REPORT FOR UNICEF
Legal Review of inheritance Rights of Children Orphaned by HIV/AIDS in Sub-Saharan Africa

June 2016
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PREFACE

Please note the following in relation to the research reports:

1. The reports have been prepared by UK lawyers performing desk based research. Where possible local lawyers have reviewed the reports. We have endeavoured to make the report as comprehensive as possible, but it should not be regarded as exhaustive.

2. Every attempt has been made to access English versions of all relevant and up to date legislation, however, given the nature of desk based research, some legislation was not available in English (or at all) and some may be outdated, although it was not always clear when this was the case.

3. For many jurisdictions, reports and resources may be several years old. Due to a lack of up to date resources, in some cases older resources have been cited and relied upon as representing current practice. We would recommend referring to footnotes before relying on information.

4. Words such as "child", "infant", "juvenile" and "minor" may not always be used with the strict definition ascribed to them by that jurisdiction's legislation.

5. Despite clarifications provided to our researchers, there may be instances where the word "orphan" is used to describe a sole surviving child.

6. UK lawyers preparing these reports are not experts on inheritance or African law, but have applied their general research skills to prepare the reports. Local lawyers reviewing the reports will also not have expertise on inheritance law.

7. We would recommend that more exhaustive research is undertaken to verify particular information before reliance is placed on particular content for the purposes of publication or disclosure to third parties. This report may not be relied upon by any party other than UNICEF.

8. The tables found in the Appendices of each report are there to provide an overview of each jurisdiction and will not be able to capture all relevant information. In light of this we recommend reading each report in full and relying on the full report, rather than the tables, for information.

9. The common chapter of this report lists the international and regional treaties relating to inheritance rights, as well as other relevant instruments (which are generally "soft law"). In each country specific report a table is provided outlining when each international or regional treaty was signed and ratified (or acceded to) by each country.

10. The table in each report does not contain country-specific adoption dates in relation to other relevant instruments. This is because in most cases it has been difficult to find exactly which countries were present at the adoption of each instrument, and each instrument was generally adopted through a wider forum, such as the UN or African Union. In some cases it may be the case that countries covered by this report, did not adopt one of the other relevant instruments mentioned.
EXECUTIVE SUMMARY

NB: In this report "orphan" refers to a child with one or both of their parents deceased, whereas "sole survivor" refers to a child where both parents are deceased.

An estimated 17.8 million of the world's children have lost one or both parents to AIDS. 85% of these children live in sub-Saharan Africa. Particularly given the cultural stigma surrounding this disease, these children are vulnerable not only to heightened poverty and reduced access to education and healthcare, but also displacement and confiscation of movable and immovable properties left to them by their deceased parent(s).

The legal framework surrounding inheritance rights for these orphaned children is unclear in the majority of Sub-Saharan countries. Many jurisdictions do not establish a legal right to inheritance, and those that do are often in conflict with customary law and practice which may discriminate against females and children born out of wedlock.

A legal review of children's inheritance laws in this region has been requested by UNICEF, to inform programmatic responses (such as advocacy and policy work) in order to strengthen and protect the rights of children orphaned by HIV/AIDS.

This report provides an overview of the main legislative and policy provisions in the below mentioned jurisdictions that relate to children's inheritance rights. The report reviews such provisions in an international context and goes on to consider the current practices within both the traditional, "customary", setting and the non-traditional, "civil", legal framework. The aim of the report is to provide the reader with a general guide to the legal framework within which children's inheritance rights in the jurisdictions operate and ultimately to inform of areas in which improvements need to be made to the existing legal structure to ensure the recognition and protection of these rights.

A 2004 report by the Centre of Housing Rights titled "Bringing Equality Home" looked at some of the issues affecting the inheritance rights of women in Sub-Saharan Africa, and by extension many of these can be relevant to children orphaned by HIV/AIDS.

The report states that barriers to inheritance rights are not simply cultural, but also political and legal. A key obstacle for women in claiming their inheritance rights is a lack of adequate legal protections, both in the form of shortcomings in national legislation and ineffective judicial mechanisms. Courts struggle to deal with the confusion between civil and customary systems of law, which often leads to deference to a codified version of customary law in family-related matters. These narrow interpretations of customary law are handed down by magistrates who view women as second-class citizens with few, if any, rights to property.

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This is the case where the women concerned have actually managed to access a court system which is, in most African jurisdictions, far away and unresponsive. Even where suitable legislative protection is available, it can prove ineffectual for women due to the lack of education programmes and basic information disseminated by governments. This leaves women, especially in rural areas, unaware of the existence of their rights, let alone how to claim them. While politicians place responsibility on the legal system for inheritance rights violations, the legal system blames a lack of political will. There is a general trend of apathy and inertia on the part of political leaders, who blame cultural norms, a lack of resources and even women themselves for the lack of action to protect women's rights.

Regardless of legal and political problems, the interpretation and practice of traditional culture within communities represents a significant barrier to inheritance rights. The report maintains that while culture and traditions should not be discarded, women should be able to redefine harmful cultural practices in order to claim their basic human rights. The practices of "property grabbing", in which a widow's in-laws forcibly eject her from her home in the name of culture; and dehumanising rituals such as forced "cleansing" sex with an in-law, prolonged isolation, lack of hygiene and scalp-scraping are often justified by tribal leaders on the basis of tradition. Widows find themselves in a hopeless situation, as they are forced between homelessness and degradation if they allow such practices to happen, or ostracism and violence if they attempt to claim their rights. As the report will show, similar obstacles exist for orphans (especially girls) throughout Sub-Saharan Africa.3

3 We would recommend reading the report in full for more information on this area.
INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

Please note that the list of instruments below is not exhaustive and is meant to provide a sample of the type of international obligations which jurisdictions are subject to under international law in relation to human rights and inheritance.

Details of declarations, reservations, objections and derogations made by each relevant jurisdiction are beyond the scope of this report.

There are a number of human rights treaties and other soft law instruments which have been signed and/or ratified by jurisdictions covered in this report. Although some cover inheritance rights specifically, they generally enshrine principle of equality and non-discrimination, relevant to children having the right to inherit their parents’ property.

The UN treaties outlined below are not directly legally enforceable in the jurisdictions covered in this report. However, they do establish binding obligations in international law. If a country has ratified a treaty, it has pledged to make sure its domestic laws and policies comply with the treaty obligations.

1. GLOBAL TREATIES

A. INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (1965, ENTRY INTO FORCE 1969) ("ICERD")

The ICERD was one of the first human rights treaties to be adopted by the UN and is widely supported, with 177 countries (over 90% of the membership of the UN) having ratified it. It is designed to protect individuals from racial discrimination, whether intentional or as the result of neutral policies. The Treaty sets certain standards and specifies measures that governments at national, state and local level must take to eliminate racial discrimination.

The ICERD also establishes a monitoring body, the Committee on the Elimination of Racial Discrimination. This Committee is staffed with 18 independent experts who monitor the implementation of the Treaty. All States subscribed to the Treaty are obliged to submit regular reports to the Committee on the progress of implementation. The Commission also has the power to use an "early warning" procedure (which aims to prevent violations of the ICERD), to hear complaints from one state claiming that another is not upholding its Treaty.
obligations and to hear complaints from individuals who have exhausted domestic legal avenues.\(^7\)

Article 5 ensures equality for individuals before the law, irrespective of race, colour, national or ethnic origin. This is in relation to a number of rights, including the right to own and inherit property (under Articles 5(d)(v) and (vi) respectively).

**B. INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (1966, ENTRY INTO FORCE 1976)\(^8\) ("ICESCR")**

The ICESCR is part of the International Bill of Human Rights and elaborates upon most of the economic, social and cultural rights enshrined in the Universal Declaration of Human Rights.\(^9\) It is widely supported, with 170 signatories.\(^10\) The ICESCR aims to ensure the protection of economic, social and cultural rights, including the right to non-discrimination (Article 2),\(^11\) social security (Article 9), health (Article 12) and education (Article 13).\(^12\)

The UN established the Committee on Economic, Social and Cultural Rights to monitor the implementation of the Treaty, examine reports submitted by State parties and issue responses to these reports making conclusions and suggesting improvements to implementation.\(^13\)

The following Articles are worth noting in relation to this report:

*Article 2(2)*

*The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

*Article 3*

*The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.*

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\(^7\) Migration Citizenship Education, "International Convention on the Elimination of All Forms of Racial Discrimination 1966". Accessed 23 April 2015. [http://www.migrationeducation.org/17.2.html?&rid=212&cHash=e061164c4edc7a6fe0cde54f09a20746](http://www.migrationeducation.org/17.2.html?&rid=212&cHash=e061164c4edc7a6fe0cde54f09a20746)


Article 10(3)

Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation.

Article 11(1)

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

C. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1966, ENTRY INTO FORCE 1976) ("ICCPR")

The ICCPR provides for a range of civil and political rights. Like the Universal Declaration of Human Rights and the ICESCR, it is part of the International Bill of Human Rights.

The ICCPR obliges States to protect and preserve basic human right such as the right to life (Article 6), equality before the law (Article 14) and freedom of expression (Article 19). The ICCPR also compels governments to provide an effective remedy where rights have been violated (Article 2(3)).

The Human Rights Committee was established to monitor implementation of the Covenant. States must periodically report on progress and the Committee has the power to make recommendations based on these reports, as well as to hear inter-state complaints.

The following Articles are worth noting in relation to this report:

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to

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adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

**Article 3**

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

**Article 24**

Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

**Article 26**

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

**D. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (1979, ENTRY INTO FORCE 1981)**

("CEDAW")

The CEDAW aims to define what constitutes discrimination against women and set up an agenda for national action to end such discrimination. It was preceded by a 1967 UN Declaration to the same effect.

States who commit themselves to the CEDAW undertake to implement a series of measures to end discrimination against women, including incorporating the principle of equality of men and women before the law (Article 15), establishing legal protection of women against discrimination (Article 2(c)) and eliminating all acts of discrimination against women by persons or organisations (Article 2(e)) (see below).

Countries who sign up the Convention must report, at least every four years, on measures that have been taken to comply with the convention obligations.

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The following Articles are worth noting in relation to this report:

**Article 2**

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.

**Article 3**

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

**Article 5**

States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women…
Article 15

1. States Parties shall accord to women equality with men before the law.

2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.

4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

Article 16

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

...  

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

E. CONVENTION ON THE RIGHTS OF THE CHILD (1989, ENTRY INTO FORCE 1990)22 ("CRC")

The CRC was adopted by the UN in 1989 and aims to change the way that children are viewed. Its intention is to make sure that children are treated as human beings with a distinct set of rights rather than passive objects of charity.23

The Convention has 54 Articles that deal with all aspects of a child's life and outline the civil, political, economic, social and cultural rights that all children everywhere are entitled to.24 The Convention is bolstered by a number of additional "Optional Protocols" that signatories can choose to adopt.25

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The UN Committee on the Rights of the Child is a body of 18 children's experts whose role is to make recommendations to governments about how to improve children's rights, hear complaints from individuals who think their rights have been breached and expand on what the CRC means and how it can be applied.26

Article 1 of the CRC defines a child as "every human being below the age of 18, unless under the law applicable to the child, majority is attained earlier." The following articles are relevant:

**Article 3(1)**

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

**Article 12**

1. State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

**Article 27**

1. States Parties recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.

2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child’s development.

3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad.

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2. REGIONAL TREATIES

A. AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS (1981, ENTRY INTO FORCE 1986) 27 (“ACHPR”)

The ACHPR was introduced to "promote and protect human rights and basic freedoms in the African continent" 28 and established the African Commission on Human and Peoples’ Rights ("Commission"). One function of the Commission has been to implement and monitor a state reporting procedure which requires all states who have ratified the ACHPR to report on measures taken to ensure that the "rights enshrined in the African Charter are being implemented". 29

The ACHPR confers rights on "every individual" regardless of "race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status". 30

Article 14 states that:

"the right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws".

Further, Article 18(3) states that:

"the State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions."

B. AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD (1990, ENTRY INTO FORCE 1999) 31 (“ACRWC”)

The ACRWC was adopted by the African Union to complement and build upon the CRC, dealing with "the specific realities of children in Africa", 32 for example by taking into account the potential conflict between children's rights and cultural traditions and practices that exist in Africa, and also taking into account factors prevalent in Africa affecting children, such as armed conflicts, child labour and natural disasters. 33

30 Article 2 of the African Commission on Human and Peoples’ Rights.
The ACRWC is divided into two parts: the first dealing with rights, freedoms and duties of children, and the second with the obligations of the states who have ratified the ACRWC to adopt laws to enforce its provisions. 34

Reflecting the provisions of the ACHPR, the ACRWC confers rights on every child:

"irrespective of the child's or his/her parents' or other legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status". 35

The ACRWC specifies that "any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the [ACRWC] shall to the extent of such inconsistency be discouraged", while Article 21 prescribes protection against harmful social and cultural practices:

(1) In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.

(2) In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, and opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law. 37

C. PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA (2003, ENTRY INTO FORCE 2005) 38 (ALSO KNOWN AS THE "MAPUTO PROTOCOL")

The Protocol was adopted by the African Union to develop the ACHPR to specifically address the rights of women. Prior to the Maputo Protocol, human rights guarantees such as the freedom from "…torture, cruel and degrading treatment" had not "been interpreted to include such acts as domestic violence, rape, female genital mutilation, forced sterilisation, forced childbirth, and other numerous forms in which violence against women and girls is manifested in Africa". 39

The Maputo Protocol covers rights of women to participate in political processes, to control and be informed about their reproductive health, and aims to stop the practice of female


35 Article 3 of the African Commission on Human and Peoples’ Rights.

36 Article 1(3) of the African Commission on Human and Peoples’ Rights.

37 Article 4(1) of the African Commission on Human and Peoples’ Rights.


genital mutilation in condemning "any practice that hinders or endangers the formal growth and affects the physical and psychological development of woman and girls…".  

As of July 2013, only 36 of the 53 member counties to the African Union had ratified the Maputo Protocol, and it continues to elicit public opposition from religious sects and anti-abortionist groups from around the world.

Article 6(j) of the Protocol states that "during her marriage, a woman shall have the right to acquire her own property and to administer and manage it freely".

Article 7(d) requires states to ensure that "in case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of joint property deriving from the marriage".

Article 16 states that "women shall be entitled to equal access to housing and to acceptable living conditions in a healthy environment. to ensure this right, State Parties shall grant to women, whatever their marital status, access to adequate housing".

Article 19(c) requires states to "promote women’s access to and control over productive resources such as land and guarantee their right to property".

Article 21(1) states that "a widow shall have the right to an equitable share in the inheritance of the property of her husband and shall have the right to continue to live in the matrimonial house", and Article 21(2) gives men and women the right to inherit parental property in equal shares.


The AYC reconfirms some of the human rights set out in the ACHPR but specifically in relation to the "youth or young people" in Africa, which is defined in the AYC as "every person between the ages of 15 and 35 years". It goes on to target some of the key issues affecting young people in Africa such as participation in society and politics, education, health, employment, poverty and peace and security.

The AYC includes a specific provision on inheritance of property under Article 9. It states that:

(1) Every young person shall have the right to own and to inherit property.

(2) States Parties shall ensure that young men and young women enjoy equal rights to own property.

40 Preamble to the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa.
(3) States Parties shall ensure that youth are not arbitrarily deprived of their property including inherited property.

Article 9(3) is particularly relevant as many customary practices in the considered jurisdictions could be considered to be a breach of this Article.

Similarly Article 25 states that:

State Parties shall take all appropriate steps to eliminate harmful social and cultural practices that affect the welfare and dignity of youth, in particular;

(a) Customs and practices that harm the health, life or dignity of the youth;

(b) Customs and practices discriminatory to youth on the basis of gender, age or other status.

The Charter enshrines principles of non-discrimination in Article 2:

(1) Every young person shall be entitled to the enjoyments of the rights and freedoms recognized and guaranteed in this Charter irrespective of their race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.

(2) States Parties shall take appropriate measures to ensure that youth are protected against all forms of discrimination on the basis of status, activities, expressed opinions or beliefs.

(3) State Parties shall recognize the rights of Young people from ethnic, religious and linguistic marginalized groups or youth of indigenous origin, to enjoy their own culture, freely practice their own religion or to use their own language in community with other members of their group.

The Charter further enshrines this principle in relation to women in Article 23:

(1) States Parties acknowledge the need to eliminate discrimination against girls and young women according to obligations stipulated in various international, regional and national human rights conventions and instruments designed to protect and promote women’s rights.

This Article includes a number of obligations on signatory states in this regard, including an obligation to:

(a) Introduce legislative measures that eliminate all forms of discrimination against girls and young women and ensure their human rights and fundamental freedoms.

E. SOUTHERN AFRICAN DEVELOPMENT COMMUNITY ("SADC") INSTRUMENTS

The SADC was founded in 1993 (when its 1992 founding treaty entered into force). Its current Member States are Angola, Botswana, Democratic Republic of Congo, Lesotho,

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Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.\textsuperscript{46}

Its founding treaty states under Article 6(2) that the SADC Member States will not discriminate based on, amongst other things, gender.

In 1997, the SADC Member States reaffirmed their commitment to removing gender based discrimination under the Gender and Development Declaration, (including removing discriminatory laws (Article H(iv))), and again by signing an Addendum on the Prevention and Eradication of Violence Against Women and Children in 1998.

The Declaration and Addendum became a Protocol on Gender and Development, including provisions on equality in accessing justice (Article 7) and access to property and resources (Article 18). The Protocol was signed in 2008 and entered into force in 2013.\textsuperscript{47} In relation to this report, Article 10 is important as it addresses the rights of widows and widowers:

\textit{States Parties shall enact and enforce legislation to ensure that:}

\begin{enumerate}
\item widows are not subjected to inhuman, humiliating or degrading treatment;
\item a widow automatically becomes the guardian and custodian of her children when her husband dies, unless otherwise determined by a competent court of law;
\item a widow shall have the right to continue to live in the matrimonial house after her husband's death;
\item a widow shall have access to employment and other opportunities to enable her to make a meaningful contribution to society;
\item a widow shall have the right to an equitable share in the inheritance of the property of her husband;
\item a widow shall have the right to remarry any person of her choice; and
\item a widow shall have protection against all forms of violence and discrimination based on her status.
\end{enumerate}

\textit{States Parties shall put in place legislative measure to ensure that widowers enjoy the same rights as widows under sub-Article 1.}

3. OTHER INTERNATIONAL INSTRUMENTS

\textbf{A. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948) \textsuperscript{48} ("UNIVERSAL DECLARATION")}

The Universal Declaration is an international document that states basic rights and fundamental freedoms to which all human beings are entitled. The Universal Declaration was adopted by the General Assembly of the United Nations on 10 December 1948 in response to


\textsuperscript{47} South African Development Community. http://www.sadc.int/documents-publications/show/803
the experiences of the preceding World Wars. This was a milestone document as this was the first time that countries agreed on a statement of inalienable human rights.

The Universal Declaration contains 30 Articles, including provisions on the right to equal treatment, the right to life, freedom from slavery, equality before the law, the right to a fair public hearing, the right to education, freedom of belief and religion, the right to own property, the right to marriage and family, and freedom from torture and degrading treatment.

The Universal Declaration has given rise to over 80 international conventions and treaties, as well as numerous regional and domestic conventions and legislation. Along with the ICCPR and the ICESCR, the Universal Declaration makes up the International Bill of Rights.

The following Articles are worth noting in relation to this report:

**Article 2**

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

**Article 7**

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

**Article 16**

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

**Article 17**

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

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Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

B. THE BEIJING DECLARATION AND ITS PLATFORM FOR ACTION (ENDORSED BY UNGA RESOLUTION 50/203 IN 1995)\(^53\)

The Beijing Declaration was made at the Fourth World Conference on Women and endorsed by the UN General Assembly in 1995. The Beijing Declaration generally concerns equality for women, but Governments also made the following commitments related to inheritance:

61(b) Undertake legislative and administrative reforms to give women full and equal access to economic resources, including the right to inheritance and to ownership of land and other property, credit, natural resources and appropriate technologies;

165 (e) Undertake legislation and administrative reforms to give women equal rights with men to economic resources, including access to ownership and control over land and other forms of property, credit, inheritance, natural resources and appropriate new technology;

274(d) Eliminate the injustice and obstacles in relation to inheritance faced by the girl child so that all children may enjoy their rights without discrimination, by, inter alia, enacting, as appropriate, and enforcing legislation that guarantees equal right to succession.

C. UN GENERAL ASSEMBLY SPECIAL SESSION (“UNGASS”) DECLARATION OF COMMITMENT ON HIV/AIDS (2001)\(^54\) (“DECLARATION OF COMMITMENT”)

At the UNGASS in June 2001, the UN member states committed to the Declaration of Commitment and to reporting to the UN General Assembly in relation to measures taken domestically to "review and address the problem of HIV/AIDS in all its aspects".\(^55\)

Committed States, pledged to:

By 2003, enact, strengthen or enforce, as appropriate, legislation, regulations and other measures to eliminate all forms of discrimination against and to ensure the full enjoyment of all human rights and fundamental freedoms by people living with HIV/AIDS and members of vulnerable groups, in particular to ensure their access to, inter alia, education, inheritance, employment, health care, social and health services, prevention, support and treatment.


\(^{55}\) Article 1 of the Declaration of Commitment.
The SDGEA recognised that the rights of women across Africa were very poor in comparison to men's rights. They recognised that women often suffer the most severe levels of poverty

56 Article 58 of the Declaration of Commitment.
57 Article 65 of the Declaration of Commitment.
58 Article 66 of the Declaration of Commitment.
59 Article 67 of the Declaration of Commitment.
60 Article 94 of the Declaration of Commitment.
whilst trying to shoulder the responsibility of raising children, often against the backdrop of conflicts and internal displacement, and the mistreatment that comes with those conflicts.\textsuperscript{64}

In response to the acknowledged gender inequality, the African Union agreed on thirteen provisions, including those on gender specific measures aimed at combating HIV and AIDS, ensuring that women are allowed to participate in any peace processes and appointing women as Special Envoys and Representatives of the African Union and reporting on gender equality.

After several consultations on how the SDGEA should be implemented and a year after its adoption, the African women's movement created a campaign "Gender is my Agenda". This campaign was aimed at mobilising heads of state to implement the SDGEA and also to inform and educate the society on what the SDGEA means.\textsuperscript{65}

The introduction of the SDGEA states that its members are "aware that AIDS orphans and older people, especially grandmothers, shoulder excessive responsibility for providing care for those infected and affected by HIV/AIDS, most times without support of any sort either from the society or from the State".

Article 9 of the SDGEA states that its members agree to "actively promote the implementation of legislation to strengthen women's land, property and inheritance rights".

