South African Law Commission
Discussion Paper 93
Project 90

CUSTOMARY LAW

(Closing date for comments: 22 September 2000)

INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

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PREFACE

This Discussion Paper (which reflects information gathered up to the end of April 2000) was prepared to elicit responses and to serve as a basis for the Commission's deliberations, taking into account any responses received. The views, conclusions and recommendations in this paper are accordingly not to be regarded as the Commission's final views. The Discussion Paper is published in full so as to provide persons and bodies wishing to comment or to make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place focussed submissions before the Commission.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may in any event be required to release information contained in representations under the Constitution of the Republic of South Africa, Act 108 of 1996.

Respondents are requested to submit written comments, representations or requests to the Commission by 22 September 2000 at the address appearing on the previous page. The researcher will endeavour to assist you with particular difficulties you may have. Comment already forwarded to the Commission should not be repeated; in such event respondents should merely indicate that they abide by their previous comment, if this is the position.

The researcher allocated to this project, who may be contacted for further information, is Maureen Moloi. The project leader responsible for the project is Professor RT Nhlapo.

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1. BACKGROUND TO THE INVESTIGATION

1.1 The Issue Paper

1.1.1 The investigation into this topic was launched formally with the publication, on 28 April 1998, of an Issue Paper entitled **Succession in Customary Law** under the auspices of **Project 90: The Harmonisation of the Common Law and the Indigenous Law**. The issue paper posed a number of questions about the extent and scope of the investigation, and about the substance of customary law in the area of succession.

1.1.2 Amongst the issues raised were:

* succession to the head of a family
* variations in the order of succession (including disinheritance and distributions of property *inter vivos)*
* underage heirs
* widows
* succession to women
* wills
* burial and funeral ceremonies
* administration of estates

The closing date for comments was set at 30 June 1998.

1.1.3 The issue paper generated immediate public interest and elicited a steady trickle of oral and written responses. Among the most notable responses were those from Justice Albie Sachs (who expressed general concern over the approach of the Commission); the Houses of Traditional Leaders of the Free State, the Northern Province and the Eastern Cape; and the Department of Justice (which stressed the urgency of the matter and the growing pressure for action, mainly from women's groups).

1.1.4 Reading through the early responses, it soon became apparent that the area of succession raised serious, and potentially divisive, issues of constitutionality and of culture, issues in which the contending constituencies had invested a great deal of emotional capital. Law reform would need to proceed in a sensible and sensitive manner and would have to take into account the somewhat conflicting needs of a speedy resolution, on the one hand, and broad consultation on the other.

1.1.5 The Houses of Traditional Leaders, for example, were unanimous in their view that this investigation was not a matter that could be resolved without bringing in the views of their subjects. In particular they warned against any attempt to "westernise" the customary law of succession.

1.1.6 Representatives of the Department of Justice were equally adamant that it was unacceptable, four years after the elections, to apply a system in which women were routinely barred from inheriting property.

1.2 The Customary Law of Succession Amendment Bill 1998

1.2.1 In May 1998, as the responses were coming in to the Commission, the Department responded to the mounting pressure for action by developing a draft Bill. This Bill was submitted to Cabinet in June 1998 and then introduced in Parliament as the **Customary Law of Succession Amendment Bill 1998.**
The Bill extended the general law of succession as embodied in the **Wills Act 7 of 1953** and the **Intestate Succession Act 81 of 1987**, to all persons by the simple expedient of including within the terms of the latter Act all persons previously covered by section 23 of the **Black Administration Act 38 of 1927**.

1.2.2 The Bill met a hostile reaction from traditional leaders, notably those of the Eastern Cape House, who were scathing in their criticism of the terms of the Bill and the lack of consultation preceding it. Arguing that laws of succession are inextricably linked with the African concept of family and kinship, the House in a written submission declared itself 'fundamentally opposed to the Eurocentric approach which is prevalent

in [our] country' and decried the extension of Roman-Dutch law principles to customary law.

1.2.3 At a meeting in Parliament in the office of the Deputy Speaker on 22 July 1998, attended by the Chairperson of the Portfolio Committee on Justice, the Chairperson of the Ad Hoc Sub Committee on the Quality of Life and Status of Women, and representatives from the Law Commission, the implications of the Bill were discussed. Concerns were raised about introducing drastic changes to the customary system without thinking through the issue of interim measures . After lengthy discussion a decision was taken not to proceed with the **Customary Law of Succession Amendment Bill.**

1.2.4 On 1 March 1999 a meeting was held at the offices of the South African Law Commission in Pretoria between a delegation from the Constitutional Development Committee of the (then) National Council of Traditional Leaders and representatives of the Department of Justice. The meeting had been convened by the Law Commission as an interested party, and its aim was to bring the two sides together to find a way out of the impasse over the reform of the customary law of succession.

1.2.5 Generally speaking, the same positions taken earlier in the debate were re-iterated at the meeting. The Department emphasized speed and urgency in curing the constitutional defects of customary law; the Council stressed the need for caution and wide consultation. The parties did agree to meet again to find common ground.

1.3 The investigation revived

1.3.1 Communications continued between various stakeholders and the Department of Justice, and on 14 September 1999, the then Acting Director-General, with the permission of the Minister, issued an instruction that the investigation into the customary law of succession should go back to the Law Commission as a matter of urgency.

1.3.2 The Project Committee immediately set about the task of commissioning the preparation of a Discussion Paper, a draft of which was completed in May 2000 and finalized in June.

1.4 Nature and structure of the Discussion Paper

1.4.1 The Discussion Paper had to be prepared in the context of an investigation which had been in a state of suspension since the publication of the Issue Paper almost a year and a half earlier. In the interim, several significant developments had taken place. Of the two main developments, one was the fate of the draft Bill and the debate it generated.

1.4.2 The other was the case of **Mthembu v Letsela**. At the time of writing, the case had gone through three stages of adjudication, beginning with a judgment by Le Roux J in the Transvaal Provincial Division (reported in 1997). A further judgment by Mynhard J was recorded in 1998, and finally a ruling of the Supreme Court of Appeal was handed down in June 2000.

1.4.3 In all these hearings, the dispute revolved around the constitutionality of the customary law rule of succession which, on the basis of male primogeniture, prevents women from inheriting upon intestacy. In the 1997 judgment, Le Roux J found that the rule was discriminatory, but not unfairly so, because of the concomitant obligations of the heir towards the widow and the rest of the dependants of the deceased. The Mynhardt judgment in 1998 dealt with the question of fact regarding the existence or non-existence of a customary marriage between the applicant (Mthembu) and the deceased. There being no further evidence adduced, the matter was dealt with on the basis that the deceased and the applicant had not been married, and consequently that the applicant's daughter had been excluded from the inheritance not because she was a girl, but because she was illegitimate.

1.4.4 The judgment of the Supreme Court of Appeal, delivered by Mpati AJA, confirmed the reasoning of the court *a quo* and ruled the issue of sex, gender and age

discrimination to be 'academic'. Dismissing this and other arguments of a more technical nature, the court found for the first respondent (the deceased's father), who was held to be entitled to inherit all of the deceased's property. In declining an invitation by applicant's counsel that the court should 'develop' the customary Law rule in terms of 35(3) of the interim Constitution in such a way that it did not differentiate between men and women, the judge observed:

> Any development of the rule would be better left to the legislature after a full process of investigation and consultation, such as is currently being undertaken by the Law Commission.

1.4.5 It is significant that Mynhardt J, in the 1998 judgment, had also noted the South African Law Commission's work. He cited the Discussion Paper on Customary Marriages which was calling for comment, responses and debate from individuals and bodies interested in or affected by the customary law of marriage. He concluded:

> I believe that that route should also be followed to reform the customary rules of succession.

1.4.6 These developments left the Commission in no doubt as to the twin pressures of this investigation: its urgency, and the need for genuine consultation. This Discussion Paper reflects these twin imperatives.

1.4.7 In the preparation of the Discussion Paper there was a great deal of debate on the approach to be adopted to the reform of the customary law of succession. We heeded all the voices in the debate, to the effect that there were constitutional issues involved as well as issues of process and consultation. The question became: What is the best approach to follow? The nature of the proposals put forward would determine the pace of the process, ie the nature of the proposals would affect the time taken to develop them and the manner and extent of consultation. The Commission was faced with two options.

1.4.8 One was to revisit the whole of the customary law of succession (including the variations between different systems of customary law) with a view to clarifying the rules and identifying the areas that required reform. Indeed, the first draft attempted to propose a comprehensive statute codifying the relevant aspects of customary law as a starting point, and from there, moving to harmonize the rules with the Constitution by drawing on principles and approaches from the common law and from African jurisdictions. The Commission quickly became convinced that the resources and time required to pursue this approach fruitfully lay beyond its means. We were obviously reluctant to repeal laws that were deeply imbedded in South Africa's cultural tradition, laws that, in many respects, have been functioning perfectly satisfactorily to regulate family matters. None the less, the pressures referred to above compelled us to consider seriously the second option, which was to determine which areas in the customary law of succession raised constitutional issues and to see if those issues could be addressed by amendments to existing legislation.

1.4.9 There are two major advantages to this second approach. The first is that it allows for the preparation, in a reasonably short time, of proposals to be tested in public. The second advantage is that it homes in directly on the major constitutional issue, the very one that the High Court and the Supreme Court of Appeal suggested should be the subject of broad consultation. In this regard it is important to emphasize that the constitutional issue arises squarely for South Africa, because of the provisions of the Bill of Rights. It has not arisen elsewhere in Africa primarily because in the constitutions of those countries, notably Botswana, Zambia and Zimbabwe, the customary law of the family is expressly excluded from their Bills of Rights.

1.4.11 It is in this context that the present Discussion Paper seeks comment on whether the Intestate Succession Act 81 of 1987 can be made a vehicle for improving the rights of dependants, especially widows and children, and for bringing certain rules of customary law into line with the Constitution. The Commission also requires input on other measures that might be taken to strengthen the existing provisions of the Act so that it can accommodate rules of customary law that do not raise constitutional difficulties.

A SUMMARY OF RECOMMENDATIONS

1 THE PURPOSE AND NATURE OF RULES OF SUCCESSION

Rules of succession are designed to counteract the disruptive effect of death on the integrity of a family unit. The law therefore seeks to secure the material needs of those who were most closely related to the deceased. Given the profound changes that have occurred in the society and economy of South Africa, a major concern of this Discussion Paper is to amend the customary law of succession so that it can cater more effectively for modern family forms.

2 CUSTOMARY LAW AND THE BILL OF RIGHTS

While the Constitution requires respect for the African legal heritage, it also stipulates that the right to culture, and hence customary law, is subordinate to the right to equal treatment. Moreover, because the right to equal treatment is applicable to the private relationships of individuals, any rules of the customary law of succession that discriminate unfairly on the grounds of sex, gender, age or birth must be changed.

3 THE DUAL LAWS OF SUCCESSION

3.1 Legal dualism and the principle of equal treatment

South Africa currently recognizes at least two different systems of succession: the common law (together with the statutes amending it) and various closely related customary laws. Many of the customary rules currently used by the courts are not only in conflict with the principle of equal treatment but are also out of step with social practice. Instead of attempting to reform customary law, the common law could be substituted. While this solution would have the advantage of providing a single law of succession for the whole country, it should not be adopted without careful consideration, for different cultural groups may be unwilling to surrender their legal heritages. Maintaining a policy of dualism accepts the fact of South Africa's legal and cultural diversity, a reality that the Constitution demands we respect.

3.2 Choice of law rules

For as long as different laws of succession are retained, rules will be required to specify when customary law or the common law should be applied to the facts of particular cases. In its project on *Harmonisation of the Common Law and Indigenous Law: Conflicts of Law* (1999), the Law Commission made recommendations for reforming the existing choice of law rules. The Commission felt that they are unnecessarily complicated and are based on criteria that are no longer relevant. One of these criteria - the form of a deceased's marriage - may be kept as a rough guide to the applicable law, because it is simple and easy to apply, but the form of a marriage is not a completely reliable indication of a person's cultural orientation; nor, of course, is it of any use where someone was unmarried. Flexibility is therefore necessary to ensure that whichever law is applied will reflect a deceased person's cultural orientation.

3.3 Choice of law under the KwaZulu and Natal Codes is dependent on the form of marriage or the fact that a deceased left no male heir. These rules must also be amended.

4 INTESTATE SUCCESSION

4.1 Reform of the order of succession

The customary law of succession, in its official version at least, discriminates against women and young men. Admittedly, the heir has a duty to maintain the deceased's dependants out of the estate, and, on the strength of this duty, it has been held that customary law formally complies with the Bill of Rights. Even so, the law is no longer effective to achieve its major social purpose, which is to provide a material basis of support for the deceased's surviving spouse and immediate descendants. The time has therefore come to amend customary rules that discriminate on grounds of gender, age or birth and to give the deceased's immediate family more secure rights.

4.2 Amendment to the Intestate Succession Act

This goal can be realized by applying the Intestate Succession Act (81 of 1987) to all estates, even if a deceased was subject to customary law. If s 1(4)(*b*) of the Act is repealed, the following sections will operate to determine the order of succession in

cases of total or partial intestacy: s 1(1), which secures the inheritance of surviving spouses and children and, failing them, parents, siblings and more remote kin; s 1(2), which provides that illegitimacy does not affect the capacity of one blood relation to inherit the estate of another blood relation; and s 1(4)(*e*)(i), which provides that an adoptive child is deemed to be a descendant of its adoptive parents.

4.3 Exclusion from the Act: traditional leaders

Under customary law, the offices of traditional leadership are hereditary according to the rules of primogeniture in the male line. These rules frequently come under attack for being in conflict with the principle of constitutional democracy, which requires governmental positions to be open to all on the basis of free election, without discrimination on the ground of gender. It is inappropriate, however, to deal with this issue in legislation that is aimed at remedying the economic position of widows and children. Hence, if application of the Intestate Succession Act is to be extended, then special provision must be made to exclude succession to offices of traditional leadership from the terms of the Act.

4.4 Implications of the Act

4.4.1 Repeal of customary law

Once the Intestate Succession Act is made generally applicable, the customary heir's duty to continue supporting a deceased's dependants should be repealed. Various provisions of the Natal and KwaZulu Codes should also be amended to ensure that the Act is applied uniformly throughout South Africa.

4.4.2 Estate debts

Under customary law, heirs are responsible for all the deceased's debts, even if an estate contains fewer assets than debts. Once the material needs of the deceased's surviving family are secured by a right to inherit, then equity would suggest that the heir's customary-law responsibilities, in particular any liability for the deceased's debts, should cease. Because general application of the Intestate Succession Act will not necessarily have this effect, specific provision must be made that heirs under the Act do not succeed to any customary-law liabilities of the deceased.

4.4.3 Succession to women

Because traditionally women seldom held property or positions of authority, succession to women in customary law used to be of little importance. As a result, the rules governing devolution of female estates were not only fragmentary but also different from the rules applicable to male estates. Once the Intestate Succession Act is made generally applicable, any gender-specific rules of customary law to the contrary will by implication be repealed, for the Act applies without reference to the gender of the deceased.

4.5 Amendments to the Act

4.5.1 Broader definition of 'surviving spouse'

As the Intestate Succession Act stands, surviving spouses may inherit only if they can establish that they were validly married. Strict application of this requirement may result in the exclusion of many potential beneficiaries, especially those married under customary law, which tends to leave marital status ambiguous. The Recognition of Customary Marriages Act (120 of 1998) will provide some assistance to spouses who have difficulty in proving their marriages, in part because it deems unregistered marriages valid and in part because it fully recognizes all existing marriages. Nevertheless, there is a strong possibility that many deserving partners may not qualify as 'spouses'. The concept of a 'surviving spouse' should therefore be defined so as to include partners of informal unions. Further work on this issue need not be pursued here, however, since the Law Commission already has a Project on *Domestic Partnerships* which is concerned to define informal unions and their legal effects.

4.5.2 Polygynous marriages

Because the Recognition of Customary Marriages Act specifically recognizes polygynous marriages, provision must be made in the Intestate Succession Act for inheritance by two or more wives of a deceased. Each wife should be allowed to share equally in the estate.

4.5.3 The spouse's right to the matrimonial home and its contents

Notwithstanding any inheritance under the Intestate Succession Act, a surviving partner should be given a right to the matrimonial home and its contents. There are two reasons for this recommendation. First, the Act was predicated upon marriage in community of property, whereby a surviving spouse would automatically take half of the marital estate. In the case of customary marriages, however, husbands tend to assume ownership of all assets, with the result that wives lose whatever property they personally acquired. (Customary marriages will be in community only when the Recognition of Customary Marriages Act comes into force.) Secondly, the Intestate Succession Act may require division of an estate into fractions, a method of distribution that assumes a sizeable estate and hence a certain level of affluence. Small estates need to be kept intact to ensure a smooth transmission of wealth. This effect is currently achieved in the Act by the rule that spouses are guaranteed a minimum amount of R125,000. For the surviving spouse, however, the most vital items in an estate are the matrimonial home and its contents. To avoid splitting up these assets, the spouse should have a guaranteed right of inheritance to the house and its contents even if these items exceed R125,000 in value.

4.6 Remaining issues

4.6.1 Underage heirs

If heirs are too young to undertake the responsibilities attached to their position, an administrator must be appointed to deal with the estate. In customary law, both administration of the estate and guardianship of the heir were placed in the hands of a senior male kinsman. While the courts generally confirmed the customary rules, they intervened to regulate the deposition of guardians to allow remedies for negligent administration or abuse of powers and to specify the persons who can bring these actions. Legislation is now required to remove elements of gender discrimination in the appointment of guardians and to provide more precise rules on the guardian's duties. These issues can be best pursued in the Law Commission's Project on the *Administration of Deceased Estates*.

4.6.2 Levirate and sororate unions

When families arrange levirate or sororate unions, the possibility always exists that the woman concerned will be compelled to accept the arrangement against her will. Although the Recognition of Customary Marriages Act stipulates consent of the spouses as the primary requirement for all customary marriages, levirate and sororate unions may fall outside the scope of the Act, because they are not new marriages. Special legislation to protect the partners of such unions is unnecessary, however, since judicial precedent has already established that no forced union will be recognized.

5 WILLS

5.1 Application of the principle of freedom of testation to customary law

Under the common law, everyone has freedom of testation. Persons normally bound by customary law thereby acquire a means for overriding the interests of their intestate heirs. Although this situation may appear inequitable, the power to make wills has always been generally available in South Africa and to withdraw it now from persons subject to customary law would seem discriminatory.

5.2 Protection of the testator's dependants

Under the common law, testators may not absolve their estates of the responsibility for maintaining spouses and dependent children. Children have a common-law right to support and surviving spouses have the same right under the Maintenance of Surviving Spouses Act (27 of 1990). This Act will apply to spouses of customary marriages when the Recognition of Customary Marriages Act comes into force. The question arises, however, whether the statutory protection of the deceased's spouse and children should be extended to include certain dependants, such as parents and siblings, who could expect support under customary law.

5.3 Property that may not be disposed of by will

Subsections 23(1) and (2) of the Black Administration Act (38 of 1927) prohibit Africans from disposing by will of movable house property or land held under quitrent tenure. The former category must devolve according to the customary law of intestate succession and the latter must devolve according to statutory rules (which are modelled

on customary law). These subsections should be repealed for various reasons, principally because they do not achieve the major purpose for restricting freedom of testation: to protect surviving spouses and children.

