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HARMONISATION OF THE COMMON LAW AND THE INDIGENOUS LAW
(The application of customary law: conflict of personal laws)

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INTRODUCTION

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

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PREFACE

This issue paper (which reflects information gathered up to the end of June 1996) was prepared to elicit responses and, together with those responses, to serve as a basis for the Commission's deliberations. The views, conclusions and recommendations contained herein should not, at this stage, be regarded as the Commission's final views. The issue paper is published in full so as to provide persons and bodies wishing to comment or make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place substantiated submissions before the Commission.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may have to release information contained in representations under the Constitution of the Republic of South Africa, Act 200 of 1993.

Respondents are requested to submit written comments, representations or requests to the Commission by 30 November 1996 at the address appearing on the previous page.

The project leader responsible for this project is Prof R T Nhlapo and the researcher, who may be contacted for further information, is Mr P A van Wyk.

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CHAPTER 1

INTRODUCTION

The Commission's investigation on the harmonisation of the common law and the indigenous law emphasizes the need to address the pressing problems relating to the application of customary law and the conflict of personal laws.

At its meeting of 23 and 24 February 1996 the new Commission approved the reconstitution of the Project Committee and the ranking proposed by the outgoing committee which had identified the application of customary law and the conflict of personal laws as a priority area.

The matter was subsequently referred to the newly-formed Project Committee on the Harmonisation of the Common Law and the Indigenous Law.

CHAPTER 2

THE NEED FOR NEW RULES GOVERNING APPLICATION OF CUSTOMARY LAW

Customary law now has explicit recognition on a par with common law as part of South Africa's legal system. Previously, s 1(1) of the Law of Evidence Amendment Act[1] provided that courts *may* take judicial notice of customary law if it is readily ascertainable. By implication this section suggested only that customary law need not be proved as a fact. Section 211(3) of the 1996 Constitution, however, now *obliges* courts to apply customary law 'when that law is applicable' (subject to the Constitution and 'any legislation that specifically deals with customary law').

It is unfortunately far from clear when customary law is applicable, for the rules on application are fragmentary, vague, badly drafted and out of date. At present, the principal rule is one of *recognition* and it is contained in the Law of Evidence Amendment Act (which is concerned with the evidence necessary to prove both customary and foreign systems of law). This rule gives no guidance to courts wishing to discover when customary law is applicable.

More specific rules regarding application of customary law in cases of succession and civil or Christian marriages are contained in the Black Administration Act and in obscure and confusingly worded regulations passed under it.[2] These provisions (most dating from 1927) did little more than repeat nineteenth and early twentieth-century enactments from Transkei and Natal, and nearly all are now obsolete. What is more, because the only criterion for applying customary law is race, they are unacceptably discriminatory.

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1 45 of 1988.

2 38 of 1927. Certain provisions, such as the choice of law rules for applying different systems of customary law, were lifted from this Act and inserted in the Law of Evidence Amendment Act.

Since these various enactments were promulgated, society has fundamentally changed and with it South Africa's legal system. Clear choice of law rules are now needed, ones that will direct courts to apply either customary or common law, depending on the parties' social circumstances and provisions in the Constitution. Modern family law legislation, emanating from both the South African Parliament and former independent or semi-autonomous homelands, is also relevant to choice of law, since much of it amends or repeals customary law.

Choice of law rules in the existing legislation often do not make it clear whether customary and common law is attributable to persons or territories. None the less, choice of law should reflect the fact that litigants are subject to particular legal regimes because of personal qualities, ie their cultural orientation (and that under ss 30 and 31 of the Constitution they are entitled to demand that courts apply the law associated with their culture). For this reason potential conflicts between common and customary law are properly considered to be conflicts of 'personal' laws.

CHAPTER 3

GENERAL RULES ON THE APPLICATION OF CUSTOMARY LAW

(a) Courts competent to apply customary and common law

All courts in South Africa are competent to apply customary law.[3] Under s 12(1) of the Black Administration Act,[4] however, courts of the traditional authorities only have jurisdiction 'to hear and determine *civil* claims arising out of Black law and custom' brought before them 'by Blacks against Blacks resident within [their] area of jurisdiction'. Thus, in civil suits, these courts have no competence to apply common law. Under s 20(1)(*a*) of the Act, on the other hand, traditional leaders may try offences at either common or customary law,[5] provided the accused was Black or the offence was suffered by a Black.

The major objection to these provisions is the racist manner in which limitations on the traditional courts' jurisdiction were conceived (an objection that can be remedied in whatever new legislation is contemplated for specifying powers of traditional leaders).[6] For the purpose of this paper, however, which is to define circumstances when customary law may be applied, the question is whether it is not arbitrary to deprive traditional courts of jurisdiction to hear civil suits arising out of common law and whether customary criminal law should continue to be recognized.

(b) Principles governing choice of law

Specific statutory choice of law rules stipulate when common or customary law are to be applied

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3 This proposition follows from s 1(1) of the Law of Evidence Amendment Act 45 of 1988 and s 211(3) of the 1996 Constitution.

4 38 of 1927.

5 Other than those specified in the Third Schedule to the Act.

6 Thus civil claims should not be restricted to 'Blacks against Blacks' and criminal jurisdiction need not depend on the race of the accused/injured party. As far as jurisdiction over persons is concerned, a simple requirement of residence within a court's area of jurisdiction should suffice.

in cases of succession and civil or Christian marriages. For all other cases, application of customary law is left to the discretion of the courts. The only statute relevant to the issue, the Law of Evidence Amendment Act,[7] has only the following cryptic provision:

> Any court may take judicial notice ... of indigenous law in so far as such law can be ascertained readily and with sufficient certainty ...[8]

In fact, South African courts have never had the benefit of precise choice of law rules to direct them, with the result that they have had to create their own guidelines on a case-by-case basis.[9] According to one line of thinking, all Africans were subject to customary law and common law could be applied only in exceptional cases. A contrary view considered common law to be *prima facie* applicable to all people in the country and customary law only by way of exception. This deadlock was finally resolved in *Ex parte Minister of Native Affairs: In re Yako v Beyi*,[10] where the Appellate Division held that neither common nor customary law should be given priority: the courts had to select whichever law seemed appropriate in all the circumstances of a case.

Underlying the courts' decisions was a clear tendency to choose whichever law the parties would have expected to apply. While this rationale was never overtly expressed as a basis for choice of law, it is the soundest principle for deciding when to apply customary law, for, in doing justice between the parties, courts should seek as far as possible to uphold their legitimate expectations. Such reasoning can now be supported by the individual's constitutional right to pursue the culture of his or her choice.[11]

If courts are to endeavour to give effect to the parties' expectations, then litigants should

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7 Section 1(1) of Act 45 of 1988.

8 Subsection 1(4) provides that for the purposes of s 1 '"indigenous law" means the Black law or customs as applied by the Black tribes in the Republic or in territories which formerly formed part of the Republic'.

9 Before the Law of Evidence Amendment Act was promulgated, s 11(1) of the Black Administration Act 38 of 1927 governed application of customary law, and it too left choice of law to the discretion of the courts.

10 1948 (1) SA 388 (A).

11 Sections 30 and 31 of the 1996 Constitution.

be entitled to agree that a particular law apply. From existing case law it is evident that the courts regularly inferred tacit agreements from prior conduct. Thus, if a defendant did nothing to contest the choice of law implicit in the plaintiff's pleadings (ie the nature of the remedy or the type or quantum of damages sought), the parties were deemed to have accepted that law as the basis of their suit.

