removed by reason of gender discrimination, even if this removal occurred prior to the coming into operation of the 1996 Constitution.¹⁵ The background to the case is set out below.

In 1968, when the traditional leader, *Hosi* Fofeza of the Valoyi community, died, he had only one child, a daughter by his principal wife. Because customary law at the time did not allow a woman to succeed as *hosi*, Fofeza’s younger brother, Richard, was appointed as *hosi* (traditional leader) in 1968.¹⁶ On 22 December 1996, during the reign and with the participation of *Hosi* Richard, the Royal Family of the Valoyi unanimously resolved to confer the traditional leadership on Ms Shilubana.¹⁷ However, at that time, she did not want *Hosi* Richard to be replaced. Therefore the Royal Council resolved that *Hosi* Richard would continue in his position for an unspecified period. The High Court assumed that Ms Shilubana would take up the chieftainship once she had returned from her service as a Member of Parliament. On 17 July 1997, in the presence of the Chief Magistrate and 26 witnesses, *Hosi* Richard acknowledged that Ms Shilubana was the heiress to the Valoyi traditional leadership. The Valoyi Tribal Authority sent a letter to the Commission for Traditional Leaders of the Limpopo Province, informing them that the Royal Family had selected Ms Shilubana as *hosi*. On 5 August 1997, the Royal Council accepted and confirmed that *Hosi* Richard would transfer his powers to Ms Shilubana. On the same day, a ‘duly constituted meeting of the Valoyi tribe’ under *Hosi* Richard resolved that, ‘in accordance with the usages and customs of the tribe’, Ms Shilubana would be appointed as *hosi*.¹⁸

¹³ TW Bennett *Customary law in South Africa* 2004 6.

¹⁴ Note 8 at par 9.

¹⁵ *Id* at par 1.

¹⁶ *Id* at par 3.

¹⁷ *Id* at par 4.

¹⁸ *Id* at par 5.

However, on 25 February 1999, *Hosi* Richard withdrew his support for Ms Shilubana's traditional leadership by means of a letter which was accepted by the High Court, as well as by the Supreme Court of Appeal. After *Hosi* Richard's death in 2001, at a meeting of the Royal Family held on 4 November 2001, the Royal Family again confirmed that Ms Shilubana would become *hosi*. However, Richard's son, Sidwell, interdicted Ms Shilubana's scheduled installation as *hosi*, claiming the traditional leadership (*vuho*si), despite the fact that he had originally also approved her appointment as *hosi*. Sidwell's claim was based on the fact that his father had been the *hosi* of the Valoyi community and that he was therefore entitled to succeed *Hosi* Richard as the only son of his father.¹⁹

The claim was disputed by Ms Shilubana, who argued that she was the only child of her father's (Fofoz's) principal wife, and that she has a constitutional right to succeed her father as *hosi* of the Valoyi. The Pretoria High Court found that she was ineligible because of her lineage and not on account of her gender, particularly after 1994. This verdict was confirmed by the Supreme Court of Appeal. Furthermore, both courts found that *Hosi* Richard had been appointed *hosi* (a point that was conceded by the applicants), and that Ms Shilubana had not been appointed in accordance with custom, as the court found no precedent in custom or tradition for the chieftainship to be transferred from the line of a *hosi* to another line, 'particularly by appointing a female'.²⁰

The case was then taken to the Constitutional Court, which held that both the High Court and the Supreme Court of Appeal had failed to acknowledge the power of the traditional authorities to develop customary law so as to eliminate gender-based discrimination in the customary succession to leadership. According to the judge, Section 211(2) of the Constitution includes the right of traditional communities to amend and repeal their own customs. However, Section 211(2) provides that:

A traditional authority that observes a system of customary law may function subject to any applicable legislation and custom, which includes amendments to, or repeal of, that legislation or those customs.

The terms 'applicable legislation' and 'repeal of that legislation' clearly refer to legislation by a competent legislative authority. As shown below, a traditional authority is not a legislative authority in terms of the Constitution.

¹⁹ *Id* at pars 6 & 7.

²⁰ *Id* at pars 7, 20–3.

