

A Critical Analysis of the Impact of the Common Law on African Indigenous Law of Inheritance: A case study of post-colonial legislation in Zimbabwe.

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ABSTRACT

The study looks at the main features of African indigenous law of succession and inheritance in Zimbabwe. It draws a distinction between the forms of inheritance practised between the two major ethnic groups, the Shona and the Ndebele. Whilst the research was mainly aimed at these two groups an investigation into inheritance practice by the South African Zulu and Xhosa counterparts was also made. An investigation into the impact of western influence on succession and inheritance was made taking a look at colonial legislation and case law, the general deduction being that it was a vehicle for attaching customary law to a western type law. After independence there was the issue of the impact of constitutionalism and international human rights law on succession in post colonial Zimbabwe. These were tools for change by bringing in notions of equality between men and women, issues that were highlighted in the cornerstone case of *Magaya v Magaya*, which was in turn discussed in the light of the *Mthemu v Letsela* and *Bhe* trilogy of cases in South Africa. In the final chapter there is a discussion of possibilities of reform and the future of customary law in Zimbabwe the highlight here being conducting proper legal research to ascertain the true purpose of custom.

CHAPTER 1

1. INTRODUCTION

1.1 BACKGROUND TO THE STUDY

Many post-colonial states and legal systems continue to face challenges in harmonizing legal systems in such a manner that they are inclusive of indigenous African systems while also continuing to implement predominantly colonially inherited justice systems such as Roman-Dutch law as well as international frameworks. Inheritance laws have continued to highlight the challenge that many such states face, especially with increasing emphasis on and promotion of gender equity and the empowerment and development of women to actively participate in mainstream economy and governance of states. With the changing roles of women in society, inheritance laws based on customary law have left many women disempowered due to the patriarchal or patrilineal systems in most African societies.

With the effects of HIV/AIDS and higher mortalities, cases where inheritance is disputed based on the gender of proposed heirs have been on the increase, and with the slow disintegration of the extended family support structures, many women are left indigent upon the deaths of spouses as they are disenfranchised to take control of their husbands' estates. The inspiration behind the study emanates not only from the lack of harmony between the Common Law and Indigenous Law of inheritance but from the controversial decision in the case of *Magaya v Magaya*¹. The

¹ 1999 (1) ZLR 100 (S), the decision was controversial because women's rights groups, lawyers, law professors, and human rights organizations were so outraged by the decision that they

issue was whether a daughter could be heir to her deceased father's estate in a case where there are male children of the deceased. The problem is that in the court's decision, customary law as applied preferred male heirs to female heirs. The judgment undermined the authority of Parliament by nullifying the greater part of a statute, The Legal Age of Majority Act² of 1982, which accorded majority status to everyone upon attainment of 18 years of age, a provision excluded by the judge in his decision. In terms of section 15(3) of the Act, the provisions were applicable for the purpose of any law including customary law.

The decision in *Magaya* also had an over-reliance on provisions of the Administration of Estates Act of Zimbabwe stating that, "*If any African has contracted a marriage according to African law or custom or who, being married according to African custom, dies intestate his estate shall be administered and distributed according to the customs and usages of the tribe or people to which he belonged.*"³

It was an equally retrogressive precedent in erasing the progress made in advancing the status of rights of women in independent Zimbabwe, and therefore heightened contradictions in Zimbabwe's own internal law, its international law obligations and what Zimbabwe's legal

declared their opposition to the Court's findings. These critics alleged that the decision violated fundamental issues of fairness, international norms and rights, and even customary law itself and that the decision was a direct attack on the rights of Zimbabwean women to inherit. The effectiveness of Constitutional provisions to ensure women's rights and the applicability and enforceability of international treaties in Zimbabwe was therefore questioned cf discussion of *Magaya's case* pg 82 ff *infra*

² The Legal Age of Majority Act 15 of 1983

³ Section 68(1), Administration of Estates Act (Chapter 6:01)

system practices in reality. Hence the harmonization of various legislative systems which are informed by variant ideologies and belief systems continues to be a challenge in Zimbabwe.

At Common law the discretion to bequeath one's assets is that of the deceased. He may at any point during his lifetime state how he wishes his property to be distributed amongst any heirs mentioned in his testament.⁴ On the contrary in terms of Indigenous Law, tradition dictates how a deceased's property will be distributed, the authority being traditional practices that have been at the centre of peoples' lives for centuries. As this study professes the interaction between the two legal systems is sought to be brought out more fully.

1.2 STATEMENT OF THE PROBLEM

The fundamental question to be asked is whether it is possible to harmonize the Common Law and Indigenous Law in terms of inheritance in the post-colonial legal system. Nherere⁵ points out

⁴ As to the position in South Africa see AJ Kerr, *The Customary Law of Immovable Property and of Succession* (1990) 113 and the cases cited therein, the author says, it is true that the head of a household can make arrangements for the distribution of his estate by various types of oral disposition but these are not the same as wills, because he may not disregard the usual order of intestate succession

⁵ P Nherere, *The limits of litigation in human rights enforcement*, 6 Legal Forum No. 3, 1994, pg 30-31, the writer goes on to say that, international conventions tend to be couched in exhortative generalities meant to set standards and goals to be attained, rather than concrete rules, see also discussion on human rights perspectives in 4.2.2 Chapter 4 *infra*. This raises difficult questions about the relationship between human rights and culture. The Zimbabwean constitution is said to be culturally relative cf discussion of its constitution in 4.2 *infra*, and thus insulates customary law from the application of the norms of equality and international human rights norms making harmonization difficult in this context. On the other hand, harmonization of customary law with fundamental rights in the South African context is imminent but awaits to be seen with its culture of universality of human rights and rights to culture. I am of the view that if customary law can

that in making efforts to draw the two systems of law together, their conformity with international statutes and Conventions cannot be ignored. As there will almost always be conflict when two legal systems run parallel to one another, another question that can be raised is whether policy makers can devote their energies to drafting new legislation that is not only gender sensitive but accommodates rights of the child as well.

It is equally important to investigate whether the courts should continue to enforce the disinheritance procedures as distinctively customary methods for varying the rules of intestate succession or should only the Common Law only be recognized. One may then ask if these procedures must be subject to any form of regulation. With regards to issues surrounding inheritance, can it then be said that a widow should be entitled to inherit at least a portion of her deceased husband's estate. If widows are not allowed to inherit should they, none the less, be given greater rights in the estate and better powers to control the heir's management of estate assets?

While we need to know more about the customary law rules regulating succession to women's estates, we ask ourselves if different systems of succession, distinguished only by the deceased's gender should be maintained. If it is felt that only one system of rules is now necessary then more questions arise whether succession issues should be gender-based, or, succession for women should be the same as succession for men or whether a new, harmonized law should be formulated.

endure the harmonization process, then all uncertainty about its continued existence in a human rights legal order will become pointless.

With regards to the power to make wills, there is a need to understand whether people subject to customary law should have the power to make wills taking into cognizance broader policy considerations concerning freedom of testation. Should individuals be entitled to disregard the interests of their intestate heirs? A deduction in the final analysis will be made that, in any conflict of laws situation, the ultimate goal is to ensure that justice is done rather than injustices due to the rigid application and interpretation of relevant systems of law in any dispute. Subsequently there is a need to analyze the various attempts made in Zimbabwe to address the gap some of which, though not wholly perfect, are in the form of legislative reform and judicial creativity or conservatism and the work of women and children's organizations⁶.

1.3 JUSTIFICATION OF THE STUDY

The study is of course justified by several considerations. First and foremost is the need to determine whether certain principles and practices carried in inheritance laws can be compromised to initiate a possible process of transformation without the consequences of disharmony with parallel systems of law. In the process of a social transformation, the study should rally behind, uplift and consolidate the work advocated for by women and children's organizations ensuring their participation in the legislative process.⁷

⁶ Canaan F Dube, "Addressing the Gap Between Customary and Statute Law and International Conventions: Zimbabwe's Twists and Turns," CHOGM Conference, Durban, November, 1999

⁷ Some of the organizations at the forefront of advocating for women and children's rights are the Zimbabwe Women Lawyers Association that seeks to enable women and children to assert their rights by accessing the relevant legal resources. The organization also seeks to uplift the legal status of women and children in Zimbabwe by providing advocacy services in areas pertaining to children/youth; democracy/good governance; education/training; human rights; women

1.4 DELIMITATION OF THE STUDY

The study will essentially focus on the written inheritance laws in three main provinces in Zimbabwe which are geographically adjacent to each other. These are the Midlands province which is predominantly comprised of the Shona and Ndebele, Masvingo province which is a Shona region with Karanga being the primary dialect and lastly Matabeleland North province which is mainly Ndebele.

1.5 REVIEW OF RELATED LITERATURE

Much work has been written on the subject. May⁸ in his work, recognizes the social and economic implications of the application of traditional legal practice to African women in the changing socio-economic context of Zimbabwe's past, and the significance of such practices for social and legal planning.

The Women and Law in Southern Africa Research Trust⁹ has contributed significantly on the subject. In their text, *Inheritance in Zimbabwe Law, Customs and Practices*, after a two year research project the general laws of inheritance and their effects on families were investigated. The most significant of the findings was the divergence that exists between the laws applied by the courts and people's practices when it came to administering a deceased's estate.

⁸ J May, *Zimbabwean Women in Colonial and Customary law*, (1983), May is a senior Research Fellow in the Centre for Applied Social Sciences at the University of Zimbabwe.

⁹ K Zvobgo and Others, *Inheritance in Zimbabwe Law, Customs and Practices*, (1996)

The Harvard Human Rights Journal has played a more analytical role of the problem by focusing on the socio-legal significance of the controversial *Magaya* case. The analysis goes a long way in dissecting the origins of customary law in Zimbabwe, the introduction of Colonial law and the subsequent confusion that arose as the courts faced a dilemma on which system of law apply.

South African indigenous laws of inheritance will be used as a matter of comparison. Koyana¹⁰ in his work, refers to the calabash custom (*isiphipha*) which holds that the deceased may allocate some of his belongings to his wife. This form of inheritance is well known amongst the Mpondo and the Bomvana but an exception amongst the Xhosa.¹¹ There is an endeavour to effect some balance by allowing the husband to donate a female beast to his wife which will be inherited by the youngest son, not the eldest, as in most circumstances of customary inheritance in terms of a custom called *isicino*.

Church¹² referring to legal dualism puts forward a progressive truth that the existence of African indigenous law as a whole alongside the 'General Law' (Common law) is evidence of cultural diversity. However, the tendency in the colonial era was that the Common law would be deemed, or rather was by default, the dominant law, whilst indigenous law was the servient law. This is a position which needs correction and legal certainty, particularly when presiding officers find themselves having to largely rely on a judicial discretion.

¹⁰ D S Koyana, *Customary Law in a Changing Society*, (1980) 80

¹¹ See also on *isiphipha* beast, Kerr *Immovable Property* 3 ed 102 and the cases cited in the footnote

¹² J Church, The place of indigenous law in a mixed legal system and society in transformation, Australian and New Zealand Law and History Society e-Journal (ANZLH E-Journal), 2005

Tetley¹³ suggests that, jurisdictions such as Zimbabwe where legal dualism or pluralism exists, there is need to adopt a system of internal conflict rules as a measure to alleviate the confusion that may arise as to on which system of law best suites the merits of controversial cases avoiding the impact of negative public outcries and ensuring that the litigants and affected parties understand the application of these conflict rules and their interest that justice is done.

However, most text book writers seem to hold a very conservative stance as to the content and application of customary rules of inheritance. Bennett is of the view that customary law of succession is intestate, universal and onerous. Upon the death of a family head his oldest son, (if the deceased had more than one wife, it would normally be the oldest son of his first wife) succeeds to the status of the deceased. The emphasis on the term ‘status’ implies that a heir inherits not only the deceased’s property but also his responsibilities, in particular his duty to support surviving family dependants.¹⁴ Goldin and Gelfand’s¹⁵ work will be useful in giving the research an analysis of particularly Shona and Ndebele customs, which, though significantly the same, have differences that are worthy to note.¹⁶

The relationship between the customary law of succession and international human rights law shall also be visited. In this regard, there is some literature worthy to note from the Arab world

¹³ W Tetley, *Mixed jurisdictions: Common law vs Civil law (codified and uncoded)*, Part I at: <http://www.unidroit.org/english/publications/review/articles/1999-3.htm#NR2>

¹⁴ T W Bennett, *Human Rights and African Customary Law Under the South African Constitution*, (1995) 126

¹⁵ B Goldin and M Gelfand, *African Law and Custom in Rhodesia*, (1975) 284

¹⁶ see Kerr *opcit* at 109-110 and 113-118 where the author talks about the allotment of property before death and a system of oral dispositions respectively

and among these writers is An-Na'im¹⁷ of the Arab world, who makes a persuasive argument for the dynamic concept of internal “cultural transformation” as the most convenient assurance of entrenching human rights in African societies. His argument is that culture has a significant effect on human rights paradigms around the world and that, as such, culture is the best-suited vehicle for protecting rights.

1.6 **RESEARCH METHODOLOGY**

The study will be anchored on documentary analysis, the primary focus being textbook authors in Zimbabwe and South African writers for the purposes of comparison. Relevant legislation shall be incorporated as well as documentary analysis of legal forums from Zimbabwe and journal articles. Thus a comparative approach shall be adopted to add depth to the study revealing the interplay between customary law and the common law inheritance laws and their possible harmonization.

Case law shall be employed to exemplify the true situation in legal reality, the *Magaya* case acting as the cornerstone and landmark decision prompting the purpose of this study. South African case law will also be used as a basis for comparison, to highlight differences and similarities in the way the courts in both Zimbabwe and South Africa exercise their judicial powers in adjudicating upon cases where both the Common Law and Customary Law are applicable but the inclination leans towards application of customary as in the South African

¹⁷ A A An-Na'im, Human Rights in the Arab World: A Regional Perspective, Human Rights Quarterly 23, 2000

cases of *Bhe and others v The Magistrates, Khayelitsha and Others*, *Shibi v Sithole and Others* and in *South African Human rights Commission and Another v President of the Republic of South Africa and another*¹⁸, cases that raised the constitutionality of the principle of male primogeniture.

Initially the study was intended to be essentially a qualitative research design anchored on interviews with traditional leaders and focus group discussions involving a case study method. However, for the purposes of convenience and feasibility, I decided to abandon this method. The main provinces designated for the research will be a sample of the dominant ethnic groups as mentioned in the delimitation of the study and as such their written traditional laws on inheritance will be my focus.

1.7 ETHICAL CONSIDERATIONS

In carrying out the research any legal propositions that may suffice should not be a deliberate attempt to undermine the laws of Zimbabwe or any other country's inheritance laws discussed for the purposes of comparison. On the contrary the study should restrict itself to being more of an analysis that can in turn improve the literature on the subject of inheritance laws in mixed jurisdictions for the benefit of policy makers and activists.

¹⁸ 2005 (1) BCLR, 2005 (1) SA 580 (CC); 2008 (9) BCLR 914 (CC)

CHAPTER 2

MAIN FEATURES OF AFRICAN INDIGENOUS LAW OF SUCCESSION AND INHERITANCE IN ZIMBABWE

2.1 ADELPHIC AND LINEAL SUCCESSION

2.1.1 The Shona

Among the Shona society, upon the death of a patriarch, customary law required that the livestock, which were perceived to be the most important property in the predominantly agrarian society, and other family property, be inherited by male relatives in the same generation in terms of collateral concession.¹⁹ Property such as livestock and essential foodstuffs which served organic or ritual needs had communal value and was therefore regarded as part of the family estate.²⁰ Property vested in the family was administered on its behalf by the head of the family, and thus the organic part of the estate of a deceased male family member would, in Shona law be administered in the family interest by the living family head who would in most cases be the deceased's father, one of his uncles or his brothers depending on the circumstances peculiar to each case.²¹

¹⁹ J F Holleman, *Shona Customary Law*, (1952) 322, 'collateral concession' refers to a system in which the throne/chieftanship, status of the deceased or his assets are passed on, not linearly from father to son, but laterally from brother to brother and then to the eldest son of the eldest brother who had died

²⁰ *Ibid*

²¹ May, *Colonial law* 52. The author says, "whoever inherits the position of the head of the family inherits the 'organic' property and administers it on behalf of the family. It is on this basis

This state of affairs then justifies the reasoning by Rundt²² who writes of what he terms ‘adelphic’ succession, where the inheritance of the family passes to the heir following collateral rather than a lineal form.²³ However as shall be seen in the next chapter which focuses on the impact of western influence on succession and inheritance, there are certain instances where the eldest son is allowed to inherit.²⁴

2.1.2 **THE NDEBELE: Lineal Succession**

However among the Ndebele of the south, an interesting feature more inclined to being lineal succession surfaces. There is an apparent descent from an ancestor down through a series of male links, that is, through the ancestor's son, his son's sons, his son's sons' sons, etc. The eldest son of the house took both his father's name, on the one hand, and the property that he left on the other. Each wife establishes a house or independent family and economic unit. Thus if a man has three

that a dead man's brother will claim his property, even though strictly speaking it may not come into the category of property which was formerly considered to be for the common good of the family, which is the reproductive or organic property.” The organic property here refers to the part of the deceased's estate, that comprised of property such as livestock and essential foodstuffs which served organic or ritual needs and was central to providing the means and resources for the continued upkeep of the surviving children and the spouse.

²² R J Rundt, *The Ivory Coast's civil code*, African Law Studies X11, 65

²³ *Matambo v Matambo* 1969 (3) SA 717 (RAD), where it was held that, “with regard to intestate succession the heirs are the persons who are entitled to succeed to the property of the deceased, and that the person at African law who is entitled to succeed to the property of any deceased African shall succeed in his individual capacity to any immovable property.”

²⁴ *Mwazozo v Mwazozo* S-121-94, where Muchechetere J A in the Appeal Court held that, “giving preference to one sex in customary succession was not in violation of the constitutional right to freedom from discrimination because there was a specific saving for customary law. In this particular case appellant, a Shona son was appointed his father's heir instead of respondent, his older sister. Shona society has patrilineal succession. This system was not based on a women's perpetual minority, but was meant to prevent the diversion of wealth from one family to a new family.”

wives there will be three houses in existence. An Ndebele heir, *indhlalifa*, the eldest son, inherits the family property, *ilifa*, as absolute owner exclusive of the assets of the junior houses. The senior house is known as, *indhlu nkulu*. The seniority of houses is not necessarily automatic according to the chronological order of establishment.”²⁵

On the other hand, the Shona have no system of ranking of wives for the purpose of inheritance and succession. As May shows, it is this general heir at Ndebele law who was ‘trustee’ of the minor houses until such a time that their respective sons come of age.²⁶ In the event that the heir is too young to administer the estate, it passes into the control of the deceased’s brother awaiting his maturity to render him capable of accepting his responsibilities.²⁷

2.1.3 SOUTH AFRICAN COUNTERPARTS

At this stage it is interesting to compare the Zimbabwean position with two of the main ethnic groups in South Africa, the Zulu and the Xhosa.²⁸ There is a marked similarity between Zulu and Xhosa customary law and that of the Ndebele of Zimbabwe who fled from Shaka (Zulu) during the *mfecane* exodus of the mid-19th century.

²⁵ Goldin and Gelfand, *Custom in Rhodesia* 284

²⁶ May, *Colonial Law* 52

²⁷ *Ibid*

²⁸ These groups originally resided in the province of Natal and in the Eastern Cape respectively, under then King Shaka and King Hintsa respectively but have now spread all over South Africa and form the majority over the Sotho/Tswana groups that originally occupied the northern Transvaal and Free State provinces

2.1.3.1 The Xhosa

With the Xhosa-speaking peoples, the homestead of a man with two wives is divided into the Great and Right Hand houses. The oldest son of each house becomes heir to that house and if one house has no male descendent, the eldest son of the other house inherits as was the issue in the case of *Sonti v Sonti*.²⁹ In the event that there is no male descendant in the first order of male ascendants, the deceased's grandfather succeeds, failing whom, the deceased's oldest paternal uncle or his oldest male descendant. Failing the paternal uncles, in order of seniority, or any of their descendants, the estate would pass to the next order of male ascendants if he has no male descendants, the first wife's second son is heir, or, failing him, his son. Similarly but not identical, among the Pondo when the family head has died without a male issue, or has outlived all his sons and their male descendents, his father succeeds as in the case of *Palaza v Palaza*³⁰ where it was held that, among the Pondo, the heir of a deceased twin, who has died without male issue, is his father, not his surviving twin.

If one of the houses has no heir, it is inherited by the most senior heir of the section of the homestead to which it was attached. In other words, the heir to a *qadi* of the great house would be the eldest son of the great house. Conversely, if the great house had no heir, it would be inherited by the heir of its *qadi*. The Xhosa therefore embrace the rule of primogeniture a

²⁹ 1929 NAC (C & O) 23, where it was held that, "On the death of a Native his estate devolves on his eldest son or his eldest son's eldest male descendant. If the eldest son has died leaving no male issue, the next son or his eldest male descendant inherits, and so on through the sons respectively."

³⁰ 1938 NAC (C & O) 35

principle that was highlighted by Elliot P in the case of *Madolo v Nomawu*³¹ where the rights of women to inherit were clearly undermined.

As Bekker³² writes, the left hand section is subordinate to the great house in matters of succession. When there are no sons in the Great House section, this section is inherited by the heir of the left hand house and the converse applies when there are no sons in the left hand section. The writer is also of the view that, where a family head had three wives, namely the great, the right, and an heirless *qadi* to the great house, he was entitled to institute the younger son of the right hand house as heir to the heirless *qadi* house, despite the fact that there is a younger son in the great house.³³ In the case of *Jenti v Jakeni*³⁴ the heir of the great house, while not objecting to the institution of an heir to the *qadi* house, maintained that his younger brother should be appointed, and objected to the appointment of the younger son of the Right Hand house.

However among the Xhosa there is an interesting feature known as the Calabash custom or (*Isiphipha*).³⁵ Koyana says, via the calabash custom, Xhosa law endeavors to effect some balancing up of this apparently unfair situation, by allowing the husband to donate a beast, usually a female beast, to his wife.³⁶ The female beast and its progeny are inherited by the

³¹ Elliot P in *Madolo's case* (1896) 1 NAC 12, where it was held that, "It is clearly laid down by all authorities upon Native law that no female can inherit property."

³² J C Bekker, *Seymour's Customary Law in Southern Africa*, 5 ed, (1989) 276

³³ Bekker, *Customary Law*, 283

³⁴ 1954 NAC (S) 90

³⁵ See also Kerr *opcit* pg 13 above

³⁶ Koyana, *Changing Society* 80

youngest son of the house, and the elder sons have absolutely no real rights to it. This emphasized that the customary legal system is not married to primogeniture and thus Xhosa law showed mechanisms for redress by introducing this ‘ultimogeniture’ rule.³⁷ In practice the calabash custom found its application in the 20th century case of *Dingezweni v Ndabambi*.³⁸ It set a precedence in which the rights of the youngest child found security under indigenous law of inheritance among the Xhosa as opposed to the eldest son as is common practice. Kerr³⁹ has also briefly demonstrated the recognition of the *isiphipha* custom when he says that, “some items of property are by law the inheritance of a son other than the eldest. Thus in some tribes the *isiphipha* beast and its increase are inherited by the mother’s second son, in others by the youngest son.”

2.1.3.2 The Zulu

The Xhosa system is largely similar to that of the Ndebele and the Zulu as appears below. Zulu homesteads may be divided into three sections: a great house (*indlunkulu*), a right-hand house or support (*iqadi*) and a left-hand house (*ikhohlwa*). As with the Xhosa, junior houses are affiliated to one of the senior houses, and, if there are no sons in the *iqadi* (or any of its affiliated junior houses), recourse is had to the *indlunkulu*, and vice versa. Where the *ikhohlwa* and its junior

³⁷ Ultimogeniture, also known as ‘postremogeniture’ or junior right, is the tradition of inheritance where the last-born of the entirety of a family has a privileged position in a parent’s wealth, status or office.

³⁸ 1 NAC (1894 – 1909) 126, in this case the younger son of the deceased successfully appealed against a judgment in which fifteen head of cattle and its progeny had been passed to the eldest son by court a quo. The custom made it possible for a father to deviate from the ‘usual’ rules of succession and leave something for his younger son.

³⁹ AJ Kerr, *Immovable Property* 102

houses have no heir, this section is inherited by the heir of the *indlunkulu*. This system is largely similar to that of the Ndebele of Zimbabwe and the Xhosa who have a system of ranking of wives for the purposes of inheritance and succession

It has however been observed that other family heads may have only a great house, with or without minor houses, until a left hand wife has been appointed, there is no affiliation of minor houses, but the effect is the same as if the houses of the minor wives were affiliated to the great house in order of their marriage. When there are no sons in the great house, its heir is the eldest son of the house of the first-married minor wife and when a minor house is without sons, it is inherited by the heir of the great house.⁴⁰

With regards to the rights and responsibilities of an heir, he steps into the shoes of his predecessor and inherits all the latter's rights and liabilities past, present and potential, in respect of the family and property of the house of which he is heir. Kerr⁴¹ then comes up with what he terms, 'Universal succession', stating that, "when a man dies his heir takes the deceased's position as the head of the family or clan and stands in *loco parentis* to the other members of the family, that he steps into the shoes of his predecessor."⁴²

⁴⁰ Kerr, *opcit* 153

⁴¹ Kerr, *opcit* 100

⁴² *Mgoza and another v Mgoza* 1967 (2) SA 436 (A), In this case when the respondent's father died leaving no valid will, the respondent as the eldest son instituted an action against the applicants, his sons, claiming an order of ejectment from certain property which the deceased had purchased, used, occupied and controlled, but of which he did not have transfer. The applicants defence was that the respondent not being the registered owner of the property, had no *locus standi* to bring the action. The court held that, the claim was not based on ownership or

The minor inmates of the house fall under the universal heir's guardianship and their rights are neither increased nor diminished by reason of this change in the person of their family head. Bekker takes note of some of the rights that the heir inherits as follows: to administer and control the house including its property, to claim the balances of *lobolo*, fines, and other debts due to the house in respect of acts or transactions done or entered into during the deceased's lifetime, to receive *lobolo* and fines payable in respect of the unmarried women of the house, and to claim as house property the earnings and acquisitions of the minor inmates of the house in respect of transactions entered into after he has come into his inheritance, and to get the obedience and services of the minor inmates of the house.⁴³

The heir thus has a duty to maintain suitably the widow and minor children of the house. He is to consult with the widow in dealing with the property of the house, and she has the right to restrain him from dissipating its assets, or impoverishing it. He usually supplies the *lobolo* for the first son of the deceased, who marries after the latter's death, but like his predecessor, he may not be compelled to supply it.⁴⁴ The senior or general heir, being the heir of the great house, obtains a somewhat wider inheritance than the heirs of other houses.

possession, but on a "better right which the claimant had to the property as compared to which the defendants had", and that when the respondent became the sole and general heir, he stepped into the shoes of his father and became entitled to whatever rights his father had in respect of the property.

