ANALYSEN UND BERICHTE

Family Law Reform and the Integration of the Laws of Succession in Zambia[1]

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1. Introduction

This paper examines the question of family law reform and the integration of the laws of succession in Zambia. In May 1989, Zambia enacted two important statutes[2], the Intestate Succession Act[3] (ISA) and the Wills and Administration of Testate Estates Act[4] (WATEA). The Intestate Succession Act, especially, has been described as a big landmark in the Zambian legal history.[5] The main reason for this estimation of the Act lies in the social and legal problems it seeks to solve for a large section of the country's people. The Act attempts to reform and integrate the customary laws of succession in force immediately before its enactment, and thereby to redress the grave injustices suffered by spouses, especially widows and children of deceased men, under these laws and practices.[6] On the

1 This paper was presented at the Annual Conference of the African Law Association, Heidelberg, 10-11 November, 1989. It is based on on-going research for the Project on Family Law Reform and Socio-Economic Developments in Africa, being undertaken under the direction of Prof. Dr. Ulrich Spellenberg at the University of Bayreuth. I would, therefore, like to thank the University of Bayreuth for the research facilities which made the collection of data, upon which this paper is partly based, possible, and the Deutsche Forschungsgemeinschaft which is funding the research project. My thanks also to Dr. Ulrike Wanitzek and to Professor Gordon Woodman both of whom read the paper and made very useful comments.

2 These statutes are based on the preceding Wills and Inheritance Act (Bill) of 1982.

3 No. 5 of 1989.

4 No. 6 of 1989.

5 Minister of Legal Affairs and Attorney-General, Parliamentary Debates, 5th April, 1989, 361. The debates referred to in this paper are the unedited and unpublished version. Due consideration should, therefore, be given to any errors in them.

6 See also Minister of Legal Affairs, Parliamentary Debates, 5th April, 1989, 348-55; *C.N. Himonga*, The Law of Succession and Inheritance in Zambia and the Proposed Reform, International Journal of Law and the Family, 3 (1989), 164-7.

other hand, the Wills and Administration of Testate Estates Act replaces the English Wills Act of 1837 in its application to Zambia, and provides for the law governing testate succession. In the following, these two Acts will be examined as an aspect of the implementation by the post-independence Zambia of its policy of family law reform[7] and the solution of social and legal problems explained below.

The Zambian Government views the subject of family law reform from two angles. The first is the discontinuation of dependence upon foreign law, and the replacement of that law by a law that satisfies the peculiar needs of the Zambian society. The second angle is the reform and integration of the received law and the various customary laws of the country.[8] To the extent, therefore, that the two Acts under consideration respectively replace foreign law, reform and integrate the laws of succession, they represent a big policy achievement on the part of the Government. Moreover, the importance of this achievement by the Government may be seen in terms of the small number of Anglophonic African countries that have successfully implemented relatively similar policies.[9]

However, when viewed in the wider context of the subject of family law reform in Zambia, the Government's achievement represented by the new laws of succession is but a very modest one. In the first place, it did not only take the Government up to 25 years after the country's independence to complete its first family law reform exercise[10], but the history of the two Acts itself is long, stretching over a period of 13 years since the reform of the law of succession was first conceived. Secondly, there is still a substantial part of family law that has not yet been reformed, nor is it likely to be so in the near future. Yet, most of this law is as full of injustices as the customary law of succession that was changed. Why then, it may be asked, has the Government done so little to reform the family law? In examining the new laws of succession, I will also consider some of the problems encountered in their enactment as reflecting the problems of implementation of the Government's policy on family law reform as a whole.

7 For purposes of simplicity, the expression "family law" is used in this paper to include both the family law and the law of succession.

8 Minister of Legal Affairs, Parliamentary Debates, 4th April, 1989, 262; Parliamentary Debates, 5th April, 1989, 352, 360.

9 These include Malaw, 1967, Ghana, 1985 and Kenya, whose Law of Succession Act (no. 14 of 1972) only came into operation in 1987. Other countries, like Uganda, attempted similar reforms in the sixties but failed. Tanzania is still considering this matter, although it successfully achieved its integration of marriage laws in 1971.

10 The country's policy and attempts in this regard can even be traced back to the year of its independence in 1964. See, Annual Report of the Judiciary and the Magistracy, 1964, Government Printer, Lusaka, 1964, 4.

In this respect, it has been suggested by B.O. Nwabueze, in relation to other African countries, that the reason for the lack of progress in the reform or integration of laws governing personal matters, such as family law, is that "these areas touch deeply upon the lives of the people, and to abrogate the laws governing them would be to knock the bottom out of the communities they govern"[11]. I will attempt to show that while this is, to a certain degree, true of Zambia, other factors such as social constraints, institutional and bureaucratic impediments and, above all, the lack of requisite resources on the part of the Government are equally responsible for the little progress of law reform in the country.

2. Sources of the Law in Zambia

Upon attaining its independence from Britain in 1964, Zambia inherited a pluralistic system of private laws. The customary law[12], governing land, torts, contracts and personal relations of marriage and succession, operated side by side with the general law. There has been a significant element of the integration of certain aspects of the received and customary laws by the courts.[13] And the customary intestate laws of succession were integrated by the Intestate Succession Act in 1989, as already indicated. Otherwise the pluralistic system of laws has largely continued to remain to date.

In so far as the dualistic system of the received general law and the customary law still exists, it operates in such a way that customary law applies primarily to civil disputes between Africans[14] as well as between Africans and non-Africans in limited circumstances.[15] However, Africans can also choose to be governed by either system of law. For example, they may choose to marry under the general law or under customary law, and the issues of divorce and related matters are governed by the law under which the marriage was contracted.[16] It is not clear whether non-Africans have a similar choice for either system of

11 *B.O. Nwabueze*, Integration of the Law of Contracts, in: University of Ife (ed.), Integration of Customary and Modern Legal Systems in Africa, Conference, 1964, Ibadan, University of Ife, 1971, 140.

12 By customary law in this paper is meant the customary laws of the indigenous ethnic groups of Zambia (about 73). These laws have not been codified. In this sense, the term is sometimes also used to draw a distinction between customary law and the written (i.e. received) law.

