

MIDLANDS STATE UNIVERSITY



FACULTY OF LAW

A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF A BACHELOR OF
LAWS HONOURS DEGREE

RESEARCH TOPIC:

**INTESTATE SUCCESSION AND THE SPOUSAL RIGHT TO THE MATRIMONIAL
HOME IN ZIMBABWE**

SUBMITTED BY

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DECEMBER 2018

DECLARATION

I **TARISAI EUNICE KAMEMA**, do hereby declare that this dissertation is the result of my investigation and research, save to the extent indicated in the acknowledgements, references and by comments included in the body of the research, and that to the best of my knowledge, it has not been submitted either wholly or in part thereof for any other degree at any other University.

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APPROVAL FORM

The undersigned certify that they have read and recommended to the MIDLANDS STATE UNIVERSITY for acceptance, a dissertation entitled: **INTESTATE SUCCESSION AND SPOUSAL RIGHT TO THE MATRIMONIAL HOME IN ZIMBABWE**, submitted by TARISAI EUNICE KAMEMA in partial fulfilment of the requirements for the award for the Bachelor of Laws (Honours) Degree.

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DEDICATIONS

To my beloved boys MOOSA and SHANE

ACKNOWLEDGEMENTS

I would like to acknowledge my appreciation to DR ROSALIE KUMBIRAI KATSANDE, my supervisor of the dissertation for her invaluable advice and expeditious feedback on my research. She taught me more than I could ever give her credit for. I am also indebted to my colleagues and fellow classmates for their moral support and encouragement throughout the course of the study.

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CHAPTER 1

1.1 INTRODUCTION

Gender equality is a fundamental principle of the democracy¹. Zimbabwe has a dual legal system² in which the general law and customary law are applicable in inheritance and succession matters³. The inheritance pattern is determined by the marriage regime whether one is married under customary law or general law⁴. Intestate inheritance under the general law is governed by Section 3(A) of the Deceased Estates Succession Act⁵, which provides for the surviving spouse and children as the major beneficiaries of the estate. The surviving spouse is entitled to inherit the house in which he or she lived “immediately before” death of the deceased.

It is trite to note that before the Amendment 6/97, inheritance of Africans who were married under civil rights were governed by customary law⁶. The male primogeniture rule was dominant under customary law and a widow had no capacity to inherit from her husband’s estate and hence she could not be appointed intestate heir⁷. Stewart⁸ describes the inheritance as follows, ‘the intestate estate of a deceased African male would go to his eldest son as his heir or in the absence of a son to the nearest male

¹ Section 3(1)(g) of the Zimbabwean Constitution (No. 20 Amendment of 2013)

² Section 89 of the Lancaster House Constitution as read with Section 192 of the 2013 Constitution.

³ Section 68G (1) (a) customary law applied to a person who, at the date of his death, was married in accordance with customary law; and

(b) the general law of Zimbabwe applied to a person who, at the date of his death, was married in accordance with the Marriage Act [*Chapter 5:11*] or the law of a foreign country, even if he was also married to the same person under customary law.

⁴S,Chirawu“*Principles of the law of succession in Zimbabwe: incorporating the women’s rights perspective*”WLSA,HARARE,2015,1

⁵ Deceased Estates Succession Act (Chapter 6:02)

⁶ Section 13 of the African Marriages Act (Chapter 238) which provided that the marriages solemnised by Africans in terms of the Marriages Act does not affect the property of the spouses, which shall be disposed, unless by a will, shall be disposed according to African law and custom

⁷*Murisa v Murisa* SC 41-92

⁸ J.E, Stewart,“ *The quiet revolution in Women and Law in Southern Africa Research Project*”, working paper No.5,page 9

relative of the deceased'. The then male heir inherited immovable property in his personal capacity and was only supposed to provide alternative accommodation and maintenance to the widow and dependants⁹. This therefore means that the heir had real rights in the property in question and was entitled to deal with the property the way he deems fit¹⁰. It is in this context that the widow and surviving children had no right to continue staying at their matrimonial home.

In light of the foregoing, the dissertation endeavours to establish that despite the significance of the Amendment 6/97¹¹ which introduced Section 3(A) of the Deceased Estates Succession Act¹² in giving the surviving spouse the right to inherit the matrimonial house, it still remains of little, or of no any practical value to the surviving spouses who would be on separation or who would have been living apart at the time of death of the spouse. This is because the inheritance is not automatic it is preceded by a number of cumbersome procedures in respect of proving that she lived in the house immediately before death. Further, it is argued that the right is given by one hand and taken by the other. The dissertation focussed on the effectiveness of the state's attempts to correct injustices that are perpetuated in the pretext of custom and traditions with regards to the concept of gender equality.

The research therefore sought to examine the Zimbabwean law on intestate succession in relation to the protection offered by Section 3(A) of the Deceased Estates Succession Act¹³. It further evaluated the protective measures, their applicability, effectiveness and their conformity to the constitutional provisions, international conventions and treaties to which Zimbabwe is a party.

⁹ *Masango v Masango* SC 66-86

¹⁰ Section 71 of the constitution

¹¹ Amendment 7/97 of the Administration of Estates Act (Chapter 6:01)

¹² Deceased Estates Succession Act (Chapter 6:02)

¹³ Deceased Estates Succession Act (Chapter 6:02)

1.2 BACKGROUND OF THE STUDY

The dissertation explored how, upon dissolution of marriage by death, widows often suffer in the hands of law in the name of customs and customary law in breach of their right to inheritance. The dual legal background has seen personal laws being governed by customary law which evolves in patriarchal customs whose discriminatory effects against women were protected by the contradictions in the Lancaster house constitution¹⁴.

Section 23 (1) of the Lancaster house constitution outlawed discrimination on the basis of gender and on the contrary section 23 (3) allows it at customary law in matters of family to do with marriage, divorce and inheritance. This provision meant that the old constitution recognized both laws to apply at the same level without hierarchy. This constitutional provision laid the basis of inequality in that the constitution held that application of customary law shall not be *ultra-vires* the Constitution. It is common cause that there were no checks and balances or harmonization of these two systems considering that gender equality was not a known feature under customary law. This provision was purely discriminatory against women.

The 2013 Constitution clearly lays a framework for equality in marriage especially through non-discrimination clause in section 56 and Section 26 (d) which states that the state should put in place necessary measures to ensure that upon dissolution of a marriage whether through death or divorce, provision is made for the necessary protection of any children and spouses;¹⁵ and section 80 (3) stipulates that all laws, customs, traditions and cultural practices that infringe on the rights of women

¹⁴ The Constitution (1980)

¹⁵ Section 26 (d) Constitution of Zimbabwe

conferred by the Constitution are void to the extent of the infringement¹⁶. It should also be noted that at the time of writing the laws on inheritance have not yet been aligned to the 2013 Constitution.

