

EQUITABLE INTERPRETATION OF THE INTESTATE SUCCESSION ACT

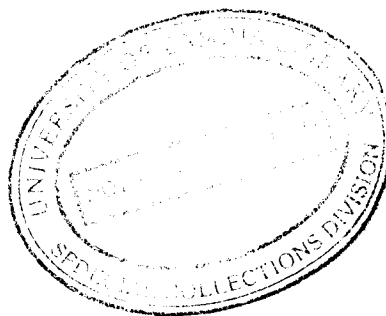
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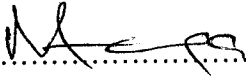
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Being a Directed Research essay submitted to the University of Zambia Law Faculty in Partial fulfilment of the requirements for the Award of the Bachelor of Laws (LLB) Degree.



DECLARATION

I, MISOZI MTONGA, computer number 27002365, do hereby declare that this Directed Research Essay is my genuine work and to the best of my knowledge, information and belief, no similar piece of work has previously been produced at the University of Zambia or any other Institution for the award of Bachelor of Laws Degree. All other works in this essay have been duly acknowledged. No part of this work may be reproduced or copied in any manner without the prior authorization in writing of the author.



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PROF. MARGRET MUNALULA

.....

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ABSTRACT

The purpose of this work is to analyse how best to make the Intestate Succession Act more applicable on the ground. The dissertation therefore tries to look at what the mischief was that parliament intended to remedy, the impact of the dual legal system on the law of inheritance and whether there are any lessons that Zambia can learn from other countries experiences. The method of approach consisted mainly of interviews, desk work and case studies.

From the historical development of the statutory law of inheritance, this dissertation has shown that the mischief of property grabbing arose from the manipulation of customary law of inheritance. It has also been shown that there is minimal reflection of the harmonisation of the English and customary inheritance laws in the current Intestate Succession Act. The Act reflects a departure from the various customary laws of inheritance that it attempts to unify. South Africa and Zimbabwe on the other hand, have to a great extent not westernized their laws of inheritance. These countries have used legislation to recognise the application of customary law in the area of inheritance.

There is need to have an equitable interpretation of the Intestate Succession Act due to the harshness caused by the strict interpretation of the provisions of the Act. An equitable interpretation will help to make the Act more applicable as it would consider the humane interpretation of the law in accordance with the particular facts of the case. It has also been made clear from the country study that even though countries have addressed the problems of inheritance laws differently, there is great need for inheritance laws to reflect equality, justice and principles of human rights.

With the increasing number of cases on property grabbing, it is essential that the Act should clearly target the cause of the problem which is the manipulation of customary law of inheritance. The Government should therefore begin by involving the local traditional leaders to ensure that the real customary law of inheritance is known by all.

ACKNOWLEDGEMENTS

I would like to thank my Lord and saviour Jesus Christ for helping me through strength and weakness to accomplish successfully the completion of this essay. The whole process has been an educative adventure that has helped me to learn as well as contribute to the need for better and more equitable statutory provisions in the Intestate Succession Act. It has not been easy but through all the challenges, the desire to complete and produce a more outstanding piece of essay became stronger.

To my supervisor, Professor Margret Munalula, I am entirely grateful for the guidance throughout the research. It has been a great pleasure to have been taught, moulded and supervised by you. Your patience, understanding and encouragement will forever be appreciated. I thank the almighty God for giving you the patience and willingness to guide me through this research.

I am grateful to my mother, Mrs Rosemary Mtonga, for all the moral and financial support rendered to me during the collection of the necessary material and arranging it. Your words of encouragement helped to give me the power to keep moving forward. I will forever be indebted to you for always being available when I needed you.

I would like to express my sincere gratitude to my sisters, Ruth, Fadile, Rita and my brothers William and Mabvuto for the much appreciated helping hand they gave to me. Every minute of your support has manifested into something very beneficial to me and society at large.

To my friends, Veronica Cheupe and Malunga Pangani, I say thank you for the support, advice, guidance and encouragement you have rendered to me throughout my entire stay in the school of law and for always being there for me. We have been through a lot together but we always encouraged each other. I thank God for bringing you into my life. Thank you and I greatly treasure your assistance.

Lastly, but not the least I would like to thank the Zambia Law Development Commission, the National Assembly and the University of Zambia main library for their support and all those who contributed to the successful completion of this work.

DEDICATION

This paper is dedicated to my late dad Mr. Jasper Mtonga who was an extremely hard working man and instilled in us, his children, the zeal to always aim high in life to attain success. I would like to express my sincere gratitude for the sacrifice, guidance and care you had given me throughout the years we shared together. You had always encouraged me to work hard and you had always believed in me even at times when things were so hard that I felt like giving up. The last words that you spoke to us your children have been stepping blocks for us when we stumble and keep us moving forward. Had it not been for you I would not have reached this far. You have been a great inspiration to me and I shall forever be grateful to you. Thank you and May your soul rest in eternal peace.

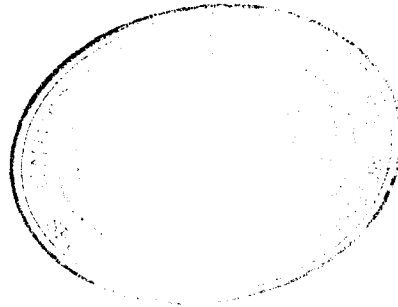


TABLE OF STATUTES

The British Acts Extension Acts, Cap 10 of the Laws of Zambia

The Constitution of Zambia, Cap 1 of the Laws of Zambia

The English law (Extent of Application) Act, Cap 11 of the Laws of Zambia

The Intestate Succession Act, Cap 59 of the Laws of Zambia

The Wills and Administration of Testate Estates Act, Cap 60 of the Laws of Zambia

FOREIGN STATUTES

The Administration of Estates Amendment Act No. 6 of 1997 (Zimbabwe)

The Constitution of South Africa, Act No.108 of 1996

The Customary Law and Local Courts Act of 1990 (Zimbabwe)

The Intestate Succession Act, Act No. 81 of 1987 (South Africa)

The Marriage Act, Chapter 5:11 of the Laws of Zimbabwe

TABLE OF CASES

A v A (1995) 1 FLR 345,FD

Bhe v Magistrate, Khayelitsha (2004) (2) SA 544(C) (South Africa)

Charity Oparaocha v Winfrida Murambiwa SCZ Judgment No. 15 of 2004

Chibwe v Chibwe SCZ Judgment No.38 of 2000.

Elsie M. Moobola v Harry M. M. Muwezwa SCZ Judgment No. 3 of 1991

Ester Ngula Sitali v Fenias Mafemba. 2004/HPA/004

Gray Nachandwe Mudenda v Dorothy Chileshe Mudenda SCZ Judgment No. 12 of 2006

Heydon's case (1584) 3 Co. Rep.8

Ireen Lubasi v Charles Lubasi and others SCZ Judgment No. 20 of 1998

Kaniki v Jairus (1967) Z.R. 71 (HC)

Magaya v Magaya (1999) SC No. 210-98 (Zimbabwe)

Mthembu v Letsela and another (1998) 2 SA 675 (South Africa)

Moobola v Muweza SCZ Judgment No.3 of 1991

Monica siankondo (Suing in her capacity as Administratrix of the Estate Of the late Edith Siankondo) v Frederick Ndenga (2005) Z.R. 22 (SC)

New Gold Mining Co. v Transvaal Provincial Administration (1919) AD 367 (South Africa)

Phyllis Kakunta Bansa v Omas Kope 2007/HP 0315

Raphael Njovu and another v Kayula Chewe (sued as administrator of the estate of the late Dorothy Zulu) 1997/HP/1882

Sibande v The People (1975) Z.R. 101 (S.C.)

Siwale v Siwale SCZ Judgment No. 24 of 1999

The Attorney General and MMD v Lewanika and others SCZ Judgment No. 2 of 1994

Vwavwa v Patmore Siang'ombe (2006) Choma Local Court. 535

LIST OF ABBREVIATIONS

ASAZA	A Safer Zambia
NGO	Non Governmental Organisation
WLSA	Women and Law in Southern Africa
ZLDC	Zambia Law Development Commission

TABLE OF CONTENTS

Research Topic	i
Declaration.....	ii
Supervisor’s Approval.....	iii
Abstract	iv
Acknowledgements.....	v
Dedication.....	vi
Table of Statutes.....	vii
Table of Cases	viii
List of Abbreviations	x
Table of Contents.....	xi

CHAPTER 1

1.0 Introduction.....	1
1.1 General Introduction	1
1.2 Operational Definition of Terms.....	1
1.3 Statement of the Problem.....	2
1.4 Significance and Purpose of the Study.....	3
1.5 Rationale and Justification.....	3
1.6 Research Objectives.....	3
1.7 Research Questions.....	3
1.8 Methodology.....	4
1.9 Outline of Chapters.....	4

1.2 Conclusion.....	5
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CHAPTER 2

THE EFFECT OF THE DUAL LEGAL SYSTEM IN ZAMBIA AND THE ADVENT OF THE INTESTATE SUCCESSION ACT OF 1989

2.0 Introduction.....	6
2.1 The Dual Legal System.....	6
2.2 Customary Law and Equity.....	9
2.3 The Advent of the Intestate Succession Act.....	11
2.3.1 The Application of Customary Law.....	11
2.3.2 The Mischief of Property Grabbing.....	11
2.4 The Problems identified in the Enactment of the Intestate Succession Act.....	13
2.5 The Enactment of the Intestate Succession Act.....	14
2.6 Conclusion.....	15

CHAPTER 3

THE LAW OF INHERITANCE AND SUCCESSION

3.0 Introduction.....	16
3.1 Persons Targeted by the Act.....	16
3.2 Prescribed Distribution of the Deceased Estate.	18
3.3 Penalties	24
3.4 The Administration of the Deceased Estate.....	25
3.5 General View of the Act.....	26
3.6 Conclusion.....	27

CHAPTER 4

THE EQUITABLE INTERPRETATION OF THE INTESTATE SUCCESSION ACT

4.0 Introduction.....	28
4.1 Duties Arising from the Principles of Equity	28
4.2 The Canons of Interpretation.....	29
4.2.1 The Mischief Rule or Purposive Approach	29
4.2.2 The Context Rule.....	31
4.2.3 The Fringe Rule	31
4.2.4 The Literal or Grammatical Meaning Rule	31
4.2.5 The Golden Rule	32
4.3 Interpretation under Customary Law	35
4.4 Conclusion.....	36

CHAPTER 5

THE LAWS OF INTESTACY OF COUNTRIES IN SOUTHERN AFRICA

5.0 Introduction.....	37
5.1 Jurisdictions.....	37
5.1.1 Zimbabwe.....	37
5.1.2 South Africa.....	41
5.2 Observations from the Country Study.....	43
5.3 Lessons.....	45
5.4 Conclusions.....	45

CHAPTER SIX

CONCLUSIONS AND RECOMMENDATIONS

6.0 Introduction.....46

6.1 General Conclusions.....46

6.2 Recommendations.....48

6.3 Conclusion.....50

CHAPTER ONE

1.0 INTRODUCTION

This chapter gives an introduction to the essay and in general terms gives the outline of the research. It also deals with the preliminary aspects of the research. These include the statement of the problem, the objectives and the research questions, significance of the study conducted, the methodology and how the particular chapters are laid out.

