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THE WOMEN'S LEGAL RIGHTS INITIATIVE

INHERITANCE LAWS BROCHURE - LESOTHO

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A Task Order Under the Women in Development IQC

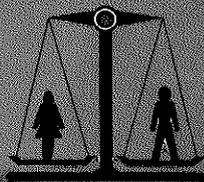
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INHERITANCE LAWS



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1. Introduction

The subject of inheritance remains one which has always been very close to the hearts of many Basotho. It is a matter that is often at the centre of many disputes, some of which end up in courts, for decision by such courts.

Lesotho has a dual legal system, that is, it operates and maintains in parallel two legal systems, the customary law and the common law or the received law system. This topic will therefore deal with both the customary as well as the common law.

Under the common law, the following laws will be discussed:

1. Law of Inheritance Act No. 26 of 1873;
2. Intestate Succession Proclamation No. 2 of 1953;
3. Administration of Estates Proclamation No. 19 of 1935;
4. Land (amendment) Act of 1992, (recognizing the rights of women to inherit residential property); and
5. Deeds Registry Act of 1967

Under the customary law reference will be made to the Laws of Leretholi and to the customary law and practice as it has evolved over time.

2. CUSTOMARY LAW:

The majority of Basotho still practice a customary way of life hence their inheritance is still governed by the customary law.

Succession under the customary law is patrilineal. Customary inheritance law, as a general rule restricts inheritance to males. The first male child is regarded as the heir and in a polygamous marriage, the heir is determined in accordance with the priority of the mothers' marriages to the deceased, while recognizing that each wife constitutes a house and her son will retain the administration of the property belonging to that house.

The death of a member and head of the family means that someone has to take over the administration of the family property for the family.

2.1 Objectives of Customary law of inheritance

The two major objectives of Sesotho customary law of inheritance are:

- Firstly, to determine the identity of the person designated as heir (mojalefa); and
- Secondly, to spell out and enforce his rights and responsibilities in relation to the other members of the deceased's family.

2.1.1 Identity of the heir

The first objective of the customary inheritance law is easily achieved as the law has already given guidelines as to how the heir will be identified.

According to the Laws of Lerotholi, the heir is the eldest male child. In the event of more than one customary marriage, polygamous marriages, each house's estate will be administered by the eldest male child born to the respective wife/ widow. The eldest son in the first house will then be the universal heir.

In the event that the deceased left no male issue, the law stipulates the hierarchy that has to be followed to determine the identity of the heir.

The courts have however been very reluctant to leave the widows destitute, and out of practice, which has now also become custom, a widow who has no male children inherits on the basis of usufruct and administers her late husband's estate in consultation with her husband's male relatives.

Customary law stresses the concept and process of consultation as a very important pillar in dealing with issues of inheritance.

The Laws of Lerotholi, while recognizing the position and the role of the heir and the deceased husband's brothers, provide that the issue of inheritance should always be resolved through consultations within the family structures before it goes to the courts of law.

The Laws of Lerotholi further provide that where the deceased has left written instructions, such written instructions should be followed unless they deprive the customary heir of more than half of the deceased's estate.

2.1.2 Rights and responsibilities of the heir

That heir is expected to use the estate, lefa in consultation with his father's widow and to share that estate with his junior brothers. The heir does not have unfettered and absolute

rights over the estate, he has obligations towards other members of the family and the property does not really belong to him alone but his obligation is to administer it on behalf of the family, and in the best interests of the family. An heir also has to settle the liabilities and take responsibility for the family.

As shown above, it is the first born male child who is entitled to succeed as an heir to the deceased's estate, and who is expected to look after the widow and his brothers as well as his sisters, and to give some share of the estate to the younger brothers, although it would seem that it does not matter how big the shares should be.