The Constitution in line with the international human rights instruments enshrines marriage rights, setting a platform for law reform which reflects women's rights. Thus it provides a background against which legal reforms are necessary in Zimbabwean law, and an opportunity to meet international standards in women's rights. The research examined inequalities in inheritance laws and shows the weaknesses in relation to rights of women upon dissolution of marriage by death. This allows for an informed re-alignment of the Deceased Estates Succession Act¹⁷ to the Constitution.

1.3 PROBLEM STATEMENT

Zimbabwe is party to the Convention on the Elimination of All forms of Discrimination against the rights of Women (CEDAW), which generally provides general guidelines on non-discrimination and equality. Article 21 of the AU Protocol to the African Charter on Human and People's Rights on the rights of Women in Africa and Article 10 (c) of the SADC Protocol on Gender and Development give a widow the right to equitable share in the inheritance of the property of her husband and a right to continue living in the matrimonial house. Section 26(d) of the Constitution provides that in the event of dissolution of a marriage by death, provision should be made for necessary protection of any children and surviving spouse. Chirawu¹⁸ states that Zimbabwe has addressed the right of the spouse to live in the matrimonial home through the Administration of Estates Amendment 6/97. The amendment was

¹⁶ Section 80 of the Constitution

¹⁷ Deceased Estates Succession Act (Chapter 6:02)

¹⁸S,Chirawu (n4)p5

incorporated in the Deceased Estates Succession Act ¹⁹ through Section 3A. The problem this dissertation seeks to address is the restrictive interpretation of the phrase, “lived immediately” before death as it poses potential violations or disinheritance of the surviving spouse.

1.4 RESEARCH AIMS AND OBJECTIVES

- To assess theories of equality and non-discrimination as they relate to inheritance and the matrimonial home.
- To critique provisions of Section 3(A) of the Deceased Estates Succession Act in light of International Human Rights Standards and the Constitution.
- To analyse whether the provisions comply with the standards of best practices.
- To recommend possible ways of ensuring the right to inherit matrimonial house is guaranteed and easily available to a surviving spouse.

1.5. METHODOLOGY

The research methodology of this dissertation was restricted to desktop research.

The following sources were used;

- a) Leading textbooks, legislation, journals and scholarly articles
- b) Case authorities, given that there is a plethora of case law on how the courts have interpreted the phrase “lived immediately” before death.
- c) International Conventions
- d) Internet sources

¹⁹ Deceased Estates Succession Act (Chapter 6:02)

1.6 JUSTIFICATION

Studies have shown that there is a continued violation of widows' inheritance rights in Zimbabwe despite, reforms in inheritance legislation. Therefore, the research is useful because apart from exploring the reasons for continued violations of widow inheritance rights it will be useful to;

1. Legislators as it will guide them when re-aligning the Deceased Estates Succession Act to the 2013 Constitution.
2. Policy makers in particular Gender and Development commission to formulate policies that will seek to protect and safeguard the inheritance rights for widows married under general law on separation.
3. Non-Governmental Organisations, Civil Society organisations and women groups such as Women and Lawyers in Southern Africa (WLSA) and human rights Organisations to advocate for Constitutional and legal reforms.

1.7 LIMITATIONS

The research is limited to the consequences of intestate succession of a spouse married under General law with regards to the matrimonial home. In developing the theoretical framework the research would examine how the matrimonial home has been dealt with in the past, by exploring how the courts have interpreted the phrase "lived immediately" before death.

1.8 SUMMARY OF CHAPTERS

Chapter 1

This chapter gives an introduction and background to the study, statement of the problem, an outline of the research aims and objectives, the research methodology as well as a synopsis of chapters.

Chapter 2

This chapter focus on theories of equality and non-discrimination. It will further highlight the difference between formal and substantive equality. Section 56 (1) of the Constitution will be analysed with regards to the right to inheritance of the matrimonial house by a surviving spouse.

Chapter 3

This chapter will analyse the International and constitutional provisions and case law. It will critique the provisions of Section 3(A) Deceased Estates Succession Act, “lived immediately” before death. It will also provide a platform for the analysis of the current position on the right to matrimonial house in light of the purpose of the Act, whether it accords with such purpose.

Chapter 4

This chapter gives a comparative analysis of other jurisdiction as to how they had given effect to the provisions of the International instruments with regards the right to remain in the matrimonial home upon dissolution of a marriage by death. It will further give a critical analysis as to how the courts have interpreted the phrase “lived immediately” before death ,and how the phrase negatively impact on the rights of the surviving spouse.

Chapter 5

This Chapter will conclude the study and advance some recommendations aimed at addressing the problems that militate against the proper and effective exercise of the right to inheritance of the matrimonial house by the surviving spouse.

CHAPTER TWO

The right to equality and non-discrimination vis-a-vis the right to inheritance of the matrimonial home

2.1 Introduction

The scope of this chapter is to analyse the right to equality and non-discrimination in light of the right to inheritance of the matrimonial home. It will define and distinguish the forms of equality. The historical background of the right to equality and non-discrimination under the Lancaster House Constitution will be provided. The chapter will highlight the progressive developments which were ushered in by the 2013 Constitution and how it lays a legal platform for law reform with regards to the protection of the right to inheritance.

After establishing the essential background it will then focus on whether the right to equality is protected and realised with regards to inheritance of the matrimonial house under the new order .It will further evaluate the form of equality in the Zimbabwean context and whether the legislative framework on intestate succession with regards to matrimonial home promote the right to equality and non-discrimination in relation to people who has been on separation awaiting dissolution of their marriage.

2.2 Formal and substantive equality

Currie and De Waal²⁰ distinguish formal and substantive equality as follows; “Formal equality means the sameness of treatment, the law must treat individuals in like circumstances alike and whereas substantive equality requires the law to ensure

²⁰ I, Currie and J. De Waal, “*Bill of Rights Handbook*”, (5th Edition), Juta and Company Ltd, Cape Town, 2005, 232

equality of outcome and is prepared to tolerate disparity of treatment to achieve this goal". Fredman²¹ concurs with the given definition but, she further observes that this is only an abstract view of justice which does not take into account existing distribution of wealth and power. She then proposes that equality should be based on a more substantive view of justice, which concentrates on correcting misdistributions. Equality should aim at achieving the redistributive goal of alleviating disadvantage, the liberal goal of treating all with equal concern and respect²².

