

# The judicial and legislative reform of the customary law of succession

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## OPSOMMING

### Regterlike en Wetgewende Hervorming van Gewoonteregtelike Erfopvolging

Die inheemse erfreg was gebaseer op die grondslag dat die manlike eersgeborene die oorledene se erfgenaam is. Die Konstitusionele Hof het dit ongrondwetlik verklaar omdat dit teen vrouens en kinders van die oorledene diskrimineer. Die hof het dus gelas dat alle intestate boedels moet vererf ingevolge die Wet op Intestate Erfopvolging. Weens die verweefdheid van die inheemse familiereg met die erfopvolgingsreg was die wetgewer verplig om die reëls van die intestate erfopvolging te versoen met sekere familieregtelike gebruike. Die uitkoms was die “*Reform of Customary Law of Succession and Regulation of Related Matters Act*”. In hierdie artikel wys die skrywers op sekere ongerymdhede in die Wet en dat sommige bepalings nie prakties uitvoerbaar is nie.

## 1 Introduction

The object of this article is not a mere narration of the current customary law of succession. It is fully covered in recent literature.<sup>1</sup> Our purpose is to examine the implications of what may be termed the judicial and legislative reconstruction of the customary law of succession.

A great deal has been written about the judgment of the Constitutional Court that the rules of male primogeniture are unconstitutional.<sup>2</sup> We accept that the unconstitutionality is a *fait accompli*. It, however, left the legislature with the unenviable task to create a framework for nevertheless applying the customary law of succession, or rather what was left of it.

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- 1 See, among others, Himonga “The Advancement of African Women’s Rights in the First Decade in South Africa: The Reform of the Customary Law of Marriage and Succession” 2005 *Acta Juridica* 82; Mbatha “Reforming the Customary Law of Succession” 2002 *J of Human Rights* 159; Rautenbach “South African Common Law and Customary Law of Intestate Succession: A Question of Harmonisation, Integration or Abolition” 2008 *Electronic J of Comp L* 1.
  - 2 See, among others, Rautenbach & Du Plessis “Reform of the South African Customary Law of Succession: Nails in the Customary Law Coffin” in *The Future of African Customary Law* (eds Fenrich *et al*) (2011) 336-360; also Rautenbach 2008 *Electronic J of Comp L* 1.

## 2 Traditional Customary Law of Succession in a Nutshell

The African system of succession was almost invariably patrilineal. Although in practice the order of succession differs nowadays so much so that every woman may succeed, the official version is as stated by Bennett:<sup>3</sup>

The rules of succession to a deceased who had only one wife are the same for all systems of customary law in South Africa. The guiding principle is always primogeniture in the male line. If the deceased had no descendants the whole range of male ascendants would be considered in order of 'seniority'.

For present purposes no details are necessary.

It was governed by the principle of primogeniture that even prevailed in polygamous marriages. The rules were plain, straightforward and part and parcel of their system of family law, catering among others for the status and well being of all members of an extended family.

Each family home was a separate establishment. Movable property acquired by the husband accrued to, or was allotted, by him to the different houses. The eldest son of each house succeeded to the property of that house whereupon he was responsible for the widow and children. The system also covered land so that on the death of the family head it accrued to the benefit of his dependants.

This is not merely an idyllic sketch of primitive African life. To this day Africans put a high premium on family solidarity and ancestor veneration. According to Mbiti:<sup>4</sup>

[w]hen [a man] gets married, he is not alone, neither does his wife "belong" to him alone. So also the children belong to the corporate body of kinsmen, even if they bear only their father's name. Whatever happens to the individual happens to the whole group, and whatever happens to the whole group happens to the individual. The individual can only say: 'I am, because we are, and since we are, therefore I am'.

There are such family homes – many indeed, especially in rural areas<sup>5</sup> where a family head – male or female plays an indispensable role in caring for all the inmates. The family home (household) has no monetary value worth distributing among heirs. It may consist of a single house or a cluster of houses occupied by the family.

But we hasten to add that the primogeniture rule need not necessarily last forever. Take the fact that all westernised blacks – the teachers,

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3 Bennett *Customary Law in South Africa* (2004) 337.

