A critical analysis of the efficacy of the Intestate Succession Act chapter 59 of the Laws of Zambia in protecting the rights of widows

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September 2005
This article seeks to examine to what extent the Intestate Succession Act chapter 59 of the Laws of Zambia protects the rights of widows and to what extent the said Act complies with international treaties and conventions on the rights of widows. Relevant case law will be cited in an attempt to show whether cases taken to court have had any impact on the protection of widows’ rights. The cases cited will comprise cases that the writer has handled as volunteer advocate at the National Legal Aid Clinic for Women, Copperbelt Branch, Ndola, since 1997.

The National Legal Aid Clinic for Women is a project of the Women’s Rights Committee of the Law Association of Zambia which was set up to provide full legal services to women and children who cannot afford the high costs of consulting and engaging a lawyer.

Finally, this article, will suggest necessary interventions that need to be undertaken in order to bring about desired change.

This article uses a theory of patriarchy which explains women’s position in society through a plural perspective. Patriarchal social structures operate within an ideology that promotes male dominance and subjugation of women in many aspects of life, in their sexuality and reproduction, in their ability to control and access resources and also in redirecting their time, conscience and labour (Rwebangira et al., 1995: 27).

Patriarchal ideology shapes family life and defines it in terms of a bread-winning husband and domesticated wife which is male dominated in spite of the fact that some women may make substantial contributions to the household income. Thus men are attributed with greater economic power and control – considerably more than their wives – and have potentially greater power in determining how family income and resources should be allocated. It follows then that women’s ability in general to realize their human rights is limited by factors that are determined by the way societies are organized and structured. Through this patriarchal culture, women are treated both in law and social practice as economic dependants of men who can only access resources necessary to realize their capabilities through men. Likewise, economic and political institutions are contracted on the basis of this belief. Matters of inheritance and problems associated with the processes of inheritance and succession can be understood within this framework. A patriarchal theory portrays the family positively as a basis of stability but also as central to the reproduction of patriarchal relations and the perpetuation of women’s subordination (Rwebangira et al., 1995: 30).

The Intestate Succession Act was enacted and came into effect on 19 May 1989. The main objective of this Act was to reform the law of succession into a unified one that would cater for all Zambians. Prior to the enactment of this Act matters of succession were organized on the basis of patrilineal, matrilineal and bilateral systems of succession, the chief characteristics of which were the exclusion of spouses from inheriting each other’s property. The Act also sought to include spouses and children among the beneficiaries to the intestate estate (Chuulu, Nga’ndu et al., 1994: 107).

In its preamble the Intestate Succession Act is:

‘… an Act to provide a uniform intestate succession law that will be applicable throughout the country; to make adequate financial and often provisions for the surviving spouse, children, dependants and other relatives of an intestate; to provide for the administration of the estate of persons dying not having made a will and to provide for matters connected with any incidentals to the foregoing.’

As can be seen, the preamble takes into account the traditional concept of family which by and large extends beyond the nuclear family. Although, on the face of it, the Act is supposed to be uniform – it should be applicable throughout the country – section 2 restricts its application to only members of the community to whom customary law would have applied if the Act had not been passed. The effect of this is that certain groups of people who may have settled in Zambia for many years and may have intermarried from other ethnic groups from neighbouring countries are not subjected to this law. The Act also does not explain to which members of
the community the Act would apply (Chuulu et al., 1994: 106).

Similarly, section 2 provides that the Act does not apply to: (a) land which at the time of the intestate’s death had been under customary law; (b) property which immediately before the death of the intestate was institutionalized property of a chieftainship and had been acquired and was being held as part of chieftainship property; and (c) family property.