While an absolute freedom to choose the applicable law has never been unconditionally endorsed, courts have never objected to a widespread practice whereby persons normally subject to customary law use the forms and institutions of common law, such as wills and contracts. (Conversely, of course, there is no reason why persons subject to common law should not engage in customary institutions if they wish.) Nowadays, under the Constitution, it would be necessary only to insist that this practice conform to the principle that all people in South Africa have recourse to protections offered by the bill of rights. In other words, one party's choice of customary or common law should not operate to prevent the other party from relying on his or her constitutional rights.

If a defendant contests the plaintiff's choice of law as it appears *ex facie* the summons, the court will have to determine which law the parties contemplated at an earlier stage of their relationship. According to several precedents, a choice of law can be inferred from the transaction on which the suit is based, if that transaction was characteristic of a particular legal system.[12] Where the transaction was common to both legal systems, use of a form peculiar to one may be decisive. Especially in the case of marriage, if the spouses had married in church, the form of the ceremony is taken to imply the parties' tacit acceptance of common law as the basis of all legal issues related to their union.

Where a transaction had no culturally marked form, the courts delved deeper into the circumstances in which the transaction occurred in order to discover a prevailing cultural identity. Accordingly, the purpose of a transaction, the place where it was entered into and its subject matter have all been used as indications of tacit choice of law. In suits arising out of

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12 Hence transactions usually associated with customary law, such as bridewealth and loans of cattle, point to that law, while the contracts typical of modern commerce suggest application of common law.

delicts and family relationships, where no prior transaction was involved, however, the courts looked to the parties' lifestyles as an indication of an overall cultural orientation and thus choice of law.

(c) Exemption from customary law

Under s 31 of the Black Administration Act, Africans who are deemed sufficiently acculturated to a 'western' lifestyle can apply to the State President for an exemption from customary law.[13] So few people have applied for exemption that the procedure could now be considered obsolete.

(d) Unifying choice of law

The courts unified (and thereby simplified) choice of law by deeming all aspects of an action subject to one legal system. Hence the law applicable to the main claim determined such subsidiary questions as the relevant defences, quantification of damages and capacity.

Locus standi in judicio and contractual capacity are regulated by special statutory choice of law rules contained in s 11(3) of the Black Administration Act:

> The capacity of a Black person to enter into any transaction or to enforce or defend his rights in any court of law shall, subject to any statutory provision affecting any such capacity of a Black, be determined as if he were a European; Provided that -
>
> (*a*) if the existence or extent of any right held or alleged to be held by a Black or of any obligation resting or alleged to be resting upon a Black depends upon or is governed by any Black law (whether codified or uncodified) the capacity of the Black concerned in relation to any matter affecting that right or obligation shall be determined according to the said Black law.

In terms of this section, if a right or obligation arose out of a common law transaction, then capacity to enter the transaction and capacity to sue or be sued upon it must be tested by the

13 The effect of exemption was never altogether clear: although the person concerned was generally deemed free from customary law, he or she was would still be considered bound by customary obligations incurred before exemption.

same system.

Under s 11(3)(*b*), a Black woman 'who is a partner in a customary union and who is living with her husband shall be deemed to be a minor and her husband shall be deemed to be her guardian'. In consequence, such women lack contractual capacity or *locus standi*. This proviso drastically restricts the scope of the main section, creates legal confusion and contravenes the right to equal treatment/non-discrimination under s 9 of the Constitution.

(e) The 'repugnancy' proviso

In s 1(1) of the Law of Evidence Amendment Act, application of customary law is subject to a so-called 'repugnancy proviso', ie that customary rules may only be applied:

> Provided that [they] shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles ...

This general limitation on the recognition of customary law is a legacy of colonialism and a clear reflection of the ethnocentric bias in South Africa's legal system.

The repugnancy clause is unsatisfactory for other, technical reasons. In the first place, its scope of application is vague, for it is uncertain whether customary rules should be considered in abstract or in the context of particular facts or whether the clause should be used as a choice of law rule to avoid hard cases. In the second place, the clause can be used to subject customary law to the Constitution. Instead of engaging in a principled debate (as would be implied by s 211(3) of the Constitution) about horizontality or the limitation of constitutional rights, courts can read the terms 'natural justice' and 'public policy' in the repugnancy proviso as expressions of constitutional norms and without further consideration override customary law.

(f) Proposed reforms

Most provisions in the Black Administration Act need to be amended in order to delete the racist

term ‘Black’ (and its definition in s 35). For the purpose of choice of law, an expression such as ‘person subject to customary law’ or a cognate term is more appropriate.

As far as the courts' power to apply customary law is concerned, it is necessary only to note that the civil jurisdiction of traditional authorities under s 12(1) should be expanded to include claims based on common law.

A further general issue, affecting all the courts, is whether recognition of customary law should be limited to civil matters only. South Africa has never taken a clear policy decision about recognizing customary criminal law and s 211(3) of the Constitution is too general to provide an answer. While a principled argument could be made in favour of all people in the land being subject to the same criminal code, traditional leaders are already authorized to try minor offences at both common and customary law.[14]

Application of customary law should remain a matter of judicial discretion, but explicit statutory choice of law rules could usefully provide the courts with guidance in this regard. A model provision would read as follows:

Customary law may be applied [in any civil suit] where:

(a) the parties have agreed that it should apply; or

(b) from the nature of the pleadings, a prior transaction, the parties' lifestyle or their understanding of the provisions of customary law or the common law (as the case may be), it appears that the parties would have expected it to apply.

Because the exemption procedure provided by s 31 of the Black Administration Act has so seldom been used and because it is conceived in such paternalistic terms, it should now be abolished. That every person has free choice of culture (with the corollary that no one should be perpetually bound by a system of personal law against his or her will) is undoubtedly consonant with constitutional principles. None the less, it is undesirable to allow individuals to change

14 And any attempt to circumscribe the jurisdiction of these courts is unlikely to succeed, since customary law does not draw a precise distinction between civil and criminal matters nor does it always draw a distinction in the same way as common law.

their personal law by an administrative procedure, especially when it is uncertain what effect this change will have on existing obligations and on relations with third parties.

Three amendments should be made to s 11(3) of the Black Administration Act. First, in the interest of eliminating racism, the term 'Black person' should be replaced with 'person subject to customary law'. Secondly, the phrase 'to enter into any transaction or to enforce or defend his rights in any court of law' should be deleted to expand the ambit of this section to cover delictual and proprietary capacity. Thirdly, with a view to bringing the status of customary law wives into line with s 9 of the Constitution, proviso (*b*) to the section should be deleted.

The so-called 'repugnancy proviso' has not been invoked by South African courts for many years and in other southern African states it has been repealed because of its associations with the colonial past. Retention of the proviso gives the courts an opportunity to avoid serious constitutional debates by applying the bill of rights under the guise of 'public policy'. In the circumstances, the proviso should be repealed.

CHAPTER 4

CHOICE OF LAW IN SUCCESSION

(a) Wills and testamentary freedom

The common law gives individuals considerable freedom to decide on the devolution of their estates, regardless of the interests of intestate heirs.[15] This preference for testate succession is predicated upon individual ownership of property, a concept that is limited to only certain types of property in customary law. Hence, under customary law, transmission of property and status on death is controlled by predetermined rules of intestate succession, rules which family heads may not completely ignore if they seek to dispose of their property *mortis causa*.[16]

The first issue to consider in matters of succession is whether people subject to customary law may disregard their personal law by making wills. In view of the destructive effect that freedom of testation may have on a family's material security and social cohesion, many African countries restricted this power to persons subject to common law. The question has never been seriously debated in South Africa, where it has always been assumed that anyone may make a will.

