CHAPTER 9

BASIC QUESTIONS IN THE TASK OF INHERITANCE LAW REFORM

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This is a preliminary contribution to the current discussion of reform of the law of inheritance. The public concern over the existing law is reflected in, for example, discussions in the press, the misgivings privately expressed by individuals, and the inclusion of the subject in the current programme of work of the Law Reform Commission.

It will be argued that proposals for law reform, if not based on an adequate theory, are likely to be misdirected and ineffective. We have as yet no general agreement on a theory for law reform. This problem will therefore be discussed first, after which the paper will examine the initial stages in the application of a particular theory to the law of inheritance.

1. A Basic Theory of Law Reforms

For the present purpose "law" may be defined in the words of Dean Harvey as "a specific technique of social ordering, deriving its essential character from its reliance upon the prestige, authority and ultimately the reserved monopoly of force of politically organised society."[1] A "rule of law" and "a law" may be defined as any regularity in law. Law reform is, on these definitions, not restricted to legislative changes. Any form of state action may be considered. It is submitted further that existing laws and proposed reforms should be judged in terms of their consequences. An investigation of law reform will therefore require at some stage an inquiry into the consequences of existing or possible laws. (It should not , of course, be assumed that all laws necessarily have consequences.)

There is a danger that discussion of law reform theory may absorb so much effort that we shall never proceed actually to reform the law. The fear of this encourages the *ad hoc* approach: the method whereby we simply take a particular rule of law which seems to have unsatisfactory consequences, and proceed immediately to discuss proposals for improving it. However, the *ad hoc* approach suffers from two defects.

Firstly, it does not really dispense with a theory. It merely ensures that the theory shall be unstated, thus increasing the danger of inconsistency. A possible example of the *ad hoc* approach, taken from the law of inheritance, may illustrate this. Looking at the current Ghanaian law, it seems sometimes to result in wealthy men's children being impoverished on their fathers' deaths. This seems unsatisfactory, so we could direct attention immediately to ensuring that children receive a proportion of, or a right of maintenance from, or a minimum amount of property from their fathers' estates. This looks like a step towards a clear improvement, and one may be tempted to wonder what need there is of abstract theories concerning the proper methods for law reform. But the absence of a theory may even here render any results questionable.

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The programme of work envisaged is based on a number of assumptions of doubtful validity. It assumes, for example, that a prime objective of the law of inheritance should be the maintenance of a man's children on his death. But this is not a necessary assumption, and was quite possibly not made by, for example, Akan law. This assumption probably results from certain broader assumptions, such as that the law ought to prevent extreme poverty or disappointed expectations, or should strengthen certain personal relationships in preference to others. None of these is beyond controversy. If they are not articulated, they are less likely to be rationally established or consistently applied. The example may be developed to illustrate the danger of inconsistency. The investigator who has made recommendations for giving children rights in their fathers' estates may later be called upon to investigate another alleged defect in the law, namely that state revenue is inadequate for national development. He may propose that a tax be imposed on the estates of deceased persons. This proposal could produce results at variance with the objectives of his first proposal. Had he followed a programme that led him first to consider comprehensively the scope and consequences of the law of inheritance, he would have been more likely to notice the wider implications of possible specific proposals.

Secondly, the *ad hoc* approach is unsatisfactory in that it is not exhaustive. If the law is to be made as satisfactory as possible, we should follow a programme that leads us to identify *all* existing defects in the law, and the *best* solutions. Thus in the example already taken, the investigator following the *ad hoc* method may consider only how children can be maintained from their deceased fathers' estates. This overlooks other possible defects in the existing law of inheritance, such as the impoverishment of wives, or younger brothers of a deceased. And it over looks other possible solutions, such as the maintenance of the children from other sources.