The problem that arises is that the property excluded may be the only property owned by the deceased person. This means that widows are unable to benefit or even seek protection under the provisions of the Act which could help elevate their status. This issue is compounded in Zambia by the fact that 70 per cent of land is situated in the reserves and trust land, commonly known as customary areas, where farming is practised by most people. Thus, the fact that the Act excludes land held under customary law means that a lot of widows and a major percentage of the population in rural areas are excluded from benefiting from this very important resource which is a significant means of making a living. Thus the subordinate position of women under customary law is perpetuated as they are excluded from inheriting their husband’s landed property in spite of the fact that they may have contributed to its acquisition. This leaves widows at the mercy of customary practices which the Act seeks to avoid in the first place (Chuulu et al., 1994: 108).

Section 4 of the Act defines intestacy and partial intestacy as a situation whereby a person dies without having made a will disposing of his estate or where a person dies leaving a will disposing only part of his or her estate. The person dies intestate in respect of the estate not disposed of by will.

Section 5(1) of the Act sets out the basic rules for the distribution of the estate as follows:

(a) 20 per cent of the estate shall devolve upon the surviving spouse; except where more than one widow survives the intestate, 20 per cent of the estate shall be distributed among them, proportionate to the duration of their respective marriages to the deceased, and often factors such as the widow’s contribution to the deceased’s property may be taken into account when justice so requires.

(b) 50 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) 20 per cent of the estate shall devolve upon the parents of the deceased;

(d) 10 per cent of the estate shall devolve upon the dependants in equal shares.

In addition to their share of the estate, in accordance with the rules set out above, the surviving spouses and/or children are entitled to the house of the deceased and have a right to choose a house of their own liking where the estate has more than one house. Where the deceased is survived by more than one spouse and children of more than one spouse, the house is to be held by them as tenants in common, presumably with each spouse and her children holding jointly an equal share. The interest of the surviving spouse or spouses in the house is, however, a life interest which determines upon his or her remarriage. This provision is discriminatory as it puts widows in a disadvantaged position, especially if they happen to be young widows. From experience of cases of intestate succession handled at the Legal Aid Clinic, widows in most cases refrain from marrying again for fear of losing the matrimonial home. Where widows do get involved in relationships they usually opt to live together with the man without necessarily getting married to the person.

Although the Act makes provision for sharing the property proportionate to the duration of the widows’ respective marriages in cases of polygamous marriages, inheritance cases in polygamous unions are not so common. I have never handled a case where an intestate was survived by more than one wife. Most cases I handled – three cases out of five in 2004 – involved conflicts between stepchildren and their stepmothers over demands by the stepchildren to be given a share of their late father’s property because they allegedly could not live with their stepmothers due to misunderstandings. In these cases the only property of worth were houses left behind
by the deceased which stepchildren wanted to be sold so that they could be given their share of the estate in monetary terms. Although the cases were never formally taken to court, the parties were advised to sell the property and share the money, with the widows being advised use their share to purchase houses for themselves to which the stepchildren would have no claim. Section 6 of the Act provides that, where an intestate leaves:

(a) no spouse, the portion of the estate which the spouse would have inherited shall be distributed to the children in such proportions as are commensurate with a child’s age or educational needs or both;

(b) no spouse or children, the aggregate portion of the estate which the spouse and children would have inherited shall be distributed equally to the parents in equal shares;

(c) no spouse, children or parents, the estate shall be distributed to dependants in equal shares;

(d) no spouse, children, parents or dependants, the estate shall be distributed to near relatives in equal shares;

(e) no spouse, children, parents, dependants or near relatives, the estate be bona vacantia and shall devolve upon the state.

Where an intestate leaves:

(a) a spouse, children, dependants but no parents, the proportion of the estate which the parents would have inherited shall be shared equally between the surviving spouse and children on the one hand and the dependants on the other;

(b) a spouse, parents, dependants but no children, the portion of the estate which the children would have inherited shall be distributed to the surviving spouse, parents and dependants in proportion to their shares of the estate as specified in section five;

(c) a spouse, children, parents but no dependants, the portion which the dependants would have inherited shall be distributed equally to the parents;

(d) a spouse and dependants but no children or parents, the portion of the estate which the children and parents would have inherited shall be distributed to the surviving spouse and the dependants in proportion to their shares of the estate as specified in section five;

(e) a spouse and children but no parents or dependants, the portion of the estate which the parents and dependants would have inherited shall be shared equally among the surviving spouse on the one hand and the children on the other.