Nevertheless, freedom of testation was subject to two statutory exceptions contained in s 23 of the Black Administration Act:

> (1) All movable property belonging to a Black and allotted to him or accruing under Black law or custom to any woman with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under Black law and

15 A surviving spouse can of course claim maintenance from a deceased estate under the Maintenance of Surviving Spouses Act 27 of 1990, but the Act does not apply to spouses of customary marriages, because the term 'survivor' is defined to mean the spouse of a marriage dissolved by death, and marriages do not normally inlcude customary unions.

16 Before he dies, the head of a family may make arrangements for the distribution of his estate, but his instructions must be approved by the family and they may not depart too far from the usual order of succession.

custom.

(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 sub-section (10).

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

(i) Movable house property

Under s 23(1) testators may not bequeath movable 'house' property.[17] The concept of 'house' property follows from the structure of polygynous households, whereby each wife creates an independent estate for herself and her children. Because the heir to each house is destined to inherit property in that house, it must be kept strictly separate from the property of other houses.

Section 23(1) may well not apply where the testator is a wife, since wives' property cannot strictly speaking be called house property. Similarly, because a civil or Christian marriage cannot technically create a house, the section does not apply if the testator had contracted this form of marriage. The most important objection to s 23(1), however, is that polygynous marriage is no longer a norm.

If this form of marriage (and thus household structure) is now the exception rather than the rule, then the rationale for s 23(1) has disappeared. Thus, if a man takes only one wife, it seems inappropriate to speak of the creation of a 'house' and thus 'house property'. A literal reading of s 23(1) might suggest that the prohibition on testation applies even to movable property in a monogamous union, but it is equally plausible to regard such property as 'family' property, and hence devisable by will.

17 Section 35 of the Black Administration Act defines the term 'house', and the Natal and KwaZulu Codes, Proc R151 of 1987 and Act 16 of 1985, respectively, give specific definitions of 'house property'. Section 23(1) of the Act also applies to property accruing to the wife of a customary marriage that was automatically terminated by a later civil/Christian marriage by the husband to another woman. Such property is protected by s 22(7) of the Act.

(ii) Land held under quitrent tenure

When, in the nineteenth century, Africans were first given quitrent title to land, the authorities were concerned to prevent plots being fragmented into uneconomic holdings amongst a number of intestate heirs. Accordingly, succession was regulated by statutory provisions (currently contained in the Black Areas Land Regulations R188 of 1969) designed to approximate the customary order of intestacy.[18]

Quitrent is a colonial form of tenure, limited mainly to the former Ciskei and Transkei. New tenures are likely to be imposed on land restored to people under the Restitution of Land Rights Act.[19] If the land regulations specified in Proc R188 of 1969 are to be superseded, the reason for maintaining this particular exception to the rule of testamentary freedom may disappear.

(iii) Immovables and family property

It is implicit in s 23 that the two main categories of property amenable to disposition by will are immovables and 'family' property. Because neither of these categories is in the exclusive patrimony of the deceased, it is incongruous that the bequest of such property is allowed. The law in most African countries provides the reverse: only personal property may be willed.[20]

Intractable legal problems will be created if a person is permitted to bequeath property in which others have concurrent interests. With regard to land, under customary law a landholder's interests are extinguished on death and the land reverts to the traditional authorities for reallocation. If the landholder were to bequeath these interests under a will, what rights would

18 Annexure 24.

19 22 of 1994.

20 Admittedly Roman-Dutch law does allow testators to dispose of things they do not own, but the testator cannot create rights he never had and the rule is exceptional.

the beneficiary receive?[21] Although the principle that one cannot give more rights than one has oneself is obviously relevant, South African law has no precedent for deciding this problem.[22]

(iv) Guardianship clauses

Guardianship clauses, ie directions in wills that guardianship of the testator's minor children should go to a named person, create a problem analogous to the bequest of land. In customary law, provided that bridewealth is paid, rights to children vest in the father's family, not in the father personally. Hence, it is uncertain what effect a will would have if the testator were to transfer these rights to a person outside the family (especially if the testator were the mother, who in customary law has no legal right of guardianship at all). Arguably, these dispositions are invalid, unless guardianship had been given to someone with an independent entitlement under customary law.[23]

(b) The law applicable to wills

A will is a juristic act peculiar to the common law. Hence, in keeping with the assumption that testators probably envisaged application of the common law, most issues connected with the will - such as capacity, formalities and modes of revocation or amendment - are governed by the same legal system.[24] By relegating these various issues to the common law, choice of law is both unified and simplified. If a testator used distinctively customary law terms in the will, however, that system should obviously govern their interpretation.

(c) Partial testacy

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21 Regulation 53(5) of Proc R188 of 1969 provides that land subject to the Black Areas Land Regulations may not be bequeathed, but in those areas where the regulations do not apply, ie where land is held subject to customary law, it is an open question what the effect of a will would be.

22 It seems inequitable to allow a landholder to convert a precarious interest into something more permanent simply by willing the land to a named beneficiary.

23 This proposition does not apply in the case of civil or Christian marriages, where custody and guardianship are governed by the common law.

24 Most systems of customary law permit disinheritance and the disposition of property *mortis causa*. These practices, however, are not the same as wills, for they are oral and require approval of the family, and they do not permit the deceased to stray too far from the established order of intestate succession.

Common sense would dictate that, if only a portion of a deceased estate were disposed of by will, then the testator's personal law should apply to the intestate part of the estate. Section 23(9) of the Black Administration Act, however, allows a different approach.

> 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 No 24 of 1913).

This provision has been read to mean that common law must apply to the devolution of any property not governed by a will, but a more logical interpretation of s 23(9) would suggest application of customary law, for the section states only that *administration and distribution* of the estate be subject to the Administration of Estates Act (and thus common law), not the *devolution* of property.

(d) Intestacy

Choice of law is governed by regulations promulgated in terms of the Black Administration Act.[25] These provide as follows:

> (2) If a Black dies leaving no valid will, so much of his property, including immovable property, as does not fall within the purview of subsection (1) or subsection (2) of section 23 of the Act shall be distributed in the manner following:
>
> (*a*) If the deceased was, during his lifetime, ordinarily resident in any territory outside the Republic other than Mozambique, all movable assets in his estate after payment of such claims as may be found to be due shall be forwarded to the officer administering the district or area in which the deceased was ordinarily resident for disposal by him.
>
> (*b*) 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 Act, exempting him from the operation of the Code of Zulu Law, the property shall devolve

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25 Section 23(10) of Act 38 of 1927. The current regulations are contained in GN R200 of 1987. The Intestate Succession Act 81 of 1987 is excluded, for s 1(4)(b) provides that: 'Intestate estate includes any part of an estate which does not devolve by virtue of a will or in respect of which s 23 of the Black Administration Act does not apply.'

as if he had been a European.

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

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

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

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

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

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

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

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

or by any issue of himself and any such partner, and the circumstances are such as in the opinion of the Minister to render the application of Black law and custom to the devolution of the whole, or some part, of his property inequitable or inappropriate, the Minister may direct that the said property or the said part thereof, as the case may be, shall devolve as if the said Black and the said partner had been lawfully married out of community of property, whether or not such was in fact the case, and as if the said Black had been a European.