1.1 GENERAL INTRODUCTION

The laws of succession in Zambia as provided for in the Intestate Succession Act became a topic of debate shortly after the Act was enacted. It is not doubted that the intentions behind its enactment as seen from parliamentary debates brought this country much relief. The views expressed by many stakeholders and institutions concerned with seeing the progression of justice in the inheritance of property, were greatly appreciated. They provided much driving force to ensure that victims of wrongful customary practices were given a remedy. However, many scholars through vigorous research have shown that the problems continue to increase despite the much concerted effort. Many recommendations have been made to improve the law contained in the Act and its implementation but very few have ventured into trying to find a solution to the problems in the interpretation of the Act.

1.2 OPERATIONAL DEFINITION OF TERMS

Dual legal system: is a system that encompasses not merely the law derived from the countries ex colonial powers, now supplemented by post independence legislation and a system of courts to apply the law, but also a body of indigenous or customary law.¹

Equitable: Marked by or having equity. Equity is defined as fairness or natural justice.²

¹ Carlson Anyangwe, "The Whittling Away of The African Indigenous Legal and Judicial System." Zambia Law Journal, special edition. (1998) 46

Inheritance: refers to the devolution of title based on the origins of an individual.³

Intestate: means a person who dies without having made a will and includes a person who leaves a will but dies intestate as to some beneficial interest in his movable or immovable property.⁴

Property Grabbing: an act that occurs after the death of a spouse and is usually done by the family of the deceased where property is taken usually without the consent of the rightful and legal owners and sometimes done with force.⁵

Unification: is the attempt to eliminate diversity between individual rules of different systems of customary law.⁶

1.3 STATEMENT OF THE PROBLEM

The enactment of the 1989 Intestate Succession Act was meant to curb the mischief that had arisen due to the various customary practices. The most prominent among them was property grabbing- unconscionable sharing of property- to the detriment of children and the surviving spouse. There are a number of relevant provisions in the Act that have provided for the much needed protection. These are considered as legal rights available to both the surviving spouse and the children of the deceased. Regardless of all that the Act intends to achieve, it is still short of what is really desired to make the distribution of the deceased estate more equitable. The literal interpretation of the Act as seen from the various judicial decisions as well as the statistics of the number of resolved disputes are evidence enough of

² Margaret Munalula. *Legal Process: Zambian Cases, Legislation and Commentaries* (Lusaka, UNZA Press, 2004):17

³ Patricia Kameri-Mbote. "The law of Succession in Kenya: Gender Perspectives in Property Management and Control," *Women and Law in East Africa*, (1995) :2

⁴ The Intestate Succession Act. Cap 59, s. 3

⁵ ASAZA, "The Basic Minimum Standards for the Operation and Management of Coordinated Response Centres", July 2009.

⁶ Thomas Hutchinson, *Developing Legal Systems in African Commonwealth Nations: Africa and Law* (London: university of Wisconsin Press, 1966):12

the many shortcomings. The real problem arises not from the actual provisions of the Act but from its interpretation.

1.4 SIGNIFICANCE AND PURPOSE OF THE STUDY

This study will contribute to literature reviewing the Intestate Succession Act in order to make it more relevant and applicable on the ground.

1.5 RATIONALE AND JUSTIFICATION

The study is vital and timely considering that there is a lot of field work and research that is being done with the aim of finding the solution to making the Intestate Succession Act more responsive to the problems of the majority of the population.

1.6 RESEARCH OBJECTIVES

This research was conducted with a number of objectives set forward. These include determining what parliament had intended when it enacted the Intestate Succession Act and to determine the impact of legal dualism on the interpretation and the application of the Act. It also aims to identify the main difficulties that arise in the interpretation as well as enforcement or implementation of a decision passed in accordance with the law in the Act. It goes on to try and provide some clear cut solutions, objectively arrived at after comprehensive and thorough research has been conducted. This provides a means of filling in the lacuna in our intestate succession law. Furthermore, it provide recommendations on how to achieve more equitable and concrete interpretation of the Act that harmonizes the customary and English law practices of inheritance.

1.7 RESEARCH QUESTIONS

- 1.7.1 What was the mischief parliament intended to curb by enacting the Intestate Succession Act and has the remedy put forward resolved the problem?
- 1.7.2 Has the unification of the various customary laws with the English law reflected in the Act resulted in harmonizing the dual legal system?

1.7.3 To what extent can the laws of intestacy of other countries provide Zambia with lessons to ensure the Acts currency and relevancy?

1.8 METHODOLOGY

The methodology of this research was basically a qualitative one. Both desk research and field investigations were employed to enable the steady and accurate collection of relevant information. This meant the collection of secondary data in the form of reports of well recognized commissions and institutions, parliamentary debates, books, the internet, journals and dissertations. The field investigations included open ended interviews with prominent public officers in institutions such as the courts, law firms, Parliament, Non Governmental Organizations, Zambia Law Development Commission, Police stations and the Ministry of Justice.

One limitation that was encountered was the unwillingness of some prominent figures to give interviews to aid with information on the topic. Most people interviewed did not have enough knowledge on how to make the Intestate Succession Act more equitable.

1.9 OUTLINE OF CHAPTERS

Chapter two focuses on the events that led to the enactment of the Intestate Succession Act of 1989 and the impact of the dual legal system in its enactment. It looks at the current status of customary law and equity in Zambia. The chapter tries to elaborate on how misinterpretation of customary law led to the emergence of property grabbing which was the mischief that parliament intended to remedy in the Act.

Chapter three brings out the law contained in the Act and how it has been applied to disputes arising from the distribution of a deceased estate after dying intestate. It also tries to show whether the Act has reflected the unification of the various customary laws of inheritance.

This chapter also tries to show the extent to which the harmonisation of the English and customary law of inheritance is reflected in the Act.

Chapter four shows the impact of interpreting the Intestate Succession Act using the English canons of interpretation. It brings out the duties placed on the interpreter under customary law and equity. It shows how these duties can help the interpreters of the law to decide cases in an equitable manner to ensure a just result. It also shows that an equitable interpretation can make the Act more applicable on the ground.

Chapter five of this paper looks at how other countries have handled similar issues of interpretation of their inheritance laws and goes on to provide lessons on how to proceed in Zambia. Various countries have unique customs and statutory laws applying to the issues of inheritance. Each country has used at some point in the enactment of its laws the laws of the other countries whether on inheritance or marriage. Another country's failure might serve as a lesson to the other. This chapter will therefore look at how to ensure an equitable result from the statutory law of inheritance and succession.

Chapter six gives the general conclusions and the recommendations on the way forward to ensuring that the Intestate Succession Act is interpreted equitably to make it more applicable in consideration of the changes of society.

2.0 CONCLUSION

This chapter has laid out the summary of the contents of the chapters of the essay. As already shown from the statement of the problem, there appears to be great need to have a law that is applicable on the ground. Clearly, as each chapter will attempt to address the issues at hand, the essay as a whole provides a way forward to having a law that is greatly appreciated.

CHAPTER TWO

THE EFFECT OF THE DUAL LEGAL SYSTEM IN ZAMBIA AND THE ADVENT OF THE INTESTATE SUCCESSION ACT OF 1989

2.0 INTRODUCTION

Chapter one gave a general introduction of the essay and the summary of the chapters contained in the dissertation. This chapter as already mentioned will look at the dual legal system in Zambia and the impact it had in the enactment of the Intestate Succession Act. It will proceed to look at the events that characterised the period leading to the enactment of the Act.

2.1 THE DUAL LEGAL SYSTEM

Zambia has a dual legal system which is attributed to its history dating back to the beginning of British colonialism in Southern Africa. The legal system comprises of the general or statutory laws and customary laws.¹ It is generally accepted that the coming of the British South African Company was the first act of colonialism in Africa after the famous scramble for Africa in Berlin in 1884. The coming of the settlers in Africa brought with it the desire to rule and be ruled in a manner similar to that followed by their countries of origin. Originally, the indigenous people were governed by the local customary laws or traditional practices that were particular to a specific tribe.² Even after introduction of the foreign law into the territories, in Zambia, the English law was not to oust the customary law and the two were isolated from each other in terms of application. Statutes or other received English law had

¹ Margaret Munalula. *Legal Process: Zambian cases, Legislation and Commentaries* (Lusaka, UNZA Press 2004):52

² Misozi Banda, "The Effectiveness of the Zambia Intestate Succession Act No.5 of 1989 and the Laws of Inheritance under the Zambian Legal System. A critical Appraisal." An Obligatory Essay submitted to the school of Law in partial fulfilment for the award of Bachelor of Laws Degree. (2003)

general application in criminal and civil cases while customary law was only applicable in exceptional circumstances such as a civil dispute between Africans only.³ The time of reception of colonial common law is obviously less important than the date of independence, *for it is the latter that determines the degree to which the independence government has had the opportunity either to abolish or harmonise the dual legal system.*⁴ The task on the new African governments in the legal system was to modernise it in line with the current social and economic needs, unify it and Africanize it mostly through maintaining customary law especially in the fields of family law.⁵

The full establishment of the general law alongside customary law in the country as a dual legal system led to the requirement of ascertainment of the customs in the courts. This was shown in the case of *Sibande v The People*⁶ where it was held that the court cannot be called upon to consider, as being possibly the customary law on a particular issue, a purely speculative suggestion completely unsupported by evidence.” The law now provides for the need to use assessors in the courts of law as a way of proving that a custom relied upon does actually exist. The subjection of customary law to foreign modes of adjudication is quite questionable. This also creates a problem of interpretation as the standards of one law cannot rightly be used to qualify another.

Customary law is currently mostly administered by the Local Courts which are an improvement of the African native courts. The traditional courts also resolve disputes in remote areas. However these courts have not been recognised officially. Kuper and Kuper stated that “improvement of the African local customary courts means in effect their

³ Banda: 7

⁴ UN-HABITAT, “*Land Tenure, Housing Rights and Gender-National and Urban Framework: Zambia*” (2005): www.unhabitat.org. (accessed, 9th January 2012)

⁵ Hilda Kuper and Leo Kuper, *African Law Adaptation and Development* (California: University of California Press, 1965): 223-231

⁶ (1975) Z.R. 101 (S.C.)

disappearance through assimilation with the courts of European type. The advantages that the African courts and procedure have had should not be overlooked. The benefits that arose from them include having justice that is popular, local, speedy, simple and flexible.⁷ These courts also reduce the requirement of proof as the traditional leaders already know the customary law and interpret it accordingly.

