SOUTH AFRICAN LAW REFORM COMMISSION

PROJECT 90

REPORT

CUSTOMARY LAW OF SUCCESSION

APRIL 2004

TO MRS BS MABANDLA, MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT

I am honoured to submit to you in terms of section 7(1) of the South African Law Reform Commission Act 1973 (Act 19 of 1973), for your consideration the Commission's report on the Customary Law of Succession.

MADAM JUSTICE Y MOKGORO
CHAIRPERSON: SOUTH AFRICAN LAW REFORM COMMISSION
APRIL 2004

INTRODUCTION

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

The Honourable Madam Justice Y Mokgoro (Chairperson)
The Honourable Ms Justice L Mailula (Vice-Chairperson)
Professor IP Maithufi (Full-time member)
The Honourable Mr Justice CT Howie
Adv JJ Gauntlett SC
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This report will be available on the Commission's Web site at: http://www.doj.gov.za/salrc/index.htm once the report has been submitted to the Minister for Justice and Constitutional Development.

The project leader responsible for this project is Professor IP Maithufi. The members of the Project Committee for this investigation are:

Professor T W Bennett (University of Cape Town)
Ms LG Baqwa (Attorney) (resigned)

Professor CRM Dlamini (Department of Education: KwaZulu Natal)
Professor C Himonga (University of Cape Town)
Professor RB Mqeke (Dean of Law, Rhodes University)
Ms L Mbatha (Center for Applied Legal Studies, University of the Witwatersrand)
Mr PR Mawila (University of Venda)
The Honourable Madam Justice JY Mokgoro (Commission's representative)
Professor S Rugege (University of the Western Cape)
Ms MJ Mashao (Commission on Gender Equality)
Professor JC Bekker (University of Pretoria)

The researcher allocated to this project who may be contacted for further information is Ms GMB Moloi.

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CHAPTER 1

ORIGIN OF THE INVESTIGATION AND SOME INTRODUCTORY REMARKS

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**.[1] 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. The closing date for comments was set for 30 June 1998.

1.1.2 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 South African Law Reform Commission (the Commission); the Houses of Traditional Leaders of the Free State, Limpopo and the Eastern Cape; and the Department of Justice (who stressed the urgency of the matter and the growing pressure for action from, mainly, women's groups).

1.1.3 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.

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[1] The project committee consisted of the following members: Professor TR Nhlapo (Chairperson); Madame Justice JY Mokgoro (who has since requested that she be released from the duties of the project committee due to her work at the Constitutional Court); Professors TW Bennett and CRM Dhlamini; Ms L Baqwa (who has since resigned) and Advocate F Bosman (Adv Bosman is no longer part of the project committee since her expertise is no longer required for the committee's present focus area). Professor TR Nhlapo, the full-time member of the Commission, who was the project leader, has resigned with effect from 1 September 2000 leaving the position of project leader vacant. Professor IP Maithufi, who replaced Professor RT Nhlapo as full-time member of the Commission was appointed as the new project leader during March 2001. The Working Committee recommended that Ms L Mbatha, Professors C Himonga and RB Mqeke and Mr P Mawila be appointed to the project committee and they were appointed on 6 December 2001. Additional members, Professor S Rugege and Ms M Mashao were appointed on 28 January 2002. The latter was appointed after the Commission on Gender Equality requested the Minister to appoint one of its members to the project committee. Professor JC Bekker was appointed on 8 December 2003. This project is now **Project 90**: **Customary Law**.

1.1.4 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.

1.1.5 Representatives of the Department of Justice (as it then was) 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 into the Commission, the Department of Justice 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** (hereafter the Intestate Succession Act), 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** (hereafter the Black Administration Act).

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 Status and Quality of Life of Women, and representatives from the 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 a 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 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 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 reiterated at the meeting. The Department emphasised speed and urgency in curing the constitutional defects of customary law; the Council stressed caution, and wide consultation. The parties agreed 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 Constitutional Development 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 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 finalised in June of the same year.

1.4 The Discussion Paper and responses to it

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 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** which had gone through three stages of adjudication,[2] beginning with a judgment by Le Roux J, in the Transvaal Provincial Division (reported in 1997). A further judgment by Mynhardt J was recorded in 1998, and finally a ruling of the Supreme Court of Appeal delivered by Mpati AJA, was handed down in June 2000.[3]

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 section 35(3) of the interim Constitution[4] 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.[5]

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2 **Mthembu v Letsela and Another** 1997 (2) SA 936 (T), 1998 (2) SA 675 (T) and 2000 (3) SA 867 (SCA).

3 **Mthembu v Letsele and Another** 2000(3) SA 867 (SCA).

4 The Constitution of the Republic of South Africa 200 of 1993.

5 **Mthembu v Letsela** 2000 *supra.*

1.4.5 It is significant that Mynhardt J, in the 1998 judgment, had also noted the Commission's work. He cited the Discussion Paper on Customary Marriages[6] 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 route should also be followed to reform the customary rules of succession.[7]

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.

1.4.7 The Commission is satisfied that it has indeed genuinely and extensively consulted. As may be expected, divergent views have been expressed. Some are of the opinion that the customary law of succession should somehow be retained. The problem with that is that the customary law of succession revolves around the principle of male primogeniture which is currently alleged to be incompatible with the Constitution. Some believe that the customary law of succession is in need of reform and should be abolished. Others are of the opinion that out-dated practices should be discarded while useful ones should be retained.[8]

1.4.8 Since the adoption of the Recognition of Customary Marriages Act 120 of 1998 the Commission is obliged to take account of new rules governing marital property. In terms of section 7(2) all customary marriages entered into after this Act's date of coming into operation are automatically in community of property unless excluded by an ante-nuptial contract. According to the current choice of law rules, common law would therefore govern succession to the intestate estates of those spouses.

1.4.9 Some restatement of the customary law of succession could notionally apply to customary marriages entered into before the Recognition of Customary Marriages Act came into operation,[9] because the proprietary consequences of those marriages continue to be governed by customary law. But it is foreseen that the constitutionality of a distinction between the pre- and post- "recognition" of marriages could be impugned on the grounds of discrimination.

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6 The South African Law Commission Discussion Paper 74: **Customary Marriages** (1997).

7 **Mthembu v Letsela and Another** 1998 (2) SA 675 (T) 686.

8 See discussion in paragraph 1.5 and Chapter 6 below.

9 The Recognition of Customary Marriages Act came into operation on 15 November 2000.

1.4.10 It has been suggested by some commentators that succession to status should be distinguished from inheritance. Typical patriarchal succession to status would fall foul of the equal status and capacity of spouses conferred by section 6 of the Recognition of Customary Marriages Act.

1.4.11 Since the present project was launched, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 was enacted. In terms of section 8(c) no person may unfairly discriminate against any person on the ground of gender including "the system of preventing women from inheriting family property".

In terms of section 4 of this Act its application should take account of *inter alia* –

> (a) The existence of systemic discrimination and inequalities, particularly in respect of race, gender, and disability in all spheres of life as a result of past and present unfair discrimination, brought about by colonialism, the apartheid system and patriarchy.

In so far as inheritance and succession are systemic discrimination brought about by patriarchy, they would be in conflict with this Act.

1.4.12 The Commission is now confronted with two decided cases categorically declaring the fundamental nature of the official customary law rule of intestate succession unconstitutional.[10]

1.4.13 The two cases came before our courts after **Mthembu** in relation to the discriminatory effect of the principle of male primogeniture. In **Bhe and Others v The Magistrate Khayelitsha and Others**[11] Ngwenya J declared the provisions of the Black Administration Act dealing with male primogeniture unconstitutional and invalid. Section 1(4) of the Intestate Succession Act was also declared unconstitutional for excluding from its operation people whose estates devolve under the provisions of the Black Administration Act. The judgment guarantees the rights of widows and children who are discriminated against in terms of the customary law of succession. In another development, in **Shibi v Sithole and Others**[12] the Pretoria High Court ruled that the provisions of customary law which exclude females from inheriting from an intestate estate were inconsistent with the

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10 See full discussion in Chapter 3 below.

11 2004 (1) BCLR 27 (C); 2004 (2) SA 544 (C).

12 Case No 7292/01 of 19 November 2003, unreported decision of the Transvaal Provincial Division.

Constitution.[13] In his judgment Maluleke J said that the Constitution was the supreme law of the land and those provisions of law or rules inconsistent with it were invalid. He declared section 23 of the Black Administration Act unconstitutional and invalid and also ruled that Regulation 2(e) of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks was consequently invalid. The Judge ruled that until the defects were corrected by a competent legislature, the distribution of intestate estates of black persons would be governed by section 1 of the Intestate Succession Act.

1.4.14 The two judgments will be placed before the Constitutional Court in March 2004 for confirmation. In **Mthembu**'s case it was indicated that although the rule of male primogeniture may not be regarded as unfairly discriminatory, it may in certain circumstances be discriminatory. It is also necessary to point out that if the application of the rule of male primogeniture would operate harshly or lead to inequitable or inappropriate results in the sense that the heir is not prepared to maintain the children and widows of the deceased, "the whole matter assumes a different aspect".[14] The possibility that the application of this rule may be unconstitutional was expressed as follows:

> In its proper setting in a tribal community there can be no question that the succession rule preserves rather than offends the dignity of the persons affected. It is only in a case when the rule is applied in an urban community that there is a possible argument in this direction. I do not express any view on the application of the rule under those circumstances as it seems to me that the factual situation must be resolved.[15]

1.4.15 In the circumstances of these two judgments it is imperative to reform the official customary law of succession.

1.4.16 There has also been a lot of pressure from the Joint Monitoring Committee on the Improvement of Quality of Life and Status of Women. The Joint Monitoring Committee believes that the Commission has spent too much time on the project, while thousands of black women and children in South Africa are thrown out of their homes every year. According to the Chairperson of this Committee it is tragic and disturbing, almost ten years into South Africa's democracy that black women are still legally discriminated against.[16]

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13 The Constitution of the Republic of South Africa 108 of 1996.

14 **Mthembu** 1997 (2) SA 936 (T) 946D.

15 *Ibid*.

16 This was pointed out at a meeting of the Joint Monitoring Committee on the Quality of Life and Status of Women held in Cape Town on 18 October 2002.

1.5 Written comments: an overview

1.5.1 The release of Discussion Paper 93 was advertised in the **Government Gazette** and by way of media statements. Written comments were received from 19 respondents. A list of respondents appears in **Annexure C** to this Report. The written response to the Discussion Paper was quite disappointing, and the Commission was concerned about the lack of response.

1.5.2 The comments will be attended to in the body of the Report under the relevant Chapters. An overview of the written comments is given under paragraphs 1.5.3 and 1.5.4 and an outline of the workshop process is given under paragraph 1.6, so that the whole consultation process can be viewed in perspective. The Commission wishes to express its gratitude to all who took the trouble to comment on the Discussion Paper.

1.5.3 Most of the commentators welcomed and supported the proposed legislation as they hoped it would clarify the customary law of succession and thereby assist to curb the unfairly discriminatory practice of male primogeniture.[17] However, there were those who felt that customary law should not be replaced with common law. They proposed that an option should be created for people who wished to continue practicing customary law.[18] Rather than merely imposing the common law of succession on people who are subject to customary law, it is vital to investigate the possibility of incorporating those aspects of customary law and values that are compatible with the Constitution in the reformed law of customary inheritance. This approach goes hand in hand with an argument by **Zehir Omar**, an attorney from Springs, who sees the proposals as so radical that what is created is no longer customary law of succession. Two of the commentators were confronted with a difficult question as to what would remain of the customary law of succession after the removal of the principle of male primogeniture.[19]

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17 **Women's Legal Centre in Cape Town, Joelene Moodley, Centre for Human Rights, University of Pretoria, GH van Rooyen, Greytown Magistrate, Sue Padayache of the Lawyers for Human Rights in Pietermaritzburg, the National Council of Women of South Africa** and **SM Molotsi**.

18 **Mr K Radebe**, a student at the University of Cape Town, states that using a system of law that is wholly alien to regulate the lives of people who live customary lives carries with it the danger that the new system will simply be ignored and people will continue to apply customary practices among themselves. **Professor JC Bekker** points out that it should be possible to blend customary law and common law. It may, for example, be possible to respect personal choices. If people are married by customary law and expect the consequences to be covered by customary law, why not leave them alone?

19 **HT Madonsela,** attorney from New Castle and **Mr Mahapa**, Bochum Magistrate.

1.5.4 **Professor Kerr** of Rhodes University objected to the whole process. He believes that, before the rules of customary law of succession are tampered with, there needs to be an in-depth consultation with those who, at present, are subject to customary law. He does not accept that the consultation process undertaken by the Commission was sufficient to cater for all the people who are subject to customary law. He believes that the Commission may not have the personnel or finance to appoint a special body along the lines of the 1883 Cape Commission, but that Government could appoint one. Representatives from the Commission could be appointed as members of this Commission.[20] According to him, had this procedure been adopted, the matter would have been far advanced.[21]

1.6 The consultation process: an overview

1.6.1 The Commission believes that the most effective way of securing the legitimacy of its recommendations is to ensure the widest possible consultation with the people likely to be affected by new laws, and to this end the Commission views the polling of opinions across the country as an important component of its working methods. The Project Committee therefore decided to consult with all relevant stakeholders through a series of workshops. Each workshop was conducted over the course of a single day in all the nine provinces as appears in **Annexure D** to this report.

1.6.2 The objectives set for the workshops were to afford the Commission's Project Committee on Customary Law the opportunity to present Discussion Paper 93 to all stakeholders, experts and supporters of the customary law of succession, to subject the preliminary recommendations and the draft Bill to critical discussion, and to formulate proposals and recommendations. Secondly, although the purpose was essentially information-collection on the part of the Commission, the workshops would also afford communities (through their representatives) the opportunity to address the issue of customary law of succession. Lastly, the workshops were intended to enable people at grassroots level to feel that they "own" the process from its early stages.

1.6.3 The workshops were a success, with the Commission’s recommendations (as contained in Discussion Paper 93) and the draft Bill receiving a fair amount of support. The

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20 He indicates that he had suggested this long ago in his articles: (1994) 111 **SALJ** 720, (1997) 114 **SALJ** 346 and (1998) 115 **SALJ** 262.

21 He revealed this in his submission on the South African Law Reform Commission Discussion Paper 93: **Customary Law of Succession** 2000 and the Discussion Paper. 95: **Customary Law Administration of Estates** 2002.

workshops yielded an invaluable amount of information and opinions on the issue of customary law of succession. Consensus emerged around the need to reform customary law of succession in line with the provisions of the Constitution. What remained a challenge was how to reform the customary law of succession according to the equality provisions. Certain issues were raised which had not been dealt with, including some that fell outside the scope of Discussion Paper 93 (for example, difficulties in the implementation of the Recognition of Customary Marriages Act, the legal position of Islamic marriages and domestic partnerships).[22]

1.6.4 In addition to the activities described in the preceding paragraph, other forms of discussion and consultation took place. The Commission sought to maintain close contact with organisations with special responsibilities or interests in customary law. The Commission briefed the Joint Monitoring Committee on Improvement of Quality of Life and Status of Women on 29 August 2001, 18 October 2002, 04 April 2003 and 18 November 2003 on progress made in the investigation. In the initial stages of the consultation process, the Centre for Applied Legal Studies and the Commission hosted an 'expert meeting'[23] to discuss the recommendations made by the Commission and to ensure that all the necessary measures are taken to make the reform of customary law of succession inclusive of all.

1.6.5 The Provincial Parliamentary Programme in KwaZulu-Natal assisted in hosting a workshop at Umzinto[24] with the communities of surrounding villages. The purpose was to give a more balanced picture of the realities in communities living under customary law. The project leader also attended a workshop at the Tonga Constituency Office, Mpumalanga on 2 and 3 February 2002 on customary law of succession and customary marriages. He also attended a briefing session at the Mpumalanga Provincial Legislature on 22 May 2002.

1.6.6 After careful consideration of the report of the workshop process, the Project Committee felt that the Commission should grant it the opportunity to consult further with the people that would be affected by the reform process. The Committee decided that the process of further consultation should cover rural areas in seven provinces.

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22 Questions came up on these issues in all the provinces and participants were informed that the Commission had published Discussion Paper 101: **Islamic Marriages** in December 2001 and Issue Paper 17: **Domestic Partnerships** in September 2001.

23 The meeting took place on 30 August 2001. The list of attendants at this meeting appears as **Annexure F** to this report.

24 On 8 November 2002 where Mrs F Gaza, MPP, was one of the speakers.

1.6.7 In addition to the provincial workshops, the Project Committee benefited greatly from the meetings that were held between November 2002 and October 2003. Household surveys (field trips) were conducted in about twelve sections in the townships.[25] The household surveys were undertaken principally to gain as much information as possible on succession practices in different sections of these townships.

1.6.8 As one of the methods to solicit input from stakeholders, recommendations on Discussion Paper 93 were resubmitted to magistrates for comment. Telephonic comments were received from **Mr Ngobeni**, Nelspruit Chief Magistrate, **Mr Mahapa**, Bochum Magistrate and **Mr Kgati**, Maclear Magistrate.

1.6.9 Most of the women consulted in all the provinces supported the draft Bill and the preliminary recommendations in Discussion Paper 93. In the discussions women participants noted that many problems encountered in protecting women's right to inheritance arose as a result of conflicts between cultural practices and human rights. They appreciated that if the draft Bill is approved, women will no longer be subjected to differential treatment and they will be allowed to inherit their husbands' estates.

1.6.10 A substantial number of academics[26] strongly objected to any efforts to justify the customary rule of succession (the principle of male primogeniture) by South African courts. They vehemently attacked the judges' views in the **Mthembu** trilogy that male primogeniture is justified because the male heir is supposed to maintain the deceased's spouse(s) and children. They argue that this is out of step with reality. In the present circumstances it is a fiction.

To quote but one commentator:

> However, the circumstances in which the rules of the African customary law of succession apply today are vastly different: The 'cattlebased economy' was converted into a cashbased one. This altered economy, along with impoverishment, urbanization and migrant labour fundamentally affected African family structures. The question is

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25 See **Annexure G** to this report for the townships visited.

26 Kerr AJ "Issues arising from a challenge to the constitutionality of the customary law of intestate succession: Mthembu v Letsela 2000(3) SA 867" (2001) **THRHR** 320, Prinsloo MW "Tweede aanval op die inheemse opvolgingsreg: **Mthembu v Letsela and Another** 1998(2) SA 675 (T)" (1998) **TSAR** 771, Maithufi IP "The constitutionality of the rule of primogeniture in customary law of intestate succession: **Mthembu v Letsela 1997** (2) SA 935 (T)" (1998) 61 **THRHR** 146 and Janse van Rensburg AM "The Judiciary and its constitutional mandate to develop customary law - Mthembu v Letsela revisited" (2001) **Obiter** 216.

whether the application of African customary rules of succession is still appropriate to modern social conditions.[27]

1.6.11 Commentators submitted that there are several fallacies in the tribal/urban divide. The one is that it is not feasible to create two sets of succession rules. It is obviously impossible to formalise a territorial-social distinction application. Where does an urban area begin and end? Secondly, it does not account for the untold number of female households, living together relationships or the vast number of inchoate customary marriage relationships (where it is extremely difficult to prove that the parties were married).

1.6.12 The magistrates who responded felt that the reform of the customary law of succession was long overdue. They supported the draft Bill, as it answered most of the problems they encountered in the administration of black estates. They, however, urged all stakeholders concerned to allow a speedy resolution of the problem of customary intestate succession so that the surviving spouse and children are protected as it is their right in terms of the Constitution. The case of Mrs Mildred Mthembu[28] and her daughter, who were thrown out of their home by her father-in-law, highlighted the plight of women and children.

1.6.13 Some traditional communities criticised the process of reform and the end product as a westernisation of customary law.[29] In particular, the draft Bill was criticised for preferring common law over customary law.[30] It was argued that rather than merely imposing the common law of succession on people who are subject to customary law, it is vital to investigate the possibility of incorporating those aspects of customary law and values that are consistent with the Constitution in the reform of the law of succession.[31] They argued that they were doubtful whether the traditional communities would accept the elimination of the principle of male primogeniture. They were supported by prominent academics and experts on customary law[32] who warn strongly against merely abandoning the customary

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27 De Koker "Male primogeniture in African customary law- are some more equal than others" (1998) **JJS** 114.

28 The case of **Mthembu v Letsela** *supra*.

29 At the Commission's workshops in the Eastern Cape, Free State, Limpopo and Mpumalanga.

30 Traditional leaders at the workshop in East London on 07 November 2001.

31 This view was expressed by I**nkosi Matanzima, Chairperson of the House of Traditional Leaders, Eastern** Cape at the workshop in East London.

32 **Professors Kerr** and **Bekker** in their submissions to Discussion Paper 93, as well as **Prof Chuma Himonga** and **Marius Pieterse** at the 'expert meeting' held at the University of the Witwatersrand on 31 August 2001.

system of succession in favour of a slightly modified version of the common law, as would seem to be the approach adopted in the Discussion Paper on these issues. An entirely different position was, however, held by traditional leaders in KwaZulu-Natal. At a workshop held in this province, the Committee was informed that the proposed changes were long overdue. The recommendations relating to the amendment of the customary law of succession were welcomed.[33]

1.7 Conclusion

1.7.1 The Committee, together with a number of civil society organisations and many ordinary people, believe that, in order to comply with the constitutional value of equality, it is imperative to ensure that the law relating to inheritance and customary law does not prejudice certain people, particularly widows, daughters and male children who are not first born.[34] The Committee believes that using the Intestate Succession Act as a vehicle would go part of the way to comply with this requirement.[35] The main purpose of the draft Bill attached to Discussion Paper 93 was to amend the Intestate Succession Act (according to which an estate must be distributed in accordance with the Administration of Estates Act 66 of 1965) to include the estates of persons subject to customary law. This recommendation is mainly intended to bring intestate estates administered in terms of customary law (section 23 of the Black Administration Act) under common law, thereby improving the position of women.[36]

1.7.2 After critical evaluation and discussions, the draft Bill was revised to cater for the modification of the customary law of succession so as to provide for the devolution of certain

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33 This is well described by Godenough J in "The process of change in the customary law of succession" (2001) **KwaZulu-Natal Perspective** 10 where she says "KwaZulu-Natal's public hearing was hardly underway when traditional leaders registered their support for the change in legislation saying that the proposed law reflected what was currently happening in traditional communities in KwaZulu-Natal. It was evident that the processes in KwaZulu-Natal and in the former KwaZulu were somewhat different to those carried out in other areas".

34 A point made by **Nthofela Makhene** at the Commission Workshop in Nelspruit.

35 Although some members are of the view that an alternative approach might exist. See Mbatha L "Proposal: The alternative approach to the reform of the customary law of succession" **Committee Paper 1080**, available on request at the offices of SALRC.

36 As indicated by most women at the provincial workshops and meetings; household surveys in some of the townships visited by the researcher, magistrates at the workshops and those who responded in writing, lawyers, women activists at a conference on "Enhancing the Participation of Women in the Law Making Process" in Cape Town from 25 to 26 July 2001 as well as at the Gender Summit at Braamfontein from 5 to 8 August 2001 and Jody Kollapen, Chairperson of the Human Rights Commission, in an article by L Oliphant "Discrimination against women is still legal" (2003) 8 August **Saturday Star** 3.

property in terms of the law of intestate succession, for house property to be disposed of by will; to protect property rights in certain customary marriages, to amend the Intestate Succession Act so as to protect the rights of certain children, and to amend the Maintenance of Surviving Spouses Act 1990[37] so as to provide for a claim for maintenance by certain wives or spouses in customary marriages.

[37] Act 27 of 1990.

CHAPTER 2

THE PURPOSE AND NATURE OF RULES OF CUSTOMARY LAW OF SUCCESSION

2.1 The purpose

2.1.1 The law of succession deals with the devolution of the estate of a deceased person, that is, what happens to a person's estate after his or her death.[38] Accordingly the law of succession consists of rules that govern the devolution and administration of a deceased estate. Succession can either be testate or intestate. A person dies testate where he or she had executed a valid will[39] which indicates what is to happen to his or her estate after his or her death. The devolution of the estate then takes place in accordance with the wishes of the deceased as stated in the will. A person dies intestate, on the other hand, when he or she did not leave a valid will.[40] In terms of South African law the estate of a deceased person devolves in terms of legislation or common law.[41] Where the common law is applicable, the estate devolves in terms of the Intestate Succession Act 81 of 1987. The choice of law rules relating to the applicable legal system in cases of intestate succession of blacks is governed by Regulation 2 of Government Notice R 200 of 1967.[42]

2.1.2 The main purpose of succession was to keep the property in the family from generation to generation. In his response to Discussion Paper 93 **Prof Bekker** agrees that the rules of succession are designed to counteract the disruptive effect on the integrity of a family unit. However, he disagrees with the statement that "the law therefore seeks to secure the material needs of those most closely related to the deceased".[43] He indicates that the maintenance of "the integrity of the family unit" and "material needs" are not synonymous. The fact of the matter is that in African culture a family unit is a cultural concept in which the material needs of the component family members are not the main

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38 Matshilane Mokotong "The impact of the Constitution of the Republic of South Africa on certain selected aspects of customary law of succession" (2002) **Speculum Juris** 63.

39 In terms of the Wills Act 7 of 1953.

40 De Waal and Schoeman **Introduction to the Law of Succession** (2003) 3.

41 Maithufi IP "Marriage and succession in South Africa, Bophuthatswana and Transkei: A legal pot-pourri" (1994) **TSAR** 276.

