HARMONISATION OF THE COMMON LAW AND INDIGENOUS LAW
(DRAFT ISSUE PAPER ON SUCCESSION)

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 Issue Paper (which reflects information gathered up to the end of February 1998) 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 Issue 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 focused 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 30 June 1998 at the address appearing on the previous page. The researcher will endeavour to assist you with any 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 Ms P Matshelo-Busakwe. The project leader responsible for the project is Professor RT Nhlapo.

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1 THE PURPOSE AND NATURE OF RULES OF SUCCESSION

In all legal systems, rules of succession are designed to establish in advance who will take over the property and responsibilities of a deceased person.[1] The function of the law of succession is therefore to counteract the disruptive effect of death on the integrity of a family unit. In doing so the law asserts the family bloodline by prescribing which of the deceased's immediate kin qualify as potential successors to the deceased.

Rules of succession are inevitably shaped by the type of society in which they are supposed to operate. It comes as no surprise, then, to find that the various systems of customary law in this country bear the imprint of family and social structures prevalent in precolonial Africa. Customary rules of succession assumed, for instance, that families were typically `extended', both through polygynous marriages and especially through connections with ascending and descending generations in the male line.

The economy is another significant influence on the law of succession. In the predominantly subsistence economies of precolonial Africa, each family was more or less self-sufficient. Food production, whether herding or farming, was the main activity, and livestock and land were the major assets. Because all members of a family had an immediate concern with the husbandry of these assets, no one person could claim full rights and powers over them. Thus, although the head of a family was overall manager of the family estate, his powers were in practice less important than his responsibilities to care for dependants.

From the last paragraph it will be apparent that in customary law individual ownership was limited. All members of a family had an interest in the major productive assets. Full ownership could only be asserted over specifically personal property, such as wearing apparel, tools of trade or the livestock that for ritual reasons was regarded as an individual's.

When the head of a family died, rules of succession were needed to determine who would take over the powers associated his position, since someone had to take over the responsibility of managing the family estate and caring for surviving dependants. (Rights to the deceased's personal property were less significant.) Because the position as family head was socially so

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1 The words `succession' and `inheritance' are often used interchangeably, but strictly speaking they should be distinguished. `Succession' means transmission of *all* the rights, duties, powers and privileges associated with a social position, while `inheritance' means transmission of property only.

important, rules governing succession to this position were at their most elaborate. Succession to women and unmarried sons could be dealt with in a more perfunctory way.

The socio-economic order which produced the customary law described above has, of course, changed. Diverse forces associated with colonialism, apartheid and the cash economy have had a profound effect on the economy and African family structures. A major question to be posed in this Issue Paper, therefore, is whether the customary rules of succession are appropriate to modern social conditions. In other words, can these rules serve the social purposes expected of a law of succession?

Another major question arises from South Africa's new constitutional order. The promulgation of a justiciable Bill of Rights has affected all branches of the law, including succession. This Issue Paper therefore considers whether customary law now meets the standards set in our new Constitution, in particular the prohibition contained in s 9(2) on unfair discrimination on grounds of age, sex or gender.

2 SUCCESSION TO THE HEAD OF A FAMILY

Customary-law systems of succession in southern Africa are usually described as intestate, universal and patrilineal. They are `intestate' because individuals are not entitled to establish by wills how and to whom their estates devolve. They are `universal' because *all* a deceased's rights and duties are transmitted to the heir (who, as it were, `steps into the shoes of the deceased'). They are `patrilineal' because heirs are determined by their relationship to the deceased through the male line. Finally, customary systems of succession are guided by a principle of male primogeniture: a deceased's heir is his *oldest* son, failing whom, the oldest son's oldest male descendant.

If the head of a family had only one wife, the rules of succession for all systems of customary law in South Africa are more or less the same. A deceased is succeeded by his oldest son; if that son is already dead, the oldest surviving grandson succeeds. Failing any male issue in the oldest son's family, succession passes to the deceased's second son and his male descendants and so on through all the deceased's sons and their male offspring.

Customary law never discriminated against illegitimate children in the way common law did, and in fact it is often said that the concept of illegitimacy is irrelevant to customary law.[2] None the less, preference is generally shown for sons who are related to a deceased by blood. Thus, although a man might accept any child born to his wife as a member of his family, if that child had not been fathered by a kinsman, it would have only an ultimate right to succeed. It follows that legitimate sons are ranked above the illegitimate.