Some of the duties of a customary heir are the following:

- (a) to acquire and take charge of the deceased's estate;
- (b) bury the deceased, in conjunction with other members of the family;
- (c) to collect the debts owed to the deceased and to pay the deceased's creditors;
- (d) as mentioned already, to step into the deceased's shoes and perform all of the deceased's obligations in relation to the estate and the dependants.

2.2 Women

Customary law regards women as minors, married women as minors and dependents of their husbands while unmarried women, dependants of their fathers, brothers or of some male relative.

Under customary law single women could not inherit from their fathers. Consequently, daughters, whether married or not could not inherit as heirs. However, during his lifetime, a father could and can make gifts of his property to his daughters.

The position of the widow has however always been protected under customary law in that the Basotho customary law courts have almost always held that an heir can only take over the deceased's estate after the widow's death and not during her lifetime. Consequently, a widow has the usufruct right, that is, she can remain on the property and make use of all the property, in consultation with her sons and /or the male relatives of her late husband.

Where the widow dies, leaving no son, the family property will go to the nearest next of kin, in the husband's family, who qualifies as such.

2.3 Written Instructions

Section 14(1) Part 11 of the Laws of Lerotholi, provides that a husband can make and leave written instructions allocating his property. These written instructions should however not deprive the heir of more than half of the deceased's property.

These written instructions are not a will to be registered by the Master of the High Court's office, but should be kept safely and will only be carried out in so far as they do not deprive the heir of more than half of the deceased's estate.

Subject to this qualification contained in the Laws of Lerotholi, and subject to the qualification on women, every Mosotho has a right to dispose of his property as he deems appropriate.

2.4 Administration of the Estate by the Master

Under Basotho custom, there is no requirement on the heir or on the widow to report the deceased estate to the Master of the High Court. This may in part be due to the fact that the Administration of Estates Proclamation applies only to those Basotho who are said to have abandoned the Sesotho way of life and are living according to a European way of life, or it could also be in part due to the fact that ordinary Basotho find it too cumbersome and costly to realize the deceased's estate.

As already said, under Basotho law and custom consultations form a cornerstone of every decision making process.

2.5 Conclusion

It can be seen from the Laws of Lerotholi that the rights of a customary heir are protected by custom, even to the extent of nullifying the deceased's instructions in so far as they deprive the customary heir of more than half of the deceased's estate.

It can be observed further that:

- the local courts are very reluctant to deprive a widow of the deceased of the assets of the estate and give them to a male heir during the lifetime of the widow, this position has indeed been confirmed by higher courts;
- the widow has usufruct rights over the property until her death;
- in the case of any disagreement as to who has to succeed the deceased as the heir to the estate, customary law regards consultations amongst the deceased's family members as of paramount importance before any such disagreement can be taken to the courts;

- under customary law a father can, during his lifetime make gifts to his daughters; and
- there is no requirement under customary law to report the deceased's estate to the Master for the appointment of administrators of the deceased's estate.

3. The COMMON LAW

The law of inheritance under the common law is governed in the first instance by the "received law" which was introduced in Lesotho through Proclamation 2B of 1884 as the law that was for the time being in force in the Cape of Good Hope.

This law created dualism in Lesotho's legal system. In addition to that law, there are also specific laws that deal with inheritance.

These are the laws mentioned above, and these are:

- Law of Inheritance Act No. 26 of 1873;
- Intestate Succession Proclamation No. 2 of 1953; and
- Administration of Estates Proclamation No. 19 of 1935.

There are also other laws that come into play on this subject, although not primarily concerned with inheritance as such, these are:

- Land (amendment) Act of 1992; and
- Deeds Registry Act of 1967

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3.1 Objectives of the common law of inheritance

The objectives of the common law of inheritance are the following:

- to regulate inheritance where such inheritance has been provided for under a Will (Inheritance Act);
- to regulate inheritance and determine the identity of the heirs and how the deceased's property should be shared amongst them (Intestate Succession Proclamation); and
- to regulate the administration of the estates of the deceased persons (Administration of Estates Proclamation).