42 See Chapter 4: The Dual Laws of Succession.

43 Discussion Paper 93: **Customary Law of Succession** of 2000 34.

ingredients. To suggest that the disruption will somehow be ameliorated by securing the material needs of close relatives is, according to him, meaningless.

2.1.3 Land and livestock were, at customary law, the most important property, which provided the whole family with subsistence and a place to live. In customary law, ownership of this property was not individualistic but collective.[44] Differently put, every member of the family is the owner of property through the head of the family. Ownership by the family head is akin to trusteeship.[45] In customary law two objectives must be achieved: the family must be perpetuated and the deceased's property must be devolved among survivors (particularly members of the family).[46]

2.2 Nature of rules of customary law of succession

2.2.1 The rules of the customary law of succession were plain and free from complications, thoroughly understood by the Africans and very suitable to the conditions of their life.[47] While customary law differs in its details from one community to another, there are certain basic principles regulating succession that are common to all systems. Basically the customary system of succession is intestate.[48] Individuals are not free to decide how and to whom their estates would devolve.[49] 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. Customary property which is mainly land and livestock attracts group interest and cannot therefore be devolved by will. Devolving customary property by means of a will is likely to cause problems among group members with an interest in the property.[50] Certain property

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44 **Bhe and Others v Magistrate, Khayelitsha and Others** 2004 (1) BCLR 27 (C).

45 Bekker J C **Seymour's Customary Law in Southern Africa** 1989 Juta 5th ed 74 supports the view by disclosing that the property belongs in law to his (family head) family as a unit, under his supervision and control and administration.

46 De Waal MJ "The social and economic foundations of the law of succession" (1997) 8 **Stellenbosch LR** 164.

47 Whitfield GMB **South African Native Law** (1948) Juta 331.

48 Bekker (footnote 45).

49 Although testamentary succession is not known in customary law, a person can make a final allocation of his property *mortis causa*-Maithufi (footnote 41) 279. Rautenbach, Mojela, du Plessis and Vorster "Law of Succession and Inheritance" in Bekker *et al* **Legal Pluralism in South Africa** Butterworths (2001)109 declares that "the notion of wills might have been known at customary law, albeit not in the Western legal sense".

50 Mbatha "Reforming the Customary Law of Succession" (2002) 18 **SAJHR** 262.

cannot, in terms of present legislation, be devolved by a will[51] and it is to be inherited in terms of Black law and custom.[52]

2.2.2 In the second place, succession in customary law is universal and onerous. These terms mean that an heir succeeded not only to the deceased's rights but also to his duties,[53] in particular, the duty to maintain all surviving dependants. Customary law is concerned not only with inheritance of property, but also with succession to the status of the deceased.[54] The successor in status "steps into the shoes of the deceased and takes over control of the property".[55] In this capacity, the successor in status is responsible for the maintenance of the family.[56] 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.

2.2.3 In the third place, customary law of succession follows the male lineage. Heirs are identified by their relationship to the deceased through the male line until all the known male relatives of the deceased have been exhausted in which case the inheritance devolves upon the Paramount Chief of the deceased tribe.[57] Only men had the power to take control of the family head's affairs. According to statutory customary law, if there is no person to take over family property it goes to the State President in his capacity as the Supreme Chief.[58]

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51 Land held under quitrent tenure and house property cannot be the subject of will, section 23(1) and (2) of Act 38 of 1927.

52 Regulated by section 23 (1) of the Black Administration Act 1927 which provides that 'All immovable 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'.

53 It is assumed here that succession involved a deceased male, because, succession to women was socially less important in traditional society.

54 **Professor JC Bekker** in his response to Discussion Paper 93.

55 Bekker (footnote 45) 297.

56 In his response to Discussion Paper 93 **Professor Bekker** reminds us that 'Now it is true that for many people it is an outdated and impractical concept. Yet it still survives in many communities. And even where the succession in status does not any more practically benefit the family members, it does play a role in family affairs, among others, in bonding the family, serving as a link with the ancestors, in marriage negotiations'.

57 Bekker (footnote 45) 274.

58 In its report on the **Review of the Black Administration Act** the Commission has recommended that section 1 of the Black Administration Act, providing that the State President is the supreme chief of all blacks in South Africa, should be repealed (See Chapter 5 paragraph 5.2.9 below).

2.2.4 The customary law of succession is based on the principle of male primogeniture.[59] This principle entails that the eldest male descendant of the deceased inherits the estate.[60] The application of this rule means that women and children who are not the eldest, cannot inherit. This principle prevents women, daughters and other male children from inheriting upon intestacy. In this regard the Codes[61] provide for a deviation. The principle of male primogeniture also enjoys legislative recognition. Section 23 of the Black Administration Act provides that all intestate estates of deceased Blacks must devolve according to customary law. This means that only males are allowed to succeed to status and property in the family.

This situation is no longer satisfactory because heirs today tend to be interested in the property but not the responsibilities that go with it. Western notions of property ownership have also influenced the interpretation of the heir's property rights under codified customary law as individual. By not emphasizing that the enjoyment of inherited property belongs to the widow and other dependants, western interpretations of customary inheritance law allow the heir to control and alienate property, without discharging his obligations to the deceased's family.[62]

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59 In a polygamous household this principle is qualified by the fact that the senior or general heir is the eldest son of the great wife, even if he is not the first born son of the family head, see Olivier NJJ *et al* **Indigenous Law** (1995) Butterworths Durban 148.

60 The eldest male descendant is charged with the obligation of providing for the widow and dependants of the deceased. The general rule is that only a male who is related to the deceased through a male line, qualifies as intestate heir. In a monogamous family, the eldest son of the family head is his heir. If the eldest son does not survive his father, then his (the eldest son's) eldest male descendent is the heir. If there is no surviving male descendant in the line of the deceased's eldest son, then an heir is sought in the line of the second, third and further sons, in accordance with the principle of male primogeniture. For a detailed clarification of the principle of male primogeniture see Bekker (footnote 45) 273. **Mthembu v Letsela** 2000(3) SA 861 (SCA) confirmed that female children cannot inherit (in this case the illegitimate daughter was excluded from inheriting on the basis of her illegitimacy and not gender).

61 Section 81(5) of the KwaZulu Act on the Code of Zulu Law 16 of 1985 and the Natal Code of Zulu Law Proc R151 of 1987 provide that 'In the event of there being no male heir, any property, whether family, house, or personal property, which shall in terms of section 23 of the Act and the regulations framed thereunder devolve according to Zulu law, shall devolve according to the law relating to intestate succession applicable to a civil marriage'. In other words it allows women as daughters and widows to inherit.

62 Mbatha (footnote 50) 261.

2.2.5 In the fifth place, the customary system of succession was regulated privately by the deceased's family.[63] 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.[64] 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.[65]

2.2.6 The 'official customary law' of succession has administered the rule of male primogeniture without requiring the heir to take responsibility for the widow and the deceased person's dependants and ignored the entire property accrual mechanism. This interfered with family members' opportunities to access inheritance as a family. It enriches the customary heir unfairly at the expense of other family members who have contributed to the accumulation of this property.

2.2.7 The socio-economic order which produced the customary law described above has, of course, changed.[66] 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 answered, therefore, is whether the customary rules of succession are appropriate to modern social conditions. In other words, can the rules stated above serve the social purposes expected of a law of succession?

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63 Ngwenya J, in the **Bhe** case (footnote 44), notes that under African Customary Law there is room for extended family members to participate in whatever decision that has to be taken, as long as the property is communally held.

64 **Ms Palweni** at the workshop in Kimberley. See also Maithufi (footnote 41).

65 **Ms Palweni** tried to untangle the problem and explained that under customary law of succession the position of the widow did not change after the death of her husband. The heir had a duty to maintain her. If the heir did something suggesting the lowering of her standard of living, she had the right to call a meeting with the family for assistance. The senior member of the family would then keep an eye on the heir's dealings. He could also be reported at the chief's court which had the power to deprive the heir of his position in the family.

66 **Joyce Maluleke: Gender Directorate of the Department of Justice and Constitutional Development** informed the 'Expert meeting' at Wits that circumstances have changed. The position used to be simply sharing the crops and small property. People are now sharing money.

2.3 Customary law of succession: the 'official' and 'living' versions

2.3.1 Customary law exists not only in the 'official version' as documented by legislation, courts and writers; there is also the 'living law', denoting 'law actually observed by African communities'.[67] Some of the earliest criticisms of the outcome in **Mthembu** were based on concerns that the court did not give enough weight to the distinction between 'official customary law', on the one hand, and day-to-day African practice, on the other.[68] At the time, under attack was the conclusion of Le Roux J that the concomitant duty of support attaching to the heir's right to take all the property to the exclusion of girls and women had the effect of 'saving' the customary law rule from constitutional attack. This was because the duty of support rendered the discrimination fair.

2.3.2 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.[69] The outline of customary law of succession 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, commissions 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.[70]

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67 T R Nhlapo "The African Family and Women's Rights: Friends or Foes?" 1991 **Acta Juridica** 135; **Mabena v Letsoalo** 1998 (2) SA 1068(T).

68 *Ibid.*

69 This was confirmed by **Mr Raulinga,** Bloemfontein Chief Magistrate, at a workshop on customary law of succession in Bloemfontein on 01 November 2001. See also Himonga and Bosch "The application of African customary law under the Constitution of South Africa: problem solved or just beginning?" (2000) 117 **SALJ** 319 who described 'living law' as: "dynamic and constantly adapting to changing social and economic conditions…customary law is formed out of interactive social, economic and legal forces which give it its flexibility in content".

70 Dengu-Zvogbo *et al* **Inheritance in Zimbabwe** 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.

2.3.3 The principle of male primogeniture, for instance, which has long been assumed to be the keystone of customary law of succession, is now only partially observed.[71] The eldest 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. 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.[72]

2.3.4 At a workshop in Nelspruit **Mr Ngobeni,** Nelspruit Chief Magistrate, pointed out that the nature of family assets has changed and most of it comes from cash earnings by both spouses. It is observed that both spouses have contributed to the accumulation of these assets. During their lifetime parents spend their property on their children through education and paying lobolo for them. In this way they practically pass on the share of the children during their lifetime. That is why in practice the surviving spouse is preferred to inherit when a person dies intestate rather than children.[73]

2.3.5 In some communities last born sons inherit the family homestead.[74] This shift is explained by the fact that the eldest son is normally the first to marry, leave home and start a new family. He already has the benefit of an education and *bogadi* has already been paid for him.[75] The youngest son is left behind to care for his parents in their old age. Once the father dies, the youngest son becomes responsible for his mother, the widow. His inheritance of the family land and house gives him both the means and the incentive to carry out his duties.[76] **Prof Bekker**[77] has also encountered instances where the last born son succeeds to property at death. The reason for choosing the youngest son is that he is the

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71 **Mr M C Zikalala,** Johannesburg (Family Court) Magistrate, indicated that, among the Tswanas and Zulus all children born whether of a never married, widowed, or divorced mother are joint heirs in her estate. This has made it easy and fair to the children of the deceased. Other tribes still believe a male issue is the heir in such estates.

72 This was disclosed by **Kgoshi Malekane** who chaired the proceedings at the workshop in Pietersburg.

73 Workshop held at Nelspruit.

74 Meetings in Limpopo have shown that this happens frequently.

75 A point made by **Mrs Mlamleli** at the Commission's workshop in Bloemfontein.

76 Prinsloo **Inheemse Publiekreg in Lebowa** 16; Donzwa *et al* "Which Law? What Law? Playing with the rules" in Ncube & Stewart (eds) **Widowhood, Inheritance Law, Customs and Practices in Southern Africa** (1994) 99 note this practice as a feature in Lesotho, Zimbabwe and Botswana. **Mrs Ramokgopha** at a meeting at Ga-Mothiba on 14 June 2003 where she pointed out that in Limpopo Province the youngest son is the one who has to take care of the widow and the deceased dependants.

77 Bekker & De Kock "Adaptation of the customary law of succession to changing needs" (1992) 25 **CILSA** 368.

one who would be at home caring for his father and mother into old age. The other children would have left and established independent households.[78]

2.3.6 The **Gender Research Project of the Centre for Applied Legal Studies** at Wits, conducted research in three urban and two rural areas on succession practices.[79] Their research suggests that many inheritance practices within communities are accommodative of all family members. In practice, parents leave their property to needy children and other dependants. These include married women, women who have returned from broken marriages and males who cannot establish their own homesteads. Surveyed respondents have also indicated that contrary to the rule of male primogeniture, married couples would like the surviving spouses to succeed to marital property.[80] These practices take place in both urban and rural areas. The research points out that while the traditional customary law of succession conflate rights with responsibilities, developments on the ground show that it is possible for customary inheritance systems to allow the widow to succeed to the marital property and to provide the heir with resources to discharge cultural responsibilities. This is already happening in practice due to high rates of unemployment and poverty in the rural areas.

2.3.7 **Jolene Moodley** of the Centre for Human Rights, University of Pretoria states that women often run their own households very successfully while their husbands work in the cities. They have administered their homes and finances for many years. Many of these women play the role of both parents and form the backbone of their households. According to her, it would be absurd not to allow them to inherit after taking care of their families for so long. They should be afforded the same privileges as men.

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78 **Mr Thoka** pointed out that her brother and all his sisters have left (through marriage and all of them are teachers) their parents' homestead at Mokumuru in the area of Bochum and he, as the last born son, was left behind with the parents. Now that the parents are dead he has inherited the homestead.

79 As pointed out by Mbatha L in a paper that was delivered at a two-day conference on "Enhancing the Participation of Women in the Law Making Process" from 25 to 26 July 2001.

80 This is also supported by most of the participants in some of the townships visited during the Commission's household surveys and meetings held with communities indicated in **AnnexureG**.

2.3.8 In the Free State, it has been found that true succession takes place only when both spouses die.[81] When the husband dies, family property falls under the control of the widow. The eldest son may preside over family meetings as the notional head of the family, but the widow exercises greater control over the estate.[82] It is only when the widow finally dies that the eldest son inherits the land and cattle. Remaining cattle are shared amongst the children. What this finding suggests is that succession is not a single event but rather a process occurring over a period of time.

2.3.9 Another significant change is in the principle that only males can succeed as heirs.[83] Throughout southern Africa, it appears that widows have stronger claims to estates than the official version of customary law would lead us to believe.[84] Most of the families at Schoonveldt own a piece of land. According to customary law of succession, rights and responsibilities to land following an owner's (father) death went to his sons in equal shares, although the eldest son might receive an extra share in recognition of his responsibility for rituals and maintenance for his mother and unmarried sisters. Land was not regarded as vesting in individuals as sole beneficial owners, but rather in the family. According to participants, the position has changed, and women also get their share of land when the father dies. They can decide what they do with their share, whether they build a house or, if it is agricultural land they can plough and sell it. The women revealed that they prefer to own their pieces of land and pass it on to their children.[85]

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81 **Kgosigadi Moroka**, Free State House of Traditional Leaders explained that in Thaba Nchu when a husband dies his widow takes over family property to look after the children. It is only after she had died that the children will divide the property among themselves.

82 **Mr Khati**, Maclear Magistrate at a workshop in Bloemfontein.

83 In relation to the Lobedu in Limpopo, women and children succeed as heirs. The other exception is in KwaZulu Natal (footnote 61) and the former homeland of Bophuthatswana, where the Succession Act 23 of 1982, as amended by the Intestate Succession Law Restatement 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.

84 Donzwa *et al* (footnote 76) 100. 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. Mokobi & Kidd "Marriage and Inheritance: the Chameleon Changes Colours" in Ncube & Stewart (eds) **Widowhood, Inheritance Law, Customs and Practices in Southern Africa** (1994) 22. WLSA found that the most 'traditional' form of customary law was maintained in Swaziland. Because a widow is not considered to be fully part of husband's family, she cannot inherit and must therefore depend on the eldest surviving son for maintenance.

85 At a meeting with community members at Schoonveldt-Bochum on 19 July 2003. They pointed out that by children they meant both male and female who will share the property equally.

2.3.10 In comparison, **Mr Zikalala**, Johannesburg Magistrate, points out that most of those identified as heirs in an estate are men (sons), who were long parted from their families. Others might have deserted their families. In either case, customary law calls for the persons to inherit their fathers' estates, although they are usually irresponsible or have no interest in the estate except the money. From his experience, these heirs normally sell the immovable property of their parents for personal gain, thus leaving their siblings without shelter. In practice, the younger siblings (whether male or female) may well have improved the home and therefore should be the ones to inherit.[86]

2.3.11 **Mrs Nnuku Motha**, at an *imbizo* at Daantjie, indicated that, in her area, 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.

2.3.12 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 the basis of current social acceptance. The lawgiver cannot hope, however, to solve all the problems experienced by widows, for any formal reform 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.

2.3.13 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 the work of an independent NGO, Women and Law in Southern Africa Research Trust (WLSA), is a growing emphasis on providing for those who were directly dependent on the deceased for support.[87] 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

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86 **Mr Zikalala** was giving examples from cases that come before him.

87 Letuka *et al* **Inheritance in Lesotho** (1994) 165-173.

customary law can work against the welfare of deserving beneficiaries.[88] The workshops also revealed that heirs at customary law do no longer fulfil their maintenance obligations.[89] This is also revealed by cases recently decided by our courts as discussed in Chapters 3 and 5 below.

2.4 Reform of the customary law of succession in Africa

2.4.1 The struggle for women's inheritance rights in Africa has gained urgency in recent years for several reasons. These include a sharp increase in the number of women widowed at a young age as a result of HIV/AIDS.[90] Throughout Africa, post-colonial governments have paid close attention to the customary law of succession. In all cases, their object was the same: to grant the deceased's surviving spouse and children rights of inheritance. Some of the countries have passed legislation to alleviate such wrongs suffered by women in the area of inheritance under customary law.

2.4.2 The more detailed enactments that emanated from Malawi, Ghana, Zimbabwe and Zambia present especially useful models for South Africa.

2.4.3 The principal concern of Malawi's Wills and Inheritance Act of 1967 was to reconcile the interests of customary law heirs with those of surviving spouses and children. This Act provides that 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.[91] The residue devolves according to customary law.

2.4.4 A study on Women's Property and Inheritance Rights that was carried out in Malawi by the Gender Studies Unit at Chancellor College, University of Malawi, indicated that women's inheritance rights have attracted a lot of attention in the 1990s in Malawi, especially after the Beijing Women's UN Conference.[92] There is now more discussion of and advocacy

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88 Thus plaintiffs choose forums and invoke rules favourable to their claims. Dow U and Kidd P **Women, Marriage and Inheritance** (1994) WLSA University of Botswana, Gaberone, maintained 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.

89 This seems to be a problem experienced in all the provinces visited.

90 This was revealed at the 8th Women's World Congress held in Kampala, Uganda on 21-26 July 2002.

91 Roberts S "The Malawi law of succession: another attempt at reform" (1968) 12 **JAL** 82.

92 This was revealed by N Ngwira, A Chiweza, N Kanyongolo and E Kayambazinthu "Upholding Women's Property and Inheritance Rights in Malawi: Changes required to meet the challenges" a Paper presented at the 8th Women's World Congress held in Kampala, Uganda on 21-26 July 2002.

for these rights, as well as a new awareness on the part of women themselves. The Wills and Inheritance Act of 1967 has been revised to criminalize 'property grabbing'. However, evidence from media and court sources indicates that women's inheritance rights are far from secure. Property is sometimes 'grabbed' or stolen when the woman is still mourning after the burial. In certain cases, relatives and thieves take advantage of the absence of widows to steal household effects or livestock.[93] The underlying causes of 'property grabbing' seem to be the lack of wills, the uncertainty in the Wills and Inheritance Act (which is unclear on heirs and shares), the perception that women are not entitled to inherit (due to misunderstanding of customs) and the opportunistic behaviour of relatives.[94]

In February 1998 the Bill to amend the Wills and Inheritance Act so that 'property-grabbing' and 'chasing-off' became criminal offences, was rejected for the third time.[95] Some women's groups alleged that the Bill was thrown out because the male majority in Parliament believed such law would encourage wives to murder their husbands for financial gain.[96]

2.4.5 In Ghana, the 1985 Intestate Succession Law[97] was enacted to change the prevailing situation under which widows were excluded from all inheritance under customary law. It also sought to prevent the deprivation of inheritance suffered by children of the deceased in matrilineal communities where males do not, by virtue of marriage, add members to the family unit.[98]

2.4.6 The Ghana Intestate Succession Law of 1985 enjoys the reputation of being the most progressive inheritance law on the continent, and it is certainly the most progressive law in West Africa. It has been hailed as revolutionary in that it directly challenges customary notions of inheritance. The framers of the law acknowledged that, with the onset of urbanisation and changing lifestyles, women played a more significant role in the household economy. Thus, customary laws and practices, which completely excluded women from inheritance, were considered unjust. The Intestate Succession Law also emphasised the

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93 N Ngwira *et al* (footnote 92) 2.

94 *Ibid.*

95 *Ibid.*

96 WLSA Malawi representative Seodhi Mnthali has presented a critique on this matter to the Malawi Ministry for Women and Children ("Property Grabbing Rages on in Malawi" by Joel Chipungu, **PANA** correspondent).

97 PNDCL 111 of 1985.

98 Ekow-Daniels WC "Recent reforms in Ghana's family law" 1988 **JAL** 45.

increasing importance of the nuclear family as opposed to the traditional extended family unit.[99]

2.4.7 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).[100] The residue of the estate then passes to the spouse, children, parents and other customary heirs in specified fractions.[101] 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.[102] 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. In 1991 new provisions were enacted for dividing matrimonial property so as to give the widow and children the greater part. It criminalised the ejecting of a widow and children from the home without a court order.[103] Even though the law makes radical changes in the law and practice of intestate succession in Ghana, its implementation over the past twelve years has revealed a number of drawbacks which have limited its effectiveness in achieving its stated objectives.[104]

2.4.8 In Zambia the 1989 Intestate Succession Act[105] was designed to provide women with a share of the joint estate. Under this Act, the children of the deceased man equally share 50 percent, the widow receives 20 percent, the parents receive 20 percent and other relatives receive 10 percent. A 1996 amendment of this Act[106] placed the widow's share at 20 percent, to be divided equally with any other women who can prove a marital relationship with the deceased man, thus granting inheritance rights to other wives, mistresses and

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99 "What is intestate succession?" a paper prepared by E Appiah, Chief State Attorney of Ghana, on Ghana's Intestate Succession Law of 1989 (in a package sent to the researcher together with the PNDCL 111 of 1985).

100 Sections 3 and 4.

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

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

103 Section 16 of the Intestate Succession Amendment Law II of 1991.

104 See footnote 99.

105 Act 5 of 1989.

106 The Intestate Succession Bill of 1996 (21 February 1996).

concubines.[107] The amendment was never approved. In practice 'property grabbing'[108] by the relatives of the deceased man remains widespread.[109]

2.4.9 The position in Zimbabwe was clarified by **Emilia Muchawa** and **Ruvimbo Masungure** of the Zimbabwe Women Lawyers Association[110] who informed the researcher that in the rural and urban areas of Zimbabwe, men die without leaving wills. More often than not, the grief of the widow and children quickly turns to despair, as the relatives take his house, land and property, leaving his own family homeless - as those who have seen the film 'Neria' will be all too aware. People who had been able to cope are thrown into grinding poverty while others get rich. Howerver, in 1997 the Zimbabwe Government made an enlightened move to address this problem. It recognised that Zimbabwean culture should protect the weakest in the family, women and children. Legislation was passed that protects widows and allows them to keep the property they had worked with their husbands to acquire for the benefit of their children.[111] This is easier if the man leaves a will, but is now possible even if there is no will.

2.4.10 Under the Zimbabwean Administration of Estates Amendment Act 6 of 1997, when a death is reported, the Master is obliged to summon the deceased's family in order to appoint an 'executor'.[112] 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.

2.4.11 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 or more

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107 Zambia Country Reports on Human Rights Practices-1999 released by the Bureau of Democracy, Human Rights and Labour February 23, 2000.

108 *Ibid.*

109 Ncube W & Stewart J (eds) **Widowhood, Inheritance Law, Customs and Practices in Southern Africa** WLSA Harare (1995) 69. Himonga C "Protecting the minor children's inheritance rights" (2001) **International Survey of Family Law** 457.

110 They visited the Commission on 23 March 2003 and shared ideas with Ms Moloi, the researcher of this project.

111 Administration of Estates Amendment Act 6 of 1997.

112 Section 68B(3) of Act 6 of 1997. Because of its specifically common-law associations, the use of the term 'executor' was possibly unfortunate.

wives and one or more children, one-third of the estate goes to the wives and two-thirds to the child(ren).[113] 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). 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.[114] Where the deceased was survived by children but no spouse, the children inherit in equal shares.

2.4.12 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. If the deceased left neither spouse nor children, the estate devolves on parents and siblings in equal shares.[115] 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.[116] Customary law then applies to determine devolution of any residue.[117]

2.4.13 A less satisfactory aspect of the new law is its attempt to cater for the practice of 'dual' marriages, i.e. 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.[118] 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 law marriage is deemed invalid. From this somewhat arbitrary provision, it follows that the surviving spouse and children of the second union have no more than a right to maintenance from the deceased estate.[119]

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113 Section 68F(2(b).

114 Banda F "Changing the face of customary law of succession in Zimbabwe: Inheriting trouble?" (1997) **International Survey of Family Law** 525-549.

115 Section 68F(2)(g).

116 Section 68F(2)(i).

117 Section 68F(2)(j).

118 This follows from the deeming provision in s 68(3) of Act 6 of 1997.

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

2.4.14 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.[120] 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.