If a deceased has no male descendants, his father is heir. If the father is dead, the deceased's oldest brother is next in line of succession, and if he is also dead, the oldest brother's oldest son (or oldest surviving male descendant) is heir. Failing the oldest brother and his male descendants, the next brother in order of seniority and his descendants are in line.[3]

In polygynous families, these rules of succession are modified to take account of the fact that the household is divided into separate units or `houses'. According to all the systems of customary law in South Africa, each of a man's marriages establishes a new and independent house. The property in these houses is kept strictly separate, for each estate is inherited by the heir to the house.

A further consideration to determine the inheritance of house property is whether the system of polygyny is `simple' or `complex'. According to the simple system, the heir is the first-married wife's oldest son, or, if that person is already dead, his oldest son.[4] Failing any male descendants in the first house, the next in order of succession is the oldest son of the second-married wife and his male descendants, and so forth.

When homesteads are divided into two (or even three) different sections, the system of polygyny is termed `complex'. With Xhosa-speaking peoples, for instance, the homestead of a man with two wives is divided into great and right-hand sides. The oldest son of each house becomes heir to that house; if one house has no male issue, the eldest son of the other inherits both. Where the deceased had married a third wife, she would be affiliated (as a *qadi* or support)

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2 Partly because a child's legitimacy was not defined simply by its parents' marriage, but rather by payment of bridewealth.

3 Failing any male issue in the first order of male ascendants, the deceased's grandfather succeeds, failing whom, the deceased's oldest paternal uncle or his oldest male descendant. Failing the paternal uncles, in order of seniority, or any of their descendants, the estate would pass to the next order of male ascendants.

4 If he has no male descendants, the first wife's second son is heir, or, failing him, his son.

to the great house.[5] If one of the houses has no heir, it is inherited by the most senior heir of the section of the homestead to which it was attached. In other words, the heir to a *qadi* of the great house would be the eldest son of the great house. Conversely, if the great house had no heir, it would be inherited by the heir of its *qadi*.

Zulu homesteads may be divided into three sections: a great house (*indlunkulu*), a right-hand house or support (*iqadi*) and a left-hand house (*ikhohlwa*). As with the Xhosa, junior houses are affiliated to one of the senior houses, and, if there are no sons in the *iqadi* (or any of its affiliated junior houses), recourse is had to the *indlunkulu*, and vice versa. Where the *ikhohlwa* and its junior houses have no heir, this section is inherited by the heir of the *indlunkulu*.[6]

If a polygynous household produced no male descendants, the order of succession follows the same principles that apply to a monogamous marriage. Succession passes to the deceased's father, failing whom, to the deceased's brothers and their descendants in order of seniority.

This description of the order of succession is the theory. In reality, different rules may well be developing. If the extended families of earlier times have been replaced by nuclear, or other family forms, and if polygyny is no longer a norm, customary law is bound to change to reflect new social patterns. Unfortunately, we have very little published evidence of current trends in customary succession, but, from the limited material available, it seems quite clear that new trends are emerging.

The principle of primogeniture, for instance, has long been assumed to be the keystone of customary law; but in certain situations it appears that this principle is being discarded. Several studies have shown that *last born* sons generally inherit land. Economic pressures and changes in family structure account this shift towards what could be called a principle of `ultimogeniture'. Because the youngest son is the last to leave home, he is the most readily available to take over the care of his parents in their old age. His inheritance of land gives him both the means and an incentive to do so.

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

6 If there is no heir in both the *indlunkulu* and *iqadi*, the heir of the *ikhohlwa* becomes heir to both sections.

Another rule that is probably changing is the preference for only male heirs. Formerly, women could not exercise power and authority over men, so there could be no question of wives or daughters succeeding a family head.[7] Where women are family breadwinners and where they manage households on their own, however, we can expect corresponding changes in the rules of succession. Evidence in fact shows that widows often take over their husbands' lands and other assets, especially when they have young children to raise.

The Constitution now provides a legal foundation for these changes in practice. Section 9 of the Bill of Rights prohibits any discrimination on grounds of age or gender, which might suggest that the rule of male primogeniture is invalid and that descendants of whatever age or gender should be entitled to succeed.[8] A further constitutional prohibition on discrimination by birth or social origin might suggest that any prejudice against illegitimate children is also invalid.