Collectively these laws are concerned with the identification of the rightful persons entitled to inherit or share in the deceased's estate and how such an estate should be managed.

3.2 Inheritance Act

This law regulates inheritance and affirms freedom of disposition of property by last will and testament. It deals with inheritance where the estate in question is to be dealt with under a will.

This law provides that every person who is competent to make a will, is given full powers to do so.

3.2.1 Identity of the heir and his responsibilities

Section 5 of the Act provides that a person may by a will, bequeath his/her property to anyone he/she chooses. It provides that a person may, in a will disinherit anyone, omit to give anyone anything, omit to mention any child, a parent, relative or descendant, without assigning any reason for such disinheritance or omission.

It further provides that a will shall not be set aside because of any of these aforementioned reasons.

This law provides that no person shall be entitled to any portion of the deceased's estate, only by reason that he has been given some entitlement by any law. An heir will only be entitled to inherit where such entitlement stems from under this law.

It provides that no one shall claim, as of right, any portion out of the estate of any one who has made a will as to how his estate should be dealt with upon his/her death, unless such right emanates from such a will.

The person entitled to share in the deceased's property, is therefore whoever the deceased has mentioned in the will, and then to the specified extent, share or proportion of the property.

The law then concludes by containing two provisos, which are that, it shall not alter the laws of inheritance where there is no will and that it shall not affect the laws relating to community of property between spouses.

On the face of it, the law entitles anybody to deal with their property by will as they choose. It entitles anybody to inherit, both male and female. Under this law both males and females can make a will and can inherit.

3.2.2 Proclamation 2B of 1884

This Proclamation, which is the law that introduced the law of the Cape of Good Hope as

the common law of Lesotho provides that:

"In any suit, action or proceedings in any court to which all the parties are..." African that customary law may be applied.

The effect of this provision has been to allow customary law to be applied wherever the circumstances of a particular case are appropriate. There are no guidelines as to how the choice between the two legal systems is to be made.

Because of the provisions of this Proclamation, there have been controversy as to whether, therefore the provisions of the Inheritance Act override Section 14(1) Part 11 of the Laws of Lerøtholi, which provides that the deceased's written instructions should only be carried out in so far as they do not deprive the heir of more than half of the estate.

There is still a controversy that the making of a will is open only to those Basotho who have abandoned the Sesotho way of life and live (d) a European way of life. This could be in part one of the reasons why most wills still have a preamble justifying why the testator was entitled to make a will.

This view is further strengthened by the provisions of the Administration of Estates Proclamation which will be discussed below.

On examination of the Administration of Estates Proclamation, it will be seen that the Proclamation specifically excludes the administration of estates of those Basotho who are said to not have abandoned the Sesotho way of life. In their case the customary law will be applied.

Subsection 3(b) of the Administration of Estates Proclamation provides that the Proclamation shall not apply to:

"to the estates of Africans which shall continue to be administered in accordance with the prevailing African law and custom of the Territory: Provided that such law and custom shall not apply to the estates of Africans who have been shown to the satisfaction of the Master to have abandoned tribal custom and adopted a European mode of life, and who, if married, have married under European law."

3.2.3 Conclusion

The effect of Proclamation 2B of 1884 has been to cast doubt on whether or not the Inheritance Act does apply to every Mosotho without exception, overriding the Laws of Lerøtholi which provide that an heir should not be deprived of more than half of the deceased's estate.

The view that not every Mosotho can make a valid will is further strengthened by the

provisions of the Administration of Estates Proclamation as has been explained above

Consequently it is not very clear cut whether every Mosotho's will can be executed after his/ her death, and in fact there have been a number of cases decided by courts on the issue. The crux being on whether the testator had or had not abandoned the customary way of life prior to his/her death.

3.3 Intestate Succession

Intestate succession relates to inheritance under the common law in circumstances where the deceased has not left a will. The law applicable here is the Intestate Succession Proclamation of 1953.