2.4.15 This is contrary to the decision in **Magaya v Magaya** (ZS)[121] which attracted a lot of attention, both locally and internationally. The facts were as follows: Lennon Magaya, a Zimbabwean of African descent and practitioner of traditional Shona custom, died, leaving behind two polygamous wives and four children, a house in Harare and some cattle at a communal home outside the city. However, he did not leave a will. The eldest child, Mr Magaya's only daughter, was born in 1941 of his first or senior wife; his three sons were all the children of his second wife. Shortly following the death of the deceased, Ms Magaya sought heirship of the estate in the local community court. The eldest brother declined to seek the inheritance, claiming he would not be able to look after the family as is required under traditional law. Ms Magaya had been living in the house with her parents until her father's death. With the support of her mother and three other relatives, she received the appointment and title to the house and cattle.[122] Soon thereafter the second son applied to cancel this designation. He contended that the failure to involve him and "other persons interested in the deceased's estate" contradicted section 68(2) of the Administration of Estates Act. Ms Magaya's appointment was cancelled forthwith and all interested parties then attended a new hearing. The second son was proclaimed the rightful heir under customary law. He proceeded to evict his sister from the Harare property.[123] In justifying its decision, the Court relied on the Administration of Estates Act. The crux of the criticism

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120 Dengu-Zvogbo *et a*l (footnote 70) 67.

121 16-2-1999 Case SC210/98 unreported.

122 Magaya *supra* 113.

123 Sue Nanji Matetakufa "Zimbabwe in Reverse Gear as Court Ends Women's Rights" **African News Services** 27 October 1999.

leveled at the decision is that it discriminates against women and fails to take proper account of international norms of gender equality.

2.5 Conclusion

It is clear from the above that the purpose of succession is that the property of the deceased should be left to the use or benefit of his or her closest relatives or those who were dependent upon him or her during his or her lifetime. The official customary law of succession in terms of the principle of male primogeniture, however, grants to the eldest surviving male relative of the deceased the exclusive use and enjoyment of the deceased's intestate estate. The present version of customary law, according to written comments and the majority of comments gathered in the workshops undertaken is that this is no longer the position as all children of the deceased acquire a benefit at his or her death. Where the deceased is a man, his widow continues to be in possession of the estate until her death whereupon the estate is divided amongst her children.

The reform of the customary law of succession in other African countries provides insight in relation to the changes made and the problems of implementation of the new laws.

CHAPTER 3

CUSTOMARY LAW OF SUCCESSION AND THE BILL OF RIGHTS

3.1 Customary law, culture and the Bill of Rights

3.1.1 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,[124] problems arise from the fact that particular customary rules appear to contravene section 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.

3.1.2 As far as gender discrimination is concerned, the prohibition in section 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).[125] 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'.

3.1.3 More recently, the government's duty to ensure equal treatment was repeated in the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000.[126] One of the purposes of this Act is to bind the state, when enacting legislation, to promote equality.[127] 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'[128] and 'any practice, including traditional, customary or religious practice, which undermines equality between women and men'.[129]

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124 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 interfere with the devolution of property to private individuals.

125 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.

126 Act 4 of 2000.

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

128 Section 8(c).

129 Section 8(d).

From the provisions of section 8(c) it seems the legislature prohibits the principle of primogeniture in the customary law of succession without regard to the implication of such a step.

3.1.4 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.

3.1.5 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 provide for the recognition of customary law and respect for South Africa's diverse cultures.[130]

3.1.6 The first obligation was met by section 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.[131] According to the proviso to section 211(3), however, customary law must be read subject to the Bill of Rights and any relevant legislation.

3.1.7 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 section 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 preference over any

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

131 Under section 1(1) of the still current Law of Evidence Amendment Act 45 of 1988, the courts simply have discretion whether to apply customary law. See also **Thibela v Minister van Wet en Orde** 1995 (3) SA 147 (T). Courts are now obliged to apply customary law as acknowledged and endorsed in **Mabuza v Mbatha** 2003 (4) SA 218 (C) at 228.

other.[132] Customary law must, in other words, be accorded the same respect as common law.

3.1.8 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.[133] Hence, both sections 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.

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

3.2.1 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.

3.2.2 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.[134] Relations between citizen and citizen were a reserved domain, which would continue to be regulated by private law, free from constitutional review.[135] 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 individuals 'if, and to

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132 **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.

133 In any event, a right may in principle never be limited by a freedom, such as the freedom to practice 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.

134 See Du Plessis in De Villiers B (ed) **Birth of a Constitution** (1994) Juta Cape Town.

135 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).

the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'.[136]

3.2.3 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 enforceable only against the state, and thus do not fall within the purview of section 8(2). Section 9 on equal treatment, on the other hand, is worded in such a way that it dovetails with section 8(2) to become horizontally applicable. Hence, section 9(4) provides that '[n]o person may unfairly discriminate directly or indirectly against anyone …'. The provisions of sections 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.[137]

3.2.4 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 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'.[138]

3.2.5 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).[139] The particular wording of the right to culture, 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 this regime does not interfere with someone else's right to equal treatment.

3.2.6 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

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136 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.

137 Section 6 of Act 4 of 2000.

138 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.

139 See **S v Makwanyane** and Another 1995(3) SA 391 (CC) 104.

reference to context, whether historical or social. If social context had prevailed, customary law might well have shaped the content of the fundamental rights,[140] but, instead, the interpretation process was reversed: fundamental rights must determine the content of customary law.[141]

3.2.7 Authority for this approach lies in section 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.[142] 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.

3.2.8 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 the so-called 'living law' to laws set down in the official version.[143] A recent decision, **Mabena v Letsoalo**,[144] for example, used the precursor to section 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.

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140 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.

141 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.

142 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 is modified so as to reflect the spirit and objects of the fundamental rights.

143 **Thibela v Minister van Wet en Orde** 1995 (3) SA 147 (T).

144 1998 (2) SA 1068 (T) at 1074-5.

3.2.9 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 section 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.

3.2.10 The question whether the customary rules of succession are discriminatory and hence unconstitutional has been raised in a number of cases. These cases are probably merely an indication of a bigger problem whereby women and children may be debarred from inheritance in terms of customary law. They reflect the very essence of this inquiry. The following is a review of these cases.

3.2.11 The first attack on the constitutionality of the customary law of succession was launched in the **Mthembu v Letsela** trilogy.[145] The judgments of Le Roux J, in the first **Mthembu** case, and Mynhardt J, in the second **Mthembu** case, were based on a finding that the customary law of succession is not in conflict with the Bill of Rights.[146] The reasons advanced by the two judges are, however, divergent. In the first judgment Le Roux found that the challenged male primogeniture rule was not an unfair distinction between persons of different gender, because " … the devolution of the deceased's property onto the male heir involves a concomitant duty of support and protection of the woman or women to whom [the deceased] was married by customary law and of the children procreated under that system belonging to a particular house".[147] He, however, conceded that in an urban community the position may be different and in such a case "the factual situation must first be resolved".[148] This judgment drew a range of praise and criticism. Nhlapo, although conceding that the judgment had weaknesses, praised the courts' approach. He explained his point of view as follows:

These are early days in constitutional litigation in South Africa, especially on issues of such sensitivity as those of culture and customary law … [I]t is a welcome development when the

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145 **Mthembu** cases (footnote 2).

146 **Mthembu** (1997) at 946 C and **Mthembu** (1998**)** at 686 G-H.

147 **Mthembu** (1997) at 945 E-F.

148 *Ibid*.

courts are prepared to keep an open mind until a customary practice has been assessed on merit without resorting to any assumptions about the ranking of rights.[149]

3.2.12 Maithufi also welcomed the decision, but said that it 'reads like a riddle'.[150] He thought that the judgment was not an express authority for the view that male primogeniture is constitutional. Justice Le Roux, according to Maithufi, was hesitant to decide what the position would have been if succession in an urban area was at stake.[151]

3.2.13 The main point of criticism though was the vague tribal/rural distinction drawn by the Judge. Kerr was of the opinion that there should be no uncertainty about the application of the rule in an urban environment.[152]

3.2.14 In the second judgment, the right to succeed was based on the child's legitimacy.[153] Justice Mynhardt's reluctance to decide categorically on the constitutionality of the customary law of succession was due to his view that the development of customary law should best be undertaken by the legislature. He also failed to lay down any guidelines for the development of customary law.

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149 Nhlapo "African family law under an undecided constitution: the challenge for law reform in South Africa" in Eekelaar and Nhlapo (eds) **The Changing Family:International Perspectives on the Family and Family Law** (1998) 630.

150 Maithufi "The constitutionality of the rule of primogeniture in customary law of intestate succession" (1998) **THRHR** 146.

151 *Op cit* 146-147. Mbatha "The role of courts in the development of customary law" vol 4/1999 Gender Research Project Bulletin 7 expressed the view that Justice Le Roux failed to answer the specific question why women turn to courts to seek legal aid. The issue, according to her, was the fact that heirs do not comply with the duty of support. She felt that academic lawyers, magistrates and judges should develop customary law and not ascribe the role to the legislature only.

152 Kerr "Inheritance in customary law under the Interim Constitution and under the present Constitution" (1998) **SALJ** 262. Criticism along these lines were expressed by a large number of academics. See *inter alia* De Koker "Male primogeniture in African customary law – are some more equal than others? (1998) **JJS** 99, Van Niekerk "Indigenous law and narrative: Rethinking methodology" (1998) **CILSA** 208 at 235, Himonga C and Bosch C "The Application of African Customary Law under the Constitution of South Africa: Problem Solved or Just Beginning?" (2000) 117 **SALJ** 306 and Molapo D "The legal status of women in customary law: The call for equality" (2001) 1 **Responsa Meridian** at 17.

153 **Mthembu** (1998) at 686 E-G.

3.2.15 The third **Mthembu v Letsela**[154] judgment largely confirmed the earlier decisions. Mpati J held that the girl had no right to inherit, because she was born out of wedlock,[155] which meant that in terms of Regulation 2(e) of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks, GN R200 of 1987 (hereinafter the Estate Regulations) the property had to be distributed according to customary law, which would exclude the girl. The Court held that Regulation 2(e) was not unfairly discriminatory in regard to female children, younger children and extramarital children:

What needs to be stressed from the outset is that the regulation in issue did not introduce something foreign to black persons.... It merely gave legislative recognition to a principle or system which had been in existence and followed, at least, for decades. It is not inconceivable that many blacks, even to this day, would wish their estates to devolve in terms of black law and custom. Section 23(3) of the [Black Administration] Act provides that: "All other property of whatsoever kind (excluding property referred to in ss (1) and (2)] belonging to a Black shall be capable of being devised by will." The existing law therefore enables blacks to avoid the consequences of the application of the customary law of succession if they so wish. It is therefore in the power of blacks to choose how they wish their estates to devolve. If they take no steps to alter the devolution of their estates (as is their right), the resulting consequences cannot be assumed to be contrary to their wishes. As the wishes of the deceased are still paramount in our law, it is difficult to see how a regulation which respects that right can be said to be unreasonable and *ultra vires* at common law.[156]

3.2.16 On the question whether the Court was called upon to develop customary law, the Judge remarked:

In any event we would be ill-equipped to develop the rule for lack of relevant information. Any development of the rule would be better left to the Legislature after a process of full investigation and consultation, such as is currently being undertaken by the Law Commission.[157]

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154 **Mthembu** (SCA) (footnote 3).

155 Footnote 3 at 878-879.

156 Footnote 3 at 880.

157 Footnote 3 at 883H-I.

3.2.17 The case of **Zondi v President of the Republic of South Africa**[158] revolved around the fact that, in terms of section 22(6) (since repealed) of the Black Administration Act, Africans could enter into three types of marriage: by antenuptial contract; in community of property; or out of community of property.

Regulation 2 of the Estate Regulations[159] distinguished between the succession rules applicable to these three types of marriage. In the case of marriage entered into by antenuptial contract and in community of property, the estates were governed by the Intestate Succession Act.[160] In the case of marriages out of community of property the estates were to devolve in terms of customary law. In *casu* the Judge questioned the justification for the distinction:

In the case of the present deceased, the notion that because he was not married in community of property or by antenuptial contract his intestate estate devolves according to customary law is, in my view, artificial in the extreme. There is no rational reason for the differentiation. The fact that he contracted a marriage out of community of property points away from customary law. The proprietary regime resulting from his marriage was fundamentally no different from that brought about by an antenuptial contract.[161]

He came to the conclusion that the distinction offended against the equality provisions of the Constitution and held that:

In the interests of promoting the values espoused by the Constitution, the regulation should without further ado be struck down thus conferring on all illegitimate children the same succession rights.[162]

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158 2000 (2) SA 49 (N).

159 R200 of 1987.

160 Act 81 of 1987.

161 Footnote 158 at 52 B-E.

162 S*upra* 53 G-I. Ironically, it would appear that the case should not have been resolved on the basis of the discriminatory nature of section 22(6) of the Black Administration Act, read with Regulation 2. The estate would probably have had to be administered in terms of the applicable Code of Zulu law. Section 79(3) of the KwaZulu Act on the Code of Zulu Law 16 of 1985 and section 79(3) of the Natal Code of Zulu Law, Proc. R151 of 1987 provide that –"Notwithstanding any provision in any other law contained, the estate of a Black married by civil rites shall devolve according to the Succession Act, 13 of 1934, as amended."

3.2.18 Regulation 2 was thus declared unconstitutional, but only in so far as, for purposes of succession, a distinction was made between marriages of Blacks in and out of community of property. It does not serve as authority for saying that the customary rules of succession are *per se* unconstitutional.

3.2.19 **Moseneke v The Master** 2001 (2) SA 18 (CC) does not deal with succession, but with the administration of estates. In terms of section 23(7) of the Black Administration Act, the Master of the High Court had no powers in respect of the administration of estates of deceased blacks. Under Regulation 3(1) of the Estates Regulations, such estates had to be administered by the magistrate in whose district the deceased was resident. Sachs J, delivering the judgment of the Constitutional Court, held that section 23(7) of the Act and the Regulation create unfair discrimination within the meaning of section 9(3) of the Constitution. These provisions also constitute a limitation of the right to dignity entrenched in section10.[163]

3.2.20 Sachs J realised, however, that declaring the provisions unconstitutional with immediate effect would create various practical problems, and in order to avoid them, he decided that section 23(7)(a) was invalid with effect from 6 December 2000, but that the declaration of invalidity of Regulation 3(1) be suspended for a period of two years to enable the Master to take steps to administer African estates. Magistrates would retain their powers to administer estates that devolve in terms of customary law.[164]

3.2.21 The outcome of this decision was an amendment of the Administration of Estates Act[165] to provide, briefly, that –

- all estates of deceased persons, which do not devolve according to customary law, must be administered under the control of the Master. The Act states that the Master will not have jurisdiction or functions in respect of any property that devolves according to customary law.[166] By implication these estates will still be administered by magistrates;

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163 **Moseneke v The Master** 2001 (2) SA 18 (CC) (hereafter the **Moseneke** case) at 30 B-E.

164 *Supra* 32 D-E.

165 Act 66 of 1965.

166 Section 2A of Act 66 of 1965.

- service points had to be designated where officials of the Department of Justice and Constitutional Development could exercise functions on behalf of and under the direction of the Master.[167]

3.2.22 The **Moseneke** case did not change the substantive rules of customary succession. It is, however, clear that the courts will not readily accept statutory provisions that discriminate 'disgracefully' and 'shamefully' between races.[168] Furthermore the Judge was particularly sympathetic towards the fate of African women, stating that "[p]roper consideration has to be given to the way the measures concerned impact in practice both on the dignity of widows and their ability to enjoy a rightful share of the family's worldly goods".[169]

3.2.23 In **Bhe v The Magistrate, Khayelitsha**,[170] the question was simply whether an African female, whose parents were not married, could inherit intestate from her father. On the basis of the principle of equality as contained in section 9 of the Constitution, Ngwenya J held that female persons may inherit intestate. It followed that the rule of male primogeniture, as sanctioned by Regulation 2(e) of the Estate Regulations, was unconstitutional.[171]

3.2.24 Although the facts were similar to those in **Mthembu v Letsela,**[172] the Judge did not deem himself bound by that decision, because the Interim Constitution, which was applicable in the **Mthembu** case, did not have retrospective effect so that it could not undo rights that accrued before the Constitution came into operation.[173]

3.2.25 The Court's decision is important for purposes of this report. The relevant part is therefore quoted in full:

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167 See **Moseneke** (footnote 163).

168 *Supra* at 31E.

169 S*upra* at 33 B-C.

170 See the **Bhe** case (footnote 44).

171 *Ibid*.

172 See footnote 2.

173 See the **Bhe case** (footnote 44).

1. It is declared that s 23(10)(a)(c) and (e) of the Black Administration Act are unconstitutional and invalid and that Regulation 2(e) of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks, published under Government Gazette No 10601 dated 7 February 1987 is consequently also invalid.

2. It is declared that section 1(4)(b) of the Intestate Succession Act 91 of 1987 is unconstitutional and invalid insofar as it excludes from the application of section 1 any estate or part of any estate in respect of which section 23 of the Black Administration Act 38 of 1927 applies.

3. It is declared that until the aforegoing defects are corrected by competent legislature, the distribution of intestate Black estate is governed by section 1 of the Intestate Succession Act 81 of 1987.

3.2.26 In the last case, **Shibi v Sithole and Others**,[174] the court was called upon to declare that:

2.5.1 Where a person ("the deceased") dies intestate, either wholly or in part, and the devolution of the intestate estate is governed by Black law and custom ("customary law") and the deceased is survived by one or more descendants, then customary law must be interpreted and, to the extent that it is necessary, is hereby developed such that the said descendants shall inherit the intestate estate *per stirpes*, irrespective of their gender or sex.

2.5.2 alternatively …

2.5.2.1 The rules of customary law that exclude females from inheriting from an intestate estate ("the customary law rules") are inconsistent with the Constitution; and

2.5.2.2 Declaring that, pending the reform of customary law by the legislature to correct the defects caused by the customary law rules, where a person dies intestate, either wholly or in part, and where the devolution of the intestate estate is governed by customary law and the deceased is survived by one or more descendants, then the said descendants shall inherit the intestate estate *per stirpes*, irrespective of their gender or sex.[175]

3.2.27 Maluleke J held that this case was distinguishable from the **Mthembu** cases on several grounds. Firstly, in the **Mthembu** case, the cause of action arose prior to the coming into operation of the Interim Constitution on 27 April 1994, while in intestate succession the inheritance vests immediately upon the death of the deceased.[176] Secondly, in **Mthembu** Mpati AJA held that:

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174 See **Shibi v Sithole** (footnote 12).

175 *Supra* at 11.

176 **Mthembu** (footnote 3) at 882.

As the Court held, Tembi of course, is excluded from inheriting because she is illegitimate. The question of gender discrimination is not reached in this case and it is not desirable to address a question of such constitutional importance in a case in which it is academic.[177]

Thirdly, Mynhardt J held that women are perpetual minors under the guardianship of their husbands, and that they are guaranteed support and maintenance. Maluleke J, however, pointed out that women married by customary rites have, in terms of section 6 of the Recognition of Customary Marriages Act,[178] been granted equal proprietary rights with their husbands. One of the principles on which the rule of male primogeniture was based has thus been eroded and rendered largely untenable.[179]

3.2.28 On the question whether the matter should be deferred to await completion of the process embarked upon by the South African Law Reform Commission and subsequent legislative intervention, Maluleke J remarked:

> I agree with Ms Pillay that the third respondent has had nine years since the advent of the new Constitutional dispensation to address the discriminatory nature of the customary law rules of succession. I do not agree that the granting of an order developing the customary law rules of succession should be deferred any longer to wait for the Law Commission to complete its investigations as contended for by the third respondent for the reasons advanced by the third respondent.[180]

The Court accordingly made the following order:

1. It is declared that section 23(10)(a) and (e) of the Black Administration Act (Act No 38 of 1927) is unconstitutional and invalid and the Regulation 2 (e) of the Regulations of the Administration and Distribution of the Estates of Deceased Blacks, (R200) published under Government Gazette no 10601 dated 7 February 1987 is consequently also invalid.
2. It is declared that section 1(4)(b) of the Intestate Succession Act 81 of 1987 is unconstitutional and invalid in so far as it excludes from the application of section 1 any estate or part of any estate in respect of which section 23 of the Black Administration Act 38 of 1927 applies.

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177 *Supra* at 883.

178 120 of 1998.

179 Footnote 12 at 32-33.

180 *Supra* at 36.

3. It is declared that until the aforegoing defects are corrected by competent legislature, the distribution of intestate black estates was to be governed by section 1 of the Intestate Succession Act.[181]

3.3 Conclusion

The case law following the **Mthembu v Letsela** trilogy sends out a clear message that discriminatory rules of succession are unconstitutional. The equality principles in the Bill of Rights, the Promotion of Equality and Prevention of Unfair Discrimination Act and the Recognition of Customary Marriages Act have left the courts with no alternative. Male primogeniture and patriarchy are the main considerations. In addition the courts were faced with colonial-apartheid legislation that blatantly discriminated in the application of the customary law of succession. The courts have furthermore made no effort to "develop" customary law. They have in fact indicated that they are not in a position to do so, preferring to apply the Intestate Succession Act to cure the unconstitutionality of customary law of succession.

In the meantime various individuals and bodies are, as appears from the comments, adamant that discriminatory rules of succession are not acceptable. They are in fact impatiently awaiting change.

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181 *Supra* at 47-48.

CHAPTER 4

THE DUAL LAWS OF SUCCESSION

4.1 Legal dualism and the principle of equal treatment

4.1.1 South Africa has a dual legal system in the sense that it recognises and enforces at least two systems of personal law.[182] 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 amended it.[183] The other system comprises a number of closely related customary laws. Substantial differences mark these two systems. It is a standing practice in a plural or dual legal system to allow parties to choose the applicable system of law.

4.1.2 Historically in South Africa, the 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;[184] 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,[185] they could be forgiven for thinking that they were being subjected to a second-rate system of law.[186]

4.1.3 The customary law with which we now have to deal with 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

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

183 Such as the Maintenance of Surviving Spouses Act 27 of 1990 and the Intestate Succession Act.

184 See South African Law Commission **Intestate Succession** (1983) Project 22 Working Paper 2 paragraph 1.1.

185 Notably the Intestate Succession Act 81 of 1987.

186 The assumption seems to have been that, if Africans wished to escape the shortcomings of customary law, they had to make wills.

cannot make this assumption without careful consideration, nor can we assume that different cultural groups would want to surrender their legal heritages.[187]

4.1.4 The question posed in this chapter is whether a dual succession law should be maintained. **Prof AJ Kerr** remarks that it is clear that we cannot continue with the dual system as it currently exists as the common law is accorded superior status and customary law an inferior status. He is of the view that the Law Reform Commission's recommendations do not depart in any substantial way from the existing *status quo*. According to him, there needs to be a more equitable integration of the two systems of law.

4.1.5 The **Women's Legal Centre** submits that a unitary system would afford women and minor children much-needed protection. The current rules are outdated and the unnecessary reliance on the form of a deceased's marriage results in discrimination in many cases where the deceased had contracted a customary marriage early on in his or her life but then lived in a largely urban setting away from the customary context. A customary wife, in such circumstances, often does not have the support that she would have or should have had in a customary setting. The application of customary rules of inheritance in an urban setting, without an extended family and a concomitant duty of support, results in discrimination against women in many cases.

4.1.6 On the other hand, **Dr J C Beenhakker** of the National Council of Women of South Africa says that on first impression, because South Africa is one nation, we should strive for a unitary system of law. However, some of her colleagues feel that there is merit in preserving certain rules which their communities follow (ie customary law). They have taken cognisance of the fact that there should be as little government interference as possible in the devolution of black estates, which should be left to the family of the deceased.

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187 **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.

4.1.7 **SM Molotsi** advises that there should be a single law of succession in the whole Republic, especially bearing in mind marriages that take place between ethnic groups and tribes. He mentions that the Intestate Succession Act 1989 of Zambia recognised the difficulties that arose out of the application of different customary laws and suggested that the Commission should take the Zambian route.

Supporting him on a uniform law of intestate succession for all South Africans are the **Law Society of South Africa**, **Mr Venter**, Cape Town Magistrate, **R E Laue**, Durban Chief Magistrate and **Mr D G Knott** of the Association of Trust Companies in South Africa. They believe that it is wrong for the country to have different Acts applicable to different races in matters of succession. In supporting this **M M Dimbaza**, Wynberg Magistrate sites the **Moseneke** case[188] as leaving little choice in this regard. They recommend that the Black Administration Act and the existing Administration of Estates Act of 1965 should be abolished in their entirety and a new code be made. In light of the decision of the Constitutional Court of South Africa in an application brought by **Moseneke**, it is difficult to imagine how two different systems of administration of estates can be retained. In that case, Section 23(7) of the Black Administration Act, and regulation 3(1) which was promulgated under the same Act and published in Government Notice 10601 of 6 February 1987, were both declared to impose differentiation on the grounds of race, ethnic origin and colour and as such constituting discrimination which is unfair in terms of section 9(5) of the Bill of Rights.

First National Asset Management and Trust Company (Pty) Limited holds the same view. However, it urges that provision will have to be made for the customary law applicable with regard to the devolution of house property and land held in tribal settlements. All other property should be capable of devolution in terms of a will or the Intestate Succession Act.

G E Du Plooy, Witbank Additional Magistrate says that he has been involved in the administration of intestate estates of black persons for the past 13 years and can therefore state with authority that the customary law of succession of black persons often leads to gross injustice. He proposes that there should be one unitary system for all South Africans.

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188 Footnote 163.