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

(i) Foreigners

Regulation 2(*a*) governs the estates of Africans ordinarily resident in countries outside the Republic (except Mozambique). If the usual conflict principles were to apply, such cases would be dealt with according to choice of law rules supplied by private international law, under

which the law of the deceased's country of domicile (not residence) would prevail.

(ii) Persons exempt from customary law

Because the exemption procedure contained in the Black Administration Act allows applicants to become subject to the common law, the estates of persons exempted devolve according to common law rules of intestate succession.[26]

(iii) Married persons

Movable house property must devolve according to customary law and the devolution of land held under quitrent tenure is governed by statutory tables of succession. In the absence of a will, all other property is subject to choice of law rules contained in regs 2(*c*)-(*e*). In broad terms, the relevant system is determined by the cumulative effect of the deceased's form of marriage and matrimonial property system, factors that are supposed to reflect what law the deceased would have expected to apply.

I Persons married by civil/Christian rites in community of property

According to general principles, the form of a marriage is usually sufficient to dictate application of the common law, but reg 2(*c*)(i) and (ii) requires an additional factor: the deceased's matrimonial proprietary regime. If common law is to regulate devolution of an estate, the deceased must have been married by civil or Christian rites, in community of property (or with an antenuptial contract) and he or she must not have been party to a subsisting customary marriage.

For purely legal reasons, few deceased estates can comply with all these requirements. Before 1988, Africans married by civil or Christian rites were deemed to be married *out of*

26 Regulation 2(b) gives the misleading impression that exemption can be claimed only from the provisions of the Natal Code, whereas s 31 of the Black Administration Act allows any person in the country to apply for exemption.

community of property, unless they made a prenuptial declaration,[27] an option exercised by very few Africans. In 1988, the Marriage and Matrimonial Property Law Amendment Act[28] reversed this rule, with the result that *all* civil/Christian marriages are now in community of property. (And this regime may be varied only by antenuptial contract.) The amending legislation was not made retrospective, however, so most African marriages are still out of community of property. In consequence, most cases of intestate succession will still be governed by customary law.

Because a customary system of succession applies to nearly all existing civil/Christian marriages, and because the laws of succession complement the law of marriage, anomalies are bound to occur. Thus, even if the spouses deliberately married according to civil rites to escape the strictures of customary law, their estates will still devolve according to that system. Similarly, although the spouses may have lived their married lives according to common law, on the death of the husband, the surviving spouse is reduced to the position of a customary law widow, dependent for support on maintenance paid by the heir.[29]

II Persons married out of community of property or under customary law

Customary law applies to the estate of a person who is survived by a customary law spouse and children or a person who had married by civil rites but out of community of property. Despite its intricate wording, this regulation does not cover all the situations intended. What of a person who had married by customary law, but who died leaving no surviving spouse or children? Presumably, *a contrario* the terms of reg 2(*d*), the common law would apply. Another ambiguity is the position of a divorcée. Customary law will continue to apply to this person's estate, regardless of the absence of the critical choice of law factor: the customary marriage.

If the application of customary law under reg 2(*d*) seems inappropriate or inequitable, potential beneficiaries can petition the Minister - it is obscure which Minister, since the

27 Before a magistrate, commissioner or marriage officer: s 22(6) of the Black Administration Act.

28 3 of 1988 repealed s 22(6) of the Black Administration Act.

29 Presumably the widow would qualify under the Maintenance of Surviving Spouses Act 27 of 1990 to apply for maintenance from the estate, however, and in doing so she would be free from whatever restrictions are imposed on her right by customary law.

Department of Development Aid is now defunct - for a directive that the common law be applied instead. This saving provision was hardly satisfactory. Choice of law is made an administrative process, and, although it may save the cost of litigation, argument from all interested parties is precluded.

III Discarded wives: the problem of dual marriages

Formerly, if a man married according to customary law and if he were then to marry another woman by civil or Christian rites, the second marriage automatically extinguished the first. To cure some of the inequities of allowing civil/Christian marriages to override customary unions, s 22(7) of the Black Administration Act provided:[30]

> 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.

By preserving the property rights of the customary-law wife, this provision had the effect of ranking civil and customary wives (and their progeny) equally for purposes of the devolution of an estate. Hence, on the death of a husband, customary law would revive as it were to govern both families' succession to his property. Section 22(7) continues to apply to the victims of dual marriages contracted between 1929 and 1988.

By subjecting the widow and children of the civil marriage to customary law, s 22(7) has the unfortunate side-effect of depriving them of their common law rights of succession. After the law had declared the customary spouse no longer married, she might (possibly many years later) regain her status as a wife. At the same time, however, the civil law spouse, who had enjoyed the benefits of common law (again possibly for many years), would find her position suddenly

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

downgraded to that of a customary law widow.[31]

(iv) Unmarried persons

Because choice of law in reg 2(*c*)-(*d*) is predicated upon the form of a deceased's marriage, the rules do not cater for those who never married. Instead, reg 2(*e*) applies and customary law is deemed to govern devolution of the estate. Evidently it was assumed that all Africans should automatically be subject to customary law, and, if they wanted to avoid application of this law, they could make wills. While these assumptions may in some situations be appropriate, the common law will be more suitable where the deceased's lifestyle inclined to that system.

(v) KwaZulu/Natal and the former Bophuthatswana

The Natal and KwaZulu Codes enacted special provisions designed to override the Black Administration Act and the regulations described above. The Codes stipulate that estates of Africans married by civil rites, regardless of the matrimonial property system, are to devolve according to common law.[32] Bophuthatswana also enacted legislation designed to replace the customary law of intestate succession with the common law.[33]

(e) Proposed reforms

A general code of succession law that sets standards applicable to all persons regardless of their personal law would obviously be desirable in a country striving for political unity and equality before the law, but such a project would involve difficult policy decisions. Instead of a thorough-going reform of the law of intestate succession, a code of *testamentary* succession

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31 It is questionable whether a man, who terminated his customary marriage by a civil/Christian union, can protect his second spouse by making a will to bequeath her property acquired during the civil marriage. It is also questionable whether the widow can appeal to the Minister under reg 2(d) for an order that the common law apply.

32 Namely, the Succession Act 13 of 1934, as amended. See ss 79(3) and 81(5) of the Natal and KwaZulu Codes, Proc R151 of 1987 and Act 16 of 1985 respectively.

33 Intestate Succession Law Act 13 of 1990.

aimed at solving conflict of laws problems in a manner that is sensitive to both customary and common law can be more easily achieved. In any event, the choice of law rules contained in the existing medley of anomalous rules and regulations need to be consolidated and amended.

Section 23(1) of the Black Administration Act should be amended to provide that a person may bequeath by will only *personal* property. (In view of the rarity of polygynous marriages, there would seem to be no sense in preserving the special status of house property.) This change will cure the various anomalies caused by permitting people to bequeath family property and land (which may in any event be dealt with later by separate legislation).

Consideration should be given to introducing an express provision to permit guardianship clauses in wills.

Regulation 2(*a*) should be deleted so that succession to the estates of all foreigners is now subject to the ordinary rules of private international law. The special provision in reg 2(*a*) was probably occasioned by the presence of a large number of foreign workers in South Africa (and it no doubt suited South African officials, who could avoid the complexities of administering estates under a foreign law), but it is undesirable that such people should be treated differently to persons subject to the common law.

Regulation 2(*b*) can be deleted, since the exemption procedure is so seldom used.