4 Mbiti *African Religions and Philosophy* (1969) 108-109.

5 Sibanda "The birth of a new order and unitary land administration system in communal areas of South Africa" (unpublished paper) (Feb 2006) par 2.1 states that there are 3,550,402 households who occupy communal land.

lawyers, clerks, doctors etc, without coercion or persuasion of any kind get married in terms of the common law. Today marriages are accordingly dissolved in terms of the common law and their estates are wound up as though they were Europeans. Many get married in community of property and the rules of community apply without any arguments on the death of one or the other spouse. Furthermore, South Africa is a growing industrial society. Although most of those who work in the labour centres retain close ties with their rural homes and adhere to the primogeniture rule, there is a growing tendency to establish a place of residence away from home and to lead an independent life. In time these people would easily change and adopt the solutions of the Intestate Succession Act.<sup>6</sup> This is evolutionary and smooth as against the revolutionary method brought about by hasty legislation.

### 3 The Emergent “Living” Customary Law of Succession

Having said that we must add that in the field of succession a substantial volume of living customary law has emerged. This is due to several factors:

- (a) Patrilocal residence<sup>7</sup> is no longer practiced, that is the families no longer converge around a male-headed household. Children move to centres where they are employed and there are innumerable female-headed households.
- (b) Communal lands are no longer coherent entities. Some erstwhile communal areas are, for instance, huge conurbations where acquisition of ownership and succession differ vastly from typical rural areas. The monetary value of property is far less important than in an industrial economy.

The consequential incidents of “living” customary law of succession may be summarised as follows:<sup>8</sup> The monetary needs of a widow or children may dictate what is to be done with the assets of a deceased.

Several field studies have shown that last-born sons and even daughters inherit the family homestead, this is sometimes done on the basis of a living will. In a case culled from our own material the story was simply that before he died a deceased asked his last-born daughter to take over his homestead and even told her where to bury him.

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6 81 of 1987.

7 See about patrilocal residence Ember & Ember *Cultural Anthropology* (1988) 188-190.

8 Legal anthropologists point out that “official” customary law consists of the version developed by colonial administrations in written renditions, case law and legislation. On the other hand, “living” customary law is the law that has been adapted to fit the circumstances, such as that in some communities a system of ultimogeniture, as distinct from primogeniture, is applied. See Rautenbach *et al Introduction to Legal Pluralism* (2011) 28-30.

Disputes are settled by the family. First-born sons would readily concede that property should devolve upon other family members. Some of this might coincide with the application of the Intestate Succession Act,<sup>9</sup> but the Act is rigid. It might jeopardise the give and take approach that occurs in real life situations.

Moreover, incidents of living customary law cannot without more ado be elevated to a general rule of law. We suggest that it could only be regarded as law if "... a fixed line of behaviour is followed by a more or less constant group of persons for a certain period", and ... "a custom, in order to be law, must be commonly believed to be obligatory".<sup>10</sup>

#### 4 Declaration of Unconstitutionality of Customary Rule of Male Primogeniture.

In *Bhe v The Magistrate, Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa*<sup>11</sup> (hereafter the *Bhe* case) the Constitutional Court declared customary rule of male primogeniture, which allows only an oldest male descendant or relative to succeed to the estate of a Black person, unconstitutional and invalid. It also declared unconstitutional and invalid, section 23(7) of the Black Administration Act<sup>12</sup> which unfairly discriminates against women and others with regard to the administration and distribution of black deceased estates. The court imposed, as an interim measure, the provisions of the Intestate Succession Act<sup>13</sup> on estates previously dealt with under the Black Administration Act.<sup>14</sup> It also made special provision for estates relating to polygynous marriages and that estates previously administered in terms of the Black Administration Act<sup>15</sup> must be administered by the Master of the High Court in terms of the Administration of Estates Act.<sup>16</sup>

This judgment was widely hailed as a major victory for rights of African women, particularly those married in terms of customary law. They now enjoy the same rights of succession as their white counterparts and men. Women in polygynous marriages and their children have equal succession rights. Extra-marital children are brought into the fold of successors. Above all the law no longer recognises the concept of "*indlalifa*" or universal heir.

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9 81 of 1987.

10 Ubink *In the Land of the Chiefs: Customary Law, Land Conflicts and the Role of the State in Peri-urban Ghana* (2008) 221.

11 2005 1 SA 580 (CC).

12 38 of 1927.

13 87 of 1987.

14 38 of 1927.

15 *Idem*.

16 68 of 1965.