13 See *Himonga*, Integration of Family Law in Zambia: Marriage and Succession Law, in: *J. Abun-Nasr / U. Spellenberg / U. Wanitzek* (Eds.), Law, Society and National Identity in Africa (forthcoming).

14 See S. 16 Subordinate Courts Act, Cap. 45, Laws of Zambia.

15 For example, in disputes between Africans and non-Africans in which justice may demand the application of customary law (see S. 16 of the Subordinate Courts Act, Cap. 45, Laws of Zambia).

16 According to judicial decisions, however, issues relating to children, such as custody, are determined according to the general law principle of "welfare of the child" regardless of the type of marriage contracted (see *Himonga*, above n. 13).

law.[17] However, they are governed by the general law in civil disputes between themselves and between them and Africans. The general family law is based on English law which has been extended to Zambia as a continuation in application of the law in force in Northern Rhodesia and through various enabling reception statues.[18] It may be interesting to note that Zambia still maintains in its laws the "strange" provision which extends the matrimonial causes law "for the time being in force in England" to Zambia.[19]

It is against this background of diverse and foreign family laws operating in the country that the Government's policy of reform and integration of family law is to be appreciated. In the next section, I examine the reform and integration of the intestate and testate laws of succession by the Intestate Succession Act and the Wills and Administration of Testate Estates Act[20] by outlining the Acts' historical background, major features, objectives, the extent of integration achieved, and their future prospects.

3. Reform and Integration of the Laws of Succession: The Intestate Succession Act and the Wills and Administration of Testate Estates Act

a. Historical Background

The history of the two Acts goes back to 1976, when the Law Development Commission commenced its research on the reform of the law of succession. In May 1987, the Government presented the Wills and Inheritance Bill to Parliament for enactment. It was aimed at the integration of the law of intestate succession and provision for wills. The Bill was opposed, however, upon its first reading on the ground that it was not clearly drafted; the members of Parliament were confused about the two aspects of succession, namely, testate and intestate succession.[21] Consequently, the Bill was withdrawn by the Government. When taken back to Parliament, the Bill had been split into the Intestate Succession Bill and the Wills and Administration of Testate Estates Bill, to solve the earlier problem of lack of clarity. Some changes had also been made to the substance of the provisions.

The Wills and Administration of Testate Estates Bill was passed without any difficulty and with very little debate in the National Assembly. The Intestate Succession Bill was, on the other hand, debated extensively, opposed and amended before it was passed. Both Acts

17 See *C.N. Himonga*, Family Law Reform and Socio-Economic Developments in Zambia, Research Report, University of Bayreuth, 1991 (unpublished).

18 See *T. Mabula*, Zambia: Development or its Lack Since Independence, Journal of Family Law, 27, 1 (1987), 329-37, 330-31.

19 See S. 11 High Court Act, Cap. 50, Laws of Zambia.

20 Above, n. 3 and 4.

21 Parliamentary Debates, 4th April, 1989, 260.

came into force in July 1989.[22] However, the rules for their operation have not been made yet.[23] This will, obviously, cause some problems, especially to the administration of estates under either Act. But, presumably, the rules for administration of testate and intestate estates under the received law in force before the two Acts will, with necessary modifications, continue to operate in practice until the new rules have been made.

b. Major Features, Objectives and Extent of Integration

i. Intestate Succession Act

As already indicated, the main objective of this Act was to change and integrate the various customary laws and practices relating to intestate succession. One of the major problems was the unsatisfactory state of the customary succession law and practices in changing social and economic conditions, particularly as they affected the position of widows and children.[24] There were three systems of succession under the customary law before the enactment of the Act under consideration, namely matrilineal, patrilineal and bilateral ones. In all three systems, spouses had no right to inherit from each other. In matrilineal systems the children of a deceased man had no right either to inherit from him, while in bilateral and patrilineal systems children had the right to inherit from both their parents. These rules obviously operated quite well in the traditional society within which they developed, because other rules existed for the support of the surviving spouse and children who were not entitled to inherit from the deceased spouse or parent. For example, widows were provided for through the system of "widow inheritance", by which a widow was married by one of her deceased husband's relatives, who provided for her through the new marriage relationship. Widows who were not "inherited" returned to their own families where they were cared for by their male kins until they remarried. The deceased's children were also provided for by the deceased's heir who inherited a larger portion of the property for that purpose.

However, due to social and economic changes in the country, these traditional family support systems could no longer be relied upon to provide adequate support for surviving spouses (especially widows) and children who were denied the right of inheritance to their deceased spouses' or parents' property. On the other hand, under the practice of "property grabbing" which developed as an abuse of the customary succession law, the children in

22 Statutory Instruments nos. 90 and 91 of 1989.

23 The reason it was decided by the Government to take the Bills to Parliament without the rules was to avoid further delays in the enactment of the principal legislation (Mrs. *E. Jhala*, Acting Parliamentary Draftsman, 4th September 1989: Interviews).

24 For a more detailed discussion, see *Himonga*, above, n. 6, 163-7.

bilateral and patrilineal systems of succession were equally deprived of the property by the deceased's wider kinship group.

"Property grabbing" referred to a practice whereby the deceased's property, especially of the husband, was forcefully taken by the deceased's relatives. In such instances, no consideration was given to the right of the children to inherit their father's property, nor to the maintenance needs of the widow and children. These customary rules and practices of succession resulted in considerable suffering especially on the part of widows and their children. This may be illustrated by the facts of the following case (one of many similar cases) decided by a court in 1981.

Tembo v Muchimba[25]

> The deceased man, a Tonga by tribe and also matrilineal by descent, died in Lusaka. He was survived by a widow and six children. Amos, the deceased's brother, was appointed heir by the deceased's family according to Tonga customary law. He took away all of the deceased's property, including his terminal benefits from his former employers, and Amos claimed that all this was according to Tonga customary succession law. However, Amos left all the children with the widow and made no provision for their future support. The widow was unemployed. She was unable to support the children nor to buy them school uniforms. As a result, the children were expelled from their school by the school authorities. In desperation, the widow and her children decided to leave Lusaka, where they had lived throughout the deceased's lifetime, and to go back to their rural home-village to look for shelter and possible support. But they had no money to make their journey. So they decided to sell the only property left by the deceased's brother, namely the dogs, to raise the transport money!

These and other problems[26], therefore, compelled the Zambian Government to enact the Intestate Succession Act.