⁴³ Bekker, *Customary Law* 297

⁴⁴ Section 64 (1), Code of Zulu Law

Among the Nguni ethnic groups especially among the Zulu, as was the issue in the case of *Sivijana v Sivijana*,⁴⁵ all property which has not been allotted to, or which does not automatically accrue to a particular house (usually called the general estate or family home property) automatically accrues to the great house, and as such is inherited by the senior heir. The principle of primogeniture, for instance, has long been assumed to be the keystone of customary law but as appears from the succeeding chapter, this principle does not remain unchallenged⁴⁶

2.1.4 CONCLUSION

What can be seen as a point of convergence between the two groups is that the brother in Shona law and the son in Ndebele law do not acquire the estate in their individual capacities but as the representatives of the deceased. They therefore also inherit the deceased's obligations such as the maintenance of his dependents,⁴⁷ as the case may be, ensuring their welfare is well taken care of. Kerr⁴⁸ thus refers to what he terms, 'Universal succession', stating that, "when a man dies his heir takes the deceased's position as the head of the family or clan and stands in *loco parentis* to the other members of the family, that he steps into the shoes of his predecessor." This is surely

⁴⁵ *Sivijana v Sivijana* 1940 NAC 27

⁴⁶ see the South African cases of *Bhe v Magistrate Khayelitsha* 2004 1 BCLR 27 (C) and *Shibi v Sithole* 2005 (1) SA 580 (CC), that arose in South Africa's new constitutional dispensation declaring that there were instances where the customary law principle of male primogeniture could be held unconstitutional, decisions that have set a precedent that affect the rules of Zulu and Xhosa inheritance laws and will hopefully be emulated in the Southern African region at large.

⁴⁷ H Child, *The History and Extent of recognition of Tribal Law in Rhodesia*, (1976) 55

⁴⁸ see Kerr *opcit* 100

the case whether it is the adelphic or lineal form of succession and this represents the position that was adopted in South African case of *Bhe*.⁴⁹

2.2 BURIAL CUSTOM AND INHERITANCE CEREMONY

2.2.1 The Shona

It is at the *kugadzira* or *kurova guva* ceremony where decisions about inheritance are made. The literal meaning of *kugadzira* is to fix and in the context of shona inheritance ceremonies, *kugadzira* or *kurova guva* means settling the deceased's spirit. It takes place a year after the deceased's death. Before the distribution of the estate at the *kurova guva* ceremony, a Shona estate, known as *nhaka*, is under the control of the *samukadzi*, the eldest sister of the deceased, who performs duties greatly similar to that of an executor.⁵⁰ The widow or widows and children of the deceased are under the authority of the *samukadzi*, assisted by her son, who is known as the *muzukuru*.⁵¹ The ceremony emphasizes the value of lineage continuity and of stability of the kinship group. The people believe that after a man's death his spirit lingers around his village until the *kugadzira* (*kurova guva*) ceremony has taken place, for it is this ceremony which is believed to join the dead to his forefathers.

⁴⁹ see discussion in 4.10 *infra*

⁵⁰ *Rebecca and Musiyima v Vurayayi* 1958 (1928-62) SRN 847, where it was held that a woman can acquire the right to distribute the property of her late brother by virtue of being an executrix (*samukadzi*) of his estate and the principle official at the time of the *kurova guva* ceremony.

⁵¹ Child, *Tribal Law in Rhodesia* 83

The central rite of *kurova guva* takes place when the widow hands over to the heir her husband's weapons. Through this transfer of weapons the heir is officially recognized as the successor to the deceased, in accepting the weapons he becomes the social person of their former owner. Hence the continuity of the family is preserved.⁵² At the ceremony of *kurova guva* the paternal aunt may take part in sharing out her brother's possessions among his children. She gives instructions about all matters concerning her dead brother.⁵³ Firstly the deceased person is buried in his own village, close to a neighboring village and a year later the spirit of the deceased is brought back from the grave into the village to be with its kin on earth and that puts the *kurova guva* ceremony in a nutshell.

It is also at this ceremony that any persons with an interest in the estate of the deceased should come forward and make their rightful claims as was held in the case of *Gideon v Tawadzadza*.⁵⁴ The brief facts of the case are as follows; one Gaza, the co-defendant and the man who made arrangements for the ceremony of *kurova guva*, stated in evidence that he called all relations and gave due notice. He further stated that he followed Native custom and asked if anyone had a claim against the estate, and he said no claims were lodged. The respondents, Gaza's brother and two other elder brothers and the mother were absent from the inheritance ceremony although their home was eight miles from the kraal. It was held to be established custom that at the

⁵² A K H Weinrich, *African Marriage in Zimbabwe and the Impact of Christianity*, (1983) 65-66

⁵³ M Gelfand, *The Genuine Shona*, (1982) 38

⁵⁴ 15 July 1946, (heard by L. Powys-Jones, Assistant Native Commissioner, Salisbury), were it was also held that, "all relatives must be notified of the date and place of the ceremony and when it takes place all present must be asked if anyone has a claim against the estate and the nature, extent and ground for such claim. In the absence of a good reason for failure to lodge a claim the right to do so is forfeited, see also *Mhlaba v Makuhlane* 1947 (1928-62) SN 421

ceremony of the division of the estate any person having a claim should then make it, unless there are very good reasons for such omission.

2.2.2 The Ndebele

It is at the *umbuyiso* ceremony that any parties who had an interest in the estate of the deceased would raise their claim.⁵⁵ *Umbuyiso* meant it was time for the deceased's spirit to be brought home and be settled by appeasement of the ancestral spirits. It is performed a year or more after the deceased has passed on. The sole purpose of *umbuyiso* as with the Shona and *kurova guva*, is to bring back the dead father.⁵⁶ In the case of *Mhlaba v Makuhlane*,⁵⁷ as in the Shona case of *Tawadzadza*⁵⁸, it was held that all claims in the estate of the deceased were supposed to be heard at the *umbuyiso* ceremony as the Shona do at the *kurova guva* ceremony.

Under Ndebele custom the eldest male relative of the family acts in a similar capacity as the *samukadzi* in Shona law until the deceased's belongings are claimed by designated heirs at the *umbuyiso* ceremony.⁵⁹ *Ukubuyisa* also incorporated the general distribution of estate assets and

⁵⁵ as will be seen in 2.3.3 below

⁵⁶ Rev W Bozongwana, *Ndebele Religion and Customs*, (2000) 29

⁵⁷ *Mhlaba v Makuhlane* 18th December 1947, (heard by E.H Beck, Commissioner of the Native Court, Gwelo), it was held that, "a claimant to a share of a deceased estate must, by Shangaan custom, make his claim at the *ukubuyisa* ceremonies. Failure to do so precludes him from claiming thereafter."

⁵⁸ see 2.2.1 *supra*

⁵⁹ see *Rebecca's case supra* in 2.2.1 above

arose in the case of *Magwisi v Kombayi*⁶⁰, where in a claim between brothers for thirty head of cattle, the Native Commissioner held that, “When the heir to a deceased’s estate at Native law (Tebele) law points out cattle at the *ukubuyisa* ceremony as the share due to a relative, the ownership in such cattle passes immediately to such relative and the award is binding.”

Another point of convergence between *umbuyiso* and *kurova guva* ceremonies is the immediate implications of rituals for the re-admission of the recent dead man into the home in another form and capacity underlines the importance of their belief in immortality and the appeasement of spirits. At the *umbuyiso* ceremony, the deceased’s property is distributed as decided by the *abosendo*.⁶¹ The eldest son is given the deceased’s spear, symbolizing his assumption of the headship of the family in consonance with the handing over of the deceased’s weapons by the widow at the Shona *kurova guva* ceremony to whoever she proposes to take care of her subsequent to her husband’s death.

Generally, the eldest son was allocated a larger share than the other children. Each child of the deceased was given something. A daughter’s share was called *inyembezi* meaning tears, which meant that she was mourning her father’s death. It could be one, two or more cattle, depending on the number of cattle available for distribution and the number of children entitled to receive something. Here again as we have seen with the Xhosa and *isiphipha*, *inyembezi* in Ndebele

⁶⁰ *Magwisi v Kombayi* 18th December 1947 (heard by E.H Beck, Commissioner of the Native Court)

⁶¹ *Abosendo* could be uncles, brothers and other senior relatives of the deceased.

custom meant another departure by customary law from the strict application of the primogeniture rule.⁶²

The eldest son was considered to be *indlalifa* (heir), not in the sense that he was entitled to inherit the entire estate, but only in so far as he was the sole successor to the deceased's name and headship of the family. It was in consideration of his raised status as the new head of the family that he was normally allocated more cattle or property than the rest of children. He was expected to be allocated more since his new position as head of the family mean that he 'inherited' the obligations and debts of the deceased. However where cattle were few and could not go round all the children, it was and not uncommon for the eldest son to receive the same number as the other children.⁶³

2.2.3 South African Zulu and Xhosa

There are points of similarity between the Zulu Xhosa and Shona Ndebele burial customs when holding traditional inheritance ceremonies. In terms of the *ukubuyisa* ceremony, as soon as the family head dies his immediate kin and in particular his widow is expected to go into mourning for a year culminating in the ceremony of *ukubuyisa* by which the spirit of the deceased is laid to rest and united with the ancestors.⁶⁴ Thus the basis of *ukubuyisa* is bringing the deceased's spirit home, which during this time is believed to be wondering around the veld near the grave. This is

⁶² see discussion on *isiphipha* in 2.1.3.1 *supra*

⁶³ Zvobgo and Others, *Inheritance in Zimbabwe* 101

⁶⁴ Ncube and Stewart, *Widowhood, inheritance, Customs and Practices in Southern Africa* 39

particularly similar to the Shona and Ndebele belief that the deceased's spirit lingers in and around the vicinity of its home, looking upon its kin and is brought back to the living by means of the *kurova guva* and *umbuyiso* ceremonies respectively.

At the *ukubuyisa* ceremony the heir is identified and debts are paid and the estate is distributed. The sacrifice of livestock is another point of convergence between Zulu Xhosa and Shona Ndebele custom. At *ukubuyisa*, a large ox is slaughtered by *Intlabi* or marksman, who is usually the new head of the family.⁶⁵ However at Shona custom it is the deceased's sister, *samukadzi*, who is officiator at the *kurova guva* ceremony.⁶⁶

2.3 WIDOWS

2.3.1 Introduction

A number of approaches have been proposed by researchers in the assessment of women's status within different communities, the choice of which is influenced by the researcher's commitment to either of the respective model types or to one that suits the set-up of a particular people's social organization. Tiffany⁶⁷ identifies three main anthropological approaches:

- (i) The 'incorporation' approach, emphasizing the implication of descent principles, residence, property rights and jural status for ordering the economic and political relations of men and women as a corporate group.

⁶⁵ Ncube and Stewart, *customs and practices* 45

⁶⁶ the role of the *samukadzi* is outlined in 2.2.1 above

⁶⁷ S W Tiffany, *Models and the social anthropology of Women, A preliminary assessment*, Man X111, 35

(ii) The ‘role’ approach, which contrasts formalized and informalized roles of men and women in public and domestic spheres of activity

(iii) The ‘economic’ approach, dealing with subsistence roles, differential participation in economic institution and the relationship between the control of resources, political power and social status.

The legal status of women was determined by principally by customary law⁶⁸. In an attempt to establish the position of women in a ‘pre-literate’ society, where “social norms took the place of the field of law, and though they functioned as legal norms, they were in fact social norms”.⁶⁹ The ‘incorporation’ approach appears to be most suitable for the purposes of the research and will be used as a framework for the examination of the traditional position of Shona and Ndebele women.

2.3.2 Shona

The process of succeeding to a widow in terms of Shona law is termed *kugara nhaka* (inheritance)⁷⁰ In connection with *kugara nhaka* the central rite of *kurova guva* takes place when the widow hands over to the heir her husband’s weapons. The *kurova guva* ceremony is

⁶⁸ J Kazembe , Legal status of women in Pre-colonial and Colonial Zimbabwe, Syracuse Journal of International Law And Commerce, Vol. 26:195, 1995, pg 198

⁶⁹ J Vansina, *A Traditional Legal system, African Law: Adaptation and Development*, (1965) 109

⁷⁰ After the *kurova guva* ceremony, described in 2.2 *supra*, the *kugara nhaka* or inheritance ceremony followed. On this day the wife or wives and all the unmarried children of the deceased, as well as his property, are taken over by members of the family. Thus a younger brother takes over the wife and unmarried children, in as much as he takes over the property.

completed by holding of *kugara nhaka* in the case of a married man. *Kugara nhaka* therefore is an integral part of *kurova guva* and the two cannot be separated.

A widow may be provided at the *kurova guva* ceremony with a husband from her late husband's family. When a woman accepts a second husband then she and her children of the new union are part of the family of the second husband under Shona custom. Child points out that the converse is the position under Ndebele custom. Such a widow under Ndebele custom merely raises seed for the house of her late husband. A widow's refusal to be inherited by her deceased husband's brother or a member of his family in no way affects her ownership of cattle in her own right.⁷¹

In practice the *samukadzi* spreads a mat on the ground and the deceased's younger brother, *baba mudiki*, is then asked to sit on the mat so he can be given the deceased's wife. The deceased's wife is asked to jump over the prospective husband's *tsvimbo* (could be a knobkerrie, spear and axe) and after that she picks up the weapon and hands it to the man who is to be her husband. The women present all ululate and the man claps his hands and personal belongings such as clothes, are now handed over to members of his family. Thus at the ceremony of inheritance the children and the wife go over to the deceased's younger brother. However if the wife of the deceased has a son who is grown up, even if he is unmarried, she might easily prefer, especially if she is beyond child-bearing age, to remain in her home and look after it and the land and allow her son to be responsible for her.⁷²

⁷¹ *Nyongwana v Mapiye* 1947 (1928-62) SRNC 423

⁷² Goldin and Gelfand, *Custom in Rhodesia* 293

If the wife to be inherited refuses to jump over the implements it may be suspected that her non-acceptance of the deceased's brother is because she has committed adultery. This is because the mourning period preceding the ceremony of *kurova guva*, the widow is thought to live half with the dead and half with the living, hence in this marginal situation she may not sleep with any man in order not to offend her dead husband. Intercourse during this period is called *kupisa guva*,⁷³ and is considered a crime which is tried in a chief's court.

A widow who breaks her continence is treated with contempt and her lover is fined one head of cattle, which is slaughtered to appease the spirit of the dead. The father takes her daughter to a woman for questioning and if she has committed this offence she confesses. She and her father may be required to appear in court where they can be required to pay damages. After these are paid she can return for *kugara nhaka* if she so wishes. If it is a relative of the deceased man that interferes with his wife, the case is not taken to court. He is asked only to pay a fine a fine to the nephew, the reason for this being that the widow is likely to marry the man with whom she has had relations before *kugara nhaka*.⁷⁴

However women seem to oppose widow inheritance much more strongly than men. One woman was noted saying, "*Should my husband die before me, I shall refuse to be inherited. I shall stay without a husband in my husband's home and look after my children. If my husband's relatives make this impossible for me, I shall leave them and go to live with my parents. I have no desire*

⁷³ Literally meaning to burn the grave, going against the wishes of the deceased usually before his spirit is settled at the *kurova guva* ceremony

⁷⁴ Goldin and Gelfand *Custom in Rhodesia* 294

to disturb the peace and freedom of my sister-in-law by entering into her home. If I did, she would surely accuse me of witchcraft."⁷⁵

2.3.3 The Ndebele

Similar to the Shona concept of *kugadzira* or *kurova guva*, the Ndebele hold the *umbuyiso* ceremonies which correspond with *kugara nhaka* and *ukungenwa* respectively. The widow had three options availed to her. She was required to choose whether she wanted one or other of the deceased's brothers to become her new husband or if she simply wanted to remain in her home with her youngest son, but under the general jurisdiction of her eldest son, the new head of the family.⁷⁶ The Ndebele widow also had the option of going back to her natal home, in which case she would be free to marry anyone whom she desired. In a survey in Matabeleland by the Women and Law in Southern Africa Trust, the majority of the respondents mentioned the fact that widow had an option to decide what she would like to do.

In practice on the third day of the *umbuyiso* ceremony, usually on a Sunday morning, the next of kin, *abosendo*, gather indoors and the widow is given a spear.⁷⁷ She is asked to give it to whoever she chooses to look after her. She will either choose a husband among the next of kin or give the spear to her child if she does not want *ukungenwa*. This practice is highly similar to the Shona if we substitute the spear for the bowl of water as used by the in Shona law when pinpointing her proposed consort.

⁷⁵ Weinrich, *African Marriage* 67

⁷⁶ Zvobgo and Others, *Inheritance in Zimbabwe* 106

⁷⁷ The spear served as instrument she would silently use to pinpoint her desired heir

However an interesting feature in Ndebele custom surfaces and relates to the role played by the youngest son, *isicinathunjane*, also known as the *isicino*, in the life of a widow who chooses not to be taken by one of her late husband's brothers as a second wife. The youngest son remains within his father's kraal. He is not permitted to establish his own kraal outside that of his father. If he marries he is required to build his houses or huts within his father's kraal. In the event that he marries his wife had the major responsibility of looking after her mother-in-law. On the death of the son's father he takes his share of the inheritance but remains within the kraal.

In addition, he has the responsibility of ploughing for the widow. He is also said to have general management control over the property inherited by the widow.⁷⁸ Again in the same survey conducted by the Women's Trust, respondents regularly mentioned that the ploughs and other agricultural implements were inherited by the youngest son as he was expected to use these to look after his mother, and that this formality was common practice whereby widows preferred to give the spear to their youngest sons.⁷⁹

Thus if Ndebele custom is to be followed strictly a situation arises whereby upon the death of a man whose matrimonial home (kraal) is situated in an urban area, the widow would be entitled to retain occupation of the matrimonial house until her death, whereupon the youngest child would be entitled to take over the house. Therefore prior to the death of the widow, the youngest son

⁷⁸ *Isicino* and its emphasis on the youngest son is similar to the ultimogeniture rule amongst the Xhosa where the youngest son inherits a bull and its progeny which can in turn be used for general upkeep of the widow, see also Weinrich *African Marriage in Zimbabwe* 67

⁷⁹ See discussion on the fairly similar calabash custom of the Eastern Cape Bomvana of South Africa 2.1.3.1 *supra* and 2.3.4.3 *infra*

only has the right to reside in the matrimonial house. Yet in living customary law and practice, the eldest son is appointed heir, thereby acquiring the legal rights to all of the deceased's properties, including title to the matrimonial home and the widow. According to Zvobgo this is contrary to the common practice in terms of customary law.⁸⁰

The communal mode of production under which Zimbabwean marriage institutions and customs evolved required large and stable families. These are guaranteed by social pressure on every adult to marry and by the values attached to enduring family units within the larger kinship groups. The long negotiations aimed at giving stability to marital unions, and the marriage negotiators, who acted as society's representatives, guaranteed the fulfillment of the marriage contract by the families of both bride and groom. Forms of marriage such as succession to widows reinforced those values which lent permanence to the extended family.

2.3.4 SOUTH AFRICA – Zulu and Xhosa

2.3.4.1 Introduction

By way of comparison it is worthwhile to shed some light on the traditional practices of some tribes south of the Limpopo. This necessitates a shift to the Xhosa and Zulu of South Africa where similar traditional practices find prominence, particularly in the rural setup of KwaZulu Natal and the Eastern Cape regions of Transkei and Ciskei. Their traditional laws and practices are not wholly dissimilar from those of the Shona and Ndebele in terms of the practice and

⁸⁰ Zvobgo and Others, *Inheritance in Zimbabwe* 111

principle behind 'widow inheritance' and aspects of property laws concerning dissolution of the estates of deceased African men.

2.3.4.2 Ukungenena

Amongst the Zulu a practice, *ukungenena*,⁸¹ is the focal point when it comes to dictating the rules of succession to widows in indigenous law. It is also referred to as the levirate custom, and it is practiced by the Bhaca and Ntlangwini group as well as the Zulu and Pondo ethnic groups. It provides that a widow be induced, as Koyana says, "to accept a consort for the purpose of keeping alive the marriage between her and her late husband's people."⁸²

This is a similar custom in principle as has been seen amongst the Shona and their concept of *kugara nhaka* and the Ndebele *ukungenwa* marriage. It is believed that the desire to make lifelong family bondages could explain the origins of the custom of *ukungenena*, as an integral part of Zulu family law, that if the widow was still of child bearing age she would continue to bear children for her late husband's family, thus the Shona, Ndebele and the Zulu all believed in the perpetuation of the lineage group.

Bekker⁸³ identifies three main objects of providing a widow with a male consort as follows; (i) to enrich and strengthen the deceased's family with more children; (ii) to prevent strangers by

⁸¹ similar to the Ndebele custom of *ukungenwa* in meaning and purpose

⁸² Koyana, *Changing Society* 81, In *Mguni v Khumalo*

⁸³ Bekker, *Customary Law* 286

blood from being attracted to her, which frequently happens if she is not so accommodated, and thus introducing bastards into the family; (iii) to provide an heir for a man who has died heirless. The point of departure will be that, in terms of African customary law, a widow was expected to remain at her late husband's residence with minority status under whoever was the heir of the late husband. She could not engage in sexual relations with another man other than the designated heir, a principle that was similarly recognized by the Shona and their concept of *kupisa guva*.⁸⁴ She was offered support and protection by the supposed heir and Koyana⁸⁵ agrees with this state of affairs saying, "It is in my own view only a fair, logical and practical outcome of this that custom also caters for her private life. It accepts that she cannot live a chaste life."

In both Zulu and Pondo custom the widow does not go to the family home of her consort; but to the contrary he must come to her at the family home of her late husband⁸⁶ Usually he does not reside with her but merely visits her from time to time. However no son of a deceased family head is permitted to contract an *ukungena* marriage with any of his father's widows as this is regarded as taboo.⁸⁷

However the *ngena* custom does not come without criticism. A former Judge of the Native Appeal Court in South Africa, Stanford P, was quoted saying, "*ukungena* is one of great antiquity, it probably originated in former times owing to the preponderance of females over

⁸⁴ see explanation on *kupisa guva* in 2.3.2 *supra*

⁸⁵ Koyana, *Changing Society* 81

⁸⁶ *Makaula v Matatu* 2 NAC 44

⁸⁷ *Nginyana v Jomose* 1949 NAC (S) 147

males caused by frequent inter-tribal wars and the desire to keep the same descent or blood in the families.”⁸⁸

2.3.4.3 The Xhosa – Quasi ukungena

Koyana talks about *quasi ukungena* and takes note of three ethnic groups among the Xhosa, the Thembu, Gcaleka and Bomvana who, according to him, adopt a puritan attitude in sex matters.⁸⁹ Seemingly sex between a man and a woman married to the same clan is deemed to be incestuous. The conclusion to be drawn from this is that once a woman is married into the family of her husband, this cuts the ties she had with her maiden family and becomes part of her husband’s clan until she dies. When saying that ties were cut this does not mean that she was no longer part of her maiden family’s life but for the purposes of traditional legal reality.

Interestingly the Xhosa do not practice the *ngena* custom. However if the widow did not desire to remain at her late husband’s home she had an opportunity to leave. This issue found application in the case of *Nolwatshu v Ben Tshikitshwa*⁹⁰ where it was held that, “the woman by her departure from the plaintiff’s ‘kraal’, had broken the *ngena* union and was liberty to marry another man so the plaintiff’s claim for damages for adultery should be dismissed.”

⁸⁸ *Manysine v Nonkanyezi* 1 NAC (1894-1909)

⁸⁹ Koyana *opcit* 83

⁹⁰ 3 NAC (1912-17) 290 (Ntabankulu)

A widow was expected to seek consolation from men outside the clan to which she belonged and there was no hindrance placed in her way, but it was deemed proper for her to engage in intercourse at her late husband's family home or at a family home where she had been required to live by her late husband's nearest male relative. Children so conceived were regarded as entirely legitimate, with rights of succession equal to any son of the deceased, subject, of course, to the rule of primogeniture. Such children are said to be born "on the mat" i.e, the mat on which she used to sleep with her late husband.

However a child who was conceived while the widow was living away from her late husband's family home, or other family home where she was required to live, even though the widow may have been away with the permission of her late husband's nearest male relative, is said to have been born 'off the mat' and has no rights of succession.⁹¹ Children born to a widow belong to her late husband's heir and he is entitled to any *lobolo* paid for them.⁹² This is because *lobolo* was paid for the widow and "cattle begot children" it is said.