## 5 Brief Evaluation of *Bhe* Judgment

It would serve no purpose whatsoever to deal with the judgment in detail. The outcome is a *fait accompli*. We nevertheless have a few remarks about the manner in which the court went about its task.

Succession in customary law is not as in European legal systems a matter of winding-up an estate (a deceased's wealth and property) and distributing the proceeds to legally specified heirs. Succession in customary law could aptly be described as universal succession, which cannot be understood in isolation. It is inextricably interwoven with African family law and society. Maine<sup>17</sup> explains:

The decease of individual members makes no difference to the collective existence of the aggregate body, and does not in any way affect its legal incidents, its faculties or liabilities.

The Constitutional Court did not see it in this wider context. It seemed to have been overawed by the submission that male primogeniture is unconstitutional. Was there no middle way? The judges did not seem to have been able to think "outside the box".

Justice Langa, delivering the majority judgment, added a vacuous remark<sup>18</sup> about the manner in which customary law may be "developed":

The order made in this case must not be understood to mean that the relevant provisions of the Intestate Succession Act are fixed rules that must be applied regardless of any agreement by all interested parties that the estate should devolve in a different way. The spontaneous development of customary law could continue to be hampered if this were to happen. The Intestate Succession Act does not preclude an estate devolving in accordance with an agreement reached among all interested parties but in a way that is consistent with its provisions. There is, for example, nothing to prevent an agreement being concluded between both surviving wives to the effect that one of them would inherit all the deceased's immovable property, provided that the children's interests are not affected by the agreement.

The suggestion is quite absurd. It does not warrant comment, except to say that it is highly improbable that "all interested parties" or two women will spontaneously develop customary law of succession in this manner. Even if two persons come to an agreement it would be *ad hoc*, not developing customary law.

The minority judgment of Ngcobo J<sup>19</sup> is a more true reflection of the customary law of succession and the possibility of developing it. Comments would serve no purpose, because the judicial abolition of the customary law of succession is an accomplished fact.

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17 Maine *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* (1930) 202.

18 Par 130.

19 Parr 137-241.

## 6 The Constitutional Court Orders on the Dismembered Rules of Succession

We quote only two aspects from the judgment that are relevant for our purposes:

The rule of male primogeniture as it applies in customary law to the inheritance of property is declared to be inconsistent with the Constitution and invalid to the extent that it excludes or hinders women and extra-marital children from inheriting property.

In the application of sections 1(1)(c)(i) and 1(4)(f) of the Intestate Succession Act 81 of 1987 to the estate of a deceased person who is survived by more than one spouse:

- (a) A child's share in relation to the intestate estate of the deceased, shall be calculated by dividing the monetary value of the estate by a number equal to the number of the children of the deceased who have either survived or predeceased such deceased person but are survived by their descendants, plus the number of spouses who have survived such deceased;
- (b) Each surviving 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 for Justice and Constitutional Development by notice in the *Gazette*, whichever is the greater; and
- (c) Notwithstanding the provisions of subparagraph (b) above, where the assets in the estate are not sufficient to provide each spouse with the amount fixed by the Minister, the estate shall be equally divided between the surviving spouses.<sup>20</sup>

## 7 The Reform of Customary Law of Succession and Regulation of Related Matters Act

### 7 1 Introduction

At the outset we would like to state categorically that the Reform of Customary Law of Succession and Regulation of Related Matters Act<sup>21</sup> (hereafter "the Reform Act"), is not customary law in the true sense of the word. It is said in the long title that it is a "modification" of the customary law of succession, but section 2(1) emphatically provides that:

[t]he estate or part of the estate of any person who is subject to customary law ... and whose estate does not devolve in terms of that person's will, *must devolve in accordance with the law of intestate succession*.<sup>22</sup>

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20 Par 136.

21 11 of 2009.

22 Our emphasis.

The Reform Act makes a few gratuitous concessions, amongst others, that women in ancillary unions may also share in the estate of the deceased man, but that does not create customary law. We shall presently return to these unions. We would rather move on to the consequences of judicial and statutory reconstruction of the customary law of succession.

## 7 2 The Definitions in the Act

### 7 2 1 Customary Law

“Customary law” is defined as meaning the customs and practices traditionally observed among the indigenous African people of South Africa, which form part of the culture of those people. It is only lately that customary law came to be defined in some laws in South Africa. Just as “common law” or “Roman-Dutch law” was never defined by statute, customary law was also not defined. Bekker<sup>23</sup> contains a section under the sub-heading “customary law defined” but it is a description of customary law, not a definition.