With regard to choice of law on intestacy, the position of the person who dies partially testate and partially intestate should be clarified. The poorly drafted s 23(9) of the Black Administration Act should be amended to provide that devolution of the intestate portion of an estate should be governed by the testator's personal law, unless it can be shown that the testator's lifestyle gave reason for application of another law.

Otherwise, the current choice of law rules need to be simplified and drafted in a more comprehensible style. There is obviously merit in retaining the form of marriage and the matrimonial property system as indications of the appropriate law, since together they provide

simple, certain criteria for selecting the relevant law. Executors and others charged with administering and distributing deceased estates are not necessarily trained in the intricacies of the conflict of laws (and the choice of law process is potentially complex). In such circumstances, easily ascertainable guides to choice of law are always welcome.

None the less, the form of marriage and the matrimonial property system are not infallible manifestations of the parties' expectations. By participating in a culturally marked ritual (the marriage ceremony) the deceased is deemed to have intended a particular law to apply to all the rights and duties (including succession) related to that act. Many people who marry by Christian rites may have no intention of living under common law, and, whatever justification the rule may find in a deceased's presumed intention, it seems arbitrary in relation to the spouses' children and family, who had nothing to do with the decision to marry according to a particular rite. Thus the choice of law rules must make allowances for exceptional cases and for succession to the estates of unmarried persons.

Consideration should be given to introducing two additional factors as guides to vary the basic choice of law rules: the financial position of the surviving spouse and children and the deceased's lifestyle. Hence, the more closely aligned the deceased was to the common and the larger the estate, the more relevant application of the common law would be. Once exceptions of this nature have been established, the existing provision allowing an appeal to the Minister may be deleted. The courts, rather than administrative officials should have control over choice of law.

The problem of the so-called ‘discarded’ wife - the victim of a dual marriage - will unfortunately not disappear until all the survivors of customary unions terminated by civil and Christian marriages have died out. When this long-standing inequity has completely vanished, the anomalous provisions of s 22(7) of the Black Administration Act may obviously be repealed. In the interim, it is debatable whether the section serves any useful purpose. It seems unlikely that discarded wives would know about or act on their rights, and, if they do, the surviving families of civil marriages are likely to suffer prejudice.

CHAPTER 5

CHOICE OF LAW IN MARRIAGE

(a) Civil/Christian marriage and the conflict of laws

Since colonial times, Christian marriage has been taken as a sign not only of religious commitment but also as an indication that the spouses decided to follow a westernized way of life. This assumption had a direct bearing on what law was chosen to govern the marital relationship: the form of marriage was deemed to indicate the spouses' intention that their rights and duties *inter se* and their relations with their children should be governed by common law.

The uniform application of common law had the advantage of providing a single, straightforward answer to all potential choice of law problems, but it ran the risk of not co-inciding with the parties' actual expectations. Spouses might have contracted a Christian marriage as a matter of conscience, with no intention of abandoning customary law, an attitude which is apparent from the almost invariable companion to a church marriage: a bridewealth agreement.

(b) Engagement

Where couples decided to marry in a church or registry office, the courts have had no hesitation in applying the common law to determine actions for damages for breach of promise. This approach is in line with the general principle that effect should be given to the parties' presumed expectations.

(c) Capacity

Capacity to marry by civil or Christian rites is governed by common law.[34]

34 In this regard, s 11(3) of the Black Administration Act 38 of 1927 would be relevant.

(d) Formalities

In South Africa it has been taken for granted that only Africans have a choice of marrying by civil/Christian or customary rites; those subject to common law are assumed to be capable of marrying only according to civil or Christian rites. This assumption is without foundation, since under ss 15, 30 and 31 of the Constitution all people in the country are free to pursue the religion and culture of their choice.

Once the parties have decided to marry in a church or registry office, they have to comply with the various requirements of the common law.[35]

Prospective husbands have to observe special formalities in s 22(2) and (3) of the Black Administration Act which are designed to protect the wives of existing customary marriages. They must declare before the marriage officer that they are not already married under customary law to another woman. While persons who contravene this rule or make a false declaration are liable to criminal penalties,[36] the validity of their marriages is not affected.

(e) Consequences of marriage

A marriage by civil or Christian rites generally subjects the spouses to a common-law status, with the result that common law regulates the parent-child relationship (determining *inter alia* whether children are legitimate) and any relationships the spouses might have with third parties (which might give rise to a delict of adultery).

35 Notably, ss 21-22 and 29-30 of the Marriage Act 25 of 1961.

36 Under s 22(4) and (5) of the Act.

Originally, under common law, the spouses were deemed to be married in community of property and of profit and loss and the wife fell under her husband's marital power.[37] These automatic consequences were variable by antenuptial contract. When the Black Administration Act was passed in 1927, Africans were given a special dispensation to save them from being caught unawares by an unfamiliar legal regime. Hence s 22(6) provided that a civil/Christian marriage would not produce a community of property between the spouses (unless they made a prenuptial declaration specially requesting this)[38] and that the wife remained subject to her husband's marital power.[39] Thus, in most cases, marriage was out of community of property.

The *common law* regarding both the matrimonial property regime and marital power was changed in 1984.[40] In 1988, s 22(6) of the Black Administration Act was repealed and African marriages were brought into line with this reform.[41] As a result all civil and Christian marriages are now automatically in community of property and of profit and loss and the husband's marital power is excluded. These consequences may be avoided only by antenuptial contract.[42]

The 1988 amending Act was not retrospective, but it made special provision for spouses whose matrimonial property system was previously governed by s 22 of the Black Administration Act to harmonize the consequences of their marriage with the new laws by executing and registering notarial contracts two years after the commencement of the 1988 Act.[43]

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37 A wife nevertheless attained majority on marriage. Cf the Age of Majority Act 57 of 1972 and s 14 of the Natal and KwaZulu Codes.

38 The latter was an inexpensive method of varying the matrimonial proprietary regime, although, if the spouses wished to enter into an antenuptial contract instead, they were free to do so.

39 Marital power could be excluded only by an antenuptial contract, not by a prenuptial declaration. See s 27(3) of the Natal and KwaZulu Codes.

40 By the Matrimonial Property Act 88.

41 The Marriage and Matrimonial Property Law Amendment Act 3.

42 Under s 3 of Act 3 of 1988, where the marriage is out of community of property, the accrual system may be made applicable.

43 Namely, 2 December 1988. Section 4 of Act 3 of 1988, inserting s 25(3) into Act 88 of 1984.

(f) Dissolution by divorce

It is generally accepted that both the procedure and grounds for dissolving a civil or Christian marriage are governed by common law.[44] Nevertheless, courts granting orders of divorce on the ground of irretrievable breakdown have sufficient discretion to allow them to take account of cultural factors that might have influenced the spouses' relationship.[45]

Common law is presumed to govern post-nuptial maintenance, the proprietary consequences of the divorce and the custody and guardianship of minor children.[46] Continued application of common law to these issues seems unobjectionable. The principles regulating maintenance are strongly influenced by equity and a concern to protect the economically weaker spouse and children; rules determining custody and guardianship give full expression to s 28(2) of the Constitution, namely, that the best interests of the child are of paramount importance; and the common law governing distribution of property is more likely to protect wives from a potentially discriminatory customary regime.

(g) Dissolution by death

Under common law, when a spouse dies the marriage is automatically terminated and with it the various rights and duties regulating the spouses' lives. Logic might demand that, if the parties were subject to customary law, the personal law of a surviving spouse (and children) should revive to govern his or her status once a marriage ends. On this question, however, no consistent approach is discernible.