B. PRETORIA DECLARATION ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN AFRICA (2004)\textsuperscript{66} ("PRETORIA DECLARATION")

The Pretoria Declaration was adopted at a seminar in Pretoria, South Africa in September 2004 at which representatives of the Commission, 12 African states, national human rights institutions and NGOs participated. The Pretoria Declaration was adopted by the African Commission at its 36th session in December 2004.\textsuperscript{67}

Article 5 of the Pretoria Declaration provides that:

*The right to property in article 14 of the Charter relating to land and housing entails among other things the following:*

a. **Protection from arbitrary deprivation of property;**

b. **Equitable and non-discriminatory access, acquisition, ownership, inheritance and control of land and housing, especially by women;**

c. **Adequate compensation for public acquisition, nationalisation or expropriation;**


\textsuperscript{65} Gender is my Agenda, "Solemn Declaration on Gender Equality in Africa (SDGEA)". Accessed 22 April 2015. [http://www.genderismyagenda.com/campaign/sdgea.html](http://www.genderismyagenda.com/campaign/sdgea.html)


d. **Equitable and non-discriminatory access to affordable loans for the acquisition of property;**

e. **Equitable redistribution of land through due process of law to redress historical and gender injustices;**

f. **Recognition and protection of lands belonging to indigenous communities;**

g. **Peaceful enjoyment of property and protection from arbitrary eviction;**

h. **Equal access to housing and to acceptable living conditions in a healthy environment**

### C. STATE PARTY REPORTING GUIDELINES FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS (2010)**

*also known as the “TUNIS REPORTING GUIDELINES”*

The Tunis Reporting Guidelines were adopted at the 50th Ordinary Session of the African Commission on Human and Peoples’ Rights in Banjul, held between 24 October - 7 November 2011. The Introduction to the Guidelines states the following:

> *These reporting guidelines are adopted to give further guidance to states parties to the African Charter on Human and Peoples’ Rights (the Charter) in reporting, pursuant to article 62 of the Charter, on the implementation of their obligations to realise the enjoyment of economic, social and cultural rights under the Charter. These guidelines are to be used in conjunction with the 1989 Guidelines for National Periodic Reports under the African Charter. Further reference should be made to the Principles and Guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples’ Rights, adopted on 26 May 2010 (Principles and Guidelines) which give a more detailed explanation of States Parties obligations under the Charter.*

The general content of the Tunis Reporting Guidelines provides details around what should be included in state party reports in relation to the economic, social and cultural rights of the people. This includes summaries of national plans and policies and information on legislation in place to protect the enjoyment of marginalised groups’ rights on a non-discriminatory basis. Rights to property, work, health, education, culture, housing, social security, food, water and sanitation and protection of the family should all be reported on by the state parties.

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Article 7A(i) requires state members to "report on legislative and practical measures taken to ensure peaceful enjoyment of property".

Article 7A(ii) requires state members to "indicate the laws that govern the terms and conditions for the acquisition, nationalisation or expropriation of property to ensure that this is conducted transparently, in the public interest".

Article 7A(iii) requires state members to "indicate what measures have been taken to ensure that compensation for public acquisition of property fairly balances the rights of the individual and the wider interests of society".

Article 7A(v) requires state members to consider "[indicating] what steps have been taken to ensure equitable and non-discriminatory access, acquisition, ownership, inheritance and control of land and housing, especially by women and members of low income groups".


The African Commission on Human and Peoples’ Rights adopted the Principles and Guidelines during a meeting in November 2010. The Commission developed the Principles and Guidelines to detail the obligations on state parties to the African Charter on Human and Peoples’ Rights to respect, protect, promote and fulfil economic, social and cultural rights. The preamble to the Principles and Guidelines states that the Commission took inspiration from other international instruments, court decisions and various constitutional acts and charters when adopting the Principles and Guidelines.

The Principles and Guidelines recognise that state parties have obligations to ensure that economic, social and cultural rights are protected, and that any limitations on these rights should be strictly in line with human rights principles and obligations. The Principles and Guidelines cover a wide range of issues, such as the obligations of the states to take measures to ensure rights are not violated, through obligations to respect, protect and promote such rights. Resources and progressive realisation are addressed in general, along with specific measures and obligations to take immediate steps in some instances. Further obligations exist around the periodic reviews of plans and policies. Equality features in the Principles and Guidelines, as does international cooperation and the recognition of National Human Rights Institutions.

Part IV of the Principles and Guidelines outlines the rights which are enshrined in the African Charter and provides a more detailed explanation around the protection afforded by each Article, and how states should uphold these rights, through policies, plans or legislation. Some explanations provide details of the absolute minimum standard which should be reached, whereas others appear to leave this to the states’ discretion.73

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Article 1(e) requires state members to interpret "vulnerable and disadvantaged groups" within the Principles and Guidelines as "people who have faced and/or continue to face significant impediments to their enjoyment of economic, social and cultural rights. Vulnerable and disadvantaged groups include, but are not limited to, women, linguistic, racial, religious minorities, children (particularly orphans, young girls, children of low-income groups, children in rural areas, children of immigrants and of migrant workers, children belonging to linguistic, racial, religious or other minorities, and children belonging to indigenous populations/communities), youth, the elderly, people living with, or affected by, HIV/AIDS [...]."

The first section of Part IV (Articles 51-55), elaborates on Article 14 of the ACHPR.

Article 53 provides that "the right to property is a broad right that includes the protection of the real rights of individuals and peoples in any material thing which can be possessed as well as any right which may be part of a person's patrimony. The concept also includes the protection of a legitimate expectation of the acquisition of property."

Article 54 states that protected rights include "rights guaranteed by traditional custom and law to access to, and use of, land and other natural resources held under communal ownership".

Article 55 places a variety of obligations on state members which include the obligation to ensure peaceful enjoyment of property and protection from forced eviction, as well as the obligation to protect traditional land ownership while ensuring gender equality.

Article 55(h) requires state members "to ensure equitable and non-discriminatory access, acquisition, ownership, inheritance and control of land and housing, especially by women. This includes the obligation to take measures to modify or prohibit harmful social, cultural or other practices that prevent women and other members of vulnerable and disadvantaged groups from enjoying their right to property, particularly in relation to housing and land".

Article 77 reminds state members that "in SERAC & CESR v Nigeria, the Commission held that, although the right to housing or shelter is not explicitly provided for under the African Charter, housing rights are protected through the combination of provisions protecting the right to property (art 14), the right to enjoy the best attainable standard of mental and physical health (art 16), and the protection accorded to the family (art 18(1))".

Article 79(d) requires state members to "carry out comprehensive reviews of relevant national legislations and policies with a view to ensuring their conformity with international human rights provisions. Such reviews should also ensure that existing legislation, regulation and policy address the privatization of public services, inheritance and cultural practices, so as not to lead to, or facilitate forced evictions".

Article 79(p) requires state members to "take measures to ensure that women (whatever their marital status), internally displaced persons, refugees, indigenous communities/populations and other members of vulnerable and disadvantaged groups are guaranteed equal access to land, adequate housing or shelter and to acceptable living conditions in a healthy environment. Special attention should be given to ensuring fair and equitable inheritance of land and rights in housing regardless of sex".
Article 79(z) requires state members to "take steps to ensure that no one is subject to violence, especially women and children, or arbitrarily deprived of property or possessions as a result of forced evictions".

Article 82(e) requires state members to "guarantee to widows and orphans adequate benefits and assistance under social security schemes, including ensuring that they are entitled to inherit property from their husbands, parents or other relatives".

Article 95(h)(4) requires state members to provide that "in case of separation, divorce or annulment of marriage or other form of family partnership, all spouses shall have the right to an equitable sharing of the joint property deriving from the marriage or family partnership".

Article 95(j) requires state members to "ensure that both spouses have equal rights in respect of the ownership, acquisition, management, administration, enjoyment and disposal of property, whether free of charge or for a valuable consideration".

It is clear that nations signed up to the aforementioned instruments are under a number of obligations relating to non-discrimination and inheritance rights. However, as will be seen from the jurisdiction specific reports, in reality compliance with these obligations is often sporadic or non-existent.
CÔTE D'IVOIRE

INTRODUCTION

This report considers the inheritance rights of children in Côte d'Ivoire, specifically in relation to children who are orphans, having lost one or both of their parents to HIV/AIDS. This issue is most significant in Côte d'Ivoire given that the HIV/AIDS adult prevalence rate was 3.46% in 2014, while life expectancy is on average 58 years.⁷⁴

As a result, many children have become orphaned or vulnerable. In 2013 an estimated 400,000 children in Côte d'Ivoire were classified as such.⁷⁵ Given the cultural stigma surrounding HIV/AIDS, children who have lost parents to this disease are at the highest risk of displacement and confiscation of property left to them. Côte d'Ivoire has enacted legislation aimed at protecting inheritance rights of children, while recently the lack of women's rights in this area has been highlighted in the media.⁷⁶

This report is split into the following paragraphs:

1. Compliance with International Law
2. The National Legal System
   A. general provisions relating to inheritance rights
   B. specific provisions relating to sole survivor children and inheritance
   C. mechanisms for facilitating children's inheritance claims
3. Conclusion

1. COMPLIANCE WITH INTERNATIONAL LAW

Title 5 (Articles 84-87) of Côte d'Ivoire's Constitution (the "Constitution") explains the interrelation of Ivorian law and international treaties:⁷⁷

Article 84: The President of the Republic negotiates and ratifies the treaties and international agreements.

Article 85: The peace Treaties, the Treaties and Agreements concerning international organization, [and] those that modify the internal laws of the State can only be ratified after passage of a law.

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**Article 86:** If the Constitutional Council seized [saisir] by the President of the Republic, or by the President of the National Assembly, or by one-quarter at least of the Deputies, has declared that an international obligation includes a clause contrary to the Constitution, the authorization to ratify it can take place only after revision of the Constitution.

**Article 87:** The Treaties or Agreements regularly ratified have, on their publication, an authority superior to that of the laws, provided, for each Treaty or Agreement, that it is applied by the other party.

Under Article 95, the constitutionality of international commitments must be pronounced on by the Constitutional Council.

This seems to imply that laws are only needed to give effect to peace treaties, treaties on international organisation and those which modify state law. This suggests that treaties outside these three categories can be directly enforced as long as they are applied by other parties. 

Below is the status of Côte d'Ivoire's commitment to the treaties listed in the introduction to the overall report.

<table>
<thead>
<tr>
<th>International treaties</th>
<th>Signature Date</th>
<th>Ratification/Accession Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>International Convention on the Elimination of All Forms of Racial Discrimination (&quot;ICERD&quot;)</td>
<td>n/a</td>
<td>4 January 1973</td>
</tr>
<tr>
<td>International Covenant on Economic, Social and Cultural Rights (&quot;IESCR&quot;)</td>
<td>n/a</td>
<td>26 March 1992</td>
</tr>
<tr>
<td>International Covenant on Civil and Political Rights (&quot;ICCPR&quot;)</td>
<td>n/a</td>
<td>26 March 1992</td>
</tr>
</tbody>
</table>

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### Regional treaties

<table>
<thead>
<tr>
<th>Regional treaties</th>
<th>Signature Date</th>
<th>Ratification/ Accession Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>African Charter on Human and Peoples’ Rights (&quot;ACHPR&quot;)&lt;sup&gt;64&lt;/sup&gt;</td>
<td>30 August 2005</td>
<td>6 January 1992</td>
</tr>
<tr>
<td>African Youth Charter&lt;sup&gt;67&lt;/sup&gt;</td>
<td>15 February 2008</td>
<td>30 November 2009</td>
</tr>
</tbody>
</table>

* Please note that Côte d’Ivoire is not party to the Southern African Development Community due to its geographical location.

### 2. NATIONAL LEGAL SYSTEM

Côte d’Ivoire is a republic, heavily influenced by French colonialism. Côte d’Ivoire has a dual legal system comprised of Civil and Customary Law, with the Constitution as the overarching legal authority.

The Constitution was adopted on 23 July 2000 and entered into force on 1 August 2000.<sup>68</sup> Pursuant to its Preamble, the Constitution is the supreme law ("loi fondamentale") of the land. The Preamble of the Constitution defines the rights and freedoms of the people based on the Universal Declaration of Human Rights (1948) and the African Charter on Human and Peoples’ Rights (1981).

For the purposes of this report, both Civil Law and Customary Law are addressed, insofar as the information could be accessed. Customary Law and practices vary significantly throughout Côte d’Ivoire. Given the impossibility of considering all customary laws and practices, please note that references to such laws and practices may be particular to a specific region of the country.

For a comprehensive review of the legal framework and land rights in Côte d’Ivoire, we would recommend reading IDS Research Report 58 'The Law, Legal Institutions and Protection of Land Rights in Ghana and Côte d’Ivoire: Developing a More Effective and Equitable System' by

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Emulating French Law, Côte d'Ivoire's Civil Law regulates the civil life of an individual including matters related to birth, death, marriage, property ownership and inheritance. Civil Law in the country comprises of a set of statutes which together form the Civil Code of Côte d'Ivoire (the “Code”). Civil Law is administered by the Courts of First Instance, the Court of Appeals and the Supreme Court. Although under Article 102 the Constitution says that the Supreme Court should be formed of three separate courts (the Court of Cassation, the Council of State and the Court of Accounts), it seems this idea has not yet been followed, and there remains one Supreme Court with separate chambers. Côte d'Ivoire's judicial system is modelled on the French system and consists of five courts of first instance which are competent to deal with civil matters and two courts of appeal. There are also justice of the peace courts which can handle petty civil matters, and local 'tribunal branches'. Article 12 of the Civil, Commercial and Administrative Code explicitly states that the courts of instance have jurisdiction over inheritance disputes between beneficiaries, claims by creditors of the deceased and cases concerning the execution of matters arising from the deceased's death. The Article also states that the first instance court will rule definitively on this issue (ie there seems to be no route of appeal).

The Civil Code grants rights to all Ivorian nationals, and accords to foreigners all rights which would be accorded to Ivorians through treaties to which Côte d'Ivoire is a party.

Much of the national legislation of Côte d'Ivoire surrounding ownership and inheritance of property was originally structured around a patriarchal society where the man was the head of the family and had the sole right to choose where the married couple would live. As a result, aspects of this can still be seen in the Code. For example Part 12 (Minorité),
Chapter 4 (L'Administration Légale), Article 6 states that parental authority is in the first place exercised by the father.

Civil Law applies to the whole of Côte d'Ivoire, and in theory should be enforced throughout the country. The Code was drafted with the aim of replacing Customary Law and codifying Constitutional principles of equality and non-discrimination. Unfortunately, as will be seen below, Customary Law is still applied to the exclusion of Civil Law in much of the country which can lead to discriminatory practices towards women (and in some case minors), within the sphere of inheritance rights and otherwise.

A number of issues exist in relation to using the Civil Law system in Côte d'Ivoire. Firstly, some tribunals do not function properly and other local first tier tribunals proclaim themselves competent to deal with those jurisdictions. A lack of administration and a largely rural population living under Customary Law pose challenges in terms of enforcement and jurisdiction. Cases can be referred back to customary courts, in order to allow for local enforcement. Use of the Customary system is often preferred as cases before Civil tribunals take an average of eight years (with some lasting decades) and the impartiality of judges can be questionable.

The Civil Law system is slow, which means many disputes are resolved outside of its remit. However, this in turn means that there are no calls to reform the system, as it is not seen as overburdened. There are other reasons for low usage too. One is the irrelevance of the courts. Many disputes relate to Customary Law and so the Civil Code which courts have knowledge of has little relevance and the court cannot offer a viable juridical solution (although in reality they do offer pragmatic solutions with the benefit of state backing). In the past authorities linked to the state were seen as favouring migrants, and as a result migrants were often prevented from bringing court actions (e.g. by fines, curses and social stigmatisation).

Equally the formalised, private and need for written submissions can discourage litigants. Although written submissions can delay the process, this means cases are dealt with meticulously and exhaustively. Many litigants are keen to see disputes through to the end and fight for their land, seeing this as the only way to obtain a fair, final and legal

98 Civil Code, Titre Préliminaire, Article 1.
resolution to their issues, and they did not see costs as prohibitive. As a result, they are not interested in out of court settlements.104

There was a rise in cases being brought before civil courts, as young Ivorians mistrusted the customary settlement of disputes (with the corruption of local chiefs), while locals wanted final and legal resolution of disputes about transfer of property. A general political liberalisation, meant more Ivorians turned to state courts. As migrants were favoured by state authorities, they were more willing to use formal dispute resolution systems.105

Some Civil Law tribunals keep tabs on the operation of customary courts in order to inform their actions, but may also encourage complainants to settle their disputes under Customary Law before commencing a more formal judicial process.106

A 2007, report titled “The Organisation and Functioning of the Judicial System in Côte d'Ivoire” cites a number of issues with the Ivorian judicial system.107 The report refers to the unfit state of judicial buildings, a lack of budget and the paucity of equipment and human resources for the courts. Poor training of judicial workforce and corruption also affect the system. There are also questions around the independence of magistrates, in terms of how they are nominated, promoted and who they ultimately answer to. Difficulties in accessing jurisprudence and the length of time taken to deliver judgment are other problems, while in many instances cases are rejected, or sent back to the parties, for various reasons, such as the failure of parties to appear in court, provide information, or exchange documents on time. The court system is also often unused due to ignorance of procedure, distance from the courts and lack of financial means.108

The report also comments on the fact that some individuals may attempt to navigate the legal system without professional assistance. This is mainly due to claimants lacking money and the fact that most lawyers are concentrated in the capital of Côte d'Ivoire. This approach means that parties are unrepresented and suffer as a result (e.g. they do not know about appeal procedures). The lack of professional representation means that the quality of arguments before the court is low, which negatively limits the professional development of judges and magistrates, while in some cases judges and magistrates are


forced to, in the interests of justice, assist individuals, which in turn leads to questions about their impartiality.\textsuperscript{109}

Other specific dispute resolution methods also exist, such as local commissions for the settlement of farmer/cattle-herder disputes. However, difficulties in agreeing damages, slow processes due to nomadic communities and the need for strong executive action were some of the problems the commissions faced. In addition, there are state agencies and administrative officials that can be used for dispute resolution, but often their jurisdiction and authority is not accepted.\textsuperscript{110}

\textbf{ii. CUSTOMARY LAW}

Customary Law is widely practiced among societies in Côte d'Ivoire. For example, in 2012, 98% of land was still held under custom,\textsuperscript{111} and only 1-2% had proper legal title, while the majority of disputes were settled in customary courts.\textsuperscript{112} Customary Law is an unwritten, orally practiced law, based on the local traditional social norms, and is implemented by local or customary councils. Traditional norms may vary from one region to another.\textsuperscript{113} In the colonialist period, Customary Laws remained intact and most cases relating to personal laws were heard before the customary courts.\textsuperscript{114} Similarly, formal state courts are only used as a last resort (which is presumably why there are so few of them) and rulings can cause conflict.\textsuperscript{115}

Years of internal upheaval and civil war in the country have led to internal displacement and migration of native populations, which has created confusion problems in the administration of the legal system, as well as conflict over land. Property mediation can favour certain communities, and as a result, children of deceased parents outside these groups may find themselves at a disadvantage in terms of inheritance rights.

Under Customary Law, it is the chief of the village who rules on property disputes. The village chief ("chef du village") may also be the land chief ("chef de terre"). If not, the land


chief and other members of the community help to present the case to the village chief. Sometimes the village chief delegates his functions to the land chief.\textsuperscript{116} Despite the land chief (or priest) being important mediators, their authority is often not respected by younger generations and migrants,\textsuperscript{117} and there can be suspicion attached to them as they are often viewed as biased and having profited from the land.\textsuperscript{118}

The village chief is a customary and administrative role and he oversees the community. The land chief is a customary authority and is under the authority of the village chief. He decides issues of property and occupation. The village chief is usually a member of the family first native to that area, and the land chief is often the one who manages the land of important families. Nowadays land chiefs are elected by the village chief or are village chiefs because they come from the family of the original settlers.\textsuperscript{119} The vast majority of rural land disputes are settled by a land or village chief.\textsuperscript{120}

In some areas a family or elder council (which includes the village chief) settles disputes, but the land chief has authoritative rule. However in some cases there has been disintegration and fragmentation of local systems. Some disputes (especially those involving migrants) are settled through negotiation to avoid the problems of the ‘more’ official settlement options. This option is used by migrants who often work for a local Ivorian. Migrants often also use their own communities to settle disputes, while others take their dispute straight to more official authorities.\textsuperscript{121}

There is also the option of an appeal to the "chef de canton" where parties are not satisfied by a judgment. This chief is even recognised by the Civil Law administration. Chefs de canton are not elected, but come into office by succession. Their authority over village chiefs is generally respected. As an alternative appeal route, some communities turn to the 'sous-préfet' (sub-Prefect) or the local police. The number of appeals has risen as migrants see customary decisions as generally favouring the natives.\textsuperscript{122}

The 'sous-préfet' (sub-Prefect) administers the 'sous-préfecture', which is a collection of villages. The sub-Prefect is an emanation of the state and is an administrative

\begin{itemize}
\item \textsuperscript{120} USAID Country Profile, Property Rights and Resource Governance: Cote d'Ivoire, p.13, available at: http://usaidlandtenure.net/sites/default/files/country-profiles/full-reports/USAID_Land_Tenure_Cote_d'Ivoire_Profile.pdf.
\end{itemize}
coordinator and also supervises the village chiefs. The 'préfet' (Prefect) administers the next administrative which is known as the 'département', and is in charge of matters such as public order and security.\textsuperscript{123} The Prefect, sub-Prefect and Ministry for Agriculture are often involved in dispute resolution. They hold public meetings and try to involve local communities in resolution. As a result their local knowledge is good. In some cases the sub-Prefect will refer cases to the local chief, and it is this referral process which gives the local chief legitimacy.\textsuperscript{124}

With the help of the European Union the sous-préfets established 'Comités Villageois de Gestion Foncière Rurale' (Rural Property Management Committees), which helped to settle property disputes related to customary rights. The Committees were set up to link administrative and judicial bodies with local communities,\textsuperscript{125} and have the local land chiefs as members.\textsuperscript{126} A close working relationship and an understanding of the local communities was imperative. NGO and governmental authority input is also important to resolve these social differences.\textsuperscript{127} The Committees have encountered a number of problems, mainly the lack of implementation of the law and training, as well as a lack of public awareness about the property regime.

It was found that Customary Law was often more adapted to settling disputes, as opposed to a strict application of Civil Law. In this way a system of peaceful resolution was created, which often benefitted the migrant population. Nevertheless there remain issues of security and resources. In some cases the former has been addressed by replacing military préfets with civil préfets, but in others, powers are not properly separated between préfets and others.\textsuperscript{128}

The role of the local police in dispute resolution is informal, and they are often called upon to stop local disputes from escalating. Local police sometimes direct complainants to a more formal customary or judicial authority. In other cases police are called upon to enforce judgments already delivered by authorities. Sometimes customary authorities threaten to approach police in order to ensure people obey their rulings. Similarly, in areas of military activity, soldiers can be called upon in a similar way to police matters.


\textsuperscript{125} Although one article says that there is a 'Grand Mediator' which plays this role: ID21, Land: Research Findings for Development Policymakers and Practitioners, 'Land Rights in Ghana and Cote d'Ivoire', (April 2008), available at: \url{http://r4d.dfid.gov.uk/PDF/Outputs/IDS/id21Land_6.pdf}.