2.3.4.4 Isiphipha – The Calabash Custom

Among the Xhosa as has been mentioned before, in 2.1.3.1, by means of the calabash custom or (*Isiphipha*), as Koyana⁹³ says, Xhosa law makes efforts to effect some balancing up of what may be perceived as an apparently unfair state of affairs. The husband may at his discretion donate a beast, usually a female beast, to his wife. It is by such a donation that the argument that

⁹¹ *Noseyi v Gobozama* 1 NAC 214

⁹² *Dumezweni v Kobodi* 1971 BAC (S) 30

⁹³ Koyana, *Changing Society* 80

customary law is purely marked to male primogeniture does not entirely hold water. The female beast and its progeny are inherited by the youngest son of the house, and the elder sons have absolutely no real rights to it.

The focus of *isiphipha* on the youngest son as a beneficiary in his late father's estate resembles the Ndebele custom of *isicino*.⁹⁴ In terms of *isicino*, the youngest son does not leave his father's kraal and he is not permitted to establish his own kraal outside that of his father. This youngest son shoulders the responsibility of ploughing for the widow. He is also said to have general management control over the property inherited by the widow. Thus if Ndebele and Xhosa custom were to be closely observed, it shall be seen that customary law did have the interests of the widow and the youngest son apart from the common assumption that African custom only catered for the needs of the eldest son.⁹⁵ Mqeke⁹⁶, points out other safeguards that customary law has for ensuring consensus and stability where a man has left a widow. The actual involvement of the whole family group is the prominent one among these measures.⁹⁷ The decision in the *Bhe* case will adversely affect this custom since it also relates to males and not females.⁹⁸

⁹⁴ See discussion on *isicino* in 2.3.3 *supra*

⁹⁵ Zvobgo and Others, *Inheritance in Zimbabwe* 111, for the Xhosa see *Dingezweni v Ndabambi* at 2.1.3.1 *supra*

⁹⁶ R B Mqeke, *Basic Approaches To Problem Solving In Customary Law*, (1997)

⁹⁷ See discussion at pg 147 ff and the reference to the 1883 Commission report on this aspect

⁹⁸ See discussion of *Bhe* decision in 4.10 *infra*

2.4 CONCLUSION

There are three aspects common to the majority of ethnic groups. In all groups a child who is not born out of a valid *ukungena* marriage although he belongs to the family of the deceased, is regarded as irregularly begotten, and among the Zulu and the Pondo, can succeed neither to the deceased nor to any family head in his family group, unless there is a complete failure of regularly begotten males in the group.⁹⁹ Secondly, among both the Shona and Ndebele and among the Zulu, a common characteristic is that, a *kugara nhaka*, *ukungenwa* or an *ukungena* marriage is deemed to be invalid unless it is sanctioned by the nearest male relatives of the deceased in terms of a meeting that has been expressly convened for the purposes of approving a consort for the widow a issue raised in the case of *Manyosine v Nonkanyezi*.¹⁰⁰ In addition, the consort must be a blood relative of the deceased through the male line, hence the rule of primogeniture.¹⁰¹ Thirdly it is generally considered to be contrary to custom if a male relative of

⁹⁹ See *Matambo v Matambo* 1969 (3) SA 717 (RAD), where it was held that, “with regard to intestate succession the heirs are the persons who are entitled to succeed to the property of the deceased, and that the person at African law who is entitled to succeed to the property of any deceased African shall succeed in his individual capacity to any immovable property.”

¹⁰⁰ 1 NAC (1894-1909) 114, where it was held that, “to mark an *ukungena* union the man must be approved by the relatives and an animal slaughtered to cleanse the utensils. The man then has all the rights of a husband, and if he finds another man committing adultery with the woman he has a right of action against him for damages” The purpose of the *ngena* union was to enrich and strengthen the deceased’s family with more children; to prevent strangers by blood from being attracted to her, which frequently happens if she is not so accommodated, and thus introducing bastards into the family and to provide an heir for a man who has died heirless.

¹⁰¹ see *Mwazozo’s case* S-121-94, where Mucshetere J A in the Appeal Court held that, “giving preference to one sex in customary succession was not in violation of the constitutional right to freedom from discrimination because there was a specific saving for customary law. In this particular case appellant, a Shona son was appointed his father’s heir instead of respondent, his older sister. Shona society has patrilineal succession. This system was not based on a women’s perpetual minority, but was meant to prevent the diversion of wealth from one family to a new family,”

the deceased other than the properly appointed *kugara nhaka*, *ukungenwa* or *ukungena* consort or a stranger has a relationship with the widow.¹⁰²

The former President of the Transkeian Territories Native Appeal Court was quoted and shared the sentiment that the practice of *ukungena* is ancient and belongs in the ‘dark ages’.¹⁰³ I am of the view that the motives or the driving forces behind the emergence of the levirate marriage are immaterial, that, it does not find its place in today’s society, what is of essence is that it developed to be an integral feature of the African traditional family setup that sought to establish indefinite family ties.

¹⁰² see *Manyosine’s case* in 2.3.4.5 *supra*

¹⁰³ Stanford P, in *Manyosine’s case* 1 NAC (1894-1909) 114 at 116 (Ngqeleni), said: “*ukungena* is one of great antiquity, it probably originated in former times owing to the preponderance of females over males caused by frequent inter-tribal wars and the desire to keep the same descent or blood in the families”

CHAPTER 3

THE IMPACT OF WESTERN INFLUENCE ON SUCCESSION AND INHERITANCE

3.1 INTRODUCTION

The system of primogeniture persisted as an integral and functional feature of indigenous law for as long as the Shona and Ndebele social structures remained unhampered by a Western concept of individual property.¹⁰⁴ Child¹⁰⁵ points out that “there is a growing tendency among the Shona to recognize individual rights of property acquired through inheritance and the communal character of the group called *chizvarwa*¹⁰⁶, is weakening”. In current practice most property is personal property.

Wealth obtained through wage labour is likely to exceed the inherited family possessions. Even cattle are becoming more associated with personal wealth than with a lineage group. As a result, seniority in a lineage group has less importance now than in the past. The bulk of a deceased's

¹⁰⁴ M F C Bourdillon, *An Ethnography of The Contemporary Shona, With Special Reference to Their Religion*, (1998) 27-28

¹⁰⁵ Child, *Tribal Law in Rhodesia*, 86

¹⁰⁶ Referring to the old patrilineage of three to five generations of the descendants of one man or the common ancestor primarily recognized in practice only between those who lived together. The *chizvarwa* has a bull dedicated to the spirit of the common ancestor, to be sacrificed when he shows signs of wanting it, and often there is a spirit medium that becomes possessed by the common ancestor when he wishes to speak to the living descendants. So even after his death, the common ancestor keeps the group together.

estate goes to his sons if they are sufficiently old. The eldest son still has to take the consequent responsibilities although this may be problematic in practice. Already this is evidence of the general and inherent shift from communal to a milder form of individualism and the realization of individual property rights. Nevertheless, the ancient system is still practiced by many.

3.2 SOCIO-ECONOMIC FACTORS

3.2.1 Social and economic independence

The ideal system of the past often survives in spite of the numerous influences of change. One of these is the advancement of social and economic independence encouraged by labour migration in which young men have to fend for themselves without the support of their extended families.

3.2.2 Disintegration of the subsistence economy

Another factor is the diminishing availability of land which prevents a group dependent on subsistence agriculture from growing too large. Prevalence of the adelphic and lineal types of succession will, therefore, find itself substituted by other forms as westernization brought concepts of individual property rights and management. In practice, such customs will tend to find their place in rural setups where communities are still relatively subsistent.

3.2.3 The capitalist economy

The impact of the capitalist mode of production is that the family has ceased to be part of the economic base just as it is in capitalist countries.¹⁰⁷ Production is no longer organized within kinship groups, but kinsmen sell their labour power to various unrelated economic enterprises. With its economic function removed, the family has also been deprived of its traditional continuity and stability that the various principles of succession seemed to offer at customary law. Stability is now vested in the capitalist system as a whole rather than in individual families. Consequently, it is its economic establishments which become the new nuclei of social life. Families can shed their members whenever these are drawn by economic necessity to work in different industrial enterprises. The instability of family units is not a threat to the capitalist mode of production, and so no social pressure is exerted to guarantee marriage stability.¹⁰⁸

The continuity of family groups is even less important under capitalism, hence the father-son and the brother to brother relationship which was vital in the past for the survival of the lineage, becomes marginal and gives way to the husband-wife bond as the most significant relationship within the family. With this structural shift, shifts in marriage values occur. Therefore, the survival of the customary law inheritance and succession structures is gradually losing their significance in the post-colonial era.¹⁰⁹

¹⁰⁷ Weinrich, *African Marriage* 70

¹⁰⁸ *Ibid*

¹⁰⁹ *Ibid*

3.3 LEGISLATIVE MEASURES IMPACTING ON CUSTOMARY LAW

3.3.1 Cooperation of State and Church

The law of succession deals with and regulates the devolution of property, rights and liabilities of the deceased. But while the subject matter and object of law of succession are inevitably the same under every system of law the rules and principles of customary law are significantly and distinctly different from those under the then law of Rhodesia or Roman-Dutch law. It is essential to have regard to these distinct features and the effects of changing social and economic conditions as highlighted above. Goldin and Gelfand¹¹⁰ have come up with these scenarios below.

- (i) Firstly in the absence of a written language the rules concerning a written will do not exist and cannot arise under customary law.
- (ii) Secondly under traditional government there was no officer or person responsible for administration of estates. Primarily the family was responsible for distribution in accordance with accepted rules and practice.
- (iii) Thirdly, African religious beliefs and customs influenced and contributed to certain principles and rules of inheritance and in particular obligations and rights of dependents, surviving spouses and children.
- (iv) Fourthly, family law, including such subjects as *lobolo*, polygamy, the status of women, guardianship of minors, inevitably resulted in rules governing inheritance and succession which are unknown or different from Western legal systems.

¹¹⁰ Goldin and Gelfand, *Custom in Rhodesia* 277

- (v) Fifthly, ownership of immovable property was unknown to customary law. Thus devolution of such property cannot be governed by the customary law of succession.
- (vi) Sixthly, movable property which was not known in a society in which such items were confined to cattle, food and agricultural or household utensils and implements, can often not be distributed or inherited in accordance with customary law; for example: shares, deposits with banks and savings societies or vehicles, rights and obligations incurred by an African under a lease, as a surety, insurance policies, hire-purchase agreements, and commercial debts or under an agreement of partnership. The above factors explain the need for and the existence of statutory provisions which govern aspects of succession unknown to customary law. In practice the vast majority of African deceased estates are distributed in accordance with customary law. Nevertheless a significant and increasing number of estates are partly or entirely distributed and governed according to statutory enactments. This is because of the influence of western law. However, it is noteworthy that the state and the church worked hand in hand in those early days.

Zimbabwean Africans may accept or reject those values of Christianity that are derived from the experience of the petty bourgeoisie in Europe. What they must take into account are the institutions of marriage created by the State and the Church, for unless they comply with certain legal requirements, they are seriously disadvantaged in their social life. Throughout the twentieth century several acts and regulations have been passed to make the African marriage conform to western expectations. In no other field of civil life have missionaries and civil servants co-

operated so closely and fought with each other so intensely as in the field of marriage and legislation.¹¹¹ The result as from the introduction of Colonial law, there has been the evolution of a hierarchy of marriage forms, the lowest of which is the traditional marriage, followed by a traditional marriage which has been registered by a District Commissioner, and lastly a civil marriage or Christian Marriage, that is, a marriage which has been registered as ‘civil’ and not a traditional marriage, and blessed in church.

3.3.2 LEGISLATION

A. Colonial Legislation

3.3.2.1 Native Marriage Ordinance of 1917

In 1917 the then Rhodesian government passed the Native Marriage Ordinance,¹¹² providing that a man was entitled in terms any indigenous law to take a widow of a deceased relative although there was precondition that the marriage be registered. The Rhodesian government, in terms of its general law effected a consolidation of the already existing indigenous law, in the sense that the system of patriarchy whereby the brother of a deceased African man could succeed to his widow and take her as his new wife, was recognized as valid form of marriage between Africans.

¹¹¹ Weinrich, *African Marriage* 82

¹¹² Native Marriage Ordinance Act No.15 of 1917 as amended by Act No.16 of 1929, provided that, ‘when under any prevailing law or custom a man entitled to take to wife the widow or widows of a deceased relative, he should as soon as the inheritance ceremony has been completed, appear before a Marriage Officer, with such widows as he may desire to take to wife, and register a marriage with each of them.’

In a similar context the Native Marriage Ordinance in Rhodesia had a strong relationship with an Ordinance of Cape Colony, that had already since effected a consolidation of existing indigenous law by providing that, *‘Notwithstanding the fact that any natives have contracted a marriage in accordance with the terms and provisions the Marriage Ordinance in Council, as from time to time amended, such forms of marriage shall not affect the property of the spouses, which shall be held, may be disposed of, and unless disposed of by will, shall devolve according to native law and custom.*¹¹³

As with the Marriage Ordinance in Rhodesia, both had the effect of creating some harmony between colonial legislation and the customary law position. Customary law was left to operate as it would, depending on the customs and usages of a particular people. The problem then arose where provisions of customary law would be seemingly discriminatory and customary was still held to apply. This was one of the downsides of colonial legislation.

According to Schmidt¹¹⁴ women’s oppression was further institutionalized with the Native Marriage Ordinance which reaffirmed customary law by relegating a woman to the status of minor under the control of her father, guardians or husband. When conflicts arose between the need to keep women working both on the farms and export crops and the desire of the state or

¹¹³ Marriage Ordinance in Council 1838, Colony of the Cape of Good Hope

¹¹⁴ E S Schmidt, *Ideology, Economics, and the Role of Shona Women in Southern Rhodesia*, (1987) 743, PHD dissertation, University of Wisconsin-Madison

church to challenge what was considered repugnant in terms of African patriarchal rule, African patriarchal power over women was upheld in the interest of colonial profit.¹¹⁵

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3.3.2.2 African Marriages Act¹¹⁶

The African Marriages Act deals with the effect of a civil marriage between Africans on the property rights of the parties. According to the Act, '*the solemnization of a marriage between Africans in terms of the Marriage Act shall not affect the property of the spouses, which shall be held, may be disposed of and unless disposed of by will, shall devolve according to customary law.*'¹¹⁷ Until 1992, when an African married in accordance with the provisions of the Marriage Act (Chapter 37) died intestate, his/her movable estate was distributed in accordance with customary law because of the provisions of section 13 of the African Marriages Act which provided that customary law should apply to Africans even where they had contracted a civil marriage.

In 1992 in the case of *Mujawo v Chogugudza*,¹¹⁸ Manyarara JA, delivering the judgment of the Supreme Court, held that section 13 of the African Marriages Act was incompatible with the provisions of the Legal Age of Majority Act¹¹⁹ as it denies women who opt to marry in

¹¹⁵ A K H Weinrich, *Women and Racial Discrimination in Rhodesia*, (1979) 120

¹¹⁶ African Marriage Act No. 29 of 1951

¹¹⁷ *Ibid*, section 13 African Marriages Act

¹¹⁸ SC 142/92, the Supreme Court had ruled that section 13 had been repealed by implication by the Legal Age of Majority Act

¹¹⁹ Act No. 15 of 1982, see also in 3.3.2.6 *infra*

accordance with general law the full effect of this option.¹²⁰ There seemed to be an inherent conflict between the two Acts. Section 13 of the African Marriages Act was regarded as repealed by implication by the Legal Age of Majority Act and it was concluded that such estates fall to be determined in accordance with the general law rules of intestate succession. Commendable as the result of the decision may be, namely, that, the general law of succession now applies to the intestate estates of deceased Africans married in terms of the Marriages Act, the Supreme Court's reasoning in reaching the decision is not entirely sustainable.

Only if customary law with regards to a woman's property rights negates her capacity, conferred by the Legal Age of Majority Act, to deal with property as a major could it be said that section 13 of the African Marriages Act is impliedly repealed by the Legal Age of Majority Act. Customary law has been characterized as treating a woman as a minor and putting her in a position that she has no control over property. However, it is questionable, as we show, whether this is a correct interpretation of custom. Whatever the actual position is, current reality is that the superior courts seem to take the view that women are the junior as far as proprietary rights are concerned in civil marriages between Africans.

In the High Court in 1992, Smith J in *Chingattie v Munoti*¹²¹ reaffirmed the decision of Gubbay CJ in *Joshua Jena v Ettie Nyemba*¹²² in which the learned Judge held that women at customary law could not own property. In African law and custom, property acquired during a marriage

¹²⁰ SC - 142 - 92

¹²¹ H - H 207-92

¹²² S-49-86

becomes the husband's property whether acquired by him or his wife. To this rule there are a few exceptions.¹²³ Child¹²⁴ has been cited saying, 'should a woman go out to work with the approval of her husband while under his marital control, any money she earns belongs to him under Shona and Ndebele law. If a Shona or a Ndebele wife were to keep her earnings, property acquired with her own money would be hers and would fall into *mavoko* category, and during her lifetime she would have control of it.

In the case of *Angeline Chiutsi v Dennies Garisa*,¹²⁵ Pittman J ruled that: 'unfortunately for the plaintiff, although in fact some African women may have achieved economic emancipation after marrying by Christian rites, the law of the land is still that, despite the solemnization of such a marriage, the property of the spouses shall be held according to African law and custom.'

In another judgment Newham J in *Jirira v Jirira and Another*, allowed that a woman's earnings came under the category *mavoko* and were therefore her own, when having regard to her modern lifestyle 'the justice of the case demands it.' By this the true customary law position that women could in fact own some forms of property was upheld. In a traditional customary society, ownership per se was not a focal point, it was the community rights that prevailed and women

¹²³ exceptions referred to related to *mavoko* property which is property acquired by a woman through her own industry and *umai* property which is property accruing to a woman through the marriage of her daughters

¹²⁴ Child, *Tribal Law in Rhodesia*, 91

¹²⁵ 1969 CAACC 70 at 74, "it did not matter whether the two were married by Christian rites, the law of the land is still that, despite solemnisation of such a marriage, the property of the spouses shall be held according to African Law and custom", see also section 13 of the African Marriages Act in 3.3.2.2 *supra*

exercised rights to seemingly male controlled property through appropriate males, a phenomenon that masked the reality of their access. Thus the notion in *Mujawo*'s case that section 13 was in conflict with the provisions of the Legal Age of Majority Act is questionable as women's capacity to deal with property at customary law is not as limited as it is often portrayed. Even more telling is the observation that, under customary law, men also had very limited individual property holdings and were unlikely to have any greater rights of disposal of property in real terms than women.

The *Mujawo* case was further complicated by the fact that the deceased, a male, had a child by a woman to whom he was married by purely customary rites as well as a child from his union to the woman to whom he was married under civil rites. Although the court concluded that the general law applied to the estate thus the 'civil rites widow' and her child would benefit in terms of the common law and provisions of the Deceased Persons Family Maintenance Act,¹²⁶ the dubious decision was reached that the child of the customary law union was also entitled to succeed to his father's estate by virtue of the provisions of section 3 of the African Marriages Act which provides: '*A marriage contracted according to African law and custom which is not a valid marriage in terms of this section shall, for the purposes of African law and custom relating to the status, guardianship custody and rights of succession of the children of such marriage, be regarded as a valid marriage.*'

¹²⁶ Act No. 39 of 1978, see also in 3.4.5 *infra*, regardless of whether customary or the general law is applied or whether the estate is testate or intestate, there is an obligation to maintain certain categories of dependents of a deceased person either under customary law or in terms of the Act

This section was seen as legitimizing the child for the purposes of general law so that it could become one of the heir's *ab intestate* under general law. The wording is quite specific and confined to situations where customary law is to be applied to the questions of succession. As is often said, hard cases make bad law and can understand the concern of the Supreme Court for the future of a child of the deceased who could not, for the purposes of the general law, be regarded as legitimate and is thereby apparently precluded from sharing in his father's estate.

However, in the instant case, the Supreme Court need not have been unduly concerned with the hardship that could be occasioned on the customary law union child, as various maintenance provisions would have covered him. As mentioned earlier, the entire ambit of succession in Zimbabwe with regard to the needs of the dependent nuclear family of a deceased person are underpinned by the provisions of the Deceased Persons Family Maintenance Act.

3.3.2.3 African Law and Tribal Courts Act¹²⁷

Section 3 (1)(a)(iii) of the African Law and Tribal Courts Act provides that customary law shall be deemed to be applicable in any case between Africans which relates to the 'devolution otherwise than by will of movable property on the death of an African'; but this is the position 'unless the justice of the case otherwise provides'.¹²⁸ Therefore, while the African Marriages Act relating to devolution of property makes it peremptory that it be governed by customary law, the

¹²⁷ Act No. of 1969

¹²⁸ African Law and Tribal Courts Act No Section 3 (1) (a) (iii)

African Law and Tribal Courts Act provides for customary law to be applied in a case involving movable property unless the justice of the case otherwise provides. Under the one Act the application of customary law was compulsory, and under the other Act it was permissible or possible but the application of the law of Rhodesia was not ousted. Therefore unlike the African Marriages Act, the African Law and Tribal Courts Act did not effect a full consolidation of indigenous but one that was conditional, allowing for a judicial discretion to override any apparent custom or practice.

The Act also found application in cases involving the guardianship of children, a concept that was well known in customary law. At customary law the heir or the widow's chosen husband, who could be the deceased's brother, had a duty to maintain the family, as heir, with the proceeds of the deceased's estate which formed the organic part of the estate.¹²⁹ African law of guardianship of a child of a father who has died was set out by Tredgold SJ in the case of *Tabitha Chiduku v Chidano*,¹³⁰ "In native custom the guardian practically takes the place of the deceased father. His duty to any children left is to treat them as his own, and the children cannot do anything of importance in life without his consent. The duty is to support the children even if the father had left no property on his death. If property is left, it is the duty of the guardian to conserve it and hand it to his wards immediately."

¹²⁹ see also in 2.1 chapter 2 *supra*, a discussion on 'adelphic' succession explaining the nature of the 'organic' part of the family estate

¹³⁰ 1922 SR 55 at 56-7

As in the case of *Chiduku*, some native commissioners use the expression: “The child is the guardian’s property in every sense of the word” The child is not a chattel and cannot be destroyed or disposed of as such. It cannot be sold into slavery, as that is definitely prohibited by our law, and a girl now cannot be made to marry any man without her consent. Subject to such qualifications as these, the absolute control of the children of the deceased appears to be vested in the guardian, and he can apparently act contrary to the wishes of the mother.’¹³¹ I am of the view that this dictum is not totally in harmony with the customary law position. The heir according to custom was indeed responsible for facilitating the future marriages of the deceased’s daughters, but the fact that he could always act arbitrarily against the widows wishes is not a true interpretation of custom. In some instances although the heir would be the main decision maker, the widows consent was also paramount in the decision making process.

3.3.2.4 African Wills Act¹³²

Testamentary succession takes place by virtue of a will or a codicil. A will is a written document executed by a person in proper form provided by law, as to how or to whom his property is to be disposed of after his death. A codicil is a document usually executed later for the purpose of modifying or altering provisions of an existing will. In terms of the Act, an African may, subject only to the limitations of the Act, freely dispose of immovable property by will.¹³³ A will under the Act must be registered and executed before a District Commissioner and must relate to

¹³¹ 1922 SR 55 at 56-7

¹³² Act No. 13 of 1987

¹³³ section 5 African Wills Act (Chapter 108)

immovable property or any rights attaching thereto. Any dispute concerning such a will is decided by a District Commissioner subject to a right of appeal. In terms of section 13, nothing in the Act ‘shall be construed as instituting a testamentary successor as the general heir of the testator.’ These special provisions override and take the place of any customary law.¹³⁴ In this way the rule of customary law of succession is distinctly overpowered.

In the case of *Komo and Leboho v Holmes NO*,¹³⁵ it was held that Africans were entitled to regulate inheritance of immovable and movable property by making a will under the law of Rhodesia. The right to make a will under the law of Rhodesia was governed by the common law. Statutory enactments were generally concerned with the proper form and execution and administration of wills. In the case of *Dokotera v The Master and others*¹³⁶ it was held that ‘property’ must be considered to refer to movable property. It therefore appears that the decision in *Komo’s*¹³⁷ case still stands that Africans are not precluded from making wills in the same manner as other citizens of Rhodesia.