The Proclamation provides that:

3.3.1 Identity of the heir

Where a deceased dies intestate, or partly intestate, that is, without leaving a will, or where there is a will and that will does not cover all of the property, then the property goes to the deceased's spouse subject to the following qualifications:

3.3.2 Sharing of property with others

This provision is subject to the following qualifications:

- If the spouses were married in community of property, and the deceased spouse also leaves behind a descendant who has a right to inherit, when the deceased dies intestate, then, the surviving spouse receives her/his half share of the property. The other half of the property is divided equally between the spouse and the children, so the surviving spouse also gets a child's share of the remaining property;
- If the spouses were married out of community of property, and the deceased spouse leaves a descendant who is entitled to inherit if the deceased dies intestate, then the spouse shares equally in the property with the deceased's children, the surviving spouse also still keeps her/his own property;
- Whether the spouses were married in or out of community of property, if when the deceased dies, he leaves no descendants, who

are entitled to inherit from him when he dies intestate, then the surviving spouse will get half of the deceased's property and the other half will go to the parents or brothers or sisters if there are any and if they are entitled to inherit;

- Where the deceased does not leave any descendants nor parents, nor any brothers or sisters who are entitled to inherit, then all of the property is inherited by the surviving spouse.

The Proclamation also provides that any adopted children will be treated as if they had a blood relationship with the deceased.

This Proclamation also makes a very important point that it shall not apply to the succession of the estate of any Mosotho unless that Mosotho had abandoned the Sesotho customary way of life.

This Proclamation emphasizes the provisions of section 3 (b) of the Administration of Estates relating to which estates are to be administered by the Master's office.

3.3.3 Administration of Estates by the Master

Only those estates that qualify the test set by section 3 (b) of the Administration of Estates Proclamation qualify to be administered by the Master under the Proclamation, otherwise all other estates remain to be administered according to the customary law as discussed above.

3.3.4 Conclusion

A surviving spouse is entitled to share in the property of his / her deceased spouse in a manner shown above whether or not the spouses' marriage was in or out of community of property.

The Provisions of this Proclamation, the sharing referred to above, will only affect the estates of those Basotho who pass the test of having abandoned the customary way of life. To all other Basotho, their estates will be administered according to the Sesotho customary law referred to earlier.

3.4 Land (amendment) Act 1992

This law makes it possible for widows to inherit residential property.

3.5 Administration of Estates Proclamation

3.5.1 Objective

The objective of the Administration of Estates Proclamation is to make provision for, amongst others, the administration of the estates of deceased persons and minors and to regulate the rights of beneficiaries under mutual wills made by persons married in community of property.

3.5.2 The Proviso, section 3 (b)

Section 3 (b) of the Proclamation provides that the Proclamation shall not apply to the estates of those Basotho who had not abandoned the customary way of life and who had not adopted the European way and of life. To the estates of those Basotho, the customary law shall be applied.

3.5.3 Part 1: Administration of the Proclamation

The Proclamation is administered by the office of the Master of the High Court and her assistants. This is an office that is a government office in the office of the Attorney General, despite its title, it is not in the High Court.

3.5.4 The Master of the High Court

The Proclamation establishes the office of the Master of the High Court.

The Master's office supervises and oversees the administration of the estates of deceased persons and minors.

- It appoints and confirms executors of the deceased's estates;
- It records and keeps a register of executors to whom letters of administration have been issued;
- It keeps a record of wills and death notices;
- It appoints persons as appraisers for the valuation of deceased persons' property; and
- The office can charge prescribed fees for any services it performs.

3.5.5 Part 11 Estates of Deceased Persons

- (a) **Death Notices:** A nearest relative or a person who has control of the premises where the deceased died, is required to, report the death of any person who dies leaving property or a will, within 14 days of such death, to the office of the Master or if the death occurs in the districts, to the district administrator's office. The Master has a right to request such further information as may be appropriate.