The courts have held that common law continues to apply to the custody and

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44 It follows that the wife may institute an action in her own right and that she has the *locus standi* necessary to do so, even if she is under her husband's marital power.

45 Section 3 of the Divorce Act 70 of 1979.

46 Under s 7(1) of the divorce Act 70 of 1979, a court may not grant a decree of divorce until it is satisfied that proper provision has been made for the children, and s 6(3) of the Act provides that the child's best interests must prevail.

guardianship of minor children,[47] but customary law may well regulate a surviving spouse's status as a minor or major,[48] and in practice succession to the deceased estate is nearly always governed by customary law.[49]

It is true that special regulations provide for the application of common law to succession, but for this to happen certain conditions must be met. The deceased, at the time of death, must have been married in community of property, which would imply that the spouses made an antenuptial contract or a prenuptial declaration under s 22(6) of the Black Administration Act.[50] Yet, because few Africans availed themselves of these opportunities, customary law is normally applicable. Thus, for all intents and purposes, the widow of a civil or Christian marriage is in the same vulnerable position as the widow of a customary marriage: she has no more than a personal right against the heir for maintenance out of the estate. Her position may be improved only if she claims under the Maintenance of Surviving Spouses Act.[51]

(h) Bridewealth agreements

Although the courts have declared that bridewealth is not essential for the validity of a civil or Christian marriage, nearly all Africans who marry according to these rites have an accompanying bridewealth contract.[52] The co-existence of two legal relationships is bound to

47 If the widow decides to enter into a levirate union, and if she bears more children for her deceased husband's family, they are deemed to be illegitimate.

48 According to common law, if a spouse was still a minor before getting married, the marriage operates as a form of emancipation, and he or she will not revert to minority status if the union is later dissolved. While early cases from the Transkei (based on a proclamation which is similar to the Age of Majority Act 57 of 1972) confirm that this rule applies in the case of African marriages too, there is no clear authority for the rest of the country.

49 While s 23(1) of the Black Administration Act provides that house property must devolve according to customary law, because civil/Christian marriages do not create 'houses', they are not covered by this section. See s 79(2) of the Natal and KwaZulu Codes.

50 Or, at some time prior to death, had been the partner of such a marriage and was not survived by the spouse of a customary marriage. See reg 2(c) of GN R200 of 1987.

51 Section 2(1) of Act 87 of 1990 provides that 'the survivor shall have a claim against the estate of the deceased spouse in an amount sufficient to provide him with his reasonable maintenance needs in so far as he is not able to provide therefor from his own means and earnings'.

52 Without a clear agreement on bridewealth, however, payment cannot be demanded.

generate contradictory obligations. According to common law, the marriage is exclusively the concern of the bride and groom, whereas, according to customary law, bridewealth involves the groom and the bride's guardian. In the event of a conflict, which obligations are to prevail?

The courts have decided that bridewealth is ancillary to the marriage and therefore modified by the principles on which the union is based.[53] Thus, in what are probably the most litigated issues - claims for return of bridewealth[54] and parental rights to children[55] - the courts applied common law standards. In following this trend, the Law Commission proposed that a decree of divorce should operate to end any bridewealth agreement.[56]

No such categorical solution is possible where the marriage is ended by the death of a spouse. As mentioned above, according to the common law death automatically terminates a marriage but under customary law the union continues until bridewealth obligations have been settled.[57] The widow was never party to the agreement, however, so there is no reason why her freedom of action should be circumscribed by it. (And it is clear that marriage accompanied by bridewealth does not imply two separate unions; the civil/Christian union is the only marriage.) To be consistent with the rule that bridewealth is subordinate to the marriage, therefore, the contract should end once the marriage ends.

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53 Thus, under certain systems of law, a wife's guardian will lose his right of theleka (and with it the corresponding duty of phuthuma disappears). Theleka is objectionable in the context of civil/Christian marriage because it gives the wife's guardian a right to interfere in the marital consortium.

54 If a husband committed adultery, customary law does not always afford the wife cause for complaint (or justification for ending the marriage). By contrast, under common law, adultery by either spouse may lead to irretrievable breakdown.

55 For custody and guardianship are decided by common law. The courts are prepared to enforce customary law to the extent that they will allow the bridewealth holder to claim bridewealth for a daughter when she marries.

56 And that a court granting divorce should have the power to make an order regarding return of bridewealth: *Marriages and Customary Unions of Black Persons* para 11.8.9.

57 According to some systems of customary law, if the principal reason for the marriage is frustrated because the wife died while still young and capable of bearing children, her family would be expected to provide a substitute wife. If they failed to do so, the wife's guardian would be expected to return some at least of the bridewealth. Conversely, if the husband were to die when his wife was still capable of bearing children, she would be expected to enter into a levirate union, and, if she refused to do so and returned to her own family, her guardian would be obliged to return part of the bridewealth.

The courts, however, adopted an expedient approach - and one that is probably in more accord with the parties' expectations - by supporting continuation of the bridewealth agreement, even after the marriage. On this basis they awarded the husband's family any posthumous children born to the widow,[58] and they held that, while a widow is free to do as she wishes, if she leaves her husband's family, she renders her guardian liable to restore portion of the bridewealth.

(i) Dual marriages

According to customary law, marriage is, of course, potentially polygynous, and it may happen that the husband of a customary union marries another woman by civil or Christian rites. Conversely, the spouse of a civil marriage may take another partner according to customary rites. The validity and effect of these subsequent unions have depended on the extent to which customary marriage is recognized. In South Africa, where customary marriage enjoys only limited recognition, a union by civil or Christian rites has always been given overriding effect.

(i) Civil/Christian marriage by the husband of a customary union

Until recently, the rule in South Africa was that a civil or Christian marriage superseded and extinguished any prior customary union(s), a legal result that could work great hardship for the 'discarded' wife and children. Some legislative protection was introduced by s 22(7) of the Black Administration Act, which preserved 'the material rights of any partner' of a subsisting customary union.[59] In other words, a discarded wife could not be deprived of any property that might have been allotted to her house before the civil marriage.[60]

The inequity of one marriage automatically terminating another was finally remedied by Act 3 of 1988.[61] Section 1 provides that, although partners to a customary union may remarry

58 The husband's heir has been allowed to claim bridewealth paid for any daughters.

59 And note the special formalities required for a civil or Christian marriage under s 22(2) and (3) of the Black Administratioin Act.

60 But the husband was not obliged on to continue augmenting this property, and once it had been exhausted the discarded wife would have nothing left from her previous marriage with which to support herself.

61 Amending s 22 of the Black Administration Act.

one another by civil rites, a spouse may not contract a valid civil or Christian marriage with a third person (including a polygynous wife). Because this amendment was not retroactive, the discarded spouses of customary marriages dissolved prior to 2 December 1988 continue to receive the protection of s 22(7) of the Black Administration Act.[62]

(ii) Civil/Christian marriage by the spouses of a customary union

Where spouses to a customary marriage decide to celebrate their union anew under civil rites, the first union is extinguished and the parties' status is thereafter determined by common law.[63]

(iii) Customary marriage by the spouse of a civil/Christian marriage

If a party to a civil or Christian marriage purports to enter into a customary union with a person other than his or her spouse at common law, the second union is null and void. While the second (customary) union has been described as an immoral contract (because it contravenes the common law precept of monogamy), it is not bigamous, since customary marriages are not given full recognition.