Some African countries have definitions. Allott<sup>24</sup> says about them: “Whether these definitions of customary law contribute anything by way of precision or facilitation of choice of laws is an open question.”

In view of the foregoing there is a problem that might arise from the customs and practices traditionally observed among the indigenous African people of South Africa. The phrase seems to confine the operation of the law to South African Africans. By implication it excludes persons who are non-Africans and other people of mixed origin who entered into customary marriages. Some were legally married by customary law, because “Blacks” included “any person residing under the same conditions as a Black in a scheduled Black area or a released area”. In terms of the definition in the Black Administration Act,<sup>25</sup> somebody who was in fact married by customary law could now on his or her death therefore be regarded as single with the result that a spouse would not reap the benefit of the estate devolving according to the common law of intestate succession. So much more, there has for some time been no longer a prohibition on inter-racial marriages.

One may ask: Who are the indigenous African people of South Africa? According to anthropologists the only true indigenous people of South Africa are the Khoi-San. If in any event African people are meant to be what is presently referred to as Africans or Blacks, what about the Nama and Griquas?

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23 Bekker *Seymour's Customary Law in Southern Africa* (1989) 11-13.

24 Allott *New Essays in African Law* (1970) 157.

25 38 of 1927. This inclusion was repeated by s 9(a) Abolition of Racially Based Land Measures Act 108 of 1991.

The Government has drafted the National Traditional Affairs Bill, 2011 to recognise Khoi-San communities and their leadership positions in the same manner as existing traditional leaders. The bill takes it for granted that the Khoi-San disposes of customs in principle akin to South African customary law. For instance, in terms of clause 35(1) a Khoi-San council and branch have a variety of functions including:

- (a) Administering the affairs of the traditional or Khoi-San community in accordance with custom and tradition.
- (b) Performing the functions conferred by customary law, customs and customary law consistent with the constitution.

These questions are not merely academic. When money is in issue, claimants will try to show that the deceased was, or was not, an indigenous person, depending on what is to be gained from either one or the other. We are being consulted on an ongoing basis by persons who want to prove that they were or were not married by customary law – depending on what is to gain from an estate.

We are of the view that intensive research and wide-ranging consultation could produce a less problematic ratio for applying customary law to some across the board.

### ***7 2 2 Traditional Leader***

In terms of the definition in section 1 of the Reform Act “traditional leader” means a traditional leader as defined in section 1 of the Traditional Leadership and Governance Framework Act.<sup>26</sup> In section 1 of that Act “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 that Act.

Other definitions in the Traditional Leadership Act define the whole range of traditional leaders, namely –

- (a) Principal traditional leader;
- (b) Regents;
- (c) Senior traditional leader;
- (d) King or queen;
- (e) Headman or headwoman.

The Reform Act does not deal with succession to traditional leadership positions. But section 6 deals with “disposition of property held by traditional leader in an official capacity”, as follows:

Nothing in this Act is to be construed as amending any rule of customary law which regulates the disposal of the property which a traditional leader who has died held in his or her official capacity on behalf of a traditional

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26 41 of 2003.



community referred to in the Traditional Leadership and Governance Framework Act.<sup>27</sup>

What the drafters had in mind was probably cases where communities acquired land and had it registered in the name of the traditional leader to be held in trust for the community. The land can obviously not devolve in terms of the Intestate Succession Act.<sup>28</sup> It is now required to be disposed of in terms of the rule of customary law which regulates the disposal of such property. The rule is based on male primogeniture. The property would then have to pass on to the first-born son of the deceased chief's wife, to be held in trust for the community. This was probably not intended. The incongruity, we suggest, should be rectified by statute.

Another matter that is more important is that the Reform Act implies that a traditional leader is just an ordinary person whose property on his death passes to his common law heirs. In our view it is wishful thinking. The succession to the office and inheritance of the property are intertwined. The idea is apparently that when a traditional leader dies his successor in title is recognised by the Premier of the province concerned,<sup>29</sup> but his property must be turned into money and distributed among some common law heirs, including his wife or wives in terms of the Reform Act. That is unlikely to happen.