5.4 Property that may be disposed of by will

Although, according to customary law, no one person has full rights of ownership in family property and land, s 23(3) of the Black Administration Act expressly permits wills that dispose of both these categories of property. This section creates many unintended legal difficulties and should therefore be repealed. Given the possibility in common law of bequeathing another person's property, any attempt to regulate the disposal of family property by will seems unnecessary. It can be assumed that, if testators make such bequests, they intend to dispose only of their own interests. Land held under customary law is another matter, however, since the customary tenure gives families, traditional authorities and the wider society interests in land. In these circumstances, testators should not in principle be free to dispose of their rights.

5.5 Guardianship clauses

From the perspective of customary law, if a father or a mother transferred guardianship of a minor child by will, the clause would be invalid, for strictly speaking the testator had no right to transfer. Legislation is not necessary to remedy this problem, however, because the Guardianship Act (192 of 1993) provides that both spouses have equal rights and powers over minor children, and any doubt about the mother's right of guardianship is answered by the prohibition on gender discrimination in s 9 of the Constitution.

B REQUESTS FOR COMMENT

1. In the interests of further strengthening the proposed draft Bill the Commission invites specific comment on the following questions, most of which have arisen in consultations with the Houses of Traditional Leaders in the form of responses to the original Issue Paper and during the parliamentary hearings.

1.1 Protection of testator's dependants

Under the common law, testators may not absolve their estates of the responsibility for maintaining spouses and dependent children. Children have a common-law right to support and surviving spouses have the same right under the Maintenance of Surviving Spouses Act (27 of 1990). This Act will apply to spouses of customary marriages when the Recognition of Customary Marriages Act comes into force. The question arises, however, whether the statutory protection of the deceased's spouse and children should be extended to include certain dependants, such as parents and siblings, who could expect support under customary law.

1.2 Oral wills

A family head sometimes indicates, during his lifetime, his wishes regarding the devolution of particular items of property after his death. This process of 'earmarking' is recognized in many systems of customary law. It has been suggested that for reasons of certainty such oral dispositions should be reduced to writing and signed and that a record should be kept by a traditional authority with copies for the family. Should such a rule be incorporated in a statute?

1.3 Variations on the order of succession: disinheritance and distributions of property

Customary law had no system of testate succession, but it did allow heirs to be disinherited and property to be allotted to particular members of a family. The family council had to approve these oral dispositions, which would normally take effect on the death of the family head. In practice, wills are available only to those who can afford professional legal services, whereas the simpler customary procedures serve the needs of a broader range of people. Should these procedures, which are analogous to the privileged wills that used to be available in Roman-Dutch law, be incorporated into the Wills Act (7 of 1953)? Alternatively, should the customary procedures be legislatively regulated by, for example, allowing disinherited heirs a right of hearing before the family council and/or appeals from the council's decision?

1.4 The right to decide burial and funeral ceremonies

Both customary and common law allow the heir to decide the manner and place of a deceased person's burial. Identifying the heir should, in principle, require a determination whether common or customary law was applicable to the deceased, an inquiry that in turn requires reference to his or her cultural orientation. The courts have avoided this issue by referring to the deceased's form of marriage: if married by civil or Christian rites, the widow has the right to decide burial and, if married by customary law, the deceased's oldest son. A counter argument is to the effect that as long as *lobolo* is involved, the decision rests with the heir or a senior family member regardless of the form of marriage. While legislative regulation might be unnecessary, general comment on this matter would be appreciated.

1.5 Traditional courts and succession

What jurisdiction should traditional courts have in matters of succession governed by customary law, and what relationship should these courts have with the office of the Master?

1.6 Codification of customary law principles

Are there any other fundamental principles of customary law which ought to be included in the statute?

1 THE PURPOSE AND NATURE OF RULES OF SUCCESSION

1.1 The major purpose of a law of succession is to counteract the disruptive effect of death on the integrity of a family. The law therefore transmits some or all of a deceased's rights and duties to selected members of the surviving kin. The terms 'succession' and 'inheritance' are often used interchangeably to describe this process, but strictly speaking they denote two different things: succession means transmission of *all* the rights, duties, powers and privileges associated with a social status, while inheritance means the transmission of only property rights.

1.2 All laws are shaped by the type of society in which they operate, so it will come as no surprise to find that the customary laws of succession, at least in their traditional form, bear the imprint of a precolonial society. Patriarchy and an extended family structure were two of the most distinctive features of this social order. Patriarchy implied that all significant rights and powers were held by senior males. And, for purposes of succession, men were the medium through which a family's bloodline was traced. Women were no more than transient members of the patriline.[1] The extended family structure implied an extension of the nuclear unit through polygynous marriages and through connections with ascending and descending generations in the male line. This expansive network of kin provided individuals with a secure basis of support and protection.

1.3 The precolonial economy was geared predominantly to subsistence. Each family had to be more or less self-sufficient, and, because food production through herding and farming was the main activity, the key items of property were livestock and land. Although the head of a family had overall charge of this property, his wide-ranging powers were less important than his responsibility to provide for dependants. It followed that customary law recognized outright ownership in only certain intimate items of property, such as wearing apparel, tools of trade and the livestock that for ritual reasons were deemed to belong to specific individuals. Because of the wider family's interests

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[1] Themba et al in Ncube & Stewart (eds) *Widowhood, Inheritance Law, Customs and Practices in Southern Africa* 108.

in land and herds, no one person had exclusive rights and powers over these resources.

1.4 It was this socio-economic structure that moulded the principles of succession in customary law. Of these principles, the following were the most significant. In the first place, the customary system of succession was intestate. Individuals were not free to decide how and to whom their estates would devolve. By contrast, the common law favoured testate succession. It allowed individuals freedom to dispose of their property to whomever they chose, a power that was derived from the principle of absolute ownership of property.[2]

1.5 In the second place, succession in customary law was universal and onerous. These terms meant that an heir succeeded not only to a deceased's rights but also to his duties,[3] in particular, the duty to maintain all surviving dependants. (For this reason, it is more accurate to describe the customary system as succession, compared with the common-law system of inheritance.) By providing the heir with all the rights and powers necessary to continue managing family affairs, the customary law of succession was designed to ensure the welfare of the surviving family. What is more, by prescribing which of a deceased's kin qualified as heirs, the law had the effect of confirming the family's bloodline.

1.6 In the third place, it followed from the patriarchal nature of African society that heirs would always be male. Only men had the powers needed to assume control of the family's affairs. In addition, although it was not a necessary consequence of this authority structure, customary law was patrilineal: heirs were identified by their relationship to the deceased through the male line.

1.7 In the fourth place, customary law was guided by a principle of primogeniture. Only mature adults were capable of realizing the deceased's duty to maintain the family and

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2 De Waal (1997) 8 *Stellenbosch LR* 163 and 165.

3 It is assumed here that succession involved a deceased male, because, for reasons that are explained below para 4.8.3, succession to women was socially less important in traditional society.

to perform his responsibilities towards the wider society. Hence, the first-born, and therefore oldest, son succeeded in preference to younger descendants.

1.8 In the fifth place, the customary system of succession was regulated privately by the deceased's family. Some time after the deceased's death, his family would meet to approve the heir, distribute the estate and see to the needs of widows and children. Unless there was a serious disagreement at this meeting, no outside authority was involved. (By contrast, under the common law, the appointment of an heir and the winding-up and distribution of the estate are supervised by state officials.) Partly because succession was a private matter, customary law could afford to be flexible and accommodating. Family councils had considerable discretion in deciding how best to secure the welfare of surviving dependants. Hence, while the rules of succession provided a general normative framework, they could be modified as circumstances dictated.[4]

1.9 All systems of succession are liable to change in response to new social demands. Factors that have led to changes in the western systems include a decline in the birth rate, longer periods of life expectancy, improved social security, a higher divorce rate and a greater incidence of informal unions.[5] Another influence for change has emerged in new forms of property.[6] Whereas in the past the main assets in an estate would have been tangibles, such as land, buildings and cash, the property that is now critical to survival is more likely to be a pension, an insurance policy, a state welfare benefit or the life skills imparted by education. Much of this property is not transmitted on death, or, if it is, the transmission is arranged by contract rather than by will or intestate succession.[7]

1.10 The socio-economic order underpinning customary law has also changed, originally because of colonialism and apartheid but latterly because of the diverse forces

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4 See, generally, Allott (1970) 71 *Zeitschrift für Vergleichende Rechtswissenschaft* 112-14.
5 De Waal (n2) 165-6.
6 Bekker & De Kock (1992) 25 *CILSA* 366-7.
7 See Langbein (1988) 86 *Michigan LR* 722ff and De Waal (n2) 168.

associated with urban industrialism and economic globalization. It is usual to draw a distinction between the traditional extended family, subsisting at a rural homestead, and the modern nuclear family, living in an urban area and depending upon the income of a single breadwinner. The former structure suggests that a wide range of kin would be entitled to claim from a deceased estate, whereas the latter suggests that only the surviving spouse and children should benefit.[8]

1.11 All too often, the extended family is dismissed as a relic of the past and therefore irrelevant to the modern law. This temptation must be resisted.[9] Societies in all parts of southern Africa are in a state of transition, which implies that old social forms have not been completely abandoned in favour of the new. Both the extended and nuclear families are relevant to any inquiry into law reform, although the relevance of each will depend upon the context. For instance, the ceremony at which a deceased's spirit is laid to rest - an occasion for asserting family solidarity - is a time when the family in its extended form will gather.[10] The deceased's widow and children will no doubt have immediate needs to be satisfied, but parents and brothers may also have financial needs (and they may justify any claims by their earlier investment in the deceased's education and upbringing). Both sets of demands are brought to bear simultaneously.[11] The law of succession obviously cannot create property to satisfy all these needs, but it can be expected to effect a fair distribution.

1.12 Rules of succession are designed to counteract the disruptive effect of death on the integrity of a family unit. The law therefore seeks to secure the material needs of those who were most closely related to the deceased. Given the profound changes that have occurred in South African society, a major concern of this Discussion Paper will

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8 In this regard, systems of customary law are undergoing changes similar to those that occurred in western systems of law: Glendon *New Family and the New Property* 239.

9 Thus WLSA warns against polarizing urban and rural practices or assuming that extended families have been replaced by nuclear families: Letuka et al *Inheritance in Lesotho* 88.

10 Jones-Pauly in Eekelaar & Nhlapo (eds) *The Changing Family* 265ff. See, too, Letuka et al (n9) 182. This is also an occasion at which connection with the ancestors can be reasserted.

11 Dengu-Zvogbo et al *Inheritance in Zimbabwe* 206-7.

be to ensure that the customary law of succession can cater effectively for all family forms, ancient, modern and emerging.

2 CUSTOMARY LAW AND THE BILL OF RIGHTS

2.1 Customary law, culture and the Bill of Rights

2.1.1 The customary law of succession must take account not only of changed social conditions but also of South Africa's new constitutional order. While succession to a deceased person's property and status, as a general institution of private law, is clearly compatible with the Constitution,[12] problems arise from the fact that particular customary rules appear to contravene s 9 of the Bill of Rights. This section provides that no one may be unfairly discriminated against on grounds, *inter alia*, of age, birth, sex or gender.

2.1.2 As far as gender discrimination is concerned, the prohibition in s 9 of the Constitution is reinforced by South Africa's obligations under the international Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[13] This treaty places the government under a duty to amend any of its laws that may infringe the principle of gender equality. Article 16(1)(*h*) of the Convention, for instance, obliges states parties to take all appropriate measures to ensure '[t]he same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property ….'

2.1.3 More recently, the government's duty to ensure equal treatment was repeated in the Promotion of Equality and Prevention of Unfair Discrimination Act.[14] Although this Act is not yet in force, one of its purposes is to bind the state, when enacting legislation, to promote equality.[15] What is more, under the general principle that no person may unfairly discriminate against any other person on the ground of gender, the Act requires abolition of the 'system preventing women from inheriting family property'[16] and 'any practice, including traditional, customary or religious practice, which undermines equality

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12 De Waal in Butterworths *Bill of Rights Compendium* para 3G4 argues on analogy with German law that the state does not have an unrestricted power to intefere with the devolution of property to private individuals.

13 South Africa signed the Convention on 29 January 1993. Note that art 14 obliges states parties to take action to ameliorate the particular problems faced by rural women.

14 4 of 2000.

15 Sections 5 and 24(1)(*c*)(ii).

16 Section 8(*c*).

between women and men'.[17]

2.1.4 Customary law is the product of a culture that was, and to a great extent still is, patriarchal: senior males enjoy full rights and powers at the expense of junior males and all women. On the face of it, then, any rules in the customary law of succession that seem to discriminate on grounds of age, sex or gender must undergo constitutional scrutiny.

2.1.5 Notwithstanding the principle of non-discrimination, the government is at the same time obliged to respect the African cultural tradition. Those who were responsible for drafting the final Constitution were required to recognition of customary law and respect for South Africa's diverse cultures.[18]

2.1.6 The first obligation was met by s 211(3) of the Final Constitution: '[t]he courts must apply customary law, when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.' This section makes application of customary law mandatory in the courts, when conflict of laws rules indicate that it is applicable to the facts of a particular case.[19] According to the proviso to s 211(3), however, customary law must be read subject to the Bill of Rights and any relevant legislation.

2.1.7 The second obligation was met by two sections in the Bill of Rights protecting a right to culture. Section 30 provides that '[e]veryone has the right to … participate in the cultural life of their choice' and s 31 provides that '[p]ersons belonging to a cultural … community may not be denied the right, with other members of that community … to enjoy their culture'. One of the inferences to be drawn from these sections is that no particular culture, and thus no particular system of personal law, is to be given

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17 Section 8(*d*).

18 Under Constitutional Principles XI and XIII(1), contained in Schedule 4, as read with s 71(1)(*a*) of the Interim Constitution.

19 Under s 1(1) of the still current Law of Evidence Amendment Act 45 of 1988, the courts simply have a discretion whether to apply customary law. Cf *Thibela v Minister van Wet en Orde* 1995 (3) SA 147 (T).

preference over any other.[20] Customary law must, in other words, be accorded the same respect as common law.

2.1.8 Although the state is obliged to treat all cultures equally, a group's right to practise its culture may not be used as a reason for depriving an individual of his or her fundamental rights.[21] Hence, both ss 30 and 31 expressly provide that the right to culture may be exercised only in a manner consistent with the Bill of Rights. It follows that any right to have customary law applied to a case is subordinate to the right to equal treatment.

2.2 Horizontal application of the Bill of Rights, limitation and interpretation

2.2.1 From provisions in the Constitution, CEDAW and the Promotion of Equality Act, it is evident that customary law must be read subject to fundamental rights, especially the right to equal treatment. Nevertheless, the fate of customary law depends largely on the extent to which the fundamental rights are applicable. This issue resolves itself into questions of horizontality, limitation and interpretation. Of these, the most important question is horizontality.

2.2.2 When the Bill of Rights was being drafted, popular understanding had it that fundamental rights were to be applied only 'vertically', in other words, to relations between citizens and the state.[22] Relations between citizen and citizen were a reserved domain, which would continue to be regulated by private law, free from constitutional review.[23] The Final Constitution, however, made it clear that fundamental rights would be horizontally applicable. Section 8(2) provides that the Bill of Rights is binding on

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20 *Ryland v Edros* 1997 (2) SA 690 (C); 1997 (1) BCLR 77 (C) for instance, held that continued refusal to recognize a Muslim marriage would violate the principle of equality between groups. The Court noted the spirit of tolerance infusing the Constitution and the state's consequent duty to permit religious and cultural diversity. A similar view was expressed in *Fraser v Children's Court* 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC) paras 21-3.

21 In any event, a right may in principle never be limited by a freedom, such the freedom to practise a culture: *Kauesa v Minister of Home Affairs & Others* 1995 (1) SA 51 (NmHC) at 66, citing *R v Zundel* (1987) 35 DLR (4th) 338 at 359-60.

22 See Du Plessis in De Villiers (ed) *Birth of a Constitution* 93.

23 Prior to the final Constitution, this matter was regulated by the decision in *Du Plessis and others v De Klerk and another* 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) paras 45-7.

individuals 'if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'.[24]

2.2.3 In their relations with one another, private individuals obviously cannot assert all the rights contained in the Constitution. The rights to a fair trial and South African nationality, for instance, are opposable only against the state, and thus do not fall within the purview of s 8(2). Section 9 on equal treatment, on the other hand, is worded in such a way that it dovetails with s 8(2) to become horizontally applicable. Hence, s 9(4) provides that '[n]o person may unfairly discriminate directly or indirectly against anyone …'. The provisions of ss 8 and 9 of the Constitution are confirmed by the Promotion of Equality and Prevention of Unfair Discrimination Act, which declares that neither the state nor any person may unfairly discriminate against any other person.[25]

2.2.4 Customary law might still escape the full rigour of the Bill of Rights if it could be argued that the right to equal treatment should be limited by the customary rules of succession. Section s 36(1) of the Final Constitution prescribes the conditions for this type of argument: a rule that potentially infringes one of the fundamental rights has to be reasonable and justifiable 'in an open and democratic society based on freedom and equality'; the rule should not negate the essential content of the right and the limitation should be 'necessary'.[26]

2.2.5 In essence, a case of limitation requires a balancing of interests. In order to determine whether the limiting law is acceptable in an open and democratic society, one right (equal treatment) is weighed against another right (culture) and the limiting law (the customary system of succession).[27] The particular wording of the right to culture,

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24 Section 8(3) provides that, when applying the Bill of Rights to a natural person, a court 'must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right'. The omission of customary law in this section seems to have been inadvertent.

25 Section 6 of Act 4 of 2000.

26 In applying these criteria, South African courts have tended to concentrate on reasonableness and justifiability (in particular the proportionality test they implied), although neither term was given a precise definition. See *S v Makwanyane and another* 1995 (3) SA 391 (CC): 1995 (6) BCLR 665 (CC) para 104.

27 See *Makwanyane's* case supra para 104.

however, suggests that it may not limit the right to equality. An individual may claim the freedom to pursue a culturally defined legal regime, but only to the extent that that regime does not interfere with someone else's right to equal treatment.

2.2.6 The Constitution may also not be interpreted in a way that would favour customary law at the expense of fundamental rights. The courts have adopted three broad approaches to constitutional interpretation - textual, purposive and 'generous' - supplemented by reference to context, whether historical or social. If social context had prevailed, customary law might well have shaped the content of the fundamental rights,[28] but, instead, the interpretative process was reversed: fundamental rights must determine the content of customary law.[29]

2.2.7 Authority for this approach lies in s 39(2) of the Final Constitution, which stipulates that 'in the interpretation of any law and in the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter' (ie, the chapter on fundamental rights). Courts are therefore obliged to construe customary law so as to 'promote the spirit, purport and objects of the Bill of Rights', an approach that amounts to 'indirect' application of the Bill of Rights to family relationships.[30] Any of the generalized rules of private law, such as a spouse's duty to behave reasonably, together with any ambiguity or conflict in the rules, presents an opportunity for indirectly applying the Bill of Rights.

2.2.8 As far as customary law is concerned, indirect application has far wider significance than might first be apparent, for it gives the courts a ground for preferring

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28 Namely, the values, perceptions and interests of South Africa's population as a whole. See, for example, *Ex parte Attorney-General of Namibia: in re corporal punishment by Organs of State* 1991 (3) SA 76 (NmS) at 91 and *S v Van den Berg* 1995 (4) BCLR 479 (Nm) at 521.

29 Hence, the Constitutional Court in *S v Makwanyane* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) para 88 held that, no matter how widespread a social practice, it should not necessarily be allowed to shape the meaning of a constitutional right.