2.3. Equality and non-discrimination in the Zimbabwean context

Non- discrimination, together with equality before the law and equal protection of the law, constitute the best principle relating to protection of human rights²³. Equality and gender equality are some of the constitutional founding values and principles²⁴. The Constitution therefore commits to the goal of achieving equality. It strives on creating a democratic society which is based on openness, justice, human dignity, equality and freedom. Section 56 guarantees that the law will protect and benefit people equally and provides for a prohibition of unfair discrimination on various grounds ²⁵ *inter alia*; culture, sex, gender, marital status and economic or social status. To this end, special measures may be taken to ensure the protection and advancement of people who have been disadvantaged by discrimination in the past²⁶ and those measures are for genuine cause and should not be regarded as discrimination. In terms of Section 56(4)²⁷ for a person to be regarded as having been treated in a discriminatory manner the test is whether or not he has been subjected directly or

²¹ S, Fredman ,(2011), " *Clarendon Law Series: Discrimination Law*" 2nd Edition, Oxford University Press, NewYork,p2

²² Fredman(n 27)

²³ CCPR General Comment No.18 :Non-Discrimination of 1989 p1

²⁴ Section3 (1)(f) and (g)

²⁵ Section 56 (3)

²⁶ Section 56 (6)

²⁷ Section 56(4) of the Constitution

indirectly to a condition, restriction or disability to which others are not subjected or other people have directly or indirectly a privilege or advantage to which he is not accorded.

In African law and custom, property acquired during a marriage becomes property of the husband whether acquired by him or his wife²⁸. The proprietary rights of Africans regardless of a marriage in terms of the Marriages Act, customary practices continued to apply to both movable and immovable property in the estate²⁹. The court in *Jenah v Nyemba*³⁰ highlighted the controversy as to the ownership of property acquired by married women by means of income earned from employment an activity unknown to traditional African Society. It was the court's conclusion that although logically and equitably the property should be classified as *maoko* property and it should belong to the women, the court noted that this view is not universally shared by African men.

Before the enactment of the Legal Age Majority Act of 1982³¹, women were regarded as minors and hence property was registered in their husband's names. Property law gives extensive rights to a person in whose name property is registered in the Deeds Registry. The owner of the property has real rights in terms of section 71 of the Constitution and Section 2 of the Deeds Registry Act³² to deal with his property as he deems fit. The default position is thus upon separation the husband would remain staying at the matrimonial house. If he dies before the finalization of the divorce proceedings the wife would still qualify as the surviving spouse and fail the

²⁸*Jenah v Nyemba* 1986 (1) ZLR 138(S)

²⁹ Stewart (n8) page 6

³⁰*Jenah v Nyemba*, supra

³¹ Section 15 of the General Laws Amendment Act (Chapter 8:07)

³² Deeds Registry Act (Chapter 20:05)

second rung on whether she lived immediately before death of the deceased as was illustrated in the case *Munangatire v Chikaka and others*³³.

The South African Constitutional Court in the case *Harksen v Lane*³⁴, held the following factors to be used in determining whether discrimination has unfair impact or not;

- (1) The position of the complainants in society and whether they have been victims of the past patterns of discrimination. Differential treatment that burdens people in a disadvantaged position is more likely to be unfair than burdens placed on those who are relatively well off.
- (2) The nature of the discriminating law or action and the purpose sought to be achieved by it. An important consideration would be whether the primary purpose of the law or action is to achieve a worthy and important societal goal.
- (3) The extent to which the rights of the complainant have been impaired and whether there has been an impairment of his or her fundamental dignity.

It is beyond this backdrop that there is need to interrogate the historical background of equality and non-discrimination.

2.4. The historical and social context of the right to equality

The constitutional guarantee of equality must be interpreted contextually³⁵. This means that there is need to look at the historical background of the type of society that Zimbabwe once was before the 2013 constitution³⁶. The importance of the equality right under the Lancaster House Constitution should not be overemphasized as it lays the basis of the new order. The Patriarchal society and the legal framework

³³ *Munangatire v Chikaka and others* H/H 11/18

³⁴ *Harksen v Lane*³⁴ NO 1998 (1) SA 300 CC

³⁵ I, Currie and J. De Waal, " *Bill of Rights Handbook* " , (5th Edition), Juta and Company Ltd, Cape Town, 2005, 231

³⁶ Constitution of Zimbabwe

was based on inequality and discrimination against women. Women in Zimbabwe only achieved equal suffrage as recently as 1982 through the enactment of the Legal Age Majority Act of 1982. Although equality before the law was a major achievement, it soon became clear that it was far from sufficient to achieve genuine equality.

Gender discrimination was introduced in the Constitution in 1996 through section 23 of the Constitution Amendment (No.14) as a form of prohibited grounds of discrimination. On the contrary, the Constitution had a drawback clause as alluded to in the first chapter. The patriarchal society and the colonial background ensured that African women are deprived of economic means as under customary law property belongs to the husband³⁷. The enactment of Legal Age Majority Act brought in a number of contradictory judgements where some judges would give effect to the statute and some would apply customary law and all these judgments were *intra-vires* the constitution³⁸.

Section 3 (A) is one of the manifestation of inequality inherited from the past it therefore means that according to Currie and De Waal³⁹ Constitutional commitment to equality cannot simply be understood as a commitment to formal equality. The authors further point out that it is not necessary to remove sexist laws as this will result in a society that is formally equal but that is unequal in every other way. Section 17 (2) obliges the state to take positive measures to rectify gender discrimination and imbalances resulting from past practices and policies. Section

³⁷ *Jenah v Nyemba*, supra

³⁸ The Supreme Court held in the case of *Chinhowa v Magwende* 1987 (1) ZLR 138 that the Legal Majority Act had granted rights to females to inherit like their male counterparts, but this decision was overruled by the same court in *Vareta v Vareta* SC-126-90 and in *Magaya V Magaya* 1999 ZLR 100.

³⁹ I, Currie and J. De Waal (note 1 page 232)

26(c) and (d)⁴⁰ provides that there must be equality of rights and obligation of spouses during marriage and its dissolution, in the event of dissolution of a marriage, whether through death or divorce, provision is made for the necessary protection of any children and spouses. Section 80 (3) provides that, “all laws, customs, traditions and cultural practices that infringe the rights of women conferred by this constitution are void to the extent of the infringement”. It is trite to note that provisions of the Constitution ensure substantive equality which is committed on rectifying the historical disadvantages.

2.5 Right to the matrimonial home under section 3(A) of the Deceased Estates Succession Act

From the face of the provision a surviving spouse and children are the major beneficiary of the estate yet, there is a likelihood of disinheriting a spouse who was living apart at the time of the demise. Ncube⁴¹ posits that it is clear from the provision that a surviving spouse is entitled to inherit in a monogamous marriage but he also foresees difficulties with the formulation of the provision, with particular reference to “lived immediately” before death. Numerous hurdles hinder women’s ability to claim their rights to inheritance. Legislation is inadequate or inherently discriminatory, as well as interpretation which is inadequate to protect human rights.