The Law Commission would be interested to know whether the description here of rules of succession to the head of a family still holds true. Have any new rules emerged? Should the traditional rules be changed to take into account the principle of equal treatment in the Bill of Rights?

3 VARIATIONS ON THE ORDER OF SUCCESSION: DISINHERITANCE, DISTRIBUTIONS OF PROPERTY INTER VIVOS

For a wide variety of reasons it may become necessary to depart from the usual rules of intestate succession. A prospective heir may be too young or may be incapable of performing the duties expected of the head of a household; certain deserving children might need more financial support than others. In the common law provision can be made for these eventualities by will. While this option is not available in customary law, most (if not all) systems allow some variation on the strict order of succession.

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7 Section 81(5) of the Natal and KwaZulu Codes (Proc R151 of 1987 and KwaZulu Act 16 of 1985), on the other hand, provides that, if there is no male heir, any property in the estate devolves according to the rules of intestate succession applicable to a civil marriage, which would allow inheritance by the deceased's wife and/or daughter(s).

8 A recent decision in *Mthembu v Letsela & another* 1997 (2) SA 936 (T), however, found that female dependants suffer no discrimination (ie no prejudice), because, although they do not inherit property, they are entitled to maintenance out of the estate.

In the first place, an heir may be disinherited, provided an acceptable reason exists (such as obvious incompetence or persistent disobedience). The head of a family would be obliged to call a meeting of the family to announce his intention and have the matter debated.[9] The effect of the family's decision is to exclude the heir and to institute the person next in order of succession.

In the second place, a man may, prior to his death, allocate property to various sons (or houses) in order to ensure a fairer distribution of the estate when he dies. Again, a family meeting must be called at which the distribution is announced. While this type of declaration is backed by a belief in the power of a deceased's shade to vindicate his wishes, his instructions will not be obeyed if they are unreasonable or seriously upset an heir's prospects.

Neither the disinheritance nor the distribution procedure resembles testate succession. Under the common law individuals may dispose of whatever portions of their estates they like to heirs of their choice. Testators need give no reason for their decisions and they are not accountable to their families.[10] To prevent fraud and undue influence on the testator, the law merely requires compliance with certain formalities for drawing up a valid will.

Should the courts continue to enforce the disinheritance and distribution procedures as distinctively customary methods for varying the rules of intestate succession (or should only the common-law will be recognized)? Should these procedures be subject to any form of regulation?

9 A report of this meeting should then be sent to the local traditional ruler. Alternatively, the heir could be summoned before a traditional authority's court, where complaints against him may be investigated.

10 Although their freedom is now curtailed by the Maintenance of Surviving Spouses Act 27 of 1990.

4 UNDERAGE HEIRS

If an heir happens to be too young, the estate must be administered for him until he is old enough to assume full adult responsibility. In customary law, the person who acts as administrator, and at the same time as guardian of the heir, is determined according to certain well-recognized principles. In polygynous families a minor heir of any house is subject to the deceased's highest ranking major son (who is most likely to be the heir's oldest step-brother). In monogamous families or in situations where all a deceased's descendants are too young, the estate is administered by one of the deceased's brothers or by his father.

The courts have supported these rules. By implication, therefore, they do not allow an individual freedom to appoint whomever he chooses as an administrator/guardian (although, as we shall see below, he may do so by executing a will). Only in KwaZuluNatal have the customary rules been changed. Here the heir's mother may become his guardian.[11]

The administrator does not act as a mere agent for the heir. As a member of the deceased's immediate family, he has a personal interest in the estate. At the same time, however, his powers of administration are subject to the family's interests. Thus, before disposing of property, the administrator should take care to consult the widow, the deceased's close male relatives and the heir (if old enough). The legal effects of failure to consult, however, are obscure. Would a transfer of property or a contract be deemed void (or voidable) at the instance of one of the interested parties?

Customary law, in fact, has little to say about administrators who do not perform their duties. Accordingly, the courts have intervened to give a limited range of remedies. These include an order for recovery of property that has been alienated, a declaration of rights and, in the last resort, an order removing the administrator from office. These actions are available mainly to the heir (although presumably the widow too). If the heir is not capable of suing alone, a senior male relative of the deceased may act on his behalf or the court may appoint a curator ad litem.