The problem now was that, there was no customary law dealing with the devolution of immovable property of intestacy. In terms of the African Wills Act¹³⁸, in the absence of a will, immovable property devolves upon ‘the heir at African law in his individual capacity.’ The words ‘in his individual capacity’ mean not as the head of his family or by reason of his position

¹³⁴ *Gwebu v Gwebu* 1961 R & N 694 at 698

¹³⁵ 1935 SR 86 at 92

¹³⁶ 1957 (4) SA 468 (SR)

¹³⁷ see also *Komo’s* case in 3.3.2.4 above

¹³⁸ section 6 African Wills Act

in the family or the tribe.¹³⁹ The problem was there was generally no concept of individual ownership of immovable property at customary law. The meaning of the words ‘heir at African law’ were interpreted by Beadle CJ in *Matambo v Matambo*,¹⁴⁰ he says, “It seems to me that what must be decided here is what precisely the legislature meant by the words ‘heir at African law’ where they occur in section 6 of the African Wills Act. The word ‘heir’ here, since there is nothing to indicate any intention to the contrary, must be construed in the normal grammatical sense in which it is understood in our law. I look therefore to our law to see what is meant by the word ‘heir’. In regard to intestate succession the heirs are persons who are entitled to succeed to the property of the deceased.” Paraphrasing section 6 of the African Wills Act in the light of that definition I consider that section 6 must be interpreted as meaning: “the person at African law who is entitled to succeed to the property of any deceased African shall succeed in his individual capacity to any immovable property.”¹⁴¹

This can therefore be interpreted as a distortion of African custom because individual ownership to immovable property was an unknown concept altogether. In the case of *Dokotera*¹⁴² this problem was answered. Movable property was held to devolve according to the principles and practices of customary law. In *Dokotera*’s case the court mentioned that in regard to movable property native law and custom recognized private ownership of various kinds, dependent on the manner of acquisition of such property. Counsel explained to the court that certain movable property could be disposed of freely or by will, other property was held in trust for devolution

¹³⁹ see *Dokotera*’s case below

¹⁴⁰ 1969 (3) SA 717 (RAD)

¹⁴¹ *Ibid*

¹⁴² 1957 (4) SA 468 (SR)

after the owner's death. Customary law provides different forms of succession to movable property, dependent on the method of its acquisition. It should be observed that the reference to a 'will' under customary law is similar to that known in Roman-Dutch law as a donation *mortis causa*. Such a donation made by a person in contemplating his own death and unlike the position under Roman-Dutch law, it did not have to be executed in writing with the formalities required of a will.¹⁴³

On the other hand the African Wills Act also found application with regard to the customary law of guardianship of the deceased's children. The provisions of section 3 (1) of the African Law and Tribal Courts Act concerning the law applicable to guardianship overrides the position which prevailed hitherto. Customary law is deemed to apply unless the justice of the case otherwise requires. Hence a case may be decided according to the law of Rhodesia.

The African Wills Act (Chapter 108) provides that, '*notwithstanding any African law and custom which may be in existence, it is lawful for any African who enters into a civil marriage to make provision by will for the guardianship of his children.*'¹⁴⁴ If no such provision has been made, it is competent for any person lawfully interested in the children of such a marriage to make application to the district commissioner, who is entitled to make such order for their guardianship as he may deem fit in terms of section 3. It should be noted that these provisions relate to children of a couple who are married by civil rites.

¹⁴³ see *Meyer v Rudolph's Executors* 1918 AD 83, *Wiley v The Master* 1926 CPD 123

¹⁴⁴ section 2 African Wills Act (Chapter 108)

However it is submitted that an African woman could make a will in the same way as an African male. Section 3 (a) (iii) of the African Law and Tribal Courts Act, section 13 of the African Marriages Act (Chapter 105) and section 5 of the African wills Act¹⁴⁵ (Chapter 108) draw no distinction between the application of those provisions to males or females. Under Roman-Dutch law a woman may make a will.¹⁴⁶ This was surely a diversion from the customary law position because testamentary succession was unknown in the case of both men and women.

3.3.2.5 Deceased Person's Family Maintenance Act¹⁴⁷

At customary law one of the aims of the distribution of the deceased's estate, was to ensure that his children would continue to be well looked after subsequent to his death. The 'organic' part of the estate was central to providing the means and resources for the continued upkeep of the surviving children and the spouse. Regardless of whether customary or general law is applied or whether the estate is testate or intestate, there is an obligation to maintain certain categories of dependents of a deceased person either under customary law or in terms of the Deceased Persons Family Maintenance Act.¹⁴⁸ The Deceased Person's Family Maintenance Act seemed to find some consistency with indigenous law in this regard.

¹⁴⁵ African wills Act No. 13 of 1987

¹⁴⁶ Steyn, *The Law of Wills in South Africa*, (1948) 20

¹⁴⁷ Act No. 39 of 1978

¹⁴⁸ *Ibid*

According to the Act, where the deceased, whatever his race, dies testate his or her property will be distributed in accordance with his or her will subject only to the rights of his or her dependants to claim maintenance from the estate in terms of sections 7 and 8 of the Deceased Persons Family Maintenance Act. Where he or she dies intestate the distribution of the estate will take place in accordance with customary law or general law, whichever is applicable to the case. If the case is governed by customary law, which is the case with respect to all Africans, the surviving spouse will retain whatever property he or she owned in his or her own right and the property of the deceased will be inherited by his or her heirs. Of importance to note is that the initial Act did not take cognizance of the widow as a recipient of maintenance but the deceased's children, which was against customary practice that, although a widow could not be heir, she had a right to claim maintenance from the estate of her deceased husband.

If it is the husband who has died the wife would be entitled only to her *mavoko* and *umai* property and the rest of the property will go to the heir or heiress of the deceased who would be the eldest child of the deceased regardless of sex.¹⁴⁹ The wife herself has no right to inherit anything from her husband's estate. However, she has a right to be maintained by the heir or heiress. As a dependant of the deceased she is also entitled to claim for periodical or lump sum maintenance from the estate. In awarding her maintenance the court shall have regard to: "(a) the

¹⁴⁹ see *Chihowa v Mangwende* SC84187 where the Supreme Court ruled that, the heir of a deceased African male is his eldest child regardless of sex. The Supreme Court came to this ruling on the basis that prior to the Legal Age of Majority Act, No.15 of 1982, African women were excluded from the customary law order of inheritance because of their then perpetual minority status and now that they become majors, like do men, on attaining the age of 18 years it follows that their exclusion from the inheritance line falls away, see also definitions on *umai* and *mavoko* property in 3.3.2.2 *supra*

age of the applicant and the nature and duration of the marriage; and (b) the contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family; and (c) the provision which the applicant might reasonably have expected to receive if, on the day on which the deceased died, the marriage, instead of being terminated by death, had been terminated by a decree of divorce.”¹⁵⁰

In 1987 the Deceased Persons Family Maintenance Act was amended so as to broaden the definition of dependant and to protect spouses from immediate property deprivation on the death of a spouse. This was major victory as far as uplifting the welfare of woman at statutory law as they would under African law custom. Section 8B of that Act makes it an offence for anyone to deprive a surviving spouse or child of any rights he/she may have had in immovable or movable property or livestock of her or his deceased spouse or parent.

B. POST COLONIAL LEGISLATION

3.3.2.6 Legal Age of Majority Act¹⁵¹

The effect of this Act is important to adequately understand its legal implications on the status of women. In terms of the Act, “On and after 10 December 1982, a person shall attain the legal age of majority on attaining eighteen years of age and in terms of section 3(1) shall apply for the purpose of any law and, including customary law and, in the absence of a definition or any

¹⁵⁰ see section 7(3) of the Deceased Persons Family Maintenance Act No. 39 of 1978 as amended by the Deceased Persons Family Maintenance Amendment Act No. 21 of 1987

¹⁵¹ section 15(1) of Act No. 15 of 1982

indication of a contrary intention for the construction of ‘full age’, ‘major’, ‘majority’, ‘minor’, ‘minority’ and similar expressions in;

(a) any enactment, whether passed or made before, on or after 10 December; and

(b) any deed, will or other instrument of whatever nature made on or after that date”¹⁵²

The Act found application in the case of *Chihowa v Mangwende*¹⁵³ where it was noted that, at customary law, it is the eldest male adult who becomes heir to his deceased father’s intestate estate. The eldest female adult does not enjoy a similar right at customary law. However in *Chihowa* the Supreme ruled that an eldest child, regardless of gender, inherits his or her deceased father’s estate by virtue of the Legal Age of Majority Act. The Court remarked that, “The legislature by enacting the Legal Age of Majority Act, made women, who in African law and custom were perpetual minors, majors and therefore equal to men who attain or attained the age of eighteen years before the Act came into force acquire capacity. That capacity entitles them to be appointed intestate heiresses. All that the courts are required to do is to give effect to the intention of the legislature.

Now the eldest daughter of a father who dies intestate can take the lot, but not herself only but for herself and her late father’s dependents.”¹⁵⁴ The judgment was therefore consonant with the notions gender equity and also did not diverge from the traditional communal concept that a

¹⁵² *Ibid*

¹⁵³ 1987 (1) ZLR 228 (S), it was held that the respondent was rightly appointed the intestate heiress to her father’s property.

¹⁵⁴ *Ibid*

deceased's assets were really meant for the upkeep of those who remained although a single party tended to be held trustee of such property. However there is argument that, the question to consider is whether the disabilities and discrimination suffered by women under customary law were based on their perpetual minority.

Muchechetera JA is of the view that, "they were not based on their perpetual minority but on the nature of African society, especially the patrilineal, matrilineal or bilateral nature of some of them. I reasoned that the concepts of minority and majority status were not known to African Customary law but that they were Common law concepts which, in my view, should only be used in customary law situations with great care."¹⁵⁵ From my point of view, the influence of the Common law in this regard was therefore surely not appreciated by the learned judge.

3.3.2.7 The Communal Lands Act¹⁵⁶

Access to Communal Land in Zimbabwe is governed by the Communal Lands Act. Section 8 of this Act states that when allocating land in communal areas of Zimbabwe Rural District Councils (the responsible local Authorities) must consult and co-operate with the local chiefs. They must also have regard to customary law relating to land allocation, occupation and use of land to those people who are customarily permitted to use the land and occupy the land. This section as read with s 23 (3) (b) of the Constitution earlier alluded to results in land being allocated in terms of

¹⁵⁵ Muchechetera JA, in *Magaya v Magaya* SC-210-98, see chapter 4 *infra*

¹⁵⁶ Communal Lands Act No. 20 of 1982

male primogeniture as sanctioned by customary law.¹⁵⁷ Women thus work and earn a living from the land through their husbands.

Women were allocated land use rights within the households as wives and daughters in patrilineages. Chiefs have the right to allocate rights for usage on pieces of land to adult males, meaning that the women can only acquire access to land through their husbands or male relatives. Because of the patrilineal nature of society and its patriarchal values, married women in communal areas live and work on land that has been traditionally occupied by their husband's lineage for generations. Unmarried women under this regime are allocated land use rights on a temporary basis in the belief that they will one day marry and go and live with their husbands.¹⁵⁸

Men's access to land therefore is primary while women's entitlement is secondary and entirely dependant on males. This is much to the demise of widowed/single or divorced women who find themselves unable to access communal land since individual ownership of immovable property is not recognized as ownership at customary law and can only be derived through a male member of the family.

¹⁵⁷ section 23(3)(b), is the non- discriminatory clause. It prohibits discrimination on the grounds of race, colour, creed, tribe and gender but not sex. It then proceeds to outline that the application of African customary Law shall not be held to be discriminatory in other issues of personal law such as inheritance, access to communal land which then prejudice women's rights to access property

¹⁵⁸ *Ibid*

3.3.2.8 The Wills Act¹⁵⁹

Testate succession in Zimbabwe is governed by the provisions of either the Wills Act¹⁶⁰ or, if the will was executed prior to 1 January 1988, a combination of the Roman Dutch law and the Wills and Attesting Witnesses Act. The capacity to make a will is unregulated by the race or sex of the individual. The only significant criteria, in terms of the Wills Act¹⁶¹ is that the testator be over the age of 16 at the time of making the will and should not have been mentally incapacitated at the time. Complete freedom of testation is a primary characteristic of the law of testate inheritance in Zimbabwe,¹⁶² but the adverse effects of an innocently misconceived or even a deliberately exclusionary will on the future of the family of the deceased can to some extent be improved by the provisions of the Deceased Person's Family Maintenance Act.¹⁶³

There is an unarticulated assumption that the middle class aim or the expectation is for a 'western' form of inheritance, leaving the surviving spouse as the primary or sole beneficiary and the children taking a share of the remainder, if there are any.¹⁶⁴ Thus it is often assumed that when a black man seeks advice on the execution of a will, the contents of his intended will would reflect 'western' notions of inheritance patterns. However, attitudes to making wills and their contents are not consistent across the racial groups.

¹⁵⁹ Act No. 13 of 1987

¹⁶⁰ *Ibid*

¹⁶¹ section 4, prior to 1/1/88, girls could make a will at 12 years and boys at 14. These ages were based on the Roman age of puberty.

¹⁶² section 5 of the Wills Act No.13 of 1987

¹⁶³ J Stewart, *The dependants Live On, Protection of Deceased Estates and Maintenance Claims Against Deceased Estates*, Zimbabwe Law Review, 1989 - 90

¹⁶⁴ J Stewart, *Women's Inheritance of Property in Zimbabwe*, (1987)

Sibanda¹⁶⁵, in surveying wills made in a firm of legal practitioners and also those lodged with the Master's Office, noted that whereas 96% of white/ non-black males bequeathed all or the bulk of their estates to their spouse, only 12% of black males left their estates to their wives. Sibanda noted that, of the 25 wills made by black males that he examined, 40% left the entire estate to the eldest child. Only 10% of black males made provision for their wives to receive only the household goods and effects. A significant 18% of black males provided that their children were to share the estate but made no mention of the wife sharing. Sibanda's work is limited by the fact that he was not able to interview the testators and that is he surveyed only one firm of legal practitioners. Thus his sample is not necessarily representative. However, since the clients of the firm could be described as middle class, that is, business, professionals and farming, the work can be said to be representative of the black middle class.¹⁶⁶

Despite the limitations of Sibanda's sample, it can be safely deduced that the majority of black males who make wills prefer a form of succession that does not make their wives the principal beneficiaries of the estate. Intestate succession under customary law and general law, or a mixture of the two (where the gaps in the law allow dual systems in one estate), plus recourse to the Deceased Persons Family Maintenance Act, may provide some protection for the needs of the family of a deceased person.¹⁶⁷ It can therefore be said that apart from allowing freedom of testation, the Wills Act¹⁶⁸ is not totally in disharmony with customary law, because in the event

¹⁶⁵ Zvobgo and Others, *Inheritance in Zimbabwe* 47

¹⁶⁶ *Ibid*

¹⁶⁷ Stewart J, Women, Law and Development or a Tale of three Families in a Changing World, Legal Forum Vol 3, No. 1

¹⁶⁸ Wills Act No. 13 of 1987

of an exclusionary will it does not disallow recourse available in terms of other forms of legislation.

3.3.2.9 Customary Law and Local Courts Act¹⁶⁹

In terms of section 6A of the Customary Law and Local Courts Act, rights in immovable property in the estate of a person to whom customary law is applicable devolves on the heir at customary law in his individual capacity. It seems that the approach of the courts has been that rights in immovable property are to be distributed to an individual heir even though in *Matambo's*¹⁷⁰ it was suggested that there might be more than one heir, one to status and one to property. The Appellate Division faced the issue whether the applicable customary law entitled somebody besides the eldest son of the decedent's senior wife to share in the estate. The court stated: *'This seems to me to be a matter which requires the most careful investigation, an investigation which can only be conducted by hearing witnesses who are experts in this matter and who are in a position to give their views on what the karanga custom is.'*¹⁷¹

From my point of view this is the true customary law position that recognized a successor to the position or status of the deceased and those that inherited the deceased's property so in essence

¹⁶⁹ Customary Law and Local Courts Act No. 2 of 1990

¹⁷⁰ 1969 (3) SA 717 (RAD)

¹⁷¹ *Ibid*

there could in fact be more than one heir. In the case of *Seva v Nzuda*¹⁷² the decision was that the heir may dispose of that property as he sees fit without regard to the needs of the family of the deceased unless they ‘blow the whistle’ on him early enough and enable the enforcement of maintenance rights under custom. Holleman¹⁷³ describes the rights that individuals could exercise over land and the principles underlying those rights, he says, ‘although every individual cultivator has a full and indisputable right to the crops he/she raises and is entitled to the full use of his field without the interference of others, the land itself is never regarded as individual property.’ This further explains the conflict that existed between application of even post-colonial legislation and customary law as individual property rights were a generally alien concept to customary law.

The second problem arises where the provisions of the Act with regard to the heir inheriting in his individual capacity, do not indicate who that heir should be.¹⁷⁴ From my point of view the provisions of the Customary Law and Local Courts Act¹⁷⁵ are therefore a bit too general in nature and impose another task on the courts to ascertain the true customary law position as to who should be heir.

However there seems to be some guidance and direction in section 5 of the Customary Law and Local Courts Act which provides that; ‘*If a court of law entertains any doubt as to the existence or content of a rule of customary law relevant to any proceedings after having considered such*

¹⁷² SC-131-92

¹⁷³ Holleman, *Customary Law* 7

¹⁷⁴ Zvobgo and Others, *Inheritance in Zimbabwe* 81

¹⁷⁵ Act No. 20 of 1982

submissions there on as any be made, and such evidence thereof as may be tendered, by or on behalf of the parties, it may, without derogation from any other lawful source which it may have recourse to, consult reported cases, textbooks and other sources, and may receive pinions either orally or in writing, to enable it to arrive at a decision in the matter.'

The procedures to be taken by the court were highlighted by Dumbuthsena J in *Madondo v Mkushi*.¹⁷⁶ The case involved a dispute as to who was the heir of a deceased African male and an integral part of resolving that issue was a further dispute as to who was the person who appointed the heir under *Karanga* custom. It was held that: *'In the view of this court a thorough investigation or enquiry into the Karanga custom pertaining to inheritance of estates of persons who die intestate is required. Both counsel entertain doubts as to what the custom is. Is it only Karanga custom that is applicable? Or is Karanga custom the same as Shona custom? Is it the eldest sister of the deceased who appoints the heir? Or is it the brother or half brother of the deceased?'*¹⁷⁷

3.3.2.10 The Administration of Estates Amendment Act¹⁷⁸

Aimed at providing a solution particularly amongst the problem arising from multiple marriages, the Administration of Estates Amendment Act was reformist in nature. It applied to the estates of

¹⁷⁶ 1985 (2) ZLR 1987 (SC)

¹⁷⁷ see also the role of the *samukadzi* in 2.2.1 Chapter 2 *supra*, that the true position at customary law was that the *samukadzi* or the deceased's sister would distribute the estate

¹⁷⁸ Administration of Estates Amendment Act No. 6 of 1997

any person to whom customary law applied at the time of his death. Having regard to the two types of registered marriages in Zimbabwe, namely monogamous marriages under the Marriage Act and polygamous marriages under the Customary Marriages Act. Marriages solemnized under the Marriage Act result in relations governed by Roman Dutch Law. Marriages solemnized under Customary Marriages act as well as unregistered marriages, which are contracted in accordance with custom result in the estates of the spouses being administered in terms of Part IIIA of the Administration of Estates Amendment Act of 1997. For widows of polygamous men the position is as follows:

- If a man registered his first marriage in terms of the Marriages Act any subsequent customary union results in the second widow not being recognized as a spouse.
- If the man's first marriage was an unregistered customary union and any subsequent marriage was registered in terms of the Marriage Act, both widows are recognized as surviving spouses.
- If a man's first marriage was solemnized in terms of the Customary Marriages

Act and subsequently contracted "monogamous" marriage both widows are recognized as surviving spouses.

It is such progressive legislation that has been condoned by women's groups in the region acknowledging that in terms of polygamous marriages they support the position in Zimbabwe where all wives share equally in the estate as well as special provision being made along the lines of legislation in Ghana, Zambia and Zimbabwe that a surviving spouse must be guaranteed

rights to the deceased's house and household goods.¹⁷⁹ Procedurally, after the death of a person one of the relatives registers the estate at the nearest Magistrates Court. In the presence of at least four close relatives of the deceased an executor is appointed and given either a certificate of authority or a letter of administration depending on the value of the estate. However, this procedure does not apply widows of registered monogamous marriages and widows and orphans of men who left wills. In reaching his verdict the Magistrate is guided by the following principles, which are set out in section 68F of Act 6 of 1997:

- One third of the net estate should be divided between the surviving wives in the proportions two shares to the first or senior wife and one share to the other wives
- The remainder of the estate should devolve upon A. his child or B. his children in equal shares.

Other sections of the Act provide widows with entitlement to receive ownership rights over the house they lived in at the time of their husband's death. However in practice, some widows are not recognized as surviving spouses and therefore according to the law receive nothing from their husband's estate. Mr. Mandeya also reiterated the disharmony that exists between culture and the law. Widows face difficulties from relatives who fail to understand that they are entitled to their husband's estate.¹⁸⁰ However at the same time it is noteworthy that the Act had the impact of consolidating the customary law reasoning that the 'organic' part of the deceased's

¹⁷⁹ M O'Sullivan, comments on the South African Law Commission's Project 90, discussion paper 93 on customary law and inheritance, Women's Legal Centre, South Africa at <http://www.wlce.co.za/index.html>

¹⁸⁰ H Mandeya, Chief Magistrate, Zimbabwe, Customary laws and property rights of widows and orphans in Zimbabwe, Report of the National Conference, 25 to 27 January 2006 Lusaka, Zambia at <http://www.fao.org/hivaid/publications/reportzambia.pdf>

estate had a primary function of providing resources for the upkeep of the surviving widows and their families.

3.3.3 CONCLUSION

The status of Zimbabwean women has shifted dramatically due to the impact of colonial rule and legislation as outlined above. Historically, women's land and resource access was guaranteed through social and family connections, with women's agricultural production tied to traditional roles in the family, and access to land guaranteed by marriage or clan-based land allocation. Precolonial Zimbabwean women therefore held a relatively high social position and were attributed a certain place of honour and respect by customary laws and traditional community structures.

As British colonial influence penetrated Southern Rhodesia during the years 1888-1980, newly imposed legal structures reduced women's access to economic and natural resources, including access to land. As colonization affected the legal structures and African rights to natural resources, the problem was that women faced increased competition for land. Under these new legal structures, colonial authorities and administrators had much to do with the subjugation of women.

CHAPTER 4

THE IMPACT OF CONSTITUTIONALISM AND INTERNATIONAL HUMAN RIGHTS LAW ON SUCCESSION IN POST INDEPENDENCE ZIMBABWE

4.1 INTRODUCTION

Some constitutions see customary law and culture as being subject to non-discrimination provisions contained within the Bill of rights.¹⁸¹ On the other hand, others grant customary law immunity from non-discrimination provisions.¹⁸² In general it seems the newer post-1990 Constitutions are more progressive as they embrace human rights principles of equality and non-discrimination. In so doing, these Constitutions strive to fulfill the first state obligation of the Convention On The Elimination Of All Forms Of Discrimination Against Women (CEDAW) on the equality of men and women.¹⁸³

In defining these constitutional models, one can come up with three constitutional models notably: (i) 'strong cultural relativism' which allows customary law to exist unfettered by considerations of non-discrimination or equality before the law provisions, such as in the Zimbabwean Constitution; (ii) 'weak cultural relativism' which recognizes customary law also

¹⁸¹ section 39, South African Constitution Act 108 of 1996

¹⁸² section 23 (3) Zimbabwean Constitution Amendment Act No. 16 of 20 April 2000

¹⁸³ Article 2 (a) The Convention On The Elimination Of All Forms Of Discrimination Against Women, that, states are required to embody the principle of equality of men and women in their national constitutions

provides for equality before the law without making explicit the hierarchy for the recognition of equality provisions and the continued existence of customary law and (iii) the ‘universalist’ position, which, while recognizing customary law and the right to culture, it makes both subject to the test of non-discrimination and equality before the law such as in the Constitution of South Africa. This may appear to be a more vivid illustration:

	ZIMBABWE (strong cultural relativism)	TANZANIA (weak cultural relativism)	SOUTH AFRICA (universal)
Recognize customary law	✓	✓	✓
Recognize sex/gender non-discrimination	✓		✓
Customary law subject to non-discrimination provision			✓
Customary law not subject to non-discrimination provision	✓		
Equality before the law provision		✓	✓

4.2 **CONSTITUTION OF ZIMBABWE 1980¹⁸⁴ - Cultural Relativism**

The Zimbabwean Constitution is a strongly relativist one. It recognizes customary law as being on par with general law. The initial Constitution in its non-discrimination provisions in section 23 (2) covered race, tribe and religion but not sex. Although the Constitution¹⁸⁵ was amended in 1996 to include gender as ground on which discrimination is forbidden, the Constitution shields customary law from the non-discrimination provision. Under section 11, which contains the declaration of Rights, it states that every person in Zimbabwe, whatever his race, tribe, place of origin, political opinions, colour, creed or sex, is entitled to the fundamental rights of the individual, subject to respect for the rights and freedoms of others and for the public interest. The fundamental rights of the individual are set out as those relating to:

- (a) life, liberty, security of the person and protection of the law;
- (b) freedom of conscience, of expression and of assembly and association; and
- (c) Protection for the privacy of his home and other property and from the compulsory acquisition of property without compensation.

The section confers substantial rights and freedoms in general terms, which may be expanded on in the ensuing section 23. Section 23(1)(a) forbids any provision that is “discriminatory either of itself or in its effect”, while section 23(1)(b) provides that no person shall be treated in a discriminatory manner. Discrimination referred to by section 23, would be such that “persons of

¹⁸⁴ Constitution of Zimbabwe 1979/1600 also referred to as the Lancaster House Agreement

¹⁸⁵ Constitution Amendment Act No. 14 of 1996

a particular description by race, tribe, place of origin, political pinion, colour or creed, are prejudiced by being subject to, or are given privileges or advantages which persons of other descriptions are not given. The problem for the recognition of women's rights was profound because the absence of gender is noteworthy.¹⁸⁶ Unlike the first Constitution¹⁸⁷, the new Constitution of Zimbabwe in Section 23 outlaws discrimination on the basis of gender, and yet in the same section allows it in matters governed by customary law. It reads, "Subject to the provisions of this section;

(a) no law shall make any provision that is discriminatory either of itself or in its effect; and;

(2) For the purposes of subsection (1), a law shall be regarded as making a provision that is discriminatory and a person shall be regarded as having been treated in a discriminatory manner if, as a result of that law or treatment, persons of a particular description by race, tribe, place of origin, political opinions, colour, creed or gender are prejudiced

(a) by being subjected to a condition, restriction or disability to which other persons of another such description are not made subject; or

(b) by the according to persons of another such description of a privilege or advantage which is not accorded to persons of the first-mentioned description; and the imposition of that condition, restriction or disability or the according of that privilege or advantage is wholly or mainly attributable to the description by race, tribe, place of origin, political opinions, colour, creed or gender of the persons concerned.

