The Evolution of Zimbabwe's Law of Intestate Succession: Improving Welfare for Widows Under Customary Law

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SUMMARY

This article examines the evolution of Zimbabwe's law of intestate succession since it gained independence in 1980, with a specific focus on improvements made to the welfare of widows married under customary law. It explores the influence of international human-rights legislation, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), in advocating for gender equality and women's rights. The ratification of the African Union Protocol on the Rights of Women in Africa and the SADC Protocol on Gender and Development further supports women's inheritance rights in Zimbabwe. The article highlights the significant strides made by the Constitution of Zimbabwe Amendment (No 20) 2013 in promoting gender equality and non-discrimination measures. The distinction between testate and intestate succession is examined, and light is shed on the historical flaw of male primogeniture within Zimbabwe's intestate succession framework. The article discusses the landmark *Magaya v Magaya* case, wherein the Supreme Court declared male primogeniture unconstitutional, citing violations of the fundamental rights to equality and non-discrimination. The article also addresses the challenges and inconsistencies within customary inheritance laws that hinder the full emancipation of widows. Furthermore, the article explores the parties left behind after the death of the other party in civil partnerships, specifically examining the rights and entitlements of surviving partners. The study delves into relevant legislation, including the Constitution of Zimbabwe, the Administration of Estates Amendment Act, and the abandonment of the rule of male primogeniture. It also examines the introduction of section 68F(2)(*b*) to the Administration of Estates Act, which mandates the division of the net estate among surviving wives. This provision ensures that widows are provided for and acknowledges their contributions to matrimonial property. In addition,

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the study emphasises the need for consistent legal protection for widows and minor children against the misappropriation of matrimonial property. The study discusses the various types of marriage recognised in Zimbabwe, including civil marriage, customary marriage, and unregistered customary law union (UCLU). It places its primary focus on customary unions, highlighting the legal complexities they pose in determining marital status and inheritance rights. The article also explores the "immediately resident concept", which grants surviving spouses the right to immovable property and household artefacts if they resided in the house prior to the deceased's passing, providing some level of protection to widows. In conclusion, the article acknowledges the progress made in Zimbabwe's law of intestate succession but stresses the necessity for further alignment with international conventions and the removal of barriers to ensure equitable inheritance rights for spouses, including those in civil partnerships. The article emphasises the importance of providing adequate legal protection and entitlements to surviving partners in order to enhance their welfare and address any potential disparities in inheritance rights.

KEYWORDS: intestate succession claims, intestate succession, intestacy, inheritance of property, administration of estates, distribution of the estates, deceased estates

1 INTRODUCTION

Zimbabwe's law of intestate succession[1] has evolved since independence in 1980, the focus having been on improving the welfare of widows married under customary law. The country has drawn inspiration from international human-rights legislation, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[2] to advocate for equitable inheritance rights. The adoption of a new Constitution in 2013 aimed at promoting gender equality and combating discrimination against women and girls. Male primogeniture,[3] where the eldest male child inherits the entire estate, has been declared unconstitutional by the Supreme Court of Zimbabwe.[4] However, challenges and inconsistencies, such as misappropriation of matrimonial property and a lack of legal protection for widows and minor children, remain in Zimbabwe's customary inheritance laws. The article explores the evolution of Zimbabwe's law of intestate succession, the influence of international human-rights legislation, and the need for consistent legal protection for widows and minor children. It also analyses relevant constitutional provisions and includes a case-law analysis since independence.

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1 Intestate succession is the condition of the estate of a person who dies without a legally valid will, resulting in the distribution of their estate under statutory intestacy laws rather than by their expressed wishes.

2 UN General Assembly *Convention on the Elimination of All Forms of Discrimination Against Women* 1249 UNTS 13. Adopted: 18/12/1979; EIF: 01/09/1981 (CEDAW).

3 Male primogeniture is a system of succession where the eldest male heir in the family line inherits everything, effectively excluding women from inheriting the estate, titles or responsibilities.

4 SC-210-1998.

1 1 Background on Zimbabwe's law of intestate succession

The law of intestate succession refers to the legal framework that governs the distribution of a person's assets and property in the event of their death when they have not left a valid will.[5] Intestate succession laws are particularly significant as they determine how an estate is divided and inherited among the deceased person's heirs, including their spouse, children and other relatives. Zimbabwe's law of intestate succession has a complex history that has evolved over time.[6] Prior to the country's independence in 1980, the legal system inherited from colonial rule heavily favoured the application of English common-law principles.[7] These principles often disregarded customary practices and cultural norms prevalent in Zimbabwean society, leading to significant disparities and injustices in the distribution of inheritance.

One of the key issues that has historically affected Zimbabwe's intestate succession laws is the prevalence of male primogeniture. Male primogeniture is a system in which the eldest male child inherits the entirety of the estate, and which excludes the customary spouses of the deceased and all the other siblings, including female children.[8] This practice has resulted in gender disparities, limiting women's rights to inheritance and perpetuating the marginalisation of widows and female intestate heirs.[9] Recognising the need for reform, Zimbabwe has taken steps to address these inequalities and align its intestate succession laws with the constitutional principles of gender equality and non-discrimination. The country's legal reforms have been influenced by a number of international human-rights instruments, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the African Union's Protocol on the Rights of Women in Africa,[10] among others, as fully discussed below. These international instruments advocate for the protection of women's inheritance rights and provide a framework for legal reforms at the national level.

In 2013, Zimbabwe adopted a new Constitution, the Constitution of Zimbabwe, 2013 (Constitution), which reflects a commitment to gender equality and non-discrimination. The Constitution includes provisions aimed at promoting women's rights and addressing discriminatory practices,

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5 Kodiyo *Customary Law of Succession and the Influence of Colonialism* (doctoral dissertation, University of Pécs) 2023.

6 Coldham "Succession Law Reform in Zimbabwe" 1998 42(1) *Journal of African Law* 129–134.

7 Fidelis "Succession Politics and State Administration in Africa: The Case of Zimbabwe" 2021 9 *Review Public Administration and Management* 293.

8 Malepe and Odeku "Perspectives on the Recognition of Male and Female Primogeniture in Post-1994 Democratic South Africa" 2023 12(3) *African Journal of Gender, Society & Development* 7.

9 Afunugo and Nganwuchu "Embracing Divine Gender Equality: Promoting Female Legacy Through the Inheritance of Family Properties in Igbo Land" 2024 2(2) *NJIKO: A Multi-Disciplinary Journal of Humanities, Law, Education and Social Sciences* 39–54.

10 African Union *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (2003).

including those related to inheritance. This constitutional framework has laid the groundwork for reforming Zimbabwe's law of intestate succession and ensuring a more equitable distribution of assets among heirs, including widows and minor children. Despite these positive developments, challenges and inconsistencies persist within Zimbabwe's customary inheritance laws. Issues such as misappropriation of matrimonial property, lack of consistent legal protection for widows, and ambiguities surrounding different types of marriage recognised in the country continue to hinder the full realisation of women's inheritance rights. Efforts to reform Zimbabwe's law of intestate succession are ongoing to provide greater protection and entitlements to widows, promote gender equality, and eliminate discriminatory practices. These reforms seek to address the historical flaws and disparities within the legal framework, ensuring that widows and other heirs are not deprived of their rightful share of assets and resources.

1 2 The importance of improving intestate laws for widows married under customary law

The importance of improving intestate laws for widows married under customary law cannot be overstated. In many societies, customary practices govern marriage and inheritance, often resulting in significant challenges and disadvantages for widows upon the death of their spouses. Intestate succession laws, which determine the distribution of a deceased person's estate in the absence of a will, play a crucial role in shaping the welfare and rights of widows in these contexts.[11] Recognising and addressing the specific needs and vulnerabilities of widows married under customary law is essential for promoting gender equality,[12] and for protecting their inheritance rights,[13] and ensuring their overall well-being.[14] This article explores the significance of improving intestate laws for these widows, delving into issues such as legal reforms, equitable distribution of assets, economic empowerment, social protection and the preservation of cultural heritage. By examining these aspects, valuable insights can be gained into the transformative potential of enhancing intestate laws and the positive impact such change can have on the lives of widows married under customary law, their families, and the broader society.