Does the law provide the heir (and other family dependants) with sufficient protection against administrators who act negligently or fraudulently?

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11 Section 29(1) of the Codes (Proc R151 of 1987 and KwaZulu Act 16 of 1985).

5 THE WIDOW

(1) Levirate unions

Because a customary marriage involves two families, not simply the individual spouses, the union does not automatically end when a husband dies. His widow remains with the deceased's family under the protection of his heir.

When a man dies without an heir or when his wife is still young and capable of bearing more children, the widow is expected to enter a levirate union (*ngena* in Zulu/Xhosa and *kenela* in Sotho) with one of the deceased's brothers.[12] While a major purpose of this arrangement is to bear children, levirate unions also ensure a widow's continued protection within her husband's family.

Forced marriage was never considered optimal in customary law, and levirate unions were generally arranged to suit all parties. Nevertheless, widows could be subject to considerable social pressure to acquiesce. (If a woman refused to stay with her husband's family, the marriage would strictly speaking have to be dissolved, which would mean that her guardian would have to refund bridewealth.) The courts and colonial governments were prepared to be tolerant: they did not outlaw levirate unions, but they did insist that widows freely consent.[13]

Today, it seems as if levirate unions are obsolescent. They unpopular with women and certain churches have condemned them as adulterous.

Should an attempt be made to prohibit levirate unions?

(2) Inheritance and maintenance

Although customary law does not allow wives to inherit from their husbands, widows are not left destitute. The deceased's responsibilities towards his dependants, including his wife, are transmitted to his heir. Hence, although a widow has no inheritance out of the estate, she can claim maintenance from the heir. Even so, widows are placed in a vulnerable position, in part

12 Although most systems of southern African customary law recognize levirate unions, Xhosa-speakers regard intercourse between the widow and one of her deceased husband's relatives as incestuous.

13 And, if a widow refused to enter into a levirate union, the courts held that her guardian would liable to return bridewealth only when she remarried.

because the social basis for customary law has changed and in part because their rights have not been fully developed.

In the first place, a widow's right to support is considered to be conditional upon her residing at her late husband's homestead. Not only does this rule assume the ready practice of levirate unions, but also a particular residential pattern (isolated, self-sufficient homesteads) and a particular type of estate (land and livestock).

None of these assumptions are borne out by modern social conditions. As we have seen, levirate unions are now uncommon. In the overcrowded cities of southern Africa, it may be physically impossible for a widow to remain living with the heir. And, where cash is the main asset, the need for a widow to remain with the estate disappears: cash must be invested and money can be drawn from financial institutions anywhere in the country.

In the second place, the legal implications of the widow's interest in the estate have not been fully explored. The courts have been careful to point out that she does not have a right of ownership. It is the heir, as successor to the deceased, who is generally considered owner of the estate. Admittedly, he must consult the widow before disposing of assets, but we have little indication of what a widow could do if he mismanaged the estate or failed to consult her.

In the final analysis, the widow's right to maintenance is effective only if she and can preserve a good working relationship with the heir (not to mention her husband's family generally). Unfortunately, circumstances do not favour this relationship. 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 with no support from the deceased's family.

In KwaZuluNatal an attempt has already been made to alleviate the position of widows.[14] They may request a district officer to initiate an inquiry into a deceased estate. If the officer is satisfied that application of customary law would be unjust to the widow, taking into account the assets and liabilities of the estate and the extent of the widow's and the heir's contributions to it, he may order that the estate devolve according to common law.

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

Whether widows can find a more immediate remedy in the constitutional principles of equal treatment and non-discrimination is questionable.[15] The customary order of succession, which prefers the deceased's oldest male descendant as heir, clearly constitutes discrimination against females (daughters, granddaughters, sisters and mothers). Widows, on the other hand, are not members of their husbands' families, and hence could be said to experience no discrimination.

One of the most important questions in this Issue Paper is whether a widow should be entitled to inherit at least portion of her deceased husband's estate. If widows are not allowed to inherit, should they none the less be given greater rights in the estate and better powers to control the heir's management of estate assets?

6 SUCCESSION TO WOMEN

(1) Rules regulating succession to women

In a patriarchal society, not only do men hold the positions of authority but they also control property. Hence succession to a deceased woman (who is unlikely to have a sizeable estate) is of less importance than succession to a deceased family head. It is probably for this reason that we have very little information on the customary rules governing devolution of women's estates. From the fragmentary data available, it seems that, if a woman died without having had children, her property would usually go to her father, brothers and sisters. If she had borne children, they would inherit.