¹⁸⁶ Section 23, first Constitution of Zimbabwe 1980

¹⁸⁷ *Ibid*, The first Constitution was silent on sex as a ground of discrimination

However in subsection (3); Nothing contained in any law shall be held to be in contravention of subsection (1) (a) to the extent that the law in question relates to any of the following matters;

(a) adoption, marriage, divorce, burial, **devolution of property on death** or other matters of personal law;

(b) the application of African customary law in any case involving Africans or an African and one or more persons who are not Africans where such persons have consented to the application of African customary law in that case.¹⁸⁸

Section 23 has been a bone of contention for many women who have called for its removal from the Constitution. The already apparent conclusion to be drawn is that currently the Constitution permits the elevation of customary law over constitutional rights. These are the very areas that are the source of women's suffering and oppression in Zimbabwe.

British policy at the period of occupation of Rhodesia was to leave as intact as possible the laws of the conquered peoples, particularly in the realms of land law and family law¹⁸⁹. As early as when the British Charter was granted, the British South African Company in 1889 made provision for the recognition of African custom and law, in the administration of justice to the said people or inhabitants. It held that careful regard shall always be had to customs and laws of the class or tribe or nation to which the parties respectively belong, especially with regard to the

¹⁸⁸ section 23(1) and (2) Constitution of Zimbabwe Chapter III as amended to Act No. 16 of 20 April 2000

¹⁸⁹ J Kazembe and M Mol, Women and Development, Beyond the Decade, Conference 26 - 29 September 1985 Guelph, Ontario, Canada or www.library.yorku.ca

holding, possession, transfer and disposition of land and goods, testate and intestate succession and marriages, divorce, legitimacy and other rights of property and personal rights, but subject to any British laws which may be in force in any of the territories aforesaid and applicable to the people and inhabitants thereof.¹⁹⁰ As an extension to the above, the ‘repugnancy clause’ was added. This stated that African customary law would be recognized except where it was ‘repugnant to natural law, justice or morality.’¹⁹¹ This meant that if a case regarding succession or inheritance was deemed to be against these western notions of morality it was struck down as immoral. Western law was thus used as a yardstick for the application of customary law.

Sedler,¹⁹² writing of the United States of America submits that, “there is no justification for sex based discrimination in law except to serve the notions of male supremacy. Sex based distinctions, like racial ones which are designed to maintain white supremacy, should be declared inherently invidious and insupportable except upon a showing of a compelling governmental justification which, as a practical matter, means no at all.”

In the case of Magaya v Magaya¹⁹³ when Shonhiwa Magaya died intestate, a local court in Zimbabwe designated his eldest child, Venia Magaya, heir to his estate. On appeal, Miss Magaya’s younger half-brother claimed heirship on the grounds that according to African customary law, a female cannot be appointed as heir to her father’s estate when there is a man in

¹⁹⁰ section 14 of the British Royal Charter of 1889

¹⁹¹ May, *Colonial Law* 42

¹⁹² R A Sedler, The legal dimensions of women’s liberation, *Indiana Law Journal* XLVII, pg 420-

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¹⁹³ see also *Seva and Others v Nzuda* *infra*

the family who is entitled to claim it. An appellate Judge agreed and Miss Magaya's heirship was reversed.

In the facts of the case, Venia Magaya, a 58 year old seamstress, sued her half brother for ownership of her deceased father's land after her brother evicted her from the home. Under the Zimbabwean Constitution and international human rights treaties, Magaya had a right to the land. However, the court ruled unanimously that women should not be able to inherit land "because of the consideration in the African society which, amongst other factors, was to the effect that women were not able to look after their original family (of birth) because of their commitment to the new family through marriage."

The newly appointed heir took his position as head of household, removed Miss Magaya from her family home, and placed her in a shack in the neighbor's backyard. Upon further appeal, the Supreme Court of Zimbabwe upheld the appellate decision, stating that, despite constitutional protections against discrimination, the fact that this case arose under customary law exempted its discriminatory aspects from court scrutiny. The court explained that the Constitution permits this type of discrimination against women as within "the nature of African society."¹⁹⁴

The judiciary backed up its decision by referring to section 23 of the Constitution of Zimbabwe. The court held that the Constitution prohibits discrimination in subsection (1) but in subsection

¹⁹⁴ 1999 (1) ZLR 100 (S)

(3) recognizes exceptions to this general prohibition against discrimination in issues relating to among others: (a) adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; (b) the application of African customary law. Essentially, by making this judgement, the Supreme Court elevated customary law beyond constitutional scrutiny.¹⁹⁵

The final and most significant, issue to be addressed was the extent to which these rules were inconsistent with section 3 of the Legal Age of Majority Act which fixed the legal age of majority at 18 years.¹⁹⁶ In terms of section 3(3), sub-section (1) should “apply for the purpose of any law, including customary law.” Under customary law a father had a right to sue for damages for the seduction of his daughter, and the issue arose in the case of *Katekwe v Muchabaiwa*.¹⁹⁷ The question was whether that right was affected by the Legal Age of Majority Act.

The Supreme Court held that the effect of the Act was to abolish the status of perpetual minority to which women were subject under customary law and that once a woman reached the age of 18, she ceased to be under the guardianship of her father and he ceased to have any right to claim damages for her seduction. Indeed she could sue for damages in her own right. In holding

¹⁹⁵ K Valerie, “Zimbabwe’s *Magaya* decision revisited”, in women’s rights and land succession in the international context, Columbia Journal of Gender and Law, at www.goliath.ecnext.com/coms2/browse. The Columbia Journal of Gender and Law is the preeminent journal for scholarship on the interaction between gender and law. The Columbia Journal of Gender and Law fosters dialogue, debate, and awareness about gender-related issues and feminist scholarship. The journal quotes Justice Ruth Bader Ginsburg’s introduction from their first issue, that, the Columbia Journal of Gender and Law seeks to “portray today’s feminist movement, not as unitary, rigid or doctrinaire, but as a spacious home, with rooms enough to accommodate all who have the imagination and determination to work for the full realization of human potential.” See also <http://www.columbia.edu/cu/jgl/about.html>

¹⁹⁶ Section 3(1) of Act No. 15 of 1982 (now section 15 of the General Law Amendment Act)

¹⁹⁷ SC 87/84

unanimously that the *Katekwe* case was wrongly decided the five judges of the Supreme Court in *Magaya* undeniably weakened the status of African women in Zimbabwe.¹⁹⁸ Unsurprisingly, the decision in *Katekwe* was the focus of fierce public debate being hailed by some as a victory for women's rights and attacked by others for undermining traditional family values.

More closely relevant to the present discussion was the Supreme Court decision in *Chihowa v Mangwende*¹⁹⁹ on the question of heirship to the estate of an African male. In this case the deceased was survived by his wife, two daughters, his father and four brothers, and the Community Court had appointed the elder daughter (the respondent) to the heirship. The father (the appellant) appealed to the Magistrate's Court and then to the Supreme Court. The appeal was dismissed. The court relied on the 1982 Act, pointing out that, there was nothing in section 3 which remotely suggests that for purposes of inheritance a woman can still be regarded as a minor. Dumbutshena CJ said, 'there is no indication of a contrary intention other than that enshrined in the Act and it is my opinion that there is nothing now in any enactment or at customary law which prohibits a woman from being appointed an intestate heiress.'

¹⁹⁸ S Coldham quoting A S Tsanga, a law lecturer at the University of Zimbabwe commented that "Zimbabwe has chosen to regress into the dark ages as far as women's rights are concerned.", *Journal of African Law*, Vol 43, No. 2, 1999, pg 248-252 at <http://links.jstor.org/sici?sici=0021>

¹⁹⁹ 1987 (1) ZLR 228, Dumbutshena CJ, quoting from his judgment in *Katekwe*, "the indications are that Parliament's intention was to create equal status between men and women, and, more importantly, to remove the legal disabilities suffered by African women because of the application of customary law. This view is not only common sense; it is supported by the clear and unambiguous language used in section 3." See also *Lopez v Nxumalo* SC 115/85, the Supreme Court allowed a married African woman to sue for damages in respect of her minor daughter. It seems clear that this decision is implicitly overruled by *Magaya*

Unsurprisingly, the appellant in *Magaya* relied heavily on *Chihowa* and on the former Chief Justice's interpretation of the 1982 Act.²⁰⁰ However the Court unanimously rejected that interpretation and held that both *Chihowa* and *Katekwe* had been wrongly decided.²⁰¹ The *Magaya* decision was a reflection of the position adopted in the case of *Seva and Others v Dzuda*²⁰² The inheritor-son then sold the property with the home, and the buyer evicted the deceased's family. The family then sued to try to retain possession of the home by stating that, under customary law, the eldest son is to inherit the property for the purpose of caring for the rest of the family as the patriarch.

The court ruled that under Zimbabwean law, the customary heir had the right to inherit the property personally, and not as any sort of trust. Therefore, the son could dispose of the property any way he chose, and the buyer had every right to evict the family. This decision was counter to

²⁰⁰ see Legal Age of Majority Act in 3.3.2.6 *supra*

²⁰¹ Muchechetere JA in *Magaya v Magaya* that, "the interpretation of the 1982 Act adopted in *Katekwe* and later cases stemmed from a serious misunderstanding of the position of women in African society. Any 'disability' or 'discrimination' that women were subjected to under customary law stemmed not from their status of 'perpetual minority' (itself a Western concept): but from the nature of African society in which individual interests were subordinated to the common weal and in which a patriarch or senior man controlled the lives and property of all family members, both male and female. The reason why men were preferred as heirs was not because women were 'perpetual minors': but because on marriage women would leave the family of their birth and join their husband's family. The Legal Age of Majority Act was designed 'to remove disabilities rather than to confer rights' and it was therefore irrelevant in the present context." The reasoning is not convincing.

²⁰² 1991 (2) ZLR 34 (S), the Court ruled that the eldest son, the heir under customary law, had an absolute right to personal inheritance of property even if the rest of the family was left with little or no familial property.

former decisions regarding the heir's responsibility to his family and indicated a reliance on the general law of personal property, not formerly applied to customary inheritance.

From a human rights point of view, the reasoning that women cannot be considered equal to men before the law, because of the nature of African cultural societal norms, violates several international human rights treaties to which Zimbabwe is a party. Whilst the landmark cases such as *Katekwe* and *Chihowa* upheld women's rights at customary law, *Magaya* went against these gains. On May 13, 1991, Zimbabwe acceded to the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), without reservations, thereby agreeing to provisions which specify that women and men shall be considered equal before the law and that discrimination against women should be eliminated.

4.3 THE AFRICAN CHARTER²⁰³

The Charter seeks to combine African values with international norms by not only promoting internationally recognized individual rights, but also by proclaiming collective rights and individual duties. These include the right to self-determination and to full sovereignty over natural resources, the right to peace, the right to a satisfactory environment favourable to a

²⁰³ The African Charter On Human And People's Rights, October 1986

people's development, but also the duty of individuals to their family, community and state. The African Charter recognises the importance of women's rights through three main provisions:

(i) Article 18(3), which concerns the protection of the family, promises to “ensure the elimination of every discrimination against women and also ensure protection of the rights of women;”

(ii) Article 2, the non-discrimination clause, provides that the rights and freedoms enshrined in the Charter shall be enjoyed by all irrespective of race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status.

(iii) Article 3, the equal protection clause, states that every individual shall be equal before the laws and shall be entitled to the equal protection of the laws.

Human rights critics, lawyers and activists have long regarded the provisions of the African Charter as inadequate to address the rights of women. For example, while Article 18 prohibits discrimination against women, it does so only in the context of the family. In addition, explicit provisions guaranteeing the right of consent to marriage and equality of spouses during and after marriage are completely absent. These omissions are compounded by the fact that the Charter places great emphasis on traditional African values and traditions without explicitly addressing concerns that many customary practices, wife inheritance, can be harmful or life-threatening to

women. By ignoring critical issues such as custom and marriage, the Charter inadequately defends women's human rights.²⁰⁴

4.4 THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)

CEDAW prohibits discrimination against women, whether direct or indirect.²⁰⁵ Article 16 of CEDAW obliges states parties to establish equal property rights for women in relation to marriage, divorce and death. An example of direct discrimination is seen in the Zimbabwean court case of *Jenah v Nyemba*²⁰⁶ where a married African woman instituted a claim for property without the assistance of her husband, the Supreme Court ruled that under African law and custom, property acquired during a marriage, becomes the husband's, whether acquired by him or his wife.²⁰⁷ This was in violation of CEDAW Article 14(1), that, 'States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetarised sectors of the economy. CEDAW General Recommendation 21, states that financial

²⁰⁴ E. Delport, The African Regional System of Human Rights, Centre for Human Rights University of Pretoria at www.up.ac.za/chr

²⁰⁵ Article 1, Convention on the Elimination of All Forms of Discrimination Against Women

²⁰⁶ 1986 49 (SC)

²⁰⁷ 1986 ZLR 138, It was held that 'women at customary law could not own property, see also *Angeline Chiutsi v Dennies Garisa*, Pittman J ruled that: 'unfortunately for the plaintiff, although in fact some African women may have achieved economic emancipation after marrying by Christian rites, the law of the land is still that, despite the solemnization of such a marriage, the property of the spouses shall be held according to African law and custom.' See discussion in 3.3.2.2 chapter 3 *supra*

and non-financial contributions to property ‘should be accorded the same weight’, and the woman should be consulted when property owned by the parties is disposed of.

Article 60 provides that the African Commission shall draw inspiration from international law on human and people’s rights. Such international law would include the Convention on the Elimination on All forms of Discrimination Against Women (CEDAW).²⁰⁸ However the problem arises due to the fact that section 111B of the Constitution of Zimbabwe determines that international instruments do not have the force of law in Zimbabwe until they have been domesticated by an Act of Parliament. As such they do not have authoritative force in judicial decisions, only persuasive force.²⁰⁹ The recognition and upliftment of fundamental women’s rights is therefore largely left to the discretion of the judges and the practice of judicial creativity.

Article 60 has also proved to be less useful because at least 43 African countries have ratified CEDAW, but compliance with the provisions of the Convention is often less than satisfactory. CEDAW has been criticised as reflecting only Western values and as being an instrument reflecting only the issues relevant at the time of its drafting. Furthermore, many African counties that have ratified CEDAW have entered a number of reservations. Often these reservations strike at the heart of the Convention. In particular, most reservations are made on cultural or religious grounds, and usually exclude obligations in one of the most crucial spheres for women the family

²⁰⁸ E Delport, *opcit*, The writer goes on to stress the point that, it is important to transform the African human rights discourse to more closely reflect women’s experiences

²⁰⁹ L Kalenga, Law reform: Whose responsibility? Analysis of efforts made towards reforming marriage laws in Zimbabwe in light of human rights instruments, as experienced by the Zimbabwe Women Lawyers Association (ZWLA) at www.uz.ac.zw/law/women/

very similar to the way the Zimbabwean constitution provides for exceptions in section 23 (3).²¹⁰

CEDAW was ratified by Zimbabwe in 1981 with the explicit purpose of condemning discrimination against women in all its forms, thereby extending the basic condemnation of gender discrimination put forth in the Universal Declaration of Human Rights (UDHR).²¹¹ It symbolized the states parties' commitment to eliminating discrimination against women in all its forms, from legal to social and cultural prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes.²¹² It also called for the modification or abolition of discriminatory laws, regulations, customs and practices.²¹³

In *Magaya*, however, CEDAW's aims were not met. More crucially, CEDAW could not be a source of redress for Venia Magaya. In part, this resulted from the CEDAW Committee's decision not to review the case because it had not been included in Zimbabwe's internal law.²¹⁴ The Committee's refusal to review the decision reveals the structural and political limits of

²¹⁰ See provisions in 4.10 *supra*, that, sexual discrimination shall not be unconstitutional in a matter between Africans involving customary law regarding the devolution of property, marriage divorce e.t.c

²¹¹ Article 27 of the 1948 Universal Declaration of Human Rights (UDHR) guarantees the right for everyone to freely participate in the cultural life of the community. The right to culture is also an integral part of other fundamental rights enunciated in the U.D.H.R. such as freedom of conscience, expression and religion.

²¹² *opcit*, CEDAW, Article 5

²¹³ *Ibid*, Article 2

²¹⁴ K Hall Martinez, Deputy Director, International Program Center for Reproductive Law and Policy at www3.undp.org/cedaw/msg00102.html

CEDAW and its Committee. If a member state chooses to refuse review of cases that may violate the convention, then there simply is no remedy to violations.

Clearly, *Magaya* offends principles of equality for women. Yet just as clearly, it upholds important emerging principles of group self-determination. The conflict between these areas is evident. One of the challenges this poses for courts like Zimbabwe's is the construction of solutions resolving these competing claims of rights instead of merely elevating one right or group over another. Careful interpretation and incorporation of the respective priorities of these rights could yield innovative positivism, and a new outlook on the universality of human rights.

4.5 **PROTOCOL ON THE RIGHTS OF WOMEN**²¹⁵

In an effort to make and transform African human rights law to one that is more reflective of women's experiences the Protocol on the Rights of Women represents the first major step towards this goal.²¹⁶ As a general rule, the ratification of a protocol presupposes the ratification of the treaty to which it is complementary. The significance of this document rests in the fact that it goes beyond the African Charter by exposing the specific inequalities that plague women's

²¹⁵ The Protocol was adopted by the African Heads of State and Governments in July 2003. The Protocol will enter into force once it has been ratified by 15 member states. To date, the Protocol has been signed by the Gambia, Ghana, Tanzania, Libya and Algeria which excludes Zimbabwe

²¹⁶ A Protocol is an international agreement used to indicate a legally binding instrument complementary to its mother treaty, in this instance the African Charter.

lives. In doing so, the Protocol explicitly acknowledges what the African Charter does not, namely that those women's rights are seen as human rights and must be respected and observed.

In general, the Protocol can be lauded as an innovative instrument that seeks to move towards the goal of securing the indivisibility of Human Rights. It also attempts to build on CEDAW in that it addresses gaps in CEDAW, and underlines the need to back up law with effective policy and other measures. However, this has resulted in language that is somewhat vague and weak, and a number of provisions that appear noble but legally unenforceable.²¹⁷

4.6 THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS²¹⁸

Like CEDAW, the ICCPR is based within the text of the Universal Declaration of Human Rights (UDHR), the cornerstone of modern human rights. Importantly, the ICCPR establishes that “all persons shall be equal before the courts and tribunals.”²¹⁹ While this equality does not explicitly refer to gender, later provisions in the Covenant establish the continuance of this concept from the UDHR. The Covenant goes on to call for equality for all persons, and universal entitlement to equal protections of the law, which “shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour

²¹⁷ Delpont, *opcit* at [www. up.ac.za/chr](http://www.up.ac.za/chr)

²¹⁸ Referred to as the ICCPR

²¹⁹ Article 14 International Covenant On Civil And Political Rights

and sex.²²⁰ Its praise comes from the call for minority groups to “enjoy their own culture” in community with other members of their group.

From my point of view the objectives of the Covenant clearly resemble the sentiments embodied in the Zimbabwean constitution in terms of section 23. The similarity is in the fact that both documents call for non-discrimination on the ground of sex whilst at the same time recognizing the right to enjoy one’s group’s cultural life and practice. In a conservative African setting, Zimbabwe not being an exception this would mean equal entitlement to follow tradition the result being the recognition of those cultural practices that recognize primogeniture as an essential feature for the efficacy of the group and are also perceived oppressive.

4.7 THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS²²¹

Similarly, the ICESCR calls for the elimination of discrimination against women and “the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.”²²² It also includes a call for the self-determination of all peoples, and says that by virtue of that right, they should “freely determine their political status and freely pursue their economic, social and political development.”²²³ Self-determination and women’s equality

²²⁰ *Ibid*, Article 16

²²¹ International Covenant on Economic, Social, and Cultural Rights, December 1996

²²² *Ibid* see Article 3

²²³ *Ibid* see Article 1

are thus structured as close, but separate and possibly conflicting, rights. As such, the question of prioritization arises, that is: is the self-determination of a population more valid than the assertion of a global norm of women's rights?

4.8 **THE DRAFT DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (DDRIP)**

This document deals with the importance of the self-determination of groups without detailing specifically with the protections against discrimination based on sex.²²⁴ In terms of the draft, "Indigenous people have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices."²²⁵ The *Magaya* case also violates the anti-discrimination articles of both the ICCPR and the ICESCR. In so doing, it reflects the imbalance inherent in the search for the establishment of and equalization among competing human rights. Clearly, *Magaya* offends principles of equality for women. Yet just as clearly, it upholds important emerging principles of group self-determination.

²²⁴ This document is a draft, however it offers important insight into international attitudes towards group rights as human rights and notions of communal self-determination.

²²⁵ Article 33, The Draft Declaration on the Rights of Indigenous Peoples (DDRIP)

4.9 **PROBLEMS OF HUMAN RIGHTS LAW**

When a country signs a convention, it means it agrees with the convention and is getting ready to ratify it, or come under the law of the convention. Countries have their own rules about how they must ratify a convention (like discussing it in parliament or writing a letter to the United Nations about it). When a country ratifies a convention it promises to put it into practice. The country has to report on what it is doing about the convention and other countries which have signed it can complain if that country is not doing enough to uphold it. Countries that have ratified a convention must change their own laws so that they do not differ from that convention.

Secondly, since all human rights instruments seem to draw their purpose from the UDHR, the problems emanates from the very nature of the UHDR that is not in harmony with the nature of 'living' African culture. However, when the UDHR was drafted, debated and adopted in the aftermath of World War II, only a handful of women and no sub-Saharan African sat on the floor of the UN General Assembly. Even the broad character of the rights articulated in the UDHR frame reflects normative values, inspirations and interests of Western culture of a specific stage of historical evolution. Hence, it is clear that the 'human rights' discourse emanates from a specific historical context.

Many scholars have critiqued the overall concept of culture and the approach of the UDHR as narrowly focusing on the individual's relationship to the state rooted in a Western liberal philosophy. Prominent among these is A A An-Na'im of the Arab world who makes a persuasive

argument for the dynamic concept of internal “cultural transformation” as the most practical guarantee of entrenching human rights in African societies. He argues that culture has a significant impact on human rights paradigms around the world and as such, culture is the best-suited vehicle for protecting rights.

An-Na'im has also challenged the cultural and religious obstacles to women's rights through a reconceptualisation of the opposition of culture and rights in theory and bridging their difference in practice. He begins from the premise that state driven efforts to protect human rights need to be supported by broader strategies for social and cultural transformation. When women drummed the point home during the U.N. conference on Human Rights held in Vienna (1993) that “women's rights are human rights”, emphasizing the indivisibility and interrelatedness of rights, they recognized the potential of culture to reinforce rights.²²⁶ In line with this school of thought, one may accept the decision in *Magaya* that the recognition of the primogeniture rule is relative to an African cultural setting in the private sphere of the family unit and its communal nature where rights and responsibilities are shared.

²²⁶ See “Human Rights in the Arab World: a Regional Perspective”, Human Rights Quarterly 23, 2001, pg 701–732, see also R Cook, ‘Women's international human rights law: the way forward’, Human Rights Quarterly Vol 15: 230-61, at <http://www.bridge.ids.ac.uk/reports/r49hrw2.doc>, the writer says, It is argued that international human rights law has not been applied effectively to redress the disadvantages and injustices experienced by women solely because of their gender. The distinction between the ‘public’ and ‘private’ spheres of society can present obstacles to women's rights. The public sphere or sector of legal and political order is contrasted with the private arena of home and family where states may claim it is outside their responsibility to intervene. Abuses of women's rights often occur in the ‘private’ sphere where states are reluctant to act. The dominant focus on political and civil rights in the understanding of international human rights law is therefore biased to the male-dominated public sphere.

4.10 SOUTH AFRICAN CONSTITUTION: UNIVERSALISM²²⁷

The South African Constitution is a ‘universalist’ type of constitution. It recognizes customary law²²⁸ but makes it subject to the non-discriminatory provisions of the Bill of Rights which prohibit any discrimination on grounds of age or gender among others.²²⁹ On the other hand the rule of male primogeniture according to writers such as Bennett²³⁰, Bekker²³¹ and Kerr²³², in monogamous families, provides that the eldest son of the family head is his heir, failing him the eldest son’s eldest male descendant. Where the eldest son has predeceased the family head without leaving male issue the second son becomes heir; if he be dead leaving no male issue the third son succeeds and so on through the sons of the family head. Where the family head dies leaving no male issue his father succeeds.

Before 2004, in South Africa’s legal scenario, under customary law, only males in the deceased’s family were able to inherit. This can be exemplified by an analysis of the case of *Mthembu v Letsela and Another*²³³ where the application of the Bill of Rights was considered by the Pretoria

²²⁷ Act 108 of 1996

²²⁸ *Ibid*, section 211 (3)

²²⁹ *Ibid* section 8, that, no one may unfairly be discriminated against on the grounds of sex or gender

²³⁰ T W Bennett, *A Sourcebook of African Customary Law for Southern Africa*, 1 ed, (1991) 399-400

²³¹ Bekker, *Customary Law*, 274

²³² Kerr, *Immovable Property*, 99

²³³ 1997 (2) SA 936 (T), the court gave judgment in favour of the respondent, the deceased’s father, on the basis that everyone has the right to participate in the cultural life of his choice in terms of section 30 of the Constitution. Therefore the customary law rule of male primogeniture

high court. In this 1997 case, the rule of male primogeniture was upheld and the court found that females suffer no discrimination, that is, no prejudice, because although they do not inherit property, they are entitled to maintenance out of the estate. The case involved the succession to the whole of the estate of a deceased person who died intestate, the respondent, who was father of the deceased, opposed an application by the widow to succeed to the estate.