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11 Osman "Negotiation of Inheritance Rights by Widows: A Case Study in Rural South Africa" in Moore (ed) *Generation, Gender and Negotiating Custom in South Africa* (2022) 156–172.

12 Fasanmi and Ayivor "Widows, Widowhood, and Society in Africa" in Yacob-Haliso and Falola (eds) *The Palgrave Handbook of African Women's Studies* (2021) 2269–2286.

13 Raseroka Widows, Land, Property and Inheritance Rights: An Analysis of Affirmative Action Proposals in Botswana's 2015 Land Policy, With a Legal Comparative Dimension (doctoral dissertation, Stellenbosch University) 2021.

14 Kiwala and Olanya "Widows' Vulnerability: A Descriptive Study of Neglect and Emotional Factors as Effects of Widowhood. A Case Study of Solwezi District, Zambia" 2023 2(1) *ICCCM Journal of Social Sciences and Humanities* 11–43.

1 3 Influence of international human-rights legislation and protocols

The influence of international human-rights legislation and protocols on intestate laws for widows married under customary law has been instrumental in promoting and protecting their rights. Over the years, international bodies and organisations have recognised the unique challenges faced by widows in customary-law systems and have advocated for legal reforms to address these disparities. The next section discusses international human-rights legislation and protocols, and how they influence intestate laws for widows married under customary law.

1 3 1 Universal Declaration of Human Rights (UDHR)

The UDHR, adopted by the United Nations General Assembly in 1948, establishes the fundamental principles of human rights.[15] It recognises the right to equality, non-discrimination and fair treatment, which are essential for widows married under customary law. The UDHR serves as a foundation for subsequent human-rights instruments and has provided a basis for advocating for the rights of widows, including their inheritance rights.[16]

Following its independence, Zimbabwe became a member of the United Nations on 25 August 1980.[17] This membership marked a commitment to international human-rights standards, including the principles enshrined in the UDHR.[18] These principles have significantly influenced Zimbabwe's legal framework, particularly regarding the rights of widows under customary law.

Historically, Zimbabwe's dual legal system, which recognises both formal statutory law and customary law, has posed challenges for widows, especially in inheritance matters.[19] Customary practices often favoured male heirs, leading to the exclusion of widows from property inheritance.[20] In response to these challenges, Zimbabwe has undertaken legal reforms aimed at protecting the rights of widows. The Constitution of Zimbabwe, adopted in 2013, includes a comprehensive justiciable Chapter Four Declaration of Rights that aligns with the rights and freedoms outlined in the

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15 UNGA *The Universal Declaration of Human Rights* A/RES217(III) (10 December 1948); see Wasel "The United Nations Human Rights System" 2022 113(548) *L'Egypte Contemporaine* 491–547.

16 Ngamnteni *Judicial Balancing of Cultural Relativism and Universalism of Human Rights in Post-Apartheid South Africa* (LLM thesis, University of the Western Cape) 2022.

17 Ngabaza "Enhancing Governance and Women's Rights: Zimbabwe's Path in the APRM" 2025 *Political Governance and the African Peer Review Mechanism: A Comparative Analysis* 127–141.

18 Muchemwa and Chiridza "Assessing the Convergence of Constitutional Reform, Judicial Precedent and International Human Rights Norms on Zimbabwe's Abolition of Capital Punishment" 2025 *Lighthouse: The Zimbabwe Ezekiel Guti University Journal of Law, Economics and Public Policy* 328–353.

19 Choguya "Multiple Jeopardies at the Interstices of Marriages and Inheritance Issues in Zimbabwe" in Chiweshe (ed) *Marriage in Contemporary Zimbabwe: Identity, Community, and Change* (2024) 182–195.

20 Dube "Isolation and Its Impact on Widows: Insights From Low-Resourced Communities in Binga District, Zimbabwe" 2022 11(7) *Social Sciences* 1–16.

UDHR.[21] This constitutional framework serves as a vital basis for advocating for the inheritance rights of widows.

Despite these legal advancements, effective implementation and enforcement of these rights remain critical. Ongoing efforts are necessary to ensure that widows married under customary law can fully exercise their inheritance rights, in line with both national laws and international human-rights standards. While the UDHR itself is a declaration and not a treaty requiring ratification, Zimbabwe has further demonstrated its commitment to human rights by ratifying several key international human-rights treaties, as discussed below.

1 3 2 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

CEDAW, adopted in 1979, is an international treaty that comprehensively addresses women's rights.[22] It obligates states to eliminate discrimination against women, including in matters related to marriage, family and inheritance. CEDAW has played a critical role in highlighting the rights of widows and advocating for legal reforms to ensure their equal treatment and access to inheritance, irrespective of their marital status or the legal framework under which they are married. Zimbabwe signed CEDAW without any reservations in 1991 and ratified it in 1997, making it legally bound to implement and submit periodic reports on its progress.[23]

One of the critical effects of CEDAW in Zimbabwe has been its influence on legal reforms aimed at improving the inheritance rights of women. The ratification of CEDAW has catalysed changes in legislation, such as the amendments to the Administration of Estates Act,[24] which now recognises unregistered customary marriages for inheritance purposes.[25] These reforms ensure that widows, regardless of their marital status – whether in civil or customary unions – have equitable access to their deceased partners' estates. CEDAW has thus served as a framework for legal advocacy, pushing for reforms that align national laws with international standards on women's rights.

Despite these positive changes, it remains challenging to implement CEDAW's principles effectively within Zimbabwe. Cultural norms and traditional practices often continue to overshadow statutory rights, leading to

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21 Constitution of Zimbabwe Amendment (No. 20) 2013.

22 Tchoukou "The Silences of International Human Rights Law: The Need for a UN Treaty on Violence Against Women" 2023 23(3) *Human Rights Law Review* 1–25.

23 Magweva *The Right to Sexual Orientation and LGBTIQ+ Rights: A Case Study of Zimbabwe and Nigeria* (Doctoral dissertation, University of Venda, Thohoyandou, South Africa) 2023.

24 Administration of Estates Act [Chapter 6:01].

25 Machakanja, Jeranyama and Bere "The Constitutional and Legal Frameworks for the Protection of Women Against Violence in Zimbabwe" in *Final Papers of the 2016 National Symposium on the Promise of the Declaration of Rights under the Constitution of Zimbabwe* (RWI/Lund University) (2016) 23–43.

discrimination against widows, especially in rural areas.[26] Many women still face various obstacles when claiming their inheritance rights, which highlights the need for ongoing advocacy and education to ensure that the provisions of CEDAW translate into real-world protections.[27] Continued efforts are essential to address these disparities and ensure that all women in Zimbabwe can fully benefit from the legal reforms inspired by CEDAW.

1 3 3 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)

The Maputo Protocol, adopted in 2003, specifically addresses the rights of women in Africa.[28] It emphasises gender equality, non-discrimination and the elimination of harmful practices affecting women, including widows. The Protocol calls for African states to enact laws that protect widows' rights to inheritance and ensure their economic and social welfare. Zimbabwe signed the Protocol on 18 November 2003 and ratified it on 15 April 2008, making it legally binding on submission of the instrument of ratification on 5 September 2008.[29]

The Maputo Protocol has significantly influenced Zimbabwe's intestate succession laws, particularly regarding the rights of widows and the recognition of different marital forms. According to the Marriages Act,[30] a civil marriage is monogamous, meaning that if one spouse enters into another marriage without dissolving the first civil union, any subsequent marriages are deemed null and void. In such cases, the civil spouse is regarded as the sole surviving spouse, and thus inherits the entire estate of the deceased, regardless of any separation. This principle was firmly established in the case of *Mazarura v Kativhu*,[31] where the court emphasised that separation does not alter the status of the surviving spouse. This rigid application can disadvantage those in customary unions, particularly when multiple unions are involved.

The complexity of intestate succession increases when customary marriages are considered. A customary marriage in Zimbabwe is not necessarily monogamous as it is potentially polygamous, allowing for multiple unions.[32] Thus, if a person who is already in a customary marriage

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[26] Mundenda *The Parable of the Widow and the Unjust Judge (Lk 18: 1–8): The Significance and Relevance of the Parable for the Experiences of Widows in Independent Zimbabwe* (doctoral dissertation, University of Pretoria) 2021.