(f) a spouse but no children, parents or dependants, the portion of the estate which the children, parents and dependants would have inherited shall be distributed equally between the surviving spouse on the one hand and the near relatives on the other.

The provisions mentioned above do not take into account contributions made by the spouse during the subsistence of the marriage.

Section 8 provides that where the intestate in the case of a monogamous marriage is survived by a spouse or child or both, the spouse or child or both of them, as the case may be, shall be entitled equally and absolutely to the personal chattels of the intestate. The Act has defined personal chattels as clothing articles of personal use or adornment, furniture and furnishings, appliances and utensils, and all other articles of household use as well as decorative, simple agriculture equipment, hunting equipment, books, motor vehicles and consumable stores. It does not include chattels used for business purposes, money or securities for money. The Act assumes that there is a lot of property left by deceased persons yet in reality the definition could actually constitute the entire estate.
(Chuulu et al., 1994: 108). Under section 10, the Act provides that in polygamous marriages where the intestate is survived by more than one widow or a child from any of them, then each widow or her child or both of them shall be entitled: (a) absolutely to the homestead of the intestate (b) in equal shares to the common property of the intestate.

This provision does not take into account the greater contribution a spouse may have made to the marriage if she has fewer children than her co-wives who stand to benefit more than her. Again, treating a surviving wife as an additional unit to the number of children as opposed to giving her a share in her own right has an element of discrimination as well as relegating her to the level of a child (Kange’the, 2000: 35).

Section 11 provides that where the entire estate does not exceed K30,000 (7 US dollars) then the estate should go to the surviving spouse or child of the intestate or both or in their absence to the surviving parents. This provision does not take into account the customary practices of Zambian areas where the deceased’s clothing are expected to be taken by his relations as not doing so would lead the widow into thinking some bad luck would befall her.

Section 14 of the Act provides that:

(a) any person who unlawfully deprives any person of the use of:

(i) any part of the estate of the deceased to which that person is entitled under this Act; or

(ii) any property shared with the deceased to which this Act applies, or

(b) Otherwise unlawfully interferes with the use of any person of any property referred to in paragraph (a) shall be guilty of an offence and liable on conviction to a fine not exceeding K135,000.00 (or US$29) or imprisonment, not exceeding two years, or both.

Apart from the fact that the fine is a mockery and does not deter would-be offenders, the provision has another shortcoming which is that between the time the matter is being taken to court for the administrator to render an account of how he may have distributed the estate and the time judgment is passed, the estate would have been pillaged, thereby rendering the whole exercise academic. In the case of Jennipher Chilinde Langamu and Brian Langamu 1999/HN/206, the court took three years, from 1999 to 2002, to decide in a case in which the administrator, who happened to be the deceased’s elder brother, sold the farm on which his late brother had allowed him to settle temporarily. The widow challenged the purported sale as the property had been registered in her late husband’s name in trust for her three young sons. At the time of passing judgment, which was in the widow’s favour, the administrator had since died. The High Court had made an order in its judgment that the administrator should refund the money to the respondent who had bought the farm in good faith and for its value. The widow decided to abandon the case as there was no one to refund the money and she felt that she had spent too much time on the case and wished to move on with her life.

In yet another case of Sheila Matafwali and Anthony Kambafwile 2000/HN/135, the administrator was again sued by the widow and requested to render an account of how he had administered his young brother’s estate. Similarly, judgment was found in favour of the widow and the administrator was ordered to return property he had misappropriated, some of which he had taken to Malawi. Again this case commenced in the year 2000 and judgment was only passed in November 2002, almost three years later. Most of the items returned were shells of what they originally were, they had been broken and were not working properly. The widow rejected the property as she said she did not want to keep ‘junk’ in her house and would buy other items. This widow said it was enough satisfaction to her that she had taken the administrator to court and won against him.