- (b) Wills: Any person may lodge a will with the office of the Master which shall register such a will.
- (i) a person who has a deceased person's will in his possession, is required to deliver such will to the office of the Master or to the district administrator's office as soon as possible after the death of the testator;
 - (ii) a search warrant may be issued for the search of premises wherein it is believed that a will may be concealed;
- (c) Inventories: Where a person dies, if the parties were married in community of property, the surviving spouse shall, within six weeks of such death cause an inventory to be made of the property which at the time of death belonged to them. If parties were married out of community of property, the surviving spouse or child or nearest relative, shall cause an inventory of the property that belonged to the deceased to be made. Such an inventory shall forthwith be delivered to the office of the Master. The Master has power to appoint a person to take the inventory.
- (d) Custody of Estate Pending issue of Letters of Administration
On the death of one of the spouse, the surviving spouse or in his or her absence, a child or nearest next of kin, shall take possession and control of the deceased's estate until the Master appoints an executor for the administration of the estate. There are penalties for persons who dispose of the assets of the estate without authority.
- (e) Letters of Administration: The office of the Master is responsible for the issuing of letters of administration to persons who have been appointed as executors. On good grounds shown, such as the instructions of a valid will, the Master may withdraw the letters of administration. The master may also require security to be furnished in respect of the administration of an estate.
- (f) Taking over of Estate by Surviving Spouse; Section 51 permits the Master to authorize the executor to hand over the property of the deceased to the surviving spouse if by so doing, no person would be prejudiced.
- (g) Surviving Spouse to Administer Minor's portion: Unless provided otherwise by a will, the surviving spouse is entitled to receive from

the executor and retain for and on behalf of his or her minor child such sums as are due to that minor child.

- (h) **Survivor's Rights to Deal with Communal Property:** If the parties were married in community of property, the surviving spouse is prohibited from transferring or mortgaging any immovable property belonging to the joint estate, without the prior consent of the Master, even if such property is registered in the name of that surviving spouse.
- (i) **Remarriage of Surviving Spouse:** Whenever a surviving spouse who has minor children intends to marry someone else, such a surviving spouse has to discuss the matter with the Master and get a certificate from the Master. If a surviving spouse re-marries without obtaining a certificate from the Master he or she may forfeit certain portions of the estate and may also incur certain penalties.

3.5.6 Part 111 Estates of Minors:

A father or a mother (where the father is dead or mother has been awarded custody of the minor) may nominate any person to administer and manage the estate of the minor child. The Master may then, on application issue out letters of confirmation to such a tutor before he can start administering the estate.

The office of the Master is given powers to oversee the administration of the estates of minor children.

Where it comes to the knowledge of the Master that property has passed to a minor child who at the time is not under the guardianship of a parent or tutor testamentary, the Master shall, in consultation with the minor child's relatives, appoint a person to administer and manage the estate for and on behalf of the minor child.

The appointment or confirmation of any person as a tutor may be terminated by the Master or a court of law if good grounds exist.

Letters of confirmation shall not be issued to women married in community of property or to women married out of community of property where the marital power of the husband is not excluded, unless such a woman has received her husband's written consent.

3.6 Deeds Registry Act

The Deeds Registry Act is one of the pieces of legislation which imposes conditions on the inheritance rights of married women. This Act imposes some conditions under which immovable property can be registered in the name of a married woman. Section 14 sub-section (2) provides that a woman married out of community of property shall be assisted by her husband in executing any deed in the deeds registry, unless the husband's marital power has been excluded.

Sub-section 14 (3) provides that immovable property, bonds or other rights shall not be transferred or registered in the name of a woman married in community of property, unless such property have been under any other law or by a will, been excluded from the community.

Sub-section 14 (6) authorizes the registrar of deeds to refuse to register except when compelled by a court order, all deeds in favour of a married woman whose rights are governed by Basotho law and custom where such registration would be in conflict with Basotho law and custom.