[27] Choguya in Chiweshe (ed) *Marriage in Contemporary Zimbabwe: Identity, Community, and Change* 182–195.

[28] Shivdas and Coleman (eds) *Without Prejudice: CEDAW and the Determination of Women's Rights in a Legal and Cultural Context* (2010) 198.

[29] Sithole and Dziva "Eliminating Harmful Practices Against Women in Zimbabwe: Implementing Article 5 of the African Women's Protocol" 2019 19(2) *African Human Rights Law Journal* 568–590.

[30] Marriages Act [Chapter 5:17] (No 1 of 2022).

[31] [2014] ZWHHC 287.

[32] Cotton "Are Women in Polygamous Customary Marriages Entitled to Constitutional Protection in the Southern African Development Community" in Maclean and Treloar (eds) *Research Handbook on Family Justice Systems* (2023) 250–271.

subsequently enters into a civil marriage, the latter is treated as a customary marriage for inheritance purposes. This means that both the civil spouse and any customary spouses are recognised as surviving spouses, each entitled to a share of the estate. This dual recognition is illustrated in cases such as *Gwatidzo v Masukusa*[33] and *Chinho v Chinho,*[34] where the court affirmed the rights of spouses from both types of marriage. The Administration of Estates Act [35] was amended by the Administration of Estates Amendment Act Number 6 of 1997 in order to validate unregistered customary marriages for inheritance, addressing the inequity that arose from earlier legal requirements.

The principle that the form of marriage occurring first determines the status of subsequent unions is critical in understanding intestate succession in Zimbabwe. A civil marriage, being monogamous, does not permit any customary marriages to arise afterwards; thus, any customary unions formed after a civil marriage are invalid in terms of section 68(3) of the Administration of Estates Act.[36] Conversely, a customary marriage allows for multiple unions, meaning that even if a party later enters into a civil marriage, that civil union is effectively considered a customary marriage in terms of section 68(4) of the Administration of Estates Act.[37] This legal framework reflects an attempt to balance the rights of individuals involved in different forms of marriage, aligning with the principles of the Maputo Protocol that advocate for gender equality and the protection of women's rights.

Despite these legislative advancements, challenges remain in the practical application of these laws. The strict enforcement of civil-marriage rules can still undermine the rights of spouses in customary unions, particularly unregistered ones. Cultural attitudes and societal norms further complicate the realisation of these legal protections. Ongoing legal discourse and judicial interpretations will be essential in ensuring that the intention of the Maputo Protocol is fulfilled, namely, guaranteeing that all spouses, regardless of marital status, receive equitable treatment in matters of intestate succession.

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33 2000 (2) ZLR 410 (H).

34 [2006] ZWHHC 99.

35 Administration of Estates Act [Chapter 6:01].

36 Section 68(3) provides: "A marriage contracted according to customary law shall be regarded as a valid marriage for the purposes of this Part notwithstanding that it has not been solemnized in terms of the Customary Marriages Act [Chapter 5:07], and any reference in this Part to a spouse shall be construed accordingly: Provided that such a marriage shall not be regarded as valid for the purposes of this Part if, when it was contracted, either of the parties was married to someone else in accordance with the Marriage Act [Chapter 5:11] or the law of a foreign country under which persons are not permitted to have more than one spouse."

37 Section 68(4) provides "A marriage contracted according to the Marriage Act [Chapter 5:11] or the law of a foreign country under which persons are not permitted to have more than one spouse shall be regarded as a valid marriage for the purposes of this Part even if, when it was contracted, either of the parties was married to someone else in accordance with customary law, whether or not that customary law marriage was solemnised in terms of the Customary Marriages Act [Chapter 5:07]: Provided that, for the purposes of this Part, the first-mentioned marriage shall be regarded as a customary-law marriage."

1 3 4 United Nations Sustainable Development Goals (SDGs)

In 2015, Zimbabwe signed the 2030 Agenda for Sustainable Development, which includes the Sustainable Development Goals (SDGs).[38] While the SDGs are not in a binding treaty requiring ratification, they serve as a framework for countries to align their national policies with global standards.[39]

The adoption of SDG 5,[40] which aims to achieve gender equality and empower all women and girls, has significantly influenced Zimbabwe's national policies and legal reforms. This focus on gender equality has prompted the government to address gender-based inequalities, particularly in matters of inheritance for widows married under customary law.

As a result, Zimbabwe has made strides in reforming its intestate succession laws to safeguard the rights of widows. These reforms aim to ensure that widows are not marginalised or discriminated against in inheritance matters by promoting equitable access to property and resources. By aligning its legal framework with the principles of the SDGs, Zimbabwe is working towards creating a more inclusive and equitable society that supports the rights of all individuals, especially those historically disadvantaged, such as widows.

1 3 5 Recommendations and reports by international organisations

International organisations such as the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women)[41] and the United Nations High Commissioner for Human Rights [42] have issued recommendations and reports highlighting the rights of widows and calling for legal reforms to protect their inheritance rights. These documents serve as valuable guidance for policymakers and advocate for the harmonisation of customary laws with international human-rights standards.

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38 Leal Filho, Frankenberger, Salvia, Azeiteiro, Alves, Castro and Avila "A Framework for the Implementation of the Sustainable Development Goals in University Programmes" 2021 299 *Journal of Cleaner Production* 126915.

39 Guiry "Why Do States Adhere to the Sustainable Development Goals?" 2024 13(2) *Transnational Environmental Law* 400–427.

40 Sustainable Development Goal 5 (SDG 5) aims to achieve gender equality and empower all women and girls. It emphasises the need to end discrimination, violence and harmful practices against women, ensure equal participation in leadership and decision-making, and provide access to education, health care, and economic resources. SDG 5 seeks to promote and protect the rights of women and girls, ensuring their full and effective participation in society.

41 Europa Publications (ed) *The Europa Directory of International Organizations 2022* (2022) 189–192 (entry on United Nations Entity for Gender Equality and the Empowerment of Women-UN Women).

42 Ramcharan "The Challenges of International Protection" in Ramcharan *The United Nations High Commissioner for Human Rights* International Studies in Human Rights Series vol 71 (Martinus Nijhoff 2002) 7–17.

The influence of international human-rights legislation and protocols has prompted many countries, including Zimbabwe, to review and revise their intestate laws, and align them with human-rights principles. These international instruments provide a framework for advocacy, legal reforms, and the promotion of gender equality, ensuring that widows married under customary law are afforded the same rights and protection as widows in other legal frameworks. By recognising the importance of international human-rights standards, governments can work towards creating a more just and inclusive legal environment for widows, safeguarding their inheritance rights, and promoting their overall well-being.

2 THE 2013 ZIMBABWEAN CONSTITUTION AND GENDER EQUALITY

Zimbabwe is a constitutional democracy that holds the supremacy of the Constitution as a fundamental principle. The Constitution serves as the supreme law of the land, and all arms of the State, including the judiciary, are bound by its provisions, as provided for in section 2.[43] The starting point is section 326 of the Constitution, which considers customary international law to be part of Zimbabwean law. The commitment to abide by customary international law manifests under subsection (2), which expressly places an obligation on the Zimbabwean judiciary to adopt any reasonable interpretation of the legislation that is consistent with customary international law applicable in Zimbabwe.

This same commitment appears in the interpretation of section 327(6) at first glance. This section also mandates the courts to adopt any reasonable interpretation of the legislation that is consistent with any international convention, treaty or agreement that is binding on Zimbabwe, in preference to an alternative interpretation inconsistent with that convention, treaty or agreement. In addition, any individual or entity dealing with Chapter 4 rights and fundamental freedoms is also subject to the obligations outlined in the Constitution. The Constitution introduced significant provisions aimed at promoting gender equality and addressing gender-based discrimination. The Constitution marked a pivotal moment in the country's legal framework, recognising the importance of gender equality as a fundamental human right.

2 1 Promoting gender equality and anti-discrimination measures

The 2013 Zimbabwean Constitution promotes gender equality and non-discrimination measures through various provisions that specifically address these issues.