The received law has been observed to consist of three elements in the common phrase denoting the received English law, common law, equity and the statutes of general application.⁸ Chapter 11 of the laws of Zambia goes on further to provide that:

Subject to the provisions of the Constitution of Zambia and to any other written law-

- (a) the common law; and
- (b) the doctrines of equity; and
- (c) the statutes which were in force in England on the 17th August, 1911 (being the commencement of the Northern Rhodesia Order in Council, 1911); and
- (d) *any statutes of later date than that mentioned in paragraph (c) in force in England*⁹

This together with the British Act Extension Act which has specific Acts from England that apply to Zambia after 17th August, 1911, has provided the country for many years with necessary laws that have not yet been enacted hence filling in the lacuna. One Act of great interest to our subject is the Inheritance (Family Provisions) Act of 1928. This law however did not provide the solution to the problems that were being faced by women and other rightful beneficiaries of a deceased estate. Clearly the foreign law could not have been able to solve the unique problems that were being faced by the locals. Failure of the received laws was therefore inevitable. However, by the 1960s when the country began to experience a massive increase in discriminatory inheritance practices against women and children caused

⁷ Hilda and Leo: 232

⁸ Munalula:57

⁹ English Law Extent Of Application Act, Cap 11, s. 2

by the manipulation of customary law, no attempt seems to have been made to try and revive the real customary practices. The new post colonial government and the courts continued to subject the indigenous law to the foreign rules of law and interpretation thereby posing a possible threat of distortion of inheritance practices.

2.2 CUSTOMARY LAW AND THE PRINCIPLES OF EQUITY

The current Constitution of Zambia guarantees that every person in the country shall enjoy certain rights and freedoms irrespective of sex, creed, race, religious belief, colour or political opinion. The same constitution allows customary law to run side by side with statutory law in matters that deal with personal status, marriage, divorce and inheritance rights. This means that such cases can be decided according to the state law or customary law that applies to the litigants.¹⁰ This is the general interpretation of Article 23 of the constitution. However, the Local Courts Act provides that customary law is to be applied to the extent that it is not repugnant to natural justice or morality or incompatible with the provisions of any written law.¹¹

Although the Constitution allows for customary law to be discriminatory, the laws empowering the courts to implement the laws whether under inheritance, marriage or other civil disputes involving customary law, demand for it to be subjected to the repugnancy clause. The same is provided in the Subordinate and Local Courts Acts as customary law that is repugnant to natural justice or morality is considered to be non applicable. Customary law is limited by statutes and considered to be subordinate to it. Similarly in the case of *Chibwe v Chibwe*¹² it had been stated that customary law in Zambia is recognized by the Constitution provided its application is not repugnant to any written law and that the courts must invoke

¹⁰ Patrick Matibini, "Access to Justice and the Rule of Law". An Issue Paper Presented For The Commission On Legal Empowerment Of The Poor.(2007):7

¹¹ Local Courts Act, Cap 29, s. 12(1)(a)

¹² SCZ Judgment No. 38 of 2000.

the principles of equity and law concurrently. It clearly shows that the application of equitable principles and the rules of law in a statute are given more weight than customary law.

Even in cases where the custom is not in contention, courts have been seen to hold a customary practice to be in contravention of the principles of equity, natural justice or morality. In the case of *Kaniki v Jairus*¹³ the Court held that a magistrate could properly conclude that a particular custom was contrary to natural justice. The validity of the customary practice was however not an issue to the aggrieved party in the above mentioned case. Customary law has been interpreted in a manner that makes it look disadvantageous hence posing a threat of possible disappearance of a practice even when the community to which it applies freely observe it.

The Intestate Succession Act does not give people the liberty to freely rely on a particular custom or subject it to the repugnancy clause. It is provided in section 2 that the Act shall apply to all persons who are at their death domiciled in Zambia and shall apply only to a member of a community to which customary law would have applied if the said Act had not been passed.¹⁴ The Act in short provides that it shall apply to persons that live in Zambia and to whom customary law would have been the applicable law at the time of death. Customary laws are not applicable and individuals cannot ask the court to distribute the deceased estate in accordance with it even if one is of the view that it is not repugnant to natural justice and morality. The Act does however provide for some exceptions to which customary law applies. The issue is whether the Act reflects the true harmony of most customs or traditional rules of people to render its provisions freely acceptable by all. This will be addressed as the essay progresses.

¹³ (1967) Z.R 71 (HC)

¹⁴ The Intestate Succession Act, Cap 59, s. 2.

2.3 THE ADVENT OF THE INTESTATE SUCCESSION ACT OF 1989

The advent of the Intestate Succession Act 1989 was as a result of various organisations and other groups of people, mostly women's groups and religious organisations such as the Mindolo Ecumenical Foundation calling for its enactment. Over a period of time they observed that women, children and in a few cases, men, became vulnerable during the demise of a spouse or one of the parents. The discriminatory inheritance practices led to destitution and a division in family ties which was a heavy departure from the values of customary law.

2.3.1 THE APPLICATION OF CUSTOMARY LAW

Before the enactment of the Act all matters concerning inheritance for the local population were governed by customary law. In terms of inheritance rights of children under customary laws, there are variations, determined by social norms, as demonstrated by the following groups:

- Among the patrilineal Ngoni of Eastern Province, sons are the heirs;
- both sons and unmarried daughters have rights among the bilateral Lozi of Western Province;
- but among the matrilineal groups, which are in the majority, children have no rights to inherit from their parents. They inherit from their maternal uncles.¹⁵

2.3.2 THE MISCHIEF OF PROPERTY GRABBING

Property grabbing is a troubling subcategory of tenure insecurity stemming from traditional practices and customary laws which place vulnerable groups in a subordinate status with respect to property rights. Women, the group most affected by this burden, often face forcible

¹⁵ Mabel Milimo et al., "*Zambia Strategic Country Gender Assessment*," A Report of The World Bank (Zambia 2004):52

eviction from their homes and their land by family members, traditional authorities and or neighbors. Traditional practices did not take into consideration the contribution rendered by women in the building of the family asset base and therefore did not appreciate the concept of family property.¹⁶ The practice stems from the manipulation of customary laws, which assumes a husband's sole ownership of matrimonial property and passes such ownership to a male relative of the deceased who is then supposed to assume responsibility for the children and the widow (widow inheritance).¹⁷ The manipulation or misinterpretation of customary law led to vulnerable groups (women and children) of society being largely discriminated against. This manipulation was seen in the refusal of the heir to look after the widow and children even when the real customary practice demands for such responsibility.

It is vital at this point to look at some of the beliefs that arose from the distortion of the real customary practices making it easy for property grabbing to flourish against women under the various traditions.

One case that was conducted to try and establish how men viewed women in society showed that their status in accordance with a particular custom was a determinant factor in deciding whether a widow would be able to inherit. It was shown that a Lenje man with many wives believed that women are like livestock. Meaning that they can be bought and sold, as cattle can, and they are a productive asset. This shows that women had a status of a commodity.¹⁸ This is an example of misinterpretation of the status of women that arose under some customary practices. Such beliefs made it easy for women to be denied access to property as they were considered to be a commodity or property that could be sold or even inherited.

¹⁶ ASAZA, "The Basic Minimum Standards For The Operation And Management of Coordinated Response Centres"(July 2009):7

¹⁷ SHARE, " HIV And AIDS Reference Materials For The Judiciary In Zambia."(March 2010) www.abtassociates.com (accessed 11th January 2012)

¹⁸ CARE, "Strategic Impact Inquiry on Women's Empowerment." A Global Research Framework for CARE International. (2005) :12

Although men have traditionally been the primary heirs to property, wives, daughters and under-age sons have generally been allowed to benefit from the property to guarantee their survival and well-being. While women did not own or inherit property themselves, male heirs were obliged to take care of their sisters and allow them use rights to some land to secure their livelihood until they married. Elderly widows were allowed life time usage of the land.¹⁹ Customary law did not therefore deny women or children the right to use the property of the deceased. It placed responsibility on certain members of the family to ensure that the vulnerable were taken care of. Mainza Chona was quoted by Women and Law in Southern Africa (WLSA) as having said that “property grabbing which left a widow and children destitute was an inhuman distortion of customary law. He further stated that although widows and children did not inherit under customary law, they were not left destitute because the heir or family and community as a whole were obliged to take care of them.”²⁰

2.4 THE PROBLEMS IDENTIFIED IN THE ENACTMENT OF THE INTESTATE SUCCESSION ACT

Many Non Governmental Organisations (NGOs) and religious organisations had been heavily instrumental in the enactment of the Act. The organisations concentrated on ensuring that the problem of property grabbing was curbed. However no attempt was made to deal with the root cause of the problem. Even though it had been identified that the problem arose from the manipulation of customary law, little was done to ensure that traditional leaders were empowered to find ways of re-educating their community members of the real customary practices and to discourage any inhuman practices.

¹⁹ Thematic Note 5. Protecting Women’s Land and Property Rights in the Context of AIDS. www.africa.ufl.edu (accessed 5th January, 2012):3-4

²⁰ Sophie Kasonde Ng’andu, *Inheritance in Zambia: Law and Practice*, Women and Law in Southern Africa Research Methodology Project(Zambia: WLSA 1993):76

It has been observed that issues of inheritance become more complicated where it includes land. This issue was also a major problem in the enactment of the Act. “Indeed, when designing succession laws, the country’s lawmakers tend to argue that land inheritance rights should be discussed in the context of land laws, but when designing land laws, they tend to argue that land inheritance rights should be discussed in the context of succession laws (i.e., family Laws).”²¹ Consequently, the issues of land were not adequately addressed during the enactment of the Intestate Succession Act. This tendency by the law makers to shift responsibility of addressing the problems of the most vulnerable groups, women and children, has resulted in there being inadequate remedies where there is violation of their inheritance land rights.

The period taken towards the enactment of the Act has been considered to be too long. From the 1970s when the concerns were raised to 1989 when it was enacted, it has been argued that government was not adequately committed to its enactment. Lack of such commitment by the institution that has the greatest obligation in ensuring that there is fairness and justice in all aspects of human life in a country can only spell poor performance of the law enacted.

2.5 THE ENACTMENT OF THE INTESTATE SUCCESSION ACT

The government in the Second Republic instructed the Law Development commission to make recommendations on the subject with a view of enacting legislation to curb the vice that was on the increase. This followed the concerns that became rife regarding the inequitable succession patterns in the country. One clear recommendation for this research was that despite the diversity in ethnicities in the country, it was possible to create a uniform code of succession and inheritance.²² Legislators intended to provide the country with a uniform law

²¹ Laurel L. Rose, “ *Children’s property and inheritance rights and their livelihoods: The context of HIV and AIDS in Southern and East Africa*” (2006):20-21 www.lsp@fao.org (accessed 7th December, 2011)

²² ZLDC, Consultative Workshop on the Review of the Intestate Succession Act for Copperbelt, Luapula and North Western Provinces. A Report of the Zambia Law Development Commission. (2010):9-15

that would be considered as reasonable and acceptable by all where inheritance and succession were concerned.

In 1989, the Intestate Succession Act was enacted together with the Wills and Administration of Testate Estates Act. The Act was a solution to some problems but did not cure all of them.

The next chapter will therefore consider how the Act has managed to protect women and children that are affected by property grabbing and whether it fully reflects parliament's intention to unify the customary laws of inheritance in the country.