If it were, it could arguably amend or repeal Acts of Parliament, provincial legislatures and laws of local authorities. Section 211(2), moreover, does not mean that past practices of communities may be ignored. Where there is a dispute over the legal position under customary law, a court must consider both the traditions and the present practice of a community. In the process, courts must balance the need for flexibility and the imperative to facilitate development, against the value of legal certainty and respect for vested rights, and the protection of constitutional rights. Relevant factors for this balancing test include the nature of the law in question, in particular the implications of the change for constitutional and other legal rights; the process by which the alleged change occurred or is occurring; and the vulnerability of the parties affected by the law.²¹

Applying this test, the Constitutional Court had to determine whether the Royal Family had the authority to develop the customary laws of the Valoyi community to outlaw gender discrimination in the succession to traditional leadership, and whether the Royal Family had the authority to restore the traditional leadership to the house from which it had been removed by reason of pre-constitutional gender discrimination.

Decision of the Constitutional Court

The court acknowledged the fact that the succession to the leadership of the Valoyi had in the past operated in terms of the principle of male primogeniture. However, the court decided that the traditional authorities had the authority to develop customary law. Furthermore, the traditional authorities had done so in accordance with the constitutional right to equality. The court also judged that the value of recognising the development by a traditional community of its own customary law in accordance with the Constitution, was not outweighed by the need for legal certainty or the protection of rights. The change in customary law did not create legal uncertainty, and Sidwell did not have a vested right to be *hosi*. The court concluded that the traditional authorities had the authority to develop their customary law under the Constitution and that Sidwell did not have a right to be declared *hosi*. The appeal was upheld.²²

In the *Bhe* case, the Constitutional Court denounced the customary rule of male primogeniture on the basis that the Constitution is the sole yardstick against which customary law should be judged. Admittedly, the court added

²¹ *Id* at pars 45–47.

²² Note 8 at pars 50–75.

that modern urban communities and families were no longer structured and organized purely along traditional lines.²³ The statement is rather vague. One may ask where urban communities begin and end. A vast number of South Africans (an estimated 21,3 million) live in the rural areas of South Africa.²⁴

Bennett²⁵ takes a rational approach to this matter when he says:

Urbanisation was undoubtedly an important factor leading to social change, but it cannot be regarded as the sole or primary cause. That other forces were at work is evident in the problem of defining what is meant by urbanized. On the one hand, trends in behaviour spread far beyond the confines of the city to people living in rural areas. On the other, city dwellers maintained ties with their families in the country and, often, they actively sought to preserve traditions.²⁶

Be that as it may, it is submitted that *Bhe* is a poor precedent for holding that the rules of succession to traditional leadership are unconstitutional on the ground that discrimination on the basis of gender is a clear violation of the equality clause.²⁶

Our concern is that the rule of male primogeniture is by no means intended to discriminate against women. It is meant to ensure the continued existence of the community, the welfare of the members, and their relationship with the ancestors. This appeared to be unimportant to the judge in the *Shilubana v Nwamitwa* case.

In this regard, see Van Niekerk's contention that the abolition of male primogeniture in the case of *Bhe* was based on false premises, namely that the Constitutional Court denounced 'indigenous law rules merely because they differ from the general law of the land'.²⁷

Submissions to the court

In the case of *Shilubana v Nwamitwa & Others*, the judge relied heavily on his own observation that a traditional community is entitled to develop (in

²³ *Bhe and Others v Magistrate, Khayelitsha and Others (Commission for Gender Equality as Amicus Curiae) Shibi v Sithole and Others, SA Human Rights Commission and Another v President of Republic of South Africa and Another* 2005 1 SA 580 (CC) Par 80 at C18 D–F.

²⁴ Sibanda 'The birth of a new order and unitary land administration in communal areas of South Africa 2000 *Walter Sisulu University Law Journal* 4–8.

²⁵ Note 13 above at 183.

²⁶ Section 9(3) of the Constitution.

²⁷ For a balanced account of the *Bhe* judgment, see 'Succession, living indigenous law and ubuntu in the Constitutional Court' 2005 *Obiter* 474 ff.

fact, change) its laws and customs. In this respect, the submission by counsel for the Rural Women in this case was significant. The counsel submitted that it is incorrect to think of the actions of the traditional authorities as amounting to a change or development of customary law, as customary law is already inherently flexible. Relying on academics, they argued that the process of traditional succession has always been adaptable, so as to enable the appointment of a person who meets the needs of a community at a particular time.²⁸ Comaroff²⁹ in his study of the politics of succession in the Tshidi chiefdom states:

The rules ... cannot be assumed to determine the outcome of indigenous political processes. If they are read literally, and examined in the context of the history of the office, 80 percent of all cases of accession to the chiefship represent “anomalies”. Under such circumstances, the jural determinist assumption simply cannot be entertained: stated prescriptions do not, in general, decide who is to succeed. Hence it becomes necessary to make a rather different assumption about the nature of Tshidi rules and processes. I shall argue, then, that the transmission of office in this system is determined by factors *extrinsic* to the stated prescriptions ...³⁰

According to Comaroff,³¹ the position of traditional leadership cannot be reduced to ascriptive rules but rather to the fact that the rules, as they are spelled out in southern African political ethnographies, represent a code through which the complexities of political competition are ordered and comprehended. He³² states:

‘Competition for the chiefship, moreover, is ... a continuous process, of which succession to office is one potential outcome.’

When the case between Ms Shilubana and Sidwell Nwamitwa is assessed, it supports Comaroff’s findings³³ on several points. First, the flexibility of the set of rules provides a means whereby ambitious royal actors may justify claims for office in their competition for power. The practice of the sororate – when the principal wife has no children or only daughters (such as described in point 4 under the next heading), or the practice of the levirate – when a traditional leader dies without an heir, or the rightful heir to the

²⁸ Note 8 at par 61.

²⁹ Note 7 above at 2.

³⁰ Cf Gluckman *Politics, law and ritual in tribal society* 1965 13ff, 164; Boonzaaier *Die inheemse bestuurstelsel en hofsistees van die Nkuna van Ritavi met verwysing na hulle herkoms* 1980. MA-dissertation, University of Pretoria 18–40; n 4 above at 7–18; n 5 above at 50–58).

³¹ Note 7 above at abstract.

³² Note 7 above at abstract.

³³ Note 7 above at 13–18.

throne is too young to succeed and a regent has to be appointed, create opportunities for ambitious royal members to dispute traditional leadership.³⁴ In the case of *Shilubana v Nwamitwa & Others*, these 'extrinsic factors' were all present and played a role in the creation of a climate that allowed Sidwell Nwamitwa to dispute the Valoyi traditional leadership. In such cases it is true that, in the words of Comaroff,³⁵ although 'genealogical reckoning constitutes the idiom of political argument, it can never determine the outcome of itself'.

If a female traditional leader is married or marries and bears children, the traditional title will be divested from the actual royal family and vest in foreign hands, as a result bringing with it foreign rule, as a woman should, in the first place, bear children who will succeed in the place of their father. The customary belief is that when a man delivers *lovolo* and marries a woman, her procreative being is transferred to her husband's tribe. This raises the question of whether an abolition of the agnatic system could still be regarded as traditional.³⁶

In the case of the Valoyi community, Ms Shilubana was not transferred to her husband's tribe, which is the neighbouring Nkuna Tsonga tribe. Her husband has joined her, which implies that the above concern does not apply in this case. It should be of greater concern that she has not yet given birth to a boy. Therefore, if her appointment as traditional leader is reconfirmed, there is reason to fear that the whole succession dispute may repeat itself when she dies. However, indigenous law and custom provide an answer. She may marry a woman for herself, and then according to the levirate, appoint somebody from the Royal Family to father a successor for the Valoyi tribe on her behalf. Such practices have been reported by Van Warmelo³⁷ for the Banarene of Sekôrôrô and Bakoni ba Maake³⁸ (both North Sotho) respectively. Or the Royal Family could simply appoint her uncle's son Sidwell as her successor.

We wish to emphasise that in our view rules of succession to traditional leadership are not cast in stone. The rules differ from community to community, but are relatively uniform in that normally the eldest son of the principal wife succeeds his father. That is the main feature of succession.

³⁴ Cf n 7 above at 14.

³⁵ Note 7 above at 13.

³⁶ AJ Kerr 'Customary law, fundamental rights and the Constitution' 1994 *SALJ* 728–9.

³⁷ 'The Banarene of Sekôrôrô' 1944 *Ethnological Publications* 13 at 8–9.

³⁸ 'The Bakoni ba Maake' *Ethnological Publications* 1944 12 at 21–22.

