THE CONSTITUTIONAL IMPERATIVE AND HARMONISATION IN A MULTICULTURAL SOCIETY: A SOUTH AFRICAN PERSPECTIVE ON THE DEVELOPMENT OF INDIGENOUS LAW

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1 Introduction

It is trite that the South African legal system is classified as "mixed". However, until recently, the notion of this "mix" has been Eurocentric, writers comparing the system to a "three-tiered cake" with Roman, Dutch and English law being its layers. This has been so despite the fact that indigenous or African customary law has played and still plays an intrinsic role in the lives of most South Africans and that, for more than two centuries and, for whatever reason, its application was sanctioned by colonial and national governments. The main reason for its non-recognition as part of the South African mixed legal system is that in the colonial and apartheid climate, although indigenous law was recognised, it was recognised only as a special and personal law that operated outside of, but only as determined by, the general law. In the past its legal history, both external and internal, was dealt with in a cursory fashion in South African legal literature.[1] This has changed and it has been acknowledged as part of the South African legal system and referred to as the third of "three graces of South African law".[2]

Although there were those who, even before 1994, argued that indigenous law was already an intrinsic component of the South African legal order,[3] it is particularly with the advent of a new constitutional dispensation that change has taken place and that its place in the mixed legal system in South Africa has been secured.[4] Moreover, in terms of the constitutional imperative courts are

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1 For a discussion of the "historical antecedents" to the recognition of indigenous law as part of the South African legal system see ch 4 "On 'Mixed and Mixing'" in Church, Schulze & Strydom *Human Rights from a Comparative and International Law Perspective* (2007) 53-63.

2 Zimmermann & Visser *Southern Cross* (1996) 12. The writers discuss the role of African customary law as "the third component of South African law, apart from civil law and common law".

3 Eg Dlamini "The role of customary law in meeting social needs" 1991 *Acta Juridica* 71.

4 In accordance with the thirty three so-called "foundational principles" set down in Sch 4 of the Interim Constitution of 1993, the application of indigenous law is sanctioned in the final Constitution of the Republic of South Africa, 1996, in terms of Sch 6 and in terms of ss 30 and 31 relating to rights to culture. Further, in terms of s 211(3) courts must apply

required to develop not only the common law but also indigenous law in accordance with the underlying values embodied in the Bill of Rights.[5]

In what follows the role of the courts in the future development of indigenous law will be considered with reference to decided cases. It will be argued that in developing the indigenous law in accordance with the constitutional injunction and guidelines, courts should be engaging in intelligent law reform in a process of harmonisation.

2 Harmonisation and law reform

Although there are those who might hold that conceptually harmonisation is a mere myth,[6] it is widely recognised that harmonisation may be part of a process to achieve this goal in the context of comparative law in which unification[7] of law serves as a goal complementary to that of law reform. In other words, rather than merely suppressing one legal system in favour of another which causes problems,[8] the better approach would be to regard unification itself as a process that involved progressive harmonisation as a first step and eventual integration of institutions and treatment. In this process harmonisation would serve to remove discord and reconcile contradictory elements between the rules and effects of two legal systems which would nonetheless continue in force.[9]

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indigenous law subject to the Constitution and any legislation dealing specifically with it while in s 185 provision is made for a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (significantly the reference to "communities" places the emphasis on groups as in indigenous law rather than individuals as in the common law). See further Church & Church "The constitutional right to culture and the judicial development of indigenous law" 2007 (30-1 & 2) *Anthropology Southern Africa* 56.

5 S 8(3) read with s 39(2) of the Constitution of the Republic of South Africa, 1996. The word in the relevant provision is "may" and it may be argued that judicial development of the common law and of indigenous law is discretionary rather than obligatory. However, the Court in *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) at 1006 stressed that it did not have a discretion but was obliged to develop the common law to bring it in line with the Constitution. With regard to the development of indigenous law, similar views were expressed in the minority decision in *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; SA Human Rights Commission v President of the RSA* [2002] 1 BCLR 1 (CC) and in *Mabuza v Mbatha* 2003 1 All SA 706 (C).