2.6 CONCLUSION

As shown above, the dual legal system had many consequences. The colonial rule brought about modes of adjudication that were completely different from the local traditional procedures of resolving disputes. The introduction of the received law, equity, common law and English statutes, also led to the subordination of customary law that required it to be subjected to the repugnancy clause and considered not to be 'real law' like the former by requiring proof of its existence. Customary law practices were interpreted to be contrary to natural justice even when no complaint had been made against their application. This and government's failure to Africanise some parts of the legal system after independence posed a great threat to the existence and actual interpretation of customary law.

The manipulation of customary law gave birth to inhuman practices that led to women and children being left destitute. Local people adopted a distorted interpretation of customary law that led to property grabbing. The mischief of property grabbing was based on beliefs that did not truly reflect the actual values of customary law. This was the mischief that parliament intended to cure. However, the cure was meant to remedy the existing problem of property grabbing and neglected to consider the ways in which the actual cause of it could be cured so as to prevent it from continuing.

CHAPTER THREE

THE LAW OF INHERITANCE AND SUCCESSION

3.0 INTRODUCTION

The received and customary law of inheritance and succession was finally unified in the Intestate Succession Act of 1989. The law in the Act was enacted to provide a reasonable law of inheritance that would be applicable to all persons in the country who die intestate. This chapter will focus on bringing out how the Act has been applied to disputes concerning matters of inheritance and the extent to which it reflects the customary laws of inheritance that it unifies.

3.1 PERSONS TARGETED BY THE ACT

The law in the Intestate Succession Act applies to all persons that are domiciled in Zambia and shall apply only to a member of a community to which customary law would have applied if this Act had not been passed.¹ For individuals that do not fall within the provisions of section 2(1) of the Intestate Succession Act, the English Intestate Law applies. The Act provides for the distribution of the deceased estate where no will was left to stipulate how such estate is to be shared among the deceased relatives. This means that it applies to every person who dies intestate. Intestacy is either total or partial. There is total intestacy where the deceased does not effectively dispose of his property by will. There is partial intestacy where the deceased effectively disposes off some, but not all, of the beneficial interest in his property by will.² The Act provides something to a similar effect. Section 4 provides;

(1) A person dies intestate under this Act if at the time of his death he has not made a will disposing of his estate.

¹ The Intestate Succession Act, Cap. 59, s. 2(1)

² Roger Kerridge. *Parry and Kerridge: The Law of Succession*. (London: Sweet and Maxwell, 2005):7

(2) Any person who dies leaving a will disposing of part of his estate has died intestate under this Act in respect of that part of his estate which is not disposed of in the will.³

Even though the Act applies to all persons that die intestate, it does make an exception as to which estate shall fall within its ambit. It does not apply to land that was held or acquired under customary law, property which was acquired and held as part of chieftainship property and family property. In the case of *Siwale v Siwale*⁴, the deceased had died intestate to land that had been held under customary law and the respondent after the demise of his father proceeded to acquire a certificate of title to the land in his name without consulting the rest of the family members. One of the issues was whether the Intestate Succession Act applied since the deceased had died intestate. It had been argued that the property fell within the description of family property and hence the Intestate Succession Act could not apply to it as it was held by the entire family (children) of the deceased collectively. This meant that the law to be applied was the Lands Act. The court agreed and did not use the Intestate Succession Act. This case shows how the courts have applied the provisions of section 2 (2) (a) to disputes arising from ownership of family property. Courts will hold that the Act does not apply to any estate that falls within the description of section 2 (2).

Any land that does not fall under customary tenure will definitely be caught by the Intestate Succession Act. This means that land held under statutory tenure will be part of the estate that the will be distributed in accordance with the provision of the Act. In the case of *Ireen Lubasi v Charles Lubasi and others*⁵ an action had been commenced in the Lands Tribunal by the respondents against their step mother, the appellant, over the distribution of the deceased estate. The matter concerned the proceeds of sale of land which were supposed to be administered in accordance with the Intestate Succession Act. On appeal to the Supreme

³ The Intestate Succession Act, Cap 59, s.4

⁴ SCZ Judgment No. 24 of 1999

⁵ SCZ Judgment No. 20 of 1998

Court it was held that the distribution of the deceased estate falls under the Intestate Succession Act. The court further stated that just because the estate includes land, it does not mean that the dispute has to be brought within the purview of the Lands Act. the Intestate Succession Act applies to statutory land owned by a person who dies intestate.

3.2 PRESCRIBED DISTRIBUTION OF THE DECEASED ESTATE

The Act has provided for the distribution of the deceased estate in percentages for the rightful beneficiaries. It has been noted that the beneficiaries that are given the largest portions are the priority dependants of which the children get half of the entire percentage of the deceased estate. Priority dependant means a wife, husband, child or parent.⁶ The surviving spouse, the wife or husband are given 20% of the entire estate. In the case of *Elsie M. Moobola v Harry M. M. Muwezwa*⁷ the appellant appealed to the Supreme Court for an order that she was entitled to 20% of the deceased estate. Justice Ngulube stated that “we do not consider that the Act has created any new substantive rights but it has merely specified the quantum of the entitlement already due to a widow in the position of this appellant.”⁸ The court merely confirmed the legal rights of the appellant in the quantum specified by the Act. The same would be concluded about the other beneficiaries. In the case of *Gray Nachandwe Mudenda v Dorothy Chileshe Mudenda*⁹ the court having found that the applicant was the deceased’s surviving spouse, the learned trial judge held that in terms of Section 5(1) of the Intestate Succession Act, the applicant, her children, the dependants and parents of the deceased are the beneficiaries of the estate of the deceased.

The Act provides for the other beneficiaries as in the following percentages;

⁶ The Intestate Succession Act, Cap 59, s.3

⁷ SCZ Judgment No. 3 of 1991

⁸ SCZ Judgment No. 3 of 1991 at p3

⁹ SCZ Judgment No. 12 of 2006

- (a) twenty per cent of the estate shall devolve upon the surviving spouse; except that where more than one widow survives the intestate, twenty per cent of the estate shall be distributed among them proportional to the duration of their respective marriages to the deceased, and other factors such as the widow's contribution to the deceased's property may be taken into account when justice so requires;
- (b) fifty per cent of the estate shall devolve upon the children in such proportions as are commensurate with a child's age or educational needs or both;
- (c) twenty per cent of the estate shall devolve upon the parents of the deceased;
- (d) ten per cent of the estate shall devolve upon the dependants, in equal share¹⁰

It is clear from the wording of section 5(1) (a) that the harmonization of customary and English laws of inheritance has been reflected. This is to the extent that it recognises polygamous marriages and provides how the percentage of the surviving spouse is to be shared among the deceased's spouses. Regardless of this recognition, the provision is a clear departure from customary law notions of marriage, property and succession rights, which are themselves founded on traditional customs and norms.¹¹ The distribution of estates in percentages to beneficiaries is based on the English modes of distribution of a deceased estate. The kinship systems and the manipulated practices that fostered gender segregated behavioural patterns as already stated in the previous chapter, governed the modes of distributing property after the death of a person. The Act provides mainly for priority dependants as against the customary kinship system such as matrilineal system which requires children to inherit from their uncles.

This provision has however not been spare of criticism. It has been argued that under section 5(1) (a) the portions allocated to the surviving spouses is insufficient and cannot be considered as representative enough of the contribution to the matrimonial property. Others have stated that parents do not deserve the quantum that they have been allocated as

¹⁰ The Intestate Succession Act, Cap 59, s.5(1)

¹¹ ZLDC, *Working Paper: A Review of the Intestate Succession Act*, Zambia Law Development Commission, April (2010):25

compared to that awarded to the surviving spouse which is also not sufficient.¹² It is however clear that the quantum's naturally did represent a problem even during the enactment of the Act. But the Act does seem to provide a solution in the proviso in section 5 which provides that;

Provided that a priority dependant whose portion of the estate under this section is unreasonably small having regard to his degree of dependence on the deceased shall have the right to apply to a court for adjustment to be made to the portions inherited and in that case, Part III of the Wills and Administration of Testate Estates Act shall apply, with the necessary changes, to the application.

A priority dependant can apply to court for necessary adjustments to be made upon showing their degree of dependency that they had on the deceased. This means that their portion of the 100% can be adjusted as the court will deem fit upon taking into account the relevant circumstances. The courts are empowered to rely on section 20 of Cap 60 which is the Wills and Administration of Testate Estates Act. Section 20 subsection 1 of the same Act provides that;

If, upon application made by or on behalf of a dependant of the testator, the court is of the opinion that a testator has not made reasonable provision whether during his life time or by his will, for the maintenance of the dependant, and that hardship will thereby be caused, the court may, taking account of all relevant circumstances and subject to such conditions and restrictions as the court may impose, notwithstanding the provisions of the will, order that such reasonable provision as the court thinks fit shall be made out of the testator's estate for the maintenance of that dependant.¹³

It can be stated that the courts will have to exercise their power to prevent the use of a benefit conferred on a priority dependant so that the adjustments can be properly made. The Act is silent as to which priority dependants share shall be affected where such an application is made. William Phiri of Zambia Law Development Commission did state that this section is rarely used and there are a few or no cases reported on the matter.¹⁴ Lack of reliance on this section could be attributed to lack of knowledge on the part of the priority dependants

¹² ZLDC, *Working Paper: A Review of the Intestate Succession Act*, Zambia Law Development Commission, April (2010):25

¹³ The Wills and Administration of Testate Estate Act, Cap 60, s. 20

¹⁴ SCZ Judgment No. 3 of 1991

that they even have such rights to apply for adjustments to court if their share is not sufficient owing to their degree of dependency.

Section 6 provides for the distribution of the estate where the surviving spouse is also not there. The share of the surviving spouse goes to the children in such proportions in accordance with their age. Where the children and surviving spouse are not there, then their aggregate proportion is shared equally between the parents. Where the parents, children and the surviving spouse are absent then their proportions are shared equally among the dependants. The estate shall be *bona vacantia* where none of the above mentioned priority dependants is available to claim the inheritance. This means that the estate shall devolve upon the state¹⁵ or it becomes the property of government the Republic of Zambia. Section 6 cannot therefore be understood in isolation from section 5.¹⁶

Section 7 provides for what happens in a situation where there is a surviving spouse. Where either the children, parents or the dependants are absent, their respective proportions are to be shared between the surviving spouse and the priority dependants that are present in accordance with the provisions of the Act.¹⁷ In the case of *Monica Siankondo (Suing in her capacity as Administratrix of the Estate Of the late Edith Siankondo) v Frederick Ndenga*¹⁸ whose facts before the Subordinate Court were that the appellant, who had also died, lived in house No. 1199/98 Macha Road, Choma, together with her deceased husband, who occupied the house by virtue of his employment with Zambia Railways, the owners of the house. The deceased's husband died before he could be offered the house to buy. There was no child of the family living. The appellant was offered and bought the house. But she was evicted from the house by the deceased husband's family. On appeal to the Supreme Court, it was held that

¹⁵ The Intestate Succession Act, Cap 59, s. 6

¹⁶ ZLDC, Consultative Workshop on the Review of the Intestate Succession Act for Copperbelt, Luapula and North Western Provinces. A Report of the Zambia Law Development Commission. (2010):19-21

¹⁷ The Intestate Succession Act, Cap 59, s. 7

¹⁸ (2005) Z.R. 22 (SC)

the appellate Judge fell into error when he held that the deceased husband left four children from another woman or women who were entitled to jointly purchase the house with the appellant. Since there were no children of the family in accordance with section 3, the court should have divided the rest of the property in accordance with section 7. However, the evidence on record does not state anything to that effect as it would appear that the main issue was the declaration that the house did not form part of the deceased estate.