The applicant sought to have the provisions of section 23(2) of the Black Administration Act²³⁴ regulating succession nullified on the basis that they were inconsistent with the provisions of section 8 of the Bill of Rights because the system of primogeniture discriminated on the grounds of sex or gender. The respondent based his claim to succeed to the estate on the primogeniture rule as well as on section 30 of the Bill of Rights which provides that everyone has the right to participate in the cultural life of his choice. The primogeniture system provides that only male relatives of the deceased in the direct line, that is son, father, grandfather, may succeed as heirs to the estate.

However section 30 further says that no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights. This can also be in violation of the equality clause in s 9(2) which provides for the full and equal enjoyment of all rights concerning equality. Furthermore, s 9(3) provides that the state, through its judicial organs, that is courts, has to

system was upheld. See also *Magaya v Magaya* and *Seva and Others v Dzuda* and 4.10 *supra* in this regard

²³⁴ Black Administration Act 38 of 1927

promote equality and may not unfairly discriminate directly or indirectly on the grounds of sex or culture.

The court held that, “In view of the manifest acknowledgement of customary law as a legal system existing parallel to the common law by the Constitution in terms of section 33(3) and section 181(1) and the freedom granted to persons to choose this system as governing their relationships as implied by section 31, it cannot be accepted that the succession rule is necessarily in conflict with section 8.”²³⁵ The judge went to say that, “there are instances where a rule differentiates between men and women, but which no right-minded person considers being unfairly discriminatory, for example the provision of separate toilet facilities.”

More convincingly it was mentioned that, “A widow in particular may remain at the deceased’s homestead and continue to use the estate property and the heir may not eject her at whim. Le Roux J was of the view that, if it is accepted that the duty to provide sustenance, maintenance and shelter is a necessary corollary of the system of primogeniture, it is difficult to equate this form of differentiation between men and women with the concept of ‘unfair discrimination’ as used in section 8 of the constitution.”²³⁶

²³⁵ Section 8 of The Constitution of South Africa of 1993 also known as the interim Constitution provided for non-discrimination on the grounds of sex and gender

²³⁶ This is consonance with the *dicta* in the Zimbabwean case of *Magaya* where the court ruled unanimously that women should not be able to inherit land because of the consideration in the African society which, amongst other factors, was to the effect that women were not able to look after their original family (of birth) because of their commitment to the new family through marriage. Muchechedere J went on to say, “Any ‘disability’ or ‘discrimination’ that women were subjected to under customary law stemmed not from their status of ‘perpetual minority’ (itself a

The question to be answered is whether the upholding of the customary primogeniture system by the courts is not indirect discrimination against women on the grounds of sex? In view of section 39(2) obliging the courts to develop customary law and to promote the spirit, purpose and object of the Bill of Rights the Pretoria high court could be seen by some to have fallen short in its duty of developing the customary law system that could be regarded in its present state as oppressive and perhaps infringing upon women's dignity in giving men preference over women. It follows that in terms of this system of succession, whether or not the female is the deceased's legitimate child, being female, she does not qualify as heir to the deceased's estate. Women generally do not inherit in customary law.²³⁷

In an ensuing similar case in 1998, the case of *Mthembu v Letsela and Another*²³⁸, the rule of male primogeniture was also upheld. The applicant in this case had entered into an invalid customary union with the deceased because the full amount of *lobolo* (brideprice) had not been paid to the woman's family. This is an essential feature of a valid customary union. A girl child had been born out of the incomplete marriage and therefore the child apart from being female was illegitimate. The deceased's father was the sole heir in this regard and appeared as the respondent.

Western concept): but from the nature of African society in which individual interests were subordinated to the common weal and in which a patriarch or senior man controlled the lives and property of all family members, both male and female.

²³⁷ Bennett, *Customary Law*, 400

²³⁸ 1998 (2) SA 675

The court held that the disqualification of the applicant's daughter to inherit from her deceased father flowed from her status as an illegitimate child and not from the fact that she was a girl and that the system of primogeniture was applied in customary law. Therefore there could have been no talk of unfair discrimination on the grounds of gender in present case and it followed that the value of equality had not been infringed. Moreover the applicant's daughter was not deprived of her right to support from her guardian.

The court was also reluctant in declaring the customary law rule of succession invalid. The reasoning was that, if the court declared the rule invalid because it offended public policy, it would be applying western norms to a rule of customary law which was still adhered to and applied by many African people. Since such a declaration would also have affected the customary family law rules, neither public policy nor the interim Constitution required the Court to have done that.²³⁹

Section 7(1) of the Constitution provides that everyone is equal before the law and it is qualified by section 9 providing that, 'equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to

²³⁹ See also *Mthembu v Letsela* 2000(3) SA 861 (SCA), where it was confirmed that female children cannot inherit, in this case the illegitimate daughter was excluded from inheriting on the basis of her illegitimacy and not gender, notably, the reasoning of the court here is similar to that in *Bangindawo's* case *supra*

protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.’²⁴⁰

At the same time in section 30 of the Bill of Rights, provision is made that everyone has the right to participate in the cultural life of his choice which might mean recognition of the rule of male primogeniture. There is however room permitted for the revision or rather, the development of customary law by the judiciary and other forums, in a positive way that retains principles of the bill of rights. The Constitution holds that, “when interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and object of the bill of rights.”²⁴¹ To incorporate and regulate the bill of rights and its conflicting interests, the constitution of South Africa has a ‘limitations clause’ that says that no rights are absolute and can be partially limited in view of their nature and purpose amongst other factors in the light of protection of human dignity.²⁴²

There is a Human Rights Commission which has the task of monitoring and providing avenues for review of human rights transgressions in general. This just goes on to show the great lengths to which South Africa has acknowledged the importance of addressing the historical inequalities of apartheid. South Africa like Zimbabwe is also part of and has agreed to many international human rights agreements such as The International Covenant on Civil and Political Rights, The

²⁴⁰ Act 108 1996 section 9 (2), see also section 9 (3), provides that the state, through its judicial organs, that is courts, has to promote equality and may not unfairly discriminate directly or indirectly on the grounds of sex or culture. see also preamble of The Promotion Equality and Prevention of Unfair Discrimination Act 4 of 2000

²⁴¹ *Ibid*, section 39 (2)

²⁴² *Ibid*, section 36

African Charter of Human and People's Rights and The Convention on the Elimination of all Forms of Discrimination Against Women. This means that South Africa has to do what these agreements say.²⁴³

Come year 2004 and court cases held that the position in the *Mthembu v Letsela*²⁴⁴ cases went against the Constitution and must change. These were the cases of *Bhe and Others v The Magistrate, Khayelitsha and Others*, *Shibi v Sithole and Others* and *South African Human Rights Commission and Another v President of The Republic of South Africa*²⁴⁵. The *Bhe* case concerned two girls, aged nine and two who challenged the rule that in the absence of a will stipulating that the girls inherit their deceased father's estate, they could not inherit the property on the grounds that they were female. The estate in question was the girls' home in Khayelitsha where the girls had been living with their parents until their father died. Since their parents were never married, even though they had been cohabiting for twelve years, the mother had no legal claims to the house. Under African customary law the house was therefore deemed to be the property of the heir or the eldest male relative of the deceased's children. The house thus fell to the deceased's father, who planned to sell it.

²⁴³ see 4.3, 4.6 and 4.7 *supra*

²⁴⁴ *supra*

²⁴⁵ 2005 (1) BCLR, 2005 (1) SA 580 (CC), The third case was brought jointly by the South African Human Rights Commission and the Women's Legal Centre Trust in the public interest and as a class action on behalf of all women and children prevented from inheriting by reason of the impugned provisions and the rule of male primogeniture.

The constitutionality of two Acts was put into question, namely the section 23 of the Black Administration Act²⁴⁶ and section 1(4)(b) of the Intestate Succession Act²⁴⁷ The latter Act excludes Black persons living under customary law from succession. Therefore in the *Bhe* case female children are excluded as the parents were living under customary law. This will also apply to males other than the first born in other circumstances.

The Court stated that section 23 was correctly described as a racist provision which is fundamentally incompatible with the Constitution. It was submitted that the section is inconsistent with sections 9 and 10 of the Constitution because of its blatant discrimination on grounds of race, colour and ethnic origin and its harmful effects on the dignity of persons affected by it.

“This Court has often expressed its abhorrence of discriminatory legislation and practices which were a feature of our hurtful and racist past and which are fundamentally inconsistent with the constitutional guarantee of equality. The exclusion of women from heirship and consequently from being able to inherit property was in keeping with a system dominated by a deeply embedded patriarchy which reserved for women a position of subservience and subordination

²⁴⁶ Section 23 of the Black Administration Act 38 of 1927, provides that estates of Blacks in Customary Law revolve on eldest male son failing him, his own eldest son (grandson of deceased) to the exclusion of all other children. In the *Bhe* case as the deceased did not have any male children the estate devolved upon his father.

²⁴⁷ section 1(4)(b) of the Intestate Succession Act No. 81 of 1987, prescribes how the estate of a person who, after the commencement of the said Act, dies intestate, either wholly or in part, shall devolve, “intestate estate” includes any part of an estate which does not devolve by virtue of a will or in respect of which section 23 of the Black Administration Act does not apply

and in which they were regarded as perpetual minors under the tutelage of the fathers, husbands, or the head of the extended family” argued counsel for the appellant.

The court accepted the argument for the appellant, and it went further to declare that the rule of male primogeniture as it applies in customary law to the inheritance of property was inconsistent with the Constitution and invalid to the extent that it excludes or hinders women and extra-marital children from inheriting property; and Section 1(4)(b) of the Intestate Succession Act is declared to be inconsistent with the Constitution and invalid.

The order was that a child’s share in relation to the intestate estate of the deceased, shall be calculated by dividing the monetary value of the estate by a number equal to the number of the children of the deceased who have either survived or predeceased such deceased person but are survived by their descendants, plus the number of spouses who have survived such deceased; and each surviving spouse shall inherit a child’s share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister for Justice and Constitutional Development by notice in the Gazette, whichever is the greater.²⁴⁸

²⁴⁸ See also *Brink v Kitshoff* 1996 (4) SA 197 (CC) para 44 where O'Regan J said that, the gender discrimination in our society has resulted in deep patterns of disadvantage which are particularly acute in the case of black women, as race and gender discrimination overlap and added that it was a key message of the Constitution that all such discrimination needs to be eradicated from our society. Justice O'Regan further said that, “Many women rear children single-handedly with no help, financial or otherwise, from the fathers of the children. The need to support children financially is one of the reasons for women seeking work outside the home. However, the responsibility for child rearing is also one of the factors that render women less competitive and less successful in the labour market. The unequal division of labour between fathers and mothers is therefore a primary source of women's disadvantage in our society.”

In the *Shibi* case, a magistrate had appointed a certain Sithole, an uncle of the applicant as representative of deceased's estate. The deceased had passed on living no children, spouse or parents. The estate turned out to be of an insubstantial value and the court order did not require the uncle to provide security for the applicant who was the deceased's sister. The sister made an application to the court alleging the misappropriation of the estate by the uncle.

As in the *Mthembu* cases, the magistrate in giving his order had relied upon provisions of section 23 of the Black Administration Act, that precluded Ms Shibi from being an intestate heiress of her deceased brother's estate.²⁴⁹ However in the High Court on appeal, she challenged the manner in which the estate was administered and sought an order declaring her the sole heir to the estate as well as a claim for damages from her relatives and the Minister of Justice. Miss Shibi succeeded in her claim to be appointed heiress as well as the claim for damages. In reaching its decision the Cape High Court relied upon the declarations that had been set out in the *Bhe* case.²⁵⁰

The last case in the trilogy of cases that declared the provisions of section 23 of the Black Administration Act and the rule of male primogeniture unconstitutional was the case of The South

Justice Mokgoro expressed the same sentiments in her concurring judgment, that, "Society should no longer be bound by the notions that a woman's place is in the home (and, conversely, not in the public sphere) and that fathers do not have a significant role to play in the rearing of their young children" The constitutional prohibition of gender discrimination also came into sharp focus in the case of *President of the RSA v Hugo* 1997 (4) SA (CC) where Goldstone J identified young people and mothers of young children as groups who are particularly vulnerable in our society

²⁴⁹ See provisions of section 23 of the Black Administration Act discussed in the *Bhe* case, *op cit*

²⁵⁰ See case *Bhe* case *op cit*

African Human Rights Commission and Another v President of The Republic of South Africa²⁵¹

The South African Human Rights Commission and the Women's Legal Trust were permitted direct access to the Court in the third case which was brought in the public interest, and as a class action on behalf of all women and children prevented from inheriting by reason of the impugned provisions and the rule of male primogeniture.

Langa DCJ, writing for the majority of the Court, holds that, construed in the light of its history and context, section 23 of the Black Administration Act is an anachronistic (out of date) piece of legislation which ossified "official" customary law and caused egregious violations of the rights of black African persons. The section created a parallel system of succession for black Africans, without sensitivity to their wishes and circumstances. Section 23 and its regulations are manifestly discriminatory and in breach of the rights to equality in section 9(3) and dignity in section 10 of our Constitution, and therefore must be struck down. The effect of this order is that not only are the substantive rules governing inheritance provided in the section held to be inconsistent with the Constitution, but also the procedures whereby the estates of black people are treated differently from the estates of white people are held to be inconsistent with the Constitution.

Langa DCJ went on and considered the African customary law rule of male primogeniture, in the form that it has come to be applied in relation to the inheritance of property. He holds that it discriminates unfairly against women and illegitimate children. He accordingly declares it to be

²⁵¹ *supra*

unconstitutional and invalid. He holds that while it would ordinarily be desirable for courts to develop new rules of African customary law to reflect the living customary law and bring customary law in line with the Constitution, that remedy is not feasible in this matter, given the fact that the rule of male primogeniture is fundamental to customary law and not replaceable on a case-by-case basis.

However, he holds that an interim regime to regulate intestate succession of black persons is necessary until the legislature is able to provide a lasting solution. As such, the Court orders that estates that would previously have devolved according to the rules in the Black Administration Act and the customary law rule of male primogeniture must now devolve according to the rules provided in the Intestate Succession Act.

4.11 CONCLUSION

B Santos²⁵² questions the whole universal/relativist dichotomy, arguing that universalism is no more than a western hegemonic world view that constructs different cultures as somehow deviant from the norm. Nzegwu has criticized western feminism and the liberal model of equality saying that, “in a dual-sex context where individuals are valued for the skills they bring to community building and cultural development, gender identity is differently constructed. Identity is not abstractly constructed in terms of sameness, but concretely defined in terms of the

²⁵² B S Santos, “Towards a Multicultural Conception of Human Rights,” *Sociologia del Dirrito* XXIV, 1997, pg 27

worth of social duties and responsibilities. Because gender equality implies comparable worth, women and men are complements, whose duties, though different, are socially comparable.”²⁵³ For those reasons cultural feminists have been described as out of touch with reality and as reinforcing gender stereotypes grounded in biological determinism.

On the other hand, however, the decision of the Zimbabwean court on the primogeniture system in the *Chihowa* case could be regarded as a victory for Zimbabwean women, however, setback by decisions such as those in *Magaya* and *Mthembu* cases. Their recognition of the right to equal succession to the deceased estate as shown in the *Bhe* trilogy of cases is a good example of positive development of African customary law.

To my mind being glued to one school of thought, that is, cultural relativism or universalisms problematic. Each case has to be viewed in the light of its peculiar circumstances considering factors such as the background of the parties and their social; context in the application and questioning of the customary law. I would support the *Magaya* decision if all the relevant mechanisms for sustenance are operative as Le Roux J mentioned in the South African case of *Mthembu v Letsela*²⁵⁴ that, “if it is accepted that the duty to provide sustenance, maintenance and shelter is a necessary corollary of the system of primogeniture, it is difficult to equate this form of differentiation between men and women with the concept of ‘unfair discrimination’.

²⁵³ N Nzegwu, Gender Equality in a Dual-sex system, Journal of Culture and African Women’s Studies at [www.jendajournal.com/jenda/vol 1.1/nzegwu](http://www.jendajournal.com/jenda/vol%201.1/nzegwu)

²⁵⁴ See also in 4.10 *supra*

Unfortunately with the disintegration of the subsistence economy and urbanization these mechanisms generally are no longer intact to ensure the efficacy of customary law rules, succession being one of them. Injustices arise not that the system or rule is in itself discriminatory, but because these social forces and changes expose customary law in a context that it does not fit. The decisions in the *Bhe* trilogy of cases although progressive in terms of uplifting women's rights, is destructive to the true fabric of custom and emphasizes the individual's relationship to the state. If one would render this relationship as paramount to any other then we are truly evolving to a very individualized society. On this basis I am not in favour of the *Magaya* decision because although a victory for customary law, it placed custom in an urban context, a setting to which it does not belong.

CHAPTER 5

TOWARDS REFORM AND THE FUTURE OF CUSTOMARY LAW

5.1 INTRODUCTION

This research has exposed the core of the family organization, emotional and financial support relationships, and the complex linkages of interdependence in land occupation rights.²⁵⁵ Inheritance as a mode of entry into the examination of the family was revealing as it involved the distribution of resources which can lead, as the study shows, to complex interactions between various family competitors. These interactions affect relationships and thus, consequent to dealing with the material assets, there is also the adjustment of relationships which had formerly been based in and around the personality and role of the deceased.²⁵⁶ The guiding approach to the research methodology was to take women or rather the widow as a starting point. The widow was not studied in isolation but was placed within the context of the family, community and society within which she exists.²⁵⁷ The research spread out to encompass gender issues and the interaction of customs and the law during the pre-colonial and the post-colonial era as well as the impact of constitutionalism and human rights law on custom. The time is now appropriate to

²⁵⁵ See Communal Lands Act No. 20 of 1982, in 3.4.8 Chapter 3 *supra*, women were expected to work and earn a living from the land allocated to their husbands. Women were granted land use rights within the households as wives and daughters in patrilineages. Chiefs have the right to allocate rights for usage on pieces of land to adult males, meaning that the women can only acquire access to land through their husbands or male relatives

²⁵⁶ See discussion on 'lineal' and 'adelphic' succession among the Ndebele and Shona respectively in 2.1.1 and 2.1.2 Chapter 2 *supra* demonstrating the rules governing inheritance and succession among these two ethnic groups in Zimbabwe

²⁵⁷ See also 2.3 *supra* on the position of the widow subsequent to the death of a spouse

consider possible reform and in that context, the future of customary law with emphasis on the issue of succession.

5.2 THE ROAD TOWARDS REFORM

5.2.1 LEGAL RESEARCH TO ASCERTAIN TRUE PURPOSE OF CUSTOM: The dilemma surrounding a single heir

We have established that the male heir is the universal successor to a deceased male's status and property. He may unilaterally succeed to the deceased's status whereby he takes over the deceased's duties and obligations towards the remaining family. However with regards to immovable property, which in the customary law setting would be the family homestead, he was more of trustee in this sense. On the other hand movable belongings of the deceased could be inherited in one's individual capacity.²⁵⁸ Custom, we have argued, was not rule driven but was

²⁵⁸ Zvobgo and Others, *Inheritance in Zimbabwe* 278, see also Beadle CJ in *Matambo v Matambo* 1969 (3) SA 717 (RAD) in 3.4.4 *supra* where the meaning of the words 'heir at African law' were interpreted, "It seems to me that what must be decided here is what precisely the legislature meant by the words 'heir at African law' where they occur in section 6 of the *African Wills Act*. The word 'heir' here, since there is nothing to indicate any intention to the contrary, must be construed in the normal grammatical sense in which it is understood in our law. I look therefore to our law to see what is meant by the word 'heir'. In regard to intestate succession the heirs are persons who are entitled to succeed to the property of the deceased." Paraphrasing section 6 of the *African Wills Act* in the light of that definition I consider that section 6 must be interpreted as meaning: "the person at African law who is entitled to succeed to the property of any deceased African shall succeed in his individual capacity to any immovable property." This can therefore be interpreted as a distortion of African custom because individual ownership to immovable property was an unknown concept altogether. In the case of *Dokotera v The Master and Others* 1957 (4) SA 468 (SR) this problem was answered. Movable property was held to devolve according to the principles and practices of customary law. In

based on broad guiding principles directed towards the best interests of the family of the deceased. Similarly, customary practices were not rule based but value based and thereby making them flexible, adaptable and negotiable so as to attain justice and the needs of each case. The pitfall is that the rigid and uniform application of the court's customary law often clashes with the families' decisions on how to deal with an estate. The mode of property transmission recognized by the superior courts under customary law, namely to a single heir, has now become highly problematic in situations where rights are dependent on individual ownership, rather than loose supportive assistance and control.

Many heirs are not able to perform their functions, others abuse the position and take for themselves property to the acquisition of which they had made little or no contribution. However, failure in fulfilling the traditional role of heir does not always indicate irresponsibility on the part of the heir but is sometimes attributable to constrained and very difficult socio-economic conditions. In the majority of families, the social fabric that made the role of the heir practicable has been frayed and torn, if not completely rent.²⁵⁹

Dokotera's case the court mentioned that in regard to movable property native law and custom recognized private ownership of various kinds, dependent on the manner of acquisition of such property

²⁵⁹ in *Magaya's* case see Chapter 4 *supra*, Venia Magaya, a 58 year old seamstress, had sued her half brother for ownership of her deceased father's land after her eviction by her brother where the newly appointed heir took his position as head of the household, removed Miss Magaya from her family home, and placed her in a shack in the neighbour's backyard. By this it is evident that the heir could not fulfill his traditional obligations due to pressing socio-economic conditions because the facts of the case came out of an urban setting and due to industrialization and other factors space is limited hence Miss Magaya's eviction into a backyard shack. Had the facts manifested themselves in a rural setting where the efficacy of customary law is more profound, the issue of space would not have been an issue and Miss Magaya would probably have continued to stay within a dignified family dwelling within the homestead.

The true purpose of custom in the area of inheritance was to create an environment conducive to the care and protection of the family of a deceased person. In customary law, the surviving spouse and the children are the deceased person's dependants who should be the ones to benefit from the estate. Customary law has been applied by the courts, but manipulated by unscrupulous proponents of its application to create an effect which is at times, the antithesis or converse of its true purpose, the care of the family.²⁶⁰

In urban areas, leaving the widow in charge of the estate is an adjustment of the former male based loose managerial roles in communal land holdings which reflects the pragmatism that is needed in modern urban societies. This responsive approach is also taking place in the semi-autonomous social fields surrounding the formal law, while the progressive and far reaching remedies within the law, designed to assist the dependents of a deceased person to obtain maintenance from the deceased estate, are grossly under-utilised.²⁶¹ The under-utilisation may be

²⁶⁰ This point is further exemplified in the case of *Shibi v Sithole* 2005 (1) 580 (CC); see 4.3.1 in Chapter 4 *supra*. In the *Shibi* case, the deceased had passed on living no children, spouse or parents. The sister made an application to the court alleging the misappropriation of the estate by the uncle. The estate turned out to be of an insubstantial value and the court order did not require the uncle to provide security for the applicant who was the deceased's sister. This was in the court of first instance and a magistrate had appointed a certain Sithole, an uncle of the applicant as representative of the deceased's estate a decision that upheld customary law and its rule of male primogeniture. Although customary law was upheld in this regard, its efficacy was drawn back by the fact that the deceased's estate turned out to be of an insubstantial value including its abuse by the deceased's uncle. The uncle thus failed to meet his traditional duty to maintain the deceased's sibling. On the contrary on appeal to the constitutional court in the second instance, the court held that the primogeniture rule was unconstitutional in that it discriminated on the grounds of sex and gender. Customary law was put down in this regard but my argument is that even though the estate was of an insubstantial value this was immaterial as the sister alleged misappropriation. The court should have ordered the proper administration of the estate assets rather than to disregard customary law altogether.

²⁶¹ One of the shortfalls of the *Magaya* decision was that it was passed before operation of the Administration of Estates Amendment Act 1997 an enactment that can justifiably be considered

due to ignorance of the legal provision or lack of financial and other resources to pursue such rights. There are also hidden factors which determine whether or not a person will pursue their rights to a deceased spouse's estate. Pursuing legal remedies is a confrontational process and was evident from research that women who challenged the deceased's family were those who had the capacity to be self supporting and could risk the possibility of economic and social alienation.²⁶²

5.2.2 THE ISSUE OF POLYGAMY

The most pertinent comments that can be made about polygamy are that it is incompatible with many aspects of modern life. It creates seemingly irreconcilable problems on the death of a spouse in a polygamous union, particularly so where there are limited resources for the ongoing subsistence of remnant families. As Zimbabwean economic and social life moves away from the

as a legislative victory directly aimed at making the position for the deceased's family of procreation favourable. The Act caters for both polygamous and monogamous marriages stating that, one third of the net estate should be divided between the surviving wives in the proportions two shares to the first or senior wife and one share to the other wives, the remainder of the estate should devolve upon A. his child or B. his children in equal shares. The Act is to a large extent similar to the Intestate Succession Act of South Africa which also makes provision for portions for the surviving spouse/s as well as equal shares for the children

²⁶² See Zvobgo and Others, *Inheritance in Zimbabwe* 281, the writers explain that there was always a concern that traditional relationships be maintained to ensure that intersection could be made with ancestral spirits. Thus rights exercised by women and children may be abandoned in the interests of long term relationships with the extended family. I am in agreement with this point of view. It is not easy for the majority of Zimbabwean women to be economically emancipated. The greater part of the Zimbabwean community was and is still rural (an estimated 70% - 75% of the country was initially apportioned as Native Reserves in the 1920s and were later referred to as Tribal Trust Lands in 1969 and finally termed Communal Lands at independence. The remaining 20% - 25% are urban settlements. The implication to be drawn is that, the majority of the folk who relied and continue to rely more on African traditional institutions and find themselves in a context where the operation of customary law finds its true application and perhaps its efficacy find themselves being less confrontational as they are not entirely familiar with the legal life that largely comes with urban life

subsistence agrarian labour intensive base which was the environment in which polygamy was spawned, some hope that polygamy will fall away. Some view polygamy as discriminatory against women as it allows men to enter multiple relationships which impose increasing pressures on scarce family resources, with serious problems when the time for inheritance comes. It is also evident that the customary setting in which polygamy could be accommodated can no longer be sustained.²⁶³

One of the recognized forms of polygamy, the levirate marriage, which has a strong bearing on succession, is considered to be out of touch with modern reality. If polygamy were to be formally outlawed, some widows would be relieved of the attentions of brothers of their deceased husbands trying to gain access and control over the estate through a levirate marriage. In those cases where levirate remarriage would not involve polygamy there is need to make it clear that widows have a choice and are not compelled to remarry to obtain rights to their deceased husband's property. However I am of the view that it is not necessary to formally outlaw polygamy but rather there are inherent socio – economic factors that have always been and still are there that determine the natural prevalence of the phenomena. It will thus be immaterial to go to task and advocate for the formal non-recognition of polygamy as an African marriage.