In support of the above argument Tichangwa⁴² asserts that women suffer where the judiciary is ‘sexist and conservative and chauvinistic’. This lack of fixed legal rights is likely to affect women’s rights of claim to land they have developed and worked in

⁴⁰ 2013 Constitution

⁴¹W, Ncube”*Muddling in the Quicksands of Tradition and Customs and Skating Down the Slippery Slopes of Modernity: The Reform of Marriage and Inheritance Laws in Zimbabwe*”(1996) Volume 3, Zimbabwe Law Review: 12.

⁴² W,Tichangwa , “*Beyond in equalities women in Zimbabwe*”,Printpak printers ,Harare, 1998 p19

throughout the marriage and to bring into play customary law practices which disadvantages woman in regard to immovable property.

Chirawu⁴³ observes that there is a restrictive interpretation on the phrase, "lived immediately" before death. Hence there are potential violations or disinheritance of the surviving spouse due to restrictive interpretation of the provision. She further makes an analysis of section 26(d) which gives provision for the necessary protection of any children and spouses upon dissolution through divorce or death. It is her observation that the question now relates to the form of protection. She points out that the law of Zimbabwe as it currently stands has loopholes in the manner of protection afforded.

2.6 Conclusion

From the foregoing it can be said that the equality in the Zimbabwean Constitution is substantive in nature for it intends to take into account the disadvantaged groups due to past practices. Whilst Section 3(A) is formal equality as *prima facie* it provides this right to every surviving spouse either men or women. Given the historical background of the Zimbabwean society one would notice that the males under customary law are regarded as owners of property and it follows they are likely not to be affected by the condition under this provision. From the Constitutional definition of non-discrimination the condition that for a surviving spouse to inherit should have been living immediately before the person's death would not apply to them giving them an advantage or privilege over the woman in the same position. The provision does not stand the constitutionality test as it is in defiance of the non-discrimination clause.

⁴³ S, Chirawu(n5)

The following chapter will focus on the international, constitutional framework and existing jurisprudence in Zimbabwe with regards to Section 3(A) of the Deceased Estates Succession Act. It will further interrogate whether the legal framework of inheritance under testate succession poses challenges for the realisation of gender equality regard being had to the spouses who at the time of the death were on separation and living apart. The international treaties and conventions and the constitutional provisions which relate to this right would be dealt with. It will further highlight how the courts have interpreted the phrase in question.

CHAPTER 3

The legal framework on the right to inheritance of the matrimonial home and whether it is in conformity with the International and Constitutional Provisions

3.1 Introduction

The Constitution of Zimbabwe incorporates the international human rights framework and entrenches the significance of the treaties and conventions to which Zimbabwe is a party. Zimbabwe is a party to various treaties and conventions which deals with equality, non-discrimination and the right of a surviving spouse to the matrimonial home. These includes: Convention on the Elimination of All forms of Discrimination against the rights of Women (CEDAW)⁴⁴, African Union Protocol on the Rights of Women⁴⁵ and SADC Protocol on Gender and Development⁴⁶. These instruments will be analysed with regards to the right of a surviving spouse to the matrimonial home.

This chapter examines the legal framework on intestate succession in relation to the right concerned, starting with the statutory provision, thereafter the international and Constitutional provisions. The chapter would also analyse how the courts had interpreted the provision in question before and after the 2013 constitution. The question to be determined is whether such interpretation is compatible with the need to ensure the full realisation of the right to inheritance of the matrimonial home by a surviving spouse. It will further give a critical analysis as to how the courts have interpreted the phrase “lived immediately” before death ,and how the phrase negatively impact on the rights of the surviving spouse.

⁴⁴ 1981

⁴⁵ 2003

⁴⁶ 2003

3.2 The legislative framework and the right to inheritance of the matrimonial home

The right to inheritance of the matrimonial home is provided for in terms of Section 3(A) of the Deceased Estates Succession Act⁴⁷. A surviving spouse has the right to inherit the matrimonial home if he or she “**lived immediately**” before death of the other spouse. The customary law position which was alluded to in the first chapter was abandoned by Amendment 6/97 which abolished the primogeniture rule. The statutory Amendment brought in fundamental changes with respect to the right to inheritance for instance females has the equal right to inherit from their spouses and their parents. A reading of Section 3(A) shows that every surviving spouse has a right to inheritance as compared to the old position where inheritance was the preserve of the males only⁴⁸.

It is worthy to note that the statutory Amendment substantially altered the customary law position, but still retains some traditional connotations which disadvantage only females as shown in Chapter two. It indirectly discriminates against women who would have been leaving apart and on separation as they fail to fulfil the requirement of having been living at the house immediately before the person’s death. This is the drawback phrase that hinders surviving spouses on separation to have their right to the matrimonial home.

Ncube⁴⁹, fails to understand the rationale of such formulation and suggests it should have been formulated without reference to whether or not the surviving spouse resided in the matrimonial home. He also realises that it has not been easy to find a consistent, balanced, logical and equitable mean in the dual system. He then

⁴⁷ Deceased Estates Succession Act (Chapter 6.02)

⁴⁸ Magaya v Magaya, supra

⁴⁹ Ncube (46)

concludes that the result is half-hearted reforms which are derailed in the quicksand of traditions.

3.3 International provisions on inheritance of matrimonial home

Zimbabwe ratified CEDAW in 1981, which provides for general guidelines such as non-discrimination and equality. Article 1(f) of the African Union Protocol to the African Charter on Human and People's Rights on the rights of Women in Africa describes discrimination against women as, "any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or exercise by women regardless of marital status of human rights and fundamental freedoms in all spheres of life". Article 21 further gives a widow the right to equitable share in the inheritance of the property of her husband .A widow shall have the right to continue living in the matrimonial house. In the case of remarriage, a widow shall retain this right if the house belongs to her or she inherited it.

The SADC Protocol on Gender and Development⁵⁰ Article 10 (c) speaks to the widow's right to continue to live in the matrimonial house. Article 10(e) states that, 'a widow shall have the right to equitable share in the inheritance of her husband'. The United Nations Committee on the Elimination of Discrimination against women in its General Recommendation Number 21 on Equality in marriage and Family Relations stated that, '...women may receive a smaller share of the husband's or father's property .Often inheritance rights for widows do not reflect the principles of equal ownership of property acquired during marriage. Such provisions contravene the Convention and should be abolished. Zimbabwe has addressed the right of the spouse to live in the matrimonial home through the Administration of Estates

⁵⁰ Ratified in 2003

Amendment 6/97 but provision is being subjected to a restrictive interpretation of the phrase, "lived immediately" before death⁵¹.