\textsuperscript{126} IDS Research Report 58 'The Law, Legal Institutions and Protection of Land Rights in Ghana and Côte d'Ivoire : Developing a More Effective and Equitable System' by Professor Richard Crook, January 2007, p. 73, available at: \url{http://www.ids.ac.uk/files/Rr58.pdf}.


However the impact of this approach essentially relies on the population's fear and respect of the police, and depends on the geographical location of the police in that area, their relationship with the population and the determination of those unwilling to obey 'judicial' decisions.\(^\text{130}\) It these procedures in some cases operate through 'police tribunals'.

Peace committees are another option for dispute resolution, however underrepresentation of certain groups on such committees can be an issue. The operation of these committees can vary depending on which NGO the committee is managed by. Their relationship with more formal dispute resolution authorities can be unclear, which can lead to a multiplication of processes and consequently conflicting decisions. In some areas peace protocols have been signed between communities, but these can favour native populations over migrants.\(^\text{131}\)

The advantages of pursuing a claim under Customary Law include the fact that the decisions are generally respected in customary communities, which in turn allows effective execution of decisions. The process is cheaper, local and simple. However there are many issues with a Customary Law claim. Some sources suggest that the legitimacy and impartiality of decision makers is not always clear, and decisions are not always consistent.\(^\text{132}\)

Officials using discretion and informal problem solving has the benefit of providing a rapid and flexible solution, but this can lead to a danger of corruption and abuse of power, while these concerns can also be levelled at those in more official dispute resolution positions (see above).\(^\text{133}\) Other concerns in relation to Customary Law judgments include slowness of execution of judgment/settlement, refusal of implementation/dissatisfaction with judgments and absence of defendants from the process.\(^\text{134}\)

In contrast, other sources suggest that the ability to participate in proceeding and transparency are aspects of Customary dispute resolution which make it legitimate.


however those who fear impartiality of local chiefs (e.g. migrants) may use a more official dispute resolution method, such as the ‘sous-préfet.’

In reality, Customary Law property disputes are generally settled by compromise, to ensure that both parties are happy, and the decision is respected. For example the land might be divided, or if it was sold without consent of the family, the chief will order the vendor to share the proceeds or risk the sale being annulled.

Migration and displacement has in itself caused issues for authorities being able to decide on land ownership rights. Some customary chiefs have been displaced, while in other cases self-proclaimed chiefs (or those elected by non-native groups) were overthrown by returning communities. On the other hand returning native chiefs were in some cases suspected of collusion with other communities, and their legitimacy was thus challenged. These situations led to illegal appropriation of land.

Land chiefs can also be young and inexperienced and conflicts can be caused over who is entitled to be the land chief. Returning communities can also disrupt and question existing dispute resolution systems. They can claim that they are treated too harshly, and taking part in mediation can be viewed as a sign of weakness. In one area the President created a special committee to resolve such disputes, but this in turn risks undermining the local chiefs. Non-native communities can be treated harshly, and as a result refuse to respect judgments. Ensuring all communities have a say in community life is important in overcoming this issue.

Efforts have been made recently to integrate and recognise Customary Law. In July 2014, a law on the status of kings and traditional chiefs was passed. Under Article 2, kings, province chiefs, chefs de canton, tribal chiefs and village chiefs are all recognised by the Administration. The law grants unto these individuals rights and protections (for example State protection against violence), but also gives them certain responsibilities.


141 Law No 2014-428 Article 5.
The main focus of the law however is the establishment of a National Chamber for Kings and Traditional Chiefs, in order to recognise traditional authority and custom, but also promote development. In 2015, a further law was brought into force in order to further flesh out the law of 2014, in particular the organisation and functioning of the National Chamber and designation of the organs therein, such as an assembly, a directorate and a secretariat. A dedicated building has been built to house the National Chamber and initial meetings have been well received by customary leaders.

A. GENERAL PROVISIONS RELATING TO INHERITANCE RIGHTS

Civil and Customary Law deal with inheritance separately and distribute property in very different ways. As will be seen, Customary Law on inheritance remains largely unregulated, while Civil Law is clearly established in the Code.

The Code provides that the age of majority in Côte d'Ivoire is 21 years old. At this age, the person is "capable of all acts of civil life". However, the Code also provides for circumstances, where the minor can be emancipated, for example by a statement from their parents (including adoptive and unmarried parents) or by marriage. This allows them, subject to certain conditions, to participate in all aspects of civil life.

Children who are not emancipated require a representative for all acts of civil life, which will usually be a parent. There are exceptions, for example any minor can perform 'conservatory' acts in relation to his estate, while the consent of minors aged 16 years or over is required for decisions where the minor has a personal interest in the matter.

The age of majority is not clearly defined under Customary Law, and will presumably vary between regions, depending on local practices and traditions.

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143 Law No 2014-428 Article 9.
146 Abidjan.net news article titled "Une Chambre nationale pour les rois et chefs traditionnels de Côte d'Ivoire à Yamoussoukro", 2 October 2015 available at: http://news.abidjan.net/h/565042.html
148 Civil Code, Titre XI, Chapter 1 (De La Majorité), Article 488.
149 Civil Code, 12˚) Minorité, Chapter 6.
150 Civil Code, 12˚) Minorité, Chapter 3, Article 28.
151 Civil Code, 12˚) Minorité, Chapter 3, Article 30.
152 Civil Code, 12˚) Minorité, Chapter 3, Article 29.
i. THE CONSTITUTION

The Constitution states the following:

**Article 2: The human person is sacred.**

All human beings are born free and equal before the law. They enjoy the inalienable rights which are the right to life, to liberty, to the full realization of their personality and to the respect of their dignity. The rights of the human person are inviolable. The public authorities have the obligation to assure the respect, the protection and the promotion of them. Any punishment leading to the deprivation of human life is forbidden.

Article 6 states that "[t]he State assures the protection of children, the aged and the handicapped".

Article 15 of the Constitution grants every citizen "the right of property". In addition, "[n]o one can be deprived of property, except in the public interest and subject to fair compensation".

Article 30 States that Côte d'Ivoire "assures to all equality before the law without distinction as to origin, race, sex or religion".

Under these provisions, it seems that children's property rights are equal to those of adults. Equally, the Constitution generally refers to all people, not just citizens, although some Articles specify references to citizens (e.g. Article 7 on Welfare).

In relation to property rights, Article 71 makes clear that these are matters for the National Assembly to legislate on.

ii. CIVIL LAW

I. Le Code Civil, 5˚) La Paternité et La Filiation and 6˚) Adoption

It is important to point out that adopted children have the same rights within their family as legitimate children. Although they (and their own descendants) do not have a right to inherit their adoptive parents' property (i.e that of their adoptive grandparents), they have a right to inherit from their adoptive parents and their biological parents.

Where children are born out of wedlock, they can be legitimated and will then receive the same rights as a child born in wedlock. Given that polygamous
marriage is not recognised under Civil Law, this presumably means that children from polygamous marriages are technically born out of wedlock. However children born out of wedlock can still inherit their parents' property (see below), even where not legitimated.

II. Le Code Civil, 3°) Mariage

The Civil Code includes Articles highlighting that family responsibilities ought to be shared. In particular Articles 58-60 and 67 replaced previous provisions and were brought into force by Law 2013-33. Article 58 states that the family "is managed jointly by spouses in the best interests of the household and the children", Article 59 says that spouses should contribute to the marriage. Article 60 says that "the family home is chosen by agreement of the spouses". while Article 67 says that each spouse has the right to exercise the profession of their choice (unless the profession is contrary to the best interests of the family).

Where a couple marry, their property becomes a "community of property" (unless they wish for their property to be governed by a regime of separation - see below). The husband administers the property subject to certain restrictions, but cannot bequeath by will more than his share.

The community is dissolved by the death of one of the couple, divorce etc. Each spouse retains their personal assets if they prove they belong to them (any dispute will presumably be between the surviving spouse and the deceased's representatives), while the rest of the property is shared equally among the spouses. The provisions of the Code which deal with how property is shared when it is inherited by more than one individual (Chapter 6 of The Civil Code, 7°) Successions) apply equally here. The broad principle is that if the asset cannot be divided or held jointly, it will be sold and the proceeds shared.

If property is held in a regime of separation, each spouse holds their own property. If there is any dispute, the spouse will need to prove that the asset belongs to them. Where neither spouse can prove ownership of an asset, it will be held in equal shares (any dispute will again presumably be between the surviving spouse and the deceased's representatives). Once the marriage is dissolved

157 Civil Code, 3°) Mariage, Chapter 3, Articles 18-22.
160 Civil Code, 3°) Mariage, Chapter 6, Article 69.
161 Civil Code, 3°) Mariage, Chapter 6, Article 81.
162 Civil Code, 3°) Mariage, Chapter 6, Article 95.
163 Civil Code, 3°) Mariage, Chapter 6, Article 96.
164 Civil Code, 3°) Mariage, Chapter 6, Article 102.
165 Civil Code, 3°) Mariage, Chapter 6, Article 103.
166 Civil Code, 3°) Mariage, Chapter 6, Article 104.
(including by death) property that cannot be divided, will be dealt with in accordance with Chapter 6 of The Civil Code, 7° Successions.\textsuperscript{167}

In the case of a polygamous marriage, wives will divide the amount that usually goes to the surviving spouse equally between themselves. This relates both to intestate succession and in relation testate succession, relates to the portion which passes to the surviving spouse irrespective of the will (see below).\textsuperscript{168} This presumably relates to polygamous marriages formed prior to the Civil Law abolition of polygamy.\textsuperscript{169}

III. La Loi sur le Domaine Foncier Rural de janvier 1999 \textsuperscript{170}

This law on rural property describes the types of rural land in Côte d'Ivoire. It was enacted with the goal of registering indigenous and customary rights over land and providing a legal guarantee in relation to them, as well as a method of protecting them before the courts.\textsuperscript{171}

Unfortunately the law has not had much success by reference to its goals of registering land in Côte d'Ivoire. Provisions precluding migrants from owning land (see below) led to conflict as land was reclaimed by locals to ensure their name was registered on the title deeds, while civil war after 1999 exacerbated the issues and made registration of land even more unlikely.\textsuperscript{172}

Articles 2 and 3 state there are two types of land:

(i) Land with permanent title:
   – land belonging to the State;
   – land belonging to public communities and individuals; and
   – ownerless land.

(ii) Land with temporary title:
   – land where customary rights are exercised in accordance with tradition; and

\textsuperscript{167} Civil Code, 3° Mariage, Chapter 6, Article 108.
\textsuperscript{168} Civil Code 9° Dispositions Diverses, Chapter 1, Articles 17-19.
\textsuperscript{170} RFI, 'La Loi sur le Domaine doncier rural de janvier 1999', available at: http://www1.rfi.fr/actufr/articles/064/article_35612.asp. For a comprehensive review of the legal framework and land rights in Côte d'Ivoire, we would recommend reading IDS Research Report 58 'The Law, Legal Institutions and Protection of Land Rights in Ghana and Côte d'Ivoire: Developing a More Effective and Equitable System' by Professor Richard Crook, January 2007 (http://www.ids.ac.uk/files/Rr58.pdf). Although the report has been referenced, a full review and summary of the report is beyond the scope of this report.
land where customary rights are exercised and ceded to third parties.

Article 5 states that land can be acquired by sale, intestacy, gift, will or obligation, while the rest of the Act deals with land registration (including the registration of customary land). Article 1 also states that only Ivorians can own land.

More detailed information on how property is registered under this Law can be found in the USAID Country Profile for Côte d’Ivoire. The report explains that there are three types of formal statutory tenure: land certificates (which are temporary prior to applying to one of the more secure forms of tenure), freehold rights and emphyteutic leases (available to non-Ivorians). However such leases can be for 99 years and any land certificate must include a list of people with interest in the land.

There was also concern regarding a clause that stated that upon the death of a foreign landowner, title will be given to allodial or indigenous landowners and the heir can try and renegotiate the lease, although the owners are not obliged to grant one. However this provision affected very few people.

Please note that a detailed review of property legislation is beyond the scope of this report, while issues with this Law by reference to Customary Law are discussed below.

IV. Le Code Civil, 8˚) Les Donations Entre Vifs et Les Testaments

Under Civil Law, property can only be given away by will or ‘par donation entre vifs’ (by gift) following the rules set out in the Code. Article 51 states that any person can dispose of their property by will. However this is caveated by Article 11 which states that where a person has children or descendants (ie grandchildren, great grandchildren, etc.), only one quarter of their estate can be disposed of by will or gift. If a person has siblings, descendants of siblings,


177 For more information, see paragraph USAID Country Profile, Property Rights and Resource Governance: Cote d’Ivoire, pp.4-15, available at: http://usaidlandtenure.net/sites/default/files/country-profiles/full-reports/USAID_Land_Tenure_Cote_d'Ivoire_Profile.pdf.


179 Civil Code, 8˚) Les Donations Entre Vifs et Les Testaments, Chapter 1, Article 1.

180 There are different types of will under Ivorian law, but an analysis of these is beyond the scope of this report. See paragraph Guide Juridique de la Femme en Côte d’Ivoire, (date unknown) page 42. Document provided by contacts at UNAIDS..
ancestors (ie parents, grandparents, etc.) or a surviving spouse, they can only dispose of half of their estate by will or gift. If none of these beneficiaries exist, a person can dispose of his entire estate by will or gift.\(^{181}\) It is presumed that the 'reserved' amount is then distributed as on intestacy.

The amount which the person can dispose of by will or gift can be given to people who would also succeed the deceased on intestacy.\(^{182}\) If the amount which the deceased disposes of by gift or will exceeds the amount which the Code allows them to dispose of, the total amount of gifts and dispositions by will are added to the deceased's estate, and the gifts and dispositions by will are reduced or annulled accordingly. Dispositions by will are reduced or revoked ahead of gifts.\(^{183}\)

Thus in cases where a child is excluded from a will, or the deceased tries to prevent the child from inheriting by giving his own property away prior to death, these provisions mean that three quarters of the estate will still pass on intestacy, which, as will be seen below, is extremely beneficial for the deceased's children and in turn their own descendants. Only those who stand to benefit from the 'reserve' can demand that the reserve be created.\(^{184}\)

Articles 87-95 cover the administration of a testate estate by the executor. Broadly it involves the drawing up of an inventory and distributing property in accordance with the will of the deceased.\(^{185}\)

\[\text{V.} \quad \text{Le Code Civil, 7˚) Successions} \]

The 'succession' is commenced by the death of the individual, and only those in existence at the time of death can inherit (ie the estate of a deceased child would not be able to inherit).\(^{186}\) Equally anyone convicted of certain crimes, such as the murder of the deceased cannot inherit (although their descendants can 'represent' them - see below).\(^{187}\) Various documentation needs to be presented in order for an individual to inherit.\(^{188}\)

The process of distributing the property of the deceased is covered in Chapter 5 of this Part. Broadly, the executor draws up an inventory and then pays the creditors and beneficiaries accordingly. Where mortgaged property is sold, the mortgagee

\(^{181}\) **Civil Code, 8˚) Les Donations Entre Vifs et Les Testaments, Chapter 3, Article 11-12.**

\(^{182}\) **Civil Code, 8˚) Les Donations Entre Vifs et Les Testaments, Chapter 3, Article 14.**

\(^{183}\) **Civil Code, 8˚) Les Donations Entre Vifs et Les Testaments, Chapter 3, Section 2.**

\(^{184}\) **Civil Code, 8˚) Les Donations Entre Vifs et Les Testaments, Chapter 3, Article 16.**

\(^{185}\) **Civil Code, 8˚) Les Donations Entre Vifs et Les Testaments, Chapter 5, Section 3.**

\(^{186}\) **Civil Code, 7˚) Successions, available at:**  [http://www.loi-dici.com/Successions/successions.php](http://www.loi-dici.com/Successions/successions.php). Note also that spouses cannot alter the rules of succession, except to the extent permitted by law (i.e. by will) under **Civil Code, 3˚) Mariage, Chapter 6, Article 72.**

\(^{187}\) **Civil Code, 7˚) Successions, Chapter 2, Article 5.**

\(^{188}\) **Civil Code, 7˚) Successions, Chapter 2, Article 6.**

\(^{189}\) See paragraph also Guide Juridique de la Femme en Côte d'Ivoire (date unknown) page 44-45. Document provided by contacts at UNAIDS.
will receive this amount. Under Article 76, where there are competing creditors, the judge will decide how the estate shall be distributed.\(^{190}\)

Chapter 1, Article 4, states that where inheritance is shared between Ivorians and foreign heirs, Ivorians will receive from the assets situated in Côte d'Ivoire an amount equal to the foreign assets from which they have been excluded. The rules on succession are then applied to the remaining assets situated in Côte d'Ivoire.

The Civil Law rules of intestacy are contained in Chapter 3 of the Succession Act 1964, which forms part of the Civil Code.

Article 22 of Chapter 3 states that when a deceased dies intestate their children inherit their property in equal shares, irrespective of their age, gender and whether they were born in wedlock. Children from different marriages are treated equally. If any of the deceased's children has died, their share passes to their own children in equal parts. This is the principle of grandchildren 'representing' their parents and this continues through the generations.\(^{191}\)

It is clear from this that children's rights are extremely well protected under the Code. The children and descendants (i.e., grandchildren, great grandchildren) of the deceased will inherit the property to the exclusion of all others, including a surviving spouse (see below).

If a deceased leaves no children or other descendants, half of the estate passes to the deceased's parents and the other half passes to their siblings and any of the siblings' descendants.\(^{192}\) The parents share their half equally, with the half passing to siblings being shared equally.\(^{193}\) If a sibling predeceases the deceased, their children 'represent' them and inherit their share, and it is divided equally between them (again this principle continues through the generations). If one or both of the parents has predeceased the deceased, their share is added to the share passing to the siblings or their descendants.\(^{194}\)

If siblings are due an inheritance under the intestacy rules and the deceased only had full blood siblings, the estate is shared equally between them. If the deceased has half siblings, the estate is divided equally between the mother’s children and the father’s children. Presumably this means that where the deceased has one full sibling and one half sibling, the full sibling will receive three quarters of the estate and the half sibling will receive one quarter. If there are no siblings on either the mother’s or the father’s side, the other side will receive the full share.\(^{195}\)

\(^{190}\) Civil Code, 7˚) Successions, Chapter 5, Section 3.
\(^{191}\) Civil Code, 7˚) Successions, Chapter 3, Section 2.
\(^{192}\) Civil Code, 7˚) Successions, Chapter 3, Article 23.
\(^{193}\) Civil Code, 7˚) Successions, Chapter 3, Article 31.
\(^{194}\) Civil Code, 7˚) Successions, Chapter 3, Articles 24 and 34.
\(^{195}\) Civil Code, 7˚) Successions, Chapter 3, Article 34.
If, in the above scenario, the deceased has no brothers or sisters, three quarters of the estate is passed to a surviving parent or is shared between surviving parents. The other quarter passes to any surviving spouse. If there is no surviving spouse, the surviving parent receives the whole estate or it is shared between the surviving parents.\textsuperscript{196}

If the deceased has no children or siblings and no surviving parents, half of the estate passes to a surviving spouse, and the other half passes to the deceased's 'ancestors' (ie grandparents, great grandparents).\textsuperscript{197} This half is split between maternal and paternal ancestors (ie a quarter to each side) and then is received by the ancestors most closely related to the deceased on each side.\textsuperscript{198} If there is more than one person in the most closely related class of ancestors on each side, it is shared equally among them.\textsuperscript{199} If there is no surviving spouse, the entire estate passes to the 'ancestors' as described above.\textsuperscript{200} If there are no ancestors on the maternal or paternal side, their share passes to the other side.\textsuperscript{201}

If the deceased has no children, siblings, ancestors or surviving parents, half of the estate passes to a surviving spouse, and the other half passes to the parents' relations.\textsuperscript{202} This half is split between maternal and paternal relations (ie a quarter each) and is then received by the relations most closely related to the deceased on each side.\textsuperscript{203} Proximity of relation is determined by 'degree'.\textsuperscript{204} The Act provides that siblings are of the first degree, although if they exist, the estate will have already been distributed. Uncles and nephews (and presumably therefore aunts and nieces) are of second degree, although if nephews exist the estate will have already been distributed as they are entitled to 'represent' their parents. Cousins are of third degree. If there is more than one person in the most closely related maternal or paternal class of relations, it is shared equally among them.\textsuperscript{205} If there is no surviving spouse, the entire estate passes to the relations as described above.\textsuperscript{206} If there are no relations on the maternal or paternal side, their share passes to the other side.\textsuperscript{207} Relations beyond the twelfth degree cannot inherit.\textsuperscript{208}

\textsuperscript{196} Civil Code, 7˚) Successions, Chapter 3, Article 25-27.
\textsuperscript{197} Civil Code, 7˚) Successions, Chapter 3, Article 28.
\textsuperscript{198} Civil Code, 7˚) Successions, Chapter 3, Article 30.
\textsuperscript{199} Civil Code, 7˚) Successions, Chapter 3, Article 31.
\textsuperscript{200} Civil Code, 7˚) Successions, Chapter 3, Article 29.
\textsuperscript{201} Civil Code, 7˚) Successions, Chapter 3, Article 32.
\textsuperscript{202} Civil Code, 7˚) Successions, Chapter 3, Article 35.
\textsuperscript{203} Civil Code, 7˚) Successions, Chapter 3, Articles 10 and 35.
\textsuperscript{204} Civil Code, 7˚) Successions, Chapter 3, Article 12 and 14.
\textsuperscript{205} Civil Code, 7˚) Successions, Chapter 3, Article 11.
\textsuperscript{206} Civil Code, 7˚) Successions, Chapter 3, Article 36.
\textsuperscript{207} Civil Code, 7˚) Successions, Chapter 3, Article 37.
\textsuperscript{208} Civil Code, 7˚) Successions, Chapter 3, Article 38.
In relation to a spouse inheriting as described in any of the provisions above, they must not be divorced or have a judgment of separation issued against them. If the deceased has no children, siblings, ancestors, relations or surviving parents, the spouse inherits the estate. It seems that in these circumstances there is no requirement for the spouse not to be divorced or not to have a judgment of separation issued against them. If there is no surviving spouse, the estate passes to the State.

As can be seen above, although children's inheritance rights are well protected, a surviving spouse will very rarely benefit from the entire estate of a deceased due to provisions that are extremely favourable to any blood relations. However the spouse will be able to retain her own property, and will generally receive half of the shared property because this will not form part of the deceased's estate (see above in relation to how property is held in marriage).

Chapter 5 deals with acceptance and rejection by a beneficiary of their inheritance. For example Article 46, states that acceptance can be express or tacit. Tacit acceptance is demonstrated by unequivocal actions, while express acceptance involves the presentation of certain documents to court.

Chapter 6 deals with the distribution and division of inherited property, and, as mentioned above, the general principle is that assets that cannot be divided or held jointly are sold and the profits distributed. Beneficiaries can decide among themselves how to divide property (Article 86) and disputes are settled by the courts (Article 90). Section 3 deals with the payment of debts, which pass to beneficiaries along with the estate (subject to the right to reject an inheritance).