Thus a theory seems essential. The next question concerns the type of theory needed. A necessary condition for a useful theory is that it command general acceptance among those who decide what the law is to be. If there is disagreement over the basic principle of any investigation, the resulting proposals will be of less value, since they will not be accepted, even as a basis for discussion, by those who disagree with that principle. The defect in almost all past theories of law reform is that they have failed to gain this acceptance. An example is Bentham's principle of utility, proposing that "the happiness of the individuals, of whom a community is composed, that is their pleasures and their security, is the end and the sole end which the legislator ought to have in view."[2] This principle has inspired much useful work and discussion of law reform. But few people have been found to subscribe wholeheartedly to it, and proposals for law reform today based purely on the "felicific calculus" would meet considerable criticism for their failure to satisfy other ideals. The same objection applies to other theories which could be used as a basis for research in law reform, such as the theories of natural law: some of the law-makers might accept them, but not all would. And the existence of substantial dissent reduces their practical value.

This reason for this failure of past theories was that each contained, as a principal element, a particular, controversial ideal at which law was expected to aim. Since no one of those ideals has proved generally acceptable the theories have not provided an uncontroversial basis for law reform activities. Thus the proposals of a utilitarian kind can be acceptable on their own grounds only to some one who agrees that happiness should be the sole aim of law. Anyone who thinks that other values should be taken into account will have to review every one of the utilitarian's proposals to determine whether they satisfy his values.

Roscoe Pound sought to avoid this difficulty by proposing an avowedly relativistic approach [3] Law, he argued, should seek to give effect to the greatest possible number of the interests existing in the society in question. "Interests" were defined as *de facto* claims or demands, or expressed desires. These interests should be weighed against the accepted value-system of society, in order to determine the importance to be given to each in cases of conflict. Thus Pound accepted that what was good for one society might not be good for another. The interests found in one society might differ from those in another, and the evaluation of those interests would vary according to different social norms. But even here, below the relativistic surface is a bedrock of absolutism. One universal objective is proposed: the embodiment in the law of each society of that society's accepted valuaton of the interests within that society. This objective would not be universally accepted. We may summarise with extreme brevity the main objections. Not all would agree that it is necessarily good to satisfy interests, nor that there should be no legal objectives other than the satisfaction of interests; not all would agree that every society has a value-system as contemplated, nor that, if it does, this value-system should always be followed.

The only escape from such defects is a theory which does not set up one as the proper end of law. It is suggested that investigation for law reform should aim to specify every possible law, and to discover the consequences of each in the society in question. The result of the investigation should be a list of alternative possibilities, each one described in as much detail as possible. Those who determine what the law shall be may then choose between the alternatives with the fullest possible knowledge. The investigator's report will not, as has often occurred in the past, be an advocacy of one set of proposals. The approach now being proposed gives the investigator an objective, namely to present a full account of all possible laws and their consequences. It can be developed in more detail to provide methods for achieving this objective. It is hoped that it will be useful, in that whatever decision is taken by the lawmakers (including a decision to change nothing) will be taken in the desire to produce the results which in fact ensue.

It is assumed that the investigator approves of the system of law-making in the society to the extent that he believes satisfactory decisions will, by and large, be reached if the relevant evidence is available. If he does not believe this, he will have to abandon investigation and take to propaganda.

The apparent defect of this proposal is that it presents the investigator with an infinite set of possibilities, each of which needs detailed study. In the law of inheritance, for example, it might be necessary to consider every possible way of distributing the property of a deceased person. It may, then, be contended that a practicable programme of work cannot emerge. The answer to this is that the number of possible laws is in most cases severely limited by restrictions on what the law-makers are willing to accept. There is no practical value in studying possible laws which have no chance of acceptance either now or in the foreseeable future. On this ground many of the logical possibilities can be eliminated from the start, because it will be obvious, even with the greatest caution, that they are not real possibilities. Thus in studying inheritance law reform in Ghana we do not need to consider the possibility of passing the property to persons purely on the ground that they first succeed in taking possession of it after the death, or that they were the last persons to speak to the deceased. Further apparent possibilities may be excluded on the same grounds after some investigation. Research will reveal in some cases that provisions which initially looked acceptable would produce clearly unacceptable results, and can therefore be discarded. However, these processes of elimination will not normally reduce the possibilities

to one. It should be emphasised that the investigator will be concerned not with discovering the one most acceptable proposal, but merely with excluding those proposals which are clearly unacceptable. There may still be a number which are not clearly unacceptable, and then choice between them is not, on this approach, to be made by the investigator, but by public opinion, or whatever person or group determines what the law is to be.