6 Boodman "The myth of harmonization of laws" 1991 *American Journal of Comparative Law* 699. The view that harmonisation is a myth in the context of law reform is discussed below.

7 There have been numerous writings on this subject by comparatists over the last five decades of which those of David are notable: see David "Introduction" in *International Encyclopaedia of Comparative Law* Vol 2 (1971) 7-17; see further Church, Schulze & Strydom (n 1) 19-21.

8 One problem might be that the imposed law is honoured more in the breach than in the observance, eg in Ethiopia when a Western-based Civil Code, promulgated in 1960, was followed by a general refusal to give up African customary and Islamic laws. See, too, Allott *The Limits of Law* (1980) 197.

9 Church, Schulze & Strydom (n 1) 21. See, too, Allott "Towards the unification of laws in Africa" 1965 *International Comparative Law Quarterly* 366-389; Kamba "Comparative law: A theoretical framework" 1974 *International Comparative Law Quarterly* 485 501.

A useful analogy[10] may be drawn between harmonisation in the context of music and harmonisation in the context of law – particularly with regard to the South African legal system which as has been mentioned, comprises of Western common law and African indigenous components. In a musical sense the process may be seen as one which implies a state of consonance or accord; a combination or adaptation of parts or elements so as to form a consistent and orderly whole. An attribute of harmonisation in the musical sense is that it presupposes and preserves diversity; another is that its components while retaining their individuality, form a new and more complex sound; and a third feature is that, generally perceived, harmony is the opposite of discord. A similar process, it is suggested, should take place in the judicial development of indigenous law.

The fact that "harmonisation is not particularly meaningful in the abstract" and "entails the creation of a relationship of accord among objects but does not as a concept limit these objects or define precisely the nature of the accord to be established" as one writer points out,[11] should not lead to the conclusion reached by the same writer that harmonisation is a "myth" and is superfluous to the internal analysis and development of the laws of a particular jurisdiction or particular legal domain within a jurisdiction. While one can agree that harmonisation is value neutral in that a value judgment is only passed on the diversity or difference of the objects of harmonisation, this is not to say that it is superfluous or a myth. Harmonisation should not be seen as a theoretical construct but recognised as a step in a process (albeit within certain parameters) of law reform which as will be shown in the South African context, may be effected by judicial development of indigenous law in accordance with the Constitution. It is the approach of the courts rather than the process of harmonisation which needs to be informed by theoretical considerations as to the concept of law and the exercise of value judgments particularly in a multicultural society.

It is suggested that harmonisation, as outlined, should play a role in law reform. In its broadest sense law reform may be seen as being synonymous with the natural evolution of law. However, in a narrower and more usual sense, it is seen as a process whereby rules of a particular area of law are modified in order to rectify a problem. In the South African context in accordance with the constitutional injunction regarding judicial development of indigenous law, law reform by the courts will be in the narrow and more usual sense.

10 See, too, Boodman (n 6) 701.
11 Boodman (n 6) 702 703.

To be meaningful, law reform needs to be undertaken intelligently. This means that the reformer must not only have a sound knowledge of the legal rule or institution involved but must be sensitive to the idea of law as a living entity with a past, present and future. In any society law functions as reflecting and mediating debates on various conflicting values held within the society such as those on drugs, euthanasia, abortion and same-sex unions, for example. Seen in this light law, especially law in the process of reform, would serve to secure social peace. As a highly-respected scholar recently stressed "law is not only about striking balances in individual cases but also on keeping and restoring a balance in society".[12] In this context harmonisation could play a vital role not only in the development of law but in the promotion of peaceful co-existence.

In South Africa, as is discussed below, the role of law reformer falls to the courts as they meet the obligation to develop law in terms of the constitutional imperative. Where this involves consideration and adjudication on diverse legal rules and institutions, as reflected in the Western and African components of the South African system, the need to respect difference is obvious. Contextual law which leaves room for adjustment would serve this purpose and reform in such circumstances would be facilitated in a process of harmonisation.