Chapter 7 deals with the parents' and 'ancestors'' ability to share their belongings among their children and descendants, either while they are still alive, or by will (Article 135). If there are children living that did not exist at the time the last will and testament was made, and there are not sufficient additional assets at the time of inheritance for the additional child to receive their share, the provisions regarding proportions will be void. A different division can then be demanded.

Laws in the Ivory Coast also protect widows in relation to pension benefits, but this is beyond the scope of this report.

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209 Civil Code, 7˚) Successions, Chapter 3, Article 39.
210 Civil Code, 7˚) Successions, Chapter 3, Article 39.
211 Civil Code, 7˚) Successions, Chapter 1, Article 2.
212 Protection des Droits des Femmes, Filles, PVVIH et Populations à Haut Risque dans la Legislation Ivoirienne.Recueil des Textes Juridiques (date unknown), page 10. Document provided by contacts at UNAIDS.
213 See paragraphalso Guide Juridique de la Femme en Côte d'Ivoire, (date unknown) page 42. Document provided by contacts at UNAIDS.
214 Civil Code, 7˚) Successions, Chapter 7, Article 137.
VI. Law No 2014-430, July 2014, concerning the regime of prevention, protection and suppression in the battle against HIV and AIDS

This law does not specifically address succession in relation to HIV/AIDS, but provide protection for those with the virus. It in particular refers to orphans of HIV/AIDS, as well as children with HIV/AIDS (defined as those under 18). The law is divided into three main sections - 'Prevention', 'Protection' and 'Penalties'.

The 'Prevention' section (Article 3-17) deals mainly with testing and confidentiality.

The 'Protection' section (Articles 18-45) concerns non-discrimination against those living with HIV/AIDS, and includes various equality provision for such individuals, for example in relation to employment (Article 30).

The 'Protection' section also focusses on specific vulnerable groups and protections for them. Articles 39-42 relate to women and girls. These Articles generally place obligations on the State to protect women and girls who may be vulnerable to contracting the virus, and also pregnant women living with HIV/AIDS. Articles 43-45 place an obligation on the State to protect children (including orphans) who are vulnerable due to the virus, and in particular to make sure they are looked after and are not vulnerable to abuse or exploitation.

The final section is titled 'Penalties' (Articles 46-58) deal with criminal sanctions for offences related to HIV. Offences include:

- Testing an individual for HIV without their consent (Article 46);
- Revealing that an individual is HIV positive without their consent (Article 47);
- Having sexual relations with the intention of transmitting the virus (Article 48);
- Discriminating against an individual with HIV/AIDS (Article 52); and
- Taking advantage of a state of ignorance or weakness of someone with HIV/AIDS (Article 56).

Some of these offences carry severe sentences. For example a breach of Article 56 can lead to a prison sentence of up to five years and a fine of up to £3 million francs.

It seems some organisations have been set up in order to deal with the issues above. For example some documents refer to an National Programme protecting children vulnerable to HIV (the Programme National de Prise en Charge des Orphelins et Autres Enfants Rendus Vulnérables du Fait du VIH/ SIDA abbreviated to 'PNOEV'), but it is unclear whether this programme still exists.


217 The link to the PNOEV website is no longer live - http://www.pnoev.ci/ and the last post on their Facebook page was in 2012.
iii. CUSTOMARY LAW

I. Property Law

In order to better understand the inheritance systems in Côte d’Ivoire, it is worth briefly mentioning how land is treated under Customary Law. There are three types of tenure:

i) Rights of permanent use, which are passed down through generations and belong to the community. These are inalienable and perpetual.

ii) Rights to use and benefit from land which are often granted to migrants by a guardian of the land.

iii) Leasehold rights.

The majority of land transactions still occur under Customary Law, while women have no access to property ownership. Women are allowed to work on their husbands land, and in polygamous marriages each wife receives a plot to cultivate.

The division of rights can lead to misunderstandings about whether land has been sold and about who owns it. There is a growing practice of selling customary land, despite the customary principle of inalienability. In previous years, in order to facilitate transfer of customary land, the Ivorian administration encouraged, despite not being in conformity with Civil Law (which considers invalid customary transactions), an informal transfer of rights which respected the customary principle of the inalienability of land. However this led to ownership disputes, especially when native people returned to their lands. This eventually led to the Rural Property Law of 1999 only allowing Ivorians to own land.

The Law of 1999 aimed to suppress customary transactions, register customary land ownership and create an organised system of land ownership, but the system is not functioning effectively. Equally issues of administering such a system, especially given the remoteness of many of the relevant areas, need to be noted, as well as a lack of awareness and understanding from the customary population.

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218 For a comprehensive review of the legal framework and land rights in Côte d’Ivoire, we would recommend reading IDS Research Report 58 ‘The Law, Legal Institutions and Protection of Land Rights in Ghana and Côte d’Ivoire: Developing a More Effective and Equitable System’ by Professor Richard Crook, January 2007 (http://www.ids.ac.uk/files/Rr58.pdf). Although the report has been referenced, a full review and summary of the report is beyond the scope of this report.


of such a law. Owners of customary property rights are excluded from being party to transactions and the system of registering customary rights can be complex. As registration depends on control of the land, it is only males in Customary communities who can realistically benefit from the registration system under the new Law.

As mentioned above, a detailed review of property legislation is beyond the scope of this report.

II. Inheritance Law

Due to the prevalence of Customary Law, Côte d'Ivoire's inheritance practices vary throughout the country. There are two main systems of inheritance in Côte d'Ivoire: the matrilineal system and the patrilineal system.

The literature around how patrilineal and matrilineal inheritance operates is contradictory and it is unclear how these systems work in practice. Some sources say that in cases of matrilineal inheritance the deceased's sister's son inherits the estate, others say it is the deceased's brothers, while others say that the deceased's property passes to his widow's brother, or failing that the widow's brother's son (ie the deceased's nephew). In patrilineal systems there is a suggestion that property would pass to the deceased's brothers. It is also worth noting that all succession other than patrilineal succession was abolished in 1964, but this has not been respected.


227 USAID, AIDSTAR-One, Legal Units - Child Protection Support in Cote d'Ivoire, available at: www.aidstar-one.com/focus_areas/OVC/resources/case_study_series/legal_units#tab_5_and_Wikipedia.


The most comprehensive discussion on matrilineal and patrilineal inheritance says the following, (although it is in relation to Ghanaian succession).  

**The matrilineal family**

Some of the tribal communities of Ghana which are matrilineal include the Akan, Lobi, Tampolense and the Vagala or Baga. The matrilineal family consists of all members of the family who are "lineally descended in a direct female line" from a mutual female ancestor. In order to qualify for succession to and ownership of property in a matrilineal family, each individual family member must have received nourishment from the common blood in the mother’s uterus.

**Succession to the property of a man in a matrilineal community**

When a man died intestate in a matrilineal community his self-acquired property became family property and was divided in accordance with the tenets of customary law. This meant that the deceased’s mother and her offspring were the only persons eligible to succeed. Thus the only persons that qualified for succession in this regard were: the deceased’s mother, the brothers of the deceased according to their rank, nephews according to their rank and sisters, and daughters of the deceased’s sisters. If the afore-mentioned groups were incapable of inheriting, then the deceased’s property would fall to his maternal uncles by rank or selection, maternal aunts and maternal sister’s children. The general rule therefore precluded the deceased’s wife and children from succeeding to or receiving any particular share of the deceased’s estate because the constitution of the man’s matrilineal family did not incorporate his wife and children. In fact, women almost never owned property during their lifetimes; even in cases where they acquired property with the assistance of their husbands, such property became the sole property of the husband.

The only rights enforceable by the surviving wife and children against the estate of the deceased were in respect of maintenance and accommodation in the matrimonial home. This group of successors mentioned above, were obliged (under the principles of customary law) to share the entitlement to ownership and benefit of the estate with the dependants of the deceased, especially the children and widow or widows of the deceased for whom the successor is required to be accountable for. This important obligation however was seldom upheld and often resulted in severe adversity for the living widow as she was now tasked with the responsibility of caring and providing for her children without the assistance of any financial or social resources she could have acquired from her deceased husband’s estate.

**Succession to the property of a woman in a matrilineal community**

The general rule here is that the real successors of a woman’s individually acquired property are her mother, her children and her maternal brothers and

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sisters. Thus the only persons eligible for succession in this regard were: the intestate’s mother, her sisters (by order of rank), her female children (by order of rank), her nieces (born of her sisters), her female grandchildren (born of her daughters), her sister’s female grandchildren (born of her nieces), her maternal aunts and her female cousins (born of her maternal aunts). If the afore-mentioned groups were incapable of inheriting, then the deceased’s property would fall to the male beneficiaries in the same order as given above. The deceased’s mother ranks the highest in the order of succession. Possessions of a strictly feminine nature are characteristicly given to women in the family circle. When choosing a successor, the members of the immediate family take precedence over all other family members and if a successor cannot be found in that generation, then the family considers the next generation of successors and so the process goes on until a suitable successor is found.

The patrilineal family

Some of the tribal communities of Ghana which are patrilineal include the Ewe, the Ga-Dangmes, the Guan and Kyerepong. The patrilineal family consists of all members of the family who are “lineally descended in a direct male line” from a mutual male ancestor. In this type of family, an individual’s affiliation to the group is determined by the “possession of a common spirit” (called Ntoro among the Akan) which may be defined as:

the force, personal magnetism, character, personality, power or soul; we call it the common sacred germ or spirit which, it is believed, conceives the child and is the dominant influence which directs his or her course through life and upon which depend health, wealth, worldly power, possession, success in any venture, in fact, everything that makes life at all worth living.

It is believed that the Ntoro is possessed by all members lineally descended from a common male ancestor in the direct male line and that it is passed on by a man to each child borne of him.

Succession to the property of a man in a patrilineal community

When a man died intestate in a patrilineal community his self-acquired property also became family property and was divided in accordance with the rules of customary law. The general rule here once again excluded the deceased’s wife, but included his children (irrespective of their gender) for succession to the estate of the deceased. Other persons eligible to succeed included the deceased’s “paternal brothers and sisters, children of his paternal brothers, his paternal grandfather, paternal brothers and sisters of the grandfather and the descendants of the paternal uncles in the direct male line”. When electing a successor in a patrilineal community it is common for a father or paternal uncle to rank higher and therefore take precedence over a paternal brother, sister, children and grandchildren of the deceased.
Succession to the property of a woman in a patrilineal community

The general rule here is that the father of the deceased women is the rightful successor to her estate. This does not disqualify the deceased woman’s female relatives from being appointed as successors. Female relatives who do in fact qualify in this regard include “a sister of the whole blood, where one exists, failing which, a paternal halfsister or a paternal aunt”. The mother and children (regardless of their gender) of the deceased only acquire a “life interest” in the deceased’s property.

As in the case of succession to the self acquired property of a woman in a matrilineal society, traditional female articles are awarded to other females in the family. In the event of death of either the paternal sister or aunt, the children of the deceased may control the property as family property. This type of succession therefore displays elements of both matrilineal and patrilineal succession because both male and female children are equally entitled to benefit from the deceased’s property. When electing a suitable successor, the immediate family of the primary female proprietor designates one of them to administer the property on behalf of all interested parties.

Irrespective of how exactly the two systems operate in theory, it must be remembered that each family group is led by a chief. Upon his death, his younger brother takes charge of the group. Where there is no brother, leadership passes to the oldest son of the oldest brother. This person becomes the ‘manager’ of the estate of the deceased for the family, which will in turn pass on his death. He will have obligations towards his own family line, in terms of providing food and shelter, so it is unclear to what extent matrilineal or patrilineal distribution of an estate is respected in any case.\(^\text{233}\)

Women have very few inheritance rights under Customary Law and cannot own land.\(^\text{234}\) Even though a woman works on the land, her ability to control or access it comes through male members of the family, and she relies on their goodwill. A woman cannot dispose of or sell land. Similarly she cannot inherit the land, to prevent it being dispersed away from the community. A widow can stay and ‘guard’ the land for the deceased’s children, but otherwise the deceased’s brother will inherit it.\(^\text{235}\) In some cases widows are expected to return to their natal homes\(^\text{236}\) although in other cases the community’s goodwill means widows (and sole

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233 Internal Displacement Monitoring Centre, ‘A qui sont ces terres? Conflits fonciers et déplacement des populations dans l’Ouest forestier de la Côte d’Ivoire’ (2009), p.17, available at: http://www.internal-displacement.org/assets/publications/2009/200911-af-cdi-whos-land-is-this-country-fr.pdf. This is less of an issue with personal items passing on death, but a chief may also try and include these in the items that come under his management.


236 Social Institutions & Gender Index, Cote d’Ivoire Factsheet, available at: http://genderindex.org/country/cote-d039ivoire.
survivors) receive parcels of the deceased's land.237 Thus upon a husband's death, a widow will not only lose her husband, but may also lose the support of the community. In some cases a woman may have to marry another male in the family in order to keep her children.238

Women can rent and farm land, but in reality they are excluded from the most arable lands and work in other more ghetto-like areas, although due to the scarcity of farmland, these areas are also now less available.239 However, there is some movement towards recognising the rights of those working on land through compensation.240

The manner in which Customary Law operates has implications for Ivorian customary communities. In some cases, a father will establish plantations on his spouse's land rather than on that of his group so that his son can inherit it. Similarly, sons who know they will not inherit their father's lands are not incentivised to work on them.241 In light of this, a chief of a community should have interest in distributing a deceased's estate more equitably between his children. Some groups have thus split inheritance, giving half to the nephew under Customary Law, and half to the son of the deceased, more in line with Civil Law principles.242 However it must be noted that the chief may often distribute property in a way to favour himself (to the detriment of women and beneficiaries of a deceased), and there was hope that a system of land registration may have mitigated such issues.243

B. SPECIFIC PROVISIONS RELATING TO SOLE SURVIVOR CHILDREN AND INHERITANCE

i. THE CONSTITUTION

The Constitution does not contain specific provisions relating to children whose parents are both deceased.

ii. CIVIL LAW

I. Le Code Civil, 7˚) Successions

As mentioned above, the process of distributing property is dealt with under Chapter 5 of Successions. A deceased's children and their descendants (i.e., grandchildren etc.) will receive the estate in preference to all other heirs. Chapter 5 on acceptance and rejection of property would also apply to sole survivors, as would Chapters 6 and 7.

For more information, please see paragraph 2.a.ii.V.

II. Le Code Civil, 8˚) Les Donations Entre Vifs et Les Testaments

This part of the Code, which states that if the deceased has children or grandchildren etc., they may only dispose of one quarter of their estate by will or gift. Further provisions under this part of the Code would also apply to sole survivors.

For more information, please see paragraph 2.a.ii.IV.

iii. CUSTOMARY LAW

Under strict inheritance principles, and relying on the article quoted in paragraph 2.a.iii.II, property would pass to a sole survivor in the following ways:

– **Succession to the property of a man in a matrilineal community:** A sole survivor would not receive an inheritance.

– **Succession to the property of a woman in a matrilineal community:** Sole surviving females would inherit and, in the absence of female relatives, sole surviving males would inherit.

– **Succession to the property of a man in a patrilineal community:** Both male and female sole survivors would inherit.

– **Succession to the property of a woman in a patrilineal community:** Sole survivors (both male and female) would acquire a life interest in the property. Traditional articles could be received if the paternal sister or aunt died.

These distributions may not always be respected, and as has been said, Customary Law often favours a nephew over a son of the deceased and in practice assets are taken for the benefit of the deceased's community rather than distributed in accordance with strict rules. Thus sole survivors' inheritance rights are not well protected under Customary Law, and like widows, they rely on the goodwill of their community to secure a future (although this is not to say that such goodwill is never forthcoming). 244

As noted above, sole survivors' rights are protected under the Code but these are often overlooked in communities where Customary Law is practised. Similarly a will of a
deceased parent will hold little sway in such situations, and a group chief may well ignore a deceased's wishes. Female sole survivor (and women) may be given access to plots of land often, but these are non-profitable plots with perennial crops.

C. MECHANISMS FOR FACILITATING CHILDREN'S INHERITANCE CLAIMS

i. THE CONSTITUTION

As noted above, the Constitution is the fundamental law of Côte d'Ivoire and, given the fact it enshrines principles of non-discrimination and equality, it is in theory a basis for challenging discriminatory inheritance laws. In fact under Article 96, anyone can challenge the constitutionality of a law before the Constitutional Council. However Civil Law is generally non-discriminatory, whereas the problems of challenging Customary Law, given its uncodified nature, as well as its divergent nature and application, are discussed below.

As discussed, the Constitution seems to give direct effect to treaties (other those relating to peace, international organisation or the modification of internal laws) applied by other parties. Thus it seems persons could rely directly on the treaties discussed above to challenge discriminatory inheritance laws, but as mentioned, Civil Law is non-discriminatory, while there are many issues associated with challenging Customary Law.

Equally it is worth noting that Article 20 of the Constitution states that "Every person has the right to a free and equal access to justice".

ii. CIVIL LAW

   i. Le Code Civil, 12˚) Minorité, Chapitre 1: La Puissance Paternelle et Chapitre 4: L’Administration Légale

The default position in Ivorian Civil Law is that parents exercise what is known as 'la puissance paternelle' which is a parental authority. This gives parents a number of rights and obligations towards their children, such as the administration of their property. Although both mother and father hold this authority, if the parents of the child are married, the father will exercise this authority. The Code also specifies who will exercise the authority in other situations (e.g. following divorce) and protections for children when this authority is exercised.
The mother can exercise this authority if the father cannot (for example due to absence or incapacity), or if the father gives up this right voluntarily. If one of the parents is deceased the surviving parent exercises parental authority. Where the child is born out of wedlock the parental authority will be exercised by the parent which recognises the child with priority given to the father. The mother will exercise the parental authority if the child has the mother's name and is not recognised by the father in the first year of its life. However the court may override these provisions.

252 Articles 10-12 deal with implementation of protective measures by the court in relation to a child's education. Articles 13-15 cover the situation where rights flowing from parental authority are delegated to a third party by its holder, while Articles 16-17 deal with children found abandoned.

Article 38 states that the person exercising the parental authority is the legal administrator of the child's property and can dispose of revenue from this property. Article 39 explains that the child's property will not be under legal administration if a guardian is appointed (see below).

254 Broadly, the role of a legal administrator is similar to that of a guardian. However there are some differences. For example the legal administrator cannot be called to justify his acts before a court, and can perform actions where a guardian will need the consent of the family council (as long as they have the consent of their spouse or the 'juge des tutelles' ie the judge of guardianships).

255 The legal administrator is supervised by the juge des tutelles.

Restrictions exist on when a legal administrator can act apply to legitimate, legitimated and adopted children equally. Where a child is born outside of marriage, such restrictions apply where parenthood is officially confirmed and the parents remain alive and unmarried.

Where the interests of the minor are opposed to those of the legal administrator, the administrator must nominate an ad hoc administrator by the juge des tutelles.


254 Civil Code, 12˚) Minorité, Chapter 4 Article 46.

255 Civil Code, 12˚) Minorité, Chapter 4, Article 46.

256 Civil Code, 12˚) Minorité, Chapter 4, Article 46.

257 Civil Code, 12˚) Minorité, Chapter 5, Article 52. More precisely the juge des tutelles is a role fulfilled by the juge des enfants (children's judge) - see paragraph Article 51.

258 Civil Code, 12˚) Minorité, Chapter 4, Article 40.

259 Civil Code, 12˚) Minorité, Chapter 4, Article 41.

260 Civil Code, 12˚) Minorité, Chapter 4, Article 43.
The legal administrator may receive revenue from the assets of a minor, as long as certain expenses are met, such as food, maintenance and education, the payment of arrears or interest on capital, and expenses required for the conservation of the minor's estate.\footnote{Civil Code, 12') Minorité, Chapter 4, Article 44.}

The powers of the legal administrator cease by express waiver by the administrator by deed, by forfeiture of the parental authority, or by the revocation of legal administration.\footnote{Civil Code, 12') Minorité, Chapter 4, Article 45.}

Where property has been given or bequeathed to a minor under the condition that it would be administered by a third party or where children inherit because their parents have forfeited their own right to succession, legal administration will not apply to these types of property.\footnote{Civil Code, 12') Minorité, Chapter 4, Article 47.}

Where a child is under the authority of a legal administrator (e.g. a surviving parent), they have broadly the same rights and obligations as a guardian,\footnote{Civil Code, 12') Minorité, Chapter 4, Article 46.} but will require the consent of their spouse or the juge des tutelles where a guardian will require that of the family council.\footnote{Civil Code, 12') Minorité, Chapter 5 Article 52.}

As noted above, the actions of a legal administrator are overseen by the juge des tutelles,\footnote{Civil Code, 12') Minorité, Chapter 5 Article 43.} and he can appoint an ad hoc administrator in a "conflict of interest" situation.\footnote{Civil Code, 12') Minorité, Chapter 5 Article 48.}

It is presumed that any such claims will be made through the normal Civil Law court system, as described above.

II. \textit{Le Code Civil, 12') Minorité, Chapitre 5: La Tutelle}\footnote{Civil Code, 12') Minorité, available at: \url{http://www.loidici.com/Codecivilcentral/codecivilminoritetutelle.php}}

The concept of guardianship ("la tutelle") as provided for in the Code will be applicable to sole survivor children, as a guardian will be appointed where both parents are deceased.\footnote{Civil Code, 12') Minorité, Chapter 5 Article 50.}

Guardians are also appointed in other circumstances, for example where both parents lack capacity or where parental authority has been lost under Chapter 2, due to the parents’ (or the surviving parent's) actions. This would include instances of child abuse.\footnote{Civil Code, 12') Minorité, Chapter 5 Article 48. This includes children born out of wedlock, although this guardianship can be converted into legal administration under Article 50 if the child is recognised by one of its parents. Chapter 2 also includes instances of child abuse.}
Even where there is already a legal administrator, a guardian can be appointed in extreme situations, and a legal administrator (ie the person exercising the parental authority) can be appointed guardian. Where a guardian is not the legal administrator, the mother and father retain the rights and obligations related to the child, rather than their property, flowing from the parental authority (if they have not abused the child). 271 As with a legal administrator, a guardian is supervised by the juge des tutelles. 272 It seems they can't refuse the post, 273 and the judge can remove them from the post. 274

A surviving parent can nominate a guardian for their children upon their own death, providing that that parent holds the parental authority or is acting as a guardian at the time of their death. 275 Failing that, the guardian is chosen by the family council, 276 and failing that, by the State (by way of an administrator). 277 The family council comprises of four to six family members and is set up by the juge des tutelles. 278

Family council meetings can be requested by a minor of at least 18 years of age, 279 and the minor can be present in a consultative role. 280 Failure to attend a family council meeting can lead to a fine of 1,000-10,000 francs and or a prison sentence of ten days. 281 Emancipated minors and those who have attained majority can also dispute decisions of family council meetings (as can a minor over 18 with the authorisation of the juge des tutelles). 282

Subject to exceptions, a guardian has the same rights as those flowing from parental authority. 283 The minor's family council decide what sum should be attributed towards the education of the minor and administration of his or her assets. The council may also decide to give the guardian full or partial control of the revenue from the minor's assets. 284


272 Civil Code, 12˚) Minorité, Chapter 5 Article 52.

273 Civil Code, 12˚) Minorité, Chapter 5 Article 55.


275 Civil Code, 12˚) Minorité, Chapter 5 Article 56.

276 Civil Code, 12˚) Minorité, Chapter 5 Article 58.

277 Civil Code, 12˚) Minorité, Chapter 5 Article 60.

278 Civil Code, 12˚) Minorité, Chapter 5 Articles 68-69 and 73.

279 Civil Code, 12˚) Minorité, Chapter 5 Article 73.

280 Civil Code, 12˚) Minorité, Chapter 5 Article 76.

281 Civil Code, 12˚) Minorité, Chapter 5 Article 74.

282 Civil Code, 12˚) Minorité, Chapter 5 Article 78.

283 Civil Code, 12˚) Minorité, Chapter 5 Article 88.

284 Civil Code, 12˚) Minorité, Chapter 5 Article 88.
The guardian is solely responsible for all acts of administration on behalf of the minor.\textsuperscript{285} However, a guardian is liable for damages arising from poor management, and in order to perform certain acts, such as selling the minor’s assets, he must gain the family council’s authorisation.\textsuperscript{286} As with legal administration, a guardian may receive revenue from assets of the minor, as long as certain expenses are met, such as food, maintenance and education, the payment of arrears or interest on capital and expenses required for the conservation of the minor’s estate.\textsuperscript{287}

Articles 92-106 establish the process to be followed when a guardian has been appointed (e.g. drawing up an inventory of the minor’s assets) and regulate the ability of the guardian to administer and dispose of the minor’s assets.