²⁶³ See also discussion on aspects of the Shona and Ndebele widows' lives subsequent to the death of a spouse in 2.3.2 and 2.3.3 respectively in chapter 2 *supra*. There we made the point that the trend shows that women seem to oppose widow inheritance much more strongly than men. One woman was noted saying, *"Should my husband die before me, I shall refuse to be inherited. I shall stay without a husband in my husband's home and look after my children. If my husband's relatives make this impossible for me, I shall leave them and go to live with my parents. I have no desire to disturb the peace and freedom of my sister-in-law by entering into her home. If I did, she would surely accuse me of witchcraft,* see also Weinrich, *African Marriage in Zimbabwe* 67

Furthermore, succession to the status of a deceased African must be clearly distinguished from the inheritance of his or her property. The status of the deceased should pass, as has always been the case, to the designated person as determined by the customary decision making processes. With this went the traditional symbols or rewards of that status. However the devolution of the property of the deceased should be considered as a separate exercise and determined as discussed above. At this juncture an analysis of the prevalence of polygamy in relation to various socio-economic contexts shall be made from the penetration of Christianity through the colonial to post-colonial Zimbabwe drawing attention to distinguishing features with the South African scenario, and the relevance of these developments to succession.

5.2.2.1 Missionary Attitudes and Polygamy

The missionaries' reaction towards polygamy has been extremely negative. Their condemnation derived both from their own cultural experience and from their western religious ideology. Having grown up in western countries, they had come to conceive their own form of family life as the only valid form in which Christianity could be lived. Christian families consisting of father, mother and children, and a plurality of wives were regarded as immoral. Apart from these considerations the missionaries were also convinced that monogamous families were most conducive to the economic well-being of the people in the emerging capitalist society of the country and so they thought they were acting in the interest of the people when they opposed polygamy.²⁶⁴

²⁶⁴ Weinrich, *African Marriage in Zimbabwe* 67

The missionaries' encounter with polygamy in Africa coincided with the establishment of colonial empires during the 19th century. It was deemed the Victorian age when British family morality was marked by an exaggerated sense of its own worth and self-righteousness. Kisembo and Others²⁶⁵ are of the view that, it is therefore understandable that missionaries who had grown up in this society declared at a Protestant missionary conference held in Edinburgh in 1910 that polygamy was 'one of the gross evils of heathen society which, like habitual murder or slavery, must at all cost be ended.' Thus the most important reason for the missionaries' negative reaction to polygamy derived from their European theological traditions.

Because of the churches' negative attitudes towards polygamy, polygamists have generally been refused baptism unless they divorced all but one of their wives. Men aspiring to become Christians, therefore, had to divorce wives with whom they had lived for many years and by whom they had begotten many children. What would then happen where a brother of a deceased male had to inherit his late brother's widow in a situation whereby he already had a wife and children? The answer is simple, such a marriage, the levirate marriage, did not find its place in the eyes of the missionaries and thus polygamy as an African traditional institution failed to serve its purpose, the maintenance of the deceased's family even if she was going to be a junior wife to an already existing African marriage.²⁶⁶ The levirate custom as pointed out above²⁶⁷ plays an important role in solving problems in the customary law of succession. It perpetuates the persona of the deceased, something unknown to western law.

²⁶⁵ B Kisembo and L Magesa and A Shorter, *African Christian Marriage*, (1977) 81

²⁶⁶ *Ibid*

²⁶⁷ See in 2.3.4.2 chapter 2 *supra*

The second problem that this scenario brought about was that of making illegitimate the children born of junior wives. Illegitimacy as a concept was unknown to Shona and Ndebele culture. A man could have had a child out of wedlock but if such a child was to appear from nowhere such as upon hearing news of his father's death, such a child was entitled to be recognized for the purposes of customary proceedings in connection with the father's death including succession. It was however key that such an occurrence be corroborated and authenticated by witnesses whose credibility was also determined.

Their previously contracted conjugal rights, their social status, economic security, and even their relationships with their own children, have been radically compromised, and this in the name of the Christian ideal of marriage and family life. Many of them must choose to live like nuns or like prostitutes.”²⁶⁸

Priests who take this view refer to the same Scriptural passages as do members of the African Independent Churches who openly advocate polygamy, namely to the patriarchs of the Old Testament, Abraham and Jacob, and to the lack of condemnation of polygamy in the New Testament. To Catholic theologians the New Testament period is of special importance because polygamy was still practiced at that time, as Christ's discussion of the levirate indicates.²⁶⁹ From this they conclude that if Christ had found polygamy incompatible with his teaching, 'we might

²⁶⁸ Hillman, *Polyamy* 30

²⁶⁹ We meet with the prevalence of polygamy and concubinage in the patriarchal age, (Genesis. 16:1-4; 22:21-24; 28:8, 9; 29:23-30). Polygamy was acknowledged in the Mosaic Law and made the basis of legislation, and continued to be practiced all down through the period of Jewish history to the Captivity. It seems to have been the practice from the beginning for fathers to select wives for their sons (Gen. 24:3; 38:6).

expect to find at least a clear hint of disapproval in the one passage where Jesus actually discussed the practice of the levirate marriage²⁷⁰

5.2.2.2 Polygamy and the Advent of the Colonial Capitalist Administration

The subsequent period after the establishment of the Christian culture by the missionaries was the colonial era that was marked by a more formal administrative governance approach and emergence of the capitalist mode of production that had a bearing on the socio – economic balance of the traditional way of life. Introducing industrialization and a different mode of production from which the people were used to had an impact on some traditional institutions such as polygamy that depended largely on the viability of the subsistence agrarian economy.

The process began with the structural transformation of rural areas by creating Tribal Trust Lands (TTLs), the main function of which was to provide cheap labour for the urban areas, mines and European owned farms and to reabsorb any ‘surplus population’ not wanted in these employment centres. Thus the TTLs have become the homes of the least productive age groups, the young and the old, and of women and those men who for one reason or another were not wanted in the capitalist sector. The dumping of people in the TTLs has resulted in a population density far in excess of their carrying capacity. Hence land has been over-cultivated and heavily

²⁷⁰ Hillman, *Polygamy* 163

eroded. Under these circumstances only some food can be grown and the local rural population is dependent on remittances from labour migrants.²⁷¹

The impact on polygamy and the levirate marriage was that the polygamous household could not be sustained because it was reliant on a sound economic family makeup for its efficacy. The result is that it would inherently appear unattractive for a designated heir to commit to taking his deceased brother's widow as a junior wife under such circumstances. In the event that the widow has been taken, land shortage and consequent food shortage make it difficult for men to feed the children born to them by one wife let alone those dependents that may have been left by a deceased male. Hence polygamous families posed excessive problems and polygamy ceases to be attractive and does not fare well in this regard. Here, again, the impact on the customary law of succession is negative.

Polygamy, however, seemed to fare better amongst a particular group of Africans, the Black elite, who occupied what was referred to as Black Purchase Areas. Weinrich²⁷² conducted a survey among the Vapostori, an Old Testament Shona religious group in the Chinamora TTL. According to his survey the incidence of polygamy is over 40% of all households. These Vapostori inhabit a relatively fertile stretch of land on either side of the major motor road linking the TTL with the capital Harare. Moreover, next to their settlement is one of the oldest agricultural research stations in the country, Domboshava, which specializes in extension work in African areas.

²⁷¹ Weinrich, *African Marriage* 141

²⁷² Weinrich *opcit* 143

According to Wienrich's findings, some 44% of these villagers received a 'master farmer's certificate' as a sign of agricultural merit and ability. The impact on polygamy is that there is an almost exact correspondence in that community between polygamy and proficient farming. From a succession perspective, a potentially polygamous union arising from a levirate marriage by an heir may be attractive. This is because these communities were integrated into the capitalist system and as a consequence polygamy fares well in this regard.

The fact that some Shona communities with the highest polygamy rate are engaged in commercial farming shows that the cash economy is not entirely hostile to polygamy, at least not as long as production remains to be labour intensive and family based. In such communities polygamy only declines if labour saving machinery can be afforded and human labour ceases to be of need.

It was further noted that a second phenomena hostile to polygamy existed as generations went on. The sons of the original owners of these Black Purchase Areas have taken over management of these holdings. The trend is that because their fathers were rich they received a decent education, largely from mission schools where Christian notions and perceptions of life were learnt. Modern farming methods were learnt and they accumulated labour saving machinery stressing that there high yields meant that they were doing better than their polygamous fathers.

Their higher education, moreover, has strongly influenced these men to accept the values associated with the capitalist mode of production and missionary thinking. They believe that smaller families will enable them to give their children a better education and so make them more successful in later life. The apparent distinction between the two generations should be greatly attributed to the fact that the one group that had obtained the farms on merit as master farmers did not receive missionary education and thus tended to be more conservative unlike their more educated and liberally minded sons. The effect was that while polygamy may have blossomed in the earlier days of these Purchase Areas, its incidence declined with time.²⁷³ However as these agricultural areas continue to operate today, it can safely be said that it has not been totally lost.

Only on the Tea Estates was the economic situation different. For the management of these estates, the landowners held out economic rewards to polygamists. In order to have a reserve army at hand during the tea-picking seasons, it encouraged large families among African labourers. They also offered paid employment at very low rates to women and children, their wages, however, had to be collected by their household heads and thus in order to improve a family's income, having many wives and children had economic rewards.

The management of the Tea Estates also gave to every worker a piece of land on which his wives and children could grow food crops. These small gardens did not reduce the tea plantations since the estates had superabundant land, yet they increased the potential for exploitation because the

²⁷³ *Ibid*

food grown by the workers and their families enabled management to keep their wages low and yet guaranteed the social reproduction of their labour force. Hence the arrangements favoured both managements and household heads, but grossly exploited women and children.

The impact on polygamy is that it tended to subsidize the capitalist economy of the Tea Estates. Polygamous marriages including that of the levirate union were entered into for the wrong reasons detached from those of the family's economic well-being and social integration but those of profiteering and competitiveness.

The basis for the above explanation is that polygamy and succession are inseparable. A polygamous setup inevitably leads to considerations and rules of succession which are not the same as those of a monogamous marriage

5.2.2.3 The 'Official' Customary Law and Polygamy

The 'official' customary law came with the advent of colonialism. In 1917 the then Rhodesian government passed the Native Marriage Ordinance,²⁷⁴ providing that a man was entitled in terms any indigenous law to take a widow of a deceased relative although there was the precondition

²⁷⁴ Act No. 15 of 1917 as amended by Act No. 16 of 1929, provided that, 'when under any prevailing law or custom a man entitled to take to wife the widow or widows of a deceased relative, he should as soon as the inheritance ceremony has been completed, appear before a Marriage Officer, with such widows as he may desire to take to wife, and register a marriage with each of them.'

that the marriage be registered. The Rhodesian government, in terms of its general law effected a consolidation of the already existing indigenous law, in the sense that the levirate system whereby the brother of a deceased African man could succeed to his widow and take her as his new wife, was recognized as a valid form of marriage between Africans. Here the strength and resilience of the rules of customary law of succession, to the extent of getting legislative recognition, is beyond doubt.

In 1951 the Customary Marriages Act²⁷⁵ or African Marriages Act was passed. The rationale behind the Act was to provide for the solemnization of customary marriages whilst at the same time regulating certain incidents in connection with such marriages and to prevent the pledging of children. The Act like the Native Marriage Ordinance recognized polygamy as a valid marriage but still imposing the western notion to it in that it be solemnized or formalized.

The colonial administration introduced a hierarchy of marriage forms, the lowest of which was the traditional marriage, followed by a traditional marriage which was registered by a District Commissioner, and lastly a civil marriage or Christian Marriage, that is, a marriage registered as 'civil' and not a traditional marriage. The law states that anyone who marries under the

²⁷⁵ Customary Marriages Act No. 29 of 1951 The Act held that, "no marriage contracted according to customary law, **including the case where a man takes to wife the widow of a deceased relative**, shall be regarded as a valid marriage unless; (a) such marriage is solemnized in terms of this Act; or (c) such marriage was contracted before the 1st February 1918. In terms of subsection 2, "a marriage contracted according to customary law on or after the 1st February 1918, and before the 1st January 1951 which is registered under the Native Marriages Act shall be regarded as a valid marriage. This Act although recognizing polygamy still struck at the heart of the African socio-legal system by attaching its western concepts of a specialized legal system and demanding the solemnization of such marriages.

Marriages Act²⁷⁶ or under the African Marriages Act²⁷⁷ and then obtains an Enabling Certificate binds himself to monogamy. Already it was apparent that the recognition of polygamy as a feature of the African traditional marriage had become compromised, and the rules of succession and creation of heirs flowing therefrom would be seriously affected.

In the case of *Mujawo v Chogugudza*,²⁷⁸ the deceased, a male, had a child by a woman to whom he was married by purely customary rites as well as a child from his union to the woman to whom he was married under civil rites. Although the court agreed that the general law applied to the estate and thus the 'civil rites widow' and her child should benefit alone in terms of the common law and provisions of the Deceased Persons Family Maintenance Act,²⁷⁹ the decision was reached that the child of the customary law union was also entitled to succeed to his father's estate by virtue of the provisions of section 3 of the African Marriages Act which provides: 'A marriage contracted according to African law and custom which is not a valid marriage in terms of this section shall, for the purposes of African law and custom relating to the status, guardianship custody and rights of succession of the children of such marriage, be regarded as a valid marriage.'

²⁷⁶ Act No. 81 of 1964

²⁷⁷ Act No. 29 of 1951

²⁷⁸ SC 142/92, the Supreme Court had ruled that section 13 had been repealed by implication by the Legal Age of Majority Act

²⁷⁹ Act No. 39 of 1978, see also in 3.3.2.5 *supra*, regardless of whether customary or the general law is applied or whether the estate is testate or intestate, there is an obligation to maintain certain categories of dependents of a deceased person either under customary law or in terms of the Act

This section was seen as legitimizing the child for the purposes of general law so that it could become one of the heir's *ab intestate* under general law. The wording is quite specific and confined to situations where customary law is to be applied to the questions of succession. The continued recognition of the customary law of succession remains noteworthy. The latest position in Zimbabwe is that, marriages solemnized under the Customary Marriages Act as well as unregistered marriages which are contracted in accordance with custom result in the estates of the spouses being administered in terms of Part IIIA of the Administration of Estates Amendment Act of 1997. The bearing it has on polygamy is that for widows of polygamous men the position is as follows:

- If a man registered his first marriage in terms of the Marriages Act any subsequent customary union results in the second widow not being recognized as a spouse.
- If the man's first marriage was an unregistered customary union and any subsequent marriage was registered in terms of the Marriage Act, both widows are recognized as surviving spouses.
- If a man's first marriage was solemnized in terms of the Customary Marriages Act and subsequently contracted "monogamous" marriage both widows are recognized as surviving spouses.

5.2.2.4 SOUTH AFRICAN COUNTERPART

During the era of white rule in South Africa the approach was not quite similar to that in Zimbabwe. The attitude of the administration is exemplified in the case of *Nkambula v Linda*.²⁸⁰ In this case it was illustrated that one could be party to a customary marriage in addition to a civil marriage if one so desired but the customary marriage wife and children would get nothing out of the estate. In 1978 South Africa saw the Transkei Marriages Act²⁸¹ that recognized polygamy and unconditionally equated the customary marriage to the civil marriage. The positive impact on succession was that this improved the proprietary consequences thereof, signifying a victory for customary law and overthrowing the position adopted in *Nkambula's* case.²⁸²

In 1998 the Recognition of Customary Marriages Act²⁸³ was passed and this time the Act brought similar provisions as those in the Transkei Act but this time applied to the whole of South Africa. Though polygamy was recognized in terms of this Act, a man had to apply to a court before taking a second or third wife which still taints customary law with western concepts

²⁸⁰ 1951 (1) SA 377 (A), where Fagan CJ held that “A native customary union is not a legal marriage”

²⁸¹ Act No. 21 of 1978, gave full recognition to the customary marriage and gave it equal status to the common law marriage. The wife and children of a customary marriage were now able to inherit equally with the wife and children of the civil marriage. The Act thus overthrew the position established in the case of *Nkambula v Linda* 1951 (1) SA 377 (A), that a widow and children from a customary law marriage did not have legal grounds to lodge a claim for the inheritance of a deceased male's estate where such marriage coexisted with a civil marriage

²⁸² *supra*

²⁸³ Act No. 120 of 1998, this was a half-hearted acceptance of polygamy and customary law as whole. It declared full recognition of customary marriage, but introduced rules of civil marriage into it. It thus became, in important respects, old medicine in a new bottle with beautiful labels

of law placing it in a context to which it did not belong. The Act is similar to the Customary Marriages Act in Zimbabwe that also recognizes polygamy but requires that such union be solemnized.²⁸⁴ The impact of this on succession is negative and is in conflict with the customary law of succession.

It is such progressive legislation that has been condoned by women's groups in the region acknowledging that in terms of polygamous marriages they support the position in Zimbabwe where all wives share equally in the estate as well as special provision being made along the lines of legislation in Ghana, Zambia and Zimbabwe that a surviving spouse must be guaranteed rights to the deceased's house and household goods.²⁸⁵ The victory for polygamy is that it means that the legislation does to a certain extent recognize it as a legal traditional institution.²⁸⁶

5.2.2.5 CONCLUSION

The above analysis shows that capitalism has been capable of using for its own advantage structural elements of the communal mode of production. However, in adapting polygamy to capitalist needs, the exploitative ethos inherent in capitalism has transformed the traditional

²⁸⁴ See 5.2.2.3 above

²⁸⁵ M O'Sullivan, comments on the South African Law Commission's Project 90, discussion paper 93 on customary law and inheritance, Women's Legal Centre, South Africa at <http://www.wlce.co.za/index.html>

²⁸⁶ See The Administration of Estates Amendment Act in 3.3.2.10 *supra* that was aimed at providing a solution particularly amongst the problem arising from multiple marriages. It dictates that • One third of the net estate should be divided between the surviving wives in the proportions two shares to the first or senior wife and one share to the other wives and; • The remainder of the estate should devolve upon A. his child or B. his children in equal shares.

institutions of polygamy and succession and intensified their negative elements. Polygamy does have a future in so far as people especially rural folk continue to adhere to their customs by practicing their 'living law'. However the 'official law' requiring solemnization of African marriages is out of touch with custom because the average rural folk are relatively ignorant of legal language and its implications that may impose upon them, obligations that were not known to African culture. This accordingly points to a bright future for the customary law of succession in Zimbabwe.

5.2.3 **STATUS OF WOMEN**

5.2.3.1 **The Administration of Estates Amendment Act**²⁸⁷

An important legislative provision in Zimbabwe lies in the section 23(3) (b) of the Constitution which as alluded to earlier, was applied in the *Magaya v Magaya*²⁸⁸ case. It upheld the minority status of women breaching women's rights instruments which prescribe equality before the law for all persons, such as the Convention on Elimination of all forms of Discrimination Against Women (CEDAW) and the African Charter on Human and People's Rights (ACHPR) to mention a few. Although the law was amended in 1997 to address the shortcomings met in the *Magaya*

²⁸⁷ Administration of Estates Amendment Act No. 6 of 1997

²⁸⁸ See discussion in 4.2 chapter 4 *supra*

case by the promulgation of the Administration of Estates Amendment Act²⁸⁹ in 1997, the Act applies to deaths occurring after 1 November 1997.

The 1997 amendment to the Administration of Estates Act No. 6 of 1997, which would have governed the *Magaya* decision had the deceased died after this act, specifically allows women who are parties to both monogamous and polygamous households to inherit property, both as spouses and as children of the deceased. Thus deceased estates of persons, who passed away before 1 November 1997, are bound by the *Magaya* decision.

5.2.3.2 The Legal Age of Majority Act²⁹⁰

The Act was in itself another significant move with regard to customary law, as the legislature granted women procedural rights not recognized by customary law. Such laws legislatively regulate customary law in such a way as to bring it more in line with the norms of urban Zimbabweans and international human rights community. However one might want to argue that the concepts of minority and majority status were not known to African Customary law but that

²⁸⁹ see in 3.3.2.10 chapter 3 *supra*, sets out in section 68F that one third of the net estate should be divided between the surviving wives in the proportions, two shares to the first or senior wife and one share to the other wives. The remainder of the estate should devolve upon A. his child or B. his children in equal shares. Other sections of the Act provide widows with entitlement to receive ownership rights over the house they lived in at the time of their husband's death.

²⁹⁰ The Act granted majority status and *locus standi* to both male and females upon attaining the age of 18 years, see also *Chihowa v Mangwende* 1987 (1) ZLR 228 (S) in 3.3.2.6 chapter 3 *supra* where the respondent was rightly appointed the intestate heiress to her father's property

they were Common law concepts which should only be used in customary law situations with great care.”²⁹¹

The Zimbabwe Women’s Lawyers Association is in the process of compiling a communication to the African Commission to challenge the decision in the *Magaya* case. Part of the relief sought is to have the section 23(3)(b) or the ‘Discriminatory Clause’ repealed in line with international human rights law. It is anticipated that a repeal of that section would deal with problems with regards to access to property by women.²⁹²

5.2.3.3 IMPACT OF THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)

As was noted in the previous chapter the provisions of CEDAW were aimed mainly at the upliftment of the rights of women from an international human rights perspective. It sought to discourage the discrimination of women in all spheres of their political, social, and economic life. CEDAW however cannot be seen as a compelling document in the Zimbabwean human rights arena due to the fact that section 111B of the Constitution of Zimbabwe determines that international instruments do not have the force of law in Zimbabwe until they have been

²⁹¹ Muchechetere JA, in *Magaya v Magaya* SC-210-98, see chapter 4 *supra*

²⁹² T Ngwenya, How Strategic Litigation Can Be Applied To Zimbabwe, Zimbabwe Women Lawyers Association Bulawayo at http://www.wlce.co.za/conference_2005/Thandekile_Ngwenya.pdf

domesticated by an Act of Parliament. As such they do not have authoritative force in judicial decisions, only persuasive force.²⁹³

CEDAW has also received criticism for being a reflection of Western values. In addition to the critics, many African countries that have ratified CEDAW are said to have entered a number of reservations, on cultural or religious grounds, aimed at excluding customary laws from the instrument's scrutiny, very similar to the way the Zimbabwean constitution provides for exceptions in this regard in terms of section 23 (3).²⁹⁴ CEDAW has thus been of minimal help in guaranteeing the full recognition of women's rights where customs are perceived to be discriminatory such as in the field of succession.

5.2.3.4 Research and Education: A Tool for Change?

Short of restructuring the legal system in Zimbabwe to rid it of a problematic relationship between customary and civil law within the civil system, there are steps that human rights advocates in and out of Zimbabwe can take to aid in the development of women's rights in Zimbabwe. Given the current system of law and the logic with which the *Magaya* case was decided, there are two possible modes of attack.

²⁹³ see L Kalenga, in 4.4 chapter 4 *supra*, for a more comprehensive discussion on the important provisions of the convention

²⁹⁴ See provisions in 4.2 *supra*, that, gender discrimination shall not be unconstitutional in a matter between Africans involving customary law regarding the devolution of property, marriage divorce e.t.c

First, if the justices in *Magaya* misinterpreted the current status of customary law with regard to inheritance, the human rights community must enlighten the legal community with research properly reflecting reality. Such reports are currently published by the Women and Law in Southern Africa Trust (WLSA), but more needs to be done by a variety of groups to give a true and convincing representation of customary law. The difficulty with this strategy is that, even if convincing research and arguments are put forth in abundance, the judges in the current legal system still have too much discretion and are free to ignore such research in favor of their own interpretations, relying on texts that might be a century old.

Still, it would seem more difficult to ignore the research if it is comprehensive and convincing. Along these lines, as opposed to petitioning CEDAW and writing letters to the Zimbabwe Supreme Court, as happened subsequent to the *Magaya* decision, international human rights groups would be wise to dedicate their efforts to fundraising for those doing ground research in Zimbabwe. So from my point of view legal research targeted to informing the judiciary could be more profitable than that aimed at educating the general public.