The Act sought to deal with these problems mainly in sections 5-14, relating to the distribution of the intestate estate, which are summarised below. Section 5 provides for the scheme of distribution as follows: 20 % to the surviving spouse (or if more than one widow survives, to all of them proportionate to the duration of their respective marriages to the deceased and to other factors which may be taken into account, such as the widow's contribution to the deceased's estate); 50 % to the children in such proportions as are commensurate with a child's age and educational needs; 20 % to the deceased's parents; and 10 % to his dependants (apparently other than his priority dependants - i.e. spouse, children and

25 LC 558/81, Lusaka.
26 See *Himonga*, above, n. 6 and 17.

parents[27]). Although the Act states that, in the case of a polygamous marriage, the widows' shares are to be "proportionate to the duration of their respective marriages ... and to other factors ...", it does not state how these issues are to be resolved in the actual distribution of the estate. Neither does it state who is to determine these issues. A similar problem arises in relation the the children's shares in so far as they are required to be "commensurate with a child's age or educational needs or both".

A priority dependant whose portion of the estate according to section 5 is too small, having regard to the degree of his or her dependence, can apply to the court for reasonable maintenance under the provisions of Part III of the Wills and Administration of Testate Estates Act which deals with provision of reasonable maintenance for dependants not adequately provided for by the testator. Thus, this part of the Wills and Administration of Testate Estates Act applies, with necessary modifications, to intestate succession as well. In contrast, the equivalent provision of the English Inheritance (Familiy Provision) Act of 1938, in force in Zambia until its implicit repeal in 1989, did not apply to intestate succession.

Notwithstanding the provisions for the distribution of the estate contained in section 5, the surviving spouse or children or both are entitled to personal chattels of the deceased.[28] In the case of a monogamous marriage, the surviving spouse and children are entitled to that property absolutely in equal shares.[29] In the case of a polygamous marriage, each surviving widow or her children or both are entitled absolutely to personal chattels (or what the Act calls "homestead property") used by the deceased, the wife and children of a particular household. All the widows and/or their children are then entitled to the deceased's common property, which consists of the personal chattels used in common by him and all his wives and children of every household.[30] The surviving spouses(s) and/or children are also entitled to any house included in the estate. Where there is more than one house they have a right to choose one.[31] In the case of the deceased being survived by more than one spouse or children, the house is to be held by them as tenants in common. The interest of the surviving spouse(s) in the house is a life interest, which determines upon their remarriage. But the spouses' and children's right to the house is also given without regard to the scheme of distribution in section 5. Furthermore, only the surviving spouse(s) and children

27 See S. 3 ISA for this definition of priority dependants.

28 Personal chattels are defined by the Act as clothing, articles of personal use or adornment, furniture and furnishing and all other articles of household use or decoration, simple agricultural equipment, hunting equipment, books, motor vehicles, but not chattels used for business purposes, money or securities for money (s. 3). In fact, this definition practically embraces all the property of an average Zambian.

29 S. 8 ISA.

30 S. 10 ISA.

31 S. 9 ISA.

or, where neither of these survive the deceased, his or her parents are entitled as beneficiaries in the case of small estates valued at K 30.000.[32] There is no indication by the Act, however, as to how such estates are to be divided between the spouse and the children, or between the parents, as the case may be.

Section 13 provides that, notwithstanding any other provision in the Act, any person entitled to a share in the estate may transfer his share to the intestate's priority dependants. This was to ensure that people who want to leave the whole estate to the benefit of the deceased's immediate family can do so.

Finally, section 14 provides for offences against intermeddling with the estate or for depriving any beneficiary under the Act of the use of property due to him or her. This was designed to stop the practice of "property grabbing" referred to earlier, and also to ensure an end to the application of the customary rules of succession. However, it is doubtful whether the provision will have the intended effect in view of the small penalties for its contravention[33] in comparison with the property that might, for example, be "grabbed" in some cases.

The other major features of the Act relate to the administration of estates and to general matters, including guardians of minor children of the deceased, the position of beneficiaries who caused the death of the intestate as regards their gifts, the jurisdiction of courts and the appointment of receivers pending a grant of letters of administration, aimed at avoiding any possible wastage of the estate and at the preservation of existing rights and obligations of administrators and beneficiaries before the commencement of the Act.[34]

The foregoing sections provide a scheme of distribution of the estate which, like the relevant provisions of the Wills and Intestate Succession Bill of 1987[35], recognises both the interests of the deceased's surviving spouse and children, as the case may be, on the one hand, and those of his or her wider family on the other hand. However, the provisions also clearly tilt the scale of distribution in favour of the deceased's spouse and children. In fact, in view of the inclusiveness of the definition of personals chattels[36] to which these beneficiaries are exclusively entitled, along with the house, all the property of an average Zambian will be inherited by his or her spouse and children. To this extent, therefore, the provisions of the Act reflect, quite considerably, the Act's main objective, namely the

32 S. 11 ISA. The Minister has power to vary the maximum value of the estate from time to time (S. 12 ISA).

33 The penalties are a maximum fine of K 3.000 or imprisonment not exceeding two years, or both fine and imprisonment.

34 Theses are containes in sections 15-48.

35 See *Himonga*, 1989, above, n. 6, 171.

36 See above, n. 28.

amelioration of the poor position of spouses and children under the customary law and its practices. This notwithstanding, however, the Act has missed this objective in one important respect.

It must be observed in this regard that the Act does not apply to land held under customary law[37], most of which is situated in the rural areas. Thus the Act offers little or no protection to the majority of spouses (especially widows) and their children living in these areas. This criticism of the Act must further be understood in the context, first, of the importance of land in rural areas, and second, of the restricted access of women to land under Zambia's existing land tenure systems and practices. Not only is land the major form of property in most cases in rural areas, but it is also the most important source of livelihood in terms of farming as practised by most rural communities. The exclusion from the Act of land held under customary law means, therefore, that many people in rural areas will continue to suffer deprivation of this vital resource as a result of the continued operation of the customary law and practices related to succession.