There are, however, other modes of succession. The Xhosa group their wives into different 'houses', notably a 'great house' and a 'right hand house'. A wife is placed at the head of each house. *Qadi* (affiliated) wives are allocated to one or the other of these houses. If the wife of the great house fails to produce an heir, the son of one of the *qadi* wives becomes heir.³⁹

Among the Swazi, the successor would also invariably be a man, but his appointment is a family affair. He is chosen by the deceased's family council, presided over by his father's *lisokancanti* (the first-born son of the appointee's father). The chosen heir is shown to the people. When he reaches manhood he takes over the reins of governance.⁴⁰

Women were traditionally excluded because they were expected to get married, which might result in the leadership's being transferred to their family-in-law (the husband's family).

That rule was, however, not as immutable as it appears to be, for one or more of the following reasons:

- the eldest son may be incompetent, in which event the royal council could choose a substitute;
- a dispute may arise obliging the royal council to make a choice;
- women do come into the playing field; many are appointed as regents and a few are appointed as traditional leaders.

Wiid⁴¹ gives some interesting examples:

- Apart from Modjadji of the Lobedu, some neighbouring communities also have women who succeeded their fathers.
- The appointment of women as regents is an old, established custom in the Limpopo Province. In 1982, there were no fewer than twenty-two female regents.

There are numerous cases where, in some way or another, the rules of primogeniture have not been followed. With reference to these cases, Koyana⁴² argues that chieftainship and headmanship are not hereditary.

³⁹ AO Jackson 'The ethnic composition of the Ciskei and Transkei' 1975 *Ethnological Publication* no 53 at 5.

⁴⁰ BA Marwick *The Swazi: an ethnographic account of the natives of Swaziland* (1966) 269.

⁴¹ Note 4 above at 9–10.

⁴² 'Chieftainship and headmanship are not hereditary' *Speculum Iuris* (2002) 144–160.

These exceptions substantiate our view that succession to traditional leadership must be viewed in terms of customary law *and* practice. The essence of our argument is that the choice is to be made by the followers' of customary law – not a learned peroration about discrimination and inequality. For that reason, we are more convinced by the remark of the judge⁴³ that 'the Royal Family of Valoyi met and unanimously resolved to confer chieftainship on Ms Shilubana'. That was all there was to it. However, instead, the judge focused on what he perceived to be a change in the Valoyi law of succession to traditional leadership.

The purported amendment of the law is recorded as follows in the judgment: 'On 22 December 1996, during the reign and with the participation of Hosi Richard, the Royal Family of the Valoyi met and unanimously resolved to confer chieftainship on Ms Shilubana. The resolution reads:

Though in the past it was not permissible by the Valoyis that a female child be heir, in terms of democracy and the new Republic of South African constitution it is now permissible that a female child be heir since she is also equal to a male child. The matter of Chieftainship and regency would be conducted according to the Constitution of the Republic of South Africa.⁴⁴

We do not know of a custom or rule in terms of which a royal family could meet and *situ-situ* make a law. After reference to the traditional council as a whole, a proposed law would have to be referred to a community gathering or *pitso* for confirmation. For an account of how this is done, see Schapera,⁴⁵ who states that

the chief must further initiate and, after discussion with his councillors and the tribe as a whole, promulgate new laws and regulations for the better conduct of tribal affairs, and may similarly abolish old usages which the tribe has outgrown.

Schapera⁴⁶ confirms that new laws and regulations must be discussed with the councillors and the tribe as a whole.

CONTRALESA submitted that a 'customary leader is there to uphold the people's norms and values and if customs are to be changed, ... it must be done by the whole community. They contend that the "Valoyi Traditional

⁴³ Note 8 above at par 4.

⁴⁴ *Id* at par 4.

⁴⁵ *A handbook of Tswana law and customs* (1959) 70.

⁴⁶ *The Bantu-speaking tribes of South Africa* (1959) 178–179.

Community” never met to discuss the issue. All discussions were limited to a privileged few, as the attendance numbers reveal’.⁴⁷

What is more, the resolution quoted above was not drafted in the form of a law. It merely states that the Royal Family *notes* (our emphasis) that in terms of democracy and the new Constitution it is permissible for a female child to be an heir.

However, the judge states that ‘the Valoyi were acting well within their power, under customary law, to amend their customs and traditions to reflect changed circumstances’.⁴⁸

Further on, the judge elaborates on this theme, stating that ‘traditional authorities had the power to act as they did ...’.⁴⁹

It is quite correct to say that in days gone by, African kings could make laws. But it is doubtful whether in contemporary circumstances they may still do so. In terms of the Constitution there are only three legislatures – the national, provincial and local – with clearly defined legislative competencies. If one ascribes legislative powers to a fourth legislator (or rather some 800 of them⁵⁰), it would be in conflict with the three constitutionally recognised levels of government.