Section 8 provides for the devolution of the personal chattels where the deceased is survived by the surviving spouse or child or both. Section 8 gives both the surviving spouse and the child equal share of the personal chattels. It also gives them the exclusive right to the personal chattels. In societies where the property of the deceased is comprised of only personal chattels, it would mean that there might be injustice caused to the parents as they would not inherit anything. It appears that this section and many provisions in the Act depart from even the most common held observations among the different customary law practices. One common feature that would have been expected to be reflected in the Act is “the belief in equality of human beings hence the communal ownership of major forms of property.”¹⁹

Most cases that have been adjudicated upon involve a house or houses forming part of the remaining estate of the deceased. This means that the reliance shifts to section 9 of the Intestate Succession Act. This provides for the distribution of the estate that includes a house. It provides that if the estate includes a house, the surviving spouse or child or both will be entitled to it.²⁰ The provisions of section 9 have been relied upon even in unforeseen circumstances where the court is left with the task of deciding whether one is really covered by the provision of section 9. In the case of *Ester Ngula Sitali v Fenias Mafemba*²¹ The matter was first heard in Lusaka Local Court in which the respondent had sued the appellant

¹⁹Kameri-Mbote:6

²⁰ The intestate Succession Act, Cap 59 s.9 (1)

²¹ 2004/ HPA/004

for revocation of letters of administration issued to the appellant in respect of the estate of her late daughter Inonge Sitali who died intestate on or about 20th February, 2003. The Local Court found for the respondent. The appellant unsuccessfully appealed to the Subordinate Court against that decision and later appealed to the High Court. In order for the respondent to successfully fall under section 9, there was the requirement to prove that marriage actually existed to be called a surviving spouse. In the absence of such proof, then the respondent could not be a surviving spouse to inherit in accordance with section 9. In the absence of any proof of the existence of a marriage meant that the respondent could not be entitled to inherit as a surviving spouse under section 9. The court held that the length of cohabitation does not lead to marriage and failure to comply with Lozi customary law under which the respondent and the deceased were thought to have been married, meant that there was no marriage. The court therefore declined to allow the respondent to inherit from the deceased estate under section 9. It is clear that marriage laws also have a bearing on whether one will be legally entitled to enjoy their inheritance rights as the surviving spouse. Both customary law and the English inheritance laws therefore seem to apply the same principle. This is a clear indication of some level of harmonization of the two.

The proviso states in section 9 subsection (1) that;

- (a) where there is more than one surviving spouse or child or both they shall hold the house as tenants in common; and
- (b) the surviving spouse shall have a life interest in that house which shall determine upon that spouse's remarriage.²²

The above proviso is to an extent a contradiction of itself. In accordance with the law governing tenancy in common, an individual who has such an interest in land has the right to transfer this interest either under a will or it can be inherited upon death in accordance with the law of intestacy. There is no right of survivorship or *jus accrescendi*. This is a general

²² The Intestate Succession Act, Cap 59 ,s 9(1) (a)(b)

interpretation of section 9(1) (a). Section 9(1) (b) confers on the surviving spouse a life interest which ends upon the surviving spouse remarrying. A life interest lasts as long as the surviving spouse still lives. It is not clear whether the actual interest conferred on the surviving spouse is a life interest or they hold it as a tenant in common. It is vital at this point to clarify that for many years people have misinterpreted section 9 in as far as section 9 is concerned. From most workshops held by Zambia Law Development Commission, people are of the view that surviving spouse means only the wife and hence is gender insensitive. They categorically stated in their report that the Act is inclusive of both sexes even where there appears to be the word 'man' in the provision.²³

3.3 PENALTIES

The Act has criminalised acts that deny the beneficiaries their entitlement. It provides that in so far as an individual interferes with or deprives a beneficiary of the property that they are rightfully entitled to as provided for in the Act, that person shall be guilty of an offence and can either be convicted for not more than 2 years or can be made to pay a fine.²⁴

Section 14 represents a complete departure from the modes of solving disputes under customary law. African customary law has known a flexible and conciliatory mode of dispute resolution especially in the fields of family law. Throughout history there existed outside the traditional courts a whole apparatus of arbitration, a system by which the parties endeavoured to compose their differences peaceably with or without the assistance of an arbiter, mediator or conciliator; even in places where arbitral proceedings were not systemised. Western type legal procedures barely recognise the importance of litigation as a way of removing a social

²³ZLDC, Consultative Workshop on the Review of the Intestate Succession Act for Copperbelt, Luapula and North Western Provinces. A Report of the Zambia Law Development Commission. (2010)

²⁴The Intestate Succession Act, Cap 59, s. 14.

grievance through the elimination of dispute.²⁵ Customary law attempts to reconcile the parties and resolve the dispute in a peaceful manner. Introduction of penalties seeks to punish rather than to create conciliation between the parties.

3.4 THE ADMINISTRATION OF THE DECEASED ESTATE

The administration of the deceased estate is normally done after letters of administration have been granted. The Local Courts are empowered to appoint administrators.²⁶ Powers and duties are also provided for in the Local Courts Act and the Intestate Succession Act. The role of an administrator is to ensure the fair distribution of the deceased estate and has no right to use any part of the estate. In the case of *Raphael Njovu and another v Kayula Chewe (sued as administrator of the estate of the late Dorothy Zulu)*²⁷ the administrator was of the view that his appointment entitled him to benefit from the deceased estate when he collected rent from the properties under his administratorship. The court stated that this was a clear misunderstanding of the role of administering the deceased estate. In the matter of *Gray Nachandwe Mudenda v Dorothy Chileshe Mudenda*²⁸ the court stated that the duty of the administrator is not to enhance the deceased estate but to collect the deceased's assets, distribute them to the beneficiaries and render an account. However, it so happens that some administrators are actually the priority dependants and in such cases they would be under the duty to distribute in accordance with section 5. The law only states in section 34 that an administrator should not derive any benefit from his office. Similarly unlawful deprivation of a benefit of a minor is criminalised either by an administrator or guardian.

Under customary law, when the head of the family dies, then someone is appointed to succeed him as head. Thus when one dies, the issue is who controls rather than who owns.

²⁵ Hilda and Leo: 232-233

²⁶ The Local Courts Act, Cap 29, s. 36.

²⁷ 1997/HP/1882

²⁸ SCZ Judgment No. 12 of 2006

The person who is head of the family who holds the property on behalf of the family has the responsibility and obligation to care for the family particularly out of the property which has been acquired as part of the assumption of headship.²⁹ Customary law allows the relatives to choose a person who has an obligation to ensure that the property is fully used to look after the deceased surviving spouse and children.

3.5 GENERAL VIEW OF THE ACT

All in all, commendation needs to be given to the drafters of the Act. Coming up with an Act that unifies the many customary laws of succession and inheritance and harmonise them with the received law was not easy to accomplish. The Act has been said to be similar to the English inheritance Act. Regardless of any similarities between the two, the Intestate Succession Act was made conducive for the Zambian social needs.³⁰

The Act has provided a law that protects the interest of priority dependants, especially the vulnerable groups such as women and children, and has made deprivation of property from the deceased for any of the priority dependants punishable by law. Property grabbing has therefore been criminalised as conviction of such an act is provided for by the Act. In the case of *Vwavwa v Patmore Siang'ombe*³¹ the plaintiff commenced an action against the respondent who was the administrator of the plaintiffs' late mothers' estate. The Local Court ordered the revocation of letters of administration and ordered the respondent to return the cattle that he had gotten away with which would have helped the plaintiff to pay her school fees after selling them.

However, the Act does not show a representation of the laws it attempts to unify. It has been observed that "if succession law goes, the whole fabric of customary law will go with it; if

²⁹ Kasonde- Ng'andu, :87

³⁰ Interview: Haangala Chimuka, 13th January, 2012.

³¹ (2006) Choma Local Court. 535

the succession law changes, there will be serious and irreversible repercussions on the way people live.”³² Currently, 78% of women and orphans continue to suffer injustices country wide because of archaic laws such as the Intestate Succession Act.³³ The great departure from the various common customary law practices of inheritance has led to the courts of law adopting a complete different mode of interpreting the Act making it non responsive to societal changes. The Act is not up to speed with the modern administration of estates for people who die intestate. It is therefore essential to have an equitable interpretation to reduce the cases of property grabbing and reflect the modern trends of society.

3.6 CONCLUSION

The Intestate Succession Act was enacted to unify the laws of inheritance and succession under the various customary law practices. The 1989 Act harmonised the received and customary laws of inheritance. The end product as shown above was an Act that reflects more of the received law and a suppressed unified customary law. This has had an impact on the modes of interpreting the resulting law of inheritance which will be dealt with in the next chapter.

³² Hilda and Leo :234

³³ Annette Nhekairo, “Toothless Law under Review to Curb Rising Cases of Property Grabbing.” *Zambia Daily Mail* (21st May, 2011). www.LusakaTimes.com. (accessed 17th January, 2012).

CHAPTER FOUR

THE EQUITABLE INTERPRETATION OF THE INTESTATE SUCCESSION ACT

4.0 INTRODUCTION

As already pointed out in chapter two, our dual legal system has to a large extent brought with it methods of adjudication that are considered to be foreign. In the Intestate Succession Act, the departure from the customary laws of inheritance has had an impact on the interpretation of the law of inheritance and in turn, its application and acceptability in the country. Regardless of this fact, an equitable interpretation of the Act is capable of making it more responsive to the societal changes that dwell on inheritance. This chapter analyses the how the courts of law have interpreted the provisions of the Act in a number of disputes and how this has affected the enforcement of the Act.

4.1 DUTIES ARISING FROM THE PRINCIPLES OF EQUITY

Where the law fails to achieve a result that is approximate to ideal justice, equity comes in as a kind of supplementary or residuary jurisdiction.¹ It is as a result of equity that courts are able to exercise discretionary interpretation to arrive at a justifiable decision where the formal law appears to create hardship and does not provide a fair result.