30 Direct application implies that a right can be used as a ground for striking down a rule of common or customary law. By contrast, indirect application assumes that the offending rule should be allowed to stand but that it be modified so as to reflect the spirit and objects of the fundamental rights.

the so-called 'living law' to laws set down in the official version.[31] A recent decision, *Mabena v Letsoalo,*[32] for example, used the precursor to s 39(2) of the Constitution as a basis for disregarding the typical textbook version of customary law in favour of a new social practice. The Court noted that, according to formal sources, customary marriages required the consent of the bride, the groom and the bride's guardian, and that bridewealth agreements required the consent of the bride's and groom's guardians. The Court none the less applied an emerging social practice whereby the groom negotiated bridewealth with his prospective wife's *mother*. This new gender-neutral custom clearly conformed more closely to the 'spirit, purport and objects' of the fundamental rights.

2.2.9 The Constitution makes certain principles clear. First, although legislation must continue to respect the African legal heritage, a right to culture and thus customary law is subordinate to the right to equal treatment. Secondly, discrimination on any one of the proscribed grounds laid down in s 9(3) - age, sex, gender or birth - is prohibited, even if the discrimination occurs within the family and is permitted by private law. Hence, to the extent that rules of customary law conform to the principle of equal treatment, they can be supported, but wherever customary law discriminates unfairly it must be amended.

3 THE DUAL LAWS OF SUCCESSION

3.1 Legal dualism and the principle of equal treatment

3.1.1 South Africa has a dual legal structure in the sense that it recognizes and enforces at least two systems of personal law.[33] The one (which for the sake of convenience will be referred to as the 'common law') is based on Roman-Dutch law and the statutes that

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31 The distinction between official and 'living' law is more fully explored below paras 4.2ff.

32 1998 (2) SA 1068 (T) at 1074-5.

33 Other systems, such as Muslim, Hindu and Jewish law, may also be formally recognized by the state in terms of s 15(3) of the Constitution.

amended it.[34] The other system comprises a number of closely related customary laws. Substantial differences mark these two systems. The question posed in this section is whether a dual succession law should be maintained.

3.1.2 Historically in South Africa, application of customary or common law depended on a person's race. As a result, the policy of legal dualism gave every appearance of racial discrimination. For instance, over the years, legislative initiatives to update the laws of succession were confined to Roman-Dutch law;[35] very little was done to keep customary law in line with progressive social practices or human rights. Because Africans experienced none of the benefits of reform,[36] they could be forgiven for thinking that they were being subject to a second-rate system of law.[37]

3.1.3 The customary law with which we now have to deal is, in many respects, both inequitable and out of date. Instead of attempting to change this system, we could take the simple expedient of abandoning customary law and adopting the common law in its place. A single legal regime in South Africa would eliminate any sense of racial discrimination and might have the indirect advantage of promoting national unity. This solution, however, presupposes that the common-law system of succession is capable of meeting the needs of people who are used to regulating their lives according to customary law - and this group of people happens to constitute the great majority of South Africa's population. We obviously cannot make this assumption without careful consideration, nor can we assume that different cultural groups would want to surrender their legal heritages.[38]

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34 Some of which, such as the Maintenance of Surviving Spouses Act 27 of 1990 apply to Africans and others of which, such as the Intestate Succession Act 81 of 1987, do not.

35 See South African Law Commission *Intestate Succession* para 1.1.

36 Notably the Intestate Succession Act 81 of 1987.

37 The assumption seems to have been that, if Africans wished to escape the shortcomings customary law, they had to make wills. See below para 5.1.

38 *Bangindawo and others v Head of the Nyanda Regional Authority and another* 1998 (3) SA 262 (Tk) at 278; 1998 (3) BCLR 314 (Tk) is instructive in this respect. The applicants objected to the very different kinds of justice administered in magistrates' courts and courts of traditional rulers on the ground that these differences constituted a violation of the right to equality before the law. The Court dismissed the argument, because traditional courts meet the needs and expectations of a culturally defined community.

3.1.4 It is significant in this regard that no state in southern Africa has attempted to abolish the dual legal structure that it inherited from colonial rule.[39] Instead, customary law is still applied to the devolution of intestate estates belonging to deceased persons who had lived according to customary law. In Lesotho, for example, the common law[40] is applicable only when an estate falls to be administered under the Administration of Estates Proclamation,[41] which, in turn, applies to the estates of Africans only if they 'abandoned tribal custom and adopted a European mode of life and who, if married, have married under European law'.[42] The legal systems of Botswana and Zimbabwe operate on similar (if less racist) principles.[43]

3.1.5 South Africa's system of legal dualism should, for the present, be retained. This structure accepts the fact of legal and cultural diversity in the country, which is a reality that the Constitution demands we respect. What is more, any law reform that remains true to a living system of customary law has a far better chance of winning general acceptance.

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39 Although it must be conceded that, apart from Namibia, the constitutions of these states were careful to shield customary law from the principle of equality/non-discrimination Section 23(3)(*b*) of the Zimbabwe Constitution (Order 1600 of 1979), for instance, provides that the application of African customary law is not subject to the prohibition on discrimination contained in s 23(1)(*a*).

40 Section 3 of the Intestate Succession Proc 2 of 1953.

41 19 of 1935.

42 Section 3(*b*) of the Proclamation. See *Mokorosi v Mokorosi & others* 1967-70 LLR 1 at 6 and *Hoohlo* 1967-70 LLR 318 at 323. In Swaziland, too, according to s 4 of the Intestate Succession Act 3 of 1953 [ch 104], the common-law applies to Africans only if their estates fall to be administered under s 68 of the Administration of Estates Act 28 of 1902. The latter Act applies to Africans only if, during their lifetimes, they contracted a 'lawful marriage' or were the offspring of parents 'lawfully married', which would imply that only persons married by civil or Christian rites are included in the provisions of the Intestate Succession Act.

43 In Botswana, for example, according to s 6 Rule 5 of the Common Law and Customary Law Act Cap 16:01, a deceased's personal law governs devolution of his or her estate (other than land, which is governed by the law applicable to the place where the land is situated). In Zimbabwe, the Administration of Estates Amendment Act 6 of 1997 provided a detailed system of succession that was applicable to the intestate estates of persons subject to customary law at the time of death (s 68A(1)). Section 68G of the Act lays down a rebuttable presumption that persons married under customary law are subject to that system.

3.2 Choice of law rules

3.2.1 As appears later in this Paper, recommendations for reform will have the effect of removing many of the differences that currently distinguish customary and common law. Once the two systems of law are assimilated into one, any question of a conflict between the rules will disappear. To the extent that differences remain, however, rules will be needed to determine which law should be applied to the facts of particular cases.

3.2.2 In all cases of a conflict between customary and the common law, the decision to apply one or other legal system must depend upon an individual's cultural orientation. For matters of succession, therefore, choice of law is determined by the culture under which the deceased lived. In South Africa, however, the approach has never been so straightforward. A Law Commission project on the *Harmonisation of the Common Law and Indigenous Law: Conflicts of Law* subjected all the choice of law rules governing application of customary law to a comprehensive study and made suitable recommendations for reform.[44] While it is not necessary to repeat the details of this investigation here, the broad principles for applying customary law in succession must be explained.

3.2.3 In the first place, a distinction is drawn between testate and intestate succession. Where an African executed a will, his or her estate devolves according to the will and the common law. On the other hand, where the deceased was intestate, the relevant choice of law rules are prescribed by the Black Administration Act and regulations issued under it.[45] Section 23(1) of the Act provides that 'house' property must devolve according to customary law and s 23(2) provides that land held under quitrent tenure devolves according to a special statutory regime. (By implication, neither category of

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44 *Harmonization of the Common Law and Indigenous Law: Conflicts of Law*.

45 38 of 1927. The Regulations were issued under s 23(10) of the Act.

property may be disposed of by will.)[46] Whether customary or common law applies to other categories of property is then to be discovered from further choice of law rules laid down in regulations.[47]

3.2.4 Regulation 2(*c*)-(*e*)[48] provides as follows:

'(*c*) If the deceased, at the time of his death, was -

(i) a partner in a marriage in community of property or under antenuptial contract; or

(ii) a widower, widow or divorcee, as the case may be, of a marriage in community of property or under antenuptial contract and was not survived by a partner to a customary union entered into subsequent to the dissolution of such marriage,

the property shall devolve as if the deceased had been a European.'

(*d*) When any deceased Black is survived by any partner -

(i) with whom he had contracted a marriage which, in terms of subsection (6) of section 22 of the Act, had not produced the legal consequences of a marriage in community of property; or

(ii) with whom he had entered into a customary union; or

(iii) who was at the time of his death living with him as his putative spouse;

or by any issue of himself and any such partner, and the circumstances are such as in the opinion of the Minister to render the application of Black law and custom to the devolution of the whole, or some part, of his property inequitable or inappropriate, the Minister may direct that the said property or the said part thereof, as the case may be, shall devolve as if the said Black and the said

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46 See below paras 5.3ff.

47 The existing set of Regulations is contained in GN R200 of 1987. These are substantially the same as those issued in 1929, which were amended in 1947, repealed and replaced in 1966, and then again repealed and replaced in 1987. See Visser (1982) 15 *De Jure* 133-5 on the question which version of the regulations should be applied in particular cases.

48 The Law Commission has already recommended that the exemption procedure referred to in reg 2(*b*) should be repealed. This regulation therefore becomes redundant.

partner had been lawfully married out of community of property, whether or not such was in fact the case, and as if the said Black had been a European.

(e) If the deceased does not fall into any of the classes described in paragraphs (*a*), (*b*), (*c*) and (*d*), the property shall be distributed according to Black law and custom.'

In general terms, the Regulations provide that the relevant law is to be selected by referring to the form of a deceased's marriage, together with his or her matrimonial property system. These two factors are presumed to reflect the deceased's cultural orientation.

3.2.5 Throughout colonial Africa, marriage by civil or Christian rites was taken to be sign that the spouses had submitted themselves to the western culture.[49] Reference to the form of the marriage does inject certainty into the choice of law process, but it has the disadvantage of oversimplifying issues. The mere fact that a couple married by a particular rite need not reflect their social and legal intentions. Most of the people who marry in Church do so out of religious conviction, not with the intention of binding themselves to the common law,[50] and, of course, many spouses marry under both customary and Christian rites.[51]

3.2.6 Before common law becomes applicable to intestate succession, however, reg 2(*c*) stipulates that the deceased must also have been married in community of property. This additional factor was designed to save couples who had married by civil or Christian rites from being caught unawares by the law associated with their marriage. Formerly, it followed that, if common law was to govern devolution of an estate, the deceased must have deliberately chosen to make a prenuptial declaration or execute

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49 In *Cole* (1898) 1 Nigerian LR 15 and *Asiata v Goncallo* (1900) 1 Nigerian LR 41, it was reasoned that, by opting for a particular form of marriage, spouses could be presumed to have intended to be bound by the law with which it was associated.

50 See, for example, *Smith* (1924) 5 Nigerian LR 102 at 104.

51 And, even if there is some justification for using the form of a marriage to determine the spouses' rights and duties, this connecting factor bears little relationship to their heirs' rights of succession. See Visser (n47) 137 and *Coleman v Shang* [1961] AC 481.

an antenuptial contract.[52]

3.2.7 Customary law applies to marriages under customary law or to civil/Christian marriages that happen to be out of community of property. When application of this law seems inappropriate or inequitable, reg 2(*d*)(iii) allows potential beneficiaries to petition the Minister for a directive that the common law be applied instead.

3.2.8 The Natal and KwaZulu Codes have departed from the choice of law rules outlined above. They stipulate that, where a deceased married by civil or Christian rites or had no male heir, the estate devolves according to common law.[53] These provisions override s 23 of the Black Administration Act and the Regulations.

3.2.9 There are several reasons for repealing the existing choice of law rules. First, since the Recognition of Customary Marriages Act[54] was passed, the rationale for the rules has disappeared. All *de facto* monogamous customary marriages are now automatically *in community of property* unless an antenuptial contract provides otherwise.[55] Not only does the community of property regime contradict the philosophy underlying the choice of law rules in the Regulations, but the nature of a matrimonial property regime will no longer offer any particular indication of a deceased's cultural orientation. Regulation 2(*c*) is now meaningless.

3.2.10 Secondly, because the choice of law in regs 2(*c*) to (*d*) is based on the form of a deceased's marriage, the rules do not cater for those who never married. In consequence, reg 2(*e*) applies, ie customary law governs devolution of his or her estate. This provision assumes that all Africans are automatically subject to customary law, and that, if they want to avoid application of this law, they should execute a will. While this

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52 The prenuptial declaration was possible under s 22(6) of the Black Administration Act 38 of 1927. See Bennett (1993) 56 *THRHR* 59.

53 Sections 79(3) and 81(5), respectively, of Act 16 of 1985 and Proc R151 of 1987. The 'common law' referred to in the Codes is the Succession Act 13 of 1934.

54 120 of 1998.

55 Section 7(2) of the Act. Polygynous unions, however, are out of community. Section 7(7)(*a*) provides that husbands who wish to contract polygynous marriages must obtain a court order terminating the first matrimonial property system and ensuring a fair distribution of the marital estate.

assumption might in some cases be well-founded, there will be many situations where, on the ground of cultural orientation, application of the common law would be more appropriate.

3.2.11 Thirdly, the saving provision in reg 2(*d*)(iii) has the undesirable effect of reducing choice of law to an administrative process.[56] It must be conceded that, by allowing an appeal to the Minister for a directive that common law be applied, the regulation does provide a simple solution to choice of law problems, but it tends to preclude argument from all interested parties. The Law Commission has therefore recommended repeal of the regulation.[57]

3.2.12 If a person dies partially testate, s 23(9) of the Black Administration Act provides that '… Black law and custom shall not apply to the administration or distribution of … his estate …'. A superficial reading of this section might suggest that the common law applies to the devolution of any property not governed by a will.[58] A closer reading, however, could suggest application of customary law, for the section speaks only of 'administration and distribution' of an estate. The *devolution* of property, namely, the substantive rules of succession, is an entirely separate issue to which the choice of law rules provided in reg 2 should apply.

3.2.13 Problems of choice of law presuppose the existence of different systems of law. Whether any differences will remain between the customary and common laws of succession will depend on whether the reforms recommended below are accepted. To the extent that differences persist, South Africa's choice of law rules for intestate succession (including those in the KwaZulu and Natal Codes) must be changed. The

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56 Kerr *The Customary Law of Immovable Property and of Succession* 171 and Bennett *Application of Customary Law in Southern Africa* 170.

57 *Harmonisation of the Common Law and Indigenous Law: Conflicts of Law* Discussion Paper para 6.38.

58 A choice of law that is vindicated on the basis of the testator's intention: Visser (n47) 124-5. Note that s 1(4)(*b*) of the Intestate Succession Act 81 of 1987 applies only to '... an estate which does not devolve by virtue of a will or in respect of which s 23 of the Black Administration Act does not apply'.

current rules are outdated, unnecessarily complicated and unduly reliant on the form of a deceased's marriage. They need to be replaced with more flexible rules that decide the applicable law by referring, in the final analysis, to the deceased's cultural orientation. This Discussion Paper endorses proposals to this effect made in an earlier Law Commission project on *Harmonisation of the Common Law and Indigenous Law: Conflicts of Law.*

4 INTESTATE SUCCESSION

4.1 Customary law: the 'official' version

4.1.1 A key status in customary law was the head of a family unit. Because the incumbent of this status was responsible for the welfare of all persons attached to his household, rules governing succession to this position were at their most elaborate. (Succession to women and to unmarried men could be dealt with in more or less perfunctory ways.)

4.1.2 Where the deceased was monogamous, the various systems of customary law in South Africa prescribed the same order of succession.[59] In the first instance, the deceased's oldest son was heir. If that son had already died, then the oldest grandson succeeded. Failing any male issue in the oldest son's line, succession passed to the deceased's second son and his male descendants. The same principles applied to all the deceased's sons, in order of seniority, and to their male offspring.

4.1.3 These rules assumed that the heir was legitimate, namely, that he had been born of a valid marriage for which lobola had been paid. In this way, preference was shown for sons who were related to a deceased by blood.[60] None the less, unlike Roman-Dutch law, customary law did not completely exclude illegitimate children from the order of succession. In fact, it is often said that the concept of illegitimacy was irrelevant to customary law.[61] A man might accept a child borne by his wife as a member of his family, even if he had not fathered the child. For purposes of succession, such a child would not be preferred to legitimate sons, but, failing any male descendants, he had an ultimate right to succeed.

4.1.4 If a deceased had no male descendants, his father was heir. If the father was dead, the deceased's oldest brother was next in line of succession, and, if he was also

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59 A detailed account of the order of succession in South Africa can be found in Kerr (n56) 147ff and Bekker *Seymour's Customary Law in Southern Africa* 274-5.

60 Dow & Kidd *Marriage and Inheritance* 82.

61 Partly because a child's legitimacy was not defined simply by its parents' marriage, but rather by payment of lobola, which might have been delayed or deferred.

dead, the oldest brother's oldest son (or oldest surviving male descendant) was heir. Failing the oldest brother and his male descendants, the next brother in order of seniority and his descendants were in line. Failing any male issue in the first order of male ascendants, the deceased's grandfather succeeded, failing whom, the deceased's oldest paternal uncle or his oldest male descendant. Failing the paternal uncles, in order of seniority, and any of their descendants, the estate passed to the next order of male ascendants.

4.1.5 In the case of polygynous marriages, the order of succession was modified to take account of the fact that the household was divided into separate units or 'houses'. Each of a man's marriages established an independent house, and, because the estate was inherited by the heir to that house, the property in the houses was kept strictly separate. Thereafter, the nature of the system of polygyny determined the order in which the house heirs succeeded.

4.1.6 Under the 'simple' system of polygyny, the heir was the oldest son of the first-married wife. If that person was already dead, his oldest son succeeded.[62] Failing any male descendants in the first house, the next in order of succession was the oldest son of the second-married wife and his male descendants, and so forth.

4.1.7 The system of polygyny was termed 'complex' where households were divided into two (or even three) different sections. In the so-called ‘southern Nguni’ system, for instance, the homestead of a man with two wives was divided into great and right-hand sections. The oldest son of each house became heir to that house. If one house had no male issue, the oldest son of the other section inherited both. Where the deceased had married a third wife, she would be affiliated (as an *iqadi* or support) to the great house.[63] If one of the houses had no heir, it was inherited by the most senior heir of the

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62 This system was followed, amongst others, by the Tsonga: *Maganu* 1938 NAC (N&T) 14 and *Sijila v Masumba* 1940 NAC (C&O) 42.

63 A fourth wife would be attached to the right-hand house, the fifth wife to the great house, and so on.

section of the homestead to which it was attached. In other words, the heir to an *iqadi* of the great house would be the oldest son of the great house. Conversely, if the great house had no heir, it would be inherited by the heir of its *iqadi*.[64]

4.1.8 Zulu homesteads could be divided into three sections: a great house (*indlunkulu*), a right-hand house (*iqadi*) and a left-hand house (*ikhohlwa*). As with the southern Nguni, junior houses were affiliated to one of the senior houses, and, if there were no sons in the *iqadi* (or any of its affiliated junior houses), recourse was had to the *indlunkulu*, and vice versa. Where the *ikhohlwa* and its junior houses had no heir, this section was inherited by the heir of the *indlunkulu*. If there was no heir in either the *indlunkulu* or *iqadi*, the heir of the *ikhohlwa* became heir to both sections.[65]

4.1.9 If a polygynous household produced no male descendants, the order of succession followed the same principles that applied to a *de facto* monogamous marriage. Succession passed to the deceased's father, failing whom, to the deceased's brothers and their descendants in order of seniority.