Some proponents of women's rights are of the view that customary communities ought to be educated as to their rights under international and Zimbabwean civil law. They say that efforts should be oriented towards rights enforcement and education within the communities themselves, with appropriate written promotion of the changes occurring in the communities so that judges can be kept in touch with developments.

I am of the view that, as the majority of people who rely on customary law are the rural folk, and have not yet ‘crossed the boundary’ into an urban lifestyle as their fellow urbanized black folk, it is difficult to adopt educational initiatives aimed at the formal education of these communities as to what their rights are. As these people tend to be more conservative in their thinking, it is not a guarantee that they will receive this ‘new knowledge’ and law with open hands. As Koyana puts it, “change cannot be forced down the throats.”²⁹⁵ If customary law is to be maintained within the civil system, while reforming it to better protect women’s rights, then it is the customary communities themselves who will have to change it.²⁹⁶

Recently in the Eastern Cape Province the Chief of Xolobeni in the Bizana District was assaulted and fled his home to KwaZulu Natal because he accepted the government’s mining scheme in the district, which the people oppose. The people were quoted as saying: “they will have to kill us first before they can start any mining activities on the land of our forefathers”, further illustrating the reluctance of particularly rural communities to accept the imposition of abrupt changes in the social-economic organization and perhaps their legal lives.²⁹⁷

²⁹⁵ Koyana, *Changing Society* 128

²⁹⁶ See also A A An-Na’im in 4.9 Chapter 4 *supra*, where the writer makes a persuasive argument for the dynamic concept of internal “cultural transformation” as the most practical guarantee of entrenching human rights in African societies. He argues that culture has a significant impact on human rights paradigms around the world and as such, culture is the best-suited vehicle for protecting rights.

²⁹⁷ On the 25th of August 2008, The Daily Dispatch, reported on this issue of ‘modernization’, saying it was good but that the people were not ready for it. The Editorial team of the newspaper recommends the programme to be shelved by the government because of the violence it has spawned among other practical considerations.

5.2.3.5 Socio-Legal Engineering to Raise the Status of Women

Social engineering is defined by Bullock and Stallybrass²⁹⁸ in their Dictionary of Modern Thought as “the planning of social changes according to a blueprint (plan) instead of allowing social institutions to develop in a haphazard manner”. The term ‘socio-legal engineering’ is used here after Beckstrom²⁹⁹ to describe the means whereby States seek to effect social change by the introduction of new laws or the reform of existing laws. A good and relevant example of this in a modern State was the introduction of the Sex Discrimination Act of 1976 in the United Kingdom, which sought to outlaw discrimination on the grounds of sex in Britain.

Many African countries including Zimbabwe have made far reaching changes in family law since independence in their efforts to promote national unity through legal unity and to prepare their populations for modernization and industrialization. A Commission held in Salisbury in 1976 reported amongst other things that the extended family system with its network of ties and obligations would be unfavourable to the aspirations of a modern state and legislation has been designed to weaken obligations to kinfolk and to establish the nuclear family as a viable

²⁹⁸ A Bullock and O Stallybrass, *The Fontana Dictionary of Modern Thought*, 1977, it covers (inter alia) the fields of anthropology, sociology, economics, philosophy, history, politics, physics, and biology, a relatively new concept, having originated in the 1970s with Bullock and Stallybrass. They felt that an ordinary dictionary contains “thousands of words familiar to us all”, while an encyclopedia contains (with regard to modern thought) “a vast amount of irrelevant material”. They sensed the need for a dictionary of a new kind.

²⁹⁹ J Beckstrom, Handicaps of Legal Social Engineering in Developing Nation, *The American Journal of Comparative Law*, XXII, pg 669-712

economic unit 'unfettered by traditional rules relating to status and legal capacity and in so doing, to improve the status of women'.³⁰⁰

The Kenyan Government also set up a commission on succession which presented its report in 1969 on the law of succession.³⁰¹ Included in its recommendations were those which would protect the rights of the widow. The widow of a monogamist who died intestate would be entitled to a life interest in his 'free property', that is, the property which the person was legally competent to dispose of during his lifetime. In the case of a polygamist who died intestate his free estate would be divided among the houses according to the number of children, adding any surviving wife to this number, the widow to have a life interest in the share allocated to each house. A widow's interest would terminate on her remarriage.

There is little doubt that enactments along these lines would ultimately be of immense benefit to women and, through them, to their children. A man's property would not revert to his natal family but would provide for both wife and children and other dependants. The reversion of property to the natal family group perpetuates its importance in that a man's primary responsibility is to it, rather than his family of procreation.

³⁰⁰ Church of The Province of Central Africa, Diocese of Mashonaland, Commission to inquire into the Legal Status of African Women, Salisbury, 1976, 5

³⁰¹ Report of the Commission on the Law of Succession, 1969, Kenya, Nairobi Government Printer

Allott³⁰² warns of the consequences of striking directly at family structures. The author says, “Succession law, as the most exact mirror of specific social and economic structure and the principal means by which a different society may be built, is in my opinion the most significant branch of the customary law to be considered in any examination of the African law as a whole. If the succession law goes, the whole fabric of customary law goes with it. If the succession law changes there will be serious and irreversible repercussions on the way people live. Attacks on the customary law of succession are direct attacks on the way people live.”³⁰³

But the customary law of succession, as has been shown in the study, is no longer universally complied with. The rules which govern a face to face community are too easily broken in the event of geographical mobility and urbanization among other factors.³⁰⁴ The controls exercised by the extended family are everywhere weakening.³⁰⁵ Allot also goes on and admits that the social structures of modern Africa, around which much customary law is built are rapidly changing.³⁰⁶

³⁰² A N Allott, *The future of African Law, African Law: Adaptation and Development*, (1965), 234-5

³⁰³ See also the South African case of *Bangindawo* which sought to abolish the Regional Authority Courts initially created to cater for black litigants by contesting that these courts were not independent and impartial among other issues. Madlanga J held that, regarding judicial independence and impartiality, this was a western concept that could not be attached to customary law and that attaching this western concept would be to strike at the heart of the African legal system especially the judicial facet thereof

³⁰⁴ See discussion of some of these factors in 3.3.1 Chapter 3 *Supra*, bringing to light social and economic independence, disintegration of the subsistence economy and the introduction of the capitalist economy and its effects on rural urban migration as some of the tools disengaging the extended family structures

³⁰⁵ May, *Colonial Law* 106

³⁰⁶ See also Allott, *African Law*, 236, the author says that, cohesion and discipline of, the justification for extended family groupings are threatened; the previously unquestioned authority

To conclude therefore, attempts to control or abolish custom as has been seen above can be made by legislative means, but these are rarely as effective as their promoters often believe. I am of the belief that customary practices do not cease to be practiced because there is the existence of state law. To the contrary, they may continue to live with the people in their daily lives. Bringing custom into debate, recognizing its merits, and exploring its dynamics allows a deeper consideration of its values. Equally important is ascertaining how the principles of custom which underlie inheritance practices have been adapted to meet new social and economic circumstances. Where the operation of custom is specially recognized as being applicable, there is need to constantly monitor the way in which custom is applied by the people and the lower courts. The adaptations of custom can then be compared with the ways in which customary law was ossified by the higher courts.

Finally, given that decisions as the one in *Magaya* that held that the prospective female heir's age of majority is irrelevant to the case, this goes on to show the loophole in the Legal Age of Majority Act, which does not specify the substantive rights that come with majority, it might be wise to continue lobbying efforts at the Zimbabwean legislature. Nationwide movements and marches aimed at an elected legislature could be more effective than marches aimed at a judiciary that has exercised the discretion the legislature granted.

of father over child and uncle over nephew, of husband over wife is questioned. The family relationship and the physical moral and supernatural beliefs upon which they are anchored are dying and cannot be revived

5.2.4 CONCLUSION

This research has indicated that a single approach to the problems of inheritance is inadequate. There is need to adopt multifaceted initiatives which deal with the social, legal, economic and emotional problems. Law reform is, of itself, of little significance unless it is also accompanied by the other suggested non-legal measures. It is not enough for periodic or erratic attacks into law reform to be undertaken, there is need for the constant monitoring of social and economic developments so that the care and protection of the families of the deceased persons is optimized using the resources of the deceased estate.

Firstly it is vital that grassroots programmes be instituted to ensure that there is a nationwide appreciation of the need to educate women and equip them to meet the economic and social needs of the changing Zimbabwean Society. Women need to be positively empowered and encouraged to take their rightful place in the economy of the country in their own right, and not as mere accessories to and users of male rights.

Secondly, where the family or an individual abuses their position, there has to be the capacity to intervene and impose solutions which are in the best interests of the dependants of a deceased person.³⁰⁷ Finally both custom and the general law should be evaluated, based on their own merits and in their appropriate settings. Both have their strong points and weaknesses. Reform of

³⁰⁷ See also *Shibi* case in 4.10 *supra*

either should only be undertaken after due and proper evaluation has taken place and not in response to sloganeering or for making political gain.

In the post-colonial era, southern African states are searching for means of reflecting and reinforcing pre-colonial belief systems. A return to tradition is therefore an important step in establishing independence through self-determination. At a minimum, it allows at least some adherence to traditions despite the existence of a rigid, more clearly administrable civil law system. Further, traditional authorities and community courts are unlikely to admit the distorted colonial origins of their customary law. This reinforces the need for the Supreme Court of Zimbabwe and for human rights groups in Zimbabwe to encourage the development of a modernized, responsive customary law, one that reflects traditional cultures of today instead of ages past.

In an effort to simulate national solidarity and pride it is necessary for African governments to emphasize everything that is valuable in the African past. High on the list of such African elements are the traditional African institutions and values as expressed in their legal systems. Parallel with this feeling is the desire to break away from the overpowering influence of introduced European constitutions.³⁰⁸

³⁰⁸ See Allott, *African Law*, *opcit*, 219, see also the distinctions between culturally relative and universalist type constitutions in Zimbabwe and South Africa respectively, the first seemingly defending African culture and the other reflecting western notions of individual rights, see also in 4.2 and 4.10 *supra*

It is evident from the foregoing exposition that since the advent of colonization, solutions to the vexed problem of interaction between customary law and the received western law have been tried virtually without pause. It is gratifying to note that no solution has ever really eliminated the customary law of succession and inheritance, thanks to the strength and resilience of the legal system in this area. The close relationship between the customary law of marriage and the customary law of succession has been noted in this final chapter, and the survival of the one means the survival of the other. Certainly, these two will probably be the longest survivors. Solutions like codification and the separation of the customary courts from the western type courts, which have been visited at some length in this chapter because of their importance, are further mechanisms that will no doubt be clung to in the unending search for solutions to the problem of interaction of legal systems.

6 **BIBLIOGRAPHY**

Books

Abbott and Gallagher 1966, W M Abbott and J Gallagher, *The Documents of Vatican II* , New York, Guild Press

Allott 1965, A N Allott, *The Future of African Law, African Law: Adaptation and Development*, Berkeley, University of California Press

Bekker 1989, J C Bekker, *Seymour's Customary Law in Southern Africa* 5th Edition, Juta & Co

Bennett 1995, T W Bennett, *Human Rights and African Customary Law under the South African Constitution*, Juta & Co

Bennett 1991, T W Bennett, *A Sourcebook of African Customary Law for Southern Africa*, Juta & Co

Bourdillon 1998, M F C Bourdillon, *The Shona Peoples: An Ethnography of the Contemporary Shona, With Special Reference to Their Religion*, Mambo Press

Bozongwana 2000, W Bozongwana, *Ndebele Religion and Customs*, Mambo Press

Bullock and Stallybrass 1977, A Bullock and O Stallybrass, *The Fontana Dictionary of Modern Thought*, London, Fontana Collins

Child 1965, H Child, *The History and Extent of Recognition of Tribal Law in Rhodesia*, Harare, Government Printer

Field 1964, D D Field, *The Life of the Law*, The Free Press of Glencoe

Gelfand 1982, M Gelfand, *The Genuine Shona*, Mambo Press

Goldin and Gelfand 1975, B Goldin and M Gelfand, *African Law and Custom in Rhodesia*, Cape Town, Juta & Co

Hillman 1975, E Hillman, *Polygamy Reconsidered*, Orbis Books

Holleman 1952, J F Holleman, *Shona Customary Law*, Cape Town, Oxford University Press

Kerr 1998, AJ Kerr, *The Customary Law of Immovable Property and of Succession*, Juta & Co

Kisembo and Magesa 1977, B Kisembo and L Magesa, *A Shorter, African Christian Marriage*, London, Geoffrey Chapman

Koyana 1980, D S Koyana, *Customary Law in A Changing Society*, Lovedale Press

May 1983, J May, *Zimbabwean Women in Colonial and Customary law*, Mambo Press

Mqeke 1997, R B Mqeke, *Basic Approaches to Problem Solving in Customary Law*, Grocott & Sherry, Grahamstown

Mqeke 2003, R B Mqeke, *Customary Law in the New Millennium*, Lovedale Press

Schapera 1970, I Schapera, *Tribal Innovators: Tswana Chiefs and Social Change*, London School of Economics Monographs on Social Anthropology No 43. London, Athlone Press.

Schmidt 1987, E S Schmidt *Ideology, Economics, and the Role of Shona Women in Southern Rhodesia*, PHD dissertation, University of Wisconsin-Madison

Stewart 1987, J Stewart, *Women's Inheritance of Property in Zimbabwe*, Women and Law in Southern Africa, ZPH, Harare

Vansina 1965, J Vansina, *A Traditional Legal System, African Law: Adaptation and Development*, Berkeley University of California Press

Weinrich 1983, A K H Weinrich, *African Marriage in Zimbabwe and the Impact of Christianity*, Mambo Press and Holmes McDougall, Edinburgh

Zvobgo and others 1996, K Zvobgo and Others, *Inheritance in Zimbabwe Law, Customs and Practices*, Women and Law in Southern Africa Trust, Harare, SAPES Trust

7 CASES CITED

A

Angeline Chiutsi v Dennies Garisa 1969 CAACC 70-74

B

Bhe and others v The Magistrates, Khayelitsha and Others 2005 (1) BCLR, 2005 (1) SA 580 (CC)

Bangindawo and Others v Head of Nyanda Regional Authority and Another 1998 (3) SA 262 (Tk)

Brink v Kitshoff 1996 (4) SA 197 (CC)

C

Chiduku v. Chidano 1922 SRLR 55

Chihowa v Mangwende 1987 (1) ZLR 228 (S)

Chingattie v Munoti H-H 207-92

D

Dingezweni v Ndabambi 1 NAC 126 1906

Dokotera v The Master and others 1957 (4) SA 468 (SR)

Dumetzweni v Kobodi 1971 BAC 30 (S)

G

Gideon v Tawadzadza, 15 July 1946, heard by L. Powys-Jones, Assistant Native Commissioner, Salisbury (Unreported)

Gwebu v Gwebu 1961 R & N 694

J

Jenti v Jakeni 1954 NAC 90 (S)

Jena v Ettie Nyemba 1986 49 (SC)

K

Komo and Leboho v Holmes 1935 SRLR 86

Katekwe v Muchabaiwa 1984 87 (SC)

Katiyo v. Standard Chartered Zimbabwe Pension Fund 1994 (1) ZLR 225 (H)

M

Madolo v Nomawu 1 NAC 12 (1896)

Madondo v Mkushi 1985 (2) ZLR 198 (SC)

Magaya v Magaya 1999 (1) ZLR 100 (S)

Magwisi v Kombayi 18th December 1947, (heard by E.H Beck Commissioner of the Native Court) (Unreported)

Makaula v Matatu 2 NAC 44 (1910)

Manyosine v Nonkanyezi 1 NAC (1906)

Matambo v Matambo 1969 (3) SA 717 (RAD)

Meyer v Rudolph's Executors 1918 AD 83

Mgoza and another v Mgoza 1967 (2) SA 436 (A)

Mhlaba v Makuhlane 1947 (1928-62) SN 421

Mthembu v Letsela and Another 1997 (2) SA 936 (T)

Mthembu v Letsela and Another 1998 (2) SA 675 (T)

Mthembu v Letsela 2000 (3) SA 861 (SCA)

Mujawo v Chogugudza 1992 (2) ZLR 321 (SC)

Mwazozo v Mwazozo 1994 121 (SC) (Unreported)

N

Nkambula v Linda 1951 (1) SA 377 (A)

Nyongwana v Mapiye 1947 SRNC 423

Ngiyana v Jomose 1949 NAC (S) 147

Nolwatshu v Tshikitshwa 3 NAC 290 1916

Noseyi v Gobozana 1 NAC 214 1908

P

Palaza v Palaza 1938 NAC (C & O) 35

R

Rebecca and Musiyima v Vurayayi 1958 SRN 847

President of the Republic of South Africa and Another v Hugo 1997 (4) SA (CC)

S

Seva v Nzuda 1992 131 (SC)

Shibi v Sithole and Others 2005 (1) SA 580 (CC)

Sivijana v Sivijana 1940 NAC 27

South African Human rights Commission and Another v President of the Republic of South Africa and another 2005 (1) SA 580 (CC)

Sonti v Sonti 1929 NAC (C & O) 18

W

Wiley v The Master 1926 CPD 123

8 JOURNAL ARTICLES CITED AND WEBSITES VISITED

Allott A N, Codification and Unification of Laws in Africa, **Journal of African Law**, Vol. 7 No. 2, 1963, pg 75-76

An-Na'im A A, Human Rights in the Arab World: a Regional Perspective, **Human Rights Quarterly** 23, 2001, pg 701-732

Beckstrom J, Handicaps of Legal Social Engineering in Developing Nation, **American Journal of Comparative Law** 22, pg 669-712

Bigge D M and Briesen A, Conflict in The Zimbabwean Courts: Women's rights and self determination, **Harvard Human Rights Journal**, Volume 13, 2000, at <http://www.law.harvard.edu/students/orgs/hri/archive/>

Church J, The Place Of Indigenous Law In A Mixed Legal System And Society In Transformation, **Australian and New Zealand Law and History Society E-Journal (ANZLH E-Journal)**, 2005

Coldham S, The Status of Women in Zimbabwe, **Journal of African Law**, Vol 43, No. 2, 1999, at <http://links.jstor.org/sici?sici=0021>

Kazembe J, Legal status of women in Pre-colonial and Colonial Zimbabwe, **Syracuse Journal of International Law and Commerce**, Vol. 26:195, 1995

Ladley A, Changing the Courts in Zimbabwe: The Customary Law and Primary Courts Act, **Journal of African Law**, Vol 26 No. 2, 1982, pg 95-114

Nherere P, The limits of litigation in human rights enforcement, 6 **Zimbabwe Legal Forum** No. 3, 1994

Nzegwu N, Gender Equality in a Dual-sex system, **Journal of Culture and African Women's Studies**, at www.jendajournal.com/jenda/vol 1.1/nzegwu

Rundt R J, *The Ivory Coast's civil code*, **African Law Studies** X11

Santos B S, Law and community: the changing nature of state power in late capitalism, **International Journal of Sociology of Law**, 1980, pg 27

Santos B S, Towards a Multicultural Conception of Human Rights, **Sociologia del diritto** 24, 1997, pg 27

Sedler R A, The legal dimensions of women's liberation, **Indiana Law Journal** 47, pg 420

Stewart J, The Dependents Live On, Protection of Deceased Estates and Maintenance Claims Against Deceased Estates, **Zimbabwe Law Review**, 1989 – 90, pg 104-123

Tiffany S W, Models and the social anthropology of Women, A preliminary assessment, **Man** X111, 1978, pg 35

Uwazie E, Modes of Indigenous Disputing and Legal Interactions Among the Ibos of Eastern Nigeria, **Journal of Legal Pluralism** Vol. 34, 1994, 87-103

Valerie K, “Zimbabwe’s *Magaya* decision revisited”, in women’s rights and land succession in the international context, **Columbia Journal of Gender and Law**, at www.goliath.ecnext.com/coms2/browse

9 **LAW COMMISSIONS, DISCUSSION PAPERS AND CONFERENCES CITED**

Cape of Good Hope Commission on Native laws and Customs, Report on Proceedings, 1883, Government Printer, Cape Town

Commission to inquire into the Legal Status of African Women, Church of The Province of Central Africa, Diocese of Mashonaland, Salisbury, 1976

Canaan F Dube, Addressing the Gap Between Customary and Statute Law and International Conventions: Zimbabwe’s Twists and Turns, **CHOGM Conference**, Durban, 8-16 November, 1999

Discussion Paper on Traditional Courts, 1999, see also at www.doj.gov.za/salrc/dpapers

R B Mqoke, Can Traditional Authorities Change The Law? **Discussion Paper**, paper read at Post-Graduate seminar of the University of Fort Hare, November 2008,

H Mandeya, Customary laws and property rights of widows and orphans in Zimbabwe, **Report of the National Conference**, 25-27 January 2006 Lusaka, Zambia, at <http://www.fao.org/hiv aids/publications/reportzambia.pdf>

H Slade, **Report of the Commission on the Law of Succession**, 1969, Kenya, Nairobi Government Printer

M O'Sullivan, Women's Legal Centre, comments on the customary law and inheritance, **South African Law Commission's Project 90**, paper 93, at <http://www.wlce.co.za/index.html>

J Kazembe and M Mol, **Women and Development, Beyond the Decade, Conference**, 26 - 29 September 1985 Guelph, Ontario, Canada, at www.library.yorku.ca

10 LIST OF STATUTES

A

African Marriages Act No. 29 of 1951

Administration of Estates Amendment Act No. 6 of 1997

African Law and Tribal Courts Act No. 12 of 1969

African Wills Act No.13 of 1987

B

Black Administration Act No. 38 of 1927 (SA)

C

Customary law and Primary Courts Act No.2 of 1990

Communal Lands Act No. 20 of 1982

D

Deceased Persons Family Maintenance Act No.39 of 1978

Deceased Persons Family Maintenance Amendment Act No.21 of 1987

I

Intestate Succession Act No. 81 of 1987 (SA)

L

Legal Age of Majority Act No. 15 of 1982

M

Marriages Act No. 81 of 1964

Marriage Ordinance in Council 1838, Colony of the Cape of Good Hope

N

Native Marriage Ordinance Act No.15 of 1917

Natal Codes of Zulu Law, Proclamation 168 of 1932, Proclamation R195 of 1967 and Proclamation R151 of 1987

R

Recognition of Customary Marriages Act No. 120 of 1998 (SA)

S

South African Constitution 1996 (SA)

W

Wills Act No. 13 of 1987

GLOSSARY OF TERMS

Adelphic succession *also called collateral concession, is a system in which the throne, status of the deceased or his assets passed not linearly from father to son, but laterally from brother to brother and then to the eldest son of the eldest brother who had died*

Abosendo *could be uncles, brothers and other senior relatives of the deceased*

Babamudiki *a younger brother of a deceased male who takes over the widow and unmarried children, in as much as he takes over the property.*

Chizvarwa *has a bull dedicated to the spirit of the common ancestor, to be sacrificed when he shows signs of wanting it, and often there is a spirit medium that becomes possessed by the common ancestor when he wishes to speak to the living descendants. So even after the deceased has passed on, the common ancestor keeps the group together.*

Constitutionalism *The study of constitutions, it is a complex of ideas, attitudes, and patterns of behavior elaborating the principle that the authority of government derives from and is limited by a body of fundamental law.*

Inheritance *is the practice of passing on property, titles, debts, and obligations upon the death of an individual. It has long played an important role in human societies. The rules of inheritance differ between societies and have changed over time*

Inyembezi *meaning tears, which meant that she was mourning her father's death.*

Indlalifa *an heir in terms of Ndebele, Zulu and Xhosa customary law, usually the eldest son who inherits the family property*

Isiphipha a Xhosa custom by which a husband may donate a female beast to his wife. The beast will in turn be inherited by the youngest son, not the eldest, as in most circumstances of customary inheritance.

Isicino a Ndebele and Xhosa custom whereby the youngest son inherits a bull and its progeny which can in turn be used for general upkeep of the widow. He son does not leave his father's kraal and holds the responsibility of ploughing for the widow

Kurova guva Shona custom usually held about a year after the burial of a deceased male, but it may take place earlier or even later. The purpose of kurova guva is to bring back the spirit of the deceased from the grave to his hut to be in the midst of his descendants.

Kupisa guva in terms of Shona custom a widow is not allowed to engage in sexual relations with other man before her deceased husband's cleansing ceremony is held (kurova guva), if she so engages she will be accused of having 'burnt her husband's grave' (kupisa guva).

Kugara nhaka Shona custom that comes subsequent to (kurova guva) and is a ritual for the distribution of his possessions (nhaka) which include his wife or wives, sons and daughters, cattle, other domestic stock and his personal belongings.

Linear succession involves descent from an ancestor down through a series of male links, that is, through the ancestor's son, his son's sons, his son's sons' sons, etc. The eldest son of the house may take both his father's name on the one hand and the property that he left on the other.

Organic parts also referred to as the reproductive part of the deceased's estate, it comprised of property such as livestock and essential foodstuffs which served organic or ritual needs and was central to providing the means and resources for the continued upkeep of the surviving children and the spouse.

Succession In law, succession of property covers the two distinct concepts of inheritance and heirship, and applies where property is passed to one or more dependants according to a formula set out in law, religion, custom or under the terms of a trust.

Ultimogeniture also known as a junior right, is the tradition of inheritance where the last-born or youngest in a family holds a privileged position in a parent's wealth, status or office.

Ukungena/Ukugenwa *a type of marriage in which a widow is required to marry one of her husband's brothers after her husband's death. Also known as a 'Levirate marriage', it is practiced by societies with a strong clan structure in which marriage outside the clan may not be encouraged*

Umbuyiso/Ukubuyisa *is a ceremony performed a year after the death of the head of a family. It is done in order to bring home the spirit of the deceased in terms of Ndebele, Zulu and Xhosa custom*