[43] Section 2 of the Constitution of Zimbabwe establishes the supremacy of the Constitution, declaring it the highest law in the country. It asserts that any law or conduct inconsistent with the Constitution is invalid, thereby reinforcing the principles of democracy, the rule of law, and respect for human rights. This section is vital for promoting accountability, protecting citizens' rights, and ensuring that all branches of government operate within constitutional limits, thereby laying a solid foundation for governance in Zimbabwe.

2 1 1 National objectives in the Constitution

(i) Affirmative action

The Constitution recognises the need for affirmative action to redress historical imbalances and promote gender equality. Section 17 emphasises the importance of gender balance in all institutions and agencies of the State. It calls for the implementation of measures to ensure gender representation in decision-making positions and public offices. This provision aims to address the under-representation of women in positions of power and influence.[44]

(ii) Marriage rights vis-à-vis inheritance rights

Section 26(*d*) of the Constitution states that the State must take measures to ensure that, in the event of dissolution of marriage, whether through death or divorce, provision is made for the necessary protection of any children and spouses. Applying this provision in the context of this article, a widow ought to be afforded protection upon the demise of her husband. It has been held in the *Chigwada v Chigwada*[45] case, however, that section 26(*d*) is not a legislative provision for direct enforcement by the courts, and that the section does not confer any right on anyone but is simply one of the national objectives.

2 1 2 Justiciable Chapter 4 rights and fundamental freedoms in the Constitution

(i) Prohibition of discrimination

Section 56 of the Constitution explicitly declares equality before the law and parity between men and women, and enshrines the right not to be treated in an unfairly discriminatory manner on such grounds as, *inter alia*, custom, culture, sex, gender, marital status, age, pregnancy, economic or social status, or whether they were born in or out of wedlock. This provision ensures that all individuals are entitled to equal protection and the benefit of the law, without discrimination. It serves as a foundational principle for promoting gender equality and combating gender-based discrimination in all spheres of life.

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44 To implement this provision, several key pieces of legislation have been enacted, including the Zimbabwe Gender Commission Act [Chapter 10:31], which establishes a commission to promote gender equality and monitor discrimination; the Domestic Violence Act [Chapter 5:16], which addresses domestic violence and protects victims, especially women; the Electoral Act [Chapter 2:13], which encourages gender representation in political parties; and the Labour Act [Chapter 28:01], which mandates equal pay and prohibits gender discrimination in the workplace. Collectively, these laws aim to enhance women's representation in decision-making positions and safeguard their rights.

45 *Gerald Chigwada v Penelope Chigwada* [2020] ZWSC 188.

(ii) Women's rights

Section 80 of the Constitution of Zimbabwe is of great relevance to the customary law of inheritance, as it explicitly guarantees equal rights and opportunities for women. This provision prohibits laws, customs, traditions, or practices that discriminate against women, serving as a powerful tool to challenge and reform discriminatory practices entrenched in customary law.

In terms of inheritance, traditional practices have often favoured male heirs, marginalising widows and women in general.[46] The constitutional protection empowers women to assert their rights and seek equitable treatment in inheritance matters. This framework encourages legal reforms aimed at aligning customary laws with constitutional principles, ensuring that widows have the right to inherit property and participate in decision-making regarding family assets.

In addition, recognition of women's rights in the Constitution supports advocacy efforts by civil society and women's organisations that push for changes to customary laws to uphold gender equality.[47] The promotion of women's empowerment through section 80 plays a crucial role in fostering a more equitable inheritance system, ultimately benefiting the rights of widows and contributing to broader gender equality in Zimbabwe.

(iii) Right to property

Section 71 of the Constitution recognises the right to property, including the equal right to property ownership and control. This provision ensures that women have equal rights to own, inherit and manage property, challenging discriminatory practices that may have restricted their access to and control over property in the past. It promotes gender equality in matters of property ownership and distribution.

(iv) Marriage and family

The Constitution recognises the equal rights of spouses within marriage. Section 78 provides for equal rights and responsibilities in marriage, including the right to joint property ownership, inheritance and decision-making. By ensuring equal treatment and protection within marital relationships, the Constitution challenges discriminatory practices and promotes gender equality.

(v) Gender-based violence and discrimination

The Constitution recognises the need to combat gender-based violence and discrimination. Section 52 prohibits all forms of violence against women,

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[46] Muradzikwa *Women, State Law, and the Crisis of Chieftaincy: The Case of Nswazi Village in Zimbabwe* (doctoral dissertation, University of the Witwatersrand, Johannesburg) 2024 160.

[47] Sinha and Djankov "Gender Legal Reform in Zimbabwe: Wanting" 2023 874 *Financial Markets Group Discussion Paper* 1–15.

including domestic violence, and guarantees the right to physical and psychological integrity. The Constitution also recognises the rights of victims of gender-based violence to access justice and receive appropriate support and remedies.

2 2 Impact of the Constitution on inheritance rights for widows

The Constitution acknowledges the importance of customary law and promotes its development in line with constitutional principles. This has led to efforts to reform discriminatory customary practices that have disproportionately affected widows, such as those denying them inheritance rights. The Constitution encourages the harmonisation of customary practices with the principles of gender equality and non-discrimination.

2 2 1 Supremacy of the Constitution

The Constitution establishes itself in section 2 of the Constitution as the supreme law of the land, which means that all laws, including customary laws, must be consistent with its provisions. This implies that customary practices that are discriminatory or contrary to constitutional principles can be challenged and reformed and are thus rendered null and void to the extent of the inconsistency.

2 2 2 Recognition of cultural rights

Section 63 of the Constitution recognises and protects the right to participate in cultural practices and to follow customary law, subject to the provisions of the Constitution. This provision acknowledges the importance of customary practices while ensuring that they do not infringe upon the fundamental rights and freedoms guaranteed by the Constitution.

2 2 3 Application of customary law

Section 89 of the Constitution acknowledges that customary law continues to apply in Zimbabwe, but only to the extent that it does not contravene the Constitution. This provision establishes the principle that customary law must be interpreted and applied in a manner consistent with constitutional rights and principles.

The impact of the 2013 Constitution on inheritance rights for widows has been a gradual process, as changing societal norms and practices takes time.[48] However, the constitutional provisions regarding equality, property rights and spousal rights have laid a foundation for addressing discriminatory inheritance practices and promoting a more equitable distribution of assets among widows. It has created opportunities for legal reforms, awareness

[48] Vengesai *Women's Inequality and Their Status in Zimbabwe* (doctoral dissertation, University of Pretoria) 2019.

campaigns and the empowerment of widows to assert their rights and challenge discriminatory practices in inheritance matters.

3 DISTINCTION BETWEEN TESTATE AND INTESTATE SUCCESSION

3 1 Explaining the difference between testate and intestate succession

Testate succession and intestate succession are the two different legal concepts that govern the distribution of a person's property and assets after their death.[49] The main difference between the two lies in the presence or absence of a valid will.

3 1 1 Testate succession

Testate succession occurs when a person dies with a valid will in place.[50] A will is a legal document that specifies how a person's assets and property should be distributed upon their death.[51] In testate succession, the deceased person is referred to as the testator or testatrix.[52] The will outlines the testator's wishes regarding the distribution of their assets,[53] appointment of executors, and any other specific instructions.[54] The distribution of the estate is carried out according to the terms and provisions of the will.[55] The will must meet legal requirements, such as being in writing, signed by the testator, and witnessed by competent individuals.[56]

3 1 2 Intestate succession

Intestate succession occurs when a person dies without a valid will or when the will does not effectively dispose of all the assets.[57] In this case, the deceased is said to have died intestate. When there is no will or incomplete disposition of assets,[58] the distribution of the estate in respect of property

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49 Otu and Nabiebu "Succession and Inheritance of Property Under Nigerian Laws: A Comparative Analysis" 2021 62(2) *European Journal of Social Sciences* 50–63.

50 Oppenheim "Testate Succession" 1961 36 *Tul L Rev* 1–48.

51 Dunham "The Method, Process and Frequency of Wealth Transmission at Death" 1963 30(2) *The University of Chicago Law Review* 241–285.