The investigator's range of possibilities will usually be reduced also by an initial decision to concentrate on one area of law only. We do not study everything at once. If one decides to work on, say, inheritance law, it is not necessary to consider alternative rules for other branches of law. However, it is important not to allow the delimitation of the area to exclude a consideration of relevant possibilities. The problem is that a delimitation cannot be made except on certain assumptions about the future state of the law, and as much assumptions should be unquestioningly made in a law reform programme. The assumptions inherent in the choice of inheritance law will be discussed in some detail below. The difficulties may be illustrated now if we consider a further narrowing of the area, to the law of testate succession. It may not be absolutely certain that the law-makers in Ghana will continue to regard a law of wills as essential. Thus the choice of this area should not be allowed to incorporate an assumption that the area must continue to exist. Moreover, it seems likely that the consequences of many possible laws of testate succession would depend in part on the situation in the law of intestate succession. For example, the class of persons who exercised a power to make wills might correspond closely to that class which was dissatisfied with the provisions of intestate succession applicable to them. Thus it would be a further unjustified narrowing of possibilities to assume that possible changes in intestate succession did not need discussion.

One final general comment is necessary. Discussion of law reform is directed towards assisting decision-making for the purposes of state action. State action can be important in people's lives. The type of investigation proposed is based on the assumption that it will on occasion produce laws which have better consequences than the present laws. Since the consequences can be important in human terms, the work is urgent. Certainty or near-certainty may take a long time to achieve. There may be instances where it is justifiable to present conclusions which are only reasonably probable. The lack of certainty should, of course, be admitted, but it should not be an excuse for failing to assist. This may offend the purist, but it is more helpful to society.

2. Initial Stages in the Consideration of Ghanaian Inheritance Law Reform

An attempt will now be made to indicate how the approach just described can be applied to one area of Ghanaian law. This will be a report on work which is only an early stage of a lengthy project.

Ideally all areas of the law should be examined when the resources are available. There seems to be no entirely satisfactory mode of choosing one area in priority to another. However, inheritance law looks a relatively self-contained area, and it seems likely that it can be examined without the frequent necessity of detours into other areas of law. It is also, as indicated above, an area about which dissatisfaction is being expressed. This does not prove that investigation will result in changes, but it suggests that it is more likely to be fruitful. Finally, it is an area of law in which this writer has been interested for some time.

A study of inheritance law reform may be defined as an attempt to answer the question: On the death of a person holding property rights exceeding life interests, who is to take these rights? This delimination of the subject-matter is intended to set aside an area which can be conveniently investigated. It has been argued that such a delimination involves certain assumptions, principally that the area of law delimited will continue to exist. The delimitation just given suggests that in the present case this assumption divides into three propositions about Ghanaian law: that property rights will continue to exist; that some property rights will continue to exceed life interests in duration; and that such rights will continue to be held by persons who can die, that is, by private individuals and not purely by corporations. These assumptions seem to be reasonable. The death of a person is intended here to refer only to the literal death of a human being. Other events may sometimes be regarded as "death" in law: examples would be bankruptcy, *capitis diminutio* in Roman law, or liquidation of a company. It seems preferable to exclude these, as discussion of the succession to the property of such persons in such circumstances is probably more convenient in different contexts, such as bankruptcy law, the law of persons, or company law. In so far as the law of inheritance may be applied in such cases, it is because it may be found that this law, already formulated for different situations, may be usefully transferred to these cases. It must therefore first be formulated for the ordinary situation.

The delimitation includes some possibilities which might not be regarded popularly as within inheritance law. For example, the possibility of a widow receiving periodic maintenance payments from her husband's estate is within the scope of the inquiry: she would be acquiring certain property rights previously enjoyed by the deceased. The popular view might not classify this as a matter of inheritance. However, we are concerned here not with reflecting social attitudes, but with demarcating a convenient area for investigation.