Equity has been manifested in the principal form of a liberal and humane interpretation of law in general and a liberal and humane modification of law in exceptional cases not coming within the ambit of the general rule.² From a juristic point of view, Aristotle provides that

“All law is universal but about some things it is not possible to make a universal statement which shall be correct. When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right when the legislator fails us and has erred by over simplicity to correct the omission. Hence the equitable is just and better than one kind of justice-not better than absolute justice but better than the error that arises from the absoluteness of the statement. And this is the

¹ Kemp Allen, *Law in the Making*(Oxford: Oxford University Press, 1964):384

² Allen:385

nature of the equitable, a correction of law where it is defective owing to its universality.”³

Where the application of the law generally would lead to unjust results, it is equitable for a judge or law giver to correct it with a humane interpretation which is an aspect of equity in general. This means that the interpretation that is given should be a correction of the general law where the facts do not fall within the universal rule.

4.2 THE CANONS OF INTERPRETATION

It has been noted that there are many ways in which courts will interpret provisions or sections of a statute, a will, a contract or a deed. Courts will either rely on rules of law or rules of construction. Apart from the rules of law and the rules of construction there are rules relating to equitable presumptions and in particular to equitable presumptions of satisfaction.⁴

This part of the dissertation is concerned with how the rules of interpretation, in particular the literal rule, have had an impact on the law of inheritance.

Interpretation of a word or section of an Act may require recourse to canons of interpretation which are also known as rules of interpretation. These are resorted to where there is no definition provided for within the statute or section where it is appearing. Brief explanations will be given of the well known canons so as to give a clear direction of the discussion.

4.2.1 THE MISCHIEF RULE OR PURPOSIVE APPROACH

This rule requires that one examines the mischief under the common law that the statute was meant to remedy. It gives the judges the chance of expressing their own opinions as to social policy when interpreting the statutes.⁵ The rule was established in the *Heydon's case*⁶ where it was shown that there are four preliminary principles that need to be taken into account when trying to interpret a statute. The judge must firstly look at what the common law was

³ Allen:389-390

⁴ Kerridge:299

⁵ Munalula:167

⁶ (1584) 3 Co. Rep.8

before the statute, secondly he or she must look at what the mischief was, thirdly, the remedy that parliament has chosen and lastly the reasons and the remedy that have been rendered to cure the mischief. Therefore, if a judge is to resort to the mischief rule in the interpretation of a word or provision contained in the Intestate Succession Act, he or she would have to take the four steps in arriving at the meaning that is not provided for therein. As already pointed out in the previous chapter, the mischief that parliament meant to remedy was that of property grabbing arising from the manipulated customary laws. The purpose (policy), scope and object of the statute as a whole must be considered.⁷

However, courts have taken a position that suggests that customary law is generally unacceptable and considered it to be the cause of problems faced by women and children. It was stated by the Supreme Court in the case of *Moobola v Muweza*⁸ that the Intestate Succession Act was a law enacted to alleviate the plight of, especially, widows and children who would otherwise be at the mercy of the vagaries of the largely ambiguous and malleable customary inheritance practices. “It has generally been accepted that customary law is subjected to multiple and sometimes contradictory interpretations by courts and in recent years this has almost been to the disadvantage of women.”⁹ If custom is also a victim of manipulation, then it is clearly wrong to consider the whole custom as ambiguous and malleable. The above decision also shows a departure by the courts from the purpose of the enactment of the Act which is to unify customary laws of inheritance and not to sideline them.

⁷ Anyangwe:99

⁸ SCZ Judgment No.3 of 1991

⁹ Women and Law in Southern Africa, *Venia Magaya's Sacrifice: A Case of Custom Gone Away* (WLSA Research Education Trust, 2001):64

4.2.5 THE GOLDEN RULE

It is also known as the absurdity rule. The rule allows judges to depart from a words normal meaning in order to prevent a result that is absurd. Where the plain meaning of words under the literal interpretation would lead to an absurd result that departs from the real intention of the legislature, then the judge has an obligation to remove the absurdity.¹⁴ Similarly in the case of *The Attorney General and MMD v Lewanika and others*¹⁵, the four respondents were members of the Movement for Multiparty Democracy (MMD). In 1991 they stood for election on the ticket of the MMD. They won the elections and took their seats in the National Assembly but later resigned from the ruling MMD. Consequently, the National Secretary for the MMD wrote to the Speaker of the National Assembly informing him that the respondents were no longer members of the Party. Subsequently, the Speaker wrote to the respondents that in terms of Article 71(2) (c) of the Constitution of Zambia, they ceased to be members of Parliament with effect from the date when the National Secretary gave the notification to the Speaker. The respondents then petitioned the Attorney General contending that although they had resigned from the Party on whose ticket they won the elections, they were still members of Parliament and, asked the court to declare the Speaker's decision that their seats were vacant; null and void. The High Court had interpreted Article 71 (1) (2) of the Constitution literally and held that the respondents had not vacated their seats in parliament. On appeal to the Supreme Court, it was argued that the literal interpretation of the Article had caused injustice and asked the appellate court to correct the absurdity. It was held that Article 71(2) (c) is discriminatory in itself against an independent member who joins any party and against a member who resigns from one party and joins another party. It is discriminatory and, therefore, unreasonable and unfair and it is the duty of the court to make it reasonable as it offends against Article 23 of the Republican Constitution. As shown above,

¹⁴ Munalula:165

¹⁵ SCZ Judgment No. 2 of 1994

there is a duty to rid the law of any absurdity created where the words are interpreted literally by having recourse to the golden rule. Each statute is unique and its interpretation to avoid absurdity will be done in accordance with the special circumstances surrounding it.

In light of some decisions that have been given in accordance with the Act, it can be seen that there is strict literal interpretation of the provisions of the Act. The issue is whether it is right that the law should be applied rigidly without due regard to the special circumstances that are existing at the time of adjudication. It has also been noted that the interpretation of the provisions of the Act has not reflected the unification of the various customary laws. Kalaba of Matero Local Court 2 was of the view that judges should be able to use their discretion in interpreting the Act with the aim of ensuring the full realisation of what the legislators had intended when they enacted the law. He went on to state that it is clear that society evolves with time, it is the duty of the judge to take special facts into consideration without diverting from the real intention of the legislator.¹⁶ It is of no doubt that the interpretation of the Intestate Succession Act was intended by the legislator to be done in an equitable manner.

One recent case to be noted is that of *Phyllis Kakunta Bansa v Omas Kope*¹⁷. In that case, the applicant was the surviving spouse and the respondent was the administrator of the estate of late Joshua Bansa who had died intestate. Evidence was adduced that the applicant and the deceased had bought a house in which they lived with their children. The applicant had four children of her own and the deceased had nine, each from their previous marriages. One of the issues that were in contention was whether it was right for the house to be sold and the proceeds shared. The administrator refused to go ahead with the sale as he was of the view that it would inconvenience two school going children who had no other place to live apart from two other houses that were built by the deceased and the applicant. There was further

¹⁶ Interview: Ringwell Kalaba, 9th January, 2012.

¹⁷ 2007/HP/ 0315

evidence that the applicant had been mistreating the nine children of the deceased and that there was before the magistrate court a case against her of assaulting a pregnant child. Justice Mutuna stated that it was not in the interest of the estate or indeed other beneficiaries to sell the house. He further stated that since the power to sell the house is vested in the administrator with the authority of the court under section 19, the court could not order the sale as the administrator was against it. Kalaba was of the view that the High Court should have exercised its discretion and considered what would be equitable between the applicant and the nine children of the deceased. Clearly, allowing the two parties to still be within each other's reach when there is such a conflict was not a just decision. "In many African courts the judges would try, not merely to administer the law, but to find a solution to the dispute which would appear just to the parties and would put a stop to further litigation between them; if the law had to be stretched, or even to be ignored, in the process, this was justifiable if peace and harmony were to be restored."¹⁸ The application of equitable principles has also shown us that if the application of the law is to cause injustice, then the judge should correct it with the use of his discretion.

In the case of *A v A*¹⁹, which involves the issue of finance and property under marriage, the courts ordered the sale of the matrimonial home and ordered a lump sum to be paid to the wife so as to prevent the two being in touch with each other over a period of time. This was due to the continuous cases of assault by the husband on the wife. It goes on to show that the courts have the discretion to avoid further conflict by deciding in a manner that ensures that the end result is an equitable one. These are principles that are not provided for expressly in an Act of parliament but are exercised by judges for the purposes of ensuring a justifiable decision. All the circumstances need to be taken into consideration to avoid conflicts caused by the ensuing judgement.

¹⁸ Hilda and Leo: 232

¹⁹ (1995) 1 FLR 345, FD

The other challenge that has been noted arising from the interpretation of the Act is that it is not fully comprehended. This leads to inequitable interpretation of the Intestate Succession Act. A key informant was of the view that the Act is a very good piece of legislation but judges and other stakeholders entrusted with the duty of enforcing it have not taken time to understand it and fully appreciate what parliament intended to bring out in each section.²⁰

4.3 INTERPRETATION UNDER CUSTOMARY LAW

If providing a uniform customary law was the basis of the enactment of the Intestate Succession Act and judges were to give effect to that purpose, they would be faced with a duty of interpreting custom in a manner different from that used under statute. When a judge is dealing with customary law, “the perpetual process of interpretation must inevitably produce an equally active metabolism in the subject-matter of usage. Customs become modified, sometimes to such an extent that they cease to exist. But always, the jurist or magistrate has to deal with practices derived in the first instance from actual social relations.”²¹ The interpretation of customary law based on the social experiences enables disputes to be resolved fairly as all factors (whether social, economic or political) within the context are considered.

Judges are more inclined to exercise their discretion where customary law is the legal rule to be applied to a dispute. Under statute, the exercise of discretion comes with criticism that a judge is acting as a legislator. Judges in interpreting the law fill in any gaps in the law by using their discretion.²²

The departure from the customary laws of inheritance in the Intestate Succession Act has made the application of the law rigid. A testimony was given by a widow who was a victim of property grabbing.

²⁰ Interview: Hangaala Chimuka, 27th January, 2012.

²¹ Allen: 128

²² Anyangwe:121

My name is Norah Mbewe and I come from Kafue. I got married to Bornface in 1988. My husband later died in 2003 leaving me with four children. His stepfather looked after my husband and when he died; my father in law (my husband's step father) grabbed all the property we had. I sought help from the Victim Support Unit who helped me get back some of the property. I would like to see a change in the laws of Zambia so that it can protect us from destitution as a result of property grabbing from closest relatives. To make matters worse, the stepfather was appointed as the administrator of my late husband's estate.²³

This testimony shows how the Act has not allowed the actual social relations to be used in the resolution of disputes. Failure to use discretion in deciding cases does not help in making the Act more applicable on the ground.

4.4 CONCLUSION

It has been shown in the previous chapter that the Intestate Succession Act has departed from the customary laws of inheritance. This means that it has to be interpreted in accordance with the English canons of interpretation. The interpretation of the Act in accordance with the canons of construction has proved to be ignorant of the unique circumstances of the cases. The provisions of the Act are applied generally in some cases which have led to harshness. The duties of the interpreter under equity and customary law have shown to be the solution to the existing harshness caused by the strict application of the provisions of the Act. Both allow for a more liberal departure from the general rule so as to provide a more humane interpretation. The next chapter will therefore provide the solution that is available to the government to ensure that the Act is made more applicable on the ground.