4.1.8 **Mr S S Moodley**, Grahamstown Master of the High Court believes that there is a need for one consolidated Act that encompasses both customary and common law. He wonders, *inter alia*, how one can apply the Intestate Succession Act where there is more than one surviving spouse. He accepts that, generally, certain of the tenets of customary law often work to the disadvantage of females or close relatives, since preference is given to a male heir. In the modern context, such an heir may not act in the best interests of other family members, including females, and they may thus be unfairly prejudiced. The heir may, in reality, be symbolic rather than a person who, in terms of the earlier practices, assumes responsibility for the welfare of the extended family. Mr Moodley consequently suggested that the provisions of the Intestate Succession Act be extended to black persons, and the relevant provisions of the Black Administration Act accordingly be repealed.

4.1.9 **LA Kernick** believes that it is probably correct to say that the present Intestate Succession Act generally reflects the wishes of the white community. The only exception is that most testators of ordinary wealth would leave their entire estates to the surviving spouse and not include their children as beneficiaries - unless, of course, there were complications arising from second or third marriages. According to him, the Discussion Paper seems to have proceeded on the assumption that the Act also reflects the views of the Asian and Coloured communities.

4.1.10 **Marius Pieterse** of the University of the Witwatersrand informed the 'expert meeting' at the University of the Witwatersrand that it is not feasible for the current state of dualism in relation to civil and customary law (and specifically in the context of succession) to continue. He believes that the dual system of customary and common law has never operated equally, specifically as a result of the application of the repugnancy principle. Common law has always functioned as the dominant legal system in this regard, and aspects of customary law that were considered as against principles of public policy and natural justice have throughout been abandoned in favour of common law. In a multicultural constitutional democracy, this position is no longer justifiable. Instead of maintaining dualism, he proposed that the common and customary systems of intestate succession be integrated to form a new, flexible system which can accommodate culture-specific values and concerns.

4.1.11 It is significant that no state in southern Africa has attempted to abolish the dual legal system that it inherited from colonial rule.[189] 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[190] is applicable only when an estate falls to be administered under the Administration of Estates Proclamation,[191] which, in turn, applies to the estates of Africans only if they 'abandoned tribal custom and adopted a European mode of life,[192] and who, if married, have married under European law'.[193] The legal systems of Botswana and Zimbabwe operate on similar (if less racist) principles.[194]

4.1.12 **Mr J R P Doidge** of Maitland Trust Limited is aware that there is no easy route to finding a solution to the minefield created by two systems of succession and two systems of administering estates. If one follows the progression of these matters from the Zambian through to the Zimbabwean systems, it seems that the latter was an improvement on the former, and it follows that we must end beyond where those systems have gone. It is not ideal to have two systems other than for a bridging period. The influx of *émigrés* from Africa has made the definition of 'Black' that much more difficult, and it is making reference to customary law somewhat less relevant. The debate on a unitary system of succession may,

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189 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 section 23(1)(*a*).

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

191 19 of 1935.

192 **Mmampolokeng Manyakane** and **Puleng Rammolai**, from the Law Commission of Lesotho (they visited the Commission on 20-27 January 2004) informed the researcher that the step was taken in Lesotho to codify the customs and practices of the Basotho to create certainty; this was contained in the Laws of Lerothodi. Once the choice of law indicated that the estate was to be devolved in accordance with Basotho custom, the content of the custom was clearly spelt out. There was an automatically imposed choice of law principle which was applied to the estate of a Mosotho. They, however, emphasised that the criteria that still determines the choice of law is the form of marriage of the deceased.

193 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 section 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 section 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.

194 In Botswana, for example, according to section 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 provides a detailed system of succession that was applicable to the intestate estates of persons subject to customary law at the time of death (section 68A(1)). Section 68G of the Act lays down a rebuttable presumption that persons married under customary law are subject to that system.

however, be more appropriate in a forum for the discussion of our laws of succession as a whole, rather than in a debate around the customary law of succession only.

4.2 Choice of law rules in South Africa

4.2.1 A person dies intestate when he did not execute a valid will.[195] In the case of intestate succession, the deceased's property or estate may devolve either in terms of the common law or customary law. Where the common law is applicable, the estate devolves in terms of the Intestate Succession Act of 1987. The choice of law rules governing the intestate succession of blacks are prescribed by the Black Administration Act 38 of 1927. In this respect subsections (1) and (2) of section 23, read with Regulation 2 of GN R 200 of 1987[196] are applicable.

4.2.2 Section 23(1) provides that 'house' property must devolve according to customary law and section 23(2) provides that land held under quitrent tenure devolves according to a special statutory table of succession.[197] By implication, neither category of property may be disposed of by will. Whether customary or common law applies to other categories of property is provided for by further choice of law rules laid down in these regulations.[198]

4.2.3 Where a person died without making a will, Regulation 2 of GN R200 of 6 February 1987[199] indicates the legal system to be applied to the devolution and administration of the intestate estate. The regulation uses the type of marriage contracted by the deceased as an indicator of the legal system to be applied. The relevant provisions of Regulation 2 read as follows:

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195 De Waal and Schoeman (footnote 40) 3.

196 The Regulations for the Administration and Distribution of Estates of Deceased Blacks of 1987.

197 It was to prevent small pieces of land from being fragmented into uneconomic holdings among heirs. Bennett TW "The Conflict of personal laws: wills and intestate succession" 1993 **THRHR** 56.

198 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 DP "Die interne aanwysingsreg ten aansien van erfregkonflikte tussen die gemenereg en outochtone reg" (1982) 15 **De Jure** 133-5 on the question which version of the regulations should be applied in particular cases.

199 Promulgated under section 23(10) of the Black Administration Act of 1927.

(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 marriage 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 marriage; or
  (iii) who was at the time of his death living with him as his putative spouse; or by any issue of himself or 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 of it, as the case may be, shall devolve as if the said Black and the said 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) above, the property shall be distributed according to Black law and custom.

4.2.4 The type of marriage is therefore used as a connecting factor to indicate the legal system to be applicable to the devolution of property on intestacy,[200] coupled with the matrimonial property system applicable to the deceased. These two factors are presumed to reflect the deceased's cultural orientation.

4.2.5 Throughout colonial Africa, marriage by civil or Christian rites was taken to be a sign that the spouses had submitted themselves to the western culture.[201] Reference to the form of marriage does inject certainty into the choice of law process, but it has the disadvantage of oversimplifying issues. 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,[202] and, of course, many spouses marry under both customary and Christian rites.[203]

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200 Maithufi IP (footnote 150) 146.

201 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.

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

203 And, even if there is some justification for using the form of marriage to determine the spouses' rights and duties, this connecting factor bears little relationship to their heirs' rights of succession. See Visser (footnote 198) 137.

4.2.6 Before common law becomes applicable to intestate succession, however, Regulation 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.[204] Few people comply with all the requirements specified in regulation 2(c). Before 2 December 1988, civil and Christian marriages by Africans did not automatically produce a community of property, because section 22(6) of the Black Administration Act of 1927 provided that their marriages would be automatically out of community of property, unless the spouses had made a prenuptial declaration to vary this consequence.[205] Such declarations were seldom made. It is true that since 1988 civil and Christian marriages contracted by Africans have been in community of property, but marriages entered into by Africans before 1988 are still out of community,[206] and therefore when spouses to these marriages die intestate their estates are still governed by customary law.[207] If common law was to govern devolution of an estate, the deceased must have deliberately chosen to make a prenuptial declaration or executed an antenuptial contract.

4.2.7 Customary law applies to determine succession if a deceased is survived by a customary-law spouse or children (or remoter issue) or if the deceased had married by civil or Christian rites but *out of* community of property. Probably because of its intricate wording, this provision does not cover all the situations to which it was obviously intended to apply. In relation to a person who had married by customary law, but who died leaving *no* surviving spouse or children, the common law would apply. As far as a deceased who had divorced his or her spouse is concerned, presumably, customary law will apply to this estate, even though a critical choice of law factor, the customary marriage, is missing.[208]

4.2.8 When the application of customary law under regulation 2(*d*) seems inappropriate or inequitable, potential beneficiaries can petition the Minister[209] for a directive that the common

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204 Bennett TW **Application of Customary Law in Southern Africa** (1985) 169-170.

205 Although this section did not exclude their power to execute an antenuptial contract.

206 When the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 repealed section 22(6) of the Black Administration Act of 1927 and brought African marriages into line with earlier reforms to the common law promulgated by section 25(1) of the Matrimonial Property Act 88 of 1984, the amending legislation was not made retrospective.

207 This means that the widows to these marriages will be unable to inherit from their deceased husbands' estates. These widows will inherit from the estates of their husbands in terms of the recommended bill.

208 Bennett (footnote 204) 169.

209 Since the abolition of the Department of Development Aid it is the Minister of Justice who has to be approached.

law be applied instead. While this saving provision may afford the less affluent a cheap method for determining the law applicable to a deceased estate, it has the disadvantage of reducing choice of law to an administrative process. In other words, although a ministerial directive may avoid the costs of litigation, this type of procedure tends to preclude argument from all interested parties.[210]

4.2.9 The Natal and KwaZulu Codes have departed from the choice of law rules outlined above. They stipulate that, where a deceased was married by civil or Christian rites or had no male heir, the estate devolves according to common law.[211] These provisions override section 23 of the Black Administration Act of 1927 and the Regulations.

4.2.10 There are several reasons for repealing the existing choice of law rules. First, since the Recognition of Customary Marriages Act[212] 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.[213] 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.

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210 Kerr **The Customary Law of Immovable Property** 3ed (1990) Rhodes University 171 and Bennett (footnote 204) 170.

211 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. Although the Codes refer expressly to the Succession Act of 1934 it is submitted that the purpose of both sections is to make the Roman-Dutch law as modified by statute applicable to civil or Christian marriages. Mamashela M and Freedman W "The Internal Conflict of Law and the Intestate Succession of Africans" (2003) 1 **TSAR** 204.

212 See footnote 8.

213 Section 7(2) of the Recognition of Customary Marriages 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.

4.2.11 Secondly, because the choice of law in Regulations 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, Regulation 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 the application of this law, they should execute a will. While this assumption might in some cases be well-founded, there will be many situations where, on the ground of cultural orientation, the application of the common law would be more appropriate.

4.2.12 Thirdly, the saving provision in Regulation 2(d)(iii) has the undesirable effect of reducing choice of law to an administrative process.[214] 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 again to preclude argument from all interested parties. The Commission has therefore recommended the repeal of the regulation.[215]

4.2.13 If a person dies partially testate, section 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.[216] 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 regulation 2 should apply.

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214 Kerr (footnote 210) 171 and Bennett (footnote 204) 170.

215 **Harmonisation of the Common Law and Indigenous Law: Report on Conflicts of Law** para 6.38. See also paragraph 4.2.8 *supra*.

216 A choice of law that is vindicated on the basis of the testator's intention: Visser (footnote 198) 124-5. Note that section 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 section 23 of the Black Administration Act of 1927 does not apply'.

4.2.14 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 of intestate succession (including those in the KwaZulu and Natal Codes) must be changed. The current rules are outdated, unnecessarily complicated and unduly reliant on the form of a deceased's marriage.

4.2.15 Conflicts could to a large extent be resolved by amalgamating principles of customary and common law. This would necessitate a restatement of both. Bennett considered the possibility and concluded:

> A general code of succession law that amalgamated principles of customary and common law would be politically desirable, but it would involve difficult policy decisions for which there are currently insufficient empirical evidence to inform the policy maker. For instance, the legislature would be forced to decide which social unit should be used as the model for reform, the nuclear family, on which the common law is based, or the deceased's patriline, on which customary law is based. To choose the former would result in preference for the deceased's surviving spouse and children, to choose the latter would result in their exclusion. Partly for this reason, a wholesale reform of instate succession seems a distant prospect.[217]

One might reiterate that under present circumstances an amalgamation is not a practical alternative, because any rule accommodating male primogeniture would be unconstitutional. New rules of succession would therefore have to be created, which would not be customary. New (non-customary) rules would furthermore have to be formulated to take account of the equality of the spouses, conferred by section 6 of the Recognition of Customary Marriages Act. One may also ask whether the game would be worth the candle, because customary law of succession now applies only in respect of customary marriages entered into before 15 November 2000 when the Recognition of Customary Marriages Act came into operation and in respect of single persons.

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[217] Bennett (footnote 197) 63.

4.3 Discarded wives: the problem of dual marriages[218]

4.3.1 Formerly in South Africa, a civil or Christian marriage would automatically nullify an existing customary union. For instance, if a man married by customary law were to marry another woman by civil rites, the second marriage would automatically extinguish the first.[219] Section 22(7) was inserted into the Black Administration Act in an attempt to alleviate some of the hardships inflicted on the 'discarded' customary-law wife by this rule. This section provided that:

> No marriage contracted after the commencement of this Act [1 January 1929] but before the commencement of the Marriage and Matrimonial Property Law Amendment Act 1988 [2 December 1988] during the subsistence of any customary union between the husband and any woman other than the wife shall in any way affect the material rights of any partner of such union or any issue thereof, and the widow of any such marriage and any issue thereof shall have no greater rights in respect of the estate of the deceased spouse than she or they would have had if the said marriage had been a customary union.[220]

4.3.2 Property that was allotted to the discarded wife's house could not be devised by will.[221] The material rights of the 'discarded' wife are protected in terms of this section, not only during the husband's lifetime but also upon his death. When the husband died, the civil and customary law wives (and their children) had the same claims on his estate. The effect of this provision was not only to equate a marriage with a customary union on the death of the husband, but also to apply customary law to the property which, during the marriage, was subject to the common law.[222]

4.3.3 Since the coming into operation of the Recognition of Customary Marriages Act (15 November 2000) the situation envisaged above has been outlawed.[223] This implies that a man who is a partner in a customary marriage is presently precluded from contracting a civil marriage with another wife during the existence or subsistence of a customary marriage between him and another woman. As a result of this total prohibition, a need to protect the rights of this customary law wife or the wife of the second civil marriage does not exist. The

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218 See paragraph 5.2 below and Mqeke RB "Protection of a customary union spouse" (1980) **De Rebus** 597.

219 **Nkambula v Linda** 1951 (1) SA 377 (A). Bekker (footnote 45) 323.

220 This is the version substituted by s 1 of Act 3 of 1988.

221 Maithufi (footnote 41) 269.

222 Peart NS "Civil or Christian marriage and customary unions: the legal position of the 'discarded' spouse and children" (1989) 15 **CILSA** 59. Also Maithufi (footnote 41) 269 and Maithufi (footnote 150) 146.

223 Section 10 of the Recognition of Customary Marriages Act of 1998.

subsequent civil or customary marriage simply is a nullity.[224] The same applies to marriages contracted after 2 December 1988 when the Marriage and Matrimonial Property Law Amendment Act of 1988 came into operation.[225]

4.4 Conclusion and recommendation

In this chapter, the effects of certain statutory provisions which govern the choice of law rule in succession were discussed. These statutory provisions use the type or form of marriage contracted by the deceased during his or her lifetime as a connecting factor to indicate the legal system to be applied to the devolution and administration of his or her intestate estate.

It is without doubt that the form or type of marriage contracted by the deceased is not in all circumstances a reliable indicator of a legal system to be applied to the devolution and administration of an intestate estate. These statutory provisions further provide that where the deceased was unmarried, customary law governs the administration and devolution of his or her intestate estate irrespective of the deceased's lifestyle or cultural orientation. The regulations also empower the Minister of Justice and Constitutional Development to authorise that in certain prescribed circumstances where customary law would normally apply to the devolution and administration of an intestate estate, the common law will apply if the application of the former would lead to inappropriate and inequitable results.

The rights of a widow whose customary marriage was automatically dissolved by a subsequent civil marriage contracted with another wife before 2 December 1988 and her children were protected in terms of the amended section 22(7) of the Black Administration Act. What was actually protected was the right of such a widow and her children to the property of the erstwhile husband at the time of his death in that she and the wife of a civil marriage and their children had the same rights as if the customary marriage was in existence at the time of death.

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224 *Ibid*.

225 See Bekker (footnote 45) 269; Dlamini CRM "The new marriage legislation affecting Blacks in South Africa" (1989) **TSAR** 408; Mqeke RB "Protection of a customary union spouse" (1980) **De Rebus** 597. See also Chapters 5, 6 and 7 below.

It is recommended that the statutory provisions governing this choice of law rules be repealed. It is further recommended that the protection afforded by the amended section 22(7) of the Black Administration Act of 1927 to a widow whose customary marriage was dissolved by the entering into a civil marriage by her husband with another woman be retained.

CHAPTER 5

LEGISLATION REGULATING THE APPLICATION OF THE CUSTOMARY LAW OF SUCCESSION

5.1 Introduction

5.1.1 Although the customary rules of succession are basically non-statutory, certain statutes govern their application, namely –

(a) The Black Administration Act;[226]

(b) The Regulations for the Administration and Distribution of the Estates of Deceased Blacks;[227]

(c) The Codes of Zulu Law;[228]

(d) The Black Areas Land Regulations;[229]

(e) The Cape Proclamation Marriages between Blacks and the Administration and Distribution of Estates;[230]

(f) The Recognition of Customary Marriages Act;[231]and

(g) Section 1(4)(b) of the Intestate Succession Act.[232]

5.1.2 One may gloss over these laws and proceed to create new rules, but, for effective law reform one must take all existing legislation into account. The basic rule is, after all, that those existing laws remain in force until repealed by a competent authority. Unrepealed laws may crop up in unexpected places. It is advisable to clear the statute book of redundant and obsolete provisions, more particularly in the process of creating a new legal regime. The relevant provisions of the above laws must be scrutinised to weigh their repeal against the proposals contained in this Report.

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226 Act 38 of 1927.

227 GNR 200 of 1987.

228 The KwaZulu Act on the Code of Zulu Law, 16 of 1985 and the Natal Code of Zulu Law, Proc R151 of 1987.

229 Proc R188 of 1969.

230 Proc 142 of 1910.

231 Act 120 of 1998.

232 Act 81 of 1987.

5.2 The Black Administration Act.

5.2.1 Section 22. Marriages of Blacks: Property rights

(1) …
(2) …
(3) …
(4) …
(5) …
(6) …
(7) No marriage contracted after the commencement of this Act but before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, during the subsistence of any customary union between the husband and any woman other than the wife shall in any way affect the material rights of any partner of such union or any issue thereof, and the widow of any such marriage and the issue thereof shall have no greater rights in respect of the estate of the deceased spouse than she or they would have had if the said marriage had been a customary union.

(8) Nothing in this section or in section twenty-three shall affect any legal right which has accrued or may accrue as the result of a marriage in community of property contracted before the commencement of this Act.

5.2.2 Before 2 December 1988, a black person married by customary law could freely enter into a civil marriage with another woman, because a customary marriage was partially recognised and could not continue to exist in the face of the civil marriage. But, since 2 December 1988, partners to a customary marriage have not been allowed to enter into a civil marriage[233] except with each other. None of the partners in a polygamous customary marriage was entitled to contract a civil marriage during the subsistence of the customary marriage.[234]

5.2.3 Before 2 December 1988, civil marriages with women other than customary wives were frequent. Hence the legislature enacted section 22(7) above. Section 4 of the Cape Proclamation on Marriages between Blacks and the Administration and Distribution of Estates[235] contains a similar provision.

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233 Bekker (footnote 45).

234 Section 22(1) of the Black Administration as substituted by s1 (a) of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988. The matter is now governed by s 10(1) of the Recognition of Customary Marriages Act 120 of 1998 that reads as follows: 'A man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act 1961 (Act No 25 of 1961), if neither of them is a spouse in a subsisting customary marriage with any other person.'

235 142 of 1910.

5.2.4 The effect of section 22(7) of the Act is that the property of the dissolved customary marriage devolves according to customary law. This property would include property that accrues to a house of the customary marriage after the celebration of the civil marriage, namely, lobolo, fines and the like provided or given for daughters of the house. But property acquired by the husband after the celebration of the civil marriage accrues, so to speak, to that civil marriage and devolves in terms of Regulation 2(e) of the Estate Regulations[236] according to customary law.[237]

5.2.5 There were many such dual marriages due in part to African attitudes towards polygamy.[238] Furthermore, Africans often do not clearly distinguish between civil and customary marriages.[239] It is necessary to take note of the large number of these marriages to appreciate that protection of the customary law wives is necessary.

5.2.6 It is recommended that the discarded widows of such marriages inherit on par with the civil marriage widows. If not, the customary marriage widows will be left out in the cold. The issue of such marriages could inherit as 'extra-marital' children of the deceased, but that is not desirable. The modern tendency is not to render children illegitimate. In addition it is to be recognised that there are more marriage forms than the traditional civil or Christian marriage. But we are faced with a *fait accompli*. If these marriages were to be elevated to legitimate marriages, it would amount to recognising polygamous civil marriages, which would be a highly contentious issue.

5.2.7 Succession

The various subsections of section 23 of the Black Administration Act need to be discussed individually.

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236 GN R200 of 1987.

237 Bekker (footnote 45) 323.

238 But, as stated by De Muelenaere: "[T]he modern manifestations of polygamy have a different function. They tend to be the result of social instability and the relaxation of family support structures due to rapid urbanization".

239 See in this regard Nhlapo "No cause for optimism: Bigamy and dual marriage in Swaziland" in Armstrong and Ncube **Women and Law in Southern Africa** (1987) 125.

Section 23(1)

> All movable property belonging to a Black and allotted by 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 reason for this rule is that all property in a household belongs to the familyhead.

> House property consists of all property specifically allotted to a house by the family head from his family property, of the lobolo and fines from daughters of a house and of the earnings of the wife and her minor children. In addition, if a family head has allotted a land to a house, the fruits therefrom belong to that house. Where a family head owns immovable property, this is deemed part of his family property; he may allot a certain land or lands to a particular house, the fruits from which then belong to the house.[240]

This would still be the position in a traditional ('tribal') setting, but the application of the rule would be impractical in present circumstances. In the first place it has become meaningless in customary marriages entered into after 15 November 2000 (when the Recognition of Customary Marriages Act came into operation) because from that date all customary marriages are in community of property unless the parties enter into an antenuptial contract. Secondly, it is based on the assumption that the family head disposes of matrimonial property, whereas in terms of section 6 of the Recognition of Customary Marriages Act, customary wives are in all respects equal to their husbands, and have the capacity to acquire assets and to dispose of them.

This equality provision includes spouses in customary marriages entered into before 15 November 2000. Although the proprietary consequence of such marriages is still governed by customary law, [241] it must be interpreted in the light of spousal equality.

Thirdly, the devolution contemplated here is not inheritance in the strict sense of the word. House property is transmitted to the eldest son of the house,[242] who administers it for the benefit of family members. **It is therefore recommended that this subsection be repealed**, **and that provision be made for property allotted or accruing to a customary**

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240 Bekker (footnote 45) 135. According to Bennett (footnote 204) 232-235 the following property automatically accrues to a house in a family home:(a) Gifts to the wife and her earnings; (b) Acquisitions by other inmates of a house; (c) Lobolo received for daughters in a house; (d) Fines and damages received in respect of unmarried daughters; (e) Household effects that a wife brings with her when she marries.

241 Section 7(1) of the Recognition of Customary Marriages Act.

242 Kerr (footnote 210) 144.

law wife may be devisable by will, or if there is no will, in terms of the Intestate Succession Act.

Section 23(2)

> All land in a location 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 subsection (10).

This section relates to quitrent land, which is situated mainly in the Eastern Cape Province. Outside the former Transkei, land tenure was governed by sections 12-46 of the Bantu Areas Land Regulations.[243] The tables of succession were contained in Annexure 24 to these Regulations. The quitrent tenure contemplated in these various provisions has been upgraded to full ownership.[244]

The reason for the existence of subsection (2) has thus fallen away. **It is therefore recommended that subsection (2) be repealed.**

Section 23(3)

> All other property of whatsoever kind belonging to a Black shall be capable of being devised by will.

This section was necessary because the two previous subsections limited an African's legal capacity to devolve his or her property by a will. **As freedom of testation is in any event universal it is recommended that this provision be repealed.**

Sections 23(5) and (6)

> (5) Any claim or dispute in regard to the administration or distribution of any estate of a deceased Black shall be decided in a court of competent jurisdiction.
>
> (6) In connection with any such claim or dispute, the heir, or in case of minority his guardian according to Black law, if no executor has been appointed by a Master of the Supreme Court shall be regarded as the executor in the estate as if he had been duly appointed as such according to the law governing appointment of executors.

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243 Proc R188 of 1969.

244 Section 2, read with Schedule 1 of the Upgrading of Land Tenure Rights Act 112 of 1991. For the position in former Transkei see paragraph 5.4 below.

Courts have the power to adjudicate in any disputes within the ambit of their jurisdiction, and this makes section 23(5) redundant. The provision is also inappropriate in that it presupposes the existence of an heir, while the heirship may be in dispute. **It is recommended that this provision be repealed.**

Nevertheless, disputes about the identity of heirs will no doubt arise, and these may require a simple and inexpensive mode of resolution. Without derogating from the ordinary jurisdiction of the courts, the Commission feels that the Master should be empowered to conduct an enquiry into such disputes. **It is recommended that the Master be empowered accordingly to institute an enquiry when a dispute or uncertainty arises in consequence of the nature of customary law.**[245]

Section 23(7)-(9)

> (7) Letters of administration from the Master of the Supreme Court shall not be necessary in, nor shall the Master or any executor appointed by the Master have any powers in connection with the administration and distribution of –
>
> (a) the estate of any Black who has died leaving no valid will; or
> (b) any portion of the estate of a deceased Black which falls under sub-section (1) or (2).
>
> (8) A Master of the Supreme Court may revoke letters of administration issued by him in respect of any Black estate.
>
> (9) Whenever a Black has died leaving a valid will which disposes of any portion of his estate, Black law and custom shall not apply to the administration or distribution of so much of his estate as does not fall under sub-section (1) or (2) and such administration and distribution shall in all respects be in accordance with the Administration of Estates Act, 1913 (Act 24 of 1913).