Harmonisation, moreover, is not only relevant where there is a conflict between a rule of indigenous law and a right entrenched in the Constitution but also where an entrenched right is to be interpreted. A broad perspective is necessary. Against the historical background, interpretation should be inclusive rather than exclusive and should be in accordance with the national ideal of unity in diversity as embodied in the Preamble. Harmonisation by its very nature would serve this ideal. The approach of the court in the celebrated case of *S v Makwanyane*[13] is instructive and illustrates the principle of inclusivity by harmonising indigenous and Western law. Here the Constitutional Court looked at concepts in indigenous law as well as those embodied in a Western human-rights culture in order to determine that the death penalty was unconstitutional. What is of particular importance was the *dicta* of the court that suggest the paramount importance of harmonisation when considering the constitutionality of laws. In the words of Justice Mokgoro: "[W]hen our Courts promote the underlying values of an open and democratic society ... when considering the constitutionality of laws, they should recognise that indigenous South African values are not always irrelevant nor unrelated to this task." In the opinion of the

12 Loth "The reasonable man in a divided society" (unpublished paper presented at the Faculty of Law, University of Pretoria, on 12 November 2007). Professor Loth subsequently very kindly made the paper available to the authors.

13 1995 (6) BCLR 665 (CC).

judge "these values are embodied in the Constitution". The words of Sachs J are even more explicit: "The secure and progressive development of our legal system *demands* that it draws the best from all the streams of justice in our country" (emphasis supplied).

Several of the judges emphasised the need to interpret the Western concept of human dignity in terms of the value system in indigenous law and the African concept of *ubuntu* was used to include the Western concept. Clearly the court engaged in a process of harmonisation where *ubuntu* (which focuses on the commonality and interdependance of members of the community) was held to converge with the Western right to dignity (which focuses on the individual's status as a human being). In this way greater content was given to the constitutional right to human dignity.[14]

3 Indigenous law and the constitutional imperative

As already outlined,[15] the place of indigenous or African customary law is constitutionally entrenched both explicitly and implicitly and it may therefore no longer be regarded as being subordinate to the common law as it was in the past. However, as is the case with statutory law, the common law or any other law in South Africa, in terms of the Constitution indigenous law is subject to both general and internal limitation clauses.[16] The benchmark for the interpretation and judicial development of the law is a bill of fundamental rights[17] the promotion of "values that underlie an open and democratic society based on human dignity, equality and freedom".[18]

It is inevitable in the diverse, multi-cultural South African society that within the context of an individualistic human rights ideology, there will be conflicts and tensions between the different traditions and cultural values and the constitutionalism of the new national ideal.[19] Conflict is to be expected, for example where in one legal tradition such as that of indigenous law, the emphasis is on the collective and in another the emphasis is on individual

14 By analogy with harmonisation in the musical sense as outlined above, a new chord was created in the same key. In the process, diverse elements were combined to form a new more harmonious sound.

15 See n 4.

16 Constitution of the Republic of South Africa, 1996, s 8(1) makes "all law" subject to the provisions of the Bill of Rights. S 36 provides for a general limitation on the exercise of fundamental rights while, eg, in terms of ss 30 and 31 relating to the right to culture, an internal limitation clause applies determining that the right may not be exercised in a manner that is inconsistent with the Bill of Rights.

17 Contained in ch 2.

18 S 39.

19 As embodied in the Preamble to the Constitution. For further discussion of the possible areas of conflict see Church, Schulze & Strydom (n 1) at 65 and Sacks "Multiculturalism, constitutionalism and the South African Constitution" 1997 *SAPL* 673.

rights. Moreover, where a legal system reflects a traditionally patriarchal culture for example, it is especially cultural rights (as these concern women) that may be held to be in conflict with the entrenched right of equality. Although there is no clear, simple ranking of the entrenched rights and there are diverse and divergent opinions on how such conflict may be resolved,[20] cultural rights should not be regarded merely as second-order rights.