The situation is aggravated, in the case of widows and their children, by the poor access of women to those parts of the rural areas, such as government settlement schemes, in which land is held under individual title. The law and procedures relating to the acquisition and allocation of land under statutory tenure in Zambia are, of course, substantially gender-neutral, which means that men and women can apply for and be allocated land on equal terms. However, the combined effect of negative administrative practices and social factors, such as cultural attitudes and norms, socio-economic status, and gender, severely undermines women's effective access to land, with the result that very few of them hold land of their own.[38] Instead, women in rural government schemes, for example, live and work on land belonging to their husbands, brothers or other male relatives. Thus rural widows and their children who are denied inheritance rights to land by the act cannot even look to ownership of land in settlement schemes as an alternative solution to their plight.

As regards the integration of the law, section 2 of the Act states:

> Except to the extent specifically provided in this Act, this Act shall apply to all persons who are at their death domiciled in Zambia and shall apply only to a member of a community to which customary law would have applied if this Act had not been passed.

37 S. 2 ISA.

38 See for a more detailed analysis of this problem, *C.N. Himonga / M. Munachoonga / A. Chanda*, The Access of Women to Agricultural Land in Zambia, Research Report, Department of Lands, Lusaka, 1988, unpublished.

Although this section is to some extent uncertain as regards the categories of people governed by customary law before the Act[39], it appears to envisage the application of the Act generally to Africans as persons to whom customary law would have applied in matters of personal law before the Act.[40] To this extent, therefore, the Act, by implication, repeals section 16 of the Subordinate Courts Act in so far as it provided for the application of the customary law of intestate succession.

However, customary intestate succession law continues to apply to three types of property which are excluded from the application of the Act. These are: land held by the intestate under customary law at the time of his/her death, as already indicated; property held by him or her as institutionalised property of a chieftainship; and family property.[41] The Act excludes these types of property from its application because it is intended merely for the distribution of the estate that belonged absolutely to the intestate as opposed to communally-owned property, which all three excluded categories of property represent.[42]

It is also clear that the Act does not integrate the received general law of intestate succession, even though the Minister, upon presenting the Bill to Parliament, stated its aim to be the provision of a "uniform intestate succession law to operate throughout the Republic".[43] In terms of its limits of application, the Act does not apply to non-Africans domiciled in Zambia at the time of their death, as these can in no sense be considered to be "members of a community to which customary law would have applied (as a matter of personal law) before the Act". To these, the general law of intestate succession in force before the Act will continue to apply.[44]

39 As regards this uncertainty arising from section 2, see *C.N. Himonga*, Family Property Disputes: the Predicament of Women and Children in a Zambian Urban Community, Thesis, University of London, 1985 (unpublished), 403-4, commenting on a similar section of the earlier Intestate Succession Bill, 1982.

40 See, for example, S. 16 of the Subordinate Courts Act, Cap. 45, Laws of Zambia. But presumably, the ISA does not apply to those Africans who divested themselves of customary law as their personal law before the Act, as the case may be, according to the suggestion of Justice L. Baron in *Munalo v Vengesai* (1974) Z.L.R. 91, 92, and according to the implication of S. 38(1)(b) of the Local Courts Act, Cap. 54 Laws of Zambia.

41 S. 2 ISA.

42 Minister of Legal Affairs, Parliamentary Debates, above, n. 6, 357.

43 Minister of Legal Affairs, Parliamentary Debates, 4th April, 1989, 261.

44 The general intestate succession law will, perhaps, also apply to those Africans who might have divested themselves of customary law (see above, n. 40).

ii. The Wills and Administration of Testate Estates Act

The main objective of the Wills and Administration of Testate Estates Act was the replacement of a foreign law, the Wills Act of 1837, by a local statute. There was no intention of integrating the received English law and the various customary laws of testate succession.[45] The Act does not, therefore, prohibit the making of a will under customary law. Thus, section 16 of the Subordinate Courts Act[46], which provides for the application of customary law in testamentary dispositions, is still in force. Therefore, as far as testate succession is concerned, the general law will continue to operate side by side with the customary law as before.

Furthermore, the Act excludes from its application any land held by the testator under customary law at the time of his death as well as chieftainship property held in the same manner. Consequently, this kind of property cannot be disposed of by a will purported to have been made under the Act.[47]

The Act is divided into four main parts briefly considered below. The first part (ss. 4-19) sets out the rules governing the capacity and formalities for making a valid will. Any person who is not a minor (i.e. below the age of 18 years) and not of unsound mind has the capacity to make a will. The will must be in writing, but it may also be made orally in limited circumstances.[48]

One interesting feature of this part of the Act is that, in contrast to the position under the English Wills Act of 1837, a will made before the marriage of a testator is not automatically revoked by his subsequent marriage or remarriage.[49] It was intended to thereby accomodate the potentially polygamous nature of the Zambian society. If the will were to be revoked by marriage or remarriage, a man would have to draw up a new will every time he entered into additional polygamous marriages. This was considered to be cumbersome and unnecessary.[50] Instead, any wife or subsequent wives or husband not included in the testator's will are able to apply to the court under Part III of the Act (ss. 20-24), constituting the second major part of the Act for our purposes. It is designed to ensure that financial and other provisions are made for the reasonable maintenance of dependants not adequately

45 Minister of Legal Affairs, Parliamentary Debates, 31st March, 1989, 229-32.
46 Cap. 45, Laws of Zambia.
47 S. 2 Act. It is, however, curiouus that the Act does not similarly exclude family property. This appears to be an oversight rather than an intention of the Act (compare with s. 2 of the Intestate Succession Act, above, n. 41).
48 S. 6(4)(c) WATEA.
49 S. 13 WATEA.
50 Minister of Legal Affairs, Parliamentary Debates, above, n. 43, 231.

provided for by the testator either during his/her life or in his/her will on application to the court by or on behalf of the dependant.[51]

The third part of the Act (ss. 25-53) deals with the administration of estates. And the fourth part (54-70) makes provisions for general matters similar to those already mentioned in relation to intestate succession.

4. Prospects of the Laws of Succession

The question to be examined briefly now relates to the prospects the new laws of succession have of being respected by the people. It is, of course, not yet possible at this stage to determine precisely the response of the people to these laws. Some impressionistic views may, however, be stated. Unlike my earlier considerations on this subject[52], the views stated here are based on events during and after the actual enactment of the two Acts.