Subsection 23(7)(a) has been declared unconstitutional by the Constitutional Court in **Moseneke Others v The Master and Others**.[246] In view of the recommendation in this report that black estates be governed by the Intestate Succession Act,[247] there is no need to retain paragraph (b) or subsections (8) and (9). **It is recommended that subsections (7)-(9) be repealed.**

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245 See clause 5 of the proposed draft Bill.

246 (Footnote 163) 33 E-F.

247 Para 2.7.1 of the **Draft Interim Report on the Review of the Black Administration Act 38 of 1927: Some sections that may be repealed immediately** (October 2003). See also the **Bhe** case (footnote 11) and **Shibi** case (footnote 12).

Section 23 (10) and (11)

(10) The Governor-General may make regulations not inconsistent with this Act-

(a) prescribing the manner in which the estates of deceased Blacks shall be administered and distributed;
(b) defining the rights of widows or surviving partners in regard to the use and occupation of the quitrent land of deceased Blacks;
(c) dealing with the disinherison of Blacks;
(d) ……
(e) prescribing tables of succession in regard to Blacks; and
(f) generally for the better carrying out of the provisions of this section.

(11) Any Black estate which has, prior to the commencement of this Act, been reported to a Master of the Supreme Court shall be administered as if this Act had not been passed, and the provisions of this Act shall apply in respect of every Black estate which has not been so reported.

Section 23(10)(a),(c) and (e) have been declared unconstitutional and invalid in **Bhe v Magistrate, Khayelitsha**[248] and in **Shibi v Sithole and Others**.[249] If the proposals in this Report are accepted none of the provisions in subsection (10) is required. It is unlikely that there are unreported estates as contemplated in subsection (11). **It is therefore recommended that subsections (10) and (11) be repealed.**

5.2.9 The Regulations for the Administration and Distribution of the Estate of Deceased Blacks.

Some of the regulations deal with administration of estates rather than succession, but it is considered convenient to deal with the regulations as a whole, rather than piecemeal. If the proposals contained in this Report are accepted the Regulations will serve no purpose. **It is therefore recommended that they be repealed**.

There are, however, some provisions that require an explanation.

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248 The **Bhe** case (footnote 11).

249 See **Shibi** case (footnote12).

Regulation 2(b) provides that: 'If the deceased was at the time of his death the holder of a letter of exemption issued under the provisions of section 31 of the [Black Administration] Act, exempting him from the operation of the Code of Zulu Law, the property shall devolve as if he had been a European.' In its report on the Rationalisation of the Black Administration Act, the Commission has recommended that section 31 of the Act be repealed.[250] The retention of this Regulation therefore serves no purpose.

Regulation 2(e) has been declared unconstitutional in the **Bhe** and **Shibi** cases. There is no reason for its retention.

Regulation 7(2) provides that:

> These regulations do not limit or restrict the exercise by the Supreme Chief of his functions as upper guardian of Black orphans and minors.

In its Report on the review of the Black Administration Act, the Commission has recommended that section 1 of that Act, providing that the State President is Supreme Chief of all Blacks in South Africa, should be repealed.[251] Although the President has not in reality exercised any functions in this capacity as 'upper guardian of Black orphans and minors' the proposed abolition of the office has revealed the following discrepancy:

> The magistrate administering the estate may, in terms of regulation 7(1) of the Estate Regulations (Government Notice R200 of 1987) take all such steps as he may consider necessary to safeguard and preserve the inheritance or interest of minors and may deposit the cash inheritance of any minor in the Guardian's fund, giving at the same time to the Master particulars as to the deceased parent, the date of birth of the minor and the name and address of the guardian. This does not empower a magistrate to appoint a guardian, whereas in estates administered in terms of the Administration of Estates Act 1965, the Master may appoint a curator dative to a minor whose property is not under the care of any guardian, tutor or curator. This means that a minor without a guardian is left with inadequate protection.[252]

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250 Para 27 of the **Draft Interim Report on the Review of the Black Administration Act 38 of 1927: Some sections that may be repealed immediately** (October 2003) para 2.7.

251 *Op cit* paragraph 2.1.

252 *Op cit* paragraph 2.1.18 at 16.

To rationalise the matter, the Commission recommended that –

- Regulation 7(1) and 7(2) of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks, 1987, be repealed; and
- Section 4 of the Administration of Estates Act, 1965, be amended by the substitution in subsection (2) for the words preceding paragraph (a) of the following words:

  'In respect of the property belonging to a minor, **including property governed by the principles of customary law,** or **property belonging** to a person under curatorship or to be placed under curatorship, jurisdiction shall lie.'[253] (The words in bold type indicate insertions in the existing enactment.)

It is recommended that this amendment be effected as part of the repeal of the Regulations as a whole.

5.3 Sections 79-82 of the Codes of Zulu Law

These sections make provision for testate and intestate inheritance of property and that succession and inheritance have to be in accordance with the rule of male primogeniture if the deceased family head had contracted a customary marriage. The Codes further provide that in certain circumstances, the property of a single woman may be divided among her children.

These provisions are the KwaZulu-Natal version of the customary law of succession with two progressive provisions, namely,

> Section 79(3): Notwithstanding any provision in any other law contained, the estate of a Black married by civil rites shall devolve according to the Succession Act, 1934 (Act 13 of 1934), as amended; and
>
> Section 82: Notwithstanding anything in any other law contained, when a woman who has never been married or who has been divorced or widowed and has not subsequently contracted a civil or customary marriage, dies intestate or partly intestate, so much of the property in her estate as has not been disposed of by will shall be divided equally amongst her surviving children, if any.

As a result, only the estates of men married by customary law and single men in KwaZulu-Natal devolve in terms of customary law.

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253 *Ibid.*

In the Commission's project on the future of the Black Administration Act, the Codes are also being scrutinised. It would seem that they will not survive as such, because they contain outdated and redundant provisions. There is, moreover, a possibility that the Codes, or large parts of them, could be declared unconstitutional for being discriminatory and creating legal uncertainty.[254] It would be unwise, however, to make the proposed reform of the customary law of succession dependant on the future of the Codes**. It is therefore recommended that sections 79-82 of these two codes be repealed**.

5.4 Marriages between Blacks and the Administration and Distribution of Estates (Cape)

Although this Cape Proclamation also applies to permissions to occupy granted under section 2 of Cape Proclamation 200 of 1910, most of the provisions relating to land matters apply only to land held under quitrent title. The only two sections of general application are sections 10 and 11.

This Proclamation deals with succession to land held under quitrent title according to the provisions of Proclamation 227 of 1898 (extensively amended by Proclamation 241 of 1911, and virtually embodied in Proclamation 170 of 1922). In short it governs succession to land surveyed under Proclamation 227 of 1989 and Proclamation 241 of 1921 (Xalanga district).

The Proclamation also contains elaborate procedures about administering estates in so far as quitrent lots are concerned, such as what is to be done when an heir renounces his right to the allotment.

The fate of this Proclamation hinges upon the fact that quitrent in former Transkei has **not** been upgraded to ownership in terms of the Upgrading of Land Tenure Act, 112 of 1991. There must, therefore, be statutory rules of succession in place to accommodate devolution of quitrent lots in former Transkei. But in the Schedule to the Communal Land Rights Bill[255] it is proposed that the quitrent referred to above be upgraded to land tenure in terms of section 25A of the Upgrading of Land Tenure Rights Act.[256] The ratio for the Proclamation will therefore fall away.

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254 See Bennett TW and Pillay A "The Natal and KwaZulu Codes: The case for repeal" (2003) **SAJHR** 217-238.

255 Bill 67of 2003.

256 112 of 1991.

Sections 2, 3, 8, 9, 10, 10A, 11, 12, 14, 15 and 16 were assigned to the Province of Eastern Cape by Proclamation 111 of 1994. The sections not mentioned have been repealed.

It is recommended that the Eastern Cape administration be requested to repeal the Proclamation.

5.5 The Recognition of Customary Marriages Act

Although this Act does not regulate the customary law of succession, it has a profound effect on it. As all customary marriages entered into after the Act came into operation (15 November 2000) are in community of property or by ante-nuptial contract,[257] the property of a deceased spouse will devolve in terms of common law, unless the deceased made a will. Marriages entered into before 15 November 2000 continue to be governed by customary law.[258]

The Act understandably does not deal with single persons, thus their estates will be governed by customary law.

The Act is silent on supporting and ancillary unions such as *ukungena*. **It is recommended that the 'widows' of such unions be treated as spouses of their late husbands and children born from such unions as dependants of the deceased.** These unions are discussed in some detail below.

5.6 Section 1(4)(b) of the Intestate Succession Act.

This provision reads as follows:

> In the application of this section –
> …
> 'intestate estate' ‘includes any part of an estate which does not devolve by virtue of a will or in respect of which section 23 of the Black Administration Act does not apply.

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257 Section 7(2).

258 Section 7(1).

This provision has been declared unconstitutional and invalid in the **Bhe** and **Shibi** cases in so far as it excludes from the application of section 1 (providing for the division of estates in terms of the common law) any estate or part of any estate in respect of which section 23 of the Black Administration Act applies. It would in any event serve no purpose if the proposals in this Report are accepted. **It is recommended that it be repealed**.

5.7 Conclusion

The issues discussed herein will further be elaborated upon in the next chapter (**Comments and Recommendations)**. These issues deal with the Commissions' recommendations relating to the reform of the customary law of succession without indicating how the consultation process influenced the recommendations. Chapter 6 is therefore aimed at linking these recommendations with the comments received from the consultation process.

CHAPTER 6

COMMENTS AND RECOMMENDATIONS

6.1 Any rule of the customary law of succession that discriminates unfairly on the grounds of gender, sex, age or birth must be changed.

6.1.1 The customary rule of succession (the principle of male primogeniture), in its official version at least, discriminates against women, female children, male children who are not first born and illegitimate children.[259] Women do not participate in the intestate succession of the deceased's estate.[260] Intestate succession in terms of customary law is founded on the principle of male primogeniture.[261] The general rule is that a man is succeeded by his first born son in a particular house.[262]

6.1.2 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.

6.1.3 There is overwhelming support for changing the rules that discriminate against women. Commentators do not want the patrilineal system of succession to continue. Most of those consulted in all the provinces expressed the view that women are subjected to differential treatment under the customary law of succession and feel that this has to change.[263] The most vocal voices were heard at the Cape Town workshop where 90% of

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259 **Mabaso v Mabaso** 1968 BAC (N-E) 27, **Mthembu** (SCA) (footnote 3) and **Zondi** (footnote 158).

260 Mbatha points out that if the husband dies intestate, customary law applies. Being female, the wife is according to official customary law, excluded from any inheritance from the estate which she contributed to by way of her labour and skills (footnote 50) 271. See **Mthembu** (SCA) and the **Shibi** case where Ms Shibi was, in terms of this system, precluded from being the heir to the intestate estate of her deceased brother.

261 Kerr (footnote 210), Bekker (footnote 45) Olivier *et al* (footnote 76), Bennett (footnote 204), Maithufi (footnote 41).

262 Rautenbach, Mojela, du Plessis and Vorster "Law of Succession and Inheritance" in Bekker *et al* **Legal Pluralism in South Africa Part 1 Customary Law** Butterworths (2001) 110.

263 Women at the workshops in the Eastern Cape, Limpopo, Free State, Gauteng, Western Cape, Mpumalanga and North West Province spoke with one voice pointing out that women living under customary law have faced discrimination on account of their gender in regard to inheritance which is incompatible with our Constitutional dispensation. See also paras 1.4.16 and 1.6.9 where women felt that they will no longer be subjected to differential treatment and they should be allowed to inherit their husbands' estates.

those who attended[264] felt that women living under customary law have faced discrimination on account of their gender in regard to inheritance which is incompatible with our Constitutional dispensation.[265] In addition, illegitimate children have faced discrimination based on their birth.[266] They felt that it is time to enact legislation that would give full effect to the fundamental rights as contained in our Constitution and international human rights instruments,[267] and to ensure that all persons in South Africa are afforded equal protection of the law and treated equally in relation to customary inheritance. The discriminatory law must therefore be amended or repealed.[268]

6.1.4 The Commission's response to these submissions is that the principle of male primogeniture which excludes women from inheritance on the grounds of gender is a clear violation of section 9(3) of the Constitution. The principle of male primogeniture also violates section 9(3) by denying female and illegitimate children the opportunity to inherit from their deceased fathers.

The Commission therefore recommends that the customary rule of male primogeniture that discriminates on grounds of gender, sex, birth or age must be amended to give the deceased's family more secure rights.

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264 Particularly representatives of the African National Congress Women's League, Joint Monitoring Committee on the Improvement of Status and Quality of Life of Women and members of Parliament.

265 Two cases came before our courts in relation to the discriminatory effect of the principle of male primogeniture. Some publications also carried stories of the discriminatory effects of the customary law of succession, Venter Z "Nurse takes on African customary law" **The Daily News** 28 November 2003, Oliphant L "Discrimination against women is still legal" **The Star** 8 August 2003, Powers M "Outdated laws keep women the poorer sex" **Cape Times** 8 August 2003.

266 **Judge Zulman** was concerned about the treatment of illegitimate children in customary law at an 'expert meeting' at the University of Witwatersrand on 30 August 2001. See also **Mthembu** (SCA) and **Zondi** (footnote 158)

267 **Ms Nombulelo Siqwana-Ndulo of the Commission on Gender Equality in the Eastern Cape. Joelene Moodley of the Gender Project Officer, Centre for Human Rights, University of Pretoria** who believes that its retention flies in the face of South Africa's commitment to human rights and its international obligations. Retention of such practices serves only to perpetuate poverty and inequality of many women.

268 This was confirmed in para 1.4.12 where magistrates pointed out that the position has to change. They do not want the unfair situation of Mrs Mildred Mthembu and her daughter, who were thrown out of their home by her father-in-law, **Dr J C Beenhakker of the National Council of Women of South Africa, SA Council of Churches in Cape Town**, the **Family Advocate-Cape Town**, **Rev Kortjaas of St Francis Anglican Church** and most women at the provincial workshops and *imbizos*.

6.2 Reforming the customary law of succession

6.2.1 There is overwhelming support for the reform of the customary law of succession.[269] This goal can be realised by, among others, amending the Intestate Succession Act 81 of 1987 so as to apply to all estates, even if a deceased was subject to customary law.[270] This may be interpreted as having the effect of abolishing the customary law of succession. The Commission's view, however, is that this is not in fact the case. The effect of the Recognition of Customary Marriages Act was to place the wife and children of customary marriages on an equal footing with those of civil marriages. Reforming or modifying the customary law of succession in this manner is aimed at achieving this equality.

6.2.2 This conclusion is furthermore based on the following considerations:

- The existing statutory rules regulating the application of customary law of succession are untenable. They have virtually been declared unconstitutional.
- Male primogeniture is neither constitutionally nor socially acceptable.
- An amalgamation of customary and common law is not feasible,[271] as there is currently insufficient empirical evidence to inform the policy-maker.
- The Recognition of Customary Marriages Act has equalised the status of spouses of customary marriages except those entered into before the Act came into operation.
- Aspects of customary law such as adoption and supporting unions can be embodied in the Intestate Succession Act.
- African families are no longer based on a patrilineal unit contained in a traditional homestead as spouses and adult family members operate as equals in modern social and economic environments.

6.2.3 A number of respondents support the reform of the customary law of succession to remove the principle of primogeniture.[272] Most felt that this process was long overdue as the customary laws regarding succession are outdated and discriminate unfairly against women

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269 Almost all workshops conducted as well as written submissions revealed this need.

270 The extension of the Intestate Succession Act to people subject to customary law is specifically recommended by magistrates who are faced with this problem in practice as well as lawyers who deal with customary law of succession frequently. See paragraphs 1.4.16, 1.6.9, 4.1.4, 4.6.1 and 4.6.8.

271 See para 4.1.15.

272 See footnotes 18 and 36, paras 1.4.14, 1.4.16, 1.6.9, 1.6.12 above. Traditional leaders in KwaZulu-Natal supported the extension of this Act, lawyers and some academics who critised the decisions in **Mthembu v Letsela** (footnote 26). As well as the two cases that came before our courts in relation to the discriminatory effect of the principle of male primogeniture.

and female children. Magistrates, who on a daily basis deal with intestate estates of black deceased persons, also welcomed the reform process and specifically supported the extension of the Act to customary law subjects as it answered most of the problems encountered in the administration of black estates.

6.2.4 Consequently it was suggested that the provisions of the Intestate Succession Act of 1987 be extended to apply to black persons, and the relevant provisions of the Black Administration Act of 1927 be repealed accordingly, because generally, certain of the tenets of customary law often work to the disadvantage of females or close relatives as preference is given to a male heir in terms of the principle of male primogeniture. In the modern context such an heir may not act in the best interests of other family members, including females, and thus they may be unfairly prejudiced by the application of this law.

6.2.5 Some respondents felt that extending the Intestate Succession Act to apply to black persons has the effect of abandoning the customary system of succession in favour of a slightly modified version of the common law.[273] They feel that amending the Intestate Succession Act is not the correct route that should be followed to reform the customary law of succession. This approach 'fuses'[274] customary succession rules with the provisions of the Intestate Succession Act, thus interfering with the rights of the other groups regulated by the Intestate Succession Act in an attempt to accommodate subjects of customary law. They argued that rather than merely imposing the common law of succession on people who are subject to customary law, it is vital to investigate the possibility of incorporating those aspects of customary law and values that are consistent with the Constitution in the reform of the law of succession.

6.2.6 It is without doubt that there is a need for the reform of the customary law of succession. The recent cases heard in the Cape of Good Hope Provincial Division and the Transvaal Provincial Division clearly indicates this.[275] It should be emphasised that although the Supreme Court of Appeal held that the rule of primogeniture was not unconstitutional in that its operation does not unfairly discriminate on the basis of sex or gender because of the heir's concomitant duty of support, the implication is that where the heir is not prepared to comply with this obligation, the operation of this rule may be discriminatory and lead to

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273 Traditional leaders at the workshop in East London on 07 November 2001, **Chuma Himonga** and **Marius Pieterse** at the 'expert meeting' held at the University of the Witwatersrand on 31 August 2001, as well as **Inkosi Patekile Holomisa**.

274 Mbatha L in "The Alternative Approach to the Customary Law of succession".

275 The **Bhe** case (footnote 11) and **Shibi** case (footnote 12).

injustice.[276] Recent case law has indicated that not all heirs are prepared to comply with their obligations at customary law.[277]

The Commission recommends that all intestate estates of Africans who were previously excluded from the application of the Intestate Succession Act of 1987, should devolve in accordance with the proposed Reform of the Customary Law of Succession Act. (See Annexure A)

6.3 Taking care of the needs of persons subject to customary law

6.3.1 While the 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.[278]

6.3.2 This inquiry therefore seeks to ensure that persons subject to the customary law of succession do not suffer discrimination on the devolution of an estate.

6.3.3 Customary law, like its counterpart, the common law, can be described but it is not easily defined. It is a moot point whether it should be defined at all. Some African countries have definitions. Allott[279] said about them:

Whether these definitions of customary law contribute anything by way of precision or facilitation of choice of laws is an open question.

Be that as it may, the Commission must be pragmatic. It would serve no purpose to speculate about the pros and cons of a definition. The point is that the legislature decided to define customary law for purposes of the Recognition of Customary Marriages Act.[280] As a customary marriage literally dictates the manner of devolution of the spouses' estates,

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276 **Mthembu** 2000 (footnote 3).

277 See footnote 258.

278 Which according to Traditional Leaders at the Pietersburg workshop amounted to unification, whereby the attitude seems to be that the legislator identifies one law that is good or assumed to be good for everyone, such as, the civil law of succession (i.e. common law) and then applies it to everyone.

279 **New Essays in African Law** (1957).

280 Act 120 of 1998.

different concepts of customary law would create confusion. **In the circumstances it is recommended that an identical definition be used for purposes of reforming the customary law of succession.** It reads as follows:

'customary law' means the customs and usages traditionally observed among indigenous African peoples of South Africa and which form part of the culture of those people.

6.3.4 One may infer from the legislation dealt with in chapters 4 and 5 above that the customary law of succession owes its recognition to those laws. Consequently it would mean that if those laws are repealed the customary law of succession will cease to apply. In fact customary law is part of the law of the land by virtue of section 211(3) of the Constitution which provides that "[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". It is complemented by section 1(1) of the Law of Evidence Amendment Act[281] which provides: "[A]ny court may take judicial notice … of indigenous law in so far as such law can be ascertained readily and with sufficient certainty …".

6.3.5 It follows that even if there is no other legislation amending customary law or regulating its application it will be applicable in certain circumstances. The customary law of succession will thus be applicable to all persons contemplated in the above-mentioned definition. The only persons excluded are those who:

- entered into a civil marriage;
- entered into a customary marriage after 15 November 2000 when the Recognition of Customary Marriages Act came into operation;
- married by customary law before 15 November 2000, but changed their matrimonial property regime by contract in terms of section 7(4) of the Recognition of Customary Marriages Act; and
- made a will.

6.3.6 **Bearing the aforegoing in mind it is recommended that the estates of persons subject to customary law, whose estates would otherwise devolve in terms of customary law, should devolve in terms of the law of intestate succession as regulated by the Intestate Succession Act.**

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[281] Act 45 0f 1988.

6.4 A need for a statutory protection of dependants (parents and siblings)

6.4.1 Some commentators believe that statutory protection should not be extended to include siblings or other relatives such as uncles, but that parents may be considered for support.[282] The extension of the Intestate Succession Act of 1987 to cover dependants under customary law such as parents and siblings was supported on condition that their rights to maintenance from the deceased's estate are secondary to the maintenance rights of spouses and children who have a prior claim.[283] This means that parents and siblings should only have the right to maintenance from the estate of the deceased person if there is no surviving spouse or children.[284] Such right should be based on need and the availability of funds in the estate.

6.4.2 One other concern is that of the elderly who were dependent on the deceased. It was revealed that they are sometimes locked out by young people. Women[285] who attended the *imbizo* at Katlehong suggested that the people who were maintained partly or wholly by the deceased immediately before his death should be covered by the new rules. Some members of the Project Committee felt that these dependants should be covered in the reform process. They believe that customary family relations, or extended family, should be taken into account. Customary succession practices tend to cater for the needy and at the same time remain compensatory to those who dedicate their time and resources towards ensuring the welfare of parents.[286] The reform process should not treat families as if they are the same. In customary law, family members expect children to provide assistance to the sick and the elderly during the time of need. The service provided by family members in looking after the sick and the old should not be under-rated.[287] Old and sick family members

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282 In addition to this view SM Molotsi submits that the definition of 'parent' should include anyone who was responsible for the upbringing and education of the deceased.

283 This was supported at the workshops held in Nelspruit, Bloemfontein, Pietersburg, Cape Town and Durban. The Women's Legal Centre in Cape Town has this view too.

284 **Maureen Smith** of the Banking Council submits that it must be shown that circumstances justify the existence of the right to maintenance for such siblings and parents.

285 Although attendants at this *imbizo* on 2 February 2003 proposed that the reform process should cater for needy family members to inherit, they were aware that their proposal might result in unjustified claims to inheritance. At a briefing of the Joint Monitoring Committee on the Quality of Life and Status of Women on 29 August 2001, the Committee objected to the reform process which included dependants under customary law such as parents and siblings.

286 Mbatha (footnote 50) 261.

287 *Ibid.* She further states that years of field work (her own and others) shows that there is indeed such a need. Amending the customary law of succession to include all family members under customary systems of law is necessary.

require help with cooking, washing and being taken to doctors. Indigenous people do not recognise things like old age homes and even where they are in existence, they would not be able to handle the numbers if all sick and dying old family members were to rely on them only. **The Commission, in this regard, believes that to extend the right of succession to needy family members would be casting the net too wide.**

6.5 The Right to Decide Burial and Funeral Ceremonies

6.5.1 A few respondents commented on the right to decide on burial and funeral ceremonies.[288] They are of a view that the right to decide on burial and funeral ceremonies should ideally be granted to the widow of the deceased. It was further submitted that in a polygamous marriage the most senior widow should have the right to decide on the burial place of the deceased husband. Testators, however, should preferably indicate the manner in which their bodies should be disposed of.

The Commission feels that the right to decide funeral ceremonies cannot be regulated by intestate succession.

6.6 Variation of the order of succession: disinheritance and distribution of property

An African may legally disinherit a potential heir following the prescribed customary law procedure. This has as far as can be recalled not given rise to many serious disputes. A son would virtually by his behaviour exclude himself from inheriting. **Prof Kerr** points out that if the provisions in the draft Bill are passed there will still be a need for disinherison procedures if the choice of a guardian of minors and/or the granting of consent to a marriage of a spinster is to come from among the children. He remarks that the main reason for disinherison under the present state of customary law is to exclude a son who is not worthy of being in a position to make decisions concerning the members of the family. **The Commission is, however, of the view that people should be persuaded to make wills so that over a period of time this becomes common practice.**

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288 **Prof Kerr, Maureen Smith of the Banking Council; SM Molotsi, Dr Antony Costa of the University of the Witwatersrand, Sue Padayachee** and **the National Council of Women of South Africa**.