52 Zacharias "Husband and Wife as Heir Under Testate Succession" 1933 12 *Chi-Kent Rev* 264.

53 Horton "Wills Law on the Ground" 2015 62 *UCLA L Rev* 1094.

54 Sawyer and Spero *Succession, Wills and Probate* (2015) 430.

55 Nasrul and Salim "Administration of Estates in Malaysia: Determinant of Factors Behind the Delay in the Distribution of the Deceased's Assets" 2018 3(1) *Journal of Nusantara Studies (JONUS)* 75–86.

56 Levy "Competency of a Witness to a Will" 1989 5 *Conn Prob LJ* 369.

57 Cretu and Florea "Lex Succesionis – The Determination of Applicable Law of Inheritance in Private International Law" 2021 8 *Eur JL & Pub Admin* 19.

58 Incomplete disposition of assets occurs when the deceased had a valid will but did not add to their will other properties acquired before their death.

that is not included in a will is determined by the laws of intestacy.[59] These laws provide a predetermined order of priority for distributing the assets among the deceased person's heirs, typically based on the familial relationship. The distribution, depending on the applicable laws, may be based on principles such as equal shares for children, spouse or other close relatives.

Both testate and intestate succession apply to a deceased person's estate, which is defined as their debts and property (assets and liabilities). In the event of death in Zimbabwe, a proper legal process is invoked to determine whether customary law or general law applies.[60] Where the decedent was a partner in a valid customary union, customary law applies in the winding up of the deceased's estate. On the other hand, where the decedent was in a civil marriage, general law applies in the intestate distribution of the deceased's estate.

To determine whether customary law applied to a deceased person, section 3 of the Customary Law and Local Courts Act[61] should be used, as stipulated in section 68G of the Administration of Estates Act.[62] Section 3 states that customary law shall apply where the parties have expressly agreed that it should; or when, given the circumstances, it seems that the parties have agreed that it should; or where regard is had to the nature of the case and circumstances, and it appears just and proper that it should apply. This legislative provision was enunciated in *Chapeyama v Matende*,[63] which held that, unless the justice of the case otherwise requires, customary law applies in any civil case where the parties have expressly agreed that it should apply or, regard being had to the nature of the case and the surrounding circumstances, it appears that the parties have agreed that it should apply.

In summary, testate succession refers to the distribution of assets according to a valid will, while intestate succession refers to the distribution of assets when there is no valid will or an incomplete disposition of assets. In both cases, the goal is to ensure the orderly transfer of assets and property after a person's death, but the process and outcome differ depending on the presence or absence of a will.

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59 Choguya in Chiweshe (ed) *Marriage in Contemporary Zimbabwe: Identity, Community, and Change* 182–195.

60 Customary law refers to legal systems and practices that are rooted in the customs, traditions and cultural practices of a specific community or group. These laws are often unwritten and evolve over time, reflecting the social norms and values of the community. Law of general application, often referred to as statutory or common law, encompasses laws that are formally enacted by legislative bodies or established through judicial precedents. These laws are written and codified, and apply universally within a jurisdiction, regardless of cultural or community-specific practices.

61 Customary Law and Local Courts Act [Chapter 7:05].

62 Administration of Estates Act [Chapter 6:01].

63 2000 (2) ZLR 356 (S).

3 2 The historical flaw of male primogeniture in intestate succession and how it shaped the evolution of the common law in Zimbabwe

3 2 1 The rule of male primogeniture

Male primogeniture is a traditional practice or principle that gives preference to the eldest son or male descendant in the inheritance or succession of property, titles or other privileges.[64] Under male primogeniture, the oldest male child, thus the first-born son, has a superior right to inherit the family's wealth, estate or leadership position compared to his siblings, particularly female siblings. The term "primogeniture" itself refers to the right of the first-born child to inherit.[65] However, when the term "male primogeniture" is used, it specifically emphasises the gender-based aspect of this practice, highlighting that it applies only to male descendants. This means that daughters or younger sons are generally excluded from inheriting or receiving the same privileges as the eldest son. Historically, male primogeniture has been prevalent in many societies and cultures around the world, often rooted in patriarchal traditions and inheritance practices.[66] It has been used to maintain family wealth, power and lineage within a specific male lineage, and thus exclude women and other male siblings from equal inheritance rights.[67]

The concept of male primogeniture is considered to be the first historical flaw in the framework of intestate succession in Zimbabwe.[68] Although male supremacy existed in various forms in Zimbabwean society before colonialism, colonial rule intensified and institutionalised these patriarchal norms.[69] Traditional customs often favoured male heirs in matters of inheritance and leadership,[70] but colonial authorities imposed legal frameworks that reinforced male dominance and marginalised women's rights.[71] The introduction of colonial laws exacerbated existing inequalities,

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64 Malepe and Odeku 2023 *African Journal of Gender, Society & Development* 7.

65 Miriki *An Examination of the Primogeniture Rule and Its Compliance With International Human Rights Law: A Study of Nigeria, South Africa, and the United Kingdom* (MSc thesis, Lead City University, Ibadan) 2023.

66 Ezebuilo "Human Rights, Gender Equality and Justice: A Re-Examination of Male Chauvinism in African Culture" 2023 1 *Preorc Journal of Gender and Sexuality Studies* 243–259.

67 Imiefoh and George "First Son Primacy and Family Dependent Rights in Nigerian Estate Laws" 2025 10(1) *NIU Journal of Humanities* 261–271.

68 Kodiyo *Intestate Succession in Kenya, Uganda, and Tanzania: The Role of Customary Laws and the Influence of Colonialism* (doctoral dissertation, University of Pécs (Hungary)) 2024.

69 Folbre "Patriarchal Social Formations in Zimbabwe" in Stichter and Parpart (eds) *Patriarchy and Class* (2019) 61–80.

70 Tagutanazvo and Dzingirai "'A Child is Born' – Gender, Remittances and Patrimony: The Case of Chivi District in Zimbabwe" 2024 59(1) *Journal of Asian and African Studies* 159–171.

71 Maushe, Mangwiro, Muregi, Bhala, Chihiya and Katsomba "No Gender Equality, No Progress: The Impact of Increased Women Participation in Policy-Making and Practice in Africa" 2025 13(1) *International Journal of Humanities Education* 193–206 https://doi.org/10.5281/zenodo.14791831.

solidifying male primogeniture as a dominant practice. This shift disrupted traditional inheritance practices and further excluded women and widows from property rights. Consequently, while male supremacy was present prior to colonialism, the colonial period amplified and formalised these disparities, creating lasting impacts on the socio-economic status of women in Zimbabwe.

Under customary law, succession is intestate, universal and onerous. Upon the death of the family head, his oldest son (typically the oldest son of his first wife if he had multiple wives) succeeds to the status of the deceased. This inheritance not only includes tangible assets such as land and livestock but also entails the assumption of significant familial responsibilities.[72] The heir is obligated to support surviving family dependants, who can include spouses, minor children and other relatives who relied on the deceased for financial and emotional support.[73] This system underscores the importance of the heir's role in maintaining family stability and ensuring the welfare of all dependants left behind.[74]

3 2 2 How the Zimbabwean courts interpreted the concept of male primogeniture

Male primogeniture has become a norm entrenched in custom to the extent that it is considered customary law, as reaffirmed by a significant body of case law. This is evident from the opinions expressed by McNally JA (as he then was) in the case of *Moyo v Moyo*,[75] where he stated: "It is common cause that under customary law, generally in Zimbabwe, it is the deceased's eldest son who inherits the estate." The courts have consistently adopted the same approach in subsequent cases, such as in *Antonio v Antonio*,[76] *Vareta v Vareta*,[77] and *Mwazozo v Mwazozo*.[78] The influential decision in *Magaya v Magaya*[79] further solidified the notion that, under customary law, the eldest son is typically the natural successor to his deceased father. Consequently, even if the deceased had an older daughter, if there was a son, regardless of his age or whether he was a minor or an infant, he would be favoured as the heir.[80]

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72 Beban and Bourke Martignoni "The Lucky and Unlucky Daughter: Gender, Land Inheritance and Agrarian Change in Ratanakiri, Cambodia" 2024 24(2) *Journal of Agrarian Change* e12579.