4 Judicial development of indigenous law

The fact that indigenous law is constitutionally recognised[21] as part of the South African legal order and not a subservient system as in the past but equal in status to the common law, implies that its continued existence is desirable. This, however, does not mean that it will remain static. In terms of section 8(3), read with section 39(2), it is to be developed by the courts and in the process the "purport and object of the Bill of Rights" must be promoted.

There have not been many cases in which the conflict between indigenous law and the Constitution has been considered but two approaches to the question may be distinguished. On the one hand the approach was conservative and the issue was resolved in what may be termed a constitutional mode of discourse. Indigenous law was considered a "virtual reality".[22] On the other hand, a progressive approach was followed: a better approach since it allows for the development of indigenous law rather than its demise. In a process of harmonisation, it is believed, this approach will best serve the need for peaceful co-existence in a muticultural society.

The relationship between customary law and the Constitution was considered in the two decisions of *Mthembu v Letsela*: first in the Pretoria High Court[23] and secondly in the appeal heard by the Supreme Court of Appeal.[24] The applicant alleged that she had been married by customary rites to the deceased who had died intestate. It was further alleged that in terms of the indigenous rule of male primogeniture she and the seven-year old daughter of the union would be excluded from succession and that this was in conflict with the Bill of Rights. The High Court dismissed the application, holding that the rule was not unconstitutional. Recognition of the rule under indigenous law was in accordance with the constitutional protection of the right to culture embodied in

20 See Church, Schulze & Strydom (n 1) 66 67 206ff.
21 See n 4.
22 The term is one used by Van der Merwe "The Roman-Dutch law: From virtual reality to constitutional resource" 2000 *TSAR* 1.
23 1998 (2) SA 675 (T).
24 2000 (3) All SA 219 (SCA).

section 31 of the then interim Constitution.[25] Appeal was made to the Supreme Court of Appeal to set aside this order and as required by the then interim Constitution, to develop the rule of primogeniture in order to allow all descendants to participate in intestacy. However, the Court declined to decide the constitutional challenge on the ground that the interim Constitution did not operate retroactively and the rights of the heir in the estate had vested on the death of the deceased, which was on 13 August 1993, before the interim Constitution took effect. Clearly in these conservative decisions the Court failed in its duty to develop indigenous law.

A more progressive[26] approach was followed in *Mabena v Letsoalo.*[27] In this case, the validity of a customary marriage was questioned on the grounds that the father of the groom had not been party to the marriage negotiations and that *lobolo* had been paid but had not been received by the bride's father as is customary, but by the mother of the bride. Although the court noted that, according to the official version of indigenous law, marriages required the consent of the bride and groom and the bride's guardian, and that a *lobolo* agreement had to be negotiated by the families of both bride and groom, it nonetheless determined that the marriage was valid. Taking cognisance of the current social practice of the community to which the parties belonged, whereby the groom could negotiate *lobolo* with his prospective wife's mother, the Court determined that this new, gender-neutral custom was consonant with the "spirit, purport and objects" of the Bill of Rights. Notably, the Court recognised that the nature of marriage negotiations may be changing because many households are now headed by women and consequently held that living indigenous law allows a woman to act as head of a family in certain circumstances. More specifically, the consent of the bride's mother as the head of the family could serve as the requisite permission for a marriage and a mother could negotiate *lobolo* in the absence of the father.

The case clearly illustrates the principles inherent in the concept of harmonisation. Not only did the Court acknowledge the dynamic nature of indigenous law as reflected in the living law as opposed to "official law", but also determined that this reformed law though different was consonant with the spirit, purport and objects of the Bill of Rights. Moreover, the judgment is notable in that it acknowledges the court's role in developing indigenous law.

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25 200 of 1993.

26 There may be those who consider it progressive to strike down indigenous law as inconsistent with the constitutional human-rights provisions even though this would lead to the demise of the indigenous norm. However, as is shown below, to strike down rather than to develop is conservative.