A traditional leader's family home (homestead, if you wish to call it that) is a socio-political unit. That is where his spouses and children live. It is their home. It has no monetary value. This is the place from where he governs his nation. It would be the meeting place of the elders and the seat of the court. This is no small matter. The definition is so wide that even headmen are traditional leaders. Altogether there are about 1 640 traditional leaders.<sup>30</sup>

When a traditional leader dies, it is often not obvious who is to succeed him. If, for instance, he dies leaving no male offspring his wife may be engaged in an *ukungena* relationship to raise an heir. In such event the inheritance to property and succession to office may be in abeyance for many years – at least until the lineage successor reaches adulthood and is formally accepted by the royal council as successor and installed.

At any given time there are dozens of disputes about appointment, removal and settlement of disputes about traditional leaders. In that regard a Commission on Traditional Leadership Disputes and Claims

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27 41 of 2003.

28 81 of 1987.

29 Ito s 11 Traditional Leadership and Governance Framework Act 41 of 2003.

30 The scope of identifying the persons who hold positions in the ruling hierarchy is illustrated by the fact that according to the *Department of Provincial and Local Government Report* (undated) 39 there are 1 640 traditional leaders remunerated by the government. In addition there are a number of headmen who are recognised in terms of custom but who are not accorded statutory recognition.

established by sections 21 to 26A of the Traditional Leadership and Governance Framework Act<sup>31</sup> is engaged in resolving disputes.

Thus, we submit, the Act is not worth a straw in bringing intestate succession to traditional leaders within its ambit. It will be well-nigh impossible for them to comply.

### **7 2 3 Descendant**

“Descendant” is defined as a descendant in terms of the Intestate Succession Act,<sup>32</sup> but who, during the lifetime of the deceased person, was accepted by the deceased person in accordance with customary law as his or her own child.

This is an all-embracing provision. It is necessary to express the situation that Africans have an accommodating view in respect of children. They always “belong” to some or another person or family. The children that the legislature had in mind would include the following:

- (a) Children of a spinster – they belong to the house to which their mother belongs at her father’s family home, and so to her father or his heir.
- (b) Children of a wife – children born of, or conceived by a wife during the course of her marriage, whether legitimate or adulterine, belong to her house and so to her husband, except those conceived before the marriage. The husband may claim damages for adultery in respect of adulterine children, but that is not a matter of succession.
- (c) Children born of a widow (*ukungena* unions) – the widow of a deceased may enter into an *ukungena* relationship with one of her husband’s male relatives to raise children. They are legitimate and belong to her house and so to her late husband’s heir. This poses a problem because the husband on whose behalf they were raised is dead. In the light of the unconstitutionality of the rule of primogeniture the deceased customary law heir has no status. Odd though it might seem, the children would be entitled to inherit from their mother and maybe also from their biological father, the *ukungena* partner. In terms of the Intestate Succession Act<sup>33</sup> a child would be entitled to share in his or her biological father’s estate. We have recently made enquiries and were told that these *ukungena* relationships still occur. One spokesperson added that in his community the widow may choose a consort. This has all along been done among the Xhosa who frown upon the idea of a woman being taken over by the deceased’s brother or any relative; the Xhosa prefer a stranger and if the child is born “on the mat” where the widow used to sleep with the deceased, the child is legitimate and can inherit.<sup>34</sup>
- (d) Children of a widow – children born of a woman from her extra-marital intercourse whether while staying at her husband’s home or elsewhere,

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31 41 of 2003.

32 81 of 1987.

33 81 of 1987.

34 Koyana *Customary Law in a Changing Society* (1980) 83-84.

belong to her house. The husband may claim damages for adultery, but that is not an issue of succession.

- (e) Adopted children – children may be adopted in terms of customary law either by a man or a woman. Our courts have in several cases confirmed that such adoptions are valid.<sup>35</sup> As may be expected in the case of Africans, the two families must be involved and the matter must be reported to the traditional leader.
- (f) Seedraisers – to the foregoing we must add seedraisers. It is quite in accordance with custom<sup>36</sup> for a man to marry a seedbearer for either of his two principal wives who, owing to either death or barrenness, produces no heir. Bekker<sup>37</sup> summarises these marriages as follows:

In the majority of the Cape *Nguni* tribes, if the wife of a main house, that is, of the great or right hand house, without having borne a son, has died, or been divorced, or has absconded and refused to return, or if it appears that she is barren, the family head may marry a new wife for the purpose of raising seed to the main house; since it is the special function of this woman to bear a heir for the house, she creates no house of her own, but is merely an auxiliary wife of the house into which she has been placed, and all her children belong to that house as if they were the children of the main wife; if the main wife has died or has been divorced, the seed-raiser takes her place in all respects.