Articles 98-103 deal specifically with succession rights and guardianship:

Article 98 states that where there is a plan for an amicable sharing of inherited property between beneficiaries, prior to agreement between the beneficiaries and the guardian of the minor, the division must be approved by the family council. If the council do not approve this, the dispute will be settled by the courts. Article 99 states that where such a dispute is settled by a court, the division decided on by the court is not subject to approval from the family council.

- Articles 100-102 deal with the guardian’s ability to accept the minor’s inheritance (presumably on the minor’s behalf). Articles 103-104 cover the rights of the guardian and the family council in relation to legal actions relating to enforcing or defending the minor’s inheritance, although this does not include actions commenced by the minor.

- Article 105 states that where the family council’s consent is needed, this can be replaced with that of the juge des tutelles if the value of assets is less than 250,000 francs. The juge des tutelles can authorise a sale of chattels if it is urgent.

- The guardian must give an account of his management both when so requested by the juge des tutelles and at the end of the guardianship, and in some cases must be given to the minor (where they are emancipated or over 18).\textsuperscript{288}

Sharing of property by minors under Chapter 6 “Du Partage” is done through guardians (Article 85).

In relation to sole survivors, a guardian can commence a legal action on behalf of the child relating to his or her property rights (any other actions require the consent

\textsuperscript{285} Civil Code, 12˚) Minorité, Chapter 5 Article 90.
\textsuperscript{286} Civil Code, 12˚) Minorité, Chapter 5 Article 90. See paragraph for example Articles 95-96 and 104. In some cases the juge des tutelles can give the consent instead of the family council.
\textsuperscript{287} Civil Code, 12˚) Minorité, Chapter 5 Article 91.
\textsuperscript{288} Civil Code, 12˚) Minorité, Chapter 5 Article 107-108.
of the family council). A guardian cannot dispose of a minor’s assets without the
authorisation of the family council. If the child is over 16, their consent is needed
for actions which affect him or her personally.

There are restrictions on who can fulfil the role of a guardian and those who can
be members of the family council. These include lack of integrity, habitual
negligence or ineptitude. Whether a guardian is fit for office is determined by the
family council, while the suitability of a family council member is decided by the
juge des tutelles. A guardian may be asked to justify his actions before the
court, and the juge des tutelles oversees the guardianship. These provisions
create a number of checks and balances in relation to a guardian’s powers and
obligations to enforce a minor’s inheritance rights.

A guardian has to remove himself from guardianship if he is in a legal dispute with
the minor about the minor’s state or his assets. This suggests that there is some
way for a minor to challenge a guardian, but it is unclear what the process around
this is.

Under Article 100, a guardian may only accept inheritance on a minor’s behalf
where there is an inventory. A guardian can only accept an inheritance if there is
no inventory if the family council consents and the deceased's assets significantly
exceed his liabilities. In such a case the guardian must draw up an inventory.

Article 100 also states that a guardian can only reject inheritance with the family
council's consent, but under Article 101 such inheritance can be reclaimed by the
guardian after the deliberation of the family council, or by the minor when he
becomes an adult (under certain conditions). Under Article 102, a guardian does
not need the family council’s consent to accept unencumbered property left to a
minor under a will.

III. Le Code Civil, 12°) Minorité, Chapitre 7: Les Regles de Procedure et
Dispositions Diverses

Chapter 7 deals with the court process surrounding guardianship and the meetings
of the family council (Section 4). Meetings are held in private and decisions of the

289 Civil Code, 12°) Minorité, Chapter 5 Article 103.
290 Civil Code, 12°) Minorité, Chapter 3 Article 29.
291 Civil Code, 12°) Minorité, Chapter 5 Article 62 and 81-83.
292 Civil Code, 12°) Minorité, Chapter 5 Article 66 and 86. Note that if a guardian proposed by the deceased parent does not
    wish to take this office, the juge des tutelles will decide on this (Article 66).
293 Civil Code, 12°) Minorité, Chapter 5 Article 85.
294 Civil Code, 12°) Minorité, Chapter 5 Article 107.
295 Civil Code, 12°) Minorité, Chapter 5 Article 52.
296 Civil Code, 12°) Minorité, Chapter 5 Article 84.
family council can be appealed, including by the guardian and a minor older than 18.  

Under Article 159, the guardianship of a child born out of wedlock becomes legal administration or guardianship as appropriate upon the entry into force of this law (ie 3 August 1970).

IV. Le Code Civil, 7°) Successions

Chapter 7 of this Part of the Code states that if the result of the sharing out of the assets results in unfairness meaning that some of the heirs have received more than authorised by the law, those who have not received their reserved portion of estate may demand that assets be redistributed to their benefit (although those who received too much can offer to rectify the situation of their own accord). The child that brings the claim in relation to the division of assets for the inheritance must bear the costs if the claim proves to be unfounded. The action cannot be brought until the parent or ancestor has passed away, or where their property is joint with another parent or ancestor, until they have both passed away.

V. Le Code de Procedure Civile, Commerciale et Administrative

Articles 27-31 of this Code specify that legal aid is available in all civil proceedings, to allow those without means to obtain access to justice. Legal aid can be withdrawn if the person claiming it receives the means with which to pay, or if they made a fraudulent declaration to obtain the legal aid.

The décret n° 75-319 of May 1975 outlines the process for claiming legal aid. A copy of this statute was not available online, but it seems that the way to obtain legal aid is by writing to the National Bureau of Legal Aid (Bureau National d’ Assistance Judiciaire (BNAJ)), and the BNAJ looks into whether the individual has the means to pay. It seems the scope of legal aid is rather generous, covering both legal representation (as designated by the BNAJ or a tribunal judge) and legal costs. Article 19 of the law specifies exactly which costs are covered by legal aid, for example travel costs of public officers.

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298 Civil Code, 12°) Minorité, Chapter 5 Articles 128, 151 and 154.
299 Civil Code, 12°) Minorité, Chapter 5.
300 Civil Code, 7°) Successions, Chapter 1, Article 138.
301 Civil Code, 7°) Successions, Chapter 1, Article 139.
304 Etude Portant Sur l’Analyse Des Instruments Legaux Protegeant Les Droits Des Femmes, Filles, Populations A Risque Et Personnes Vivant Avec Le VIH/SIDA En Côte d’Ivoire, M Alain KRA (date unknown), p.56. Document provided by contacts at UNAIDS, Article 19 includes the following:
   a) les droits de timbre et d’enregistrement et les taxes assimilées, soit sous forme d’exonération prévues par les lois fiscales, soit ceux qui demeurent exigibles sous forme de liquidation en débit.
   b) les redevances de greffe ;
However a number of issues exist around claiming legal aid in Côte d’Ivoire. Primarily many individuals are unaware of its existence, and those who do are often prevented from claiming it due to the complexity of process. There is often a lack of appetite from lawyers to represent individuals on legal aid while individuals navigating the legal system themselves struggle and are often not aware of possible options for legal recourse. As mentioned, those lacking means will often turn to Customary Law for dispute resolution, a system they perceive to be faster and more flexible, but where enforcement is carried out by the parties.305

In relation to legal aid, it should be noted that the Ivorian government has recently set up free legal advice centres, which will run every Wednesday in number of law courts and prisons (including twice a month in the main prison in Abidjan) for three years. These have been set up with a view to assisting 500 vulnerable people (it is unclear if this is over three years or per annum), and increasing accessibility to legal advice. The programme will be partially funded by EU investment, which has pledged 18 million euros to reform the Ivorian judicial system.306

iii. CUSTOMARY LAW

As mentioned above, there is the option to appeal to a “chef de cantori” in relation to the application of Customary Law, while in relation to property, aggrieved parties often turn to the local police or sous-préfet. However, given the lack of codification and divergence of practices, it is unclear whether such a challenge would be of value. Given a woman’s position in customary communities it also questionable whether any right of appeal of a woman would even be recognised. Similarly it is unlikely that young orphaned children would be in a position to bring such a challenge.

Where women (or orphans) have a legitimate claim under the Code, it will be rare that they attempt to enforce these rights in a situation where property has been distributed under Customary Law. This is due to the repercussions that flow from their communities or extended family: they risk being marginalised and women can be accused of witchcraft.307 However not all women were dissuaded by this as the Tabou Tribunal recorded 69 claims by women between 1990-2001.308

Even if the issue is brought before a court, the judge may not rule in favour of a woman due to the fact that under the Code, only civil marriages are valid, while in customary communities, customary marriages and polygamy are practised. However, in such a case, the woman could rely on laws allowing both female and illegitimate offspring to inherit to at least protect her children's rights of inheritance. Similarly the law permits a woman to manage the estate until the children are of age. Such actions would presumably be by way of legal administration.

The registration of customary land risks formalising the marginalisation of women in customary communities. Given that women cannot control land under Customary Law, it is unlikely that any rights they have will be formalised through the land registration system. Even though there exists the option of registering the land under a 'collective' certificate (where land is owned by more than one person), in order to be named as one of the owners, a woman will be again be relying on the goodwill of a male family member to enter her name on the certificate. However even under these ‘collective’ certificates there is still only one person named on the register and a manager of the land must also be named. The registering body does not do much in the way of interrogation to find out whether other family members ought to be added to the certificate. There is also no provision for a community to own land under a certificate. In any case the registration of customary land is not working effectively in practice.

Similarly, contracts relating to transfer of customary property rights take place between males, and this makes it difficult for women to enforce rights relating to the land of their deceased husbands.

As stated above, a woman can be forced to return to her natal home upon the death of a husband, while others may be evicted from communities following the Civil Law abolition of polygamy. Thus another obstacle to women legally enforcing any rights they may have in relation to the land is the fact they may be geographically removed from it. If this is overcome, in order to enforce any rights, the woman must demand a land registration

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309 In 1998, 34.8% of women were in polygamous unions - USAID Country Profile, Property Rights and Resource Governance: Cote d'Ivoire, p.10, available at: http://usaidlandtenure.net/sites/default/files/country-profiles/full-reports/USAID_Land_Tenure_Cote_d'Ivoire_Profile.pdf.


certificate, representing the successors of her husband. Whether a woman is successful or not in obtaining such a certificate, it is unlikely that her community would take kindly to such a process, impeding her ability to return there.316 Thus even if a certificate was obtained, whether it would be recognised by a customary community, or would be of any value seems unlikely.

Furthermore, it is unclear whether women and girls, especially those living in customary communities are aware of their rights with regard to property and inheritance. This practical issue is a major stumbling block which will prevent women and orphans from enforcing their rights, irrespective of legal and social obstacles. It is also important that women and young people are represented in the village committees governing rural land.317

As mentioned above, women and orphans will often rely on the goodwill of the community following the death of their husband or parents respectively.

Restrictions in accessing Customary (and Civil) Law resolution methods are also discussed in paragraph 2.

3. CONCLUSION

Given its comprehensive Civil Code, which applies to the entire country and which has addressed most issues of discrimination, children orphaned by HIV/AIDS in Côte d’Ivoire have their inheritance rights well protected as they are the first in line to inherit property. This applies to both male and female children, as well as those born out of wedlock. Furthermore if their own parents have predeceased their grandparents, they will inherit their grandparents’ estate (in addition to that of their own parents which they will have already inherited) by being able to claim as “representatives” of their parents.

This is how the system should operate throughout the country, but unfortunately the reality is different. As much of the population lives in customary communities, which are generally patriarchal and discriminate against women, denying them their inheritance rights under the Code. Given the community based lifestyle of these people, the rights of orphans under the Code will not be strictly respected either, although male children may benefit from favourable Customary Law inheritance principles. A reluctance to enforce inheritance rights through the court system, coupled with a lack of knowledge about their rights, leaves many members of customary communities without a method of claiming what is rightfully theirs.

Some effort has been made to address these issues. In 2008, 26 legal units were set up to “help resolve legal problems for OVC [Orphans and Vulnerable Children] and their families either by mediation or prosecution, and to raise awareness about children’s rights among OVC and their communities”. Legal Units were staffed by professionals and activities included “enforcing


inheritance laws for all children, including those born outside marriage”. In addition NGOs operate to assist in relation to both access to justice and HIV/AIDS.

Nevertheless, much more needs to be done to help the HIV/AIDS orphans of Côte d’Ivoire. Legislation comprehensively protecting their inheritance rights is in place and is far more advanced than that of other African countries. However, the problem lies in its enforcement. Until the Code is applied throughout local customary communities, women and children will not benefit from their rightful inheritance. Ensuring this happens is the real challenge facing the country.

APPENDIX 1 - SHORT SUMMARY TABLE

Note that it will be possible to provide references and narrative explanations in the full table on the next page.

<table>
<thead>
<tr>
<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td>In the Constitution</td>
<td>Yes</td>
<td>Does not specify</td>
<td>Does not specify</td>
<td>Does not specify</td>
<td>Does not specify</td>
<td>Does not specify</td>
<td>Does not specify</td>
</tr>
<tr>
<td>In legislation/Civil Law</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Does not specify</td>
<td>Yes</td>
<td>Yes</td>
<td>Don’t know</td>
</tr>
<tr>
<td>In Customary Law (codified)</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>In Customary Law (practice)</td>
<td>No</td>
<td>Don’t know</td>
<td>Don’t know</td>
<td>Don’t know</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
</tbody>
</table>

Please answer with one of the following responses only:

**Yes** - The law/practice explicitly mentions equality between the two characteristics (Questions 1-4), or relevant codified law/national provisions exist (Questions 5-7). In relation to Question 1, if gender neutral language rather than specifically mentioning gender equality, please specify ‘**Yes**’ and include an explanatory footnote to this effect.

**No** - The law/practice explicitly discriminates between the two characteristics (Questions 1-4). Not applicable to Questions 5-7.

**Does not specify** - All relevant material was accessed, but there was no information relevant to the question (Questions 1-7).

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319 Although there is no explicit reference to equality, gender neutral language is used.
**Don't know** - It is not possible to say whether all relevant material was accessed, and so a definitive answer cannot be given (Questions 1-7).

**N/A** - The question is not applicable for this type of law, for example if a country does not have codified Customary Law or a Constitution. It is likely that this answer will apply to Customary Law (practice) for Questions 5-7.
## APPENDIX 2 - EXTENDED SUMMARY TABLE

<table>
<thead>
<tr>
<th>ADDITIONAL QUESTIONS</th>
<th>RESPONSE</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1.</strong> How does the legal system define a child? Is the age of majority different for different matters?</td>
<td>Under the Civil Code, the age of majority is 21, however children can be emancipated before reaching this age. Please see paragraph 2.a. Customary Law is unlikely to have a strict definition of a child.</td>
</tr>
<tr>
<td><strong>2.</strong> Does the country have a de jure dual legal system (customary or religious law running parallel to the statutory law or common law)? Whether de jure or de facto, is the customary/religious law related to inheritance and property rights the preferred means of dispute resolution in this area?</td>
<td>There is a codified legal system in the Civil Code, but Customary Law varies throughout Côte d’Ivoire. Customary Law is divergent and widely practiced throughout Côte d’Ivoire. Thus it is used to resolve the majority of disputes (presumably including those related to inheritance and property rights) through a variety of fora. Please see paragraphs 2.i and 2.ii.</td>
</tr>
<tr>
<td><strong>3.</strong> Does the Country’s legal system (ie Civil Law and Customary Law) differentiate between different types of land tenure?</td>
<td>The Rural Property Law 1999 outlines the different types of land tenure under Civil Law (land certificates, freehold rights and emphyteutic leases). Please see paragraph 2.a.ii.iii. Tenure types recognised under Customary Law are rights of permanent use, rights to use and benefit and leasehold rights. Please see paragraph and 2.a.iii.I.</td>
</tr>
<tr>
<td><strong>4.</strong> Does the country have legislation governing inheritance rights?</td>
<td>The Civil Code contains comprehensive provisions on inheritance rights in both testate and intestate succession. Please see paragraphs 2.a.ii.I -2.a.ii.V. Customary Law in theory follows matrilineal and patrilineal succession principles but in reality inheritance is dealt with on an ad hoc manner with no basis of codified legislation. Please see paragraphs 2.a.iii.II and 2.b.iii.</td>
</tr>
<tr>
<td><strong>5.</strong> Does the legal system that governs inheritance rights (if any) ensure equality between male and female children?</td>
<td>The Constitution assures equality before the law without distinction as to sex. Please see paragraph 2.a.i.</td>
</tr>
<tr>
<td>ADDITIONAL QUESTIONS</td>
<td>RESPONSE</td>
</tr>
<tr>
<td>------------------------------------------------------------------------------------</td>
<td>------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>6. Does the legal system that governs inheritance rights (if any) ensure equality</td>
<td>The Constitution provides that 'all human beings are born free and equal', but makes no specific reference to adopted children. Please see paragraph 2.a.i.</td>
</tr>
<tr>
<td>between biological and adopted children?</td>
<td>The Civil Code seems to treat adopted children more favourably, allowing them to inherit from both their biological and adoptive parents. Presumably this applies to intestate succession and the 'reserve' of assets where there is a will (please see paragraph 2.a.ii.IV). Please see paragraph 2.a.ii.I.</td>
</tr>
<tr>
<td></td>
<td>Under the Civil Code, it is also specified that restrictions exist on when a legal administrator can act apply to legitimate, legitimated and adopted children equally. Please see paragraph 2.c.ii.I.</td>
</tr>
<tr>
<td></td>
<td>No specific information was found on whether Customary Law discriminates against adopted children.</td>
</tr>
<tr>
<td>7. Does the legal system that governs inheritance rights (if any) ensure equality</td>
<td>The Constitution provides that 'all human beings are born free and equal', but makes no specific reference to children born out of wedlock. Please see paragraph 2.a.i.</td>
</tr>
<tr>
<td>between children born in and out of wedlock?</td>
<td>Under the Civil Code, children born out of wedlock can be legitimated to obtain the same status as those born in wedlock (please see paragraph 2.a.ii.I). However children born out of wedlock have the right to inherit an intestate estate (please see paragraph 2.a.ii.V), and this will presumably also apply to the 'reserve' of assets where there is a will (please see</td>
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<td></td>
<td></td>
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<tr>
<td>ADDITIONAL QUESTIONS</td>
<td>RESPONSE</td>
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<td>-------------------------------------------------------------------------------------</td>
<td>-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>8. Does the legal system that governs inheritance rights (if any) ensure equality</td>
<td>The Constitution provides that 'all human beings are born free and equal', but makes no specific reference to children born from a polygamous marriage. Please see paragraph 2.a.i.</td>
</tr>
<tr>
<td>between children born from a monogamous and polygamous union?</td>
<td>Civil Law has abolished polygamy in Côte d'Ivoire, and so it would seem that a child from a polygamous marriage would be treated in the same way as a child born out of wedlock (please see above and paragraph 2.a.ii.I). Please note that there are provisions on wives of a polygamous marriage each inheriting property, but this seems to relate to marriages prior to the Civil Law abolition (please see paragraph 2.a.ii.II). No specific information was found on whether Customary Law discriminates against children born from a polygamous marriage.</td>
</tr>
<tr>
<td>9. Are there different legal rules for testate and intestate succession?</td>
<td>Under the Civil Code, testate and intestate succession are dealt with separately. Please see paragraphs 2.a.ii.I - 2.a.ii.V.</td>
</tr>
<tr>
<td></td>
<td>Under Customary Law, the distribution of property is fairly ad hoc, and patrilineal and matrilineal succession line as well as wills may be ignored. Please see paragraphs 2.a.iii.II and 2.b.iii.</td>
</tr>
</tbody>
</table>
### ADDITIONAL QUESTIONS