27 1998 (2) SA 1068 (T).

Similarly in *Gladstone v Liberty Group Ltd*[28] a progressive approach was followed. In issue was the existence of a customary marriage upon which the allocation explicit to a survivor of pension-fund benefits of a deceased depended. Although evidence was led that the "traditional" process regarding the conclusion of a customary marriage had not been complied with in all respects (the parents of the deceased had not been involved in the traditional negotiations, for example) the court found that the parties were married. This was so because *lobolo* had been paid; the formal relationship was of long duration; the survivor had long cared for the deceased during his illness and had been involved in the affairs of his family and in the funeral arrangements. What is important here was that the Court (as was the case in *Mabena v Letsoalo*[29]) recognised that indigenous law was not cast in stone but was flexible and dynamic and could be in harmony with Western law.

However, in *Bhe and Others v Magistrate, Khayelitsha; Shibi v Sithole; SA Human Rights Commission v President of the RSA*[30] (hereafter referred to as *Bhe*) the Court in its majority decision followed a more conservative approach. Here the issue was succession to property where the deceased had died leaving no will and was survived by a woman with whom he had lived for twelve years. Although *lobolo* had not been paid in terms of indigenous law, the parties had lived together as spouses and two children had been born of their relationship. The couple had acquired immovable property which was registered in the name of the deceased and on which they had planned to build a house. Although the widow and children continued to live on the property after the death of the deceased, the deceased's father and children's grandfather indicated that he intended selling the property in order to defray the funeral expenses. Under the legislative provisions applying at the time of his death[31] the property was to devolve in terms of indigenous law underpinned by the principle of male primogeniture, which it was maintained would have the effect that the grandfather would inherit the property. As a result a temporary interdict was obtained restraining him from alienating the property. Ultimately the matter was brought to the Constitutional Court and an order was sought declaring the relevant legislation and indigenous law rule of male primogeniture unconstitutional. Although the Court recognised that succession in terms of indigenous law is distinct from the Western concept of inheritance to property,

28 2005 JDR 0762 (WLD).
29 1998 (2) SA 1068 (T).
30 2005 (1) BCLR 1 (CC).
31 *Black Administration Act* 38 of 1927 s 23 and the regulations promulgated thereunder.

in its majority decision it nonetheless found the principle of male primogeniture to be unconstitutional since it infringed the equality clause.[32]

By a majority the Court chose not to develop indigenous law but merely struck down the relevant statutory provisions as discriminating against women and children. In brief its justification for this decision was that development on a case by case basis would be slow; could prolong uncertainty; and would not guarantee the constitutional protection of the most vulnerable members of society such as women and children. What was required, the Court determined, was more direct action to safeguard the important rights identified, namely equality and human dignity. It is a pity that by following the direct application of the constitutional imperatives rather than determining whether development of indigenous law was at all possible the approach was conservative rather than progressive. Rather than strike down rules that might lead to the demise of a system, it would be more progressive to retain the legal rule albeit modified. By contrast Justice Ngcobo in his minority judgment[33] was prepared to recognise the evolving nature of indigenous law and to distinguish between official indigenous law as found in statutes, case law and text books and the law as practiced in the community. Moreover, he stressed that the rule of male primogeniture must be understood in the context of indigenous law itself and the social context in which it originated.

In this regard it should be remembered that traditionally succession in indigenous law was not analogous to inheritance of property in Western law. Succession was to a position and not to an estate. At least originally, while the property was administered by the successor, a senior male, the right to be supported from the property was shared by the members of the family and the successor had a duty to look after them. However, as Ngcobo J points out, while the rule of primogeniture was justified in the social context of traditional society it is no longer justified in the present day and age where the traditional communities have been transformed into urban industrialised communities and where in many cases women have assumed the role of the head of the family. Such changed circumstances require courts to have regard to what people are actually doing. In other words, courts must take the living law into account and if needs be develop the official law accordingly and in order to ensure its survival in accordance with the Constitution. It may even be that the conflict is more apparent than real in that the relevant legal rule is not understood and that accord or harmony might be discovered in the principles or jural postulates