The import of this law is therefore that it is difficult for married women to have immovable property registered in their names. Therefore even where a parent has left immovable property for his married daughter, unless certain conditions are complied with, such property can not be registered in the name of that married daughter. Worse still the choice of law issues also comes into play, and in cases where the registrar is of the view that the affected woman's rights are to be governed by Sesotho law and custom, the law authorizes the registrar to refuse to register the property in the name of that woman.

4. In A Nutshell

4.1 Under customary law

- The first male child is the heir;
- A widow can inherit her husband's property and administer it in consultation with her husband's male relatives (usufruct rights);
- As a general rule a married woman has no title to immovable property which she can pass on to other people as inheritance;
- As a general rule a female person cannot inherit property
- A father can during his lifetime make gifts of his property to his daughters;
- Under the Laws of Lerotholi, a man can leave written instructions allocating his property, those instructions should however not

- deprive the heir of more than half of the deceased's property; and
- The heir must use the inheritance for the benefit of his late father's dependents and share the inheritance with his brothers.

4.2 Under the Common Law

4.2.1 Testate Succession

- Any eligible person, (above the age of 16 and with legal capacity) can make a will;
- Where there is a will, the instructions of the deceased are executed;
- Where a deceased dies leaving a will, the wife or person in charge must report the death to the Master of the High Court and get further guidance on other steps;
- There will be appointment and/or confirmation of executor by the Master for dealing with the deceased's estate

4.2.2 Intestate Succession

Where the deceased died without leaving a will the following applies:

- The estate must still be reported to the Master of the High Court;
- The Master will appoint an executor to administer the estate
- The property will be shared in such proportions as are stipulated by the law, amongst all the entitled dependents;

4.2.3 Administration of Estates

This Proclamation applies to both testate and intestate inheritance. It regulates the manner in which estates of deceased persons have to be administered. It establishes the office and gives powers to the Master of the High Court to oversee the administration of deceaseds' estates and protect the interests of minors, particularly the OVCs.

4.2.4 Deeds Registry Act

The Deeds Registry Act still makes it difficult for married women to register immovable property in their own names. The Act still requires that such women should be assisted by their husbands. This Act is still detrimental to the rights of women and OVCs.

5. Conclusion

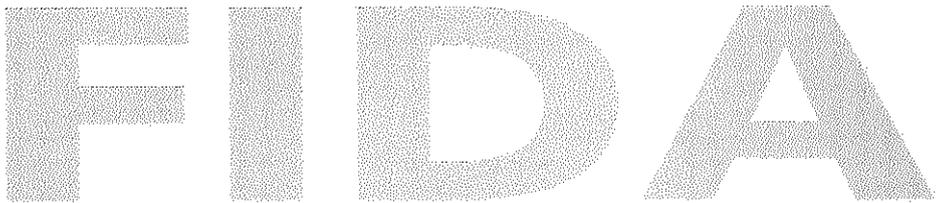
In conclusion it can be observed that as a consequence mainly of the legal restrictions

making women minors, women are not able to deal with their property as they otherwise would. Under both the customary law and the common law as a general rule women still need to be assisted in any decisions they make regarding property.

Under customary law, the male relatives are often the ones who make the major decisions over the property of the deceased, in some cases, such decisions are not made in the best interests of the orphans or vulnerable children.

There are a number of laws that need to be changed so that the situation can be reversed or rectified.

There are already Bills on the Married Persons Equality and the Land Bill which will amongst other things, remove the husband's marital power, and give women and men equal participation in land administration respectively.