3.4 The significance of the international legal framework on the right to inheritance

Customary International law is part of the law of Zimbabwe, unless it is inconsistent with the Constitution or Act of Parliament⁵². Treaties and conventions ratified, does not form part of the Laws unless incorporated into law through an Act of parliament⁵³. In light of this Section 34 of the Constitution obliges the state to domesticate all treaties and conventions to which Zimbabwe is a party. The Constitution further guarantees all the rights and freedoms are protected by providing for interpretation criterion which is consistent with customary international law⁵⁴. The interpretation in Section 46 (1) provides that when interpreting rights and freedoms the court or tribunal must take into account international law and all treaties and Conventions to which Zimbabwe is a party .Section 46(2) obliges a court, tribunal, forum or body when interpreting an enactment, and when developing common law and customary law to promote and be guided by objectives of the bill of rights.

3.5 Protection of the right to inheritance in the Constitution

The inheritance right is not enshrined in the bill of rights but inferred from section 26(d) which provides for state to take appropriate measures to ensure that, in the event of dissolution by death or divorce, provision is made for the necessary protection of any children and spouses. The court in *Madzara v Stanbic Bank Ltd and others*⁵⁵ discussed the effect of Section 26 (d) as part of the national objectives

⁵¹ Chirawu (n4) p 5

⁵² Section 326 of the Constitution

⁵³ Section 327 of the Constitution

⁵⁴ Section 326(2)

⁵⁵ *Madzara v Stanbic Bank Ltd and others* H/H 546/15

in the constitution which are designed to guide the state and all institutions in formulating and implementing laws and policy decisions. Materially it does not fall under the fundamental rights whereby the Applicant can say her rights have been violated. It is used to entice the state to take concrete action and measures on an issue that requires its intervention. The appropriate measures to be taken in anticipation of an event that may hamper equality or in the event of their being needed to affect equality.

Section 2 provides for constitutional supremacy⁵⁶ and any other law is measured against it. The Constitution has a comprehensive bill of rights which is non-exhaustive, in light of this Section 47⁵⁷ provides for the protection of any other rights which are not enshrined in the bill of rights as long as they are not inconsistent with the Constitution.

The equality and non-discrimination clause plays an important role in guaranteeing the right to inheritance. Section 56 of the Constitution provides that all persons are equal before the law and have a right to equal protection of the law. Section 56(2) provides for the right to equal treatment including equal opportunities in political, economic, cultural and social spheres. The Constitution safeguards the rights of women and provides that every woman has full and equal dignity of the person with men in all spheres. Section 17 mandates the state to promote full gender balance in Zimbabwean society and must take positive measures to rectify gender discrimination and imbalances resulting from past practices and policies⁵⁸.

⁵⁶ Section 2 provides that the Constitution is the Supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of its inconsistency.

⁵⁷ Constitution

⁵⁸ Section 17(2) of the Constitution

It is important to note that all laws including customary laws, customs, traditions and cultural practices which infringe the rights of women are invalid⁵⁹. The question which needs to be answered is whether section 3(A) affords the protection envisaged by section 26(d). The Constitutional, Supreme and the High court have inherent powers to develop the common law or the customary law, taking into account the interests of justice and the provisions of the constitution⁶⁰.

The current problem is that the statutes are not yet realigned to the Constitution and the provision is being interpreted restrictively in the presence of the framework which promotes and protects the rights of women, equality and non-discrimination. The challenge is based on the formulation of Section 3A which violates the constitutional right to protection of law as the phrase “ lived immediately” before death is conjectural and vague and prejudicial to the protection of the surviving spouse.

Chirawu⁶¹ appreciates that the Amendment 6/97 makes the surviving spouse the major beneficiary of the house if she was living at the house at the time of death but this contradicts with the right of children who also need to be protected.

3.6 How courts had interpreted the phrase’ lived immediately’ before death

In compliance with the best practices Zimbabwe amended the Deceased Estates Succession Act⁶² as discussed in the previous chapters.

The provisions of section 3A have been subject to restrictive interpretation as testified in a plethora of case law where the spouses fail to fulfil the requirement of “lived immediately” before death and lost their matrimonial home to persons who never contributed to its existence. Justice Chiweshe on page 5 of the cyclostyled

⁵⁹ Section 80(3) of the Constitution

⁶⁰ Section 176 of the Constitution.

⁶¹ Chirawu(n4) p,7

⁶² Deceased Succession Act (Chapter 6:02)

judgment in *Chimhowa v Chimhowa and others*⁶³ said that, the chief driver of the amendments to the law of inheritance was a desire to protect widows and minor children from property grabbing and to protect them against deprivation of their domestic premises (the underline is mine). However, the amendment does not adequately protect the rights of children and women on separation because there is a restrictive interpretation on the phrase ‘**lived immediately**’ before death⁶⁴ for obvious reasons that women on separation would be living apart from their spouses with relatives or rented accommodation awaiting the finalization of divorce proceedings.

In *Dzomonda and Others v Chifamba and others*⁶⁵ the court said that, the thrust of the Act is spouse centred and a spouse has a right to inherit the household goods and effects as well as the domestic premises. The court went further to explain that inheritance by children depends on the size of the estate and where the marital home is the only asset it should go the surviving spouse. This interpretation seems to be contrary to the spirit of the 2013 Constitution in terms of Section 26(d) which obliges the state to make provision for both the surviving spouse and the children. These are some of the challenges faced under the existing inheritance regime with the children are not adequately protected with regards to the matrimonial home.

It is important to note that a wife on separation awaiting divorce proceedings and living separately from the husband is likely to suffer and fail to satisfy the requirement of living immediately before death. In *Munangatire v Chikaka and*

⁶³ *Chimhowa v Chimhowa and others* H/H 183/12

⁶⁴ Chirawu (n4)p5

⁶⁵ *Dzomonda and others v Chifamba and others* 2014 (2) ZLR 473

*others*⁶⁶, the Applicant was on separation and the husband was co-habiting with his mistress and logically there was no possibility that she would have been expected to be staying at the matrimonial home. The same scenario presents itself in the case of *Ndoro v Ndoro*⁶⁷ the spouse had instituted divorce proceedings and they were living apart at the time of the demise. The widow was staying in Kadoma where she was employed. The court deliberated on whether or not she visited the premises. One would wonder why the Court would expect her to be staying or visiting the premises in question when they were on separation. The court went further to give probative value to the summons as evidence confirming that they were on separation and that she was no longer staying with the husband. With due respect the inquiry was irrelevant to the real issues before the court. This only shows how the courts are restrictively interpreting the provision to suit their own perceptions in the veil of interpretation.