This should pose no problems if these unions are simply regarded as customary marriages. However, the drafters of the Reform Act got their lines crossed. In terms of section 2(2)(b) of the Reform Act:

[a] woman, other than the spouse of the deceased, with whom he had entered into a union in accordance with customary law for the purpose of providing children for his spouse's house must, if she survives him, be regarded as a *descendant* of the deceased.

Thus the seedraiser becomes a descendant. But section 3(1) provides that:

For the purposes of this Act, any reference in section 1 of the Intestate Succession Act to a spouse who survived the deceased must be construed as including every spouse and every woman referred to in paragraphs (a), (b) and (c) of section 2(2).

Which means that a seedraiser is a descendant as well as a spouse. The anomaly is surely an oversight. The Reform Act has not yet been amended, but heads of offices of the Masters of the High Courts decided at a meeting during November 2010 that they would interpret the contradiction in the provisions of sections 2(2)(b) and (c) and section 3(1) of the Reform Act as follows: "The women referred to in these sections are regarded as spouses of the deceased in terms of section 1 of the Intestate Succession Act but not as his descendants." This conclusion was reached to ensure that the seed-raising women are placed in the best

35 *Kewana v Santam Insurance Company Ltd* 1993 4 SA 771 (Tka); *Metiso v Padongelukkefonds* 2001 13 SA 1142 (T).

36 Brownlee cited in *Yoywana v Yoywana* 1912 3 NAC 301 302.

37 Brownlee 279.

possible position, which, in this case, is being regarded as a spouse instead as a descendant. Evidently depending on the form of the marriage, a spouse shares in the deceased estate before the residue is divided between the remaining descendants.<sup>38</sup> This may be fair, but the Act should surely be amended to make it clear what the legislature had in mind.

There is another anomaly in regard to these seedraising unions and the application of the Intestate Succession Act<sup>39</sup> in respect of the childbearers being spouses or descendants. In a seedraising union:

- (a) a married man dies (so he is out of the picture);
- (b) his widow (a woman past childbearing age) marries another woman after paying lobola;
- (c) to provide children for her late husband.

But the late husband is dead and his estate would be finalised by the time this type of union is entered into so the female wife (the childbearer) cannot be said to be his descendant nor spouse for purposes of sharing in his estate.

In section 2(2)(c) of the Reform Act the drafters got their lines entangled. It provides that:

- (2) In the application of the Intestate Successions Act –
- (c) if the deceased was a woman who was *married* to another woman under customary law for the purpose of providing children for the deceased's house, that other woman must, if she survives the deceased, be regarded as a descendant of the deceased.

A description of the nature and occurrence of these marriages is not necessary for present purpose. Suffice it to say that Bennet<sup>40</sup> briefly refers to them as follows:

In this type of marriage, an older woman of wealth and status provides lobola in order to acquire a younger woman as her “wife”. The “wife” is expected to have sexual relations with a selected male consort so that she can produce children for the “husband’s” house. Women-to-women marriages were never common, but they were fully recognised by various systems of customary law in South Africa, notably Venda, Lovedu, Pedi, Sotho and Zulu.

Note that they are independent marriages – not extensions of existing marriages.

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38 s 1 Intestate Succession Act 81 of 1987 read with s 3 Reform Act. See also Rautenbach & Meyer “Lost in Translation: Is a Spouse a Spouse or a Descendant (or Both) in Terms of the Reform of Customary Law of Succession and Regulation of Related Matters Act?” 2012 *TSAR* 159. The anomaly is discussed in detail in this article.

39 81 of 1987.

40 Bennet *Customary Law in South Africa* (2004) 197-198.

Bearing that in mind we return to section 2(2)(c) of the Act. It provides that:

- (a) a deceased woman;
- (b) who was married to another woman under the customary law;
- (c) for the purpose of providing children for the deceased's house
- (d) that other woman, if she survives the deceased;
- (e) must be regarded as a descendant of the deceased.