4.1.10 In the unlikely event that the deceased had no male relatives, it seems that a traditional leader took over the estate, subject to an obligation to use the assets for maintaining the deceased's family.[66] Today, however, it is arguable that the property passes to the state.[67]

4.1.11 Perhaps the most striking feature of this account of customary law is the absence of any mention of widows or daughters succeeding. According to the official sources of customary law, which fully endorsed the patriarchal tradition, women could not

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64 Formerly, the Xhosa homestead could on rare occasions be divided into three sections: a great house, a right-hand house and a left-hand house (*ikohlo*). For purposes of succession, the left-hand house was considered to be affiliated to the great house. Hence, if there were no heir in the great house, it would be inherited by the heir to the *ikohlo*. See Soga *The Ama-Xosa: life and customs* 54-6 and Kerr (n56) 129-30.

65 See s 81(1)(*a*)-(*e*) of the Natal and KwaZulu Codes, Proc R151 of 1987 and KwaZulu Act 16 of 1985, respectively.

66 Cape Commission on *Native Laws and Customs* (1883) para 7079 p395. See, too, Bekker (n59) 275.

67 Kerr (n56) 100.

succeed to the status of a man because they did not have the legal powers to play male roles.[68] None the less, the death of a family head did not terminate his marriage. Ideally, his widow would enter into a levirate union with one of the deceased's male relatives so that she could continue to bear children for his family.[69] In addition, the heir became responsible for continuing to support the widow and any other surviving dependants out of the estate. Thus, provided that a widow was prepared to remain at her deceased husband's homestead, she was entitled to be maintained for the rest of her life.[70]

4.1.12 According to the courts, the widow's right against the heir was a personal right of support.[71] This description implied that the heir was owner of the estate, with a consequent right to dispose of it as he saw fit.[72] His rights and powers were subject to duties to support the widow and surviving family dependants and to consult the widow before disposing of major assets.[73]

4.1.13 The KwaZulu and Natal Codes created two exceptions to these principles.[74] First, the Codes provided that, if a deceased left no male heir, his estate would devolve according to the rules of intestate succession applicable to a civil marriage. Under this provision, a widow and even daughters stood to inherit from the estate.[75] Secondly, the

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68 *Myazi v Nofenti* 1 NAC 74 (1904) and *Kumalo v Estate Kumalo* 1942 NAC (N&T) 31.

69 See below para 4.10.2.

70 *Ncilana v Mandulini* 4 NAC 159 (1919), *Mdoda v Toseni* 6 NAC 40 (1929) and *Nstham* 1936 NAC (C&O) 128. *Dyasi* 1935 NAC (C&O) 1 at 9 held that, in case of conflict between an heir and widow, the widow's interests prevail. Hence the heir may not compel her to move to another place to live with him: *Mapoloba* 2 NAC 186 (1911) and *Mnyanyekwa v Macuba* 4 NAC 139 (1922).

71 *Sijila v Masumba* 1940 NAC (C&O) 42, *Dodo v Sabasaba* 1945 NAC (C&O) 62 and *Myuyu v Nobanjwa* 1947 NAC (C&O) 66.

72 Conversely, according to *Xulu* 1938 NAC (N&T) 46, *Qolo v Ntshini* 1950 NAC 234 (S) and *Zilwa v Gagela* 1954 NAC 101 (S), a widow has no right to alienate estate assets.

73 *Mapoloba* 2 NAC 186 (1911), *Letoao* 4 NAC 158 (1919), *Rashula v Masixandu* 5 NAC 202 (1926), *Mdoda v Toseni* 6 NAC 40 (1929) and *Sidubulekana v Somyalo* 1931 NAC (C&O) 12.

74 Another exception to the rule came from the former homeland of Bophuthatswana, where the Succession Act 23 of 1982, as amended by the Intestate Succession Law Amendment Act 13 of 1990, excluded customary law in favour of the statutory law of intestate succession. This Act was repealed by s 3 of the Justice Laws Rationalisation Act 18 of 1996, as read with Schedule II.

75 Section 81(5) of the Natal and KwaZulu Codes.

Codes provided that a widow could request a district officer to initiate an inquiry into a deceased estate. If satisfied that application of customary law would be unjust, taking into account the assets and liabilities of the estate and the extent of the widow's and the heir's contributions to it, the officer could make an order that the estate devolve according to the common law of intestate succession.[76]

4.2 Customary law: the 'living' version

4.2.1 Any authentic system of customary law rests squarely on the existing and generally accepted social practices of a community. The law of succession ought therefore to reflect whatever changes have occurred in the social and economic structures of South African society. The outline of customary law given above, however, owes more to the nineteenth century than to the present day. What is more, the particular demands of the sources from which it was compiled - judgments of courts, codes, commissioners of inquiry and the writings of colonial scholars, not to mention the influence of colonial and apartheid politics, have tended to distort the rules. The fact that customary law was written down in texts to be applied by the courts, for example, means that it is expressed in terms of strict rules that cannot hope to reflect the flexible processes of decision-making that typify a truly customary system.[77]

4.2.2 It is now generally acknowledged that the 'official version' of customary law, although frequently consulted as the most readily available source, is often inaccurate and misleading.[78] Formerly, it may have been true that women could expect a lifetime of support and protection within the generous embrace of an extended family. It may also have been true that, because women did not have the same authority as men, they could not manage family estates. In these circumstances, it would have been unusual for wives or daughters to succeed to a family head. With the decay of the extended

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76 Section 81(6)(*a*) of the Codes. Subsection (*b*) has a similar provision in favour of 'any child of the deceased'.

77 Dengu-Zvogbo et al (n11) 64-5. Granted, litigants arguing about customary law are not absolutely bound by the official version, since, under s 1(1) and (2) of the Law of Evidence Amendment Act 45 of 1988, they are free to refer to more authentic 'living' rules. But such rules have to be specially pleaded, and, if a party cannot meet the standards of proof required, the official version prevails for want of better evidence.

78 See Gordon (1989) 2 *J Historical Sociology* 46 and Sanders (1987) 20 *CILSA* 405.

family system, however, a weakening of the support obligations owed to women and children becomes inevitable. At the same time, the economic emancipation of women results in wives acting as family breadwinners, managing households on their own and playing (voluntarily or otherwise) most of the roles associated with men. None of these changes is apparent in the rules of succession described above.

4.2.3 An accurate account of current social practice would obviously be of great use to those embarking on a reform of the law, but, unhappily, the various customary laws of succession in South Africa are a neglected area of research. As it happens, however, an independent NGO, Women and Law in Southern Africa Research Trust (WLSA), has conducted a wide-ranging investigation into the laws of succession in Botswana, Lesotho, Mozambique, Swaziland, Zambia and Zimbabwe. Although South Africa was excluded from this project, we can still make use of the WLSA findings. Admittedly, certain differences mark the laws and social practices of the various southern African states, but the differences are outweighed by the many shared legal and social institutions. Hence, the recurrent patterns that emerged from the WLSA research would recommend it as a source of information for any study of succession in South Africa.[79]

4.2.4 One of the first features reported by WLSA was a divergence between the approaches of higher and lower courts towards customary law.[80] The lower courts, including courts of traditional rulers, responded more readily to perceived social needs. Where the law worked an injustice for widows, for example, these tribunals were prepared to disregard the strict rules. Higher courts, on the other hand, although aware of the fact that customary law operated in two registers (the 'official' and 'living' versions) tended to refer only to the official version of customary law; and they applied this law strictly, without taking account of new social practices.[81] WLSA concluded that, while the original purpose of customary law was to create an environment conducive to

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79 An overview of the reports on the six southern African countries can be found in Ncube & Stewart (n1).

80 See Aphane et al in Ncube & Stewart (n1) 30 and Letuka et al (n9) 80 and 183. Donzwa et al in Ncube & Stewart (n1) 103 report that the two versions exert a reciprocal influence on one another.

81 See Ndulo (1985) 18 *CILSA* 90 and Dengu-Zvogbo et al (n11) 64ff.

the care and protection of the deceased's family, the law applied by the higher courts very often has the opposite effect.[82]

4.2.5 In the second place, WLSA noted the emergence of new rules of succession.[83] Customary law still emphasizes the principle of *succession*, namely, that the heir takes over the deceased's status and obligations of support,[84] but the overall trend is less to uphold the traditional patriarchal order and more to respond pragmatically to the need to protect the deceased's widow and direct descendants.[85] Within this trend, WLSA's research revealed conspicuous shifts in customary law.

4.2.6 The principle of primogeniture, for instance, which has long been assumed to be the keystone of customary law, is now only partially observed. The oldest son may still inherit the largest portion of the estate, on the ground that he has responsibilities for maintaining the family, but other children also take a share.[86] If there is not enough property to go round, female children are excluded, on the understanding that they will be taken care of by the heir. Male children, on the other hand, will ultimately have to provide for families of their own, and so they always inherit a portion of the estate.[87]

4.2.7 Several field studies, including some in South Africa, have shown that *last born* sons inherit the family homestead. This shift to ultimogeniture is explained by the fact that the oldest son is normally the first to marry, leave home and start a new family. He already has the benefit of an education and lobola. The youngest son is left behind to

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82 Dengu-Zvogbo et al (n11) 279.

83 The limited research conducted in South Africa tends to confirm WLSA findings. See, for example, the study cited by Bekker & De Kock (n6) 368-9 and Watney 1992 *TSAR* 298 and (1992) 25 *CILSA* 379.

84 Matashane & Letuka in Ncube & Stewart (n1) 47ff therefore felt that the terms 'heir' and 'sole heir' were inappropriate to describe the position of beneficiaries under customary law, because these words suggest a straightforward inheritance of property.

85 Thus elders were quite prepared to allow women to inherit. Their main concern was about women's powers and capacities to manage deceased estates. See Stewart in Eekelaar & Nhlapo (n10) 222.

86 Donzwa et al in Ncube & Stewart (n1) 97.

87 Donzwa et al in Ncube & Stewart (n1) 97. Hence, amongst the Ndebele of Zimbabwe, for instance, the family council normally apportions a deceased estate amongst the children and widow.

care for his parents in their old age. Once the father dies, the youngest son becomes responsible for the widow. His inheritance of the family land and house gives him both the means and the incentive to carry out his duties.[88]

4.2.8 Another significant change is to the principle that only males can succeed as heirs. Throughout southern Africa, it appears that widows have stronger claims on estates than the official version of customary law would lead us to believe. In Lesotho, for instance, widows are always involved in family decisions about the estate and heirs regularly consult them. In the event of disagreement, the widow's word is final.[89] Further evidence from the WLSA project shows that widows often take over their husbands' lands and other assets, especially when they have young children to raise.[90] Again, the tendency to allow a deceased's children and surviving spouse to become the main beneficiaries of the estate realistically accepts basic social needs.

4.2.9 Even in South Africa, widows have long been inheriting their husbands' lands.[91] Many reported cases, some dating back to the 1920s, show that the courts were quite willing to sanction this practice. The only problem was how to describe the widow's right. While the established rule was that a widow had only a personal right to maintenance,[92] some courts held that she had a real right of usufruct,[93] *usus*[94] or even *habitatio* over land in the estate.[95] These common-law servitudes were bound to give

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88 James (1988) 14 *Social Dynamics* 36, Prinsloo *Inheemse Publiekreg in Lebowa* 16 and Watney 1992 *TSAR* 299. Donzwa et al in Ncube & Stewart (n1) 99 note this practice as a feature in Lesotho, Zimbabwe and Botswana.

89 Letuka et al (n9) 184.

90 Letuka et al (n9) 183. WLSA found that the most 'traditional' form of customary law was maintained in Swaziland. Here, because a widow is not considered to be fully part of her husband's family, she cannot inherit and must therefore depend on the oldest surviving son for maintenance: Mokobi & Kidd in Ncube & Stewart (n1) 22.

91 Schapera *Native Land Tenure in the Bechuanaland Protectorate* 88 and 153 and Wilson & Mills *Keiskammahoek Rural Survey* 18. WLSA's Lesotho study, in particular, provided evidence of succession to land, a customary practice that was legislatively endorsed by the Land (Amendment) Order No 6 of 1992. See Letuka et al (n9) 63-4.

92 See *Sijila v Masumba* 1940 NAC (C&O) 42, *Dodo v Sabasaba* 1945 NAC (C&O) 62 and *Myuyu v Nobanjwa* 1947 NAC (C&O) 66.

93 *Noveliti v Ntwayi* 2 NAC 170 (1911) and *Tetelwa v Mkashane* 3 NAC 298 (1912).

94 *Dyasi* 1935 NAC (C&O) 1.

95 *Sijila v Masumba* 1940 NAC (C&O) 42 at 45.

a misleading impression of customary law,[96] but the fact that the courts were prepared to invoke them indicates a readiness to protect widows against heirs and other parties.

4.2.10 The new practice of widows and children inheriting led the WLSA researchers, mainly in Botswana, to change their entire perspective on the customary law of succession. They found that true succession takes place only when *both spouses* are dead. When the first spouse (usually the husband) dies, family property falls under the control of the widow. The oldest son may preside over family meetings as the notional head of the family, but the widow exercises a general control over the estate.[97] It is only when the widow finally dies that the oldest son inherits the land, cattlepost and a portion of the family herd. Remaining cattle are shared amongst the children.[98] What this finding suggests is that succession is not a single event: rather it is a process occurring over a period of time.

4.2.11 WLSA also remarked on the power wielded by family councils. While rules of succession define rights to an estate in abstract, those who administer the estate actually realize the rights. As already noted, in customary law estates are administered privately. A council of members of the deceased's family, normally presided over by senior male kinsmen, convenes at the ceremony at which the deceased's spirit is laid to rest. This body determines the assets and liabilities in the estate, receives claims from creditors, confirms the identity of the heir and authorizes a final distribution. For all intents and purposes, the family council decides what the relevant rules of custom are and how they are to be applied.[99]

4.2.12 It follows that the family council exercises considerable power - a power that is

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96 *Luke* 4 NAC 133 (1920). Kerr (n56) 93 suggests that, because the widow can assert her right regardless of the heir's entitlement, it should be deemed a servitutal interest (which he called 'the widow's servitude').

97 And, sometimes, the heir formalizes the position by ceding his rights to the widow: Dengu-Zvogbo et al (n11) 135-6.

98 Donzwa et al in Ncube & Stewart (n1) 100 and Dow & Kidd (n60) 65 and 69. According to Dow & Kidd (n60) 68, this system of distribution assumes that: a male is needed to take over leadership of the family; children marry in order of age; girls leave their natal homes and men, not women, perpetuate the bloodline.

99 See Letuka et al (n9) 89-94. Donzwa et al in Ncube & Stewart (n1) 95 and 98 note that the family council is a particular feature of Swazi and Ndebele law.

generally unchecked by courts or state officials. Reference to an outside authority is necessary only to resolve disagreements within the family[100] or to obtain access to certain items of property. Thus, in order to obtain payment of the proceeds from an insurance or pension policy, the insurance company must be involved. Similarly, the co-operation of state officials is needed to obtain the conveyance of land and other immovables.[101] The family would have to accept these formal processes, but, once placed in control of the house and bank account, it could proceed to distribute assets in any way that suited it best.[102]

4.2.13 There can be no doubt that customary law in South Africa, as in other southern African countries, is responding in a pragmatic fashion to social needs. What appears from WLSA's work is a growing emphasis on providing for those who were directly dependent on the deceased for support. However, the traditional rules have not completely disappeared. By persisting alongside new and emergent rules, they give individuals an opportunity to manipulate the two systems to their own advantage - and the very flexibility and ambiguity of customary law can work against the welfare of deserving beneficiaries.[103]

4.2.14 Widows and minor children, for instance, are in a vulnerable position. A self-interested heir has a variety of stratagems for securing his own interests at the expense

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100 If, for instance, a family cannot agree on the heir. In South Africa, legislative provision (s 3(2) of GN R200 of 1987) has been made for an administrative inquiry by a magistrate in these circumstances.

101 Where immovables are concerned, s 4 of GN R200 of 1987 provides that a magistrate must appoint an administrator for the estate with a certificate of appointment, which gives the necessary authority to receive and transfer the property to the heir(s). Dengu-Zvogbo et al (n11) 161 note that portion of an estate may be administered by the family council and portion by a third party. For example, if a man died leaving a bank account, cattle in a rural area and a house in an urban area, the family could deal with the cattle informally, but it would have to report the estate to the authorities to obtain access to the bank account and the house.

102 Donzwa et al in Ncube & Stewart (n1) 102. WLSA concluded that, notwithstanding the intervention of the Master's office or some other outside authority, the family ultimately decides who receives benefits from an estate. See Himonga *Family and Succession Laws in Zambia* 156 on the position in Zambia.

103 Thus plaintiffs choose forums and invoke rules favourable to their claims. Dow & Kidd (n60) 82 and 100 note that, although individuals know very little about the common law rules of succession, they actively manipulate different versions of customary law to achieve their own ends.

of a widow. One method is to deny that the woman was married to the deceased. Another is to exclude her from participation in the mourning rituals (which has the same effect).[104] Because the formation of a customary marriage is a potentially lengthy and often ambiguous process, denying the existence of a marriage is easier than might first appear.[105] Moreover, where the woman was involved in an informal union with the deceased, no matter how long the union persisted, male heirs have a better claim to the estate.[106] Widows also run the risk of being accused of causing their husbands' deaths, since in some parts there is an ingrained belief that death can always be attributed to witchcraft or a human agency.[107]

4.2.15 In addition, through a modern interpretation of the patriarchal tradition, African women are liable to be denied ownership of whatever property they acquired during marriage. Because men are supposed to be breadwinners, the family's income is considered the man's property. Hence, WLSA noted a tendency to treat a wife's acquisitions as her husband's property. These assets then form part of the husband's estate, to be inherited by his heir.[108]

4.2.16 Finally, WLSA revealed that beneficiaries, especially widows, are seldom in a position to enforce their rights.[109] Even if they have the resources to take legal action, they will probably decide that, given the disruptive effect on family relations, it is not worth the effort. WLSA research in Zambia, for instance, indicates that, notwithstanding a widow's statutory right to a portion of the estate, she has to maintain good relations with the deceased's family if she is to realize it.[110] In Zimbabwe, too, families often overlook a widow's rights, or widows waive their rights simply to keep the peace.[111] A

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104 Conversely, the mandatory period of confinement during mourning rituals has the effect of preventing widows from protecting their interests in estates: Aphane et al in Ncube & Stewart (n1) 34 and Letuka et al (n9) 130ff.

105 See Mokobi & Kidd in Ncube & Stewart (n1) 26 and Letuka et al (n9) 115ff. Dengu-Zvogbo et al (n11) 196-7, however, note that, in Zimbabwe, authorities have a relaxed approach to the recognition of customary marriages.

106 Dow & Kidd (n60) 74-6 note, however, that in practice the surviving partner usually inherits.

107 Themba et al in Ncube & Stewart (n1) 113.

108 Themba et al in Ncube & Stewart (n1) 114.

109 Masanya & Chuulu in Ncube & Stewart (n1) 71.

110 Bbuku-Chuulu et al *Inheritance in Zambia, law and practice* 242.

111 Dengu-Zvogbo et al (n11) 59-61 and Bbuku-Chuulu et al (n110) 244.

widow's claim is more secure when a pension, life insurance policy or state welfare benefit is involved. Because payment is administered by corporations and state agencies, the proceeds fall outside the deceased estate and thus the competence of the family council.[112]

4.2.17 New trends in customary law that comply with the Bill of Rights should obviously be incorporated in any law reform. Hence, we can readily endorse practices favouring inheritance by a surviving spouse and children. Not only are these practices gender-neutral but they also rest on a basis of current social acceptance. The lawgiver cannot hope, however, to solve all the problems experienced by widows, for any formal legal process has a limited reach. In particular, the law cannot guarantee the successful implementation of an individual's right to inherit. At best, the opportunities for exercising such rights can be improved by changing the system of estate administration.[113]

4.3 The implications of the Bill of Rights

4.3.1 Section 9(3) of the Constitution prohibits unfair discrimination on grounds of gender, sex or age. It could therefore be argued that, in so far as customary law prescribes succession by males, whether the oldest or youngest, it is invalid. By implication, descendants of whatever age or gender should be entitled to succeed. A further prohibition in s 9 against discrimination on grounds of birth also suggests the invalidity of any customary rules barring the equal treatment of legitimate and illegitimate children.