²³ Annette Nhekairo et. al, "*Report Of The National Conference: Women's Property Rights And Livelihood In The Context Of HIV/AIDS*". (FAOSAFR, 2006): 19-21

CHAPTER FIVE

THE LAWS OF INTESTACY OF COUNTRIES IN SOUTHERN AFRICA

5.0 INTRODUCTION

Every country has to some extent been influenced in its enactment of its laws by the legislature on a particular subject matter of another country. Zambia shares a common history with many other countries in Southern Africa especially where colonialism is concerned. Colonialism affected the development of the legal systems of South Africa and Zimbabwe. Each of these countries adopted legislation that incorporated customary law of inheritance as a response to the effects of the changing social and legal conditions. It is therefore essential to have a comparative study of these countries to see what lessons can be learnt from their experiences.

5.1 JURISDICTIONS

5.1.1 ZIMBABWE

Zimbabwe's legal system has a mixture of Roman Dutch law, English common law and the local customary law. The law of succession is governed by written law which is codified customary law.¹ The written law is provided for in chapter 6:01 which is the Administration of Estates Act and was facilitated by the Administration of Estates Amendment Act no.6 of 1997 which came into force on the 1st of November. Prior to this date, the administration of estates to which customary law applied was governed by section 68 of the Administration of Estates Act. The section provided that where the deceased died intestate and customary law applied to him, the estate was to devolve according to the customary law.² This means that the Administration of Estates Act gave enough recognition to the various customary practices to govern the administration of estates where the deceased died intestate. This was however

¹ ZLDC, "Consultative Workshops on the Review of the Intestate Succession Act", A Consolidated Report, (October 2010):19-21

² J. Pfumorodze, "Protection of Widows and Surviving Children Under the Intestate Succession laws of Zimbabwe: The Case of Estates of Persons Subject to Customary Law", Journal of Social Development in Africa, Volume 25 no.1 (2010) 4-7

not free of criticism. It has been observed that although the heir in theory had an obligation to see to it that the estate was administered in a manner that ensured that the interests of the surviving spouse and children were a priority; there were many instances when this was ignored causing unjust results. Introduction of the amendment to the Act allowed for the rest of the family to choose an administrator upon reaching a consensus.³

The Zimbabwean legal system does not allow a person to be appointed as administrator unless that person is registered under the Estate Administration Act, Chapter 27:20 and is a surviving spouse or next of kin of the deceased. The law requires that such estate of the deceased must be registered within 14 days by the nearest relative after death at either the High Court or Magistrates Court depending on a few factors.⁴ This has an advantage of reducing the occurrence of property grabbing though individuals that take up the task of registering the estate may be tempted to hide certain property so that it is not part of the administered estate. The law normally prefers the surviving spouse as the custodian of the deceased property pending the appointment of an executor. Personal representatives are required to give account of the estate distributed. An inheritance plan on how the estate under customary law is to be distributed is also required.⁵

The inheritance law of succession under customary law currently is regulated by the Administration of Estates Amendment Act No. 6 of 1997 in part IIIA, which applies to people to whom customary law applied at the time of their death. The Act recognises mixed marriages and provides what the status of such marriage will be, depending on the circumstances of the alleged marriage. For example, if a woman marries under the Marriage

³ ZLDC, "Consultative Workshops on the Review of the Intestate Succession Act", A Consolidated Report, (October, 2010) :20-21

⁴ SIDA, "A Guide on Inheritance Laws in Zimbabwe: Justice for Children Trust", September, 2006. Found at www.kubatana.net (accessed on the 11th of February 2012)

⁵ ZLDC, "Consultative Workshops on the Review of the Intestate Succession Act for Copperbelt, Luapula and North Western Province", (11th-12th July, 2010):16

Act, chapter 5:11, to a man already married under customary law to someone else, then the last marriage will be treated as a customary marriage for purposes of inheritance.⁶ Succession based on community of property is equally recognised by law. This means that the property of the couple is considered to be available to the extended family members. The surviving spouse is given the right to inherit household goods and other domestic items used in the deceased house. Where there is a minor, the law prohibits remarriage of the surviving spouse until the share of that minor is secured.⁷

The Administration of Estates Act also provides for what amounts to an offence where distribution of the deceased estate is concerned. An executor who fails to lodge an account of administration, failure to give an inventory as required by law or failure to render an inventory wilfully or fraudulently making a false inventory amounts to an offence.⁸

Zimbabwe became the centre of attention towards the end of the 20th century due to a case that resulted in women being compared to teenage boys. The case of *Magaya v Magaya*⁹ also showed the difficulties facing legal systems that attempt to incorporate traditional or customary laws into a contemporary framework. The brief facts of the above mentioned case are that Mr. Magaya, of Shona descent died leaving behind four children and two wives of a polygamous marriage. His estate comprised of a house and some cattle at a communal home in Harare. He died intestate. The deceased's oldest daughter sought heirship of the estate of which she was granted. One of the deceased sons sought to revoke this designation. He was later appointed as the rightful heir under Shona custom and proceeded to evict his sister from the property. The community court held that "Venia was a lady and could not be appointed to her fathers' estate when there was a man". The Supreme Court upheld this decision based

⁶ SIDA, "A Guide on Inheritance Laws in Zimbabwe: Justice for Children Trust", September, 2006. Found at www.kubatana.net (accessed on the 11th of February 2012)

⁷ Pfumrodze:107

⁸ Pfumrodze:109-111

⁹ (1999) SC No. 210-98 (Zimbabwe)

on personal interpretation of the customary law and the 1983 Zimbabwean constitution.¹⁰ Justice Muchechete of the Supreme Court gave an interpretation which in simple terms meant that under customary law males were the rightful heirs and this was supported by the Constitution (section 89). “The decision has also been condemned for equating the status of women within Zimbabwean society to that of teenage boys. It has been argued that if the position of women is to be improved in Zimbabwe under customary law, the problem has to be attacked from its source: by addressing the shortcomings of judicial reliance upon undefined custom and more importantly, by addressing the weaknesses of a legal system that grants discretion as broad as that which made the Magaya decision a logical one.”¹¹

The Customary Law and Local Courts Act of 1990 provides for the definition of customary law in Zimbabwe. The Act also gives wide judicial power to interpret the various traditions and the beliefs. Zimbabwe’s liberal interpretivist stance towards customary law within its legal system exacerbates many issues; the result of which is untenable. A question to be asked is why a modern state ought to rely on the apparently antiquated and outmoded interpretation of legislation and illegitimate colonial perceptions of customs.¹² The case above illustrates how customary laws are given different and unfounded meanings. It has been generally accepted that customary law is subjected to multiple and sometimes contradictory interpretations by the courts and this has in recent years been to the disadvantage of women. The other effect of the decision in the Magaya case is that the interpretation robbed customary law of its dynamic capacity and denied Zimbabwe the real possibility to explore real jurisprudence in customary law. No effort had been made in this particular case to establish the customs and usages of the tribe or people to which Lennon

¹⁰ (1999) SC No. 210-98 (Zimbabwe)

¹¹ David Bigge, “Conflict in the Zimbabwean Courts: Women’s Rights and Indigenous Self-Determination in *Magaya v Magaya*,” *Harvard Human Rights Journal* (February 2000):260-261

¹² Bigge:304-305

Magaya belonged.¹³ It is right to argue that this decision violated customary law itself. Many institutions and NGOs called for a balance of the applicable general civil laws and customary law within the Zimbabwean judicial system and respect of human rights.

5.1.2 SOUTH AFRICA

The legal system of South Africa is slightly different from the Zambian legal system. South Africa uses the Roman Dutch law which is mostly attributed to its apartheid era. It is one of the many nations in Africa that is faced with problems posed by interpretation and incorporation of customary law in the general law. Of particular concern to us is the way in which the issues of constitutionality and culture in matters of inheritance have been debated by the South African Law Commission and other stakeholders.

To begin with, South Africa has recognised and protected the application of customary law under the Constitution in chapter 12 section 211(3).¹⁴ The Intestate Succession Act also provides for legal recognition of the use of customary law in matters of inheritance. The legal system in South Africa demands that there should be no application of customary law unless it has been subjected to the provisions of the constitution, in particular to the Bill of Rights. In the case of *Bhe v Magistrate, Khayelitsha*¹⁵ one of the issues was the constitutionality of the principle of primogeniture in the context of the customary law of succession. The Act that governed the deceased estate demanded that the law to be applied under inheritance was the customary law. The applicants had contested the appointment of the deceased father as heir and representative of the estate. The High Court held that the law that had been relied on by the deceased father was unconstitutional and the law that had to be applied was the Intestate Succession Act. This indicates that though customary law is recognised, there is an attempt

¹³Women and Law in Southern Africa, *Venia Magaya's Sacrifice: A Case of Custom Gone Away* (Harare: WLSA Education Trust, 2001):64-65

¹⁴ The Constitution of South Africa, Act No.108 of 1996, chapter 12, s.211

¹⁵ (2004) (2) SA 544(C)

every now and then by the adjudicators to decide in favour of the written law and patently ignoring the custom especially where it violates the Bill of Rights.

An attempt was made by the South African Commission to consider how best to reconcile the written laws of the country on inheritance, namely the Bill of Rights and customary law. The commission was also mandated to look at the effects of the harmonisation of the common law and the indigenous laws. One of the issues that the traditional leaders warned against was the westernisation of the customary law of succession. During the consultation, the traditional leaders clearly pointed out their dissatisfaction with some provisions of the Customary Law of Succession, the Amendment Bill of 1998 and stated that the laws of inheritance are inextricably linked with the African concept of family and kinship. The House declared itself opposed to the Eurocentric approach which was prevalent in their country and decried the extension of Roman-Dutch law to the principles of customary law.¹⁶

It had been stated at one of the meetings between the Ministry of Justice and the traditional leaders that there was great need to revisit customary rules of succession in the various systems so as to clarify the actual rules to identify the areas that needed reform and possibly codify what was relevant. The commission came to a conclusion that since they did not have adequate time to do as required, it was only necessary at that particular time to determine which areas in the customary laws of succession raised constitutional issues and to see if those issues could be addressed by amendments to the existing legislation pertaining to the same subject matter.¹⁷ There seemed to be general consensus among most of the stakeholders concerned that there had to be flexibility to ensure that whichever law is applied, there was still a reflection of deceased person's cultural orientation.

¹⁶ South African Law Commission, " Customary Law", Discussion Paper 93, Project 90 (22nd September, 2000):147

¹⁷ South African Law Commission:148

In trying to consider how best to make the law respond favourably to the needs of society, the South African Commission used Women and Law in Southern Africa's (WLSA) findings. It was shown that the local courts responded more readily to perceived social needs. Where the law worked injustice against the vulnerable groups, they were prepared to disregard the strict rules. Higher Courts on the other hand, tended to refer only to the official version of customary law disregarding the living aspect of it and applying the law very strictly. WLSA noted that manner in which customary law was applied in the higher courts did not create an environment that was conducive for the protection and care of the deceased family.¹⁸ The Magistrates and other courts responsible for the administration of intestate estates, continued to adhere to official customary law which resulted in hardships and anomalies because society is not static and changes need to be taken into account. In the case of *Bhe v Magistrate, Khayelitsha*¹⁹ the court held that customary law had been distorted in a manner that emphasised its patriarchal features which meant that its communitarian features were minimised.