National and provincial legislatures have concurrent legislative competence in respect of customary law, while customary law is subject only to the Constitution and any legislation that specifically deals with customary law.

If traditional authorities are said to have legislative powers they might try their hand at amending other rules of customary law as well. Customary law covers such a wide field that giving traditional leaders law-making powers may give rise to unexpected and unwanted amendments – in theory, it may also give rise to new law.

In the present structures of government and administration, it would be impractical to accommodate lawmaking by traditional authorities. As has been pointed out above, there are some 800 traditional authorities. There will

⁴⁷ Note 8 at par 39.

⁴⁸ *Id* at par 27.

⁴⁹ *Id* at par 71–72.

⁵⁰ Figures obtained from Information Document No 4/94 on traditional leaders, issued by the Department of Constitutional Development.

obviously be differences of opinion on what the law ought to be. The question also arises whether the laws are to be personal, or confined to the area of jurisdiction of the community concerned. If the laws are to be personal, should the law apply to the subjects wherever they are? If the laws are to be territorially restricted, would the laws have an impact on local government functional areas? Such permutations would clearly be untenable.

Bennett⁵¹ confirms our view that traditional leaders no longer have legislative powers. He states:

This power is now superseded, however, by the Constitution. Section 43 provides that legislative authority vests in Parliament (in the national sphere), in provincial legislatures (in the provincial sphere), and in municipal councils (in the local sphere).

We are, however, in agreement with the directive in section 2(3) of the Traditional Leadership and Governance Framework Act 41 of 2003, calling upon a traditional community to transform and adapt its customary law and customs relevant to the application of the Act so as to comply with the Bill of Rights by

- preventing unfair discrimination;
- promoting equality; and
- seeking progressively to advance gender representation in the succession to traditional leadership positions.

We see this as an evolutionary process, not as necessitating a conferment of legislative powers on traditional authorities to change the law. Law-making is a different exercise.

Conclusion

Customary law is by nature flexible. This view is in line with that of the rural women who argue that the process of traditional succession has always been adaptable to enable the authorities to appoint the most suitable person to the position of traditional leader. They submit that inheritance of chieftainship is not automatic and prescribed. The rules have always been flexible.⁵² It has been pointed out that the practices of the sororate and the levirate, as well as the appointment of a regent in the absence of an heir, create the opportunity for deviations from the prescriptive rules, hence making it unnecessary to regard the rules of succession as formal, absolute and certain.

⁵¹ Note 13 above at 128–9

⁵² Note 8 above at pars 35 & 36

The nature of the rules of succession of the Valoyi appears to be reconcilable with and adaptable to the provisions of the Constitution. However, the judgment will probably lead to unwarranted claims by other women that they are entitled to succession to traditional leadership positions.

Another matter that calls for comment is the manner in which the judge took judicial notice of customary law. He made some laudable remarks about knowledge of customary law. In summary he said –

“Living” customary law is not always easy to establish and it may sometimes not be possible to determine a new position with clarity. However, where there is a dispute over the law of a community, parties should strive to place evidence of the present practice of that community before the courts, and courts have to examine the law in the context of a community and to acknowledge developments if they have occurred.⁵³

Ironically, male primogeniture is still the law of communities all over the country. The Valoyi made an exception in the case of Ms Shilubana. They may revert to male primogeniture again when she has served her term.

In this case, the judge himself did not refer to any evidence of customary law. He assumed that the Valoyi tribe does not entertain the notion of women as traditional leaders and he extended that assumption to all traditional communities. He revealed no knowledge of exceptions. Secondly, he showed no understanding of the deeply ingrained cultural and religious meaning of the custom. For him, there is only one consideration: men and women are equal. In his opinion, that is why women should succeed – not only in this particular case, but by implication generally. He does not say where men now fit into the scheme of succession.

The judge offered no real solution to the question of where we go from here. He merely said that Ms Shilubana’s installation leaves unanswered some questions relating to how the Valoyi succession will operate in the future⁵⁴ and concluded: ‘These future decisions are not before the court, and nothing further need to be said about them.’ This seems to be a *laissez-faire* attitude with dangerous implications.

⁵³ *Id* at par 46.

⁵⁴ *Id* at par 81.