4.3.2 An allegation of discrimination, however, entails a complex inquiry.[114] When a law draws a distinction on any of the grounds listed in s 9(3), a *prima facie* case of discrimination (as opposed to mere differentiation) is established, and its unfairness is

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112 Aphane et al in Ncube & Stewart (n1) 30.

113 Which is the subject of a current Law Commission Project.

114 See, for example, *Harksen v Lane NO and others* 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) para 53 and *Walker v Stadsraad van Pretoria* 1997 (4) SA 189 (T); 1997 (8) BCLR 416 (T).

presumed.[115] The leading decision on the customary law of succession, however, held that discrimination against women was fair. In *Mthembu v Letsela and another*,[116] an action was brought by a woman who objected to the fact that the only person qualified to inherit in the circumstances of the case was the deceased's father.[117] Her argument was rejected. Le Roux J found that, while the estate devolved upon a male heir, customary law required him to support the widow and dependants. Because customary law gives women rights to maintenance, the Court decided that it does not prejudice them.[118]

4.3.3 Since this decision was handed down, the Promotion of Equality and Prevention of Unfair Discrimination Act was passed.[119] Section 14(2) lays down criteria for judging whether discrimination is fair or unfair. Included in the list is the context in which a law operates, the extent of the discrimination, whether it served (and achieved) a legitimate purpose and whether there were less restrictive means for achieving that purpose. Even under the Promotion of Equality Act, the presumption that customary law is unfair could be rebutted by questioning the effect of the law on the complainant in the relevant social context - which is broadly the approach adopted in *Mthembu's* case.

4.3.4 None the less, *Mthembu's* ruling on the constitutionality of customary law was highly controversial; and the appeal, based as it was on illegitimacy rather than gender, has not taken the matter much further. It is true that in theory, customary law does not leave widows destitute, but we know that in reality, they frequently suffer neglect and lack of support.[120] The law is not achieving its objectives, in part because the social basis for the official version has changed and in part because widows' rights have not been properly developed.

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115 Under s 9(5). This presumption is reiterated in s 13(2) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

116 1997 (2) SA 936 (T).

117 The property in question - a house in an urban area - was subject to customary rules of succession according to s 23 of the Black Administration Act 38 of 1927.

118 *Mthembu's* case supra at 945-6.

119 4 of 2000.

120 See Masanya & Chuulu in Ncube & Stewart (n1) 72.

4.3.5 In the first place, a widow's right to support is regarded as conditional upon her residing at her late husband's homestead. Not only does this rule assume the continued practice of levirate unions but also a particular type of residential pattern (isolated, self-sufficient homesteads) and a particular type of estate (land and livestock). None of these assumptions is borne out by modern social conditions. In South Africa's overcrowded cities, it may be physically impossible for a widow to remain living with the heir,[121] and, of course, when cash is the main asset in an estate, it can be transmitted to the widow anywhere in the country, thus removing the need for her to remain at the deceased's homestead.

4.3.6 In the second place, the legal implications of widows' interests in an estate have not been fully explored. The courts have been careful to point out that the heir, although owner of the estate, must consult the widow before disposing of assets, but we have little indication of the standards of management required or of the widow's rights if the heir failed to consult her.[122] Even more important is the understanding, implicit in *Mthembu's* case, that, a *personal* right to support renders customary law constitutionally acceptable. Personal rights of this nature are effective only if the holder can preserve a good working relationship with the duty-bearer. Unfortunately, circumstances do not favour the widow's relationship with the heir and her deceased husband's family. Widows are all too often kept on at the deceased's homestead on sufferance, or they are simply evicted. They then face the prospect of having to rear their children alone.

4.3.7 In modern, individualistic societies, a person's material security is more effectively guaranteed by *real* rights, namely, rights that the holder can assert against the world. If we bear in mind that traditional African social structures are changing, then there is every likelihood that the customary-law right to maintenance may no longer work to the benefit of women. It would follow that, even though customary law may formally comply with the Bill of Rights, it is not achieving its social purpose – which is

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121 Not to mention the fact that levirate unions are now uncommon: Mokobi & Kidd in Ncube & Stewart (n1) 24.

122 The law is more fully developed in situations where the heir is too young to assume responsibility for the estate and management is vested in a senior male kinsman. See below para 4.10.1.

to provide a material basis of support for the deceased's surviving spouse and dependants. If this is the case, then these individuals should be given real rights to inherit from deceased estates.

4.4 Law reforms in Africa

4.4.1 Throughout Africa, post-colonial governments have paid close attention to the customary law of succession. In all cases, their object was the same: to allow the deceased's surviving spouse and children rights of inheritance. For example, the principal concern of Malawi's Wills and Inheritance Act of 1967[123] was to reconcile the interests of customary-law heirs with those of surviving spouses and children.[124] Generally speaking, either one half of the estate or two-fifths (depending on which part of the country the deceased came from) devolves on the widow and children. The residue devolves according to customary law. Similarly, the Kenyan Law Commission's 1968 inquiry into the law of succession sought to give surviving spouses and male and female children (whether legitimate or illegitimate) shares of deceased estates, not mere rights to maintenance.[125] In 1972, the Commission's recommendations were translated into the Law of Succession Act.[126]

4.4.2 The more detailed enactments that emanated from Ghana, Zimbabwe and Zambia present especially useful models for South Africa. In Ghana, an Intestate Succession Law was passed in 1985.[127] This Act provides that a surviving spouse and children inherit the house and household chattels (which are defined broadly to mean all objects in regular use in the household, including agricultural equipment, motor vehicles and household livestock).[128] The residue of the estate then passes to the

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123 No 25.
124 Roberts (1968) 12 *JAL* 82ff.
125 See Ollennu (1969) 5 *East African LJ* 101-2.
126 Which came into force on 1 July 1981 and is now Cap 160 of the 1981 Consolidation. It should be noted that, under the Statute Law (Miscellaneous Amendments) (No 2) Act 1990, most of the Act was disapplied to Muslims. See Cotran (1996) 40 *JAL* 194 for the legislative history.
127 No 111. For the history and provisions of this enactment, see Woodman (1985) 29 *JAL* 118ff.
128 Sections 3 and 4.

spouse, children, parents and other customary heirs in specified fractions.[129] If the deceased is survived by a spouse but no children, the spouse is entitled to half of the residue, the remaining half being shared by parents and other customary-law heirs.[130] In order to prevent fragmentation and to ensure that beneficiaries receive an economically viable portion of the estate, small estates devolve upon the surviving spouse and children to the exclusion of other relatives.

4.4.3 In Zambia, too, the Intestate Succession Act of 1989[131] enacted a thorough-going reform of customary law. The Act applies to persons who, at the time of death, were domiciled Zambians subject to customary law.[132] Section 5 sets out a detailed scheme of distribution. It provides that 20 per cent of the estate goes to the surviving spouse,[133] 50 per cent to the children in such proportions as correspond to each child's age and/or educational needs, 20 per cent to the deceased's parents and 10 per cent to his or her dependants.[134] A 'priority' dependant whose portion under s 5 would be too small may apply to a court for reasonable maintenance. Excluded from the Act are 'chieftainship property' and land that had been acquired or held under customary law.[135]

4.4.4 Notwithstanding the distribution scheme provided in s 5, a surviving spouse or children or both are entitled to equal shares in the house[136] and personal chattels of the deceased.[137] In practice, these two categories of property normally constitute the entire

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129 Thus, according to s 5, the spouse inherits three-sixteenths, the children, nine-sixteenths, surviving parents one-eighth and other customary-law heirs one-eighth.

130 Section 6. Sections 7 and 8 deal with situations where the deceased is not survived by a spouse or by a spouse and children, respectively.

131 No 5.

132 Section 2(1).

133 If more than one widow survives, then they share in proportions corresponding to the duration of their marriages and their contributions to the estate.

134 'Dependants' are defined in s 3 of the Act to mean any person who was maintained by and living with the deceased or was a minor incapable of supporting himself and whose education was being provided by the deceased.

135 Section 2(2). See Donzwa et al in Ncube & Stewart (n1) 92-3.

136 Section 9.

137 Section 8. Personal chattels are defined in s 3 to include all articles of household use, simple agricultural equipment, motor vehicles and consumables. They do not include property used for business purposes, money and securities.

fortune of the average Zambian.[138] (It is noticeable, however, that the Act speaks only of houses, which suggests that land must be excluded.)[139] The surviving spouse and children or, where none survives, the deceased's parents, are sole beneficiaries of small estates (valued at K30,000).[140]

4.4.5 In Zimbabwe, an Administration of Estates Amendment Act was passed in 1997.[141] The title of this Act belies its purpose, which was to introduce a completely new code of intestate succession, together with a flexible scheme of estate administration,[142] applicable to anyone subject to customary law at the time of death.[143] The provisions of the Act reveal the strong influence of WLSA research.

4.4.6 Under the new law, when a death is reported, the Master is obliged to summon the deceased's family in order to appoint an 'executor'.[144] This individual then becomes responsible, in consultation with the family, for drawing up a plan for distributing the estate, selling property and maintaining beneficiaries. Once the Master has approved the plan, the estate may be distributed. At the Master's discretion, small estates (those under $60,000 in value) may be exempted from all or any of the provisions of the Act.[145]

4.4.7 When the executor and the Master draw up the distribution plan, they are obliged to take account of the following rules. If the deceased was male and survived by two

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138 Himonga (n102) 145-6. Widows, of course, retain the house only if they do not remarry, whereas widowers are not subject to the same restriction: Bbuku-Chuulu et al (n110) 152.

139 In spite of the fact that, in rural areas in particular, land is a vital asset in any estate: Bbuku-Chuulu et al (n110) 83-7.

140 Section 11.

141 6 of 1997. See Coldham (1998) 42 *JAL* 129 for commentary and (1994) 38 *JAL* 67 for the preceding White Paper. Prior to the reforms of 1997, all Africans, whether married by customary or civil/Christian rites, were subject to the customary law of succession unless they chose to execute a will.

142 Thus the Amendment Act inserted a new section 68 into the Administration of Estates Act Cap 6:01.

143 Section 68A(1) of the amended Administration of Estates Act. Section 68G lays down a rebuttable presumption that customary law applies to persons who married under that system and that common law applies to persons married by civil or Christian rites.

144 Section 68B(3). Because of its specifically common-law associations, the term 'executor' was possibly an unfortunate choice. In any event, the deceased's customary-law heir is eligible for appointment.

145 Section 68H.

or more wives and one or more children, one-third of the estate goes to the wives and two-thirds to the child(ren).[146] If the deceased was survived by one spouse and one or more children, the spouse is given ownership in or a usufruct over the house and household goods and a share in the residue (which is determined by the Deceased Estates Succession Act).[147] Although nothing is said on this issue, children presumably inherit in accordance with the same Act, which means that the estate would be divided between the spouse and child(ren) in equal shares. Where the deceased was survived by children but no spouse, the children inherit in equal shares.[148]

4.4.8 If the deceased was survived by a spouse but no children, the spouse inherits ownership or a usufruct in the house and household goods together with half the residue. The other half goes to surviving parents and siblings in equal shares.[149] If the deceased left neither spouse nor children, the estate devolves on parents and siblings in equal shares.[150] Subject to the above principles, the net estate should be applied to meet the basic needs of beneficiaries who have no other means of support.[151] Customary law then applies to determine devolution of any residue.[152]

4.4.9 A less satisfactory aspect of the new law is its attempt to cater for the practice of 'dual' marriages, ie, where a deceased contracted two different types of marriage without formally terminating the first. If the deceased had married first under customary law and then under the Marriage Act, the new law deems both unions valid.[153] As a result, the estate devolves according to the rules set out above and the spouses and children of both marriages are treated in the same way. By contrast, if the deceased had married first under the Marriage Act and then contracted a customary-law marriage with another person, the customary union is deemed invalid. From this somewhat arbitrary provision, it follows that the surviving spouse and children of the second union

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146 Section 68F(2)(*b*).
147 Cap 6:02. See s 68F(2)(*d*).
148 Section 68F(2)(*h*).
149 Section 68F(2)(*g*).
150 Section 68F(2)(*f*).
151 Section 68F(2)(*i*).
152 Section 68F(2)(*j*).
153 This follows from the deeming provision in s 68(3) of the Act.

have no more than a right to maintenance from the deceased estate.[154]

4.4.10 The above laws contain provisions that were specially tailored to the circumstances of Africa. Certain of these provisions could therefore be profitably considered for any South African law reform project. First, in order to avoid uneconomic fragmentation, small estates are exempted from the standard method of distributing fractions of the estate. The law of succession cannot hope to alleviate poverty, because the poor, by definition, have little or no property to transmit.[155] None the less, the law can (and should) attempt a fair distribution. Hence, if a surviving family is likely to inherit enough only for subsistence, the estate should not be dissipated amongst more remote kin. Secondly, widows and children are given absolute rights to the family house and its contents (which are generously defined). In this manner, the surviving family is guaranteed what are probably the most important means for sustaining its material welfare.

4.5 Reform of the order of succession

4.5.1 In an earlier project, the Law Commission established certain principles to guide its work on reform of the law of succession. First, because this branch of the law deals with domestic issues, the principles used to identify a deceased's heirs should be kept as simple and as clear as possible. Secondly, the new regime should seek to protect only the most common relationships. In other words, the target group of beneficiaries should be persons falling into whatever constitutes the most commonly accepted family unit.[156]

4.5.2 For many years in South Africa, it has been apparent that customary law affords inadequate protection to the most important family unit: widows and minor children.[157]

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154 Under the Deceased Persons Family Maintenance Act Cap 6:03. This effect was achieved via s 9 of the Administration of Estates Amendment Act, which amended the definition of 'dependant'.

155 Dengu-Zvogbo et al (n11) 278.

156 Van Warmelo (1959) *THRHR* 95, 99 and 105.

157 See Horrell *The Rights of African Women* 13, Simons 1960 *Acta Juridica* 329-33 and *African Women* chs 24 and 25 and Watney (1992) 25 *CILSA* 381.

(Because widows usually have to shoulder the burden of child maintenance, children are indirectly prejudiced by any hardship experienced by widows.) While the living version of customary law may allow widows to take control of their husbands' estates, according to the official version they acquire no more than a right to maintenance. When the head of a family dies, his wife and daughters, who have probably been active in building up the family estate, find that they are at the mercy of the heir. This person might be a comparative stranger. He can dispose of estate assets for his own purposes, paying only lip service to the vague duty to consult the widow. There have been many complaints that heirs - usually aided and abetted by the deceased's family - abuse their position of trust and neglect to support surviving dependants. Widows have to tolerate mistreatment because if they leave the deceased's homestead, they lose any right to support.

4.5.3 The time has come to remove elements of age and gender discrimination from the law and to provide the deceased's immediate family with more secure rights. Previously, freedom of testation allowed lawgivers to side-step proposals of this nature. Because the law allowed everyone to make a will, the prudent husband or father had the means for avoiding any undesireable rules in the customary law of intestacy. This, however, is no real solution. Only the literate and educated make wills.[158] In sample surveys conducted by WLSA, for instance, it was evident that very few people knew anything about the formalities for drawing up wills.[159] Perhaps more significant was a clear correlation between affluence and testacy: only those who have large estates die testate.[160]

4.5.4 Moreover, even if a man does execute a will, a study conducted in Zimbabwe showed that he was most likely to leave his estate to his oldest son.[161] An argument

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158 Letuka et al (n9) 64 note that while more people are making wills, the number of testators is still negligible. See, too, Himonga (n102) 151.

159 For Zambia, see Himonga (n102) 151 and for Zimbabwe see Donzwa et al in Ncube & Stewart (n1) 87.

160 SA Law Commission *Law of Succession: Intestate Succession* Working Paper 2 para 1.4.

161 By contrast, whites usually leave their estates to their spouses: Dengu-Zvogbo et al (n11) 47. In the exceptional cases where husbands did bequeath property to their widows, the families were quite likely to ignore the bequests. See Musanya

that such wills could be declared invalid on the constitutional ground of discrimination against female legatees is most unlikely to succeed. While the instrument may well contravene the principle of gender equality, potential beneficiaries cannot contest a testator's freedom of testation, for they have no fundamental *right*. Theirs is a legally unenforceable hope of inheriting (*spes successionis*).[162]

4.5.5 A word is also necessary on estate administration. All the research in southern Africa indicates that the system of administration is every bit as important as the rules of succession. In customary law, the administration of an estate is controlled by the family council, a body that is run by senior males.[163] Under the common law, where the process is supervised by the Master, a better assurance is given of impartiality and thus protection against negligent administration and property-grabbing kinsmen. Given the fact that in South Africa, this type of professional service is both geographically remote from most people in the country and, relative to their income, far too expensive,[164] urgent attention needs to be paid to revising the system.

4.6 Amendment to the Intestate Succession Act

4.6.1 The Intestate Succession Act (81 of 1987) provides a convenient solution for most of the problems in customary law. This Act not only complies with the Bill of Rights[165] but also secures the material welfare of surviving spouses and children. Moreover, once the Act is applied to all estates, regardless whether a deceased lived according to customary or common law, a single system of succession will be established in South Africa bringing us closer to the ideal of legal unity.

4.6.2 It is therefore proposed that s 1(4)(*b*) of the Intestate Succession Act be repealed. This section currently provides that the Act is not applicable to estates that

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& Chuulu in Ncube & Stewart (n1) 69 and Bbuku-Chuulu et al (n110) 243.

162 De Waal (n12) para 3G11.

163 The position of women depends on their age and status in the family: Themba et al in Ncube & Stewart (n1) 111.

164 For this reason, WLSA recommended leaving small estates to be administered by family councils and large estates to be administered by state officials: Dengu-Zvogbo et al (n11) 286-7.

165 De Waal (n12) para 3G14, for instance, notes out that the Intestate Succession Act 81 of 1987 does not offend the principle of equal treatment.

are subject to customary law. Thereafter, s 1(1) will operate to determine the order of succession in cases of total or partial intestacy. Under subsection (*a*) of s 1(1), if a person is survived by a spouse but no descendants, the spouse inherits the entire intestate portion of the estate. Under subsection (*b*), if the deceased is survived by a descendant (or descendants) but no spouse, the descendant (or descendants) inherit the whole estate. Under subsection (*c*), where the deceased is survived by both a spouse and descendant, the spouse inherits a 'child's share' of the estate or R125,000,[166] whichever is the greater, and the descendant inherits the residue.

4.6.3 Subsections (*a*)-(*c*) of s 1(1) constitute the most marked divergence from customary law and, at the same time, accomplish the major purpose for changing that law. By contrast, subsections (*d*)-(*f*) of the Intestate Succession Act seek to protect more remote kin, such as parents and siblings. It can probably be assumed that, because these persons were less likely to have been dependent on the deceased, there is no urgent need to protect them. Even so, customary law may exclude women from the order of succession, and so it cannot continue to regulate their claims. In consequence, the following provisions should be made generally applicable. Under subsection (*d*) of s 1(1), if the deceased has no surviving spouse or descendants, but does have parents, then the parents inherit equal shares of the estate. Under subsection (*e*), if the deceased is survived by one parent, the survivor inherits half of the estate and descendants of the other parent (ie, siblings of the deceased) inherit the remaining half.