<table>
<thead>
<tr>
<th>Question</th>
<th>Response</th>
</tr>
</thead>
</table>
| 10. Does the legal system specify the percentages of inheritance to be distributed to children? | The Civil Code comprehensively describes how property will pass on intestacy (please see paragraph 2.a.ii.V). The Code also provides that on testacy, not all of a deceased's assets will pass under a will (please see paragraph 2.a.ii.IV).  
In Customary Law, some guidance is given by matrilineal and patrilineal inheritance lines, but it is unclear if this is respected and it seems distribution happens on more of an ad hoc basis. Please see paragraphs 2.a.iii.II and 2.b.iii. |
| 11. Does the legal system address the rights of orphaned children to transact land, houses and property that they inherit? | No specific information was found on this point.  
Under Civil Law, this would presumably be done through the surviving parent who would hold the 'parental authority', as they would become the legal administrator of the child's property. Legal administrators are subject to regulation. A parent can delegate some of the parental authority, while in certain circumstances a guardian can be appointed where a child's parents are still alive and in this case they would presumably manage the child's property. Please see paragraphs 2.c.ii.1-2.c.ii.11  
No specific information was found on this point under Customary Law.  
For sole surviving children, transactions would seem to take place through the guardian (see paragraph questions 14 and 15 below). |
| 12. Does the legal system link inheritance rights to residency/citizenship? | Some of the Constitution's provisions relate only to citizens, but in any case it does not include and express right to inheritance. Please see paragraph 2.a.i.  
The Civil Code only accords to foreigners rights which would be accorded to Ivorians through treaties to which Côte d'Ivoire is a party (please see paragraph 2.i). Only Ivorians can own property, although foreigners can obtain long leases (please see paragraph 2.a.ii.III). |
<table>
<thead>
<tr>
<th>ADDITIONAL QUESTIONS</th>
<th>RESPONSE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Where inheritance is shared between Ivorians and foreign heirs under Civil Law,</td>
<td>Ivorians will receive additional assets if foreign heirs also inherit foreign assets (please see paragraph 2.a.ii.V). However state authorities have been seen to favour migrants in the past (please see paragraph 2.i).</td>
</tr>
<tr>
<td>Ivorians will receive additional assets if foreign heirs also inherit foreign assets</td>
<td></td>
</tr>
<tr>
<td>(please see paragraph 2.a.ii.V).</td>
<td></td>
</tr>
<tr>
<td>Customary Law generally favours populations native to a certain area. Please see</td>
<td></td>
</tr>
<tr>
<td>paragraph 2.ii.</td>
<td></td>
</tr>
<tr>
<td>13. Does the legal system provide for automatic inheritance for sole survivor children?</td>
<td>The Civil Code is comprehensive on how a deceased's estate passes on intestacy and sole survivor children and their own descendants will inherit in priority to others. Please see paragraph 2.b.iiA.</td>
</tr>
<tr>
<td></td>
<td>Additionally under the Code, where sole surviving children exist, the deceased can only dispose of one quarter of his estate by will or gift. Please see paragraph 2.b.iiB.</td>
</tr>
<tr>
<td></td>
<td>Under Customary patrilineal and matrilineal inheritance rules, sole survivors might inherit. However, given the variety of practices, it would be more accurate to say that Customary law does not provide for automatic inheritance for sole survivor children. Please see paragraph 2.b.iii.</td>
</tr>
<tr>
<td>14. Does the legal system mandate the appointment of a trustee/administrator/guardian for sole survivor children?</td>
<td>Under Civil Law a guardian will be appointed for sole survivor children. Please see paragraph 2.c.ii.II -2.c.ii.III.</td>
</tr>
<tr>
<td></td>
<td>No specific information was found on this point under Customary Law. Sole survivor children will look to the goodwill of their community in relation to inheritance and guardianship. Please see paragraphs 2.a.iii.II, 2.b.iii and 2.c.iii.</td>
</tr>
<tr>
<td>15. If such an appointment is mandated, does codified law enumerate:</td>
<td>The Civil Code provides for the rights, responsibilities of a sole survivor's property until</td>
</tr>
</tbody>
</table>
### ADDITIONAL QUESTIONS

<table>
<thead>
<tr>
<th>QUESTION</th>
<th>RESPONSE</th>
</tr>
</thead>
<tbody>
<tr>
<td>he/she ceases to be a minor?</td>
<td>guardian. Please see paragraph 2.c.ii.II.</td>
</tr>
<tr>
<td>ii penalties to be imposed on an appointee who misuses the property/wrongfully deprives a child of property to which they are entitled?</td>
<td>The only provision found under the Code was that a guardian will be liable for damages arising from poor management. The guardian is also closely supervised by the juge des tutelles and the family council. Please see paragraph 2.c.ii.II-2.c.ii.III.</td>
</tr>
<tr>
<td>iii mechanisms for a sole survivor child to challenge an appointee and gain access to court?</td>
<td>The Constitution enshrines the right of access to justice for all. The Constitution also provides a means of contesting unconstitutional laws before the Constitutional Court and the possibility of relying directly on rights under treaties, but this is unlikely to be invoked in the context of challenging a guardian. Please see paragraph 2.c.i. Under the Code a child can challenge the distribution of property (if other beneficiaries receive more than is authorised by law) and a minor who is older than 18 or emancipated can challenge the decision of a family council. Although the Code mentions a situation of a guardian having to remove themselves from their position if in a dispute with the minor, it is unclear how such a dispute would arise. Please see paragraph 2.c.ii.II-2.c.ii.IV.</td>
</tr>
</tbody>
</table>

16. **Is there regulation of the management of inheritance for those sole survivor children with no legal guardian?**

Under Civil Law it seems to be presumed that a guardian will be appointed. However a child can challenge the distribution of property if other beneficiaries receive more than is authorised by law. Please see paragraph 2.c.ii.II and 2.c.ii.IV.

No specific information was found on this point under Customary Law. Sole survivor children will look to the goodwill of their community in relation to inheritance and guardianship.
<table>
<thead>
<tr>
<th>ADDITIONAL QUESTIONS</th>
<th>RESPONSE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Please see paragraphs 2.a.iii.II, 2.b.iii and 2.c.iii.</td>
<td></td>
</tr>
<tr>
<td>17. Where is Customary Law applied (in traditional non-State forums, formal State Courts, by local leaders/chiefs etc.)?</td>
<td>There are various local entities which apply Customary Law in Côte d'Ivoire. Some of these are more formal and recognised by the state, while others are more ad hoc. Please see paragraph 2.i and 2.c.iii.</td>
</tr>
<tr>
<td>18. How would you qualify the proportion of property claims resolved under Customary Law?</td>
<td>High majority. Please see paragraph 2.i.</td>
</tr>
<tr>
<td>[Nearly all/ High majority/ Small majority/ Minority]</td>
<td></td>
</tr>
<tr>
<td>19. Does the country have a court or tribunal in which orphaned children/their representatives can bring an action enforcing their legal right to property? If so, is there any case law specifically regarding orphaned children's inheritance rights?</td>
<td>The Constitution enshrines for children a right of access to justice for all. The Constitution also provides a means of contesting unconstitutional laws before the Constitutional Court and the possibility of relying directly on rights under treaties. Please see paragraph 2.c.i.</td>
</tr>
<tr>
<td></td>
<td>Under Civil Law it seems these cases would be brought before the civil courts of first instance of the country, which will rule definitively on the matter. However many issues exist in relation to these courts. Please see paragraph 2.i.</td>
</tr>
<tr>
<td></td>
<td>A hierarchical court system does exist under Customary Law, along with other dispute resolution methods. Please see paragraph 2.ii.</td>
</tr>
<tr>
<td></td>
<td>In general, access to the court system can be extremely difficult. Please see paragraphs 2.i and 2.c.iii.</td>
</tr>
<tr>
<td></td>
<td>No case law specifically regarding orphaned children's inheritance rights was found under Civil or Customary Law.</td>
</tr>
<tr>
<td><strong>ADDITIONAL QUESTIONS</strong></td>
<td><strong>RESPONSE</strong></td>
</tr>
<tr>
<td>--------------------------</td>
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</tr>
<tr>
<td>20. Are there national provisions for legal aid in civil/administrative claims, including inheritance? If so: Do these provisions contain special measures or provisions regarding children?</td>
<td>The Constitution enshrines the right of access to justice for all. Please see paragraph 2.c.i. Legal aid is enshrined in the Civil, Commercial and Administrative Code and available to all, although there are practical issues around claiming it. Legal advice clinics have also been set up recently. Please see paragraph 2.c.ii.V. There is also limited assistance from 'legal units', specifically for &quot;orphans and vulnerable children&quot;. Please see paragraph 3.</td>
</tr>
</tbody>
</table>
INTRODUCTION

This report considers the inheritance rights of children in Ethiopia, specifically in relation to children who are orphans, having lost one or both of their parents to HIV/AIDS.

Whilst the HIV prevalence rate of 1.2% is lower than in many other African countries, in 2013 an estimated 793,700 people were living with HIV/AIDS in Ethiopia. The issue therefore remains a significant one given that an estimated 450,000 children in Ethiopia have been orphaned due to HIV/AIDS.

This report is split into the following paragraphs:

1. Compliance with International Law
2. The National Legal System
   A. general provisions relating to inheritance rights
   B. specific provisions relating to sole survivor children and inheritance
   C. mechanisms for facilitating children's inheritance claims
3. Conclusion

1. COMPLIANCE WITH INTERNATIONAL LAW

The Constitution of the Democratic Federal Republic of Ethiopia ("Constitution") was adopted on 8 December 1994. The preamble states that, in adopting the Constitution, the peoples of Ethiopia are:

"Firmly convinced that the fulfilment of this objective requires full respect of individual and people's fundamental freedoms and rights, to live together on the basis of equality and without any sexual, religious or cultural discrimination."

International treaties, which have been ratified, are incorporated into Ethiopian national law by Article 9 of the Constitution, which states:

"1. The Constitution is the supreme law of the land. Any law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect.

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2. All citizens, organs of state, political organisations, other associations as well as their officials have the duty to ensure observance of the Constitution and to obey it.

3. It is prohibited to assume state power in any manner other than that provided under the Constitution.

4. All international agreements ratified by Ethiopia are an integral part of the law of the land."

Chapter Three of the Constitution on "Fundamental Rights and Freedoms" provides at Article 13 that the rights protected by the Constitution should be interpreted in line with international law:

"1. All Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this Chapter.

2. The fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia."

Below is the status of Ethiopia's commitment to the treaties listed in the introduction to the overall report.

<table>
<thead>
<tr>
<th>International treaties</th>
<th>Signature Date</th>
<th>Ratification/Accession Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>International Convention on the Elimination of All Forms of Racial Discrimination (&quot;ICERD&quot;)</td>
<td>N/A</td>
<td>23 June 1976^324</td>
</tr>
<tr>
<td>International Covenant on Economic, Social and Cultural Rights (&quot;IESCR&quot;)</td>
<td>N/A</td>
<td>11 June 1993^325</td>
</tr>
<tr>
<td>International Covenant on Civil and Political Rights (&quot;ICCPR&quot;)</td>
<td>N/A</td>
<td>11 June 1993^326</td>
</tr>
<tr>
<td>Convention on the Rights of the Child (&quot;CRC&quot;)</td>
<td>N/A</td>
<td>14 May 1991^328</td>
</tr>
</tbody>
</table>


Regional treaties | Signature Date | Ratification/Accession Date
--- | --- | ---
African Charter on Human and Peoples’ Rights ("ACHPR") | N/A | 15 June 1998[^329]
Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa | 1 June 2004[^331] | N/A
African Youth Charter | 28 December 2007[^332] | N/A


* Please note that Ethiopia is not a member of the South African Development Community due to its geographical location.

2. NATIONAL LEGAL SYSTEM

A. Constitution

The current Constitution came into effect in 1995. It establishes a Federal State system. The powers and functions of the Federal Government are set out at Article 51 of the Constitution, and Article 52 sets out the powers and functions of the Federal States. Article 50(8) states: "[...] The States shall respect the powers of the Federal Government. The Federal Government shall likewise respect the powers of the States."

There are currently nine States in total, each having their own administrative and legal system. A link to the Constitution of each State is included below. Those marked "ENG" indicate that an English translation of the original Amharic text has been provided.

- The State of Tigray - ENG - [http://landwise.landesa.org/record/1834](http://landwise.landesa.org/record/1834)
- The State of Afar - [https://chilot.files.wordpress.com/2012/02/afar-national-regional-stae-constitution.pdf](https://chilot.files.wordpress.com/2012/02/afar-national-regional-stae-constitution.pdf)
- The State of Somali - [https://chilot.files.wordpress.com/2012/02/somali-national-regional-state-constitution.pdf](https://chilot.files.wordpress.com/2012/02/somali-national-regional-state-constitution.pdf)
There are also two federal cities - Addis Ababa and Dire Dawa. These cities have their own court system to deal with minor municipal matters, which are operated through the Kebele administrative system. Every neighbourhood in Ethiopia's larger cities has its own Kebele office, comprising around 500 households per unit. Addis Ababa has 330 Kebeles, organised into 28 Woredas – the next higher administrative unit, equivalent to a district. In 2004 Ethiopia as a whole had more than 30,000 Kebeles.

Article 9 of the Constitution provides that the Constitution is the supreme law of the land, and that any "law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect."

Article 51(5) of the Constitution gives the Federal Government power to regulate land issues in Ethiopia: "It [the Federal Government] shall enact laws for the utilisation and conservation of land and other natural resources, historical sites and objects". Article 52(2)(d) of the Constitution then makes State Governments responsible for the administration of land within the Federal Government's framework: "to administer land and other natural resources in accordance with Federal laws". The Constitution is silent as to which law shall prevail in case of conflict between laws made by the State Governments and the Federal Government.

Article 40 of the Constitution deals with rights in property. In terms of land, Article 40(3) appears to incorporate a principle that land has a community value, and that it should not simply be considered as a market commodity. Some of the challenges this raises, and proposed solutions, are set out in the Land Administration to Nurture Development (LAND) project run by USAID.

"Article 40

(1) Every Ethiopian citizen has the right to the ownership of private property. Unless prescribed otherwise by law on account of public interest, this right shall include the right to acquire, to use and, in a manner compatible with the rights of other citizens, to dispose of such property by sale or bequest or to transfer it otherwise.

(2) "Private property", for the purpose of this article, shall mean any tangible or intangible product which has value and is produced by the labour, creativity, enterprise or capital of an individual citizen, associations which enjoy juridical personality under the law, or in appropriate circumstances, by communities specifically empowered by law to own property in common.

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(3) The right to ownership of rural and urban land, as well as of all natural resources, is exclusively vested in the State and in the peoples of Ethiopia. Land is a common property of the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or to other means of exchange.

(4) Ethiopian peasants have right to obtain land without payment and the protection against eviction from their possession. The implementation of this provision shall be specified by law.

(5) Ethiopian pastoralists have the right to free land for grazing and cultivation as well as the right not to be displaced from their own lands. The implementation shall be specified by law.

(6) Without prejudice to the right of Ethiopian Nations, Nationalities, and Peoples to the ownership of land, government shall ensure the right of private investors to the use of land on the basis of payment arrangements established by law. Particulars shall be determined by law.

(7) Every Ethiopian shall have the full right to the immovable property he builds and to the permanent improvements he brings about on the land by his labour or capital. This right shall include the right to alienate, to bequeath, and, where the right of use expires, to remove his property, transfer his title, or claim compensation for it. Particulars shall be determined by law.

(8) Without prejudice to the right to private property, the government may expropriate private property for public purposes subject to payment in advance of compensation commensurate to the value of the property”.

The Freedom in the World 2015 Report published by Freedom House describes the practical application of these legal principles:

“All land must be leased from the state. The government has evicted indigenous groups from various areas to make way for projects such as hydroelectric dams. It has also leased large tracts of land to foreign governments and investors for agricultural development in opaque deals that have displaced thousands of Ethiopians. Up to 70,000 people have been forced to move from the western Gambella region, although the government denies the resettlement plans are connected to land investments. Similar evictions have taken place in Lower Omo Valley, where government-run sugar plantations have put thousands of pastoralists at risk by diverting their water supplies. Journalists and international organizations have persistently alleged that the government withholds development assistance from villages perceived as being unfriendly to the ruling party.”

Similarly, the BTI 2014 Ethiopia Country Report states:

“In November 2011, a controversial new Urban Lands Lease Holding Proclamation was made public. In effect the proclamation nationalised urban land and eliminated all remaining forms of transferable and inherited urban private property. According to the assessment of one close observer of the Ethiopian policy, this new regulation would mean that such property would have to

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be held on lease, so that any land could eventually be redistributed and expropriated at will by the authorities.”

State intervention in terms of providing for orphaned children is also apparent at Article 41 of the Constitution on “Economic, Social and Cultural Rights”. Article 41(5) states:

“The State shall, within the limits permitted by the economic capability of the country, care for and rehabilitate the physically and mentally handicapped, the aged, and children deprived of their parents or guardians."

The concept of equality between men and women is enshrined in the Constitution at Article 35(1): “Women shall have equal rights with men in the enjoyment of the rights and protections guaranteed by this Constitution to all Ethiopians.”

B. The Legal System

Ethiopia’s federal political structure is mirrored in its legal system. The Constitution recognises a dual judicial system of federal and state courts, which remain structurally and operationally independent of each other.

The Federal Supreme Court in Addis Ababa enjoys national jurisdiction; federal High Courts have also been established in five States. Each court has a civil, criminal and labour division. The Federal Supreme Court also includes a cassation division which has the power to hear appeals on points of law arising from judgments by lower federal courts and by State supreme courts. A decision by the cassation division is binding on all other courts, both federal and State. The jurisdiction of the federal courts is set out in the Federal Courts Proclamation No. 25/1996. This includes cases arising under the Constitution, federal legislation and international law.

State courts enjoy original jurisdiction within their own State in relation to State law. In addition, State courts can assume delegate jurisdiction over federal matters.

The Addis Ababa City Charter (“City Charter”) establishes two levels of City Court with first instance and appellate jurisdiction over civil matters and petty criminal offences within the city of Addis Ababa. The City Charter also establishes Social Courts at Kebele level, which hear property and monetary claims up to 5,000 birr (approximately GBP £156).

The Constitution also provides that individuals can voluntarily submit to the jurisdiction of religious courts in personal and family matters. See paragraph 2D ‘Customary Law and Religious Law’ below for further information.

More detailed information on the Ethiopian legal system can be found in the following two reports:

Overview of the Ethiopian Legal System by Ameha Wondirad;


All conversions are approximate and were made at the time of writing the report using a commercial rate of exchange available at www.xe.com.

Introduction to the Ethiopian Legal System and Legal Research by Girmachew Alemu Aneme.340

In terms of how the legal system works in practice, in its 2013 Country Report on Human Rights Practices for Ethiopia, the US Bureau of Democracy, Human Rights and Labour noted:

"Many citizens residing in rural areas generally had little access to formal judicial systems and relied on traditional mechanisms of resolving conflict. By law all parties to a dispute must agree to use a traditional or religious court before such a court may hear a case, and either party may appeal to a regular court at any time. Sharia (Islamic law) courts may hear religious and family cases involving Muslims. Sharia courts received some funding from the government and adjudicated the majority of cases in the Somali and Afar regions, which are predominantly Muslim. In addition other traditional systems of justice, such as councils of elders, continued to function. Some women stated they lacked access to free and fair hearings in the traditional justice system because they were excluded by custom from participation in councils of elders and because there was strong gender discrimination in rural areas."341

It is also recognised that, although Ethiopia has a democratic "looking" Constitution, its interpretation and development is controlled politically and not by the judiciary. There is therefore little confidence that the Justice System Reform Programme initiated by the Ministry for Capacity Building will have any significant effect.342

"Ethiopia remains among the hostile states towards human rights norms and liberties. Besides the sluggish practice of its own constitution, the regime’s theorization of developmental state has failed to stand the test of growing economic inequality. In reference to the judicial independence and power of the judicial review, Ethiopian constitution, appallingly, puts a trust on political entity as opposed to the judiciary in interpreting the constitution. That means the constitutionally guaranteed rights [the bills of rights] are not given meaning by the court. Unlike the South African judicial system, Ethiopian judiciary is devoid of the power to interpret the constitutionally guaranteed rights. The constitutions rather entrusts the political unit of the government, i.e., the House of Federation [HoF], the power to give meaning to the constitution and the bills of rights. House of Federation contains hand-picked political appointees from the ruling political party.

Notwithstanding the above difficulty, what is more exacerbating is a deliberate lack of legislative scrutiny that would have mitigated the risk or threats posed by judicial lack of a mandate to adjudicate the constitution. With no institutionalized system of legislative scrutiny and no culture of deliberation in the parliament, any statute and proclamation would easily be enacted irrespective of whether or not it is incongruous to the spirit of the constitution. Arguably, with a

diminished or disabled judicial function and power, Reform Program in Ethiopia is just a futile effort.\footnote{343}

C. Legal codes/ Codified customary laws

The Constitution is supported by a number of comprehensive legal codes, such as:\footnote{344}

- Civil Code 1960;
- Commercial Code 1960;
- Maritime Code 1960;
- Criminal Procedure Code 1961;
- Civil Procedure Code 1965;
- Revised Family Code 2000;

These codes set out the statutory legal framework in Ethiopia. The extent to which each code can be applied may vary. For example, the Revised Family Code, which repealed and updated the section of the Civil Code dealing with family law, applies at the federal level only, while the Revised Criminal Code applies throughout Ethiopia.

To a certain extent, the codes incorporate the customary law existing at the time of their development - customary law was incorporated where it was sufficiently clear and articulate and was not contrary to the imperatives of social and economic progress. However, where customary law is not incorporated by a code, it is displaced. For example, Article 3347 of the Civil Code 1960 ("Civil Code") states:

"Unless otherwise expressly provided, all rules whether written or customary previously in force concerning matters provided for in this Code shall be replaced by this Code and are hereby repealed."

In addition to the power of the House of Peoples' Representatives to pass primary legislation, the Federal Council of Ministers and Federal Ministries can pass regulations and directives respectively. However, the Baseline Study Report prepared for the Justice System Reform Programme highlights how difficult it is to identify and access legislation:

"The analysis of the present situation shows that the current legislative and regulatory procedure leads to a fragmentation of the legal system, a lack of coherence between existing codes and laws and, as a result, an uncertainty as to the legal norm. This lack of clarity is compounded by the lack of published judicial decisions in civil and criminal cases. […] The laws published in the Gazeta are not always circulated in sufficient numbers among ministries and the public at large. This increases the uncertainty as to the legal norm. This applies equally to international treaties ratified by the House, which are not always published, let alone circulated. Even when they are properly circulated, the relevant ministries do not always implement laws. The law making process in the Regional States is similar to the procedure on the federal level. […] The problems

\footnote{344} Ethiopian Legal Brief, "Federal Laws", available at: \url{http://chilot.me/federal-laws/11/}. 
confronting the Regional Councils and the Regional Administrations are similar to those encountered on the federal level. Conflicts between federal law and customary and religious law abound. The present system whereby federal law is not forcibly enforced is working relatively well. However problems of conflict of laws are bound to multiply in the future and should be addressed.\(^\text{345}\)

Article 52(1) of the Constitution also gives States power to make laws in relation to their own jurisdiction. For example, the States of Tigray, Amhara, Oromia and the Southern Nations, Nationalities and People have enacted their own Family Codes.\(^\text{346}\) According to one academic, these codes are based on the federal Revised Family Code, including some sections which are word for word copies.\(^\text{347}\)

D. Customary Law and Religious Law

Outwith the legal codes and a specific constitutional exemption for personal and family law, customary laws developed by traditional elder councils do not have legal authority, but continue to carry moral force. These customary practices of Ethiopia are mostly, though not exclusively, vibrant in rural areas where the formal legal system is unable to penetrate because of a lack of resources, infrastructure and legal personnel as well as a lack of legitimacy. This is because the modern law is seen as alien, imposed, and ignorant of the cultural realities on the ground.

Article 34(5) of the Constitution specifically allows for the application of religious and customary law to personal and family law issues, where the parties have both consented to this. The definition of 'personal and family law’ would include succession and inheritance rights. In the case of religious law, it would be appropriate to apply Sharia law to a succession dispute if the endowed or donor is a Muslim or the deceased was a Muslim at the time of his death.

“34(5) This Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute. Particulars shall be determined by law.”

Article 78(5) of the Constitution further provides that:

“78(5) Pursuant to sub-article 5 of Article 34 the House of Peoples’ Representatives and State Councils can establish or give official recognition to religious and customary courts. Religious and customary courts that had state recognition and functioned prior to the adoption of the Constitution shall be organised on the basis of recognition accorded to them by this Constitution”.

To date at the time of writing, Sharia courts applying Islamic law are the only religious courts that have been established at Federal and State levels. These courts are funded by the Government, and are required to follow the procedural rules of ordinary courts. However, in accordance with


\(^{\text{346}}\) For copies of these Family Codes, see paragraph the website of Abyssinia Law, available at [http://www.abyssinialaw.com/codes-commentaries-and-explanatory-notes?limitstart=0](http://www.abyssinialaw.com/codes-commentaries-and-explanatory-notes?limitstart=0).