(j) Proposed reforms

Important reforms regarding civil and Christian marriage have already been accomplished by the Marriage and Matrimonial Property Law Amendment Act.[64] Certain incremental changes are now needed to introduce flexibility into the choice of law in some areas and to provide clearer guidelines in others.

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62 Because the social and economic position of men is relatively more favourable than that of women, s 22(7) of the Black Administrationi Act does not protect men.

63 Minimum violence is done to the spouses' relationship *inter se*, although any children born before the civil marriage was contracted are automatically legitimated in terms of the common law. The spouses' relations with third parties are more complex, and it is still uncertain to what extent therse relationships are affected bythe second union.

64 3 of 1988.

The special requirements prescribed by s 22(2) and (3) of the Black Administration Act for solemnizing African civil marriages are paternalistic in intention, racist in their wording and the consequences of non-compliance serve no useful purpose. Accordingly s 22(2)-(5) should be repealed.

Courts, when making orders for the division of a matrimonial estate during divorce proceedings, should be required to take account of the parties' cultural orientation. If they were to do so, they could order return of bridewealth, subject to such rules of customary law as might be proper in the circumstances of the case.[65] The return of bridewealth on the death of one of the spouses, however, is too complex an issue to permit legislation; it must be left to the courts to deal with on a case-by-case basis.

The Law Commission has already recommended application of the common law to the devolution of estates of persons married by civil or Christian rites, with the exception of house property and land held under quitrent tenure.[66] The general application of common law in these circumstances would be a welcome improvement on the current position. The two exceptions serve no useful purpose, however, since civil/Christian marriages do not create houses and quitrent tenure may soon be phased out or superseded by other statutory tenures.

Significant reforms along the lines recommended by the Law Commission have already been effected in KwaZulu/Natal and Bophuthatswana. The Natal and KwaZulu Codes replaced the choice of law rules provided by the Black Administration Act,[67] with the result that estates of Blacks married by civil and Christian rites now devolve according to the Succession Act of 1934,[68] and Bophuthatswana too introduced the common law of intestate succession.[69]

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65 Whenever bridewealth is involved, the wife's guardian will have to be joined as a party to the action, since his rights (not his ward's) will be legally affected.

66 Careful consideration must still be given to the question whether the additional connecting factor - the nature of the matrimonial property system - should now be dropped. *Marriages and Customary Unions of Black Persons* para 11.7.2.

67 Section 79(3) of the Codes. This provision could be amended to introduce the current Intestate Succession Act 81 of 1987.

68 No. 13.

In view of the many years of uncertainty about whether marriage operates to render the spouses majors under the common law, an express provision on this question would be welcome. Such legislative intervention would be useful in other respects, for it is still not clear whether the Age of Majority Act[70] overrides customary law and whether s 11(3) of the Black Administration Act should be read subject to that Act.[71]

When customary marriages are given full recognition, the question will arise whether a spouse who purports to marry another person by customary rites during the existence of a civil marriage, should be deemed to have committed the crime of bigamy. In a country that tolerates polygyny, there are good reasons to abolish the crime of bigamy altogether, or, if it is to be retained, at least to require the imposition of lighter sentences.[72]

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69 Succession Act 23 of 1982.

70 57 of 1972.

71 Section 14 of the Natal and KwaZulu Codes, however, provides that the Age of Majority Act overrides s 11(3).

72 Aarguably, the invalidity of the second union is penalty enough.

CHAPTER 6

CONFLICT BETWEEN DIFFERENT SYSTEMS OF CUSTOMARY LAW

(a) Current statutory choice of law rules

Because South Africa does not have a single, unified system of customary law, the courts may have to decide which of two or more different systems of customary law apply to the facts of any given case. The relevant choice of law rules - a badly drafted version of nineteenth-century colonial legislation - are contained in s 1(3) of the Law of Evidence Amendment Act.[73]

> In any suit or proceedings between Blacks who do not belong to the same tribe, the court shall not in the absence of any agreement between them with regard to the particular system of indigenous law to be applied in such suit or proceedings, apply any system of indigenous law other than that which is in operation at the place where the defendant or respondent resides or carries on business or is employed, or if two or more different systems are in operation at that place (not being within a tribal area), the court shall not apply any such system unless it is the law of the tribe (if any) to which the defendant or respondent belongs.'

Implicit in this section is a hierarchy of choice of law rules. In the first instance, courts are directed to apply the law agreed upon by the parties. Because the section does not stipulate an express agreement, a tacit agreement could be imputed to the litigants by reason of their conduct, the nature or form of prior transactions, the cultural environment of the case or the parties' lifestyles.[74] In most cases the existence of an implied agreement would obviate the need to consult the subsequent choice of law rules in s 1(3) (which is a considerable advantage, since these rules are conceptually confused).

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73 45 of 1988.

74 In other words, a court may utilize the various factors considered in the context of conflicts between common and customary law, and from these factors infer a common, albeit tacit, expectation that a particular law be applied.

In the absence of agreement, courts must apply the law of the place where the defendant resides, carries on business or is employed, provided that only one system of law prevails in that area. This rule gives no solution where a defendant is resident in one area and employed in another, and it seems inappropriate where the defendant is resident in one area but has a closer attachment, such as domicile, with another.

If there is more than one system of law applicable in the area, and if the place of residence, business or employment is not within a tribal area, and further provided that the defendant's tribal law is one of the systems applicable within the area, the court is directed to apply the law of the defendant's tribe. This rule is clearly unsatisfactory, in part because it arbitrarily prefers the defendant's (as opposed to the plaintiff's) tribal law and in part because the concept of tribe is vague and misleading.

(b) The Natal and KwaZulu Codes

The application of the Natal and KwaZulu Codes has generated especially difficult conceptual problems for choice of law. Customary law is personal in the sense that it should apply to litigants by reason of their cultural orientation, regardless where they happen to be. Both Codes correctly purport to apply to the Zulu *people*, but several cases have suggested that the Natal Code is territorial in application, ie, that within the province it overrides any other potentially applicable system of personal law. The effect of these decisions is to base choice of law on the conflicting criteria of person and territory.

This conceptual contradiction bedevils another question: if people from KwaZulu/Natal move to other parts of South Africa, do the Codes continue to apply to them in their new places of residence (or domicile)? While certain *dicta* state that the Natal Code is limited to the borders of the province, there is no definite decision indicating whether people subject to the Code are still bound by it when they go abroad. Nor is it clear whether, in order to qualify as a person subject to the Code, an individual must be a domiciliary of KwaZulu/Natal or simply a member of the ‘Zulu tribe’.

Natal and KwaZulu have now, of course, been amalgamated into one province, but as yet no provision has been made to determine how (or whether) differences between the two Codes

are to be reconciled.[75] Until specific legislative action is taken, the Constitution allows for the continued application of the Codes within the former territories of Natal and KwaZulu.[76]

(c) Conflicts between foreign and domestic systems of law: problems of the former homelands

Whenever a litigant has a close connection with a foreign state, conflict problems will involve a territorially defined legal system. For instance, if a plaintiff subject to Pedi law were to sue a defendant subject to the Ovambo law applicable in Namibia, the laws in question have both a territorial and a personal dimension.

In some cases, the same system of customary law may be involved, as where both plaintiff and defendant are subject to Sotho law, but one is domiciled in South Africa and the other in Lesotho (where the customary law might have been repealed or modified). In other cases, it might not be clear what systems of law are in conflict. The common law of one state might seem to be applicable and the customary law of the other state. What rules should be used to select the appropriate system?