73 Osman "The Communal Nature of the South African Customary Law of Succession: Developments in the 21st Century" in Diala and Rautenbach (eds) *Reimagining Legal Pluralism in Africa: Balancing Indigenous, State, and Religious Laws* (2024) 62–90.

74 Cogger *Inheritance and Redistribution: Exploring the Constitutional Commitment Towards Redistribution in the Private Law of Succession* (doctoral thesis, University of Cape Town) 2021.

75 1990 (2) ZLR 81.

76 1991 (2) ZLR 42 (SC).

77 1994 ZWSC-121.

78 1990 ZWSC-126.

79 SC-210-1998.

80 *Magaya v Magaya supra*.

In the *Vareta* case, the judge explicitly stated that the Legal Age of Majority Act (LAMA) of 1982[81] had no impact on this aspect of customary law. The judge further contradicted the ruling in the *Chihowa v Mangwende*[82] case, which had recognised a woman as an heir to her father's estate, by interpreting the *Chihowa* case to mean that a daughter could only inherit in the absence of a son. The court upheld the decision in *Murisa v Murisa*,[83] which concluded that a widow does not have inheritance rights to her husband's estate and cannot be named an intestate heir as a result.

The *Magaya* judgment ultimately overturned the ruling in *Chihowa v Mangwende*[84] by asserting that LAMA did not affect the appointment of male heirs to the estates of deceased Africans and that women were not granted inheritance rights, either through explicit provisions of the Act or by necessary implication. Consequently, widows were specifically excluded from intestate inheritance from their late husbands' estates. The details of this decision are discussed further below.

4 THE *MAGAYA V MAGAYA* CASE

The *Magaya* case[85] is a notable legal case in Zimbabwean jurisprudence. It involved a dispute over the inheritance rights of a widow in her late husband's estate. The case dealt with the interpretation of customary law, particularly the application of male primogeniture and the rights of widows to intestate inheritance. In this case, the Supreme Court of Zimbabwe examined the customary-law principles that governed succession in the country. The court held that under customary law, the eldest son is typically the natural successor to his deceased father's estate.[86] It emphasised that this practice, known as male primogeniture, had been established by custom to the point where it was considered customary law.[87]

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81 Legal Age of Majority Act (LAMA) 1982.

82 1986 (1) ZLR 127.

83 1992 (1) ZLR 167 (S).

84 *Supra*.

85 *Supra.*

86 Muchechetere J held: "Clearly the courts have always maintained the proper position on this issue and 'an all powerful patriarchy who inherited all the property of the deceased and could do with it as he chose' would never receive the sanction of the courts. From the above it is clear that, in my view, the discrimination against women was not because of their 'minority' but mainly because of the consideration in African society which, amongst other factors, was to the effect that women were not able to look after their original family because of their commitment to the new family. In the circumstances, I consider that *Katekwe*'s case *supra*, *Chihowa*'s case *supra*, and those cases which followed them were decided wrongly in that respect. They defined the provisions of the Majority Act too widely" (*Magaya v Magaya supra* 14).

87 Muchechetere J held: "Whilst I am in total agreement with the submission that there is a need to advance gender equality in all spheres of society, I am of the view that great care must be taken when African customary law is under consideration. In the first instance, it must be recognised that customary law has long directed the way African people conducted their lives and the majority of Africans in Zimbabwe still live in rural areas and still conduct their lives in terms of customary law. In the circumstances, it will not readily be abandoned, especially by those such as senior males who stand to lose their positions of privilege. On this aspect see Ncube's *Critique on Katekwe v Muchabaiwa* op cit at pp 217-219, and Ncube's *Customary Law Courts* published in *Zimbabwe Law Review* Vols 7-8 1989-1990 at

One of the key issues in the case was the effect of LAMA on the inheritance rights of women. The court ruled that LAMA did not impact the appointment of male heirs to the estates of deceased Africans.[88] It stated that the Act did not grant inheritance rights to women either through express provisions or by necessary implication. As a result, widows were excluded from intestate inheritance from their late husbands' estates under customary law. The *Magaya* case overturned a previous ruling in the *Chihowa* case, which recognised a woman as an heir to her father's estate. The court in *Magaya*, in an *obiter dictum* on pages 13 and 14, citing *Matambo v Matambo*,[89] held that the *Chihowa* case's ruling applied only in cases where there was no eligible male heir, implying that a daughter could inherit only in the absence of a son.

The decision in the *Magaya* case has been influential in shaping the interpretation and application of customary law in Zimbabwe regarding intestate inheritance and the rights of widows. It reinforced the practice of male primogeniture and limited the inheritance rights of widows under customary law. Muchechetere J emphasised that the responsibility for reforming customary law lies with the legislature, not the courts. He stated:

> "Matters of reform should be left to the legislature. In cases of succession, a court cannot simply declare customary norms void; it must specify the extent to which widows can inherit and under what circumstances. Such details cannot be adequately determined through judicial proceedings. The appropriate avenue for reform is legislation, which allows for a comprehensive investigation of the social context and consultation with relevant stakeholders."[90]

The Supreme Court's finding that customary practices could exempt discriminatory norms from constitutional scrutiny, prioritising male heirs over female claimants, was criticised for undermining both Zimbabwean constitutional provisions and international human-rights standards. This decision not only reinforced male primogeniture but also sparked calls for legal reforms aimed at ensuring equal inheritance rights for women. The ruling highlighted the urgent need to address the legal barriers women face in inheritance matters, emphasising the tension between cultural self-determination and the pursuit of gender equality.[91] As a result, legislative measures were taken, leading to the declaration that the male primogeniture practice is unconstitutional, as discussed below.

p 15, on the hostile reaction received by the Court's decision on the Majority Act" (*Magaya v Magaya supra* 17–18).

88 *Katekwe v Muchabaiwa* 1984 (2) ZLR 112 (S).

89 1969 (2) RLR 154 (AD) 155F; 1969 (3) SA 717 (R AD) 717G.

90 1999 (I) ZLR 100 (S) 114.

91 Knobelsdorf "Zimbabwe's Magaya Decision Revisited: Women's Rights and Land Succession in the International Context" 2006 15(3) *Columbia Journal of Gender and Law* 749–798 https://doi.org/10.7916/cjgl.v15i3.2530.

5 THE EVOLUTION OF INTESTATE SUCCESSION LAW

5 1 Abandonment of the rule of male primogeniture and enhancement of widow's inheritance in intestate succession

The Administration of Estates Act [Chapter 6:01] underwent significant amendments through Act 6/1997, prompted by the need to safeguard the proprietary rights and interests of widows and minor children against the increasing trend of relatives exploiting matrimonial property acquired during the marriage, as reasoned by the judge in the case of *Chimhowa v Chimhowa*.[92] Section 68(3) of the Administration of Estates Act stipulates that a marriage conducted under customary law is considered valid for the purposes of the Act, even if it has not been solemnised in accordance with the Marriages Act [Chapter 5:17]. In essence, the Act recognises unregistered customary law unions (UCLUs) as valid marriages solely for the purpose of intestate inheritance. Furthermore, section 68A explicitly states that the Administration of Estates Act applies to the estate of any person subject to customary law at the time of their death. In simpler terms, a UCLU is regarded as a valid marriage at the time of the husband's death for inheritance purposes.

The right of widows to inherit is protected under section 68F(2)(*b*) of the Act, which states that if the deceased is survived by two or more wives, one-third of the net estate should be divided among the surviving wives, with the first or senior wife (*vahosi*) receiving two shares and the other wife receiving one share, or an equal share to each of the other wives, depending on the circumstances. Section 68F(2)(*c*) further provides that if a man is survived by two or more wives, each wife shall have ownership of the houses if they lived separately, joint ownership if they lived together, or joint usufruct of the house. These provisions notably transform the inheritance rights of widows and are exemplified in the case of *Pamacheche v Pamacheche*,[93] where a widow was appointed as the executor of her deceased husband's estate.