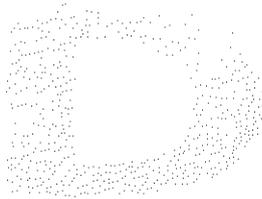
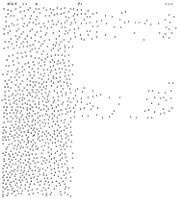
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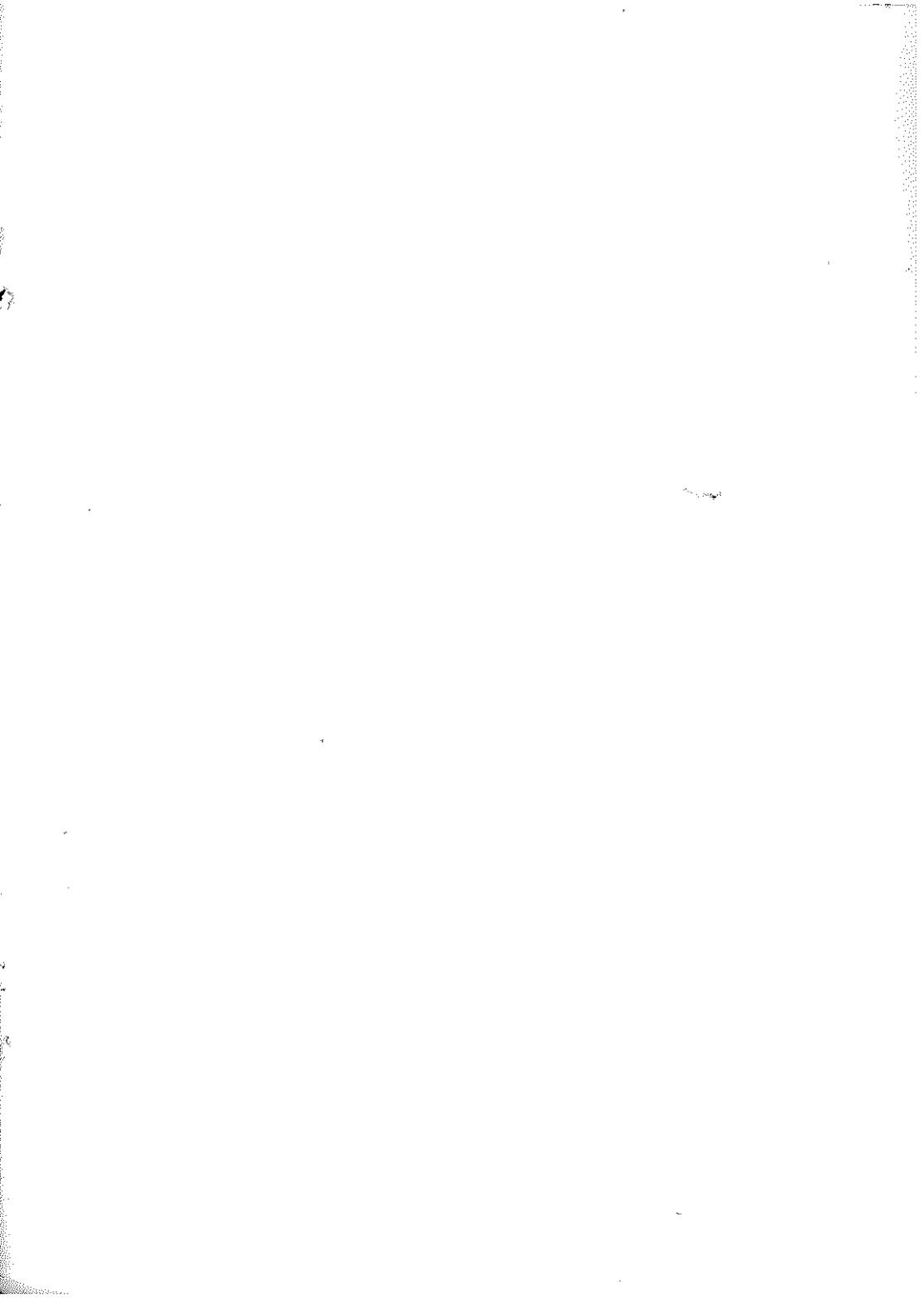


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