4.6.4 Section s 1(2) of the Act is the next provision that should be made generally applicable. By providing that illegitimacy does not affect the capacity of one blood relation to inherit the intestate estate of another blood relation, this section will bring customary law into line with the constitutional principle of non-discrimination on the ground of birth.

4.6.5 Finally, s 1(4)(*e*)(i) of the Act, which provides that an adoptive child is deemed

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166 A sum that may be altered from time to time by the Minister.

to be a descendant of his adoptive parents, should override any customary law to the contrary. Under customary law, adoption was occasionally resorted to in order to perpetuate a bloodline. The head of a family would place a boy (normally the offspring of a kinsman) in a house that had no suitable heir.[167] Girls, too, might be taken into a family, but the purpose and effect was not the same as adoption, since females did not affect rights of succession.[168] Because the Intestate Succession Act prescribes uniform consequences for the adoption of both boys and girls, it is in line with the principle of equal treatment, and should therefore be made generally applicable.

4.7 Exclusion from the Act: traditional leaders

4.7.1 Under the traditional system of government, offices of political leadership were hereditary in accordance with the customary rules of intestate succession.[169] Because succession to office involved sensitive ritual and political interests, however, the death of a ruler often gave rise to disputes, as a result of which the rules of succession might be manipulated or even ignored.[170] None the less, the guiding principle of primogeniture in the male line remained constant. With a few exceptions, women could not hold political office.[171] At most they could act as regents if no heir was immediately available or if the heir was underage.[172]

4.7.2 South Africa's new constitutional democracy conflicts with the traditional idea of succession to office in two respects: it prohibits discrimination against women and it requires political positions to be open to all on a basis of free elections.[173] This Paper, however, is not the place for debating the issues arising from these conflicts. Because

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167 Duncan *Sotho Laws and Customs* 8 and Hammond-Tooke *Bhaca Society* 154. Cf Van Tromp *Xhosa Law of Persons* 147. In polygynous families, a son might be transferred from one house to another to provide an heir: *Sibozo v Notshokovu* 1 NAC 198 (1908).

168 Hence adoption of a girl did not require the same formalities. See *Mokoatle v Plaki & another* 1951 NAC 283 (S).

169 See Sansom in Hammond-Tooke *The Bantu-speaking Peoples of Southern Africa* 257, Schapera *Government and Politics in Tribal Societies* 50ff, Myburgh & Prinsloo *Indigenous Public Law in KwaNdebele* 5-8 and Prinsloo (n88) 113-14.

170 See Gluckman *Politics, Law and Ritual in Tribal Society* 138ff.

171 See Krige & Krige *Realm of a Rain Queen* 177 and 180 and Motshabi & Volks 1991 *AJ* 105 fn4.

172 See, for example, Ashton *The Basuto* 197-8.

173 Sections 9 and 19 of the Constitution.

the system of government is at stake, another forum must be found. What is even more to the point is the inappropriateness of extending measures aimed at remedying the economic position of widows and children to political offices. Because the Intestate Succession Act deals with matters of private law, it should clearly not apply to succession to positions of traditional leadership. Accordingly, express provision should be made that any proposed reforms are not applicable to questions of succession to traditional leadership.

4.8 Implications of the Act

4.8.1 Repeal of customary laws

4.8.1.1 Once spouses, children and other relations acquire a right to inherit under the Intestate Succession Act, then the customary heir's duty to continue supporting them should, in all fairness, be abolished. For this purpose, a specific act of repeal is required, because it will not be clear whether the terms of the Intestate Succession Act repeal customary law by implication.

4.8.1.2 The various sections of the Natal and KwaZulu Codes, which currently apply customary law or the Succession Act (13 of 1934),[174] must also be repealed to ensure uniform operation of the reforms throughout South Africa.

4.8.2 Estate debts

4.8.2.1 Because succession in customary law is onerous and universal, the heir inherits not only the deceased's assets but also his obligations, both past and future. In consequence, the heir is liable to pay the deceased's debts, irrespective of the amount of property actually in the estate.[175] The heir has no simple method of calculating whether the estate is solvent. Claims for outstanding debts are usually lodged at the ceremony for laying the deceased's spirit to rest, but customary law has no equivalent

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174 Where a deceased had married by civil or Christian rites or had had no male heir, the Succession Act applies: ss 79(3) and 81(5) of Act 16 of 1985 and Proc R151 of 1987.

175 What was called a *hereditas damnatio* in Roman law. See *Maguga v Scotch* 1931 NAC (N&T) 54, *Mekoa v Masemola* 1939 NAC (N&T) 61 and *Letlotla v Bolofo* 1947 NAC (C&O) 16.

of the common-law winding-up procedure, whereby the assets and debts in an estate can be fixed at a specific time.[176] It is of course possible that the value of the estate may increase, as income from lobola and the earnings of family members continues to accrue, but it is also possible that the value of the estate may decrease, as old debts come to light and new debts are incurred.

4.8.2.2 Customary law gave no indication whether an heir, confronted with more liabilities than assets, could refuse to accept an estate. On the contrary, he would probably be expected to pay the debts out of his own pocket.[177] The courts were dubious of this principle. According to one decision, onerous succession was contrary to natural justice,[178] and there has been a clear tendency to limit its scope. Thus, the courts held that, for common-law debts at least, an heir's liability was restricted to the value of the assets in the estate,[179] and the Natal and KwaZulu Codes extended this rule to provide that an heir was generally liable for estate debts only to the extent of the assets to which he succeeded.[180]

4.8.2.3 Once the material needs of the deceased's surviving family are secured by a right to inherit from the estate, then equity would suggest that the customary-law heir's responsibilities, in particular any liability for the deceased's debts, should cease. General application of the Intestate Succession Act, however, will not necessarily have this effect. Hence, specific provision must be made that heirs under the Act do not succeed to any customary-law liabilities of the deceased.

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176 Letuka et al (n9) 71. The difficulty of determining the value of an estate is exacerbated by the absence of any rule of extinctive prescription in customary law: *Lequoa v Sipamla* 1944 NAC (C&O) 85, *Mafuleka v Dinga* 1945 NAC (N&T) 54 and s 113(2) of the Natal and KwaZulu Codes. Cf Labuschagne (1987) 50 *THRHR* 87ff.

177 See Letuka et al (n9) 70.

178 *Santyisi v Msinda* 1935 NAC (C&O) 14. Cf *Maguga v Scotch* 1931 NAC (N&T) 54.

179 *Ngqandulwana v Gomba* 4 NAC 132 (1922), *Santyisi's case* supra and *Nompenxela v Manqomntu* 1952 NAC 142 (S).

180 Section 81(8). *Ngcobo* 1946 NAC (N&T) 14, however, held that, because this provision overrides customary law, it must be strictly interpreted. Hence, the plaintiff creditor need not establish that the estate assets are sufficient to meet his claim. If the heir wishes to invoke s 81(8), he must show that there is not enough property in the estate. See *Twala* 1956 NAC 137 (NE) at 139 and *Zungu v Mlungwana* 1966 BAC 2 (NE).

4.8.3 Succession to women

4.8.3.1 In a patriarchal society, men control property and hold positions of authority. The death of a senior male, therefore, was always a matter of legal significance. The death of a woman, on the other hand, was less important, partly because women were unlikely to have much property.[181] For this reason, there were few clear-cut rules in customary law governing succession to women.[182]

4.8.3.2 None the less, customary law did provide some rules for distributing a deceased woman's assets, and these rules differed from those applicable to the estates of deceased men. The information is fragmentary, but it seems that, if a woman died leaving children, her children would inherit. If she had had no children, her property would usually go to her husband, failing whom, her father, brothers and sisters.[183]

4.8.3.3 Although succession to women may formerly have been unimportant, today it is likely to be a serious issue. To a greater or lesser degree, all women actively participate in the market economy, and, when they die, clear rules are needed to determine who will take over their property. In the circumstances, it seems inappropriate to maintain different systems of succession for men and women.

4.8.3.4 Once the Intestate Succession Act is made generally applicable, any gender-specific rules of customary law to the contrary will by implication be repealed, for the Act

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181 Dengu-Zvogbo et al (n11) 140. Thus Bbuku-Chuulu et al (n110) 242 note that men do not expect to inherit from women.

182 WLSA research confirms that female succession is still treated as inconsequential. Married women, for instance, do not make wills on the assumption that, as wards of their fathers or husbands, they have no control over property. See Donzwa et al in Ncube & Stewart (n1) 87 and Dow & Kidd (n60) 62.

183 Reference may be made to the following sources: Watney (n88) 301, Schapera *A Handbook of Tswana Law and Custom* 236, Ashton (n172) 182, Poulter *Family Law and Litigation in Basotho Society* 226-7, Mönnig *The Pedi* 338, Van Warmelo & Phophi *Venda Law* 975ff and Rubin (1965) 9 *JAL* 105-6.

applies without reference to the gender of the deceased.

4.9 Amendments to the Act

4.9.1 Definition of a 'surviving spouse'

4.9.1.1 While general application of most of the provisions of the Intestate Succession Act can be accepted, it must be remembered that the Act was drafted with a view to providing solutions for problems generated by the common law. Hence, certain amendments to the Act are required to cater for the needs of persons subject to customary law.

4.9.1.2 The first amendment concerns the definition of a surviving spouse. To inherit under the Act, claimants must establish a valid marriage. If this requirement were rigorously applied, many deserving partners of customary marriages could be excluded. Marriage under this system is not determined by a single event, so marital status tends to remain ambiguous for what may be a lengthy period of time. The state's attempt to solve this problem by requiring registration of customary marriages has provided no answer, for in practice very few couples have their unions registered.

4.9.1.3 When the Recognition of Customary Marriages Act comes into force, the situation will improve, because the Act provides that customary marriages which do not comply with the statutory formality of registration will none the less be deemed valid.[184] The Act provides, in addition, that all marriages concluded before it comes into effect are fully recognized.[185] Because customary marriages are loosely defined in the Act to mean unions negotiated and celebrated in accordance with customary law,[186] it will be possible to lead various different forms of evidence to establish the existence of a marriage.

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184 Section 4(9) of Act 120 of 1998. It follows that parties would be entitled to adduce evidence other than a registration certificate to prove that they had been validly married.

185 Section s 2(1) of the Act. Section 4(3)(*a*) provides that, if an existing customary marriage is not already registered, spouses must have it registered within 12 months after the commencement of the Act. Failure to comply with this provision, however, will not affect the validity of the union.

186 Section 3(1)(*b*) of the Act.

4.9.1.4 Notwithstanding these provisions, the probability exists that many partners may not qualify as 'spouses' under the Intestate Succession Act. To accommodate these individuals, therefore, it is recommended that the term 'surviving spouse' be redefined to include partners of informal unions. If this proposal is accepted, then criteria for constituting such a union will have to be specified, a task that is currently being pursued by the Law Commission in its Project on *Domestic Partnerships*.[187]

4.9.2 Polygynous marriages

4.9.2.1 The second amendment concerns polygynous marriages, which the Recognition of Customary Marriages Act explicitly recognizes as valid.[188] In Zimbabwe, the solution to this problem was to allow all wives to share equally in the estate, while in Zambia the wives' claims were ranked in accordance with the duration of their marriages and their contributions to the marital estate. The former appears to be the better solution, since the Zambian approach requires an unnecessarily intricate calculation of each inheritance (and may be unworkable where small estates are concerned).

4.9.3 Inheritance of the deceased's house and its contents

4.9.3.1 The third amendment would require guaranteeing surviving partners certain assets in the estate. The Intestate Succession Act is predicated upon marriage in community of property, whereby a surviving spouse would automatically take half of the marital estate. Customary marriages will be in community, but only when the Recognition of Customary Marriages Act comes into force. Until then, the great majority of customary marriages, as well as civil or Christian marriages contracted by Africans,[189] are, at best, out of community.

4.9.3.2 The customary proprietary regime is described as out of community 'at best', because the customary law on property relations is vague, and the lack of clarity allows

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187 Project 118.

188 See ss 2(3) and 7(8) of the Act. Unfortunately, polygyny is bound to complicate any question of succession, especially where an estate contains only a few assets: Dengu-Zvogbo et al (n11) 284.

189 Namely, all such marriages contracted before Act 3 of 1988.

men to invoke patriarchal privileges to their own advantage. Under the official version of customary law, the matrimonial property regime presupposes a polygynous household and a need to keep assets in the houses strictly separate.[190] Otherwise, anything obtained by members of a house automatically accrues to the house concerned and thus falls under the control of the head of the family.[191] It follows that a wife's acquisitions are likely to fall into her husband's estate on the understanding that whatever a woman earns after marriage is her husband's property.[192] If this is the case, a widow's right under the Intestate Succession Act to inherit a child's share of the estate would quite possibly constitute only a small fraction of what she had contributed during her marriage.

4.9.3.3 Application of s 1(1) of the Intestate Succession Act may well require a division of the estate into fractions amongst the heirs. This scheme of inheritance assumes a sizeable estate and hence a certain level of affluence. Research reveals, however, that small estates should be kept intact to ensure an efficient transmission of assets to the most deserving beneficiaries.[193] WLSA's project, for instance, discovered that people paid little attention to statutory divisions. In Lesotho, the surviving spouse simply took control of the whole estate,[194] and, in Zambia, families ignored the distribution formula laid down in the Intestate Succession Act.[195] WLSA concluded that confirming customary practice, whereby a widow takes overall control of the estate as sole

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190 So that, on the death of the family head, the heir to each house would inherit a separate estate.

191 Individuals had full ownership over things of an intimate nature, which served only their particular interests. See *Yimba* 1940 NAC (N&T) 35, *R v Njokweni* 1946 NPD 400, *Xakaxa v Mkize* 1947 NAC (N&T) 85, *Mpungose v Shandu* 1956 NAC 180 (NE) and *Dhlamini* 1967 BAC 7 (NE).

192 This view originated in the Transkei from the decision in *Sixakwe v Nonjoli* 1 NAC 11 (1896). See too *Fanekiso v Sikade* 5 NAC 178 (1925) at 180 and *Mpantsha v Ngolonkulu & another* 1952 NAC 40 (S). Similar rulings emanated from the Transvaal: *Mkwanazi* 1945 NAC (N&T) 112 at 114. The position in KwaZulu/Natal is governed by ss 13, 19, 20 and 78 of the Codes, which are discussed in *Masuku v Kunene* 1940 NAC (N&T) 79.

193 South African Law Commission *Law of Succession: Intestate Succession* Report para 3.1.

194 Letuka et al (n9) 184.

195 And experience here shows that it is difficult to divide up estates where a deceased was survived by children born outside marriage (or children born of earlier marriages): Himonga (n102) 174. See, too, Donzwa et al in Ncube & Stewart (n1) 100.

beneficiary, works better than giving her a specified fraction.[196] This solution means that, before children can inherit, they must wait until the surviving spouse dies, but deferring their rights in this way results in a smoother transition of wealth from one generation to the next.

4.9.3.4 It therefore seems sensible to exempt small estates from division amongst beneficiaries so that the entire estate devolves upon the surviving spouse. Although the Intestate Succession Act achieves a similar effect by providing that spouses are guaranteed an amount of R125,000, an amendment is still required. Under the living system of customary law, a surviving spouse is usually left in control of the house and its contents. For most families these are the most vital assets, and such property is not amenable to division. Thus, it is recommended that special provision should be made, along the lines of legislation in Ghana, Zambia and Zimbabwe, that surviving spouses be guaranteed rights to the deceased's house and household goods.

4.10 Remaining issues

4.10.1 Underage heirs

4.10.1.1 When heirs are too young to undertake the responsibilities attached to their position, an administrator must be found to deal with the estate. In the common law, this problem is solved by an executor attending to the administration under the Master's supervision.[197] In customary law, on the other hand, the solution is to place both administration of the estate and guardianship of the heir in the hands of a senior male kinsman, either an older brother (in the case of a polygynous family) or the paternal grandfather or uncle.[198] The KwaZulu and Natal Codes, however, provide that an heir's mother can act as his guardian.[199]

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196 Dengu-Zvogbo et al (n11) 280.

197 See s 43 of the Administration of Estates Act 66 of 1965.

198 Bekker (n59) 217. Although deceased may presumably appoint whomever he chooses in a will (see below para 5.5.1), the administrator/guardian must be chosen according to these principles. See *Ximba & another v Mankuntwan*e 1939 NAC (C&O) 142. Thus *Ngozwane* 1944 NAC (C&O) 88, for instance, held that the deceased's cousin could not act as guardian. Cf *Butelezi v Butelezi & another* 1964 BAC 124 (NE).

199 Section 29(1) of the Codes.

4.10.1.2 The courts have held that, because the guardian is a member of the deceased's family, he has a personal interest in the management of the estate, and so he does not act as the heir's agent or representative.[200] They have also held that his responsibility extends only as far as managing the estate. He is not obliged to maintain the heir or other dependants out of his own pocket.[201] Notwithstanding his personal involvement, the guardian's powers of management are subject to the family's interests. Thus, before disposing of major assets, he is obliged to consult the widow,[202] the deceased's senior male relatives and the heir (if the latter is old enough to understand the significance of the transaction).[203] Yet, as in other instances of customary law requiring consultation, the legal effect of a failure to consult is unclear.[204] For example, we have no indication whether contracts or transfers of property by the guardian could be declared void.

4.10.1.3 Where the guardian has clearly abused his powers, however, the courts have been prepared to give a range of remedies, such as an order for recovery of property that had been sold,[205] a declaration of rights or an order removing the guardian from office. The widow, as the 'natural protector' of her children's interests,[206] was entitled to bring an action, or, if she was unable or unwilling to act, one of the deceased's senior male relatives.[207] Any other member of the deceased's family with an interest in the proper administration of the estate could also sue,[208] including, of course, the heir himself, provided that he was duly assisted by a *curator ad litem*.[209]

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200 Third parties must enter into contracts with the guardian, not with the heir (*Ndinisa d/a v Mtuzulu* 1963 BAC 74 (S)) and they must sue the guardian personally (*Kopo v Njenje* 4 NAC 271 (1920)).

201 *Gcumisa* 1981 AC 1 (NE).

202 *Nobanjwa v Myuyu* 1948 NAC (C&O) 7.

203 *Ndlala d/a v Makinana* 1963 BAC 18 (S).

204 Unlike West Africa. See Coker *Family Property among the Yorubas* 86-7 and Obi *Modern Family Law in Southern Nigeria* esp 66-71.

205 *Zakade & another v Zakade* 1951 NAC 288 (S).

206 *Butelezi v Butelezi & another* 1964 BAC 124 (NE).

207 *Mgodla v Galela & another* 3 NAC 200 (1917).

208 *Sijila v Masumba* 1940 NAC (C&O) 42 at 47.

209 *Zakade & another v Zakade* 1951 NAC 288 (S), *Ndlala d/a v Makinana* 1963 NAC 18 (S) and see *Sijila v Masumba* 1940 NAC (C&0) 42 at 47. Under s 31(2) of the Natal and KwaZulu Codes, any person under guardianship can sue his guardian without assistance unless the court directed otherwise.