On the contrary, in *Chirowodza v Chimbari and others*⁶⁸, the widow was staying in the United Kingdom and used to visit the house before instituting the divorce proceedings. The court considered that she used to visit the house and she was awarded the matrimonial house. The question would remain what was the intention of the lawgiver. In this case the court did not consider the summons as evidence of separation as proceedings had been instituted. The restrictive interpretation is prejudicial to surviving spouses and too much court discretion would fly across the tenets of non-discrimination and fairness underlying a democratic society based on openness, justice, human dignity, equality and freedom⁶⁹.

⁶⁶ *Munangatire v Chikaka and others* H/H 11/18

⁶⁷ *Ndoro v Ndoro* H/H 198/12

⁶⁸ *Chirowodza v Chimbari and others* H/H 725

⁶⁹ Section 56 (5)

Section 46⁷⁰ provides that the courts are given an obligation to develop customary and common law and must be guided by rights and freedoms of the bill of rights which includes gender equality. With the standard in law having been for a long time essentially male, almost every aspect of the law when scrutinised with gender lenses will fall foul of gender-ness in its effects⁷¹.

From the foregoing it has been shown that a number of widows are the one who are affected by this law as on the face of it does not discriminate on the grounds of sex. The feminists have articulated the problem ,this is a “gender neutral law that encounters a gender specific reality” the court should therefore recognise the inappropriateness of this aspect of the law of property rights applied to a matrimonial context and hold a gendered reality that emerges unconstitutional⁷². Section 3A discriminate against women, men have always been regarded as owners of property. This explains why all the victims from the cases cited are widows.

If the divorce had been finalised regard would have been had to the provisions of Section 7 of the Matrimonial causes Act and consider her direct and indirect contribution but in this case contribution was never considered. This provision is in contravening of Section 80 (3) and also in terms of Section 56 (1) the constitution.

3.7 Conclusion

The 2013 Constitution lays the legal framework for reform of the inheritance laws especially through the non-discrimination clause, the extensive bill of rights which is non-exhaustive, judicial activism in developing customary and common law, the interpretive criterion which allows judges to consider foreign law, international Customary Law, international treaties and conventions to which Zimbabwe is a party

⁷⁰ Constitution of Zimbabwe

⁷¹ *Madzara v Stanbic Bank Ltd and others* H/H 546/15

⁷² *Madzara* , supra

and the domestication of those treaties and conventions. Section 3(A) of the Deceased Estates Succession Act does not afford the protection envisaged by the Constitution in its national objectives as it gives a condition and a restriction which disadvantage widows and it therefore follows the provision is discriminatory in nature.

The following chapter would then compare the legal framework in respect of the right to inherit the matrimonial home in other jurisdictions which include Ghana and Zambia. The purpose is to find out how these countries gave effect to the international instruments to this regard.

CHAPTER 4

Comparative analysis of Zimbabwe, Zambia and Ghana in respect of spousal right to the matrimonial home

4.1 Introduction

Zimbabwe, Zambia and Ghana are party to the treaties and conventions which promote and protect against non-discrimination, equality and a right to the matrimonial home by a surviving spouse. These conventions provide a benchmark on which the national legislation can be assessed. It is in this context that the succession laws of Zimbabwe, Zambia and Ghana would be assessed against the international legal framework.

The objective of this chapter is to evaluate and analyse the legal framework in respect of the right to inherit the matrimonial home in the aforementioned jurisdictions. Analysis is based on how these states have given effect to the provisions of the International instruments with regards to the right to inherit.

4.2 Overview of inheritance laws in Zambia

According to Goldham⁷³ at the time of independence succession laws in Zambia were to the effect that estate of an African who dies intestate was administered according to his customary law. Zambia preserves the dual legal system when it comes to intestate succession. This a system of dualism in which English Law exists side by side with customary law⁷⁴. The learned author further explains that, the situation which was subsisting of property grabbing was an inhuman treatment to the widow and children so there was need for a law, which limit, certain customary

⁷³ S.Goldham, "The law of succession in Zambia: Proposal for reform" *Journal for African Law*, Vol,27 No.2, 1983,p162

⁷⁴ Goldham(n74)p163

practices. This then led to the enactment of the Intestate Succession Act Number 5 of 1989. The Act applies to all persons living in Zambia at their time of death and only in circumstances where customary law would have applied if there act has not have been passed. The Act was a breakthrough for women's rights in Zambia. The purpose of the Act as outlined in the preamble is to adequately provide for financial and other provisions for the surviving spouse, children, dependants and relatives of the person who would have died. Property grabbing was made a criminal offence in terms of Section 14 of the Act⁷⁵.

4.3 The spousal right to the matrimonial home in Zambia

In terms of Section 9⁷⁶ where the estate includes a house, the spouse and children, shall be entitled to that house. But where there are more than one surviving spouses or children or both, they shall hold the house as tenants in common. Section 9(b) provides that a surviving spouse shall have a life interest in that house which shall determine upon remarriage. However, where the estate includes more than one house, the surviving spouse or children or both shall determine which of the houses they shall occupy and the remainder shall form part of the estate.

4.4 Overview of inheritance laws in Ghana

Ghana ratified CEDAW and the African Charter on Human and People's rights. In an attempt to remedy discriminatory inheritance laws in their legislation, Ghana became the leading nation in the struggle for inheritance rights in Africa⁷⁷.

Ghana passed, in 1985, the Intestate Succession Act (the Provisional National Defense Council, or PNDC, Law 111) .The effect of the law was to provide for uniform

⁷⁵ Intestate Succession Act (Chapter 59)

⁷⁶Section 9 of the Intestate Succession Act (Chapter 59)

⁷⁷ A,M, Richardson, "Human Rights Brief" vol 11,ISS 2 [2004], Article 6,<http://digitalcommons.wcl.american.edu/hr/brief,p19-22> accessed on 13/09/18

intestate succession law that will be applicable throughout the country irrespective of the type of marriage whether statutory or customary law. It was also aimed recognising a surviving spouse as the major beneficiary of the estate of the deceased and granting concrete rights to spouses to the property acquired during their lifetime. The Act states that wives and children may remain in the home as tenants-in-common until the widow remarries or dies.

In 1992 the provisions of the Intestate Succession Act were enshrined in the bill of rights with clauses addressing the property rights of spouses. Article 22 of the Ghana Constitution provides that spouses shall have equal access to property jointly acquired during marriage. Article 22 (a) states that, spouses shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having left a will. It is trite to note that the provision explicitly provides for women's inheritance rights with no exceptions that exist for the application of customary law in Ghana.