The Deceased Persons Family Maintenance Act [Chapter 6:03] (DESA) includes provisions in section 10 that safeguard widows from property grabbing during the period between the deceased's death and the administration of the estate. This section explicitly states that, regardless of any law, including customary law, when a person dies, any surviving spouse or child has a temporary right to occupy any immovable property that the deceased had the right to occupy and that the surviving spouse or child was ordinarily occupying before the death. This right also extends to the use of household goods, tools, vehicles or similar items that the deceased was using before their death. To protect this right, section 10(2) of DESA criminalises any action intended to deny a person the exercise of the privileges granted under this provision.

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92 2011 (2) ZLR (2) 471 H.

93 [2011] ZWBHC 69.

This legal framework was enunciated in *Mike Mhlanga v Irene Mhlanga*[94] by Chirawu-Mugomba J, who emphasised the protections provided to surviving spouses and children under the Deceased Persons' Family Maintenance Act [Chapter 6:03]. Specifically, section 10 affirms that, notwithstanding any laws to the contrary, a surviving spouse or child has the right to occupy immovable property that the deceased was entitled to occupy and which they were using immediately before the death (section 10(1)(*a*)). In addition, they are entitled to use household goods, tools and vehicles related to that property (section 10(1)(*b*)), as well as any animals kept on the property (section 10(1)(*c*)). Furthermore, these individuals have a reasonable right to any crops growing on the property at the time of the deceased's passing (section 10(1)(*d*)). The Act takes infringements of these rights seriously, classifying them as criminal offences punishable by fines or imprisonment (section 10(2)). However, it is crucial to note that these rights are not perpetual; they terminate upon the completion of the administration of the deceased's estate (section 11(*b*)). This ruling reinforces the necessity of legal protections for dependants, challenging the traditional male primogeniture rule that often marginalises women's inheritance rights.

5 2 Challenges and inconsistencies within customary inheritance laws

Notwithstanding the great improvement in the welfare of widows who were married to deceased spouses under customary law, the current customary inheritance laws lack consistency in achieving full emancipation of widows. These are explained below.

5 2 1 Discriminatory practices against widows

(i) The marriage framework: proving the existence of a marriage

Until recently, there were three marriage regimes recognisable in the intestate succession framework: first, the civil marriage governed by the Marriage Act;[95] then the customary marriage governed by the Customary Marriages Act;[96] and lastly, the unregistered customary law union (UCLU) recognised by section 68(3) of the Administration of Estates Act. The latter two marriage types created the most challenges. In the case of *Ncube v Dube,*[97] Takuva J was faced with the challenge of deciding who the surviving spouse of the deceased was for purposes of the estate. The plaintiff had been married to the deceased according to customary law, although not solemnised (UCLU), while the defendant had been married to the deceased under the Marriage Act, although she had been separated from the deceased for twelve years at the time of his death. The plaintiff argued that

94 [2020] HH485.
95 Customary Marriages Act [Chapter 5:11].
96 Marriage Act [Chapter 5:07].
97 2014 HB 132.

she was the surviving spouse, although they had not solemnised their customary union.

The court ruled that the primary issue was to establish the legal status of a customary-law marriage entered into while either party was still married to someone else under the Marriage Act. Citing section 68(3) of the Administration of Estates Act, the court held that any purported marriage between the plaintiff and the deceased was invalid, since it was preceded by a marriage contracted in terms of the Marriage Act. Consequently, the plaintiff could not be declared the surviving spouse. A customary-law marriage can only coexist with a monogamous marriage where the former precedes the latter, and not *vice versa*.[98]

The Supreme Court of Zimbabwe also interrogated the same circumstances with reference to section 68(3) in *Makwiramiti v Fidelity Life Assurance*[99] where the court held:

> "Having chosen to marry, in terms of civil law, the deceased waived his customary privileges in respect of polygamy. He is precluded from marrying another person, not only under the general law, but under customary law as well. He suffered absolute incapacity to marry."

The practical difficulty that is presented by this case is that even though a UCLU is recognised under section 68(3) of the Administration of Estates Act, the proviso to that section makes certain that the UCLU will be inferior to a civil marriage when such a marriage is contracted during the existence of a civil marriage. This proviso promotes inequality, particularly when one looks at the *Ncube* case above. The wife who concluded a civil marriage with the deceased can be unjustly enriched because the Act refuses to recognise the UCLU. Contributions of a spouse in a UCLU to purchasing an immovable property will go unrecognised, and she stands to suffer the loss.

The need for legal reform is critical in this context. First, the current laws do not adequately protect the rights of individuals in UCLUs, leaving them vulnerable to exploitation and marginalisation. Spouses in these unions often contribute significantly to household and property management; yet their legal status remains precarious, denying them rightful claims to property and inheritance. Reforming the law to provide equal recognition of all marriage types would help ensure that contributions made by UCLU spouses are acknowledged and protected.

There is also a pressing need for clearer definitions and guidelines concerning the recognition of customary marriages. This would involve revisiting the provisions that prioritise civil marriages over customary unions, thereby promoting equality among all spouses. Legal reforms should also consider establishing mechanisms for addressing unjust enrichment claims, allowing UCLU spouses to seek redress for their contributions to joint property. Thus, a comprehensive legal reform is essential to create a more equitable framework that protects the rights of all spouses, regardless of the nature of their marriage.

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98 As cited by Mwayera J in *Shambare v Shambare* HH 69-17 3.

99 1990 (2) ZLR 471.

The problem is heightened by the fact that putative marriages, in terms of Zimbabwean common law, do not provide any legal recourse for the prejudiced spouse. They only legitimise the children of that union. This was stated in the case of *Moola v Aulsebrook NO*[100] where it was stated:

> "A so-called 'putative marriage' is not a marriage, nor does recognition by a Court of a union as meeting the requirements of a putative marriage convert that union into a valid marriage. The true importance of the concept of a putative marriage lies in the fact that children of such a union are legitimate with all the advantages of legitimate children."[101]

As a result, the surviving spouse in a putative marriage can receive nothing out of the estate of their deceased partner. In the case of *Goremusandu v Chitambara*, [102] the court confirmed the position that the existence of a customary-law marriage cannot nullify a civil marriage, or the existence of any other marriage. The surviving spouse, who had a UCLU, was therefore incapable of becoming the surviving spouse of the deceased.

As if that were not enough, *Biri v Tsuro*[103] confirmed the position that a spouse cannot be considered a surviving spouse if she has a marriage of a lower rank. In this case, Kudya J held that the appellant, who had a registered customary marriage, had no *locus standi* to approach the court to stop the lawful actions of a wife married under civil rights, especially since a prior civil marriage existed.

The legal position is such that where there exist two or more marriages, whether under civil or customary law, notwithstanding the registration status of the latter, the marriage that took place first involving the parties in issue is the one that determines the existence or the non-existence of the other(s). In other words, the legal position of any marriage at the time of the death of the deceased is premised upon the first marriage, if any, that existed before the second or other subsequent marriages.

A civil marriage is monogamous in nature; therefore, it does not permit either party to marry any other spouse during the subsistence of their civil marriage. If a dispute arises where both civil and customary marriages are in issue, and the civil marriage was contracted before the customary marriage, the civil marriage is upheld, as was the case in *Ncube v Dube*,[104] and the party to the customary marriage loses spousal status in the deceased's estate. The surviving spouse is therefore legally recognised as the party to the civil marriage under the circumstances, because civil marriages do not permit parties to marry again during the subsistence of such marriages.

A customary marriage, on the other hand, notwithstanding its registration status, at the time of the death of either party to it, and in the case of a dispute involving another marriage concluded under general law, is upheld if it was contracted before the civil marriage arose. The court considers and upholds the customary marriage regardless of the existence of a civil marriage, unless it is proven that the customary marriage ceased to exist

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100 1983 (1) SA 687 (N).

101 *Moola v Aulsebrook NO supra* 687.

102 2014 HH-288.

103 2009 HH-18.

104 *Supra*.

before the civil marriage was contracted.[105] To begin with, the surviving party to the customary marriage is legally recognised as the surviving spouse of the deceased.

However, because customary marriage permits the marrying of multiple partners, the party married to the deceased under civil marriage is also legally recognised as a surviving spouse, but with regard being had to the laws governing customary marriages. Under the circumstances, the first wife receives two-thirds of the third of the deceased estate's net worth as *vahosi,* while the second wife receives a third of the third of the deceased's net estate as provided for in section 68F(2)(*b*) of the Administration of Estates Act [Chapter 6:01] as amended by Act 6 of 1997.