The delimitation excludes certain areas which are often considered to be closely related to inheritance law. Perhaps most important is its exclusion of succession on death to legal relationships of the deceased other than property rights. Thus it does not include succession to the status of the deceased as parent, son or daughter, spouse or traditional office-holder. It is considered that such questions should be directly confronted in the context of areas such as family or chieftaincy law. This does not mean that consideration of them will be unnecessary. The existing laws on these matters will be relevant facts for parts of the inquiry. For example, if it is established that a certain class of persons succeeds to paternal responsibilities, this fact may be taken into account in predicting the consequences of that class inheriting, or not inheriting property. Further, it may be found that the consequences of some of these laws may be so closely related to the consequences of inheritance laws, that the law-makers may prefer to consider possible changes in both together. This is a point where the law of inheritance may prove not to be a self-contained area. However, the present suggestion is merely that there should be no initial plan for a comprehensive review of these other areas.

The delimitation also excludes the administration of estates, the area of law which determines the procedure by which those entitled under the law of inheritance receive the property. This seems to be an area which can be considered independently. However, it may be found that it needs to be looked at in connection with certain possibilities in the law of inheritance. For example, if it is found that a certain possible distribution of estates will require unusually elaborate machinery for its administration, this consequence of the possibility will need to be noted.

Having defined the area of investigation, it is next necessary to determine how the possibilities within the area may be classified. The definition, having asked who takes the rights of the deceased, indicates that a list of possible answers will be a list of possible recipients of the property. The list will consist of individual persons and combinations of persons. Since property may pass to combinations of persons, it will also be necessary to examine the various ways in which an estate may be divided, for example, into proportions of the total value, or into rights in land and rights in moveables.

It seems justifiable to assume that some classes of persons can be excluded from the list, as laws providing for them to inherit would have no chance of acceptance: the examples already given, of the first person to take possession of the property, and the last to speak to the deceased, will suffice. The list need include only persons with a relationship to the deceased which can be regarded in Ghana as relevant to the question of inheritance. This part of the argument would be neat if we could define this special relationship as the existence of a particular characteristic, but this does not seem possible. The various relationships which might possibly be acceptable for this purpose do not seem to descend from a common principle. Hence we can only attempt to draw up a series of items. It does not seem useful to try to specify all these classes of persons which would be unacceptable: one could easily continue inventing new unacceptable classes *ad infinitum*. It is therefore necessary to try to list all those classes of persons which would not be clearly unacceptable to the Ghanaian law-makers as recipients of estates. The following is an attempt at such a list.

(*a*) **Persons related to the deceased by consanguinity.**

It seems clear that these cannot be excluded because existing inheritance laws cause property to pass in many cases to sub-classes within this class. It is possible that further investigation may allow the exclusion of certain sub-classes, leaving only cognates, agnates and a few others, but this is not certain. The relationships are intended to include all those biologically within the term "consanguinity", and also persons who, while not biologically within it, are treated by the existing law or social norms as if they were: biologically unrelated but legally adopted children are an example.[5]

(*b*) **Persons related to the deceased by affinity**

Here also existing laws give rights of inheritance to some members of this class, although further investigation may enable some parts of the class to be excluded. The marriage on which affinity is based may be either a legal marriage, or relationship regarded socially as a marriage.[6]

(*c*) **Persons whom the deceased wished to benefit from his estate:**

This covers the cases of beneficiaries by will under the existing law, but it leaves open the possibility of giving effect to wishes of the deceased evidenced in other ways.

(*d*) **Persons to whom the deceased had incurred an obligation which was undischarged at his death:**

A simple example is the lawful creditor of the deceased. Also included are persons to whom the deceased owed obligations which are socially but not at present legally recognised. However, "socially recognised obligations" must be interpreted according to precise norms. Otherwise

we are in danger of including in the present class all persons who are regarded socially as having any sort of claim. The inclusion of such a wide class would do little more than restate the earlier proportion that not every person needs to be considered as a possible beneficiary.

(*e*) **Persons who have exercised governmental authority over the deceased or over the property:**

This class includes the state, and thus allows for consideration of taxation in the form of estate duties. Investigation of the consequences of this may have to be restricted, unless a full programme of investigation into taxation law reform is envisaged. This class also includes persons such as the stool of which the deceased was a subject,[7] and the local authority of the area where he resided. It may seem unlikely that inheritance by such persons would be acceptable. However, it is necessary to contemplate the situation where there is no-one available from classes (*a*) to (*d*). While it may be found unacceptable for members of the present class to take a large proportion of the estate in preference to members of other classes, it is at least worth considering their inclusion for those cases where there is no competition from other claimants.