Judging from the response of the members of Parliament during the debates in the National Assembly, the Wills and Administration of Testate Etates Act seems to have been well received. As already indicated, it was passed without any objection. However, whether or not people will use it is another matter. Its predecessor, the Wills Act of 1837, was not used by many Zambians to make wills.[53] Some of the reasons for this were the ignorance on the part of the majority of uneducated people about their capacity to make wills under the general law, the complex technicalities about the making of a will, which consequently necessitated the costly and unaffordable services of a lawyer, and the fear of witchcraft among both testators and would-be-beneficiaries. The new Act does nothing to substantially simplify the making of wills. Neither can it be assumed that the educational standards or the social attitudes of the people about wills have dramatically changed. In these circumstances, the Act may remain as unpopular as its predecessor.

On the other hand, it is possible that people who may have strong views against the new intestate law of succession and its scheme of distribution of the estate may increasingly turn to the Wills and Administration of Testate Etates Act as a more acceptable option. Indeed, I came to learn about a number of people[54], who were drawing wills as soon as the two Acts came into force, because they did not want their property to be distributed according to the Intestate Succession Act. Among these were people who wanted to leave all their property

51 A dependant is defined broadly to include any person who was maintained by and living with the deceased person before his death, or a minor whose education was being provided by the deceased and who is incapable of maintaining himself (S. 3).

52 See *Himonga*, 1989, above, n. 6, 172-3.

53 See *Himonga*, ibid., 161.

54 I.e. during my research visit to Zambia, June-September, 1989.

to their children, or who were concerned about providing for their parents as there were no children.

As regards the Intestate Succession Act, considerable objection was raised against its enactment by some members of Parliament. This may also be an indication of how the Act will be received by the people. The social attitudes, customs and traditions underlying the opposition against the Act in Parliament may persist for some time to prevent its ready acceptance. However, some optimism was also expressed that people may respect the Act in due course. To this effect, one member of Parliament who supported the Bill stated:

> The law in itself may not change these attitudes or change these customs and traditions. But we have set a base which in time will become effective and be a much fairer yardstick.[55]

But it should also be pointed out, as it has been elsewhere[56], that optimism of the future prospects of the Act has to be viewed in the context of the need for the education of the people to change their social attitudes about it. In this respect, special attention might be directed at the operations on Non-Governmental Organisations interested in women's issues. It will be shown in the next section that these organisations made a tremendous contribution to the enactment of the law in question. Moreover, they are sometimes better funded (for example, by international organisations) than many a government institution. They are, therefore, from this point of view, in a better position to implement plans for the effective education of the public in relation to the Act than any government organisation.

5. Factors and Problems Encountered in the Enactment of the Laws of Succession

It was pointed out earlier that the enactment of the laws of succession has taken 13 years since the idea was first conceived. In the following, it will be attempted to identify some of the factors that contributed to this state of affairs. The discussion should, as already suggested, also be perceived in a much wider perspective as a reflection of the problems of the future implementation of the policy of family law reform in the country. The factors I will examine concern the "unusual" procedures through which the Succession Bills were made to pass before they were taken to Parliament for enactment, the under-representation of women in major national policy and decision-making bodies, the legal history of the country as regards the application of family law, traditionalism, and the practical operational problems of the Ministry of Legal Affairs. The first three factors, which have been

55 Parliamentary Debates, above, n. 43, 287.
56 *Himonga*, above, n. 6, 172.

briefly considered elsewhere[57], are of particular importance to the future reform of family law. Moreover, the extent of their role in this respect has become even more apparent and obvious in the context of the actual enactment of the new laws of succession.

a. "Unusual" Legislative Procedures

Compared to other legislation, the law of succession was subjected to some "unusual" procedures before it was taken to Parliament. In this respect the Wills and Intestate Succession Bill, which later became the Wills and Administration of Testate Etates Act and the Intestate Succession Act, had been referred to the Central Committee of the ruling Party, UNIP (United National Independence Party), and to the House of Chiefs for approval before it was finally taken to Parliament for legislative action.[58] The Central Committee of UNIP was given constitutional power in 1975 to formulate the policy of the Party and the Government, and its decisions on these matters prevail over those of the Cabinet.[59] It was perhaps against this background that the Bill was referred to the Committee in question for approval. Similarly the Bill was referred to the House of Chiefs. This consists of elected chiefs, representing all the provinces of Zambia.[60] The House, of course, has some legislative functions in that it can consider proposed legislation referred to it by the President of the Republic, who constitutes part of Parliament, together with the National Assembly. However, proposed legislation is, as a matter of practice, usually not referred to the Central Committee or to the House of Chiefs. The fact that the Bill was referred to both institutions added to the considerable delays in its preparation for presentation to Parliament.

On the other hand, it is arguable that, desirable as the idea of accomplishing national goals in law reform as quickly as possible may be, the presentation of legislation, such as that affecting the family, to the Central Committee and to the House of Chiefs is an important and indispensable process of consultation with the people they represent. These institutions represent very strong political and traditional interests in relation to family law reform, especially in view of the customary law component of the existing family law. Indeed, the positive value of this consultation to the enactment of the succession laws was obvious. The fact that the Bill had been presented to the House of Chiefs, presumably representing traditional interests, and approved by it (although there were some doubts about this on the part of some members of Parliament as the resolutions of the House were not laid before the National Assembly)[61], was used by the Government and some members of Parliament to

57 *Himonga*, ibid., 169.
58 Parliamentary Debates, above, n. 43, 260; *Himonga*, ibid.
59 See Constitution of Zambia (Amendment) Act, no. 22 of 1975.
60 See Constitution of Zambia, no. 27 of 1973, Art. 97.
61 Parliamentary Debates, above, n. 43, 275.

defuse the arguments of those members of Parliament who opposed the enactment of the Intestate Succession Bill on the ground that it was contrary to the traditions and customs of the people.[62]

It would appear, therefore, that some degree of procedural delay, due to consultations, is inherent in any exercise aimed at reforming a culturally and politically sensitive area of the law, such as that involving personal matters of marriage and succession. The caution taken by the Government in adopting the consultations concerned, therefore, concedes the point made by Nwabueze referred to earlier[63], concerning the "abrogation of laws that touch deeply upon the lives of the people", as well as the following observation made by Parker about personal laws: "Theses are subjects which it is impossible for legislation to move very far in advance of opinion and practice among the public ...".[64]

b. The Under-Representation of Women in National Policy and Decision-Making Bodies

The small number of women in major national policy and decision-making bodies such as the Central Committee of UNIP, Cabinet and Parliament is another factor in relation to the progress of family law reform in Zambia. The representation of women in these institutions in 1989, for example, was 6 out of 68 Central Committee members, 9 out of 135 members of the National Assembly (Parliament) and 1 out of 17 cabinet members.