(ii) A valid will exists, but does not cover all the properties

An African man is often a partner in a polygamous customary marriage, and as Mathonsi J held in the case of *Ndlovu v Ndlovu*:[106]

> "[N]o matter how you try to 'civilize' an African man, he shall forever remain entangled in the web of customary law and invariably shall have a customary wife somewhere in the background, even as he upgrades himself by marrying someone else by civil rights. It is those customary wives which the legislature sought to protect."[107]

The risk of exclusion for a customary wife from her deceased husband's estate highlights the legal complexities surrounding customary marriages. This highlights the need for legal protection to ensure that customary wives are not unjustly excluded from their rightful share of the estate. Where there is a second marriage in which the deceased husband has "upgraded" himself into a civil marriage with another woman, the settled legal position of the law is espoused above. However, where the deceased husband had proceeded to write a will in favour of his second wife and her children, excluding the first customary wife and her children, the estate is no longer intestate, but testate by virtue of the valid will. The estate, therefore, is administered under the Wills Act. Where a valid will exists, it does not matter who is a spouse or who is not, because, under testate estate administration, the will takes precedence in who stands to benefit.

However, the Wills Act is limited only to those properties listed in the will. In the event that the deceased left other properties not provided for in the will, the administration of such other properties is done under intestate succession. The first customary wife, *vahosi,* gets two-thirds of the third of the remaining net estate of the deceased that is not administered under testate succession. The second wife, who is now legally recognised as a second customary wife, gets a third of the third of the net estate of the deceased, as the case may be, as explained above.

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[105] Ngundu *Mission Churches and African Marriage in Zimbabwe 1890–1970: Contemporary African Christian Dilemmas Over Marriage in Historical and Theological Perspective* (doctoral dissertation, University of Cambridge) 2008 300.

[106] 2011 HB 10.

[107] *Ndlovu v Ndlovu supra* 5.

5 2 2 Misappropriation of matrimonial property and the "immediately resident concept"

The "immediately resident concept" is a coinage that reflects the statutory regime that has awarded the surviving spouse the immovable property and household goods that form part of the net estate of the deceased person – if such spouse lived in that house immediately before the deceased's death. This principle is set out in section 3A of the Deceased Estates Act (DESA) as well as in sections 68F(*c*) and (*d*) of the Administration of Estates Act. Under common law, the surviving spouse had no rights to the inheritance of the deceased's estate. The common-law position of intestate succession has been modified by statute, namely the Deceased Estates Succession Act [Chapter 6:02]. The Act covers monogamous marriages only, whereas the Administration of Estates Act deals with intestacy arising from polygamous marriages.

In the case of *Marara v Marara*,[108] the court was faced with an appeal against the decision of a magistrate who had refused the surviving spouse sole ownership of the immovable property forming part of the deceased estate. The magistrate had awarded co-ownership of the house to the surviving spouse and her stepdaughter. The court held that by virtue of section 68F(*d*)(i) of the Administration of Estates Act, the surviving spouse was entitled to ownership of the house. The court held:

> "Although the magistrate appeared to be influenced by the argument that if the house was to be given to the surviving spouse, who had no children (at the time) consequently upon her death, the property would devolve upon her children and therefore be removed from the deceased family effectively. This consideration was a moral one and did not fall into the category of an impracticability".[109]

The court went on to state that the injustice of the law can only be remedied by the legislature and not the courts. The injustice of the immediately resident concept may not be fully captured by the *Marara* case, but it gives an indication. A spouse gains ownership of the immovable property they are living in at the time of the death of their partner, even if she was not ordinarily resident in that house but was, however, resident immediately before the death. This can promote illegal schemes by wives under a polygamous setup to win over immovable properties, by finding their way into a property immediately before the death of a visibly terminally ill spouse.

6 PROPOSED MEASURES TO ADDRESS INJUSTICES IN POLYGAMOUS MARRIAGES

6 1 Legislative reform

The legislature should undertake a comprehensive review of existing laws related to property ownership and inheritance in the context of polygamous

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[108] 2002 HH-227.

[109] *Marara v Marara supra* (page number unavailable).

marriages. This includes clarifying what constitutes "ordinary residence" to prevent manipulation of the immediately resident concept. A clear definition should consider the length of time spent on a property and the nature of the relationship with the deceased. Provisions should also be created to ensure that all spouses, regardless of their marital status, have equitable rights to property, including automatic rights to a share of the estate for all recognised spouses.

These reforms would create a more equitable legal framework, reduce disputes and provide clear guidelines for property ownership, thereby enhancing the security of all spouses.

6 2 Legal documentation

Encouraging couples to formalise their property arrangements can significantly reduce disputes. This could involve promoting the use of prenuptial agreements that outline property rights and inheritance matters before marriage, as well as post-marriage property-sharing agreements to specify how assets will be divided among spouses. These agreements should be legally binding to ensure compliance and clarity in ownership rights.

Legal documentation promotes transparency and mutual understanding between spouses, which can prevent conflicts and provide a clear framework for resolving disputes if they arise.

6 3 Public awareness campaigns

Implementing educational initiatives is essential for informing spouses of their rights and responsibilities. Community workshops can be conducted to educate individuals about the legal implications of living arrangements in polygamous marriages and the importance of legal documentation. Using media platforms to spread awareness about property rights and the risks associated with the "immediately resident concept" can further enhance understanding and prevent exploitation.

Raising awareness empowers individuals to make informed decisions regarding their rights, ultimately promoting a culture of respect and understanding within marriages, which can lead to fewer legal disputes.

6 4 Judicial discretion

Empowering courts to adopt a more nuanced approach to property disputes can enhance fairness. Judges should be allowed to consider the circumstances surrounding residency and relationships at the time of death, evaluating the intentions of the deceased and the living arrangements of all spouses. This approach would allow for case-by-case evaluations rather than strictly adhering to legal definitions.

Judicial discretion can lead to more equitable outcomes, ensuring that the unique circumstances of each case are taken into account. This can help prevent injustice and foster trust in the legal system.

6 5 Mediation services

Establishing mediation as a primary method for resolving disputes can improve outcomes for all parties involved. Setting up mediation services specifically tailored for polygamous marriage disputes would allow spouses to negotiate property rights amicably. Ensuring that mediators are well-versed in family law and the complexities of polygamous relationships is crucial for facilitating fair agreements.

Mediation can provide a less adversarial and more collaborative environment for resolving disputes, allowing spouses to reach mutually beneficial agreements, saving time and resources compared to lengthy court battles.

7 CONCLUSION

In conclusion, the evolution of intestate succession laws in Zimbabwe has been marked by significant changes aimed at promoting fairness, equality and the protection of vulnerable individuals, particularly widows and minor children. The amendments to the Administration of Estates Act and the recognition of UCLUs as valid marriages for purposes of intestate inheritance have played a crucial role in enhancing the rights of widows to inherit from their husbands' estates. The abandonment of the rule of male primogeniture, where the eldest son would have exclusive inheritance rights, has paved the way for a more equitable distribution of assets among surviving spouses and children. The introduction of section 68F(2)(*b*) to the Administration of Estates Act, which mandates the division of the net estate among surviving wives, ensures that widows are provided for and acknowledges their contributions within matrimonial property. Furthermore, the appointment of widows as executors of their deceased husbands' estates demonstrates a shift in societal recognition of their competence and ability to manage financial matters. This recognition empowers widows to assert control over the administration of the estate, ensuring that their proprietary rights and interests are protected and that their assets are distributed fairly.

The evolution of intestate succession laws in Zimbabwe reflects a commitment to upholding fundamental rights to equality and non-discrimination. It acknowledges the changing dynamics of family structures and the need to protect vulnerable individuals from exploitation and property grabbing. These progressive reforms align with international human-rights standards and contribute to a more just and inclusive society.

However, it is important to note that challenges in the implementation and enforcement of these laws may still persist. Continued awareness-raising, education and capacity-building efforts are necessary to ensure that the intended objectives of the evolving intestate-succession laws are fully realised, and that widows and other beneficiaries are able to exercise and assert their rights more effectively.