32 Constitution of the Republic of South Africa, 1996, s 9(3).
33 In par 152 of the Report.

underlying the respective legal rule or institution. In the context of *Bhe*, for example, following the more contextual approach, the Court might have determined that the underlying principle of the rule was to ensure that members of the family shared in family resources as administered by the family head. In the context of modern urban society a family head could be a woman as was illustrated in the case of *Mabena v Letsoalo.*[34] While the rule as thus interpreted and developed would still be different from that of the Western notion of individual inheritance, it might be found to be in harmony with the constitutional precepts of equality. Only if the official law as developed still violates the constitutional imperatives, should it be struck down.

The decision stands in sharp contrast to that taken in the earlier *Alexkor Ltd v Richtersveld Community*[35] and referred to in *Bhe* with approval. Here the matter involved the restitution of land under the *Restitution of Land Act*[36] and did not as in the other cases, involve the constitutionality of a legal rule. However, the case is important in the context of judicial development and harmonisation because of the progressive approach of the court to the interpretation of ownership which though different in each case is a legal institution in terms of both indigenous and Western law. Here harmonisation took place in the sphere of interpretation.

The action was brought by the Richtersveld Community and in order to succeed, the community had to prove that they had been dispossessed of land as a result of racially discriminatory laws.[37] The matter was heard by three tribunals: the Land Claims Court, the Supreme Court of Appeal, and the Constitutional Court. It is not necessary here to go into the details of the legal

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34 1998 (2) SA 1068 (T).

35 *Alexkor Ltd v Richtersveld Community* 2003 (12) BCLR 1301 (CC); *Richtersveld Community v Alexkor Ltd* 2003 (6) BCLR 583 (SCA).

36 22 of 1994.

37 S 25(7) of the Constitution provides that a person dispossessed of land after 19 June 1913 as a result of racially discriminatory laws is entitled to compensation or redress. For the legal historian the facts make interesting reading and particularly against the background of the sound historical research reflected in the judgment of Farlam J in *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 (6) BCLR 583 (SCA). Briefly the facts were as follows: The San and the Khoi had inhabited the Richtersveld from time immemorial as hunter-gatherers and pastoralists respectively. During the nineteenth century other people moved into the area and joined them, including itinerant farmers (the so-called "basters") and missionaries. Apart from farming activities, the activities of the community included mining in copper and iron and making copper, metal and bead adornments. From the comprehensive and well-researched account given in the judgment of the SCA, it is clear that the community regarded the land as its own rooted in its laws and customs. Outsiders needed to obtain permission to graze their animals on it or to mine its resources. In 1847 the territory was annexed by the Crown and incorporated into the Cape Colony. After the discovery of diamonds in the mid-1920s, the *Precious Stones Act* 44 of 1927 was passed and diggings were established in the area by means of a proclamation which referred to the land concerned as ”unalienated Crown land”. The right of the community was not recognised in the proclamation since no such right was registered. Thereafter the State’s ”rights” to the land passed to the Alexander Bay Development Corporation and that later became Alexkor Ltd, with the mineral rights being registered to the company.

arguments involved, suffice it to say that the action of the community was unsuccessful in the first hearing but successful in the Supreme Court of Appeal and in the Constitutional Court. What is important is the approach taken by the latter tribunals.

After a comprehensive historical account the Supreme Court of Appeal found that at the time of annexation of the land in question in the nineteenth century, the Richtersvelders had a right of beneficial occupation and use akin to that of common-law ownership, both to the land and its minerals. This "customary-law interest" in the land, the Court found, survived annexation and since it was only after 19 June 1913 that the community had been dispossessed of the land, the community qualified for redress or compensation in terms of the relevant statute. Although the Supreme Court of Appeal found that when the land was annexed it belonged to the Richtersvelders, it did not go as far in circumscribing their rights as the Constitutional Court was to do. The Constitutional Court upheld the claim but further found that the right in question was a right of communal ownership under indigenous law,[38] the content of which included the right to exclusive occupation and use by the members of the community. Annexation did not extinguish this indigenous right to communal land which remained intact until 19 June 1913.