There are rare cases of female-female marriage. They are not entered into for the main purpose of providing children for the deceased's (female husband's) house. In such cases: "Often such women are traders, political leaders, or religious leaders who seek the social recognition only husbands get".<sup>41</sup>

Oomen<sup>42</sup> shows that all women-to-women marriages may fall within the ambit of the Recognition of Customary Marriages Act.<sup>43</sup> However, she fails to define "marriage". As pointed out all the ancillary unions are not marriages; only those we call "true" women to women marriage.

One would add that if all these unions were marriages the provisions of the Recognition of Customary Marriages Act<sup>44</sup> would apply to them, including patrimonial consequences as well as the rules of succession in terms of the Intestate Succession Act.<sup>45</sup> They would furthermore have to be registered.

#### ***7 2 4 Disposal of Property Allotted or Accruing to a Woman in a Customary Marriage***

In terms of section 4(1) of the Reform Act such property may be disposed of in terms of a will. There has never been any limitation on anybody's testamentary capacity, except that in terms of section 23(a)(i) of the Black Administration Act<sup>46</sup> a family head could not dispose of:

[m]ovable property belonging to him and allotted by him or accruing under customary law to any woman with whom he lived in a customary marriage, or to any house, such property devolves in terms of customary law.

This Act has been repealed.

Moreover, in terms of section 6 of the Recognition of Customary Marriages Act:<sup>47</sup>

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41 See Krige & Comaroff *African Marriage in Southern Africa* (1981) 8.

42 Oomen "Traditional Woman-to-woman Marriages and the Recognition of Customary Marriages Act" 2000 *THRHR* 274.

43 120 of 1998.

44 *Idem*.

45 81 of 1987.

46 38 of 1927.

47 120 of 1998.

[a] wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law.

Thus there seems to be no reason why an enactment was necessary to enable her to dispose of her own property (assets) by will.

More importantly, it is unlikely that a woman would ever make a will to dispose of property allotted to her or accrued to her under customary law. Except in rare cases the property would be a family home property to be used to fulfil the needs of the inmates.

In terms of section 7(1) and (2) of the Recognition of Customary Marriages Act:<sup>48</sup>

- (1) The proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law.
- (2) A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage.

In *Gumede v The President of the Republic of South Africa*<sup>49</sup> section 7(1) was declared unconstitutional as far as it relates to monogamous customary marriages. All monogamous customary marriages entered into before the Act came into operation are, as from 8 December 2008 (the date of the judgment), in community of property and of profit and loss between the spouses. The court order has no bearing on customary marriages which had been terminated by death or by divorce before the date of the judgment. Section 7(2) was also declared unconstitutional insofar as it distinguishes between a customary marriage entered into before and after the commencement of the Act. The words “entered into after the commencement of the Act” were therefore declared unconstitutional. The patrimonial consequences of monogamous customary marriages entered into before and after the commencement of the Act, are now the same.

All this means that whatever property allotted to or accrued by the wife becomes assets in the joint estate of the marriage in community of property. In fact the woman would have acquired the property by virtue of it being allotted to her by her husband. On the one hand one may speculate whether he, no longer being the general heir and by implication the *pater-familias*, may distribute (allocate) property. On the other hand all the assets belonging to the spouses prior to the conclusion

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48 *Idem*.

49 2009 3 SA 1521 (CC).

of the marriage as well as assets subsequently accumulated fall into the joint estate.

This means that a house is a homestead allotted to a woman or something accruing to her, such as an *ubulungu* beast to be pooled in the joint estate, so that she could dispose of only her share by will. All this will be preposterous in real life situations.

We may emphasise that all monogamous customary marriages, except polygynous marriages entered into after September 2008 when the *Gumede* judgment came to apply, are in community of property.

Taking all the foregoing into account we daresay that section 4(1) purporting to allow a woman to dispose of property allotted or accruing to her in a customary marriage is meaningless.

### 7 3 Disputes

In terms of section 5 of the Act:

If any dispute or uncertainty arises in connection with –

- (a) the status of or any claim by a person in relation to a person whose estate or part thereof must in terms of this Act, devolve 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 involved in such estate,

the Master may refer the dispute or uncertainty to a magistrate or traditional leader for an enquiry and recommendation.

Such enquiry may be quite helpful, but we observe that the heading to this section refers to “dispute or uncertainty” in consequence of the nature of customary law! We assume that the magistrate *or* traditional leader may be called upon to enquire into ancillary matters such as the status of children.