Article 5 of Proclamation No. 188/99, Sharia courts have their own appellate procedure and there is no right of appeal from the Sharia courts to the regular federal or State court system.

For a more detailed explanation of the interaction between codified and customary law, see:

- University of Addis Ababa course materials on customary law;\(^{348}\)
- The Danish Institute for Human Rights report on "Customary laws in Ethiopia: a need for better recognition?"\(^{349}\)

**A. GENERAL PROVISIONS RELATING TO INHERITANCE RIGHTS**

Initially, it is important to note that Ethiopia comprises nine regional governments that each have the authority for self-administration: Afar, Amhara, Benshangul/Gumuz, Gambela, Harari, Oromia, Southern Nations, Nationalities and Peoples, Somali and Tigray. Each region has a separate Constitution and the laws in a particular State may vary.

Ethiopia's civil law regulates the life of the individual relating to matters involving birth, death, marriage and property ownership and inheritance. A minor is a person of either sex who has not attained the full age of 18 years.\(^{350}\) A father and mother are jointly guardians and tutors of their minor children.\(^{351}\)

**i. THE CONSTITUTION**

The Federal Constitution enshrines equality as a basic principle of Ethiopian domestic law and contains anti-discriminatory provisions including those pertaining to woman and children born out of wedlock. It does not vary amongst each regional State. Article 25 recognises that all persons are equal before the law and are entitled without discrimination to the equal protection of the law.

Article 25 states that:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall guarantee to all persons equal and effective protection without discrimination on grounds of race, nation, nationality, or other social origin, colour, sex, language, religion, political or other opinion, property, birth or other status".

Article 34 states that:

> "(1) Men and women, without any distinction as to race, nation, nationality or religion, who have attained marriageable age as defined by law, have the right to marry and found a family. They have equal rights while entering into, during marriage and at the time of divorce. Laws shall be enacted to ensure the protection of rights and interests of children at the time of divorce."


\(^{350}\) The Civil Code - Book 2 - Chapter 2 - Section 1 - General Provisions Article 198.

\(^{351}\) The Civil Code - Chapter 2 - Section 1 - General Provisions Article 204.
(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental unit of society and is entitled to protection by society and the State.

(4) In accordance with provisions to be specified by law, a law giving recognition to marriage concluded under systems of religious or customary laws may be enacted.

(4) This Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute. Particulars shall be determined by law”.

Article 35 states that:

“(1) Women shall, in the enjoyment of rights and protections provided for by this Constitution, have equal right with men.

(2) Women have equal rights with men in marriage as prescribed by this Constitution.

(3) The historical legacy of inequality and discrimination suffered by women in Ethiopia taken into account, women, in order to remedy this legacy, are entitled to affirmative measures. The purpose of such measures shall be to provide special attention to women so as to enable them to compete and participate on the basis of equality with men in political, social and economic life as well as in public and private institutions.

(4) The State shall enforce the right of women to eliminate the influences of harmful customs. Laws, customs and practices that oppress or cause bodily or mental harm to women are prohibited.

(5) (a) Women have the right to maternity leave with full pay. The duration of maternity leave shall be determined by law taking into account the nature of the work, the health of the mother and the well-being of the child and family.

   (b) Maternity leave may, in accordance with the provisions of law, include prenatal leave with full pay.

(6) Women have the right to full consultation in the formulation of national development policies, the designing and execution of projects, and particularly in the case of projects affecting the interests of women.

(7) Women have the right to acquire, administer, control, use and transfer property. In particular, they have equal rights with men with respect to use, transfer, administration and control of land. They shall also enjoy equal treatment in the inheritance of property.

(8) Women shall have a right to equality in employment, promotion, pay, and the transfer of pension entitlements.

(9) To prevent harm arising from pregnancy and childbirth and in order to safeguard their health, women have the right of access to family planning education, information and capacity”.
Article 36 states that:

"(1) Every child has the right:

a. To life;

b. To a name and nationality;

c. To know and be cared for by his or her parents or legal guardians;

d. Not to be subject to exploitative practices, neither to be required nor permitted to perform work which may be hazardous or harmful to his or her education, health or well-being;

e. To be free of corporal punishment or cruel and inhumane treatment in schools and other institutions responsible for the care of children.

(2) In all actions concerning children undertaken by public and private welfare institutions, courts of law, administrative authorities or legislative bodies, the primary consideration shall be the best interest of the child.

(3) Juvenile offenders admitted to corrective or rehabilitative institutions, and juveniles who become wards of the State or who are placed in public or private orphanages, shall be kept separately from adults.

(4) Children born out of wedlock shall have the same rights as children born of wedlock.

(5) The State shall accord special protection to orphans and shall encourage the establishment of institutions which ensure and promote their adoption and advance their welfare, and education".

As set out in paragraph 2A above, Article 40 of the Constitution deals with the right to own land.

ii. CIVIL LAW

I. Marriage and family rights

Ethiopia recognises several different forms of marriage. This includes civil marriage concluded before an "office of civil status", religious marriage, marriage according to the custom of the community in which the spouses live or to which they belong, and marriages celebrated abroad in accordance with the relevant law of that location provided that it does not "contravene public morals". Article 40 of the Revised Family Code provides that marriage produces the same legal effects, regardless of whether it is civil, religious or customary.

Article 7 of the Revised Family Code states that both males and females must be 18 years old in order to marry, though with parental consent dispensation may be granted for two spouses at marry at 16. In practice, though, it appears that
marriage may be permitted between a man aged 18 years old and a female aged 15 years. If either party knows that the other party is not of age, this is punishable by provisions in the Penal Code. Any undertaking made by a person not to marry or not to remarry shall be of no effect. Marriage affords the same legal effects whatever form it was celebrated in. No distinction shall be made as to whether the marriage has been celebrated before an officer of civil status or been celebrated according to the forms prescribed by religion or custom.

The spouses may, before their marriage, regulate by a contract of marriage the pecuniary effects of their union. However, this cannot affect the mandatory provisions of the law.

In relation to children of previous marriages, each of the spouses shall retain an exclusive right of decision in matters concerning the education of the children which they had before the marriage. Any agreement to the contrary shall be of no effect.

II. Property rights in marriage

The Civil Code provides that in regards to the management of the family, the family will operate under the guidance of the husband. This extends to salaries, income and common property (anything other than personal property is considered common property). This is unless the father is absent or abandons his family. Any provisions in the contract of marriage stating otherwise shall be of no effect. It can however be agreed in the contract of marriage that one of the spouses shall administer the property or certain property of the other spouse and that he or she may dispose of such property.

The property which the spouses possess on the day of their marriage or which they acquire after their marriage by succession or donation shall remain their personal property. Property acquired with onerous title by one of the spouses

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353 The Civil Code - Title 4 - Chapter 4 - Section 1 - Article 607(1).
354 The Civil Code - Title 4 - Chapter 3 - Section 2 - Article 598(1).
355 The Civil Code - Title 4 - Chapter 4 - Section 1 - Article 625(1).
356 The Civil Code - Title 4 - Chapter 5 - Section 1 - Article 625(2).
357 The Civil Code - Title 4 - Chapter 5 - Section 1 - Article 627(1).
358 The Civil Code - Title 4 - Chapter 5 - Section 1 - Article 627(3).
359 The Civil Code - Title 4 - Chapter 5 - Section 1 - Article 639(1).
360 The Civil Code - Title 5 - Chapter 5 - Section 1 - Article 639(1).
361 The Civil Code - Title 5 - Chapter 5 - Section 1 - Article 637.
362 The Civil Code - Title 5 - Chapter 5 - Section 3 - Articles 652 and 656.
363 The Civil Code - Title 5 - Chapter 5 - Section 1 - Article 638(1) and (3).
364 The Civil Code - Title 5 - Chapter 5 - Section 1 - Article 650(1).
365 The Civil Code - Title 5 - Chapter 5 - Section 1 - Article 647.
during the marriage shall also be treated as the personal property of that spouse, provided that the new property was acquired in exchange for property that was already owned personally or that its acquisition derived from the alienation of property that was already owned personally.

If a marriage is dissolved, the custody of the children shall be regulated in regard to the best interests of the child.\textsuperscript{367} In the absence of a serious reason why this should not be the case, up until the age of five a child will reside with its mother.\textsuperscript{368}

In the case of death of a spouse, each spouse shall retake in kind the property which is owned personally by him where he shows that he is the owner thereof.\textsuperscript{369} If one of the spouses proves that any of his personal property has been disposed of and that the value of that property has been included in the common property, he shall withdraw first from the common property money or things of a value corresponding to such price.\textsuperscript{370} The wife shall make her withdrawal before the husband.\textsuperscript{371}

Unless otherwise provided in the contract of marriage or in a contract validly concluded between the spouses, common property shall be divided equally between the spouses.\textsuperscript{372} The provisions in the Civil Code relating to the partition of property between heirs, which are set out at Articles 1079-1113, apply \textit{mutatis mutandis} to the partition of common property.\textsuperscript{373} In the case of divorce, pecuniary relations between the spouses shall be liquidated, as in the case of death of one of the spouses.\textsuperscript{374}

These provisions are, however, contradicted by parallel provisions in the Revised Family Code. It is not clear to what extent the Revised Family Code displaces the Civil Code given that it only applies at federal level.

Article 50(1) of the Revised Family Code states that "\textit{The spouses shall have equal rights in the management of the family}". Articles 57-73 regulate the pecuniary effects of marriage:

"Article 57. — Personal Property of Spouses (1) Property not acquired by Onerous Title.

\textsuperscript{366} Please note that 'onerous title' means title to property acquired by giving valuable consideration. Valuable consideration is not restricted to monetary payment, but can include the exchange of goods or services, the discharge of a lien or the performance of conditions.

\textsuperscript{367} \textsuperscript{368} \textsuperscript{369} \textsuperscript{370} \textsuperscript{371} \textsuperscript{372} \textsuperscript{373} \textsuperscript{374}
The property which the spouses possess on the day of their marriage, or which they acquire after their marriage by succession or donation, shall remain their personal property.

Article 58. — (2) Property Acquired by Onerous Title.

1) Property acquired, by onerous title, by one of the spouses after marriage shall also be personal property of such spouse where such acquisition has been made by exchange for property owned personally, or with monies owned personally or derived from the sale of property owned personally.

2) The provisions of Sub-Article (1) of this Article shall apply only when the court, at the request of one of the spouses, has decided that the property thus acquired shall be owned personally by such spouse.

Article 59. — Administration of Personal Property (1) Principle.

1) Each spouse shall administer his respective personal property and receive the income thereof.

2) Each spouse may freely dispose of his personal property.

Article 60. — (2) Determination by Contract of Marriage.

1) It may be agreed in the contract of marriage that one of the spouses shall administer all or part of the personal property of the other spouse and that he may dispose of such property.

2) The spouse who is entrusted with the power of administering the property under Sub-Article (1) of this Article shall, at the request of the other spouse, submit an annual statement of accounts of the management of such property.

Article 61. — (3) Agency.

One of the spouses may freely entrust to the other spouse the administration of all or part of his personal property.

Article 62. — Common Property of Spouses.

1) All income derived by personal efforts of the spouses and from their common or personal property shall be common property.

2) All property acquired by the spouses during marriage by an onerous title shall be common property unless declared personal under Article 58 (2) of this Code.

3) Unless otherwise stipulated in the act of donation or will, Property donated or bequeathed conjointly to the spouses shall be common property.

Article 63. — Legal Presumption.

1) All property shall be deemed to be common property even if registered in the name of one of the spouses unless such spouse proves that he is the sole owner thereof.
2) The fact that certain property is personal may not be set up by the spouses against third parties unless the latter knew or should have known such fact.

Article 64. — Income of Spouse (1) Normal Management.

1) Each spouse shall receive his earnings.

2) The spouses may deposit their respective earnings either in personal or joint bank account.

3) One of the spouses shall, at the request of the other spouse, render an account to the latter of the income received by him.

Article 65. — (2) Exception.

1) One of the spouses may freely give the other spouse a mandate to receive the income which is due to him.

2) The court may at the request of one of the spouses, authorize such spouse to receive the income of the other spouse and to give receipt thereof.

3) Unless other laws provide otherwise, the court may also order the full or partial attachment of the income of either spouse.

Article 66. — Administration of Common Property.

1) Common property shall be administered conjointly by the spouses unless there is an agreement which empowers one of them to administer all or part of the common property.

2) Where one of the spouses is declared incapable, or is deprived of his right of property management or for any other reason is unable to administer the common property, the other spouse shall alone administer such common property.

Article 67. — Duty to give Notice.

The spouse who performs an act of management in respect of common property is duty bound to inform the other spouse thereof.

Article 68— (1) Requisite of Agreement of Spouses

Unless provided otherwise by other laws, the agreement of both spouses shall be required to:

(a) sale, exchange, rent out, pledge or mortgage or alienate in any other way a common immovable property to confer a right to third parties on such property;

(b) sale, exchange, pledge or mortgage, or alienate in any other way, a common movable property or securities registered in the name of both spouses: the value of which exceeds five hundred Ethiopian birr.

(c) transfer by donation of a common property the value of which exceeds one hundred Ethiopian birr, or money which exceeds such amount;
(d) borrow or lend money exceeding five hundred Ethiopian birr or to stand surety for a debt of such amount to another person.

Article 69. — (2) Absence of Agreement.

1) Where one of the spouses has entered into obligations in violation of the provisions of the preceding Article, the court may, at the request of the other spouse, revoke such obligations.

2) An application for cancellation may not be made six months after the day on which the other spouse came to know the existence of such obligation, or, in any case, two years after such obligation is entered.

Article 70. — Debts of Spouses.

1) Debts due by one spouse may be recovered on the personal property of the indebted spouse, and in the absence of such personal property, it may be recovered on the common property.

2) Where the debt is incurred in the interest of the household, it shall be deemed to be joint and several debt of both spouses and may he recovered on the common property and on the personal property of either of the spouses.

Article 71. — Debts in the Interest of Household.

The following debts shall he deemed to be debts incurred in the interest of the household:

(a) debts incurred to fulfil the livelihood of the spouses and their children;

(b) debts incurred in order to fulfil an obligation of maintenance to which both the spouses or one of them is bound:

(c) other debts which are acknowledged to be such by the court at the request of either of the spouses or the creditor.

Article 72. — Contribution to Household Expenses.

The spouses shall contribute to the household expenses in proportion to their respective means.

Article 73 — Contracts Between Spouses.

Contracts entered into between spouses during marriage shall he of no effect unless approved by the court."

III. Children's rights

The Civil Code and the Revised Family Code both set out a number of rights relating to children. Given the lack of clarity over the extent to which the Revised Family Code has displaced the Civil Code, both sets of rules are included below.
Rights according to the Civil Code

Maternal filiation results from the sole fact of the birth. According to Article 741 there is a presumption of paternity of the husband. A child conceived or born in wedlock has the husband as father. An acknowledgement of paternity shall result from the declaration made by a man that he considers himself the father of a certain child, born or merely conceived. Such declaration need not have been made with a view to producing the effects of an acknowledgement of paternity.

If the father of the child is dead or not in a position to manifest his will, the acknowledgement of paternity may be made in his name by the paternal grandfather or grandmother. In default of paternal grandparents, it may be made by another paternal ascendant. The acknowledgement of paternity shall be of no effect unless it has been acknowledged to be well-founded by the mother of the child. If the mother of the child is dead or not in a position to manifest her will, the acknowledgement of paternity may be accepted by the maternal grandfather or grandmother of the child.

Bonds of consanguinity and affinity may be created artificially by a contract of adoption in accordance with the provisions laid out in Articles 796-806 of the Civil Code. These provisions require the following:

- Any person of age may adopt. Where an adoption is made by two spouses, it is sufficient that just one of the spouses be of age.
- If the adopter is married, the contract of adoption must be made jointly by both spouses, unless the adopter is adopting the child of his spouse or if one of the spouses is unable to manifest their will.
- It is possible to adopt an unborn child, although the mother retains the right to revoke unilaterally the adoption for three months after the birth.
- If the child to be adopted is more than 15 years old, the contract of adoption should be made between the adopter and the child.

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375 The Civil Code - Book 2 - Title 4 - Chapter 10 - Section 1 - Article 739.
376 The Civil Code - Book 2 - Title 4 - Chapter 10 - Section 1 - Article 741.
377 The Civil Code - Book 2 - Title 4 - Chapter 10 - Section 1 - Article 747(1).
378 The Civil Code - Book 2 - Title 4 - Chapter 10 - Section 1 - Article 747(2).
379 The Civil Code - Book 2 - Title 4 - Chapter 10 - Section 1 - Article 750(1).
380 The Civil Code - Book 2 - Title 4 - Chapter 10 - Section 1 - Article 750(2).
381 The Civil Code - Book 2 - Title 4 - Chapter 10 - Section 1 - Article 751(1).
382 The Civil Code - Book 2 - Title 4 - Chapter 10 - Section 1 - Article 751(2).
383 The Civil Code - Book 2 - Title 4 - Chapter 1 - Section 1 - Article 556.
384 The Civil Code - Book 2 - Title 4 - Chapter 11 - Section 1 - Article 797.
385 The Civil Code - Book 2 - Title 4 - Chapter 11 - Section 1 - Article 798.
386 The Civil Code - Book 2 - Title 4 - Chapter 11 - Section 1 - Article 799.
is younger than 15, the contract should be made between the adopter and the child’s guardian.\textsuperscript{387}

– Consent is required from both the father and the mother of a child before it can be adopted (provided that both parents are alive and known). If one of the parents is dead, absent, unknown or incapable of manifesting their will, consent can be given on their behalf by their most closely related ascendants. If the child to be adopted has no ascendants, the consent of the family council will be required.\textsuperscript{388}

– To have effect, contracts of adoption must be approved by the court. Before giving its approval, the court will hear the child to be adopted (provided that he is over 10 years old) and, unless they have already given their consent, the person with custody of the child. The court will not approve a contract of adoption unless there are good reasons for it and unless it offers advantages for the adopted child.\textsuperscript{389}

– Once a contract of adoption has been made, the adoption cannot be revoked for any reason.\textsuperscript{390}

Without prejudice to the provisions of Article 558 (which contains certain saving clauses),\textsuperscript{391} an adopted child shall for all purposes be deemed to be a child of the adopter.\textsuperscript{392}

\hspace{1cm} ii) Rights according to the Revised Family Code

Maternal filiation is ascertained from the sole fact that a woman has given birth to the child.\textsuperscript{393} Paternal filiation can result from:

– The father of a child conceived or born in wedlock or during an "irregular union"\textsuperscript{394} will be the husband or the male partner in that "irregular union".\textsuperscript{395}

– The father can acknowledge paternity, provided that this acknowledgement is accepted as "well founded" by the mother of the child, or if she is dead by her ascendants.\textsuperscript{396}

\textsuperscript{387} The Civil Code - Book 2 - Title 4 - Chapter 11 - Section 1 - Article 802.
\textsuperscript{388} The Civil Code - Book 2 - Title 4 - Chapter 11 - Section 1 - Article 803.
\textsuperscript{389} The Civil Code - Book 2 - Title 4 - Chapter 11 - Section 1 - Articles 803-804.
\textsuperscript{390} The Civil Code - Book 2 - Title 4 - Chapter 11 - Section 1 - Article 806.
\textsuperscript{391} These saving clauses state that the adoption shall have no effect in respect of "ascendants or collaterals of the adopter who have expressly declared to be opposed to the adoption", provided that the declaration - which has effect in relation to the declarant, his spouse and descendants - is registered with a notary or court registry within one year of the date that that contract of adoption was approved.
\textsuperscript{392} The Civil Code - Book 2 - Title 4 - Chapter 1 - Section 1 - Article 557
\textsuperscript{393} The Revised Family Code - Chapter 9 - Section 1 - Article 124.
\textsuperscript{394} Defined in Article 98 of the Revised Family Code as "[…] the state of fact which is created when a man and a woman live together as husband and wife without having concluded a valid marriage".
\textsuperscript{395} The Revised Family Code - Chapter 9 - Section 2 - Articles 126-130
\textsuperscript{396} The Revised Family Code - Chapter 9 - Section 3 - Articles 131-142.
A court can make a declaration of paternity in certain circumstances such as where the mother was victim of rape or "seduction", there is documentary evidence of paternity, the father was living with the mother in "continuous sexual relation" during the pregnancy, or the father has participated in the care and maintenance of the child in the capacity of a father.  

Chapter 10 of the Revised Family Code provides for adoption. Articles 181-182 provide that the adopted child will be deemed to be the child of his or her adoptive parents for all purposes, except in relation to their ascendants who have expressly opposed the adoption:


Adoptive filiation, may he created by an agreement between a person and a child.

Article 181. — (2) Effects.

Without prejudice to the provisions of Article 182, an adopted child shall, for all purposes, be deemed to be the child of the adopter.

Article 182. — (3) Saving Clauses

1) Adoption shall be of no effect with regard to the ascendants or collaterals of the adopter who have expressly opposed the adoption.

2) The opposition referred to in Sub-Art. (1) of this Article shall lie of no effect unless it is registered in a court registry within one year from the approval of the agreement of adoption by the court”.

Articles 197-198 together with Article 201 of the Revised Family Code place an obligation on parents to feed, lodge, clothe and care for their children:

"Article 197 — Subject Matter of the Obligation.

The person bound to supply maintenance under Article 198 of this Code shall supply to his creditor the means to feed, lodge, clothe, and to care for his health and education, as the case may be, in a decent manner having regard to social conditions and local custom.

Article 198— Persons Between Whom the Obligation Exists.

1) Without prejudice to the provisions of Article 49 (1), an obligation to supply maintenance exists between ascendants and descendants, and between persons related by affinity in the direct line.

2) An obligation to supply maintenance likewise exists between brothers and sisters

397 The Revised Family Code - Chapter 9 - Section 4 - Articles 143-145.
[...]  

Article 201. — Conditions for the Existence of the Obligation.

The obligation to supply maintenance shall not exist unless the person who claims its fulfilment is in need and not in a state of earning his livelihood by his work”.

Article 215 of the Revised Family Code provides that any child of either sex under 18 is a minor. Article 216 provides that minors should be placed under the authority of a guardian, while a tutor should administer his or her property. The default position in accordance with Articles 219-220 of the Revised Family Code is that the child's father and mother are joint guardians and tutors, and, if one were to die, the surviving spouse will retain guardianship and tutorship. Article 222 provides that the last surviving spouse may nominate a guardian/tutor for their children in their will; in the absence of such a will, the functions of guardianship and tutorship will devolve on the child's ascendants, any siblings who have attained majority or an uncle or aunt, or in the absence of a relative it will be decided by a court.396

IV. Succession

The law of succession is set out in Title 5 of the Civil Code. As one academic commentator has explained:

"To add insult to injury, the Ethiopian Law of Successions was promulgated some fifty years ago as part of the 1960 Civil Code of the Empire of Ethiopia. It is, therefore, only a small exaggeration to say that most of its provisions are virtually obsolete. As such, they require an arduous task of retuning and tweaking, as well as a great deal of commenting, to make them relevant to the present social conditions and constitutional order".399

Article 829 of the Civil Code provides that the succession to a deceased estate may be wholly or partially testate or intestate, depending on whether the deceased has executed a valid will disposing of his or her property:400

“(1) The succession of the deceased may be either intestate or testate.