The absence of women in these bodies may contribute to their delays and general inactivity in proposing or processing any legislation likely to change the substantive rights and positions of men and women under existing customary law. For there is no doubt that customary law largely favours and entrenches the position of men in society in comparison to how it affects the position of women. The men sitting on these decision-making bodies alone may, therefore, be reluctant or unmotivated to propose or expedite changes to the law that undermine their own interests. The Intestate Succession Bill was, for example, opposed by some men, including members of Parliament, on the flimsy ground that because it entitled widows to a share of their deceased husband's estates the wives would kill their husbands in order to inherit their property.[65] Apparently, this scenario was so strongly held that it compelled the Government to make provision for it in the Bill. The Minister of Legal Affairs alluded to this fact in his presentation of the Bill to Parliament. He said, in part:

62 Ibid., 272-5.
63 See above, n. 11.
64 *A.E.W. Parker*, The Sources of Nigerian Law, London, Sweet and Maxwell, 1980, 142.
65 Parliamentary Debates, above, n. 43, 284.

> I must allay the fears that if the Bill is passed, it will encourage wives to kill their husbands in the hope that they can thereafter enrich themselves from the property left behind by the deceased husbands. There is a provision in the Bill which prohibits a person from benefiting from his misdeeds ...[66]

On the other hand, the contribution of women at other levels to the enactment of the laws of succession was quite notable, and this perhaps indicates what impact their participation might have upon family law reform if they were involved at higher levels of national decision-making. For example, women, through their respective Non-Governmental Organisations (NGOs) such as the Zambia Association for Research and Development and the NGO Coordinating Committee, organised seminars, panel discussions and research (an opinion poll)[67] all of which were aimed at impressing upon the Government the need to change the customary law of intestate succession and to expedite the presentation of the Bill to Parliament, as well as to put some pressure upon Parliament itself to enact the law once it was presented to it. With regards to the latter, the results of the opinion poll conducted by the organisations under consideration, showing, among other things, that members of the public contacted wanted their members of Parliament to support the enactment of the Bill, were cited and tabled in the National Assembly during the debates on the Bill by a female Member of Parliament. This woman also presented one of the most impressive arguments for the enactment of the Bill during her contribution to the debate on the Bill in her capacity as Member of Parliament.

Other activities by the NGOs in this respect included the mobilisation of people from Lusaka and other selected rural areas to be present in the National Assembly while the Bill was being debated. One member of the NGOs explained that "this was to ensure that the members of Parliament were made conscious of the presence of the electorate observing their behaviour and voting patterns in the House as regards the enactment of the Bill. The strategy was further aimed at ensuring that the members of Parliament did not tell the electorate in their constituencies that they would support the Bill but do the opposite in their absence in the National Assembly".[68]

The impact of the women's contribution to the enactment of the succession laws noted above seems to suggest that the integration of women into the country's decision-making

66 Parliamentary Debates, above, n. 43, 261.

67 For example, panel discussions organised by the Zambia Association for Research and Development on the Inheritance Bill, 8th March, 1987 and 8th March, 1988, at Mulungushi Hall, Lusaka, and the Opinion Poll on Public Attitudes Towards the Pending Bill on the Law on Inheritance, 24-27 Feb. 1988, by Zambia Association for Research and Development.

68 Mrs. *Chewe*, Executive Secretary, NGO Coordinating Committee, 5th September, 1989: Interviews.

process may itself be a necessary prerequisite to the progress of family law reform in Zambia.

c. *The History of the Application of Family Law*

The legal history of the country as regards the application of personal laws also seems to be an important factor in relation to the progress of family law reform in Zambia today. Zambia was one of those British territories in which Africans were generally not permitted to use the general received law in personal matters throughout the colonial period. They were not able to contract marriages under the Marriage Ordinance until 1963, on the eve of independence[69], and the general law of succession did not apply to them until 1968.[70] Consequently, they contracted their marriages and transmitted their property only according to their customary laws.

The reason for the non-application of the general personal law to Africans in Northern Rhodesia and other territories has been attributed to the complicated circumstances in which the general personal laws were introduced in those territories.[71] Of course, equally important to the colonial Government was the promotion of the policy of indirect rule, which depended upon the preservation of tribal institutions. The status brought about by the Ordinance marriages, for example, did much to disrupt tribal institutions[72], and the Ordinances in question had, therefore, to be kept as much as possible out of reach of the Africans.

However, the exclusion of Africans from the general personal law, in my view, meant that they were not encouraged early enough to accept or identify themselves with it. Customary law and the general law thus remained poles apart in operation and in the perception of the Africans until independence, when the general personal law was made available, in varying

69 Marriage (Amendment) Ordinance, 1963. Africans in North-Eastern Rhodesia were permitted to contract their marriages under the Ordinance from 1903 until 1918 when permission was stopped (Marriage Regulations, no. 2, 1903 and S. 47 Marriage Ordinance, 1918, Cap. 132, Laws of Northern Rhodesia).

70 The Administrator-General Act, Cap. 200, was amended (Administrator-General (Amendment) Act, no. 4 of 1968) to include the administration of estates of Africans by the Administrator-General in limited cases, such as, for example, where there is no person otherwise interested to administer the estate. However, this did not affect the customary law as the law applicable to the distribution of these estates. See also *Re the Will of Hwalima v Hwalima and Hwalima* (1968) Z.L.R. 164, which decided that Africans hat capacity to make wills under the general law.

71 See *H.F. Morris*, Development of Statutory Marriage Laws in 20th Century British Colonial Africa, Journal of African Law (1979), 37-63.