Since it had been established that customary law of succession discriminated against the women and young men where primogeniture was concerned, it was only right for amendments to be made to the customary rules that were discriminative. These necessary amendments were made to the South African Intestate Succession Act.

5.2 OBSERVATIONS FROM THE COUNTRY STUDY

Both Zimbabwe and South Africa give great precedence to interpreting matters of inheritance in the codified laws in a manner that does not fully depart from the particular customary law in question. In South Africa this was made evident in the case of *New Gold Mining Co. v*

¹⁸ South African Law Commission:436

¹⁹ (2004) (2) SA 544(C)

*Transvaal Provincial Administration*²⁰ where it was stated that to ascertain the true interpretation of the Intestate Succession Act there is need to first establish the rule under a particular custom. The written laws merely provide the legal recognition for the application of customary law to inheritance matters. Both countries do not rely on western modes of interpreting their respective customary laws of inheritance. Zimbabwe, however, has to an extent given wide judicial powers in interpreting customary laws as a result of the Customary Law and Local Courts Act of 1990. This Act allows judges to interpret both the foundations and modifications to traditions and beliefs that are rarely codified and are unwritten.²¹

South Africa has come up with a procedure to apply customary laws of inheritance with limitations. It is clear from the country study that South Africa has greatly relied on the Bill of Rights as a way of ensuring that any customary law that is applied in matters of inheritance is non discriminatory. The case of *Mthembu v Letsela and another*²² was one of the reasons that moved the courts to consider the subjection of customary laws of inheritance to the Bill of Rights. The court in the above mentioned case held that the law of primogeniture which did not allow females and illegitimate children was constitutional ignoring the arguments for the need to observe human rights. This decision was over turned by the decision in *Bhe v Magistrate, Khayelitsha* where it was provided that such a law that prohibited females from inheriting was unconstitutional. Zimbabwe has not taken a similar position. With the decision in the Magaya case, it is clear that the interpretation of custom was given priority over the Bill Rights in the Zimbabwean constitution that prohibits discrimination.

²⁰ (1919) AD 367 at 397

²¹ Bigge:304-305

²² (1998) 2 SA 675

5.3 LESSONS

It has been shown that each country has adopted a unique mode of distributing the deceased estate. However, the whole purpose behind having the laws of inheritance is to ensure that there is equality and justice in the manner in which the deceased estate is distributed. The approach taken by South Africa to subject any customary law of inheritance to the Bill of Rights is also an essential factor to be taken into consideration as a lesson for Zambia. By ensuring that inheritance laws comply with human rights principles, equality and justice, the Intestate Succession Act of Zambia can be made more responsive to the existing problems of inheritance.

5.4 CONCLUSION

The subjection of the discriminatory practices to the Bill of Rights in South Africa has allowed the country to maintain its customary laws of inheritance without westernising them and ensured that they change only in response to the social and economic changes of society. Zimbabwe's law of inheritance after the Magaya case suggests that there is little effort being made by the judiciary to interpret customary laws in a manner that reflects the current global changes such as the need for emphasis of human rights. This posed a possible threat of making customary law static. It has been noted that the most important consideration regardless of the different modes of distributing the deceased estate in the jurisdictions mentioned, is to ensure that human rights, equality and justice are upheld. The next chapter therefore provides the recommendations and conclusions that can ensure that the Intestate Succession Act is made more applicable on the ground.

CHAPTER SIX

6.0 INTRODUCTION

The Intestate Succession Act needs to be made more applicable on the ground by taking into consideration a number of recommendations. These recommendations are made with a view of ensuring that the stake holders tasked with reforming the law will take into consideration all matters that, as identified in the second chapter, were not considered. This chapter provides the conclusions drawn from the previous chapters and makes recommendations on the way forward to ensure that the Act is more acceptable and responsive to societal changes in the area of inheritance.

6.1 GENERAL CONCLUSIONS

It has been shown in this paper that Zambia acquired its dual legal system from the era of British colonial rule. This influenced the development of the laws in the country and the mode of adjudication. The introduction of the received law, equity, common law and English statutes led customary law to be subjected to the repugnancy clause which limited its application. The modern courts brought about the need for proof of the custom in order for it to be applied. In most instances, customary law practices in the modern courts were interpreted to be contrary to natural justice even when no complaint had been made against their application.

Apart from misinterpretation by the courts, customary law was also affected by its manipulation in the area of inheritance. Manipulation of customary laws of inheritance by relatives of the deceased in most tribes led to the emergence of discriminatory practices that denied beneficiaries their entitlements. Even though government and other stakeholders had established that the cause of property grabbing was the manipulation of customary law, no attempt was made to educate people on the real customary practices. This and many important issues were not considered in the enactment of the Act.

The Intestate Succession Act of 1989 was enacted to unify the laws of inheritance and succession under the various customary law practices. The Act also harmonised the received and customary laws of inheritance. The end product as shown above was an Act that reflects more of the received law and a suppressed unified customary law. There is no equal representation of customary law under the Act as compared to the received law. The effectiveness of this harmonisation is therefore questionable.

This paper has also shown that whilst Zambia has adopted the English inheritance laws, South Africa and Zimbabwe have maintained their customary laws of inheritance and have tried not to westernise them. Both countries have recognised and protected these laws through legislation. In instances where the interpretation and application of customary law of inheritance has proved to be discriminatory, South Africa subjects such a practice to the Bill of Rights in the constitution. This has ensured that only the relevant customary laws of inheritance are applied in each case. Zimbabwe has not taken a similar position to remove any discriminatory aspects of its customary laws of inheritance and has been criticised by both the local NGOs and international organisations. Regardless of this, both South Africa and Zimbabwe have attempted to avoid the rigidity of statute in the interpretation of their inheritance laws.

It has also been shown in this paper that Zambia has not made much of an effort to avoid the rigidity caused by common law and the provisions of the Act. The use of the canons of construction has proved to be ignorant of the unique circumstances of most cases. The provisions of the Act are applied generally and in some cases have caused harshness. However, Zambia also uses equity as a source of law by virtue of the English Law Extent of Application Act, Cap 11 of the laws of Zambia. This means that judges have a duty to observe the principles of equity where the application of the law has led to harsh results. The duties of the interpreter under equity and customary law have been shown to be a means of reducing

the existing harshness caused by the general application of the law. Both allow for a more liberal departure from the general rule so as to provide a more humane interpretation which results in equality and justice. The equitable interpretation of the Act will therefore remedy the rigidity caused by common law and statute.

It has been shown from the country study that regardless of the different patterns of distributing the deceased estate, there is need to allow the law of inheritance to fully reflect equality and justice where a person dies intestate. The interpretation of the law of inheritance in accordance with human rights principles has also been shown to be the basis upon which discriminatory practices can be removed. If the Intestate Succession Act is to be fully responsive to the societal needs, then judges need to interpret it with more discretion to allow it to reflect dynamic aspect of society.

6.2 RECOMMENDATIONS

Given that the majority of disputes over inheritance rights are resolved at the local customary level, any comprehensive access to these rights needs to take greater account of informal justice systems and actors. Overlooking such systems will not change problematic practices existing in customary laws and will undermine access to inheritance rights.¹ Involvement of community leaders from the beginning of activities is important in order to support changes in traditional norms and customary laws. This will allow cases to be resolved with the aim of creating peace and reduce on the creation of division within the family.

There is need for training and sensitization in gender and human rights. The formal justice centres need to create awareness and change perceptions towards customary law and help to remove the weaknesses in traditional justice delivery systems if any. Ideally, this requires a

¹ Laurel L. Rose, “ *Children’s property and inheritance rights and their livelihoods: The context of HIV and AIDS in Southern and East Africa*” (2006):25 www.lsp@fao.org (accessed 7th December, 2011)

vibrant movement of legal and Para-legal NGOs, but even with that ‘while formal rules can be changed overnight, informal norms change only gradually.’ And the bottom line is that proactive legal change can only go as far as society is prepared to accept.”² The informal norms or customary practices cannot be changed rapidly to remove any discriminatory aspects as the consequences may be detrimental and lead to complete change of customary law of inheritance. There is also need to conduct a legal review of the Act to ensure that it reflects parliaments intention of having reasonable and unified customary law of inheritance.

It has been established that the manipulation of customary law practices led to discriminatory practices mostly against women and children. The manipulation of customary law led to property grabbing that left the rightful beneficiaries leaving them destitute especially if land forms part of the deceased estate. There is need to have “an introduction of a proviso in terms of customary land where a surviving spouse should be deliberately allowed to stay on the land allocated to the deceased. There is also need to lobby the Royal Foundation of Zambia under the House of Chiefs to find a way of deliberately protecting surviving spouses and children in cases where the right to use of customary land is an issue.”³ Introduction of such a provision will protect women and children against the manipulated customary laws that are still being practiced in the country. This will have to be done in conjunction with sensitization programmes that will involve the local traditional leaders to educate people on the real customary laws of inheritance. This will help people demand the enforcement of their rights under that customary practice reducing the possibility of manipulation and property grabbing. The need for improved laws and enforcement of those laws also points to the need for more uniform interpretation of existing laws. This can be approached in part by training judges, magistrates, court officials, and law enforcement officers on succession law, and using

² Kaori Izumi, “Key Recommendations” *Women’s Property Rights and Livelihoods in the Context of HIV and AIDS* (25 to 27 January 2006): 25

³ Izumi, “Key Recommendations”(25 to 27 January 2006): 25

standard training manuals for this purpose.⁴ A guide or handbook on procedure in inheritance laws will help the courts to have a codified reference point to avoid misinterpretations to give effect to the unified customary law of inheritance. As already observed from the country study, interpretation and application of customary laws should be limited by the use of the human right principles. This will help to prevent the discriminatory practices of inheritance. If the Intestate Succession Act is not amended within the shortest period of time, there should be great emphasis on the need for judges to observe the duties placed on them as interpreters under equity. This means that judges must exercise discretionary interpretation to unique circumstances that do not fall within the ambits of the general law or where its application would cause an unjust result.

There is also need for a separate court that will specialise in family law matters and *inheritance. This court should comprise of adjudicators that will have a special mandate to fully assess all matters governing inheritance under customary law so that it is interpreted rightly.*

6.3 CONCLUSION

It has been shown that there is need to have an equitable interpretation of the Intestate Succession Act. This is as a result of the fact that the Act has not fully solved the mischief for which it was intended to remedy. The interpretation of the Act in an equitable manner will help to ensure that all dynamic aspects of society are taken into consideration for a just result in the area of inheritance. This will ensure that the Act is more acceptable and applicable on the ground.

⁴Kaori Izumi, *Protecting Women's Land and Property Rights in the Context of AIDS* (FAO, 2009):25-26

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