6.7 Related and supporting marital unions

6.7.1 In African communities there are a number of related and supporting marital unions. "It is quite in accordance with custom for a man to marry a seedraiser for either of his two principal wives who owing to death or barrenness produces no heir …"[289]

6.7.2 The women and the children in such unions should share in the estate of the deceased who or on whose behalf the union was entered into. These unions are the following:

6.7.2.1 The levirate (*ukungena*)

This is a union with a widow undertaken on behalf of her deceased husband by a male relative to raise a male heir or to increase the nominal offspring of a deceased.[290]

6.7.2.2 *Ukuzalela*

This is similar to *ukungena* but is resorted to when further children are raised for a man who dies leaving male issue. Bekker[291] defines the custom as legitimate intercourse between the wife of a deceased man and an approved relative of the deceased with the purpose of procreating more children for the house.

6.7.2.3 *Ukuvusa*

This is resorted to when a deceased person left property but no one to perpetuate his name. The *ukuvusa* custom is defined in the Codes as –

A form of vicarious union which occurs when the heir at law or other responsible person uses property belonging to a deceased person or his own property to take a wife for the purpose of increasing or resuscitating the estate of such deceased person or to perpetuate his name and provide him with an heir.[292]

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289 Brounche P in **Yoywana v Yoywana** (1912) 3 NAC 301.

290 Section 1 of the KwaZulu Act on the Code of Zulu Law 16 of 1985 and the Natal Code of Zulu Law R151 of 1987.

291 *Op cit* 406.

292 See Bekker (footnote 45)152.

6.7.2.4 Ancillary unions entered into by women

These unions, according to Maqutu,[293] were often entered into by a widow who had no son or no children at all. It is a method of having children at a time when women cannot have children of their own. The widow would find a male relative of her husband to procreate the children. Oomen[294] submits convincingly that these marriages are within the ambit of marriages recognised by the Recognition of Customary Marriages Act. The problem though is again that the Intestate Succession Act deals with descendants. Children born of such marriages would therefore be in line for inheriting from their biological parents, but not from their true 'mother'.

For present purposes it must be noted that they are not customary marriages in the true sense of the word. The children belong to the deceased's family as their biological father is not their father in terms of customary law.

In the context of the Intestate Succession Act, these children would not inherit from the deceased on whose behalf they were raised, because they are not his descendants. They would rank as the extra-marital children of their biological father and mother.

These customs may, from a Eurocentric point of view, be regarded as primitive and degrading to the women concerned. But they are realities. Recent anthropological research consistently reports that the unions still occur.[295]

Applying the Intestate Succession Act in these situations will be quite confusing. The children will loose out by not inheriting form their "father" and the estates of their biological fathers will be subject to claims (also for maintenance) from dependants who do not really belong to him and in respect of whom he had no responsibilities.

The Commission recommends that the female partners to and children born from these unions be deemed to be the spouses and children of the deceased who was notionally their 'husband' and 'father'.

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293 **Contemporary Family Law of Lesotho** (1992) 158. See also Preston-Whyte "Kingship and Marriage" Hammond-Took (ed) **The Bantu Speaking Peoples of Southern Africa** (1974) 191-192 on the different forms of what she also calls "woman-to woman" marriages.

294 "Traditional woman-to-woman marriage and the Recognition of Customary Marriages Act" (2000) **THRHR** 274.

295 See among others, Boonzaaier **Die Familie-, Erf-, en Opgolgingsreg van die Nkuma van Ritavi met verwysing na ander Aspekte van die Privaatreg** D Phil Dissertation UP (1990) 434-447.

6.8 Children adopted in terms of customary law

Section 1(4)(e) and (5) of the Intestate Succession Act places adopted children of a deceased in the same position as other children for purposes of intestate succession. The adopted children in question are undoubtedly those contemplated in section 18(1)(a) of the Child Care Act[296] in terms of which "the adoption of a child shall be effected by an order of the children's court of the district in which the child concerned resides".

Africans adopt children without having resort to the Child Care Act.[297] A husband who has no male issue may adopt as heir one who is not his descendant.[298] This form of adoption was recognised in at least two cases.[299]

6.9 Children of a woman with a man other than the husband as premarital progenitor

If an unmarried woman has children they belong to her father. If she should marry somebody else her husband may negotiate with his father-in-law the basis on which he will allow them to enter the marriage with their mother. Normally it will be on condition that he pays 'more' lobolo.[300] This way of adopting children is fairly widespread. In **Thibela v Minister van Wet en Orde**[301] the court was prepared to accept that the husband was liable for the maintenance of these children.

Such children are for all intents and purposes children of their mother's husband, but the Intestate Succession Act works with descendants, not children. These children are not descendants and they are not adopted as discussed above. When it comes to succession they might therefore receive the short end of the stick.

The Commission recommends that children adopted in terms of customary law as described above inherit on the same basis as children adopted in terms of statute.

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296 74 of 1983.

297 Bekker "Children and Young Persons in Indigenous Law" in Robinson (ed) **The Law of Children and Young Persons in South Africa** (1997) 193-4.

298 Kerr *op cit* (1976) 189.

299 **Kewana v Santam Insurance Company Limited** 1993 4 SA 771 (TkA) and **Metiso v Padongelukfonds** 2001 3 SA 1142 (T).

300 Hartman **Aspects of Tsonga Law** (1991) 88-89.

301 1995 (3) SA 147 (T).

6.10 Succession to traditional leaders

When a traditional leader dies, the inheritance of his property and succession to his office are inextricably interwoven. Hartman explains: "[W]hen the head of a household dies, his status, like that of a chief or a lineage head, passes to a successor. But in this case there are other matters to be settled as well, namely the control over the goods in his estate, and the question of who is to inherit them." [302]

Traditional leaders do own property that is subject to devolution like that of ordinary members of the community. However, some traditional leaders may hold property as "heads of states". Such property should ideally be in the hands of the traditional authority, but in some cases the traditional leader may be *de facto* in control and possession of the property. Such property should pass to the successor in title and not to the heirs.

The situation of some traditional leaders is, so to say, *sui generis*. Queen Modjadji, for instance, does not fit into any pre-ordained set of statutory rules of succession. She is not supposed to be married and she marries, it is said, numerous women who bear children that belong to her.[303] Casting succession to her personal property and the rights of inheritance of her children in an intestate succession mould is an impossible task.

Succession to the assets of a traditional leader must not be confused with succession to the office. The latter is a public law matter. It is provided for in Chapter 3 of the Traditional Leadership and Governance Framework Act.[304]

It is recommended that succession to property acquired or held by a traditional leader in his official capacity be excluded from the precepts of the Intestate Succession Act.

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302 Hartman *op cit* (1991) 157.

303 See generally Krige **The Realm of a Rain Queen – a Study of the Pattern of Lovedu Society** (1943).

304 Act 41 of 2003.

6.11 Family and house property

The devolution of property in a traditional African homestead was the most intractable problem faced by the Commission. Property in customary law consists of family property, house property and personal property. According to Maithufi[305]

> Family property is property which has not been allotted to any house or which does not accrue automatically to a house. The property is controlled by the head of the family, although he is not the 'owner' of the property since the family members share in the property.

Family property is inextricably interwoven with the family home. A family home may crisply be described as a communal estate that comes into being on marriage. It is the "fundamental unit not only in social organisation but also in economic, religious and social life".[306]

The persons comprising the family home may be members of a nuclear family, that is "persons of different sexes and generations and normally consists of a man, his wife, and their own or adopted children".[307] In polygynous family homes, a nuclear family may be expanded into larger units. Each nuclear family forms a separate unit or "house" closely allied to the larger unit.

The latter explains the concept of "house property" which has been defined in the Bill attached to this Report as "the property which accrues to a specific house, consisting of a wife and her children, and has to be used for the benefit of that house".[308]

"Personal property" belongs to the person who has acquired it. For present purposes it may be left out of account, because it poses no particular problem in terms of the proposals in this Report. In law the property is no different from any other property owned by an individual.

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305 "The Law of Property" in Bekker, Labuschagne and Vorster **Introduction to Legal Pluralism in South Africa** (2003) 54.

306 Marwick BA **The Swazi: An Ethnographic Account of the Natives of the Swaziland Protectorate** (1996) 37.

307 Myburgh AC **Anthropology for Southern Africa** (ed) (1981) 105.

308 Maithufi *op cit* 55.

Returning to the family comprising the family home: The family is an economic unit. The members individually and jointly contribute to the maintenance of the family. Education, in some cases even at tertiary level, is achieved in the context of the family. It is not uncommon for family members to contribute towards the education of a member. The family also plays a religious role. Children become acquainted with religious activities, norms and values within the family activities. The members of the family have reciprocal rights and duties. A member is part of the whole.

In terms of customary law the communal estate is kept intact by providing that the assets of the joint estate are under the husband's control. When he dies, his heir (invariably a male) steps into his shoes.

The retention of the rules of primogeniture is, in view of the considerations dealt with elsewhere in this Report, untenable. However, there appear to be several reasons why the institution of a family home and its concomitant family property should not be abolished altogether in the process of reforming the customary law of succession.

- Firstly, despite westernisation and individualism, typical African traditional family homes still exist.
- Secondly, in polygynous unions, a distribution of assets in an estate is quite impractical.
- Thirdly, the property constituting the economic unit (referred to above) is not the normal type of movables and immovables. In some cases it might consist of an assortment of dwellings, a garden lot, agricultural implements, cattle, some tools, utensils and equipment, all used by the inmates of the family home for family home purposes. As separate items of property they would virtually have no value. In **Sijila v Masumba**[309] it has been described as -

  > Joint communal possession, containing in some instances ancestral property in which the senior males of the kraalhead's family and indirectly the ancestors are concerned. Hence, though the kraalhead is legal owner of the estate, his ownership is burdened with what we might call personal rights of various types of which maintenance and habitation are two of the chief, subject to mutual corresponding duties on the part of the beneficiaries.

- Fourthly, many family homes as economic units constitute the only means of livelihood and the only homes for family members. If the property concerned

[309] 1940 NAC (C & O) 42 of 44-47.

should devolve in terms of the common law, the family members concerned will be left without a home and livelihood.

On these grounds it is felt that the family home and family property should somehow be kept intact. This would, however, have to be done subject to the following considerations:

- The family home and family property are part and parcel of a patriarchal system. The male family head is in control of the family and on his death inheritance of the property and succession to the family headship follow the rules of male primogeniture. As indicated in this Report both patriarchy and male primogeniture are unacceptable.[310]
- In terms of section 6 of the Recognition of Customary Marriages Act, a wife of a customary marriage has full status and capacity, including the capacity to acquire assets and dispose of them. This is another reason why a male family head can no longer have exclusive control and 'ownership' of family property.
- Customary marriages entered into after 15 November 2000 when the Recognition of Customary Marriages Act came into operation are in community of property. The customary law of succession therefore does not govern the consequences of these marriages.
- A civil marriage of Africans does not create a house. [311]
- The marital power that a husband had under common law over the person and property of his wife had moreover been abolished.[312]A great number of Africans of course do not live in what has been described above as a traditional family home. They live in informal settlements as tenants or on property owned and occupied by the spouses on an equal footing.
- A considerable number of families are matrifocal. A mother, grandmother, aunt or sister is *de facto* head of the family.

There is indeed a large variety of 'family homes' that can no longer be brought under the traditional concept. But, as pointed out above, it is nevertheless desirable in some instances to preserve family property.

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310 Chapters 3, 5 and 6 of this Report.

311 See Bennett *op cit* 440.

312 See sections 11-13 of the Matrimonial Property Act 88 of 1984.

Yet in view of the many variables, it is impossible to frame a substantive role of succession, providing that one or the other specific person should inherit family property. In the circumstances, **it is recommended that the destination of family property be made the subject of an enquiry in appropriate circumstances**. The criteria should be the best interests of the family. This would merely be taking the proposal in paragraph 7.7 below a step further. The idea of an enquiry is not a novel one. In terms of the Estate Regulations GNR200 of 1987 an inquiry can be made by a magistrate to determine the person or persons entitled to estate property and to give directions in regard to the property as may seem to him fit to ensure that the provisions of the Act and regulations in regard to succession are complied with. The Codes of Zulu Law similarly provides for an enquiry. In terms of Regulation 2(d) of the Estate Regulations the Minister of Justice may give directions about the devolution of an estate under certain circumstances. This is tantamount to an inquiry.

It is therefore recommended that provision be made for an inquiry into the devolution of family property. Two criteria present themselves:

- That the inquirer should have regard to the best interests of the family, and
- to the equality of the spouses in customary and civil marriages.

The question arises whether "family" should not be defined. It does not seem to be possible nor necessary. The family that comes into existence when a marriage is contracted consists of the husband and wife and their children. Polygynous households do not consist of a single family, but different families and houses under the control of the family head. The common denominator is that the family members occupy a common homestead or family home. But the inmates do not consist of a definable group. They may vary from household to household.

In the circumstances it is felt that no effort should be made to define the concept. In the application of the provision proposed above, it will naturally be interpreted in the context of the family home concerned. Both the Codes of Zulu Law, for instance, do not have a definition of a family. In the application of its family law and succession provisions, it was understood that it applied to a nuclear family or the composite polygynous family unit. [313]

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313 For a description of family see Monnig **The Pedi** (1967) 207-218 and Hartman **Aspects of Tsonga Law** (1991) 54-59).

CHAPTER 7

SUMMARY OF THE PROPOSED DRAFT BILL

7.1 Long title

The long title sets out in detail the purposes of the draft Bill. The main purpose is to reform the customary law of succession in accordance with the principles of equality and equal treatment as enshrined in the Constitution.

7.2 Preamble

The preamble expresses in a nutshell the need for reforming the customary law of succession: essentially because women, children and dependants do not receive adequate protection and because customary rules of succession do not afford all concerned the constitutional right to equal protection and benefit of the law.

7.3 Definitions: Clause 1

"**Customary law**" is defined to create clarity about the persons subject to customary law of succession. The definition is identical to the definition in the Recognition of Customary Marriages Act, which is necessary because a customary marriage is an important connecting factor in determining the applicable law of succession.

"**Descendant**" is defined to include a customary law dependant. This is necessary because descendants in common law would include only biological descendants, whereas for African people "descendants" include a far wider circle of persons. Generally, for instance, all children born of a woman 'belong' to the man who paid lobolo for her and they are dependant on him.

"**House**" is defined to clarify the concept for purposes of clause 3, dealing with property allotted or accruing to a house.

"**Traditional leader**" is defined to identify such office-bearer for purposes of clause 6 in regard to disposal of property of a traditional leader.

7.4 Reform of customary law of succession: Clause 2

This clause embodies the main proposal: that all estates of Africans should devolve in accordance with the Intestate Succession Act, extending the application to supporting and ancillary unions.

7.5 Disposition of property allotted or accruing to a wife in a customary marriage: Clause 3

When a customary marriage is entered into a "house" is created. The family head may distribute his property among houses as a matter of convenience and for the support of each house. The greater portion of house property is normally received from that allotted to a house. Property like lobolo for a daughter of a house may accrue to a house. This clause is aimed at protecting the interests of the wife and children of such house on the death of the family head.

7.6 Property rights relating to certain customary marriages: Clause 4

Until 2 December 1988 a man married by customary law could enter into a civil marriage with another woman, thereby dissolving his customary marriage. This section is meant to preserve the rights of those 'discarded' customary law wives.

7.7 Dispute or uncertainty in consequence of the non-specialised nature of customary law: Clause 5

In Western societies law emphasizes the interests, rights and liberties of individuals. On the contrary, African customary law is general, more concrete and visible, religious, magical, traditional and aimed at preserving group interests. In the circumstances it is foreseen that the rigid application of rules of succession will not always meet the needs of the persons concerned. This clause therefore proposes a simple, inexpensive manner of resolving uncertainties and disputes.

7.8 **Disposal of property of a traditional leader: Clause 6**

There is a distinction between property that a traditional leader holds in his personal capacity and property that he holds as head of the community. This clause is meant to avoid the devolution of property held by a traditional leader in his official capacity.

7.9 Amendment of section 1 of the Intestate Succession Act: Clause 7

Paragraphs (a) and (b) are consequential amendments. Paragraph (c) is necessary to ensure that children adopted in accordance with customary law are regarded as descendants for purposes of succession so as to place them in the same position as officially adopted children.

7.10 Amendment of the Maintenance of Surviving Spouses Act: Clause 8

This amendment is necessary to ensure the “discarded wives” referred to in clause 4 above can also lodge claims for maintenance.

7.11 Repeal of laws: Clause 9

The reasons for the repeal of the laws mentioned in the Schedule are set out in Chapter 5.

ANNEXURE A

BILL

To modify the customary law of succession so as to provide for the devolution of certain property in terms of the law of intestate succession; to provide for house property to be disposed of by will; to protect property rights in certain customary marriages; to amend the Intestate Succession Act, 1987, so as to protect the rights of certain children; to amend the Maintenance of Surviving Spouses Act, 1990, so as to provide for a claim for maintenance by certain wives in customary marriages; and to provide for matters incidental thereto.

PREAMBLE

WHEREAS a widow in a customary marriage whose husband dies intestate does not enjoy adequate protection and benefit under the customary law of succession;
AND WHEREAS certain children who are children of a house arising out of a marriage in accordance with customary law do not enjoy adequate protection under customary law,
AND WHEREAS section 9 of the Constitution provides that everyone has the right to equal protection and benefit of the law;
AND WHEREAS social circumstances have so changed that the customary law of succession no longer provides adequately for the welfare of family members

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows: —

Definitions

1. In *this Act*, unless the context indicates otherwise—
"**customary law**" means the customs and usages traditionally observed among the indigenous African peoples of South Africa which form part of the culture of those peoples;
"**descendant**" in relation to a deceased person includes a person who, in terms of customary law, was a dependant of the deceased immediately before the death of the deceased;
"**house**" means the family and property, rights and status which commence with, attach to and arise out of the customary marriage of a woman;
"**Intestate Succession Act**" means the Intestate Succession Act, 1987 (Act No. 81 of 1987);

"**spouse**" includes a partner in a customary marriage that is recognised in terms of section 2 of the Recognition of Customary Marriages Act 1998 (Act No. 120 of 1998);
"**traditional leader**" means any person who, in terms of customary law of the traditional community concerned, holds a traditional leadership position, and is recognised in terms of the Traditional Leadership and Governance Framework Act, 2004 (Act No. 41 of 2004);
"**this Act**" includes any regulation made under section 5; and
"**will**" means a will to which the provisions of the Wills Act, 1953 (Act No. 7 of 1953) apply.

Modification of the customary law of succession

2. (1) The estate of any person who is subject to customary law who dies after the commencement of this Act, and whose estate does not devolve in terms of a *will* of such a person, shall devolve in accordance with the law of intestate succession as regulated by the Intestate Succession Act.

(2) In the application of the *Intestate Succession Act* for the purposes of this Act-

(a) where the person referred to in section 2(1) is survived by a spouse as well as a descendant 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 from time to time by the Minister of Justice by notice in the ***Gazette***, whichever is the greater;

(b) a woman other than the wife of the deceased with whom he had entered into a union in accordance with customary law for the purpose of raising seed of the house of his wife shall, if she survived him, be deemed to be a descendant of the deceased;

(c) if the deceased was a woman, a woman to whom she was married under customary law for the purpose of providing children for the deceased's house shall, if the last mentioned woman survived the deceased, be deemed to be a descendant of the deceased;

(d) a woman deemed in terms of paragraph *(b)* or *(c)* to be a descendant of the deceased shall be included in the number by which the monetary value of an estate must be divided in order to calculate a child's portion as provided in section 1(4)(f) of that Act.

(3) For purpose of *this Act* a reference in section 1 of the *Intestate Succession Act* to a spouse who survived the deceased must be construed as including every such spouse and every woman contemplated in paragraphs *(a)*, *(b)* and *(c)* of subsection (2).

Disposition of property allotted or accruing to wife in customary marriage

3. (1) Property allotted or accruing to a woman or her house under customary law by virtue of her customary marriage may be disposed of in terms of a *will* of such woman and if she dies without having disposed of such property in terms of a *will*, it shall devolve in terms of the *Intestate Succe*ssion Act.

(2) Any reference in the will of a woman contemplated in subsection (1) to her child or children and any reference in section 1 of the *Intestate Succession Act* to a descendant in relation to such woman must be construed as including any child—

(a) born of a union between the husband of such woman and another woman entered into in accordance with customary law for the purpose of procreating children for the house of the first-mentioned woman; and

(b) born to a woman to whom the first-mentioned woman was married under customary law for the purpose of providing children to the first-mentioned woman's *house*.

Property rights in relation to certain customary marriages

4. If a civil marriage was contracted—

(a) on or after 1 January 1929 (the date of commencement of sections 22 and 23 of the Black Administration Act, 1927 (Act No. 38 of 1927)) but before 2 December 1988 (the date of commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988 (Act No. 3 of 1988)); and

(b) during the subsistence of any customary marriage between the husband and any woman other than the wife of the civil marriage,

the civil marriage shall not affect the material rights of any spouse of the said customary marriage or any issue thereof, and the widow of the civil marriage and the issue thereof shall have no greater rights in respect of the estate of the deceased spouse than she or they would have had if the civil marriage had been a customary marriage.

Dispute or uncertainty in consequence of nature of *customary law*

5. (1) If in consequence of the nature of *customary law*, a dispute arises in connection with—

(a) the status of or any claim by any person in relation to a person whose estate or part thereof must, in terms of this Act, devolves in terms of the *Intestate Succession Act*;

(b) the nature or content of any asset in such estate; or

(c) the devolution of family property,

or if there is uncertainty as to any matter contemplated in paragraphs (a) or (b) or (c), the Master of the High Court having jurisdiction under the Administration of Estates Act, 1965 (Act No. 66 of 1965) may, subject to subsection (2), make a determination as seems to him or her to be just and equitable in order to resolve the dispute or remove the uncertainty.

(2) Before making a determination as contemplated in subsection (1), the Master may direct that an inquiry into the matter be held by a magistrate in the area in which the Master has jurisdiction.

(3) After the inquiry contemplated in subsection (2), the magistrate must make a recommendation to the Master who directed that an inquiry be held.

(4) The Master, in making a determination, or the magistrate, in making a recommendation contemplated in this section must have due regard to the best interests of the deceased family members and the equality of spouses in customary and civil marriages.

(5) The Cabinet member responsible for the administration of justice may make regulations regarding any aspect of the inquiry contemplated in subsection (2).

Disposal of institutional property of *traditional leader*

6. Nothing in *this Act* shall be construed as amending any rule of customary law which regulates the disposal of the property of a *traditional leader* who has died and which was acquired and is held by such *traditional leader* in his or her official capacity.

Amendment of *Intestate Succession Act*

7. Section 1 of the *Intestate Succession Act* is hereby amended—

(a) by the substitution for subsection (2) of the following subsection:

"(2) Notwithstanding the provisions of any law or the common or customary law, but subject to the provisions of this Act and section 5(2) of the Children's Status Act, 1987 (Act No. 82 of 1987), illegitimacy shall not affect the capacity of one blood relation to inherit the intestate estate of another blood relation.";

(b) 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 38 of 1927), does not apply]**;"; and

(c) by the substitution for paragraph (e) of subsection (4) of the following paragraph:

"*(e)* an adopted child, including a child adopted in accordance with customary law, shall be deemed—

(i) to be a *descendant* of his or her adoptive parent or parents;

(ii) not to be a *descendant* of his or her natural parent or parents, except in the case of a natural parent who is also the adoptive parent of that child or was, at the time of the adoption, married to the adoptive parent of the child; and".

Amendment of Act 27 of 1990

8. The Maintenance of Surviving Spouses Act, 1990 (Act No. 27 of 1990) is hereby amended by the substitution in section 1 for the definition of 'survivor' of the following definition:

"'**survivor**' means the surviving spouse in a marriage dissolved by death and includes a wife of a customary marriage which was dissolved by a civil marriage contracted by her husband in the customary marriage to another woman on or after 1 January 1929 (the date of commencement of sections 22 and 23 of the Black Administration Act, 1927 (Act No. 38 of 1927)) but before 2 December 1988 (the date of commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988 (Act No. 3 of 1988)).".

Repeal of laws

9. The laws mentioned in the Schedule are hereby repealed to the extent indicated in the third column of the Schedule.

Short title

10. This Act shall be called the Reform of the Customary Law of Succession Act, 2004 and takes effect on a date fixed by the President by proclamation in the ***Gazette***.

Schedule

Repeal of laws

(Section 9)

No. and year of law	**Short title or description**	**Extent of repeal**
Act 38 of 1927	Black Administration Act, 1927	Sections 22(7) and (8) and 23
Government Notice R. 34 of 1966	Regulations for the Administration and Distribution of the Estates of Deceased Blacks	So much as has not been repealed
Act 16 of 1985	KwaZulu Act on the Code of Zulu Law	Sections 79 to 82
Proclamation R. 151 of 1987	Natal Code of Zulu Law	Sections 79 to 82
Government Notice R. 200 of 1987	Regulations for the Administration and Distribution of the Estates of Deceased Blacks	The whole
Act 81 of 1987	Intestate Succession Act	Section 1(4)(b)

ANNEXURE B

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] one spouse, but not by a descendant, such spouse shall inherit the intestate estate;

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

(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:

" (i) by a descendant and –

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

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

(d) 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

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*.