Section 15 of the Act makes provision for the appointment of an administrator whose role is to distribute the estate in accordance with the provisions of the Act. The main thrust of this provision is that any interested person or persons may apply to the court for letters of administration and where more than one person applies,
the court may grant letters to one or more of them taking into account greater or immediate interests in the deceased’s estate, in priority to lesser or more remote interests.

Although section 16 (1) of the Act allows the court to grant letters of administration to up to four people, in practice not more than two people are appointed to co-administer an estate. The Legal Aid Clinic normally strongly discourages the appointment of more than two co-administrators for the reason that administration of estates is supposed to be done in the shortest possible time in order to avoid misuse of the estate by the administrator. When meeting clients for the first time, they are always advised not to make administratorship of the estate a lifelong vocation. This is because experience has shown that once administrators start administering an estate they want to do so indefinitely, considering administratorship more or less a job and wrongly perceiving themselves as beneficiaries when in fact they are not. Administrators also harbour the erroneous notion that as administrators of an estate they are free to do with the deceased’s property as they wish. The clients at the Legal Aid Clinic are advised at the end of their task to render an account of how the estate has been administered.

In most if not all cases passing through the Legal Aid Clinic, where more than one administrator is appointed the widow is always appointed so she can keep an eye on how the estate is being administered. Where parties fail to agree on who should be appointed as administrator or in cases where the widow is afraid of being appointed as an administrator, then they are referred to the Administrator-General’s office for the Administrator-General to administer the estate.

The duties of an administrator are outlined in section 19(1) of the Act and include:

(a) Paying debts and funeral expenses of the deceased and payment of estate duty where necessary;

(b) To effect distribution of the estate in accordance with the rights of the persons interested in the estate under the Act;

(c) When required to do so by the court either on application of an interested party or on its own motion:
   (i) to produce on oath in court the full inventory of the estate of the deceased; and
   (ii) to render to the court an account of the administration of the estate.

Section 29 provides for the revocation of letters of administration on the following grounds, viz:

(a) that the proceedings to obtain them were defective;

(b) that the grant was obtained fraudulently;

(c) that the grant was obtained by means of an untrue statement of a fact essential to point of law to justify the grant, though the statement was made in ignorance or inadvertently;

(d) that the grant has become of no use and importance;

(e) that the person to whom the grant was made has without reasonable cause failed to furnish an account of his administration after having been lawfully called upon to do so or has prepared an account which is untrue in a material particular.

Additionally the court may suspend or remove the administrator from his office if it is satisfied that this is necessary for the proper administration of the estate and the protection of the interests of the beneficiaries of the estate.

As mentioned above, although the Act provides criminal sanction against persons who unlawfully deprive any person of their rightful share of the estate, misuse of the estate begins during the mourning period itself. By the
It is important to point out that although the letters of administration may be granted on application by an interested person, practice frowns upon a person who applies to be appointed as administrator or administratrix without consulting members of the family. The practice now is that most appointments of administrators or administratrices are being done at the local court. The Local Courts Act chapter 29 has now been amended and the court may issue letters of administration on any intestate estate. People opt for the local court as it is much faster and cheaper than the magistrate’s court or high court where one has to prepare and file originating summons and accompanying affidavits and pay fees as well as wait to get a date of hearing which can take as long as three months. At the local court however letters of administration can be obtained in one day or at most in a week, the only requirement being that the widow should be accompanied by three other relatives who should sit and agree on whom to appoint as administrator. The only disadvantage with the procedure at the local court is that the local courts largely administer customary law and tend to deal with intestate issues along traditional lines, thereby sidelining the appointment of widows. Local courts are also preferred because these courts are more accessible to larger numbers of the population.