The remaining four classes are included because arguments put in present inheritance disputes sometimes attach importance to the factors distinguishing these classes. Thus as between members of the family of the deceased, when it is being decided who is to enjoy property inherited by the family, preference may sometimes be given to the person who falls into one of these classes.

(*f*) Persons prepared to undertake obligations of the deceased which were undischarged at his death.

Thus it is sometimes argued that one who pays off the debts of a deceased should be entitled to his estate.

(*g*) Persons for whom the deceased had affection.

(*h*) Persons who had rendered services to, or had affection for the deceased.

(*j*) Charities.

This follows from the argument sometimes heard that property should pass to those who need it most.

It must be emphasised that this list is not a list of persons who will in fact benefit under any proposals to be advanced. Still less is it intended as a list of persons who ought to benefit. It is merely intended to be a list of persons whose inclusion in any of the possible inheritance schemes to be examined, cannot be shown at the outset to be totally unacceptable to those who eventually determine what the law of Ghana is to be.

The list reduces the number of possible laws, but still leaves a very large number, since there remain all possible ways in which persons on the list may, individually or in any combination, enjoy rights held by the deceased. It would seem that the most fruitful next stage will be to start examining the probable consequences of these alternatives. It would not be practicable to take every possibility singly, and examine its consequences. It should be possible to take each class just listed singly, and examine the probable consequences of law which conferred all or some portions of the estate on various members of the class. As already indicated, this may lead to the elimination of some of the remaining possibilities as unacceptable. It seems likely that

many will remain. But from the investigation there should emerge a number of propositions concerning the probable effects of certain patterns of possible inheritance laws. Since the laws being considered will be mainly potential rather than actual, conclusions as to their consequences will not be reports of observed phenomena. However, the evidence will have to be of existing or past facts, and it is expected that most of these facts will be found in investigations of the present consequences of existing inheritance laws.

Notes

1. "The Challenge of the Rule of Law" (1961) 59 *Michigan Law Review* 603 at p. 605.
2. *The Principles of Morals and Legislation* (1948 Hafner ed.), p. 24.
3. The most concise summaries of the views of this prolific writer may be found in: Pound, Essay in Julius Rosenthal Foundations publications, *My Philosophy of Law* (1941), p. 249; Pound, *Social Control Through Law* (1942), Chaps. III and IV; Pound, *An Introduction to the Philosophy of Law* (rev. ed. 1954), pp. 42-47.
4. It does not seem important to decide whether "person" should be defined to include those groups which in the existing law have corporate personality. If they are not "individual persons," they have their place in the list as "combinations of persons." Provided that they are somehow included, the investigator will have to consider the factual question of the consequences of giving them some or all of the property. One relevant fact will be the existing legal rules governing the management of property held by such persons. The possibility of changing these rules may incidentally be examined.
5. A problem arises if the facts for consideration are defined in relation to the existing law. Since the object of the inquiry is to consider possible changes in the law, existing legal rules cannot be treated as a constant factor. In the present instance it could be argued that this class of persons is rendered limitless by the inclusion of those related by legal adoption to the deceased, because the adoption laws can be changed. It is true that in theory changes in the adoption laws could incorporate any persons whatever into the present class. However, it seems reasonably practical to assume that legal adoption will continue to occur only when special factors are present, and with the main purpose of producing consequences of consanguinity other than a right of inheritance. Hence it may be possible to treat the adoption laws as a constant factor for the present purpose.
6. The comment on legal adoption in the previous footnote applies here to legal marriage.
7. The existing law does not seem to give a person's stool a right of inheritance today, even as *ultimus haeres* on the failure of the family. If a person dies intestate without any known relatives, his land may pass to a stool, but the stool takes as reversioner rather than inheritor. This is shown by the fact that in the case of a stranger to an area the stool which benefits is the stool which originally held the land, not the stool to which the deceased owed allegiance.