Section 1(3) of the Law of Evidence Amendment Act is worded in such broad terms - 'In *any* suit or proceedings between Blacks who do not belong to the same tribe ...' - that it could be interpreted as being applicable to regulate all these species of conflict. Admittedly, s 1(4) of the Act narrows the meaning of 'indigenous law' used in subsection (3) to the 'Black law applied by the Black tribes in the Republic or in territories which formerly formed part of the Republic', but s 1(3) is still ambiguous.

In principle, whenever the law of a foreign state is involved, the court should employ private international law to select the relevant law, because these choice of law rules were

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75 These differences are retained in terms of s 229 of the Interim Constitution, which provides all laws 'which immediately before the commencement of this Constitution were in force in any area which forms part of the national territory' shall continue in force 'subject to any repeal or amendment ... by a competent authority'.

76 Section 229, as read with s 232(1)(a)(ii).

designed to cater for conflicts conceived in territorial terms. Thus, in any case involving the law of a foreign state, within which two or more personal laws are recognized and enforced, the courts must first, via private international law, locate the issue in the appropriate territorial system, and then, by reference to whatever internal conflict rules are available in that system, decide which system of personal law to apply.

This type of conflict problem is most acute in South Africa, for the previously independent or semi-autonomous homelands, notably Bophuthatswana,[77] Transkei[78] and KwaZulu,[79] passed legislation to modify customary law. It is assumed that these enactments were intended to apply only within the territorial boundaries of the homelands concerned. And, conversely, South African legislation directed at Africans may be assumed to apply only in South Africa (excluding the former homelands).

For purposes of private international law, laws are deemed to have intraterritorial effect. Thus South African laws obviously do not apply to the formerly *independent* homelands, and vice versa.[80] None the less, matters of personal status are regulated by an individual's domiciliary law. Accordingly, South African domiciliaries will be bound by South African legislation (wherever they happen to be) and domiciliaries of Transkei and Bophuthatswana will be subject to their specific legislation (even if they happen to be present in South Africa).

The applicability of South African family law legislation to 'self-governing territories', notably KwaZulu, is less certain. In the areas for which they had been established, the legislative assemblies of these entities had the power to legislate over matters of personal law regarding their *citizens* (not their domiciliaries).[81] Conversely, it would seem that, until a self-governing

77 Intestate Succession Law Act 13 of 1990.

78 Marriage Act 21 of 1978. Until repealed or modified, both these enactments will continue to apply to the areas for which the original legislative authorities were competent under s 229, as read with s 232(1)(a)(ii), of the Constitution.

79 Act 16 of 1985.

80 Transkei devised a code of marriage law uniformally applicable to all persons in the territory: the Marriage Act 21 of 1978.

81 Section 3 of the National States Constitution Act 21 of 1971.

territory decided to exercise its legislative powers, South African laws continued to apply. On this reasoning, such legislation as the Marriage and Matrimonial Property Law Amendment Act[82] applied to the citizens of these entities until its provisions were superseded by local legislation to the contrary.

Now that the homelands have been re-incorporated into South Africa, all South Africans should be subject to the same law, but the transitional provisions in the Constitution allow enactments such as the Transkei Marriage Act and the KwaZulu Code to continue in operation.

(d) Proposed reforms

The many problems associated with s 1(3) of the Law of Evidence Amendment Act can be resolved only by repealing and replacing it with a new section. First, conflicts involving foreign systems of law must be clearly excluded from the scope of this provision. Secondly, the choice of law rules designed to select a domestic system of customary law should be based on the same criteria that are used for determining applicability of common or customary law. Reference to the troublesome concept of tribe and preference for the defendant's law should be avoided. Thirdly, some attempt must be made to correct the practice of applying the Natal and KwaZulu Codes as both territorial and personal legal regimes.

A model provision might read as follows:

(1) In any suit involving domiciliaries of South Africa in which two or more different systems of customary law are applicable, the court shall apply the law that the parties have expressly agreed should apply; or, having regard to the pleadings, the nature of a prior transaction, the lifestyle of the parties, the place where the parties live or where the cause of action arose and the parties' understanding of the relevant laws, the law that the parties would have expected to apply.

(2) For the purposes of this section, legislation of any former province or homeland of the Republic shall be deemed applicable to all persons domiciled within that province or homeland.

82 3 of 1988.

The definition of ‘indigenous law’, currently contained in s 1(4) of the Law of Evidence Amendment Act, can be deleted. To judge from the absence of any cases in which the issue was raised, the concept of customary (or indigenous) law is quite clearly understood, and any definition is redundant.

CHAPTER 7

PROOF OF CUSTOMARY LAW

(a) Customary law treated as custom

Rules of customary law are subject to constant and (from the point of view of most courts) imperceptible change, a characteristic inherent in any law derived from social practice. It follows that, if the courts are to administer an authentic version of customary law, they must be prepared to take account of shifts in behaviour and attitude. However, a court's knowledge of customary law is bound to be second-hand, a consequence of the fact that, apart from tribunals of traditional authorities, courts are socially distanced from the communities they serve.

Under s 1(1) of the Law of Evidence Amendment Act,[83] all courts in South Africa may take judicial notice of customary law 'in so far as such law can be ascertained readily and with sufficient certainty ...'. The courts act as the final arbiters of customary law, a position that entitles them to call for evidence of disputed or questionable rules *mero motu*.[84] Nevertheless, under s 1(2) of the Act, any party also has a right to adduce 'evidence of the substance of a legal rule ... which is in issue at the proceedings concerned'.

A party alleging the existence of a customary rule that differs from the previously accepted version obviously bears the burden of proof, an onus that is normally discharged by calling witnesses. The test of sufficient proof is a balance of probabilities. If a litigant fails to meet this test, it could be argued, on a superficial reading of s 1(1), that the court would be obliged to apply common law instead of customary law. A freer and probably a better interpretation, however, would allow the court to continue applying existing rules of customary law (culled no doubt from precedents and textbooks) in the absence of evidence of a new rule to the contrary.

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83 45 of 1988.

84 But this power does not license private investigations by judicial officers. Principles of procedural fairness should always be observed: when any rule is in doubt, the parties must be informed to give them the opportunity of calling witnesses of their own.

(b) Assessors

In the past, to alleviate the difficulties of proving customary law, commissioner's courts and the Black Appeal Courts could call to their assistance one or more assessors.[85] This statutory authorization was, however, repealed.

(c) Proposed reforms

In light of the courts' general lack of expertise in customary law and the exacting process of proving new rules, the practice of calling assessors should be re-introduced.

85 Section 19(1) of the Black Administration Act.

CHAPTER 8

THE WAY AHEAD

It is suggested that the issues and options outlined above ought to be debated thoroughly before any particular direction is embarked upon. Based on the outcome of such discussions legislation in respect of the application of customary law and the conflict of personal laws will be proposed. The comments of all parties who feel that they have an interest in this topic or may be affected by the type of measures discussed in this paper are therefore of vital importance to the Commission. All respondents are invited to indicate their preferences in respect of the options examined and to indicate whether there are other issues and/or options that must be explored. **All affected individuals, organisations and institutions that are likely to be affected by possible legislation should participate in this debate.**

To facilitate a focused debate, respondents are requested to formulate concise submissions addressing the problems raised in this issue paper. Respondents are invited to raise for consideration related problem areas which have not been identified in this paper.

The Commission has accorded this investigation one of the highest priority ratings and it is regarded as a matter of urgency. **Interested parties are accordingly requested to consider this paper and to respond before 30 November 1996.**