ANNEXURE C

LIST OF BODIES OR PERSONS WHO RESPONDED ON DISCUSSION PAPER 93

1.	GH van Rooyen	Magistrate - Greytown
2.	Dr JC Beenhakker	National Council of Women of South Africa
3.	Sue Padayachee	Lawyers for Human Rights
4.	Dr Anthony Costa	University of the Witwatersrand
5.	SM Molotsi	
6.	Joelene Moodley	Centre for Human Rights, University of Pretoria
7.	Professor Chuma Himonga	University of Cape Town
8.	Zehir Omar	Attorney, Springs
9.	AJ Louw	Laws and Administration Committee: General Council of the Bar
10.	MM Mahapa	Magistrate Bochum
11.	TM Madonsela	Natal Law Society
12.	Maureen Smith	The Banking Council
13.	Professor AJ Kerr	Rhodes University
14.	E Du Plooy	Magistrate Witbank
15.	Michelle O' Sullivan	Women's Legal Centre
16.	Kwanele Radebe	Student University of Cape Town
17.	Professor J Bekker	University of Pretoria

ANNEXURE D

WORKSHOP SCHEDULE

Province	Place	Date	Number of attendants
Western Cape	Cape Town	02 October 2001	69
Mpumalanga	Nelspruit	25 October 2001	140
Northern Cape	Kimberley	31 October 2001	57
Free State	Bloemfontein	01 November 2001	54
Eastern Cape	East London	08 November 2001	142
KwaZulu Natal	Durban	20 November 2001	134
Limpopo	Pietersburg	07 December 2001	79
North West	Mmabatho	13 March 2002	148
Gauteng	Pretoria	18 March 2002	58

ANNEXURE E

LIST OF PARTICIPANTS AT PROVINCIAL WORKSHOPS

A CAPE TOWN ON 02 OCTOBER 2001

1.	Lulama Nongogo	Women's Legal Centre
2.	Anton Neethling	Attorneys Bowman Gilfillan Inc.
3.	Prof F de Villiers	University of the Western Cape
4.	Vuyani Baloi	University of the Western Cape
5.	Sheila Camerer	Member of Parliament New National Party
6.	Pricilla Themba	JMC Status and Quality of Women
7.	Prof Chuma Himonga	University of Cape Town
8.	Danaline Fransman	Lawyers for Human Rights
9.	Lindiwe Mzo	RAPCAN
10.	D Swart	Raadslid Drakenstein
11.	Vainola Makan	South African Council of Churches
12.	Mervyn Doralingo	Goodwood Magistrate
13.	Ms S Sonnenburg	Divorce Court Magistrate Cape Town
14.	Mzukisi Dimbaza	Wyneberg Magistrate
15.	Adv Shereen Ebrahim	Family Advocate-Cape Town
16.	Cecilia Bailey	Citizens Advice Bureau
17.	Anne Tailor	Citizens Advice Bureau
18.	Andile Nonkali	Department of Justice
19.	Gaile Moosmann -	Editor Parliamentary Monitoring Group
20.	Inkosi Mhlabunzima Hlengwa	IFP Member of Parliament
21.	Chantel Fortuin	Legal Resources Centre.
22.	Cornelia Carol September	Member of Parliament
23.	Rev Kortjaas	St Francis Anglican Church
24.	Adv Paul Jethro	Advocate
25.	Douglas Tilton	Associate for Research & Policy
26.	Zoleka Dyali	SAFE: SA Female Empowerment
27.	Sizakele Mbewana	Regional Office- Justice
28.	Bashi Lerotholi	Catholic, Justice and Peace Commission

29.	Timothy Mbalo	SANCO-Khayelitsha
30.	Mildred Makasi	SANCO-Khayelitsha
31.	Jonathan Cloete	NEHAWU
32.	Julie Mentor	Atlantis Women Forum
33.	Douglas Mange	SANCO Gugulethu
34.	Zimkhitha Ntobongwana	FAMSA Gugulethu
35.	Annie Herwel	Women Action for Upliftment
36.	Sipho Citabatwa	Community networker
37.	Nape Nchabeleng	NEHAWU
38.	Prevanya Moodley	Provincial Administration Western Cape
39.	Ncediwe Zokwe	Catholic, Juctice and Peace Commission
40.	Ethel Nxumalo	Ministers' Fraternal
41.	Nelly Tebele	Ministers' Fraternal
42.	Chris van Der Heyder	Inkatha Freedom Party
43.	Nomsa Ntiabati	Ilitha Labantu
44.	Pumla Kweyana	Inkatha Freedom Party
45.	Kiki Rwexana	ANC Women's League
46.	Nzali Makhanda	ANC Women's League
47.	Jennifer Macmaster	PAWC-Social Services
48.	Rashida Abdul	ANC Women's League
49.	Cynthia Makhuni	ANC Nomzamo
50.	Mrs Maxebengula	SANCO
51.	Cynthia Kwanini	Ilitha Labantu
52.	Taufiq Damons	PAWC- Social Services
53.	Judy Herman	ANC Women's League
54.	Mama Darlina Tyawana	New Women's Movement
55.	Jeanette Hess	ANC Women's League
56.	Lungisa Jacobs	SANCO
57.	Jabu Mfusi	ANC Youth League
58.	Funeka Mpetha	ANC Youth League
59.	Antoinette Green	COSATU
60.	Esme Kleinhans	Empilwe Project-Khayelitsha
61.	Tanya Mongesi	Uluntu Centre
62.	Tokkie Fortune	Street committee member
63.	Nomzamo Mfumeni	ANC Women's League Atlantis
64.	Ms Zandi Zola	St Michael's Anglican Church

65.	Mpilo Gazi	Langa SAPS
66.	Nomvundo Jali	Langa Community Policing Forum
67.	Mbuyiselo Mapipa	Presbyterian Church of Southern Africa
68.	Mandla S Radebe	Presbyterian Church of Southern Africa

B NELSPRUIT ON 25 OCTOBER 2001

1.	David Ngobeni	Nelspruit Chief Magistrate
2.	Kgoshi T T Mashego	Traditional Leader
3.	Fish Mahlalela	Mpumalanga Legislature
4.	Phumzile Ngwenya	Mpumalanga Legislature (Women's caucus)
5.	Chief Z T Mbuyane	Mbuyane Traditional Authority
6.	Chief M M Khumala	House of Traditional Leaders
7.	Faith Phala	Department of Justice (Gender unit)
8.	Keneilwe Letele	Gender focal point
9.	Rebecca B Maile	Sukumane Makhosikate
10.	Themba Milanzi	Mpisikazi Tribal Authority
11.	Sithembiso Nkosi	Eludlambedlweni Tribal Authority
12.	Setou GA	Department of Welfare
13.	Sheila Makhanya	AFM Welfare Council
14.	LM Mathabela	Magistrate Office Eerstehoek
15.	Chief Matsamo J Shongwe	Matsamo Tribal Authority
16.	Norman Fakude	Dept of Local Government & Traffic
17.	M J Shongwe	Shongwe Tribal Authority
18.	Makatu M Y	Department of Education
19.	Dr D Mhaule	Nkambeni Tribal Authority
20.	JJ Mahlangu	Mkobola Magistrate
21.	Sara Magagula	Mawewe Tribal Authority
22.	M E Zitha	Mhlaba Tribal Authority
23.	Lindiwe Mashabane	Phaphamama Community Services
24.	Audrey Mndawe	Yinhlelentfo Young Women's Club
25.	C P Swanepoel	Magistrate Nkomazi Estates
26.	H P Mahlangu	Kubonakele Advice Centre
27.	Nkos'kazi Nyakase Magogo	House of Traditional Leaders
28.	Linah H Msiza	Kubonakele Advice Centre
29.	Thabisile Nhlambo	Social Services (Gender focal point)
30.	A L J Thulare	Thulare Community Networker
31.	Ndivhuho Sekoba	Mpumalanga Network on Violence Against Women
32.	B E Mahlangu	Kubonakele Advice Centre
33.	Evah Y Mnisi	Yinhlelentfo Young Women's Club

34.	M E Mahlalela	Mhlaba Tribal Authority
35.	Henry S Mkhatshwa	Mhlaba Tribal Authority
36.	T G Phefo	South African Police Services
37.	Hector Hem Mthombeni	Lydenburg Magistrate
38.	Hathlani H Sibanyani	Kubonakele Human Rights & Justice Centre
39.	Deliwe Ndlovu	Department of Finance and Economic Affairs
40.	Poppy P Mashane	Department of Safety and Security
41.	Ntombizodwa Mzangwe	PWRT
42.	Thandi Mebo	Department of Social Services (Gender focal point)
43.	HP Ferreira	Magistrate
44.	Vezawafa Shongwe	Radio Ligwalagwala (SABC)
45.	TE Nkosi	Eludlambedlwini Tribe
46.	John Mfana Ntimane	Matsamo Tribal Authority
47.	SL Sigudla	Mhlaba Tribal Authority
48.	Sizane Shongwe	Matsamo Tribal Authority
49.	SW Mdluli	Nkambeni Tribal Authority
50.	Portia L Nkuna	Yinhlelentfo Young Women's Club
51.	Brenda Mlimi	Yinhlelentfo Young Women's Club
52.	Johann G Liebenberg	Department of Justice
53.	KL S Fronneman	Magistrate
54.	T C Nel	Department of Justice
55.	R Carunsky	SA National Council for Child & Welfare
56.	Lulu Radebe	Women Institute for Leadership Development
57.	Tito Richard Malatji	Empilweni
58.	Maria N Motale	SACBC
59.	P J Venter	Magistrate Evander
60.	Fanie Mahlangu	Kubonakele Advice Centre
61.	Adéle Viljoen	Delmas Magistrate
62.	J M Nkosi	Bhevula Tribal Authority
63.	C F Nieuwoudt	Bethal Magistrate
64.	Godfrey Silaule	ANC Constituency
65.	Motsoalo S Masila	Department of Justice
66.	M I Mdluli	Mdluli Tribal Authority
67.	R M Chirwa	Eerstehoek Magistrate
68.	Inkos'kazi Lindiwe Sithole	Mawewe Tribal Authority
69.	Khulekile Marcia Mokoena	Mawewe Tribal Authority

70.	Elliot Shabangu	Masoyi Tribal Authority
71.	Sani Mashego	Masoyi Tribal Authority
72.	Rose Mashego	Masoyi Tribal Authority
73.	K P Masuku	Masoyi Tribal Authority
74.	Elvi Mathebula	Masoyi Tribal Authority
75.	Sibongile Abigail Mkhatswa	Department of Finance & Economic Affairs
76.	Priscilla S Mahlangu	Department of Justice
77.	Nthofela Makhele	Ukuthula Advice Office
78.	B M Fakude	Department of Justice
79.	Enock Nkosi	Enikwakuyenswa Tribal Authority
80.	German Mohlala	Traditional Leader
81.	Godfrey L Mayisela	Enikwakuyenswa Tribal Authority
82.	Vusi Nhlapho	Mpisikazi Tribal Authority
83.	Sarah Lindiwe Masango	Lay Assessor
84.	Dan D Khumalo	ANC
85.	Fraser Nyoni	ANC
86.	Mandla S Manqele	Inkatha Freedom Party
87.	H C R de Welzim	Department of Justice
88.	N M Shongwe	Matsamo Tribal Authority
89.	L V Mokoena	Kwa- Mhlanga Magistrate
90.	Stanley O Malema	Department of Justice
91.	Mgomane Ester Tana	Nkomazi Magistrate
92.	Percy Hlanganani Rikhobo	Groblersdal Magistrate Office
93.	Inkosi F L Msibi	Msibi Administration
94.	Lundi Nkosi	Traditional Leaders
95.	Kgosi N Steven Mogane	Kgarudi Tribal Authority
96.	H P Van Der Walt	Magistrate
97.	Danny Kekana	SANCO
98.	P B Haasbroek	Magistrate
99.	M.P Magagula	Enchaba
100.	Mpho Maluleka	Greater KwaMhlanga TLC
101.	Nhlapo Phumla	UDM
102.	Dan Moloko	Greater KwaMhlanga TLC
103.	Kokie Nhlapo	Balfour T.L.C
104.	Nkosana Bhembe	Balfour T.L.C
105.	NM Shongwe	Matsamo Tribal Authority

106.	Fili Msibi	Witbank
107.	F O Mukari	Msongaba
108.	Nombini Maria Nkala	Sisweni Women's Organisation
109.	Z Modipane	House of Traditional Leaders
110.	Lili Malope	Mpageni Civil
111.	Lucky Zulu	Lomshiyo Traditional Authority
112.	D C M Haasbroek	Magistrate
113.	Jennifer Julia Nkosi	Department of Justice
114.	Sebjadi Hilda Phatlane	Department of Justice
115.	GAF Gous	Middelburg Magistrate
116.	Fr Richard Menatsi	South African Catholic Bishops' Council
117.	Miranda Opperman	Women Abuse Support Group
118.	GD Sesnike	Highveld SAPS
119.	Chief BB Yende	Yende Traditional
120.	H Labuschagne	Landros Piet Retief
121.	Sipho Sibuyi	White Rivers TLC
122.	Chief D Mthethwa	Madabukela
123.	A Mbuyani	Welfare Belfast
124.	A L J Thulare	Thulare Community networker
125.	Carol Makutu	Economic Affairs
126.	Siphokazi Mabona	Witbank social worker
127.	Godfrey Mayisela	Enikwakuyenswa Organisation
128.	TB Mabizela	Mthethwa
129.	W Sifunca	Hazyview
130.	L Nkosi	Enchaba
131.	Councilor E J Mbungane	Belfast Mayor
132.	Connie Nkhonza	Bambanani Women's Organisation
133.	JB Mkhanza	Belfast Community Police Forum
134.	Chief Mashigo	Masoyi
135.	P N Motluba	Ekangala TLC
136.	Chief TM Nkosi	Ndlela
137.	John Thombeni	Timfanelo Community Legal Services Centre
138.	Welcome Kweyama	SAPS-Mpumalanga
139.	Mpholo Thupana	Witbank TLC
140.	Samuel Mothiba	Daantjie

C. KIMBERLY ON 31 OCTOBER 2001

1.	Thandiwe Palwe	Disabled People of South Africa
2.	Gloria Boinamo	Justice
3.	FT Mdluli	Legislature Northern Cape province
4.	N Benson	Prosecutor Kimberley
5.	DA Ditagwe	Barkly West Municipality
6.	EB Kale	Legislature NC
7.	Likhapa Mbatha	Centre for Applied Legal Studies
8.	Hallie Ludsin	Intern: CALS
9.	Amos J Davids	Community Police Forum Windsor
10.	L Nyati-Mokotso	Kimberley Community Health
11.	E Homan	Ritchie/Modderrivier Peace Forum
12.	E March	Community Forum
13.	B Magau	ANC
14.	Adv Portia Mafungo	Law Adviser- Premier
15.	MR Morape	Barkly West
16.	Spetho Eloff	Victoria West Municipality
17.	OG Manong	Correctional Services
18.	Y Kenny	SAPS Woodley Street
19.	D Bezuidenhout	CPF Bromerus
20.	P Jammer	Barkly West Councillor
21.	RJ Manzi	Safety and Security
22.	S Bekend	Barkly West
23.	Pastor HP Benjamin	Community Service SAPS
24.	Kabelo Selaolwe	AZAYO
25.	Simon Mojanaga	PAC
26.	BOB Moreki	ANC
27.	Mogapi Selepe	Economic Affairs
28.	Sousa Saul	Welfare De Aar
29.	MP Andreas	Department of Justice
30.	V Gouden	Premier’s office
31.	A Wycbach	Marydale Municipality
32.	KM Susla	Galeshewe Community
33.	Enneal Booight	SAPS, Kimberley

34.	Ana Smith	Department of Social Services
35.	Sheilla Langveldt	Department of Social Services
36.	GE Jacobs	SAPS, De Aar
37.	A Visser	Victoria West,
38.	CP Louw	Galeshewe
39.	M April	CPF Barkly West
40.	EB Boboko	Safety and Security
41.	SS Manene	PAC
42.	Boingotlo Chose	Legislature
43.	Margaret Williams	Disabled People of South Africa
44.	Candy Malherbe	Community networker
45.	Jeremy Williams	AZAPO
46.	Danny Boom	AZAPO
47.	Nelson Moemedi	Victoria West ANC
48.	Jennifer Damons	Kimberley Municipality
49.	Dudu Manzi	ANC
50.	Wilfred Dipitso	ANC
51.	Miriam Morelo	Widows forum
52.	Seleti Merementsi	ANC
53.	Motlatsi Goitsemang	Widows forum
54.	Maureen Moloi	South African Law Commission
55.	Prof Maithufi	South African Law Commission
56.	Engela Jacobs	SAPS Kimberley
57.	Pitso Jeftha	SAPS Kimberley

D BLOEMFONTEIN 01 NOVEMBER 2001

1.	Kabang Makola	Regional Head: DOJ Bloemfontein
2.	Raulinga TJ	Chief Magistrate Bloemfontein
3.	AP Du Plooy	Family Advocate
4.	Rita M Jansen	University of Free State
5.	Kgosigadi Gaongalelwe Moroka	House of Traditional Leaders
6.	Radebe SP	University of Free State
7.	Coetzee JA	Magistrate Koffiefontein
8.	Olly Mlamleli	Premier's office-Gender
9.	Snyman A	Magistrate Excelsior
10.	Kobi MA	Springfontein
11.	Maimane ME	Widows' Forum
12.	Kolisang SE	Justice Estates
13.	Mahasela AM	Free State National Violence Against
14.	P du Greling	Justice
15.	Williams PDD	SAPS Parkweg
16.	Elizabeth Thubisi	Barolong Tribal Authority
17.	Susan Mafojane	Black Widows' Forum
18.	Snyman A	Excelcior
19.	Mochoari KI	Premier's office
20.	Mohosho HP	Magistrate Phuthaditjhaba
21.	Khati TD	Magistrate Brandfort
22.	Breyl Hannes	Justice
23.	Vivian Namba	Philippolis community worker
24.	Labuschagne JM	Senekal Magistrate
25.	Lategan M	SAPS Legal Services
26.	Makhanya L	United Democratic Movement
27.	Rancho MM	Tseki
28.	Modibela M	Master: Bloemfontein
29.	Molaba LD	Tseki
30.	Basson Lothian	Master : Bloemfontein
31.	Fritz HF	Bloemfontein Magistrate
32.	Coertzen L	SAPS
33.	Smith MJ	Fauriesburg
34.	Hlopheho Moloi	Daggakraal Tribal Authority

35.	Puleng Sedibe	Harrismith municipality
36.	Moroka SM	Barilong Tribal Authority
37.	Seritili ML	Phuthaditjhaba
38.	DS Moeletsi	Phuthaditjhaba
39.	Nthabiseng Moloi	Harrismith
40.	Simon Matlou	SATAWU
41.	Caroline Nakana	Makotopong
42.	Van Der Meide TM	Welkom Community networker
43.	TV Matsepe	Attorney
44.	Mosia GM	National Violence Against Women
45.	Mahlalela Ntombazana	Lifateng
46.	Matjele MR	Phuthalitjhaba councillor
47.	Sinaba BD	Phuthalitjhaba councillor
48.	Roubali JA	Barolong-boo-Moroka
49.	Brenda Jacobs	ANC Women's League
50.	Hallie Ludsin	Intern CALS
51.	Likhapha Mbatha	CALS
52.	Mguqula V	Regional Office Justice
53.	Maureen Moloi	SA Law Commission
54.	Prof Papa Maithufi	SA Law Commission

E EAST LONDON ON 7 NOVEMBER 2001

1.	Ms Nomsisi Bata	Office on the Status of Women
2.	Chief Patekile Holomisa	CONTRALESA
3.	Chief MNJ Matanzima	Chairperson House of Traditional Leaders
4.	Ms Nombulelo Siqwana-Ndulo	Commission on Gender Equality
5.	Ms Lesly-Ann Foster	Masimanyane
6.	Elmarie Knoetze	University of Port Elizabeth
7.	Ntanga Welile	Traditional Affairs
8.	Mbutho Mxokisiswa	TLC Buffalo City
9.	Phumeza Mnyembana-	Ikwezi Women=s Suppport centre
11.	LN Rasmeni	Member of Provincial Parliament
12.	Chief NZ Mtirara	Member of Provincial Legislature
13.	Nogabo TT	ACDP
14.	Tebelele S	Masonwabisane Women's Support
15.	Mabasa L	Department of Justice
16.	Dlani N	SAPS Legal Services
17.	Sili ST	ECLVA
18.	Kwezi R	SAPS Legal Services
19.	Diko S	Traditional Affairs
20.	Geza N.M	Masimanyane Women's Support
21.	Chief Barney Kubashe	Amagazela
22.	Xaka T	Eastern Cape Provincial Legislature
23.	Manyosini T	Eastern Cape Provincial Legislature
24.	Ntshinga B	Correctional Services
25.	Nokele T	Department of Health
26.	Mkalipi L	SAPS
27.	Bandile Sijadu	Department of Finance
28.	Mrs Olifant	Lungelo Women's Organisation
29.	Elize Jaftha	Mdantsane community worker
30.	Bantu April	Correctional Services, Eastern Cape
31.	Nomtombi Sapula	Umtata TLC
32.	Sgt van Louw	SAPS PATERSON
33.	Jenny Lottering	Deliwe Advice Office
34.	Mr AM Blum	City Council of Umtata
35.	Velile Dyasi	Uluntu Advice Office

36.	K Dyantyi	Councilor
37.	TE Mjo	Sandile Civil Society
38.	JV Tshitsho	Member of Provincial Legislature
39.	PS Kakudi	Member of Provincial Legislature
40.	Emmanuel Ngubo	SANCA
41.	TP Mhlaba	South African Defence Force
40.	N Daniso	Manzikanyi Youth Organisation
42.	M Sam	Pato Traditional Authority
43.	C Cekiso	Pato Traditional Authority
44.	M Ndlela	Department of Public Works
45.	S Mzaidume	Regional office department of Justice
46.	Nosipho Xhego	Provincial Treasury
47.	M Mbekeni	Dumalisile Traditional Authority
48.	TL Mvubu	Legislature
49.	Farida Casoojee	Department of Sports
50.	Pat Puchert	Democratic Alliance Councilor
51.	Prince L Mavuso	ECHT
52.	S Diko	Amahlubi Traditional Authorities
51.	V M Dubisiko	Amahlubi Traditional Authorities
52.	T Mdledte	Traditional Affairs
53.	S Tyokolwana	Traditional Affairs
54.	V Dyasi	Amapwathi TA
55.	N.T Hinana	Amaqwathi TA
56.	N.F P Meje	Amavundle
57.	NT Hinana	Amavundle
58.	Nonkoliseko Mji	Peddie W.L
59.	Bonginkosi Mayekiso	Buffalo City Municipality
60.	Nobantu Hani	King Williams Town
61.	B Malebo	Buffalo City
62.	M H Mgxekwa	Department of Labour
63.	E N Dlani	SAPS Legal
64.	M Kwezi	SAPS Legal Services
65.	L Mkalipi	SAPS Legal Services
66.	Nomazizi Mseleku	SAPS Legal Services
67.	Nomvula B Giogio	Fikeni Tribal
68.	Leonne Makangce	Life line Childline

69.	G M Mabandla	Sixatyeni Traditional Authority
70.	N S Lolwana	Hala Traditional Authority
71.	Ntombi Nyauza	UDM
72.	CM Mdamase	Eastern Cape Provincial Legislature
73.	LP Mbassa	Magistrate East London
74.	PE Myembana	Ikhwezi W.S.C
75.	Queen Filani	ECLRO
76.	Tabisa Poswa	Dept of Sport Recreation
77.	Nonceba Geza	Masimanyane W.S.L
78.	Euclid Doans	Masimanyene W.S.C
79.	N Mditshwa	CONTRALESA
80.	N Gcelu	Traditional Affairs
81.	Nolitah Ludidi	CONTRALESA
82.	Lulama Booi	UDM
83.	CB Tembami	Welfare
84.	Nozi Tebelele	Masonwabisane W.S.C
85.	Nontyatyanbo Mcotana	Mcotani Traditional Authority
86.	Bukiwe Balicawe	Qolora Traditional Authority
87.	Kholiswa Hempe	Gcaleka Traditional Authority
88.	Thibili Nilule	Department of Health
89.	Bulelwa Molingo	Correctional Services
90.	Frepisi SV	Department of Sport
91.	Mr L Mxokiswa	Treasury
92.	Jacob Qobo	Amandlambe
93.	Zwelenkosi Matanzima	Inkosi
94.	Bhekinkosi Nowele	Safety & Liaison
95.	S Sodladla	Fikeni Tribal
96.	PS Diko	Fikeni Tribal
97.	T Poswa	ANCWL
98.	N Tutu	ANCWL
99.	S A Ngumbela	ANCWL
100.	M Nqwelo	ANCWL
101.	L Charlie	ECPL
102.	Bantu Mcebisi	Umtata
103.	Nomzamo Gocini	Nelson Mandela squatter camps
104.	NA Nkumanda	Civil Society Forum

105.	Thamsanqa Mohlati	UDM
106.	Noma Gantana	Youth and Family
107.	Azikwelwa Maduna	Fundanani Community Forums
108.	Lizeka Mafu	Mdantsane
109.	Ms Given Mpondo	Mdantsane
110.	Robert Wilson	Ekuseni Rural Women
111.	Thomas Madikizela	King Williamstown
112.	Zitha A Jacobs	Youth and Family Society
113.	Ann Dlikidle	UDM
114.	Mary twala	Civil Society –Mdantsane
115.	Thuli Mbanjwa	ANC
116.	Eunice Dube	Foster Care Organisation
117.	Maonela Gladys	Department of Social Development
118.	Meintjies Gillian	Security services
119.	Meyer Lizelle	Ekuthula Place of the Orphans
120.	Gill Nontombi	Umtata ANC
121.	Z Skweyiya	CPF
122.	Mbuyiselo Johnson	Oliver Tambo squatter camp
123.	Mammie Leeu	Alice Community Centre for Widows
124.	B H Zim	Mdantsane SANCO
125.	Tirara Helen	Mdantsane SANCO
126.	Musa Mthembu	VISTA Port Elizabeth
127.	Mr N E Mlangeni	Bisho CPF
128.	Penelope Tozamile	Council for Social Service Professions
129.	Banele Stofile	Inheritance Rights Project
130.	Ntsikelelo Sabane	Port Elizabeth Civil Society
131.	Nomathemba Masenge	ANC
132.	Andile Botha	UDM
133.	Nomzamo Mngadi	UDM
134.	Mtomboxo Yengeni	UDM
135.	Elias Mathebula	Widows' Forum
136.	Winnie Mbethe	PAC East London
137	Mkeli Mpofu	PAC
138.	Onica Mlambo	PAC
139.	Ntebatse Mdima	Social worker
140	Cornelius Koopman	ANC King Williamstown