72 Ibid., 38.

degrees, of course[73], to Africans who wished to avail themselves of it. It may not, therefore, be surprising that some Zambians up to now continue to consider the general personal law as European, alien and, therefore, not acceptable to them. Moreover, in some cases people, both in rural and urban areas, still talk today of the general personal law as being the law of "Europeanised" Zambians only. The statement of one member of Parliament in his contribution to the debate in Parliament on the Intestate Succession Bill, for example, reflects this attitude:

> ... there are two laws in the country which regulate marriage: you can be married under customary law or under the Act. ... I take it that those who are married under the Act are the civilised ones or are supposed to be and, therefore, they will understand the provisions of the Bill and hence it must apply only to them. Those of us who are villagers and live in villages ... and married under customary law, should be exempted from the provisions of this Bill.[74]

Therefore, as a result of the views people hold about the respective systems of personal laws, attempts at the reform and integration of these laws, which have to involve legislation and incorporate principles and values based on or associated with the received law, are bound to be unpopular with many people.

The historical fact of the way personal law was applied during the colonial period, as stated above, may also partly explain the element of traditionalism in relation to family law reform in Zambia. We may now turn to this factor.

d. Traditionalism

Traditionalism has been recognised as a problem to law reform in other African countries.[75] It may be defined as "a form of ideology which opposes attempts at law reform arguing that to do so would be contrary to the people's traditions and culture".[76] The full

73 Even after the attainment of independence Africans were, for example, still generally governed by their customary intestate succession law, and this was the case even where they were married under the general law.

74 The relation of civilisation to the contract of marriage under the Act referred to by the Member of Parliament seems to be an allusion to the fact that marriages under the Ordinance during the colonial period of most African countries were, regrettably, considered by the officials to be superior to customary marriages and the spouses of the respective marriages were treated accordingly (see, for example, *R v Amkeyo* (1917) 7 E.A.L.R., 14).

75 See *B. Rwezaura*, Traditionalism and Law Reform in Africa, in: Vorträge, Reden und Berichte aus dem Europa-Institut, Nr. 17 (1983), Saarbrücken, 1-27.

76 Ibid., 1.

extent to which traditionalism is a problem of law reform in Zambia is the subject of my continuing research.[77] Indeed, it has, to some extent, been reflected in the debates of some of the members of Parliament objecting to certain aspects of the Intestate Succession Bill.[78]

The traditionalist argument advanced by some members of Parliament[79] may be summed up as follows: The Bill cut across the traditional social and economic structure in that it restricted the rights of the traditional extended family as regards succession and inheritance; it undermined the consolidation of the extended family through its participation in the inheritance of the property of its members; it undermined traditional institutions; and it was itself untraditional for the Government to consider issues pertaining to the reform of succession law - the prerogative concerning this matter rightfully belonged to traditional authorities and they, and not the Government, should, therefore, have taken the initiative to change the law in question. Consequently, some members of Parliament opposed the enactment of the Bill unless it was made to take into account the issues in question. Indeed, the amendment of the Bill to include the concept, for example, of "family property" was apparently a result of these demands.[80] On the other hand, it should be noted that the Intestate Succession Bill being debated had been introduced partly because the traditional values advocated for in the demands in question had been substantially eroded under modern conditions of change, as pointed out earlier. The traditionalist argument and its consequent inhibition upon the process of family law reform was, therefore, not wholly justifiable.

6. Practical Operations of Law Reform Institutions

The last factor to be considered relates to the practical operations of the institutions concerned with law reform, namely, the Ministry of Legal Affairs ant two of its departments, that is the Law Development Commission and the Department of Legislative Drafting.

The Minister of Legal Affairs and Attorney-General is, of course, in charge of the Ministry of Legal Affairs and its departments. He is also the principal legal adviser to the Government and is responsible for constitutional matters, civil proceedings taken against or on behalf of the state, drafting of laws, and law reform and revision.[81] The Legislative Drafting Department is responsible for the drafting of principal and subsidiary legislation in

77 See above, n. 1.
78 See Parliamentary Debates, above, n. 43, 262-4, 267, 273, 281-2, 283-4.
79 Ibid., 283-4.
80 Parliamentary Debates, above, n. 6, 351.
81 Ministry of Legal Affairs Annual Report, Government Printer, Lusaka, 1978-79, 1.

all subjects of the law, the drawing up of other documents of a legal nature and the rendering of advisory legal opinions and expert legal advice to the Party (i.e. UNIP) as well as Government ministries and departments on various projects.[82] The Law Development Commission was established in 1976[83] for the purpose of promoting the reform of the law. Its functions were accordingly defined as being "to take and keep under review all the law with a view to its systematic development and reform, including in particular, the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments, and generally the simplification and organisation of the law".[84]

Although the underlying Act does not say anything about the Commission being a department, in practice, the latter has been operating as a department of the Ministry of Legal Affairs since it was established.[85] The Act also provides for the establishment of an Institute of Legislative Drafting for the training of draftsmen. The Institute's teaching staff are mandated to assist the Commission in the preparation of draft Bills.[86] This Institute has, however, never been established. Consequently, its functions of drafting proposed legislation fall upon the Legislative Drafting Department of the Ministry.[87] In terms of procedure of operation, the Commission submits its completed law reform reports, together with proposed legislation, to the Minister of Legal Affairs and Attorney-General.[88] The Minister and his administrative staff then seek the policy approval of the cabinet and other relevant institutions, such as the Central Committee of UNIP, for the proposed legislation. After approval has been obtained, the Legislative Drafting Department drafts the Bill for presentation to Parliament.

A number of problems have, however, undermined the operation of these institutions in relation to family and other law reforms. First, due to his other commitments, the Minister of Legal Affairs takes a long time to examine the reports on law reform projects submitted to him by the Law Development Commission and to process them for Cabinet or other approval for legislation.[89] Secondly, the Legislative Drafting Department is severely understaffed and cannot draft legislaton referred to it quickly.[90] The result of these two

82 Ibid., 14.
83 It was established under the provisions of the Law Development Commission and Institute of Legislative Drafting Act, no. 5 of 1974.
84 S. 7 of the Act, ibid.
85 *M.P. Mvunga*, Solicitor-General, 31st July, 1989: Interviews.
86 S. 9 of the Act, above, n. 83.
87 In the first three years of its operation, the Commission's proposed legislation was drafted by its first Director, who was a qualified Parliamentary draftsman. But he left in 1979 (see Ministry of Legal Affairs Annual Report, above, n. 81, 7).
88 Ministry of Legal Affairs Annual Report, above, n. 81, 17.
89 Mrs. *Jhala*, above, n. 23.
90 Ibid.