Who is the magistrate going to be? It is common knowledge (which we may affirm) that magistrates (judges too for that matter) are ill informed, if at all, about customary law and custom. Magistrates were formerly also district administrators. But they have long ago been ascribed the functions of judicial officers – only that and nothing more. One could assign to them a quasi-judicial enquiry, but to use them as advisors of another official seems misplaced.

What control measures are there to protect the interests of disputing parties? Who is the alternative traditional leader going to be? There are 1640 of them at four levels. Traditional leaders normally hear disputes in council and then only in respect of members of their own communities (tribes).

This casual ruling is in our view ill-conceived. It smacks of colonial-apartheid *ad hoc* enquiries in which an official (mostly a commissioner) would direct what “natives” should do or not do.

There are in fact many and serious disputes about succession. Brandel-Syrier<sup>50</sup> deals with the large number and vehemence of succession disputes. She wrote (*inter alia*)<sup>51</sup> that:

[t]here was firstly an increase in inheritance disputes and secondly a decrease in the number of first-borns who had been heirs in the traditional manner (ie in the manner in which inheritance was customary practice.

She adds<sup>52</sup> that:

[t]his increase in inheritance disputes is symptomatic of the heightened conflict which, inevitably occur in any disturbed social system, but also of the growing tensions appearing in an impoverishing rural economy.

## 8 Conclusion

Higgins *et al*<sup>53</sup> did extensive field research on the impact of the Recognition of Customary Marriages Act.<sup>54</sup> Their concluding remarks speak volumes. This is what they said<sup>55</sup> about the new marriages:

The South African Constitution is doubtlessly a victory for women in its explicit guarantees of non-discrimination on the basis of gender, sex, pregnancy, marital status, the right to be free from both public and private violence. And the right to bodily and psychological integrity. Yet, despite the triumph of equality at the constitutional level in South Africa, marriage is often the site of women’s legal, social and sexual subordination, as well as vulnerability to domestic violence and HIV/AIDS, all of which are exacerbated by poverty.

Their finding on the abolition of the customary law of succession is similar. It confirms our observations and experience at the time of writing this article that the provisions of the Reform Act are not fully implemented at all. It deserves to be quoted in full:<sup>56</sup>

Following the *Bhe* decision, our interviews with South African lawyers and representatives of non-governmental organisations working on gender equality issues suggest that, as of May 2006, the case had virtually no impact

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50 Brandel-Syrier *First-borns and Younger Sons: Culture Change and Sibling Relations* (1980).

51 *Ibid* 7.

52 *Ibid*.

53 Higgins, Fenrich & Tanzer “Gender Equality and Customary Marriage: Bargaining in the Shadow of Post-apartheid Legal-Pluralism” 2007 *Fordham Int LJ* 1651.

54 120 of 1998.

55 Higgins, Fenrich & Tanzer “Gender Equality and Customary Marriage: Bargaining in the Shadow of Post-apartheid Legal-Pluralism” 2007 *Fordham Int LJ* 1651 1654.

56 *Ibid* 1696.



even on the adjudication of disputes concerning inheritance rights. Although legal services organisations had begun to conduct training sessions for lawyers and magistrates on a limited basis, many estates were still administered informally by family members or traditional leaders in rural and semi-urban communities where knowledge of the *Bhe* decision was virtually nonexistent. As a practical matter, this means that a widow's access to her deceased husband's home and property depends on the inclinations of the male heir. If that heir is her son, she will likely remain in her home. If the heir is another male relative, she may well be evicted from the property, particularly if she has no children of her own.

Enquiries we made in various rural villages during the drafting of this article confirm that to date there is no evidence of even the slightest change in the *status quo*. No wonder it is so. So, angered by the Bill that paved the way to the Reform Act, the Congress of Traditional Leaders of South Africa through its Secretary, Adv Mweliso Nkomo, publicly vowed "to fight this immoral law".<sup>57</sup>

The essence of the matter is that the customary law of succession has been abolished all but in name, but no account was taken of the social and monetary circumstances of the vast number of Africans that will have to live with the new law in years to come. Admittedly in urban areas some women and children will benefit. Even for them it may be a mixed benefit. Our observation is that even in urban areas family members are exasperated when they learn that their family homes are no longer family homes, but assets in an estate. From its conversion into money to be distributed among heirs, they will get a mere pittance. The major problem is that formal, common law equality cannot without more ado be replicated in the customary law system.

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<sup>57</sup> *Daily Dispatch* (2009-08-23).