141	Meme Zimo	Youth and Family
142.	Makaziwe Masekela	UDM

F DURBAN ON 20 NOVEMBER 2001

1. Themba Mnyandu	Legal Services: Department of Education
2. MB Gwala (MPP)	Chairperson House of Traditional Leaders
3. Nomusa Mosery	Family Advocate
4. Nompumelelo Radebe	Law Society of South Africa
5. Mzwandile Gumede	Office of the Premier
6. Sizani Ngubane	AFRA
7. Inkosi WT Mavhundla	Esingolweni
8. Dudu Bophela	Hope Clinic
9. Nosipho Cibane	KwaMashu Community Resources Centre
10. SG Loonat	Graceway Project
11. Sandy Kalyan (MP)	Democratic Alliance
12. ME Shongwe	Welfare
13. Zamisa SC	SANGOCO
14. Abbie Mchunu	Chairperson Women's Brigade
15. MR Dilda-Mia	Attorney
16. MP Mamashela	University of Natal
17. Roberts C	Department of Justice
18. Thobekile Maphumulo	Midlands Women
19. ET Xolo	Council of Traditional Leaders of South Africa
20. Princess NE Nzimande	Traditional Leader
21. Inkosi MTZ Madlala	House of Traditional Leaders
22. Nolukwazi Radebe	Community Law and Rural Development
23. Inkosi S Mavundla	Traditional Leader
24. Dr Alex Fakude	Inkatha Freedom Party
25. JM Buthelezi	Umhlathuzi Municipality
26. Cookie Govender	Domestic Violence helpline
27. Shamila Singh	Domestic Violence helpline
28. Irene Brijlal	African National Congress Durban North
29. Lungi Mthembu	Social worker
30. Zama Mbonambi	National Association for People With Aids
31. Vanitha Naidoo	Domestic Violence Assistance
32. Mtshali MNP	Magistrate Pietermaritzburg
33. MD Ngobese	Inkatha Freedom Party Women’s Brigade

34. Nxumalo MG	DVAP
35. Mercy Dlamini	Inanda Support for Women
36. Bele Phikoboxoku	Scottsburg
37. VF Bhengu	Mangcolosi Tribal Authority
38. Sikhakhane GH	Magistrate Cato Manor
39. Dudu Maphumolo	CMCO
40. Goodenough CM	Profile KwaZulu Natal
41. Mdlalose A	Magistrate Vryheid
42. Botha J	Magistrate Dundee
43. Foyster P	Magistrate Ulundi
44. Rev Ndaba SB	UCC Church
45. Bawinile Zungu	People with Disability
46. Gcim Mngoma	Attorney
47. Michael Mthiyane	Qadi Bothaville
48. Mdlalose XS	KwaMashu Community Centre
49. Millicent Mthembu	Inkatha Freedom Party
50. Inkosi Zondi	Hlanganani Amakhosi
51. Sylvia Chezi	People with Disability
52. Van Der Merwe AD	Magistrate Ladysmith
53. NR Hlophe	Councillor Durban city
54. Inkosi IB Cele	Inkosi
55. Mpungose VRT	Department of Education
56. Scriven TL	Democratic Alliance
57. Majola JS	Democratic Alliance
58. Dube TL	Department of Justice Mahlabathini
59. Inkosi T Ndlovu	Amakhosi
60. Biyela BP	House of Traditional Leaders
61. Nomdeni Mkhathwa	Social worker
62. Zoni Seedat	DVHL
63. N Sifumba	Clermont Women Organisation
64. Mvuyana LR	CSLSL
65. Mr Iqbal Sheik	African National Congress
66. Mr Limali Naidoo	Education Ulundi
67. Mr Ismail Soosiwala	African National Congress
68. Nomthandazo Masondo	Graceway Women’s Project
69. Lulu Mgomezulu	Democratic Party, Westville

70. S Makhanya	Vuka Uzithathe
71. Bongani Khumalo	Community Law & Rural Dev. Centre
72. Gcim Mngoma	Attorney
73. Millicent Mthembu	Inkatha Freedom Party
74. Mrs Dalika	Department of Welfare
75. B E Shandu	Vuka Uzithathe
76. G S Naidoo	Department of Correctional Services
77. WA Ollewagen	Master of the High Court
78. NL Dellubom	Department of Correctional Services
79. FA Lugamo	Department of Correctional Services
80. PT Zulu	Vulamehlo
81. MB Ngobese	Inkatha Freedom Party
82. PM Letsipa	Campus Law Clinic
83. TE Moloi	Traditional Affairs
84. E deLange	Department of Justice
85. Gumede	Clermont Community Resources Centre
86. Marais SB	Inkatha Freedom Party Women's Brigade
87. M Chetty	District Assessor
88. Margaret Dawson	University of Natal
89. LG Gasa	KZN Programme for Survivors of Violence
90. SS Mkame	Umlazi Community Assistance
91. Mavis Mavuso	Department of Education
92. ED Ngubane	Centre for Social Development
93. Mohamed Bobat	African National Congress
94. Zenia Motala	Inkatha Freedom Party
95. Ms L Motala	Inkatha Freedom Party
96. Mr Mahommed	University of Zululand
97. Patricia Mkize	Diakonia Council of Churches
98. Mr Rashid Mohammed	Minority Front
99. Mrs B Motala	Department of Justice
100. DC Dawood	University of Natal-Durban
101. Mr F Jeewa	NICRO
102. Zooby Amod	Durban Chamber of Commerce
103. LH Manzi	Clermont Community Resource Centre
104. Silvia Gass	Marrianhill Community Resource Centre
105. Mvelase Z	Clermont Community Resource Centre

106.	Virginia Gasa	Inkatha Freedom Party
107.	Thembisile Shabalala	Inkatha Freedom Party
108.	Makhosi Mbatha	Inkatha Freedom Party
109.	Isabella Gama	nkatha Freedom Party
110.	Nombuso Mchunu	Inkatha Freedom Party
111.	Wendy van Vuuren	Hibiscus Coast Municipality
112.	Nonhlanhla Kunene	Ethekwini Municipality
113.	Mqwebu CLR	Hibiscus Coast Municipality
114.	Cele PB	Social worker
115.	Jabu Ndlovu	Inkatha Freedom Party
116.	Siyaya NH	Traditional Affairs
117.	Mdletshe BC	Traditional Affairs
118.	Nomfundo Malaza	Umlazi Women Support
119.	Thandi Mabaso	Ethekwini Municipality
120.	Inkosi EM Miya	House of Traditional Leaders
121.	DP Ngcobo	Traditional Leader
122.	Inkosi BA Makhanya	Inkosi
123.	Inkosi Duma	Traditional Affairs
124.	BM Mazibuko	Hlanganani Amakhosi
125.	Saroj Moodley	Vuka Uzi Thathe
126.	Bengu BE	Inkatha Freedom Party
127.	EF Gwala	Pietermaritzburg Support Centre
128.	AR Kazi	Domestic Violence Support
129.	DA Dangor	Democratic Alliance
130.	EL Bata	Community Policing Forum
131.	Malcolm Ntuli	Inanda Childcare Community Development
132.	Inkosi Zondi	Hlanganani Amakhosi
133.	SJ Singh	University of Durban Westville
134.	Mdlalose XS	KwaMashu Community Centre

G PIETERSBURG ON 07 DECEMBER 2001

1.	Kgoši Morgan Malekane	National House of Traditional Leaders
2.	Mawila P R	University of Venda
3.	Rasefate R E	Family Court
4.	Kgoši Makgeru S F	House of Traditional Leaders
5.	Matlou V M	Swaranang Legal Advice Office
6.	Mabula E R	Rural Women Association
7.	Makwela Frans	Relemogile Advice Office
8.	Leseke Suzan	SAPS
9.	Mudau W K	Tshakhuma Traditional Council
10.	Madzivhandila N E	Tshakhuma Traditional Council
11.	Mokou G M	Department of Justice
12.	Kganakga M H L	Prosecution - Mankweng
13.	Molepo P	NACOBACA
14.	Ramadi N E	Tshakhuma Traditional Council
15.	Matamela N B	Dzamani Magistrate
16.	Kgošigadi Mothapo	CONTRALESA
17.	Kgoši Thobejane Setlamorago	CONTRALESA
18.	Vhulahani K P	Tribal Council
19.	Mulaudzi N A	Lwamondo
20.	Tlhako M E	Lesedi Youth Empowerment Org.
21.	Nemushuri T K	Headman
22.	Muhlava M S	House of Traditional Leaders
23.	Nkuna M S	Department of Justice
24.	Nelwamendo A B	House of Traditional Leaders
25.	Sebelebele F M	Lesedi Youth Empowerment Org.
26.	Mashimbye G G	House of Traditional Leaders
27.	Lehwelere M A	House of Traditional Leaders
28.	Madihlaba D J	House of Traditional Leaders
29.	Nchabeleng M R	House of Traditional Leaders
30.	Makgoba M H	Makgoba Tribal Authority
31.	Nefefe Nefefe	Musanda Tribal Authority
32.	Muleka A J	House of Traditional Leaders
33.	Nekhwalivhe H D	House of Traditional Leaders

34.	Thupana Jowie	Regional Office Pietersburg
35.	Mahlatji Daisy	Rural Women Association
36.	Maluleke M N	Nkuri Traditional Office
37.	Mabeba M D	Department of Labour
38.	Nevondo M J	House of Traditional Leaders
39.	Eister T R	United Nations
40.	Modisha S M	Health & Welfare
41.	Mampuru K K	Sekhukhune Royal House
42.	Mantji N M	Traditional Affairs
43.	Pilusa M J	Office of the Premier
44.	Resenga S G	Traditional Affairs
45.	Maradu Mmuso	A N C W L
46.	Mothiba D R	Ga-Mothiba
47.	Mathe J K	Department of Justice
48.	Mulovhedzi N R	Tribal Authority
49.	Mashamba N T L	House of Traditional Leaders
50.	Nkoenyane C	Department of Justice
51.	Mokaba M W	Department of Justice
52.	Mhlari E C	Department of Justice
53.	Chauke H W	Department of Justice
54.	Mhlongo Thabiso	Lesedi Youth Empowerment Org.
55.	Hosi Davhana D D	Royal Member
56.	Molepo M L	Community Advice Bureau
57.	Makgoba M T J	Traditional Leader
58.	Mokhashoa M L	Bloodriver Advice Office
59.	Kgatla Rebecca	African National Congress
60.	Masuka S	Makhado Municipality
61.	Dikantle M S	House of Traditional Leaders
62.	Mohlala Thabitha	ANCWL
63.	Mamedzi Maria	Mutale Municpality
64.	Ramatsoma Betty	ANCWL
65.	Lambani M Z	Chief
66.	Mandi T S	African National Congress
67.	Mamotheti M J	SAPS
68.	Mokhabela Q E	Sekhukhune
69.	Sekhukhune P R	House of Traditional Leaders

70.	Hlungawini, R E	House of Traditional Leaders
71.	Phatudi L	Kgoši
72.	Mathekga P F	South African Police Services
73.	Makhurupetsa Makoma	ANCWL
74.	Tshisudzungwane A F	Lwamondo Traditional Councl
75.	Magena Maboku	AZAYO
76.	Penelope Mopipi	Seshego Advice Centre
77.	Moloko Thupana	ANCWL
78.	MR Makwela	Justice
79.	Gertrude Mahlatje	Seshego Community Networker

H MMABATHO ON 13 MARCH 2002

1.	Kgosi BLM Motsatsi	Chairperson North West HTL
2.	Ikaneng JJ	Rustenburg Magistrate
3.	Kgosi LM Mabalane	North West House of Traditional Leaders
4.	Ms Matlakala Matthews	NW Office on the Status of Women
5.	Mohumagadi Semane Molotlegi	Bafokeng Women's Forum
6.	Khunou SF	University of North West
7.	Masilo JM	NW Legislature
8.	Monchusi Pogiso	Potchefstroom University
9.	Shirley Bosielo	ADAPT
10.	Kgosi Mankuroane MS	North West House of Traditional Leaders
11.	Nolizwe Hottie	ANCWL
12.	J Maswanganye Andries	Master of the High Court
13.	Josie Welty	University of North West
14.	Khubeka VA	COSATU
15.	MOTSHEGARE LB	UCDP
16.	Thandi Kgechane	ANCWL
17.	Gumede MF	ANCWL
18.	Ledingwane Emily	Rustenburg Local Municipality
19.	Mothiba Mamaki	RBA
20.	Nono Senne	University of North West
21.	Putu Lorrain	CPU
22.	Malinga M	Widows' Forum
23.	Mataboge Tebogo	African National Congress Youth League
24.	Matsime MD	Molopo Magistrate
25.	Botshelong CD	Master of the High Court
26.	Joyce Nyoni	Orkney Community Education Centre
27.	Mathope AT	Public Protector
28.	Chere KMG	Traditional Leader
29.	Sebeki Lesego	Law clinic
30.	W Phiri	TRAC
31.	Legotlo EM	NNP
32.	Moiloa MGM	Traditional Leader
33.	Mosito WR	Mankwe Magistrate

34.	Mathikge KA	Koster Municipality
35.	Makhate Wendy	ANCWL
36.	Masimong Tumi	UCDP
37.	Moiloa EM	Traditional Leader
38.	Manganye Jane	ANCWL
39.	Kgaje Matlakala	Community Policing Forum
40.	Montwedi-Tshabalala GG	Public Protector
41.	Sere MP	Molopo Magistrate
42.	Tsimane MH	Atamelang Magistrate
43.	Mogapi Boitumelo	ANCWL
44.	Isaac Matlawe	Orkney Community Education Centre
45.	Mahutsela TM	Law Clinic
46.	Seleke TN	Barolong BooPhoi
47.	Kgosi More	Bethani
48.	Mokebe JJ	Rustenburg Local Municipality
49.	Matlhoko AM	Rustenburg Local Municipality
50.	Ramphele AM	ANCWL
51.	Mmemme Mokate	Bafokeng Women's club
52.	Pikanisi GM	Bafokeng Women's club
53.	Mputle PB	Bafokeng Women's club
54.	Thelma Motepe	Bafokeng Women's club
55.	William Nkomo	Molopo Local Council
56.	Madumo RB	UCDP
57.	Mokgothu KV	UCDP
58.	Diana Moseki	Women for Peace
59.	Ms Julia Mojapelo	Local Aids Council
60.	Ms Matlakala Nomdzaba	Women Against Women Abuse Mankwe
61.	Mogadime	Are Ageng
62.	Thakholi MG	Diocese of Klerksdorp Mother's Union
63.	Claasen F	Klerksdorp Magistrate
64.	Saane-Betrams K	Mafikeng TLC
65.	Jerry Bogatsu	Tlhabologang Advice Centre
66.	Serame Tlhabatlhaba	Taung Magistrate
67.	Motlhaoleng RA	Moretele Magistrate
68.	Mogoba TT	Public Protector
69.	Shole Shole	Barolong BooRatshidi

70.	Motlhabane WL	Taung Traditional Authorities
71.	Mmutle Isaiah	Barolong BooRatlou
72.	Mahlangu SJ	Mankwe magistrate
73.	Kgosi KA Ramokoka	Baphalane Tribal Authority
74.	Nohegang A	Baphalane Tribal Authority
75.	Masilo JB	Baphalane Tribal Authorities
76.	Moitaletsi MNS	Moshaweng Local municipality
77.	Motene Tryphosa	NW Nattional Violence Against Women
78.	Mogatwe GA	Tlhabologang Advice Office
79.	Tiro Montshonyane	University of North West
80.	Nano Thue	Taung Magistrate
81.	Tlhabatlhaba HS	Taung Magistrate
82.	Molefe LN	UDM
83.	Mahura B	UCDP
84.	ZC Kraai	Kudumane Magistrate
85.	Montshiwa JK	Barolong Boo Ratshidi
86.	MH Dire	Barolong Boo Ratlou Phoi
87.	Percy Thwane	UDM
88.	Leonie Windell	Potchefstroom Magistrate
89.	Evodia Skele	Diocese of Klerksdorp Mother's Union
90.	Leah Mangope	UCDP Women's League
91.	Lombard C	Justice
92.	Serobatse MM	HOTL
93.	Keneilwe Pilane	ADAPT
94.	Postma DJ	Ventersdorp Magistrate
95.	Rev V Tambam	UDM
96.	Tsholofelo Digoamaje	Public Protector
97.	KE Montsho	UCDP
98.	Mampane M	NW Legislature
99.	GM Thoane	Barolong Boo Ratshidi
100.	Seanokeng Mfazwe	Mafikeng TLC
101.	Kgwatlhe Arnold	University of North West
102.	Kgosi Makapan MH	Bakgatlha Boo Mosetlha
103.	Monnakgotla	Disabled People of South Africa
104.	Maureen Sekano	NICRO
105.	Elizabeth Masilela	Widow’s Forum

106.	Miriam Moitsi	Baphuduhutswana Advice Center
107.	Kgosi Gaolebale	ANCWL
108.	SKM Namusi	Molopo TLC
109.	TM Pule	UCDP
110.	Kathleen Mopitlo	ANCWL Zeerust
111.	Kelebonye LL	UCDP
112.	Mokgothu DE	NW Council of Churches
113.	Kutwane M	NW Council of Churches
114.	Makabanyane BN	Lehurutshe Magistrate
115.	Bosha Ramosoa	Bafokeng Women's Forum
116.	Mpho Modise	Lehurutshe Widow's Forum
117.	H Ndlovu	Lesedi Community Advice Centre
118.	Zena Tlhomelang	Ikageng Advice Centre
119.	John Makoa	UDM
120.	Itumeleng Selomane	Bafokeng Women's Forum
121.	Irene Mngadi	Bafokeng Women's Forum
122.	S Kutoane	Council of Churches
123.	Kgosi Legale	NW House of Traditional Leaders
124.	Rapoo Letta	Bafokeng Women's Forum
125.	Kgarebane Guilty	Bafokeng CPF
126.	Kgosi Tlhaganyane	Batlhaping
127.	Kgosi LK Molete	Bakolobeng
128.	Tsoeu MM	Orkney Paralegal Advice Centre
129.	Seja Ramesega	Zeerust Municipality
130.	Presley Monewang	Lebaleng Advice Centre
131.	Gabbey Mosebetsi	Gender Focal Point Education
132.	Alice Molusi	Wedela Advice Centre
133.	Moitheri Mogale	Bethanie Tribal Authority
134.	Nicolas Monaemang	Schweizer-Reneke Municipality
135.	Chefu	Motswedi Youth Center
136.	Ms Mavis Mosang	ANCRA
137.	Ms Lucia Kheswa	Boitshoko Disabled
138.	Ms Peggy Seipati	Khulumani Support Group
139.	Ms Sophy Tau	Leratong Community
140.	Mamokete Mokwadi	Ikageleng ANC Youth League
141.	Jeanette Dibetsoe	Botho Jwa Rona

142.	Sipho Nhlapo	COSATU
143.	Ms Boitumelo Tsobane	COSATU
144.	Bone Motlhanke	Lesedi Advice Centre
145.	Pepe Kgosinkwe	Makwassie Community Advice
146.	Lerato Mafora	Witkleigat Tribal Authority
147.	Virginia Shuping	UCDP
148.	Montlenyane Mogapi	Mmabatho

I PRETORIA ON 18 MARCH 2002

1.	Mmathari Mashao	Commission on Gender Equality
2.	M. Andrew Chauke	Magistrate Randburg
3.	Mkalitshi Mentani	ANCWL-Pretoria
4.	S C Masongo	Brakpan Magistrate
5.	Salang Mosaka	Germiston Magistrate
6.	Ms Sibongile Masongo	Brakpan Magistrate
7.	Mashimbye	Magistrate Germiston
8.	Christina Nkomo	ANC Women's League
9.	Busisiwe Nkosi	Disabled Women's Development
10.	Sophie Mashego	ANC Women's League
11.	Diana Maada	Lawyers for Human Rights
12.	Ria Nonyane	CALS
13.	Thoko Mampane	Women of Destiny
14.	Leannette Chibwe	WAWA
15.	Maryna Swanepoel	Warmbad Magistrate
16.	Denge NE	Magistrate Brakpan
17.	Lea Hlabati	ANC-Soshanguve
18.	Thinus Rudolf	Justice College
19.	Allan West	Justice College
20.	Francois Gerryts	Justice College
21.	Mr JN Pretorius	Magistrate Pretoria North
22.	Nonhlanhla Dlamini	UNISA
23.	Josephine Motshidi	ANCWL Mabopane
24.	Julia Njumbuxa	Provincial Mothers Union
25.	Adv Mzondi Molapo	UNISA
26.	Thandisiwe Diko	Human Rights Commission
27.	Prof Jan Bekker	University of Pretoria
28.	Hallie Ludsin	Intern at CALS
29.	Silas Risaba	ABSA Legal Services
30.	Adv BSN Skosana	Magistrate Johannesburg
31.	Keletso Makeng	Black Sash Trust
32.	MN Mojapelo	WAWA
33.	Pinkie Maboya	Widows' forum

34.	SR MokhobiA	NC Vosloorus
35.	Dorcas Chauke	ANC Shoshanguve
36.	Julia Malaka	ANCWL Soshanguve
37.	Sonto Noge	FAMSA East Rand
38.	Catherine Mosane	Community Policing Forum-Mabopane
39.	Samuel Mokhobi	Vosloorus ANC
40.	Salamina Mgidi	Woman, Youth and Children ogether
41.	Martha Mojapelo	WAWA
42.	A Sepirwa	TLC Khyalami
43.	Councilor Maseko	Community Services Central MSS
44.	Mr Ramakarane	Premier’s Office Gauteng
45.	NM Malefane	CONTRALESA-Springs
46.	JB de Klerk	Town Council Germiston
47.	Marie Jackson	Dobsonville SANCO
48.	DS Moeletsi	Randfontein Traffic Department
49.	S M Selepe	Katlehong Community Centre
50.	Margaret Williams	SAPS Germiston
51.	Mokgotho Ramokgopa	Zakkaria Park SANCO
52.	Likhapha Mbatha	Project committee
53.	Perry Mawila	Project committee
54.	Maureen Moloi	SALC
55.	Prof IP Maithufi	Project leader
56.	Prof Himonga	Project committee
57.	MR Makwela	PAC
58.	Paula Soggot	Daveyton SAPS

ANNEXURE F

LIST OF PARTICIPANTS AT THE WORKSHOP HELD AT THE UNIVERSITY OF THE WITWATERSRAND ON 31 AUGUST 2001

	NAME	ORGANISATION
1.	Prof C Albertyn	Centre for Applied Legal Studies: Director
2.	Prof JC Bekker	University of Pretoria
3.	Prof FA de Villiers	University of the Western Cape
4.	Tienie Cronje	South African Law Reform Commission
5.	Joyce Maluleke	Gender Directorate: Department of Justice and Constitutional Development
6.	Adv Nomonde Mngqibisa	Vista University - Soweto
7.	Mr Geoff Budlender	Legal Resources Centre
8.	Prof Chuma Himonga	University Cape Town
9.	Chief P Holomisa	House of Traditional Leaders
10.	Mr Marius Pieterse	University of the Witwatersrand - Law School
11.	Lulama Nongongo	Women's Legal Centre
12.	Prof I.P. Maithufi	South African Law Reform Commission
13.	Prof W du Plessis	University of Potchefstroom
14.	Dr C Rautenbach	University of Potchefstroom
15.	Ms Yvonne van Niekerk	University of Potchefstroom
16.	Shereen Mills	Gender Research Project
17.	Magistrate T Maumela	Magistrate Mutale
18.	Judge RH Zulman	Centre for Applied Legal Studies
19.	Ms Beth Goldblatt	Gender Research Project
20.	Ms L Mbatha	Gender Research Project
21.	Ms Rashida Manjoo	Commission Gender Equality
22.	Hallie Ludsin	Gender Research Project
23.	Mmathari Mashao	Commission on Gender Equality
24.	Prof Joanne St Lewis	University of Ottawa
25.	Mothokoa Mamashela	University of Natal, Pietermaritzburg

ANNEXURE G

*IMBIZO'*S AND MEETING

Province	Place	Date
Gauteng	Alexandra	26/10/2002
	Dobsonville	9/11/2002
	Katlehong	2/2/2003
	Atteridgeville, Katlehong, Thokoza, Mamelodi, Letlhabile, Moletsane, Tembisa and Mabopane	27,28,29,30,31 January 2003
	Pimville	8/08/2003
Limpopo	Ga-Maphoto	21/12/2002
	Seshego	22/12/2002
	Seshego-	23/12/2002
	Ga-Matlala	25/01/2003
	Ga-Mothiba	14/6/2003
	Schoonveldt-Bochum	19/7/2003
	Mohodi	25/10/2003
North West	Zeerust - Ikageleng	14/12/2002
	St Fancis Church	15/12/2002
	Town hall	16/12/2002
	St Augustine	29/12/2002
	Mafikeng Lomanyaneng	18/10/2003
Western Cape	Gugulethu-Uluntu Centre	8/2/2003
Mpumalanga	Daantjie	8/03/2003 (morning)
	Kanyamazana	8/3/2003 (afternoon)
Free State	Senekal	5/4/2003