problems is that the law reform projects submitted by the Law Development Commission for possible enactment are shelved at the Ministry of Legal Affairs for long periods of time. For example, the period of nearly 7 years since the Succession Bill was first submitted to the Minister by the Law Development Commission until 1989, when it was enacted, has partly been attributed to these problems.[91]

Thirdly, the Law Development Commission itself lacks adequate facilities, especially funds and professional manpower, to carry out its functions.[92] Moreover, the manpower problem of the Commission does not only relate to shortage of personnel, but also to the mobility of the Commission's professional and other staff which is quite alarming. Since 1979, there have been at least five changes of directors of the Commission.[93] Similar mobility has taken place among other members of the professional staff as well as among members of the Council of Commissioners.[94] To the extent that some of the changes of staff at the Commission were due to the Government's usual reshuffling of personnel, the Government has itself caused the problems of its law reform institutions.

The manpower and financial problems have had two notable effects on the operation of the Law Development Commission. The first is that the Commission has been incapacitated to carry out intensive and meaningful research into family law and other areas of law for purposes of reform. Moreover, its operations have largely been restricted to the reform of limited technical branches of the law such as, for example, the law of evidence and company law, which do not require a lot of resources for research.[95] Secondly, the Commission lacks stability and continuity in its work, particularly as a result of the mobility of staff. In this regard, the previous reports of the Commission, for example, indicate that the project on the reform of the law of marriage and divorce had progressed considerably. And yet none of the professional staff, including the present Director himself, seemed to know what had happened to, or even the whereabouts of, the research data collected on this project.[96] They said they had made unsuccessful efforts to contact the last research fellow and Acting Director, who had worked on the project in question, to supply them with a report on the project.[97] It may well be that if the data on this project are not retrieved, the Commission might have to start the work on it all over again or at least repeat some of the work already done. And this would certainly be unfortunate in view of the resource constraints of the Commission.

91 Ibid.
92 Law Development Commission Annual Reports, Government Printer, Lusaka: 1977, 1; 1980, 1, 7; 1981, 2; 1982, 3; 1985, 1, 4.
93 Law Development Commission Annual Reports, Government Printer, Lusaka: 1985, 2; 1986, 1, 2.
94 Above, n. 92: 1980, 1; 1981, 1, 2; 1982, 1; 1985, 2; above, n. 93: 1986, 1, 2.
95 Above, n. 92: 1977, 1.
96 The interviews on this were conducted in July 1989 during my research, above, n. 1.
97 Director of the Law Development Commission, 17th July, 1989: Interviews.

7. Conclusion

The factors and problems examined above have slowed down considerably the progress of the reform and integration of the laws of succession. Moreover, they also present considerable obstacles to the future implementation of the policy of family law reform and integration in the country. The reform of the law is not likely to go any faster than it has done so far. Arguments based upon traditionalism are, for example, likely to arise again in relation to the reform of customary law pertaining to maintenance and distribution of property after divorce. Customary law does not provide for maintenance of spouses after divorce. Nor does it recognise the right of a divorced woman to a share of the matrimonial property (other than her own property)[98], although a few changes to the law are being made by some courts in favour of divorced women.[99]

The reform of customary law in these areas of the law is, on the other hand, imperative in view of its unfairness to women and also in view of changing social and economic conditions which, to a large extent, no longer justify its application.[100] Moreover, the Government is also obligated to abrogate the customary law of maintenance and property distribution after divorce which discriminates against women in violation of the United Nations Convention on Elimination of all Forms of Discrimination Against Women[101], to which Zambia is a signatory.

The opposition likely to arise against the reform of the customary law may, on the other hand, necessitate the employment of lengthy consultative procedures on the part of the Government, such as those undertaken for the law of succession discussed in this paper. But this will cause inevitable delays. The operational problems of the Ministry of Legal Affairs and its departments are also least likely to improve in the face of the deteriorating national economy. Nor is the country likely to experience a sudden upward mobility of women to positions of national decision-making. Thus the implementation of the policy of reform and integration of family law as a whole in Zambia may still be a long way off.

98 See *Mwiya v Mwiya* (1972) Z.L.R. 113; *Himonga*, above, n. 17.

99 See *C.N. Himonga*, Property Disputes in Law and Practice: Dissolution of Marriage in Zambia, in: *A. Armstrong* (Ed.), Women and Law in Southern Africa, Zimbabwe Publishing House, Harare, 1987, 57, 61-6; *Himonga*, 1985, above, n. 39, 264-70, 272-8.

100 See *Himonga*, above, n. 39, 250-6, 315-20; above, n. 17.

101 U.N.Doc. A/34/46/1979.

ABSTRACTS

Family Law Reform and the Integration of the Laws of Succession in Zambia

By *Chuma Himonga*

In 1989, Zambia enacted two important statutes, the Intestate Succession Act and the Wills and Administration of Testate Estates Act. The Intestate Succession Act, especially, has been described as a big landmark in the Zambian legal history. It attempts to reform and integrate the customary laws of succession existing before its enactment. The reason for the above acclamation of this Act lies in the social and legal problems it seeks to solve for a large section of people in the country, especially widows and children of deceased men. The Wills and Administration of Testate Estates Act, on the other hand, provides for the law governing testate succession. This paper examines these two Acts as an aspect of the implementation by the Zambian Government of its policy of reform of family law as a whole in Zambia. The paper concludes that while the Zambian Government remains committed to the reform of family law, the progress of implementation of this policy has been, and is likely to continue to be dogged by social, institutional and bureaucratic impediments as well as problems of requisite resources as reflected by the experience with the enactment of the two succession law statutes.

Legal Developments on Women's Rights to Inherit Land under Customary Law in Tanzania

By *Rose Mtengeti-Migiro*

The rights of women especially those pertaining to land inheritance has been one of the most controversial legal issues since Tanzania's independence almost three decades ago. During the period preceeding colonialism, that is during early traditional society which was predominantly patrilineal, land was collectively owned by the clan but was apportioned to family units under the authority of a male head of the family.
The socio-economic set-up of this society started to crumble with the advent of colonialism, and, after independence new policies also affected traditional land tenure and social organisation. Nevertheless, customs and usages that regulated property relations were not