Even where letters of administration are obtained in the local court, the applications to remove the administrators are usually done in either the magistrate’s court or high court where the magistrates and judges are able to interpret the provisions of the Intestate succession Act more favourably.

Overall, on the face of it one could say that the Intestate Succession Act has provided a unified system of law to cater for all Zambians by ensuring that widows also inherit under their deceased husband’s estates. On close scrutiny, however, as discussed above, one notices that although the Act provides that a widow is entitled to the same rights as her male counterparts – life interest in the matrimonial house left by her husband – in practice, when a woman remarries she is expected to vacate the house. The Act therefore fails to protect widows from the vagaries of gender discriminatory customs and traditions.

The concept of the African extended family which the Act introduces by expanding the number of beneficiaries from that of the nuclear family is most inequitable for widows. It places a burden on the widow, who may have been the one single-handedly making financial and other contributions to the home and bringing up children of the marriage, to suddenly find that she has to share what she may faithfully have worked for over a period of years with persons who may not have contributed. The fact that there are so many potential beneficiaries is also a possible subject for litigation in succession matters due to the likelihood of most beneficiaries not being happy with their share of the estate (Kange’the, 2000: 33).

As regards cases that have been taken to court, although by and large the courts have successfully affected the provisions of the Act, the slow pace at which cases are heard has brought more sorrow than joy to widows, leading to cases being mere academic exercises.

The delays mentioned above are now making women shy away from pursuing applications for letters of administration in the magistrate’s and high courts, opting instead for the local court where the process is faster.

Alongside the Intestate Succession Act, Zambia has a number of laws touching on the status of widows of which the most important is the Zambian Constitution which provides a framework for pursuing women’s rights (Himonga, 2002: 43).

Article 23(1) of the constitution provides that no law shall make any provision that is discriminating either of itself or in effect. Article 23(2) further provides that no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

The constitution further goes on to define discrimination as:
‘… affording different treatment to different persons attributable, wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject to or are accorded privileges or advantages which are not accorded to persons of another such description.’

Article 23(4)(c) exempts a number of laws from the provisions of article 23(1) and provides that:

(a) Clause 1 shall not apply to any law so far as that law makes provision:

(c) with respect to adoption, marriage, divorce, burial, devolution or property on death or other matters of personal law

(d) for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other person; or

(e) whereby persons of any such description as is mentioned in clause (3) may be subjected to any disability or restriction or may be accorded any privilege or advantage which having regard to its nature and to special circumstances pertaining to those persons or to persons of any such other description is reasonably justifiable in a democratic society.

The laws exempted by article 23(4) are in areas that directly affect women in general and widows in particular. It is evident therefore that women’s enjoyment of fundamental freedoms guaranteed by the constitution is severely restricted. Article 23(4)(e) legitimizes the traditional position, which accorded widows fewer privileges than men in matters concerning their families, marriage and succession. Thus although the Intestate Succession Act seeks to give both men and women equal rights in matters of succession, this would pose problems with the constitution. If women’s rights or widows rights for that matter were specifically safeguarded by constitutional provisions, no doubt legislation would follow that trend and the status of widows would improve in relation to their right to inherit (Himonga, 2002: 43).

In order to fully understand the legal status of widows one also has to look at international legal instruments that have a bearing on the law of persons, marriage and succession. Zambia is a signatory to various international conventions. It is also a member of the United Nations under which it has an international legal obligation to provide for equal rights to men and women, as provided for in the United Nations Charter and the Universal Declaration of Human Rights. Zambia is also a signatory to the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and the African Charter on Human and People’s Rights. Zambia’s common law tradition however requires the incorporation into domestic law of a treaty or convention in order for it to be directly enforceable by the courts. As yet there is no legislation which has incorporated any of the human rights treaties into domestic law. However, by ratifying these treaties, Zambia has accepted an obligation to ensure that its domestic laws are consistent or comply with these treaties (Himonga, 2002: 43). The high court in the case of Sarah Longwe v Intercontinental Hotels has shown its willingness to rely on International treaties which have not yet been incorporated into domestic law. In that case the late Justice Musumali had this to say:

‘… I have to say something about the effect of international treaties which the Republic of Zambia enters into and ratifies. Ratification of such documents by a nation state without reservation is a clear testimony of the willingness by that state to be bound by the provisions of such a document. Since there is that willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by such international documents. I would take judicial notice of the treaty or convention in my resolution of the dispute.’
Thus Zambia is under an obligation in international law to ensure that all aspects of the substantive and procedural law relating to the legal status of persons, the family and succession are compatible with the human rights norms and standards contained in the treaties it has ratified (Himonga, 2002: 43).

The African Charter on Human and People’s Rights carries a number of provisions on the rights and duties of individuals aimed at the preservation of African culture, traditional African values and the group or community approach to life. It must be pointed out that provisions such as these undermine and perpetuate the subordination of women to men because African culture and traditional African values by nature discriminate against women. Article 18(3) of the charter however provides that the African human rights system contained in the charter should be subjected to international declarations and conventions such as the CEDAW and states that state parties should ensure the elimination of all discrimination against women and ensure the protection of the rights of women thereof.

The Convention on the Elimination of All forms of Discrimination Against Women or CEDAW is noted for being the most comprehensive treaty affecting, among others, the private status of women and places an obligation on member states to eliminate discrimination against women and promote equality through constitutional, legal and other appropriate means. Article 2 of the convention defines discrimination as:

‘… any discrimination or exclusion is restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political economic, social, cultural, civil or any other field.’

The convention also obligates state parties to accord to women equality with men before the law and a legal capacity equal to that of men in civil matters. It also obligates state parties to take appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations as well as some personal rights as husband and wife in respect of ownership, acquisition and management of property.

The Zambian government is therefore under an obligation to ensure that all aspects of substantive and procedural law relating to the legal status of women, family and succession are compatible with the human rights norms and standards contained in the treaties she has ratified. The application by the courts of the principles of International law, such as those affecting the equality of spouses in various areas of family law, is therefore not only expected but justified and appropriate.

As pointed out above, although this Act has met with some success in that widows’ are able to inherit under their deceased spouses estates, there is need for a change in people’s attitudes, social values and belief systems, in other words for the Act to succeed, people must identify with it (Kange’the, 2000: 46).

First and foremost the Act should be amended because it is presently limited in application to those to whom customary laws would have applied. Women should also be allowed to inherit land situated in customary areas because land is critical to people’s livelihoods.

Penalties for interfering in the deceased’s estate should be made stiffer so that would-be offenders are discouraged from meddling in the estate of a deceased.

Gender neutral laws should be introduced to replace discriminatory clauses under which a widow stands to lose a matrimonial house should she remarry.

Similarly the need for education, both formal and non-formal, cannot be overemphasized, in order to sensitize people on the need for equality between men and women, thereby ensuring that women benefit equally with men.

The Intestate Act also needs to be reviewed to come up with definite formulas of what percentages the wives
and children are entitled to in polygamous unions as well as guidelines on what should happen in case of a dispute.

The process of obtaining letters of administration in the high court should be reviewed to provide a faster process, as is the case in the local courts. Special courts could also be set up to deal with intestate succession cases so that they are dealt with more quickly.

Article 23 of the constitution needs to be amended to afford similar treatment to men and women and to include laws on marriage and devolution of property in death and personal law matters, amongst others, which directly affect women.

The long list of beneficiaries under the Intestate Act places a heavy burden on the widow, particularly if she herself has children to care for. The provision should be amended to exempt certain categories of estates falling below a certain net worth from being shared between the widow and extended family.

There is also need for non-governmental and civic organizations to pressure government into domesticating international treaties that have a direct impact on women’s rights in general.
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