Although in earlier times succession to women was obviously not a serious social issue, it is today. All women, to a greater or lesser extent, participate actively in the market economy. They are expected to run households and bring up children; sometimes they have the assistance of males and sometimes they have to operate alone. When such women die, clear rules of succession are obviously needed to determine who will take over their property and their responsibilities (especially for children).

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15 Especially in view of the decision in *Mthembu v Letsela & another* 1997 (2) SA 936 (T).

While we obviously need to know more about the customary rules regulating succession to women's estates, we must ask ourselves whether different systems of succession, distinguished only by the deceased's gender, should be maintained. If it is felt that only one system of rules is now necessary, then further questions arise whether succession to women should be the same as succession to men or whether a new, different law should be formulated.

(2) Sororal unions

In customary law, a woman's death is particularly serious if she had not fulfilled her duty to procreate children. In some systems, the husband of a wife who died young (or proved to be barren) could demand that the deceased's family provide her sister as a replacement.[16]

These sororal unions, like levirate unions, would not ideally have been forced onto unwilling women. None the less, women were still under considerable social pressure to comply. In accordance with their general policy about marriage, the courts refused to uphold any involuntary association.[17]

Sororate unions are now obsolescent, if not entirely obsolete. They belong to a different era, when polygyny was more common and procreation the main object of marriage. The institution nevertheless lingers on, if only as a potential, offering the mercenary widower a pretext for claiming refund of his bridewealth.

Should the institution of sororal polygyny now be prohibited?

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16 Because Xhosa-speakers do not countenance sororal polygyny, if a wife in one of the senior houses died childless, her husband would be obliged to contract a new marriage.

17 And they were reluctant to enforce any obligation to refund bridewealth. Section 66(3) of the KwaZuluNatal Codes (Proc R151 of 1987 and KwaZulu Act 16 of 1985) provides that, if a woman dies within 12 months of her marriage, without having had children, a maximum of half of the bridewealth may be recovered by the husband.

7 WILLS

(1) Freedom of testation

South Africa recognizes and enforces two major systems of private law: Roman-Dutch law and African customary law. Hence people who are generally deemed to be bound by customary law are free to make use of the institutions of Roman-Dutch law. The exact scope of that freedom, however, has never been prescribed. In the context of succession, for instance, it is not clear to what extent people are free to execute common-law wills and thereby ignore the customary rules of intestate succession.

Under Roman-Dutch law, at least until legislative intervention in 1990,[18] all people used to have complete freedom of testation, ie, the power to bequeath their property by will to whoever they chose. This freedom was based on an `absolute' notion of ownership: owners of property had a full and exclusive power to dispose of that property as they wished, even though a will disinheriting the testator's spouse and other intestate heirs could seriously prejudice the material security of surviving members of the family.

Customary law, on the other hand, allowed only intestate succession. That people were not at liberty to disregard these rules was due in part at least to the absence of any concept of individual ownership in productive resources (mainly land and livestock). In such property personal interests were subordinate to those of the family.

Whether people subject to customary law may ignore the customary rules of intestacy has never been properly debated in South Africa. It could be argued that the Wills Act,[19] which stipulates the method for executing an ordinary underhand will, supersedes customary law as a statute of general application.[20] We should not be too quick to accept this argument, however. Not only have other African countries have been reluctant to do so, but we should also be asking whether it would be a retrograde step to allow testators freedom to neglect the needs of surviving family members.

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18 When the Maintenance of Surviving Spouses Act 27 of 1990 was passed to give surviving spouses a right to maintenance from a deceased estate. The Act does not currently apply to the spouse of a customary marriage, because the term `survivor' is defined to mean the spouse of a *marriage*.

19 7 of 1953.

20 The argument in a leading Bechuanaland case, *Fraenkel & another v Sechele* 1964 HCTLR 70.

Any assessment of the merits of freedom of testation must take into account the principal social problem: when a family breadwinner dies, the surviving spouse is in immediate need of material support to raise dependent children.[21] People who have the power to dispose of their property by will may, of course, provide for their families, but there is no guarantee that they will use this power so sensibly. Conversely, by insisting that testators pay due regard to the interests of their intestate heirs, the law could guard against imprudent wills.