4.5 Spousal right to matrimonial home in Ghana

The term matrimonial home is defined in the Section 16(2)(a) as the house or premises occupied by the deceased and the surviving spouse or child or all as the case maybe, at the time of the death of the deceased. Section 4 of the Intestate Succession Act⁷⁸ provides that spouse and children or both are entitled to the one house. Section 9 provides that the spouse and children are entitled to the matrimonial house and they shall hold it as tenants-in-common. Section 9 (b) then explains what will happen if the estate includes more than one house. The surviving spouse or children or both shall determine which of the houses shall devolve to such

⁷⁸ Intestate Succession Act Law 1985 (PDNC 111)

surviving spouse or children or to both. If it is to both then they shall hold such house as tenants-in-common. The surviving spouse and children has an exclusive right to choose any one of those houses except for any reason the surviving spouse or children or both are unable or unwilling to make such choice or there is a disagreement then the High Court shall, upon application made to it by the administrator of the estate, determine which of the houses shall devolve to the surviving spouse or children or both of them. Section 17 makes it an offence to eject a surviving spouse and children from their matrimonial home.

4.6 Zimbabwe's succession laws in light of the international legal framework and best practices

From the foregoing, Ghana is the leading country in implementing the conventions by enshrining explicitly the right to inheritance in the bill of rights⁷⁹. The operative Act makes the surviving spouse and children the major beneficiaries to the matrimonial house. A surviving spouse does only inherit the house in her personal capacity when there are no children. Where there are children they are both entitled to the matrimonial home as tenants-in-common. This approach in the Act is similar to which subsist in Zambia although in Zambia the right to inheritance is not a constitutional right. The approach protects both the surviving spouse and children from being homeless and avoids a situation discussed in the case of *Chinhowa and others v Chinhowa and others*⁸⁰ where if the house is inherited by the surviving spouse in her personal capacity is free to deal with it in any way. This means that the house is not protected and also observations by the judge that in situations where the surviving spouse re-marries and he or dies, then the now surviving spouse would inherit the matrimonial house as his or hers and this does not protect the best

⁷⁹ Article 22 of the Ghana Constitution

⁸⁰ *Chinhowa and others v Chinhowa and others* H/H 183/12

interests of the child as envisaged by section 81 and section 26(d) of the Constitution. To this end Chirawu⁸¹ posits that the situation depicted is a reality where immovable property may end up being removed from the original family who owned it. This means therefore that Section 3(A) does not consider the best interests of the child to avoid children from being homeless.

The purpose of the amendment was meant to protect the matrimonial home and household goods and effects from property grabbing and leading to both the children and surviving spouse from being homeless and destitute. The legal framework in Zambia and Ghana are not subject to a restriction which would mean a surviving spouse is guaranteed to exercise this right as compared to Zimbabwe where a surviving spouse on separation would fail to satisfy that she lived in the house immediately before death of the spouse.

Zambia and Ghana legal framework have a provision for the surviving spouse, children or both to choose a house to inherit where the estates have more than one house, as compared to Zimbabwe where it is only to the matrimonial home. In this context Ncube⁸² posits a number of scenarios such as;

- i) What if parties lived in a rented accommodation while leasing out their matrimonial for economic reasons.
- ii) What if the deceased died while surviving spouse were leaving apart and deceased occupied the matrimonial house while the surviving spouse lived elsewhere

⁸¹ Chirawu (n4),p86

⁸² Ncube(46)

.This means such interpretations would be an affront to the protection envisaged by section 26(d) and the purpose of the Amendment. Therefore, there is need to have provisions as in the Ghana Constitution and Act as well as Zambia's Succession Act.

4.7 Conclusion

The chapter looked at the legal framework in other jurisdictions in the region who are state parties to the conventions and treaties which deals with the spousal right to the matrimonial house and analysed how they have implemented the guidelines to protect the surviving spouse and the children from property grabbing and against being homeless.

Section 3(A) attempted to make the surviving spouse and children the major beneficiaries of the estate of the deceased. However, the provision fall short on the protection of the children when it comes to the matrimonial home which is contrary to the provisions of the constitution which intends to secure the best interests of the child.

The following chapter would focus on the conclusions and recommendations on how to secure the right to the spousal right to the matrimonial home and balancing the interest of the child at the same time. The reforms that should be considered on re-aligning the Deceased Succession Act to the Constitution to ensure the rights of the surviving spouse on separation and children are guaranteed.

CHAPTER 5

Summary and Recommendations

5.1 Introduction

The study was based on a proposition to the effect that, spousal right to inheritance of the matrimonial home is illusory with regards to widows on separation. The research sought to examine the adequacy of intestate succession law in protecting the right in question. The research further sought to determine whether the Zimbabwean intestate succession law is in line with the constitution, regional and international standards of best practices. It further sought to highlight how other jurisdictions have given effect to the international instruments in relation to the right of inheritance of the matrimonial home.

The research showed the problems faced by widows on separation in inheriting the matrimonial house as they fail to fulfil the requirement of having lived at the house immediately before death of the other spouse. The study through case law has shown that in spite of a constitutional framework which has a purposive interpretation widows on separation has failed to claim this right through the courts as the courts are restrictively interpreting the provision in question. It is beyond this backdrop that reforms should be made to the intestate succession law in order to meet human rights goals domestically and internationally. Laws that disadvantage and discriminate against women should be eliminated in order to fulfil the objectives and spirit of the constitution⁸³.

This chapter will summarise the findings of the study and advance recommendations based on the findings of necessary reforms, aimed at addressing the problems that

⁸³ Section 2, 17,56 and 80 (3) of the Constitution

militate against the proper and effective exercise of the right of inheritance of the matrimonial house by the surviving spouse on separation.

5.2 Summary of findings

From the objectives outlined in Chapter 1, the following conclusions are drawn:

5.2.1 Legal framework governing intestate succession under a civil marriage

It is submitted that Section 3A of the Deceased Estates Succession Act scrutinized with gender lenses fall foul of gender-ness in its effects and therefore discriminatory.

This is so because with the standard in law having been for a long time essentially male, males being regarded as owners of property the requirement that for a surviving spouse to inherit the matrimonial home he or she should have '**lived immediately before death**' applies mostly to widows as compared to their counterparts. The provision does not guarantee adequate provision envisaged by section 26(d) of the constitution to both the children and widow on separation with regards to the matrimonial home.

It is concluded that in giving effect to the constitutional objectives in section 26(d) the intestate succession law should therefore guarantee the right of the surviving spouse and the best interests of the children to the matrimonial home. In light of the interpretive criterion in terms of the Constitution the courts should relax and disregard the requirement of having lived immediately before death in giving effect to the purpose and intent of the legislation. The study has shown that intestate succession was amended to make the surviving spouse and children the major beneficiaries of the deceased estate and at the same time dealing away with property grabbing from marauding relatives who would not have contributed to the purchase of the property. Courts should put more effort in ensuring a surviving

spouse and children are not left homeless due to their narrow interpretation in light of the human right oriented constitutional framework.