The important aspect of the judgment by the Constitutional Court is that it not only recognised indigenous law as an integral part of South African law like the common law and which like the latter, was subject to the Constitution and relevant legislation but, unlike courts in the past, it determined the important concept of ownership not only from a common-law perspective but also in terms of indigenous law. In this regard the decision echoes that of *S v Makwanyane*[39] and serves to enrich South African jurisprudence.

5 Concluding remarks

More than two decades ago a distinguished American jurist declared that "the destruction of almost any cultural value is a loss in a pluralist society".[40] The corollary would be that the preservation of cultural values would avoid loss. Ideally in a multicultural society the recognition of difference in a spirit in which the other is accommodated would serve the national ethos of unity in diversity as embodied in a unique home-grown constitution. Against the historical

38 Here the court was far more progressive than was the Australian court in the celebrated *Mabo and Others v State of Queensland* 1992 (107) ALR 1; 1992 (175) CLR 1; 1992 (66) ALJR 408 (HC). See the discussion of the case in Church & Church (n 4) 60 61.

39 1995 (6) BCLR 665 (CC).

40 Calabresi *Ideals, Beliefs, Attitudes, and the Law* (1985) 30.

background of drafting a constitution in a process characterised by negotiation, it is understandable that the framers rejected the laws that imposed domination and kept people apart. At the same time it is understandable that there should be the desire for reconciliation and a preservation of traditions of the past in so far as these could be harmoniously accommodated in the new dispensation. That this should apply to the different legal strands in South African law is clear from the constitutional injunction to develop the law both common and indigenous in order to preserve the rich civilian legal heritage as well as the hitherto unsung African heritage. In this process the ideal should be to effect harmony rather than discord and peaceful co-existence rather than alienation.

It has been argued that it is preferable to develop the law in a process of harmonisation rather than strike it down and so to avoid its demise. However, as already discussed the approach of the courts to the development of indigenous law has often been conservative rather than progressive.

There may be valid arguments raised against judicial development. For example, the argument may be that it would create uncertainty and lack of uniformity. This argument may be countered. Similar development in respect of major areas of the common law has not lead to this and there is no reason why it should be different with regard to indigenous law. With regard to the argument that reform in this way may be slow, it may be mentioned that the proposed changes to legislation relating to intestate succession are still in the offing some ten years after the investigation by the South African Law Reform Commission into reform of the Customary Law of Succession commenced in April 1998.[41] It is suggested, however, that the most cogent reason for opting for judicial development rather than striking down the indigenous norm, is that research reflects that millions of people still adhere to its precepts.[42]

In the light of the historical background as briefly sketched, the suggestion that harmonisation should be the watchword and that law should be developed rather than destroyed bears repeating. The new constitutional dispensation has created an enabling environment for development and reconciliation. Here the words of the Constitutional Court are apt and serve as a lodestar in what it is hoped will be the new South African jurisprudence:[43]

41 South African Law Reform Commission: Project 90.
42 In 1999 the figure was put at eighteen million: see Thomas & Tladi “Legal pluralism or a new repugnancy clause” 1999 *CILSA* 363.
43 *S v Mhlungu* 1995 (7) BCLR 793 (CC) at 917 per Sachs J.

> We are a new Court, established in a new way, to deal with a new Constitution. We should not rush to lay down sweeping and inflexible rules governing our mode of analysis. We need to develop an appropriately South African way of dealing with our Constitution, one that starts with the Constitution itself, acknowledges the way it came into being, its language, spirit, style and inner logic, the interests it protects and the painful experiences it guards against, its place in the evolution of our country, our society and our legal system, and its existence as part of a global development of constitutionalism and human rights.