As it happens, South African law imposes two limitations on an African's freedom of testation. Section 23 of the Black Administration Act[22] provides that movable house property and land held under quitrent tenure must devolve by the customary law of intestate succession. It is debatable, however, whether these statutory restrictions are legally sound or whether they serve any useful social purpose.

(2) Property that may not be devised by will

Section 23(1) of the Black Administration Act 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.

The main purpose of this section is to protect the interests of house heirs in a polygynous family. (The `movable property' spoken of in s 23(1) is more commonly known as `house property'.)

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21 It was for this reason that Roman-Dutch common law was amended by the Maintenance of Surviving Spouses Act 27 of 1990.

22 38 of 1927.

This provision does not meet its aim on two counts. First, for purely technical reasons hinging on the concept of `house property', the protection it offers is not available if the testator had contracted a civil or a Christian marriage. Because these marriages do not create `houses', they fall outside the purview of the section.[23]

Secondly, s 23(1) is predicated upon the existence of a polygynous marriage. Where a man has taken only one wife, which nowadays is the more likely situation, it seems inappropriate 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 (a category considered below) and therefore devisable by will.

Thirdly, it should be noted that s 23(1) does nothing to protect widows. The section in fact deprives them of the potentially beneficial effects of a will, since it insists that a substantial portion of the estate devolves under customary law. Husbands are thereby prevented from making testamentary provision for their wives.

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 allowed certain Africans to acquire land under quitrent title. (Most of this land was situated in the former Ciskei and Transkei.) In order to prevent plots from being fragmented into uneconomic holdings amongst a number of customary-law heirs, succession was legislatively regulated.

These statutory provisions (now contained in the Black Areas Land Regulations)[24] were specially designed to approximate the customary order of intestacy. Accordingly, title to land held under quitrent was to be inherited in the first instance by `the deceased's eldest son of the

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23 According to several decisions of the former Black Appeal Court. See, for example, *Tonjeni* 1947 NAC (C&O) 8.

24 Annexure 24 of Proc R188 of 1969.

principal house or, if he be dead, such eldest son's senior male descendant, according to Black custom'.

The Land Regulations are now of dubious validity. In the first place, they are likely to fall foul of s 9 of the Constitution, which prohibits discrimination on grounds of sex or gender. In the second place, they seem 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,[25] 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) may disappear.

Notwithstanding the defects in s 23(2), an important question of policy remains to be considered: should relatively small allotments of agricultural land be devisable by will? If landholders are given freedom of testation, their plots could be split up into holdings so small that they will become uneconomic.

(3) Property that may be devised by will

Subsection 23(3) of the Black Administration Act provides that `all other property of whatsoever kind' may be devised by will. It is implicit in this section that the two main categories of property amenable to disposition by will are immovables and what is usually called `family' property.

As the word suggests, `family' property is not in the exclusive control of the deceased. (For this reason most African countries allow testamentary disposition of only `personal' property.) Similarly, it would be wrong to consider land held under customary law as in the `ownership' of the holder. In the circumstances, the legislature's decision to permit freedom of testation over these two categories of property seems inexplicable.

(4) Guardianship clauses

25 112 of 1991.

Guardianship clauses are directions in wills that guardianship of a testator's minor children 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 normally vest in the father's family, not in the father personally.

What if a testator were to exercise a freedom of testation and transfer these rights to a person outside the family? A more serious problem would arise if a *mother* were to purport to devise guardianship of her children, since under customary law she has no legal right of guardianship at all. It is arguable that these dispositions are invalid, unless guardianship had been transferred to someone who had an independent entitlement under customary law.

Problems with guardianship clauses could be solved if the Law Commission's recommendations in its Discussion Paper on *Customary Marriage* are accepted.[26] On constitutional grounds, the Commission felt that both mothers and fathers should be deemed to have rights of custody and guardianship over their children. Once both parents have personal entitlements to guardianship, it follows that they can validly transmit it by will.

Whether people subject to customary law should have the power to make wills needs to be carefully reconsidered in light of broader policy questions concerning freedom of testation. Should individuals be entitled to disregard the interests of their intestate heirs? Particular attention should be paid to the validity and efficacy of s 23(2) and (3) of the Black Administration Act.