5.2.2 Constitutional provisions on the spousal right to the matrimonial home

The right to inheritance is not enshrined in the bill of rights. The Constitution in Section 26(d) obliges the state in the event of dissolution of marriage by death to ensure that provision is made for necessary protection of spouses and children. This therefore means that intestate succession law should consider the interests of the surviving spouse and children with regards to shelter. The best interests of the child need to be considered as envisaged by section 19 and 81 of the constitution. This research shows that courts are restrictively interpreting Section 3A and there is no provision for the matrimonial house as shelter when the surviving spouse was on separation and living apart at the time of the demise.

5.2.3 Standards of best practice from other jurisdictions

The study examined how Zambia and Ghana gave effect to the international instruments in protecting the right to inheritance and the right to continue staying at the matrimonial home by a surviving spouse. The study canvassed that the approach in Zimbabwean law falls short of regional and international standards as the law discriminates against woman. The research looked at the Ghana constitution which enshrined the right to inheritance in its bill of rights⁸⁴. It goes further to examine the general law of application in intestate succession and found out that the Act provides that the surviving spouse and children are entitled to the matrimonial house. If there are no children then the surviving spouse would then inherit the home in her personal capacity. Where there are children then they stay as tenants-in-common thereafter, the house would be determined upon re-marriage or death of the spouse.

⁸⁴ Article 22 of the Ghana Constitution

Where there is more than one house in the estate the surviving spouse and children would choose the house they want to live in. This is a progressive development rather than the restrictive interpretation of the matrimonial house in Zimbabwe where a surviving spouse is only entitled to the matrimonial house they were staying immediately before death. The Zambian constitution does not have the right to inheritance in its bill of rights but the Act is similar in all material respects to that of Ghana.

5.3 Recommendations

From the foregoing, in light of the international and regional standards of best practices in this study, it is recommended that the intestate succession law in Zimbabwe should be amended as follows:

(a) The right to inheritance should be enshrined in the bill of rights for its easy accessibility, justiciability and protection. This is drawn from the Ghana Constitution which made inheritance right a constitutional right.

(b) Section 3A should be repealed the words “**lived immediately before death**” and adopt the approach in Zambia and Ghana intestate Succession Acts. Where there are children they are both entitled to the house as tenants in common and where there are no children then the surviving spouse can inherit in her personal capacity.

(c) The legislators should include an express provision where there is more than one house in the estate to allow the surviving spouse and children to choose the house they want to stay in and where there is a disagreement then the High court should make the determination. The matrimonial home should be protected for the benefit of both the surviving spouse and children.

(d) The courts should purposively interpret rights in terms of the constitution considering foreign law, treaties and conventions and promoting the spirit of the constitution.

5.4 Conclusion

The objective of the study was to highlight the problems faced by a widow on separation upon dissolution of marriage by death. Section 3A was assessed against the constitution and international and regional instruments. The study further analysed how the courts have interpreted the provision in question with regards to widows on separation. The research then proposed for the approach which was taken in Ghana and Zambia to ensure that the adequate provision envisaged in section 26(d) are fulfilled in terms of the matrimonial home in the interests of both the surviving spouse and the children if any.

From the foregoing, It is submitted that the research justify the topic. The spousal right to the matrimonial home to widows on separation is illusionary and to the children of such marriages. If the widow fails to fulfil the requirement of having been staying at the matrimonial home immediately before death then she would be entitled to a child's share and the children would be homeless at the same time. Simply put, the right is a fallacy, It is in this context that the author proposes recommendations to address the short comings of the law relating to spousal right to the matrimonial home in Zimbabwe.

The suggestions if considered would ensure that there is equal right to inheritance of the matrimonial home and the best interests of the surviving spouse and children are guaranteed. Without alignment of the Act to the Constitution and without the purposive constitutional approach suggested, the right remains nothing more than a fallacy to a widow on separation who would have worked to build the house only to

be disadvantaged because she was on separation at the time of the demise, yet if divorce had been finalised her contributions would have been considered and the children's best interest would have been considered in the distribution of the matrimonial house.

BIBLIOGRAPHY

Books

Chinangwa, W (1998): *Beyond in equalities women in Zimbabwe*, Printpak printers, Harare.

Chirawu, S (2015): *Principles of the law of succession in Zimbabwe: incorporating the women's rights perspective*, WLSA, Harare.

Currie, I and De Waal, J (2005): *Bill of Rights Handbook*, (5th Edition), Juta & Company Ltd, Cape Town.

Fredman, S (2011): *Clarendon Law Series: Discrimination Law*, (2nd Edition), Oxford University Press, New York.

Women and Law in Southern Africa (2002): *Venia Magaya's sacrifice: A case of custom gone awry*, WLSA, Harare.

Articles

Stewart, J.E 'The quiet revolution in Women and Law' *Southern Africa Research Project*, working paperNo.5

Ncube, W 'Muddling in the Quicksands of Tradition and Customs and Skating Down the Slippery Slopes of Modernity: The Reform of Marriage and Inheritance Laws in Zimbabwe ' (1996) Volume 3, *Zimbabwe Law Review*: 12.

Goldham, S 'The law of succession in Zambia: Proposal for reform' (1983) *Journal for African Law*, Vol, 27 No.2.

Richardson, A.M 'Human Rights Brief' (2004) vol 11, Article 6,<http://digitalcommons.wcl.american.edu/hr/brief>,p19-22 accessed on 13/09/18

Convention on Civil and Political Rights 'Non-Discrimination' (1989) General Comment No.18 ,<http://www.refworld.org/docid> accessed on 29/02/ 18

Legislation

African Marriages Act (Chapter 238)

Constitution of the Republic of Ghana

Constitution of Zimbabwe (Amendment No.20) of 2013

Deceased Estates Succession Act (Chapter 6:02)

Deeds Registry Act (Chapter 20:28)

Intestate Succession Act (Chapter 59)

Intestate Succession Act Law 1985 (PDNC 111)

Lancaster House Constitution

Legal Age Majority Act of 1982

Marriages Act [*Chapter 5:11*]

Case law

Chimhowa v Chimhowa and others H/H 183/12

Chinhowa and others v Chinhowa and others 2011 ZLR 471 (H)

Chinhowa v Magwende 1987 (1) ZLR 138

Chirowodza v Chimbari and others H/H 725

Dzomonda and others v Chifamba and others 2014 (2) ZLR 473

Harksen v Lane NO 1998 (1) SA 300 CC

Jenah v Nyemba 1986 (1) ZLR 138(S)

Madzara v Stanbic Bank Ltd and others H/H 546/15

Madzara v Stanbic Bank Ltd and others H/H 546/15

Magaya V Magaya 1999 ZLR 100.

Masango v Masango SC 66-86

Munangatire v Chikaka and others H/H 11/18

Murisa v Murisa SC 41-92

Ndoro v Ndoro H/H 198/12

Vareta v Vareta SC-126-90