4.10.1.4 The courts have held that a family is not free to depose a guardian without a court order, nor may the family install another person of its own choice. A new guardian must be selected from the deceased's male relatives.[210]

4.10.1.5 The courts have intervened to regulate what, under customary law, was a predominantly private matter. They now control the appointment and deposition of guardians, they specify certain actions and the persons who can bring them. None the less, this area of the law needs to be revised, partly to remove elements of gender discrimination in the selection of guardians and partly to specify the guardians' duties. Because these issues principally concern the administration of deceased estates, they fall within the Law Commission's Project on that topic.

4.10.2 Levirate and sororate unions

4.10.2.1 Under customary law, marriage involved two families, not simply the individual spouses. Hence, a union did not automatically end if one of the spouses died. Instead, the concern in customary law was to ensure that the marital relationship continued with minimal disruption.

4.10.2.2 In the case of a husband dying, the solution was to retain the widow within the deceased's family under the protection of the heir.[211] Where the deceased had left no male heir or where the widow was still young and capable of bearing children, she was expected to enter a levirate union with one of his younger brothers.[212] Surprisingly perhaps, colonial governments made no attempt to outlaw this institution,[213] but they did

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210 *Mocumi v Mocumi & another* 1944 NAC (C&0) 107 at 110.

211 In some cases, as with the Swazi and, according to *Moima* 1936 NAC (N&T) 15 at 19, the Pedi, the widow was not allowed to remarry. If she refused to enter a levirate union, she was deemed to have repudiated the marriage, which meant that her guardian had to refund lobola. See Apahane et al in Ncube & Stewart (n1) 42.

212 All systems of customary law in southern Africa recognized this institution, with the exception of the Xhosa and Thembu, for whom any intercourse between a widow and one of her deceased husband's relatives was incestuous: Van Tromp (n167) 124. See, too, *Tshaka v Betyi* 1951 NAC 301 (S) and *Dumezweni v Kobodi* 1971 BAC 30 (S).

213 *Dube v Mnisi* 1960 NAC 66 (NE). See, too, *Dumalitshona v Mraji* 5 NAC 168 (1927), *Madyibi v Nguva* 1944 NAC (C&O) 36 at 38 and s 37(*b*) of the Natal and KwaZulu Codes.

insist that the widow act voluntarily.[214] Nevertheless, her freedom was in practice narrowly circumscribed, because, if she refused to continue performing her marital duties, the marriage would have to be dissolved and her guardian would be understandably reluctant to refund any lobola.[215] He, therefore, had everything to gain from persuading her to submit to the deceased husband's family.

4.10.2.3 If a wife died, and if she had not yet fulfilled her duty to procreate children, the husband could demand that her family provide a sister as a replacement.[216] Like levirate unions, the institution of sororal polygyny had the effect of preserving the marriage and ensuring the birth of more children. Although this arrangement would seldom have been forced onto an unwilling woman, the courts insisted that a sororal partner undertake her position voluntarily.[217] The courts were also reluctant to enforce suits for a refund of lobola, on the ground that such an action was mercenary and unfair.[218]

4.10.2.4 While we have no definitive opinion survey to go on, there can be little doubt that levirate and sororate unions are unpopular with women (and certain churches have stigmatized these unions as adulterous).[219] As it happens, all indications point to their obsolescence.[220] Levirate and sororate unions belong to a different era, when polygyny was more common and procreation the principal object of marriage. These institutions linger on, however, if only in their potential for offering mercenary widowers and guardians a pretext for claiming refund of lobola.

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214 *Nbono v Manoxoweni* (1891) 6 EDC 62 and *Lutuli* 1930 NAC (N&T) 132. And see s 56(1)(*b*) of the Natal and KwaZulu Codes.

215 Judges never fully accepted the fairness of this rule, which they said was contrary to natural justice (*Ngwekulu v Mano* 1952 NAC 3 (C)) and incompatible with the widow's majority status (*Sefolokele v Thekiso* 1951 NAC 25 (C)).

216 This institution was also not countenanced amongst the Xhosa. If a wife in one of the senior houses died childless, her husband would be obliged to contract a new marriage.

217 *Gidja v Yingwane* 1944 NAC (N&T) 4.

218 Section 66(3) of the Natal and KwaZulu Codes therefore provided that, if a woman had died childless within 12 months of her marriage, the husband could recover a maximum of half of the lobola.

219 Schapera *Married Life in an African Tribe* 285. See Ashton (n172) 83-5, Poulter (n183) 261 and Reader *Zulu Tribe in Transition* 154.

220 See Poulter (n183) 157, Schapera (n183) 168 and Roberts *Botswana I: Tswana Family Law* 33.

4.10.2.5 It is clearly established in the Recognition of Customary Marriages Act that consent of the spouses is the foundation of customary marriages.[221] Even though levirate and sororate unions fall outside the scope of the new Act - because they are not new marriages[222] - there is ample authority for prohibiting forced unions. Hence, there seems no good reason to impose additional regulation on these institutions (and the courts already have precedent for dealing with claims for lobola). What is more, once widows have a clear right to inherit from their deceased husbands' estates, one of the main inducements for entering a levirate union – continued maintenance - disappears.

5 WILLS

5.1 Freedom of testation in South African law

5.1.1 A cardinal principle of the common law of succession, one that is jealously guarded as a matter of public policy, is freedom of testation.[223] This principle rests on the idea of absolute ownership. During their lifetimes, owners are free to decide how their property should be used and disposed of, and this freedom extends to deciding who should inherit their estates when they die. In Western systems of law, freedom of testation is complemented by a belief that the best and the most natural way of transmitting property at death is by will. Since Roman times, testacy has been the norm and intestate succession the exception. Hence, the rules of intestate succession are seen as provisions by the lawgiver to discharge 'a function which was … left unperformed through the neglect or misfortune of the deceased proprietor'.[224]

5.1.2 Under the common law, because testacy is the norm, a testator is obviously free to ignore any claims by the intestate heirs. The latter have only a *spes successionis*, which is not a legally enforceable right. By contrast, under customary law, because intestate succession is the norm, there is a sense that the interests of the intestate heirs deserve some form of protection. In certain parts of Africa, the response was simply to

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221 Section 3(1)(*a*)(ii) of Act 120 of 1998.

222 Because no additional lobola has to be paid. See 56(1)(*d*) of the Natal and KwaZulu Codes.

223 *Bydawell v Chapman* 1953 (3) SA 514 (A) at 531. See further De Waal in Visser *Essays on the History of Law* 302-8 and 312-14 and Beinart 1958 *AJ* 92.

224 Maine *Ancient Law* 104.

deny the power of testation to persons who were subject to customary law.[225] Thus colonial governments in Kenya, Uganda,[226] Zambia and Malawi[227] declared that Africans were not free to make wills.

5.1.3 In South Africa, however, it has always been assumed that legislation governing the execution of wills[228] supersedes the customary law of intestate succession. This assumption was reinforced by the fact that people bound by customary law regularly made use of all the common-law institutions, especially commercial contracts and the civil or Christian form of marriage. The implications of these practices were never questioned.[229]

5.1.4 Notwithstanding South Africa's somewhat cavalier attitude towards customary law and the freedom of testation, now is not the time to reopen the issue. On the one hand, the understanding that everyone in the country may make a will is too well-ingrained to be reversed. On the other hand, freedom of testation is arguably protected by the Constitution (on the ground that it is related to the right to property)[230] and to withdraw it from a particular class of people would appear discriminatory.

5.2 Protection of the testator's dependants

5.2.1 Abuse of the freedom of testation can, of course, have disastrous implications for the material security of the surviving family. Most legal systems have therefore

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225 Courts and writers in Ghana and Nigeria were doubtful about the issue. See Morris (1970) 14 *JAL* 5, the Nigerian case, *Yunusa v Adesubokan* (reported in (1970) 14 *JAL* 56-64 and (1972) 16 *JAL* 82-8), and the Gambian case, *Saidy v Saidie* (reported in (1974) 18 *JAL* 183-98).

226 In Kenya, Africans acquired testamentary capacity only in 1972. See Ollennu (n125) 98-102.

227 Regarding the position in Zambia, see Colson (1950) 2 *J Af Admin* 24ff and the Zambian Government Law Development Commission *Report on the Law of Succession* (1982). In Malawi a general rule of testate succession was first introduced by the Wills and Inheritance Act 25 of 1967.

228 Namely, the Wills Act 7 of 1953. See *Fraenkel & another v Sechele* 1964 HCTLR 70 (reported in (1967) 11 *JAL* 51).

229 See discussion in Bennett (n56) 217-19.

230 De Waal in (n12) 3G6.

imposed restrictions on the principle, either by way of a legitimate portion[231] or by way of a right to maintenance.[232] When the Law Commission investigated freedom of testation in South African law, it decided to build upon the existing rule that children are entitled to maintenance out of the estate.[233] Hence, the Maintenance of Surviving Spouses Act,[234] which followed this inquiry, allowed surviving spouses to claim maintenance, a right that has the same order of priority as a dependent child's.[235] Because the term 'survivor' was defined to mean the spouse of a *marriage*, the Act did not immediately apply to customary unions. Once the Recognition of Customary Marriages Act comes into force, however, partners of these marriages will be automatically included.[236]

5.2.2 The main problem arising from imprudent wills - disinheritance of a surviving spouse and dependent children - has been remedied: children have a right at common law (and also customary law) to claim support from a deceased estate, and surviving spouses have a similar right under the Maintenance of Surviving Spouses Act. Our legislation restricting freedom of testation in favour of spouses belatedly followed a trend that began in Ghana[237] and was then pursued in Botswana[238] Zambia,[239] Malawi[240]and

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231 Namely, close relations were entitled to specified fractions of the estate if they had been disinherited for no good reason: Corbett et al *The Law of Succession in South Africa* 34.

232 Which in Roman-Dutch law availed minor children: *Glazer* 1963 (4) SA 694 (A) at 706-7. See Du Toit (1999) 10 *Stellenbosch LR* 232.

233 The Commission decided against the legitimate portion on the ground that it was too inflexible and would encourage litigation: *Review of the Law of Succession: the introduction of a legitimate portion or the granting of a right to maintenance to the surviving spouse* para 5.4.

234 27 of 1990.

235 Section 2(3)(*b*) of Act 27 of 1990.

236 Section 2(1) of Act 120 of 1998.

237 Section 13 of the Wills Act 1971. See Morris (1972) 16 *JAL* 65.

238 Section 6 of the Succession (Rights of the Surviving Spouse and Inheritance Family Provisions) Act 66 of 1970 [Cap 31:03].

239 The Wills and Administration of Testate Estates Act 6 of 1989.

240 The Wills and Inheritance Act 25 of 1967 provided that, if dependants of a deceased were not adequately provided for in a will, two-thirds of the estate could be used for their maintenance.

Zimbabwe.[241] Yet, because so few people make wills,[242] none of these Acts can be expected to have much relevance to the plight of customary-law widows. The underlying principle, however, should not be disturbed.

5.2.3 The only question is whether the South African law is not too narrowly conceived. In other words, should the Maintenance of Surviving Spouses Act be amended to expand the range of claimants to include persons such as the testator's parents and siblings? If these categories of kin were in fact dependent on the deceased, customary law would have no hesitation in enforcing their claims.

5.3 Property that may not be disposed of by will

5.3.1 While the social problems associated with imprudent wills have been more or less satisfactorily remedied, a legal problem remains. Freedom of testation is predicated upon individual ownership, whereas customary law assumes a general family interest in such major items of property as land and livestock.[243] Can a testator validly bequeath this type of property?

5.3.2 To this question the Black Administration Act[244] provides an answer, albeit a highly unsatisfactory answer. According to s 23(1) and (2) of the Act, respectively, neither movable house property nor land held under quitrent tenure may be devised by will. Section 23(1) provides that:

> 'All movable property belonging to a Black and allotted to him or accruing under Black law or custom to any woman with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under Black law and custom.'

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241 In 1987, the Deceased Persons Family Maintenance Act 39 of 1978 was amended to broaden the definition of 'dependant' and to protect the surviving spouse from dispossession. The considerations that are used to guide the court are specified in s 7. See Stewart in Armstrong (ed) *Women and Law in Southern Africa* 91-2.

242 See Dengu-Zvogbo et al (n11) 49 and comments by Bbuku-Chuulu et al (n110) 80.

243 The danger exists that these customary interests are so poorly understood in our law that they may not receive proper protection. Only in *Zikalala* 1930 NAC (N&T) 139, does the court seem to have been fully aware of this problem.

244 38 of 1927.

This section no longer serves any useful purpose and there are several good reasons for repealing it.

5.3.3 First, the racist terminology is clearly incompatible with South Africa's new constitutional order. Secondly, although s 23(1) speaks of 'all movable property', the main purpose was to protect the interests of house heirs in a polygynous family. Hence, 'movable property' should be interpreted to mean 'house property'. For technical reasons that hinge on the concept of house property, s 23(1) offers no protection to intestate heirs where the testator had contracted a civil or a Christian marriage. These marriages do not create 'houses', and so they fall outside the scope of the section.

5.3.4 Thirdly, s 23(1) is predicated upon the existence of polygynous marriages. Where a man takes only one wife, which nowadays is the more likely situation, it seems wrong to speak of the creation of a house and thus house property. A literal reading of s 23(1) might suggest that the prohibition on bequeathing movable house property includes property that accrues or is allotted to the wife of a monogamous marriage, but such property could just as well be regarded as 'family' property,[245] and therefore be devisable by will.

5.3.5 Fourthly, s 23(1) does nothing to alleviate the position of widows. By insisting that a significant portion of the estate must devolve under customary law, the section prevents a husband from making a will that might provide for his wife. The intestate heir in customary law is therefore protected at the expense of the widow.

5.3.6 Finally, and most important, the concept of house property is not applicable to customary marriages concluded under the Recognition of Customary Marriages Act.[246] When this enactment comes into force, all *de facto* monogamous customary marriages will be deemed to be in community of property and of profit and loss, unless an antenuptial contract provides otherwise.[247] Section 23(1) will therefore apply only to

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245 A category considered below paras 5.4.1ff.
246 120 of 1998.
247 Section 7(2).

customary marriages entered into before the Act.

5.3.7 Section 23(2) of the Black Administration Act provides that:

> 'All land in a tribal settlement held in individual tenure upon quitrent conditions by a Black shall devolve upon his death upon one male person, to be determined in accordance with tables of succession to be prescribed under sub-section (10).'

This provision dates from the second half of the nineteenth century, when colonial administrations were allowing Africans to acquire land, mainly in the former Ciskei and Transkei, under quitrent title. To prevent fragmentation of such land amongst a number of heirs on the death of the holder, succession was specially regulated by statute.[248] These provisions, which are currently contained in the Land Regulations,[249] were specially designed to approximate the customary order of intestacy. Thus, title to land held under quitrent was to be inherited in the first instance by 'the deceased's eldest son of the principal house or, if he be dead, such eldest son's senior male descendant, according to Black custom'.

5.3.8 Section 23(2) and the Land Regulations are now of dubious validity. In the first place, the Regulations are likely to fall foul of s 9 of the Constitution, which prohibits discrimination on grounds of race, age, sex or gender. In the second place, these provisions are destined to become redundant in view of the land reforms that have been underway since the early 1990s. Under the Upgrading of Land Tenure Rights Act,[250] any right, including quitrent, granted over surveyed land was automatically converted into freehold tenure. Once quitrent tenure is replaced by full ownership, the reason for s 23(2) disappears.

5.3.9 The policy on which s 23(2) was based, however - maintaining an economically viable size for agricultural units - may be worth preserving. If this policy is to be pursued, which is a question beyond the scope of this Discussion paper, then the

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248 Originally s 23 of Proc 227 of 1898 and later the Third Schedule to the Transkeian Proc 142 of 1910.

249 Annexure 24 of Proc R188 of 1969.

250 112 of 1991.

Subdivision of Agricultural Land Act,[251] which prevents testators from subdividing agricultural land amongst a number of beneficiaries, is still available on the statute book.[252]

5.3.10 In summary, both subsections (1) and (2) of s 23 of the Black Administration Act should be repealed. They provide that neither movable house property nor land held under quitrent tenure may be devised by will. These limitations on the freedom of testation no longer serve any useful purpose.

5.4 Property that may be disposed of by will

5.4.1 Subsection 23(3) of the Black Administration Act provides that 'all other property of whatsoever kind' may be devised by will. When read together with subsections (1) and (2), it is evident that this provision allows Africans to dispose of immovables and what is usually called 'family' (formerly 'kraal') property by will. It is difficult to understand why testators were given the power to dispose of these categories, when, under customary law, individuals do not have exclusive ownership in either land or family assets. For this reason, some African countries allow testamentary disposition of only 'personal' property.[253]

5.4.2 Again, there are several good reasons for repealing s 23(3). As far as family property is concerned, not only would a potential testator lack the absolute ownership associated with freedom of testation, but in addition, it is difficult to see the relevance of this category to modern social conditions. The distinction that s 23 draws between house and all other property rests on a polygynous family structure in which each wife ran an independent house that the heir could expect to inherit when the family head died. Today, monogamy is more common than polygyny, and legislation should cater for the norm rather than the exception.

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251 70 of 1970.

252 The Act was repealed, however, by Act 64 of 1998, but the latter has not yet come into force.

253 Okoro *Customary Laws of Succession in Eastern Nigeria* 226.

5.4.3 Furthermore, where both spouses are likely to have contributed jointly to building an estate, should the assets be treated as 'family' property, and thus be susceptible to disposal by a spouse's will? If s 23 is used to answer this question, then, the only alternative to family property is to deem the marital estate 'house' property, which would have to be preserved for the succession of the oldest son. Neither of these answers seems correct, which is probably because neither the house nor the family categories is relevant. In any event, both are destined to become redundant in light of the community of property regime that will be imposed on customary marriages by the Recognition of Customary Marriages Act.

5.4.4 The freedom to dispose of land by will creates particular problems in customary law. Traditionally, land was regarded as a God-given resource, like air or water, that no one person could permanently appropriate or dispose of. It is true that individuals had rights to land, but they held these rights precariously in the sense that traditional rulers had the power to allocate land and determine its use. As a result, most systems of customary law contained variations on the maxim: *ts'imo hase lefa* [land is not an inheritance].[254] If this is the case, then in principle, once the holder of an allotment dies, his or her rights should expire so that the land becomes available for redistribution by the traditional ruler. To acknowledge the heritability of land would be to treat it as private property.[255]

5.4.5 Today, however, overcrowding and scarcity of resources have made land so sought-after that families do not vacate their allotments when designated holders die. Traditional authorities have bowed to the inevitable and have allowed dependants of deceased landholders to remain in possession.[256] The problem now posed is whether this practice should be deemed customary law.

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254 Cf Hamnett *Chieftainship and Legitimacy* 77.

255 Hughes *Land Tenure, Land Rights and Land Communities on Swazi National Land in Swaziland* 97.

256 Jeppe *Bophuthatswana: land tenure and development* 32 and Marwick *The Swaz* 162, Schapera (n183) 204-5, Schapera (n91) 46, 81, 87-8, Sheddick *Land Tenure in Basutoland* 155, Duncan (n167) 92, Ashton (n172) 149 and Reader (n219) 71. Some writers, such as Mönnig (n183) 154 and Schapera (n183) 199, claim that inheritance has become an established feature of customary law.