8 BURIAL AND FUNERAL CEREMONIES

In Africa, burial was not an occasion of great formality, and it was usually attended to as soon as possible after death. (The more important ceremony occurred some weeks or months later, when the deceased's spirit was laid to rest and the heir formally appointed.) In Christian and other beliefs, however, considerable religious and emotional significance is attached to burial.

If some members of a family want a traditional African form of burial and others prefer Christian rites, who is entitled to decide? Although the cultural and religious affiliation of the

26 Discussion Paper 74 ***.

deceased and the deceased's family would seem to be relevant, according to the common law, the heir has the final decision (provided that the deceased left no specific instructions).[27]

If it is accepted that heirs have the sole right to decide burial, a problem may then arise. The identity of the heir can be fixed only when it is apparent what law governs devolution of the estate, and deciding whether this is to be customary or common law is a complex matter. While the existence of a will and an antenuptial contract are key factors in choice of law, the courts have held on policy grounds that, where a deceased had married by Christian rites, his widow should be preferred to the customary-law heir(s).[28]

Who should be entitled to decide the manner and place of burial in the event of a disagreement in the deceased's family?

9 ADMINISTRATION OF ESTATES

(1) According to customary law

If an estate devolves by customary law, it is administered by the same system.[29] In practice, this means that the deceased's family gathers at the ceremony at which the spirit is laid to rest in order to determine his assets and liabilities and to confirm the identity of the heir. Further actions by creditors will be against the heir, as successor to the deceased.

Unless a dispute arises about who is to be heir, no outside authority will intervene. When the family cannot agree on the heir, however, aggrieved parties may ask a magistrate to hold an inquiry. As a result of this investigation, the magistrate may decide how the estate is to be distributed.[30] Because this inquiry is considered to be administrative, not judicial, no appeal lies against the decision.

(2) Under supervision of a magistrate

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27 See *Mbanjwa v Mona* 1977 (4) SA 403 (Tk).

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

29 Section 23(1) of the Black Administration Act 38 of 1927.

30 Customary law still applies, since the magistrate has no authority to direct application of the common law: s 3(2) of GN R200 of 1987.

The supervision of a magistrate becomes necessary in two situations: if an estate contains immovable property or if it is to devolve under the common-law system of intestate succession. In the first situation, the magistrate's role is limited to appointing a representative to arrange transfer of the immovables. In the second situation, however, the magistrate is responsible for supervising the entire administration process.

Hence, where an estate devolves according to common law, a magistrate of the district in which the deceased ordinarily resided begins by appointing someone as a `representative' of the estate.[31] This official (whose functions are modelled on those of an executor) must then arrange for payment of estate debts, collection of assets and the final distribution.[32] Although magistrates usually consult the deceased's relatives when appointing a representative, the appointment (or dismissal) is entirely a matter of magisterial discretion (as is the decision whether representatives should furnish security and account for their administration).

Whenever an estate includes immovable property, the magistrate must provide the representative with a certificate of appointment, which gives the necessary authority to receive and transfer the property to the heir(s). In addition, for the benefit of the Registrar of Deeds, magistrates normally issue certificates identifying the heir(s) and indicating who will inherit what proportions of the estate.

(3) Under supervision of the Master

Estates devised by will must administered under supervision of the Master of the High Court.[33] If an estate is partially testate and partially intestate, the intestate portion, which would include house property or land held under quitrent tenure,[34] must be administered by customary law.[35]

The main question posed by these three systems of administration is whether appropriate criteria are being used to determine which type of administration to apply. (And the Law Commission would be interested to know how efficiently the present system

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31 Who has full power to represent the estate.

32 Section 4 of GN R200 of 1987.

33 Section 23(9) of the Black Administration Act. Administration is therefore governed by the Administration of Estates Act 66 of 1965.

34 Namely, portions of the estate that fall under the provisions of s 23(1) and (2) of the Black Administration Act.

35 Section 23(7) of the Black Administration Act.

works.) As the law stands, the principal criteria for involving staff of a magistrate's court or the Master's office are whether the common law governs succession and whether the estate includes immovable property. Presumably, in the interests of speed and economy, however, court officials need to become involved only if the estate is a substantial one or legal difficulties seem likely. Small estates, and those where the family is in general agreement on the heir and the assets, could be administered informally by the family concerned.