5.4.6 Courts in South Africa have certainly condoned the practice in so far as they permit widows to remain on their deceased husbands' land.[257] (The only matter for debate was the nature of the widow's right.)[258] But the courts did not consider the more general question whether land had become a heritable commodity. The only decision on this matter comes from Botswana. Here a majority of the Appeal Court held that customary interests in land had ripened into individual and absolute rights, equivalent to common-law ownership, such as would permit alienation or inheritance.[259]

5.4.7 This radical departure from previous ideas about customary land rights prompted some searching questions in the dissenting judgment, especially the question why a particular person in the landholding family should be given the power to alienate or inherit. Under customary law, land is subject to multiple interests. Family heads and individual members of a family all have rights to use the land, while traditional authorities have concurrent powers for controlling use and allotment. It seems arbitrary to permit one of these interest-holders to bequeath or inherit the land at the expense of the others.[260] Moreover, landholding entails not only rights but also duties, some owed to family members and some to traditional authorities (such as the duties to pay taxes and levies). In these circumstances, is it legally possible to allow a landholder freedom to dispose of the land?[261]

5.4.8 Through a peculiarity of the common law, however, some of the legal difficulties of disposing of land and family property may be circumvented. The common law allows testators to dispose of things of which they are not the sole owners. Testators may

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257 *Dyasi* 1935 NAC (C&O) 1 at 9 and *Mapoloba* 2 NAC 186 (1911) and *Mnyanyekwa v Macuba* 4 NAC 139 (1922).

258 The practice could be construed as a right to inherit land or as tacit redistribution of the land by the land authority, which was the court's understanding in *Mogapi v Mokua* 1948 NAC 4 (C). See Hamnett (n254) 78ff.

259 *Kweneng Land Board v Kabelo Matlho & Pheto Motlhabane* (discussed in (1993) 37 *JAL* 193). The court was asked to decide whether, under s 10(2) of the Tribal Land Act Cap 32:02, customary interests should be conceived as land 'held by any person in his personal and private capacity'. The judgment was based only on the evidence led and was prompted by a concern to construe customary law as a living, changing system.

260 The *nemo dat quod non habet* principle is also relevant here: can the head of a household dispose of interests he does not have?

261 Even under common law, while *rights* can be freely ceded, duties cannot, at least not without the consent of the person to whom they were owed.

even bequeath property belonging to a third party, provided that when they make a will, they are aware that the property does in fact belong to someone else.[262] This type of bequest cannot, of course, create rights that the testator never had. It merely obliges the executor to acquire the property or to pay its value over to the beneficiary.[263] Similarly, testators can dispose of property that belongs to themselves and others in common.[264] In this event, it is presumed that the testators intended to bequeath only their share.[265]

5.4.9 As it now stands, s 23(3) creates a host of unintended legal difficulties and it should be repealed. Rather than allowing freedom of testation over land and family property, restrictions could have been imposed on the disposal of these two categories of property. Even so, given the possibility in common law of bequeathing another's property, any legislative regulation of the disposition of family property would be unnecessary. It can be safely assumed that, if testators bequeath such property, they intend to dispose only of their own interests.

5.4.10 Land is another matter, and here some form of regulation of freedom of testation may be required. If the land in question was held under the common-law right of ownership, there can of course be no objection to a testator's disposing of it. Statutory tenures also present no problem, since inheritance of rights is normally controlled by the statute in question.[266] Thus the question is whether testators should be free to dispose of customary-law rights in land, in view of the fact that customary tenure allows various

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262 *Receiver of Revenue v Hancke & others* 1915 AD 64 at 73, *Estate Brink* 1917 CPD 612 and *Attridge NO v Lambert* 1977 (2) SA 90 (D).

263 *Booysen v Colonial Orphan Chamber* 1880 Foord 48 and *Hancke's case* supra at 73.

264 *Estate Brink* supra and *Hancke's case* at 73.

265 If the property happened to be owned by both the testator and the legatee, the latter acquired outright ownership: *McMunn & others v Powell's Executors* (1896) 13 SC 27.

266 See, for example, the Schedule to the Communal Property Associations Act 28 of 1996. Under reg 53(1) of the Land Regulations Proc R188 of 1969, an arable or residential allotment reverts to commonage on the death of a holder, and so becomes available for reallotment. Regulation 53(5) provides that the holder of an allotment may not validly dispose of interests by will, but reg 53(2) provides that, on his death, the widow (whether married by customary or civil/Christian rites) may remain in occupation.

family members rights to use land and, at the same time, gives traditional authorities powers to control that use. Because the answer has more general implications for land tenure, however, a solution cannot be found in an inquiry devoted only to the law of succession.

5.5 Guardianship clauses

5.5.1 These clauses are directions in wills that guardianship of a testator's minor child is to go to a particular person. Such clauses create a problem analogous to bequests of land and family property, because in customary law rights to children vest in the father's family, not in the father personally. The courts modified customary law to some extent, by holding that a father was the natural guardian of his children with full parental rights,[267] but they did not disturb the principle that mothers had no rights at all.

5.5.2 From the perspective of customary law, if a father (or especially a mother) transferred guardianship by will, the clause would be invalid, for strictly speaking the testator had no right to transfer.[268] This problem is cured by the Guardianship Act,[269] which provides that both spouses have equal rights and powers over minor children. Any doubt about the mother's right of guardianship is clearly answered by the prohibition on gender discrimination in s 9 of the Constitution.

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267 Both during the subsistence of marriage (*Mokoena v Mofokeng* 1945 NAC (C&O) 89, *Kabe & another v Inganga* 1954 NAC 220 (C) and s 27(1) of the KwaZulu-Natal Codes) and on divorce (*Gumede* 1955 NAC 85 (NE) and *Mahlangu v Nhlapo* 1968 BAC 35 (C)).

268 See, too, s 72 of the Administration of Estates Act 66 of 1965.

269 Section 1(1) of Act 192 of 1993.

5.6 Variations on the order of intestate succession: disinheritance and distributions of property

5.6.1 No system of intestate succession can guarantee a fair distribution of all estates.A prospective heir may be incapable of performing the duties expected of the head of a household, or certain deserving children may need more material support than others. The common law managed these problems by allowing the execution of a will. Although customary law did not offer this option, it did allow some variation on the rules of intestate succession.

5.6.2 In the first place, an heir could be disinherited provided there was an acceptable reason, such as obvious incompetence or persistent disobedience. The head of a family was obliged to call a meeting of the family, where the question of disinheritance could be debated. The effect of the ensuing decision was to exclude the heir and to institute the person next in order of succession.[270]

5.6.3 We have no indication whether the heir had a right to answer any allegations made against him. The courts merely insisted that the decision taken at the family meeting be duly reported to a traditional authority.[271] Because this requirement ensured publicity for an important change of status, it was held to be no mere technicality.[272] Nevertheless, it is unclear whether the act of reporting gave the heir an opportunity for review or appeal. Presumably it did not, because the courts have held that disinheritance is a private power vested in the head of the family.[273] By implication, the family council's decision cannot be upset if the prescribed formalities were observed.[274]

5.6.4 An alternative procedure for disinheriting the heir was to have him summoned

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270 The family was not free to choose a replacement: the person next in order of succession must succeed. See *Sitole* 1938 NAC (N&T) 35 at 37 and see *Faro* 1950 NAC 224 (S).

271 *Nohele* 6 NAC 19 (1928) and *Mbekushe v Dumiso* 1941 NAC (C&O) 57 at 60.

272 *Mnengelwa* 1942 NAC (C&O) 2.

273 *Silimo v Vuniweyo* 1953 NAC 135 (S) at 138.

274 *Joel v Zibokwana* 4 NAC 130 (1919) and *Mnengelwa* 1942 NAC (C&O) 2.

before the court of a traditional leader, where complaints about his conduct could be investigated. The disinheritance then became an order of the court.[275] There was no right of appeal from this decision. The Codes in Natal and KwaZulu made this procedure for disinheritance mandatory in all cases, although an appeal lay from the traditional court to a district officer (whose ruling in the matter was final).[276]

5.6.5 In the second place, a man could, prior to his death, allocate property to his sons (or houses) in order to ensure a more equitable distribution of the estate.[277] Again, he was obliged to call a meeting of the family at which the distribution would be announced and the merits discussed.[278] This type of declaration was backed by a belief in the power of the dead to vindicate their wishes.[279] Even so, a deceased's instructions would not be obeyed if they were unreasonable or calculated to defeat the usual order of succession.[280] The courts were prepared to hear appeals from decisions taken by families if a disposition contravened these requirements.[281]

5.6.6 In spite of a resemblance to the privileged wills of common law, neither the disinheritance nor the distribution procedures amounted to testate succession.[282] The customary declarations were typically verbal; they were permitted only within strict parameters; they required the endorsement of the family council, and the courts held that they had to be reported to a traditional leader. By contrast, the common law allows individuals considerable freedom to dispose of their property to legatees of their choice. Testators need give no reason for their decisions and they are not accountable to their families.[283] The main limitation on the power of testation is a formal one: to preclude

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275 *Nohele* 6 NAC 19 (1928).

276 Section 81(9)(*a*).

277 See Musanya & Chuulu in Ncube & Stewart (n1) 71.

278 *Zikalala* 1930 NAC (N&T) 139 at 142 held that a written document unannounced was of no effect.

279 Schapera (n183) 230, for instance, cites the SeTswana maxim: *lentswe la moswi ga le tlolwe* [the word of a dead person is not transgressed].

280 *Ngungubele v Nomfedele* 1949 NAC 101 (S).

281 *Zikalala* 1930 NAC (N&T) 139 and *Nomatshaka & others v Mhlokonywa* 1933 NAC (C&0) 18 at 23.

282 See Poulter (n183) 309ff, Mönnig (n183) 337-8 and, generally, Kerr (n56) 143-51. Moreover, dispositions of property may be intended to take effect immediately or only after death.

283 Although the freedom of testation is curtailed by the Maintenance of Surviving Spouses Act 27 of 1990.

fraud or undue influence, the law requires a written document complying with certain prescribed formalities.

5.6.7 WLSA research revealed that, although a deceased's last wishes are generally respected, people tend to view written wills with some suspicion.[284] Indeed, the similarities and differences between wills and customary declarations create much confusion, a confusion that can have serious consequences. For instance, someone might assume that a valid will can be produced by simply reducing an oral declaration to writing,[285] or a family member (and a beneficiary under a will) might witness the will on the understanding that the act was a form of customary disposition and therefore in need of family approval. Later, that person would stand to be disqualified from taking the benefit, because the common law stipulates that witnesses may not take benefits under wills.[286] It is clearly not possible to remove the confusion between wills and customary dispositions by legislation. Such problems can be settled only by referring to the deceased's intentions and the context in which an act was performed.[287]

5.6.8 Legislative intervention may be desirable in another respect, however: whether the customary procedures should be treated as wills. Written wills are the product of literacy and professional legal services. This suggests that the less formal, customary modes of disinheritance and disposition of property should be encouraged, because they can serve the needs of poorer sections of society. Previously, various privileged wills were permitted under the common law, but they were abolished by the Wills Act.[288] The question now posed is whether provision should again be made for an informal type of testament. In Zimbabwe, for example, an amendment was made to the Wills Act

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284 Hence Letuka et al (n9) 83 say that preference is shown for oral instructions. See, too, Dow & Kidd (n60) 62 who note (p63) that a practice has developed of making such dispositions before the court of a traditional leader.

285 Donzwa et al in Ncube & Stewart (n1) 87.

286 Dengu-Zvogbo et al (n11) 244-5.

287 In a Kenyan case on this question, *Public Trustee v Wambui & others* (reported in (1978) 22 *JAL* 188), the Court said that, because the testator had intended to use an institution of the common law, the will had to be judged by that system.

288 Section 3(1) of Act 7 of 1953.

allowing recognition of oral wills provided that the estates in question were under $10,000 in value.[289]

5.6.9 If oral wills are to be revived, then the customary procedures of disinheritance and distribution will by implication be superseded. On the other hand, if the customary procedures are to be maintained, then the question arises whether they should be regulated by, for instance, giving the heir a right of hearing at the family meeting.

5.6.10 Customary law had no system of testate succession, but it did allow heirs to be disinherited and property to be allotted to particular members of a family. The family council had to approve these oral dispositions, which would normally take effect on the death of the family head. Wills under the common law are the product of literacy and professional legal services. Because the customary procedures serve the needs of poorer sections of society, the question arises whether to revive the privileged will that used to be available under Roman-Dutch law. Alternatively, should some form of regulation be imposed on the customary methods of disinheritance and distribution, by, for example, giving the heir a right of hearing before the family council or a right to appeal against its decision?

6 THE RIGHT TO DECIDE BURIAL AND FUNERAL CEREMONIES

6.1 The burial ceremony is an event of religious and social significance that seldom gives cause for legal dispute. Occasionally, however, a question arises about the entitlement to decide on the manner and place of burial. If some members of a family want to conduct the burial according to traditional African rites while others prefer a Christian ceremony, who may decide?[290]

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289 Section 12 of the Wills Act [Cap 6:06]. Dengu-Zvogbo et al (n11) 240 note that, in practice, these wills are not registered with the Master and are dealt with informally.

290 In the well-known Otieno case from Kenya, the Appeal Court finally decided for the deceased's brother as opposed to the widow. See Van Doren (1988) 36 *Am J Comp L* 329 at 342-3.

6.2 Customary law did not in fact regard burial as an occasion of great ceremony - it was usually attended to as soon as possible after death[291] - but the place of burial could be critical, since deceased persons should be united with their ancestors. As with all matters affecting succession, the heir in conjunction with the family council took the necessary decisions. By contrast, under the common law, if a deceased left no specific instructions,[292] the manner and place of burial is decided by either the executor or the intestate heir (who is usually the surviving spouse).[293]

6.3 If it is accepted that in the absence of a will, both common and customary law give the heir the right to decide burial, a conflict of laws problem arises. The identity of the heir can be fixed only when it is apparent which law governs succession to the estate, and under the existing choice of law rules, this is a complex matter. In principle, of course, the cultural orientation (and no doubt religious affiliation) of a deceased would be relevant, but as it turns out, the courts have simply ignored these problems by referring to the form of a deceased's marriage. Thus, if the deceased had been married by Christian rites,[294] it was held, on policy grounds, that the widow rather than the customary-law heir was entitled to decide burial.[295] Where the deceased was unmarried, the customary-law heir was preferred.[296]

6.4 In principle, discovering who has the right to decide burial should entail an inquiry into the law applicable to the deceased, which in turn should entail reference to his or her cultural orientation. The courts have avoided these issues by referring to the deceased's form of marriage. Although this may not be the legally correct approach,

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291 The more important ritual occurs some weeks or months later, when a deceased's spirit is laid to rest and the heir formally appointed. In the interim the widow is expected to go into mourning, a period that generally lasts from one planting season to the next: Aphane et al in Ncube & Stewart (n1) 38-9.

292 Which need not be contained in a will: *Sekeleni v Sekeleni & another* 1986 (2) SA 176 (Tk), *Mnyama v Gxalaba & another* 1990 (1) SA 650 (C) and *Mabulu v Thys & another* 1993 (4) SA 701 (SE).

293 *Mbanjwa v Mona* 1977 (4) SA 403 (Tk). See Meyerowitz *The Law and Practice of Administration of Estates and Estate Duty* para 12.1 and Corbett et al (n231) 3.

294 Even though customary law usually applies to determine succession to Africans married by civil or Christian marriage, See above para 3.2.5.

295 *Saiid v Schatz & another* 1972 (1) SA 491 (T) and *Tseola & another v Maqutu & another* 1976 (2) SA 418 (Tk).

296 *Mabulu v Thys & another* 1993 (4) SA 701 (SE).

it does provide a simple solution to what might be a complex and inconclusive inquiry. We now need to consider whether the legislature should intervene to regulate the matter.

ANNEXURE

DRAFT BILL FOR THE AMENDMENT OF THE CUSTOMARY LAW OF SUCCESSION

Definitions

1. In this Act, unless the context indicates otherwise,

'customary law' means the laws and customs traditionally observed by the indigenous African peoples of South Africa which form part of the culture of those peoples, whether or not such laws and customs are codified;

'Minister' means the Minister of Justice;

'personal belongings' mean a deceased person's articles of clothing, personal use or adornment, furnishings and other items of household equipment, simple agricultural and hunting equipment, books, motor vehicles or means of transportation; the term does not include money or security for money or articles used by the deceased for business purposes;

'traditional leader' means any person who in terms of customary law or any other law holds a position in a traditional ruling hierarchy.

Succession

2. (1) Notwithstanding any law to the contrary, a person's estate must upon that person's death devolve in accordance with that person's will or, failing a valid testamentary disposition, either wholly or in part, according to the law of intestate succession prescribed by the Intestate Succession Act, 1987 (Act No 81 of 1987).

(2) The Intestate Succession Act, 1987 (Act No 81 of 1987), applies with the changes required by the context to the intestate estate of a person who, before this Act comes into force, entered a valid customary marriage which subsisted at the time of that person's death.

(3) (a) Notwithstanding any law to the contrary, and subject to paragraph (b) below, a spouse inherits the deceased's house and personal belongings

(b) If a deceased owned more than one house, the surviving spouse may inherit only one of the houses, provided that the surviving is entitled to choose which house.

(4) This Act does not apply to issues concerning succession to the office of a traditional leader.

Amendment of the Intestate Succession Act (81 of 1987)

3. Section 1 of the Intestate Succession Act (Act No 81 of 1987) is hereby amended –

(a) by the substitution for paragraph (*a*) of subsection (1) of the following paragraph:

"(*a*) is survived

by [a] <u>one</u> spouse, but not by a descendant, such spouse shall inherit the intestate estate;

(ii) <u>by more than one spouse, but not by a descendant, such spouses shall inherit the intestate estate in equal shares</u>;"

(b) by the substitution in paragraph (c) of subsection (1) for the words preceding subparagraph (i) of the following words:

"is survived [by a spouse as well as a descendant] -

(c) by the substitution for subparagraph (i) of paragraph (c) of subsection (1) of the following subparagraph:

"<u>by a descendant and –</u>

<u>(aa) one spouse, such spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed by the Minister by notice in the *Gazette*, whichever is the greater; or</u>

(bb) more than one spouse, such spouses shall inherit a child's share of the intestate estate or so much of the intestate estate in equal shares as does not exceed the amount fixed in terms of subparagraph (aa), whichever is the greater; and" and

(cc) by the substitution for paragraph (b) of subsection (4) of the following paragraph:

"(b) 'intestate estate' includes any part of any estate which does not devolve by virtue of a will [or in respect of which section 23 of the Black Administration Act, 1927 (Act No 38 of 1927), does not apply];" and

(dd) by the substitution for subsection (6) of the following subsection:

"(6) If a descendant of a deceased, excluding a minor or mentally ill descendant, who, together with [the] a surviving spouse of the deceased, is entitled to a benefit from an intestate estate renounces his or her right to receive such a benefit, such benefit shall vest in the surviving spouse who is the parent of the said descendant."

Amendment to the Maintenance of Surviving Spouses Act (27 of 1990)

4. Section 1 of the Maintenance of Surviving Spouses Act, 1990, (27 of 1990), is amended by the addition of the following words in the definition of 'survivor' – "together with any child or other person related to the deceased who was in fact dependant upon the deceased for support prior to the deceased's death".

Repeal of laws

5. (a) The Codes of Zulu Law in KwaZulu/Natal, Act 16 of 1985 and Proclamation R151 of 1987, are repealed to the extent that they are inconsistent with this Act and the Intestate Succession Act, 1987 (Act No 81 of 1987).

(b) Section 23 of the Black Administration Act, 1927 (Act No 38 of 1927), is repealed.

(c) Any customary laws obliging an heir to maintain the dependants of a deceased person or to settle debts incurred by the deceased are repealed.

Short title and commencement

6. This Act is called the Amendment of the Customary Law of Succession Act, 2000, and will come into operation on a date to be fixed by the President by proclamation in the *Gazette*.

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