(2) It may be partly intestate and partly testate.

(3) The property of which the deceased has not disposed by will shall devolve upon his heirs-at-law”.

396 The Revised Family Code - Chapter 12 - Section 2 - Articles 225-229.
400 The Civil Code - Book 2 - Title 5 - Chapter 1 - Section 1 - Article 829.
The Civil Code contains specific anti-discrimination provisions which protect children. Article 836(1) provides that the legitimacy or illegitimacy of heirs should not affect their ascertainment or the value of their inheritance. Article 837 states that: "The sex, age and nationality of the heir shall not affect in any way the ascertainment of his rights to the succession". The law also provides that an unborn child, whose father dies after his or her conception but before his or her birth, will be able to inherit provided that he or she lives for at least 48 hours after birth in accordance with Article 4(1) of the Civil Code.\footnote{401}

In addition, Article 836(2) of the Civil Code states that adopted children should be treated the same as natural-born children. The only exception to this rule, is that Article 182 of the Revised Family Code states that the rights of an adopted child cannot be enforced against the ascendants of the adopter if those ascendants did not approve of the adoption.

i) Testate Succession

In accordance with Article 295(2) of the Revised Family Code, "a minor may not make a will before he attains the age of sixteen years". This age of testamentary capacity is different to the age of majority, which is set at 18 years of age.

Article 880 of the Civil Code provides for three different kinds of will - (a) public wills, (b) holograph wills and (c) oral wills.\footnote{402} Articles 881-895 govern the form and validity of these wills. In essence, a public will is a written will which is read to and attested by four witnesses;\footnote{403} a holograph will is a will written by the testator but not witnessed; while an oral will is a verbal declaration to two witnesses made by a testator who feels that his death is imminent. Public and holograph wills may make any lawful disposition, while an oral will can only be used to give directives regarding the testator's funeral, make legacies each of which cannot exceed five hundred Ethiopian dollars, or make provisions regarding the guardian or tutor of his minor children.

Article 909 of the Civil Code provides that a testator may make legacies by will, disinherit one or more of his heirs, constitute an endowment or trust, give directions regarding his funeral or make any other declarations which may have juridical effect after his death.\footnote{404}

\footnote{402} The Civil Code - Book 2 - Title 5 - Chapter 1 - Section 3 - Article 880.
\footnote{403} According to Damtie and Kikre (2009), p.58, the number of witnesses may be reduced to two provided that one of them is a court registrar, notary or judge acting in their official capacity.
\footnote{404} The Civil Code - Book 2 - Title 5 - Chapter 1 - Section 3 - Article 909.
There are a complex set of rules which govern whether the bequests made in a validly executed will remain valid:

- The testator can revoke his will expressly or by destroying it.\(^{405}\)
- If, while alive, the testator sells or disposes of property which is subject to a bequest, the bequest will be treated as revoked.\(^ {406}\)
- An oral will lapse after three months, if the testator has not yet died;\(^ {407}\) a holograph will lapse after seven years, unless it has been deposited with a notary or a court registry.\(^ {408}\)
- Any legacies contained in a will lapse, if the testator has a child after the date of executing the will. Even if a court uses its power to maintain the effects of those legacies on the grounds that in the circumstances the testator would have maintained them, the child will be entitled to receive three fourths of the share which he would receive in the intestate succession.\(^ {409}\)
- Any legacies in favour of a spouse will lapse on dissolution of that marriage. Furthermore, any legacies to individuals who predecease the testator will also be treated as if they had lapsed.\(^ {410}\)

A testator may also expressly disinherit a child or other heir-at-law. In that case, the person disinherited will be treated as if he or she had died before the testator. Children and other descendants receive specific protection, so in order to disinherit them, the testator must give a reason for the decision to disinherit and if the testator just impliedly disinherits them by appointing a legatee by universal title, the descendants and the legatee will be treated the same (ie as if they were all children of the testator) in determining succession rights.\(^ {411}\)

ii) Intestate Succession

It is thought that the majority of successions in Ethiopia are intestate.\(^ {412}\) This means that they are governed by Title 5 Chapter 1 Section 2 of the Civil Code.

Article 842 of the Civil Code provides that in an intestate succession the children of the deceased will inherit the estate. Each child will receive an equal portion of the estate. If some or all of the deceased's children have predeceased him or her, their children will "represent" them and inherit the

\(^{405}\) The Civil Code - Book 2 - Title 5 - Chapter 1 - Section 3 - Articles 898-899.

\(^{406}\) The Civil Code - Book 2 - Title 5 - Chapter 1 - Section 3 - Article 900.

\(^{407}\) The Civil Code - Book 2 - Title 5 - Chapter 1 - Section 3 - Article 902.

\(^{408}\) The Civil Code - Book 2 - Title 5 - Chapter 1 - Section 3 - Article 903.

\(^{409}\) The Civil Code - Book 2 - Title 5 - Chapter 1 - Section 3 - Articles 904-905.

\(^{410}\) The Civil Code - Book 2 - Title 5 - Chapter 1 - Section 3 - Articles 906-7.

\(^{411}\) The Civil Code - Book 2 - Title 5 - Chapter 1 - Section 3 - Articles 937-940.

\(^{412}\) Damtie and Kikre (2009), p. 27.
relevant portion of the estate. The Civil Code does not appear to make any provision for a surviving spouse.

Articles 843-851 of the Civil Code makes provision for intestate succession, where there are no children. In these cases, the rights of succession go first to the parents of the deceased or (if they are deceased) their descendants, second to the grandparents and their descendants, or third to the great-grandparents and their descendants. In each case the paternal and the maternal lines each take an equal share, provided that if one line contains no relatives the other line will inherit the whole estate.

This line of succession is subject to one exception, namely that when a deceased dies intestate and leaves no descendants of his or her own, his or her ownership rights to immovable property which has been acquired from the paternal line by succession or donation can never pass from the paternal line to the maternal line or vice-versa for immovable property inherited from the maternal line. Instead, the full ownership rights will devolve to another more distant relative(s) in the same line. If this means that an heir cannot receive his portion of the estate, then he will receive a "mere right of usufruct on the immovable property" and no further compensation. This exception is only applicable if there is a possible heir in the line from which the immovable property originated - otherwise the property may transfer to the other line.

If there are no living relatives, Article 852 of the Civil Code provides that the deceased estate will devolve upon the State.

It is possible for an heir to renounce his or her succession rights. In this case, he or she forfeits all succession rights and cannot be represented by his or her descendants (ie he or she is not treated as dead allowing his or her descendants to step into the line of succession, but is treated as forfeiting all rights of succession). However, in accordance with Article 854(2) of the Civil Code, a person who has forfeited their succession rights, may still represent the person who they have renounced. This can be illustrated by an example. A woman Y dies intestate. Her daughter Z does not wish to inherit her property and so renounces her right of succession and the property devolves to her other relatives in accordance with the rules of intestate succession. Later, Y's mother X dies. Z knows that her grandmother was very rich and so does wish to inherit. Because Y is dead, Z can step into her shoes and represent her, so inheriting the relevant portion of X's estate.
V. Land rights

Land owned by an agricultural community such as a village or tribe shall be exploited collectively whenever such mode of exploitation conforms to the tradition and custom of the community concerned.\footnote{The Civil Code - Book 2 - Title 10 - Chapter 2 - Section 1 - Article 1489.} The Ministry of Interior shall take steps to ensure that every community draws up a charter detailing the custom of such community and, where appropriate, the supplementary provisions to give effect thereto.\footnote{The Civil Code - Book 2 - Title 10 - Chapter 2 - Section 1 - Article 1490.} Discrimination based on race, religion or social condition shall be of no effect.\footnote{The Civil Code - Book 2 - Title 10 - Chapter 2 - Section 1 - Article 1491.}

The charter shall specify in particular:\footnote{Tura (2014), p.149.}

(a) the persons or families composing the community;
(b) the land to which the rights of the community extend;
(c) the manner in which the community is administered and its authorised representative;
(d) the manner in which the land or other resources of the community are allotted and exploited; and
(e) the conditions on which the charter may be amended.

The Federal Rural Land Administration and Land Use Proclamation No. 456 of 2005 ("Federal Land Use Proclamation") recognises the right of women to land. Article 5(1)(c) of the Federal Land Use Proclamation states that "Women who want to engage in agriculture shall have the right to get and use rural land". More specifically, Article 6(4) of the Federal Land Use Proclamation states that "Where land is jointly held by husband and wife or by other persons, the holding certificate shall be prepared in the name of all joint holders". These provisions have been mirrored in State level proclamations, such as the Southern Nations, Nationalities and Peoples Land Administration and Use Proclamation No. 110/2007: Article 5(3) states that "Women who want to engage in agriculture shall have the right to get and use rural land", Article 5(5) states that: "[…] a husband and wife have equal use right on their common land holdings. They do not lose their land holding because of their marriage that they possessed individually before", and Article 5(6) states that: "Women household heads shall have the full use right on their land holdings".\footnote{Tura (2014), p.149.}
VI. Registration of property

The Civil Code also governs the registration of property. Given that the Civil Code was promulgated over 50 years ago and before Ethiopia became a republic, many of its provisions refer to the Empire of Ethiopia or include technical terms which may be difficult to understand.

The Civil Code provides that registers of immovable property shall be kept in each Awradja Guezat of the Empire of Ethiopia, by the keepers of registers of immovable property. Where the "state of the cadastre" does not allow the drawing up of a register of immovables, a register of owners shall be kept in each district instead of such register.

All acts, public or private, made inter vivos or mortis causa purporting to recognise, transfer, modify or extinguish the right of ownership of one or more persons over immovable property shall be entered in the register of property. In particular, the following shall be entered in the register of property in conformity with Article 1567:

(a) acts of sale donation, contribution in a partnership, partition, compromise and contracts creating joint ownership, where such acts have [immovable property] as their subject-matter; and

(b) acts by which an heir or a legatee accepts a succession or a legacy relating to [immovable property]; and

(c) judgments which pronounce the annulment, revocation or dissolution of the acts abovementioned; and

(d) judgments which give a decision as to the ownership of [immovable property] upon an action for the recovery thereof; and

(e) judgments which pronounce the sale by auction of [immovable property] as a consequence of an attachment effected by the creditors”.

iii. CUSTOMARY LAW

Academic commentary has described how there is little knowledge of the law governing succession rights in Ethiopia, and consequently inheritance of property is often determined arbitrarily outside the official channels:

"Needless to say, ours is a nation where successions are more often than not carried out arbitrarily at worst, and in accordance with custom at best. At that, it is a country where, because of little or no legal awareness or by choice, people as of right tend to settle...

421 The Civil Code - Book 2 - Title 10 - Chapter 1 - Section 1 - Article 1553.
422 The Civil Code - Book 2 - Title 10 - Chapter 1 - Section 1 - Article 1558.
423 The Civil Code - Book 2 - Title 10 - Chapter 2 - Section 1 - Article 1567.
424 The Civil Code - Book 2 - Title 10 - Chapter 2 - Section 1 - Article 1568.
successions in extra-legal ways at the peril of violating the provisions of the applicable rules of law."

Article 3347(1) of the Civil Code states that "unless otherwise expressly provided, all rules whether written or customary, previously in force concerning matters provided for in this Code shall be replaced by this Code and are hereby repealed". The reality, however, is that in many regions of Ethiopia the customary norms are stronger, more relevant, and more accessible than imposed and top-down legal norms. This has created an often contradictory pull between documented statute, and the lack of enforcement of such statute when matters are determined by customary practices.

Whilst it is difficult to find evidence of specific customary laws in Ethiopia, there is continual credence placed on the enforcement of custom in customary courts. These customary courts are recognised by the Constitution, but do not have any basis in statute or law. Instead, their roots stem from traditional elder councils. As such they act as primary decision makers in many rural areas throughout Ethiopia. Within some of the nine distinct governments of Ethiopia, customary courts carry great moral force. Some examples are: the Shemagelle in Amhara, the Bayito and Abo Gereb in Tigray, and the Luba Basa in Oromia. In addition, the choice whether to take a dispute to regular courts or to one of those non-official forums is entirely left to the parties.

Therefore, when looking at inheritance law, whilst the various provisions documented in international treaties ratified by Ethiopia or in Ethiopian domestic statute may state the rights of birth, death, marriage, property and inheritance, the way in which these provisions are enforced may vary from region to region depending on often undocumented but important traditions.

This is compounded by the fact that the process for adjudication can still be settled by religious or customary law.

As Article 34(5) of the Constitution states:

"This Constitution shall not preclude the adjudication of disputes relating to the personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute. Particulars shall be determined by law".

This is further supported by Article 78(5) of the Constitution which states:

"Pursuant to Sub-Article 5 of Article 34 of the Constitution, the House of Peoples' Representatives and State Councils can establish or give official recognition to religious
and customary courts. Religious and customary courts that had state recognition and functioned prior to the adoption of the Constitution shall be organized on the basis of recognition accorded to them by this Constitution”.

Therefore, if a rural region has a longstanding tradition of having dispute settlement handled by personal arbitrators in courts under customary law, this will be recognised legally under Ethiopian statute. Whilst the Constitution does not define how such courts should operate, it has traditionally been older men within the family or religious elders within the community who will primarily handle claims. Thus whilst the potential is there to bring equal rights to women, the Constitution also endorses and reinforces the use of customary and religious laws and their adjudicating forums to deal with disputes that arise in disputes of all kinds. Arbitrators can often be unsympathetic to new legal provisions. This, therefore, discourages change in enforcing law, instead keeping it within the confines of a predominately patriarchal tradition.

I. Property

Despite there being a clear statutory push for women to have the right to acquire, administer, control, use and transfer property, an overwhelming majority of men still hold ownership, management and decision-making responsibilities relating to property. This comes from their legal and customary role as the head of the household. In surveys conducted, it has been found that it is the Peasant Association (“PA”) which ultimately controls the allocation of land via local administrative units in rural areas. Family was thus found not to be the dominant source of land for surveyed households. Whilst such study outcomes are beyond the scope of this report, it is logical to deduce that, should a woman wish to challenge any property dispute, she is faced with challenging the PA coupled with an entrenched pressure to bring claims in the rurally preferred and long-standing customary courts. Despite her statutory choice to bring a claim in a civil court, there are various social and economic factors that push women litigants to submit to customary and religious courts.

Thus we see that, whilst there has been a shift to try and impose top-down imposition of norms, there has been a failure to get the people of Ethiopia en masse to participate in these more Western-style legal concepts of equality of

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431 Marcel Fafchamps and Agnes R. Quisumbing, “Control and Ownership of Assets Within Rural Ethiopian Households”, p.5
434 The Civil Code - Title 5 - Chapter 5 - Section 1 - Article 637; and Marcel Fafchamps and Agnes R. Quisumbing, “Control and Ownership of Assets Within Rural Ethiopian Households”, research tables
435 Marcel Fafchamps and Agnes R. Quisumbing, “Control and Ownership of Assets Within Rural Ethiopian Households”, Appendices
436 Muradu Abdo and Gebreyesus Abegaz, “Customary Law Teaching Material”, p.117
437 Muradu Abdo and Gebreyesus Abegaz, “Customary Law Teaching Material”, p.132
gender and instead leave it to traditional adjudications that place heavy emphasis on male dominance. Whilst the dual-track legal adjudication system is available, it is unlikely that Ethiopians in rural areas will be able to benefit from the more structured civil courts system.

A report by the UN Development Programme highlights the inequality in ownership patterns across Ethiopia:

"According to the Welfare Monitoring Surveys of 1996, 1998 and 2000, there was a substantial gap between the ownership of dwelling housing and ownership of land by male and female-headed households. Other assets especially in rural areas include livestock, an asset that serves as a form of physical savings. Ownership of animals provides women with an opportunity to engage in economic activities such as dairy processing, which allows them to generate income. Oxen, which are useful in farming, are usually perceived as the property of men. In both rural and urban areas, most women lack access to assets that might serve as collateral for credit and even fewer women have access to savings. Once women are divorced or abandoned, they often fall into destitution as they lack shelter and access to food and income. In some parts of the country, a widow can be forced to marry the brother of her deceased husband. Alternatively, she can be forced to abandon the marital home as well as any land she may have shared with her husband. For women in polygamous households, access to household resources is highly limited, and consequences are much more severe if their husbands die or they divorce".438

Research carried out among the Wolaita community further shows that, despite rights enshrined in the Constitution and statute, women continue to be marginalised and denied the right to inherit in accordance with discriminatory customary laws:

"Women are the most marginalised group of the society in relation to accessing and controlling rural land in Ethiopia. The main challenge for an effective implementation of women’s right to rural land in the country is largely attributable to the negative attitudes and harmful practices which deny a woman’s right to own, administer property and control the rural land. Moreover, women do not have a customary right to inherit land from their family; and the control of land during marriage falls chiefly under the control of their husband. Despite such a firm commitment of the government in recognizing a woman’s right to possess and use rural lands, the customary laws and practices, which deny women’s equality, are still persistent in the Wolaita community. Women generally lack legal awareness regarding their right to and control over household lands. The government authorities at Kebele (lowest administrative unit) level are also very much hesitant to enforce the legal rights of women. Instead of the modern laws, the customary practices of dispute resolution are still prevailing in the community. Thus, although

there is strong statutory recognition of a woman’s right to rural land, this study shows that much remain untouched on implementation of the law.” \(^{439}\)

The study goes on to explain customary land rights amongst the Wolaita community:

"The informal customary land right, which constitutes knowledge of the community members, is the issue of possession of land and resources. Land is not considered as goods that can be bought or sold, but is managed according to family and lineage structures, marriage practices and religion. Generally, men control land and women gain access mostly through their relationship with male relative. The customary law limits women’s rights on land and this law underpins patriarchal system of traditional authority to reinforce patriarchal values which disadvantage women and place them to subordinate position in society (Woldetensay, 2007). Unmarried women have little access to land because they have no property right to inherit in most patriarchal societies (Nizoki, 2002). Where customary law is in force, it directly discriminates against women and provides them with few rights of control over land. Discriminatory practices do not provide daughter with equal inheritance right to those of sons (Ikdhal et al., 2005). The customary land right in Wolaita community tends to be the unwritten social rules and structures of a community derived from shared value and based on tradition. Customary land right in Wolaita is to the disadvantage to women. Customary land right of women is based on social relations between men and women. According to the Wolaita customary law, women do not have right to land possession and property ownership. They cannot share and inherit the land. Women only eat and dress for their lifelong period. Beyond this, they have no any say on their properties. At divorce, the woman only has to take with herself the knife for processing enset (staple food) and pillow to go with. Male and female children are not treated equally for inheritance right. Land is given to male children. The laws had been discriminatory towards women for long time and remain obstacle to women’s attempt to ensure their right, enjoy the fruits of their labour and participation”. \(^{440}\)

II. Inheritance

The prevalence and use of customary courts to settle so many disputes means that it is unsurprising this tradition remains for family matters too. It is worth mentioning that civil courts are still of course available to bring such claims, but it will always depend on the region and religious emphasis of such region.

Evidence of how each court is used in inheritance disputes is hard to find. Where a region is predominately Muslim, the scope of the Sharia court as outlined by Girmachew Alemu Aneme could influence this choice:

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\(^{440}\) Tura (2014), pp.150-151.
"To date, Sharia Courts that apply Islamic law are the only religious courts that have been officially established both at the federal and state levels. Sharia Courts apply only Islamic law and have their own appellate system. They are required, however to follow the procedural rules of ordinary courts and receive their budgets from the state. Parties must voluntarily submit to the jurisdiction of these courts, or the dispute should be redirected to the regular courts. Proclamation 188/1999 spells out the circumstances under which Islamic law can be applied by Sharia courts at the federal level. The Sharia Courts at the federal level have been reconstituted into a three-level judicial structure, distinct from the regular federal judicial structure. These are: (1) Federal First-Instance Court of Sharia, (2) Federal High Court of Sharia, and (3) Federal Supreme Court of Sharia. Like the federal state judicial organs, all the federal Sharia courts have been made accountable to the Federal Judicial Administration Commission. All of the State Councils have also given official recognition to Sharia Courts within their respective jurisdictions".

Article 4(1) of Proclamation No. 188/1999 ("Proclamation No. 188/1999") stipulates that Federal Courts of Sharia have common jurisdiction over the following matters:

- any question regarding marriage, divorce, maintenance, guardianship of minors and family relationships, provided that the marriage to which the question relates was concluded or the parties have consented to be adjudicated in accordance with Islamic law;
- any question regarding Wakf, gift (Hiba), succession of wills, provided that the endower or donor is a Muslim or the deceased was a Muslim at the time of his death;
- any question regarding payment of costs incurred in any suit relating to the aforementioned matters.

Sub-Article (2) of Proclamation No. 188/1999 reiterates the principle of parties' consent as the basis for the adjudicatory jurisdiction of Sharia courts. Sharia courts can assume jurisdiction "only where [...] the parties have expressly consented to be adjudicated under Islamic law". Tacit consent has also been provided for in addition to express consent. Pursuant to Article 5(2) of Proclamation No. 188/1999, failure to appear before the Sharia court amounts to consent to the court's jurisdiction on condition that the defaulting party has been duly served with summons. Thus, the suit will be heard ex-parte. Article 5(3) of the same proclamation provides that in the absence of clear consent of the parties for the case to be adjudicated by the court of Sharia before which the case is brought, such court shall transfer the case to the regular federal court having jurisdiction. Moreover, once a choice of forum has been made by the plaintiff and

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441 Aneme (2010), 2.2.5.
442 Article 4(1) of Proclamation No. 188/1999.
the defendant has consented to the jurisdiction of such a forum, under no circumstance can either party have their case transferred to a regular court.\textsuperscript{443}

In other regions, it is likely that the customary systems of adjudication outlined in paragraph 2.a.iii above may take precedence. The risk here is that despite statutory moves to make rights of marriage, divorce and ownership gender equal, customary laws and their courts are primarily based upon collective responsibility for wrongs that are defined as those things which harm the community as a whole rather than individuals. Individual human rights will therefore not take precedence.\textsuperscript{444}

B. SPECIFIC PROVISIONS RELATING TO SOLE SURVIVOR CHILDREN AND INHERITANCE

i. THE CONSTITUTION

Whilst Article 36(5) of the Constitution states that the State shall accord special protection to orphans and shall encourage the establishment of institutions which ensure and promote their adoption and advance their welfare and education, it does not contain any specific provisions relating to the inheritance rights of children whose parents are both deceased.

The Regional Constitutions of the National State of Tigray, the Southern Nations, Nationalities and People's Regional State and the Amhara National Regional State do not contain specific provisions relating to children whose parents are both deceased.

ii. GENERAL LAW

Whilst the Civil Code contains provisions which govern succession rights, including the succession rights of sole surviving children (see paragraph 2.a.ii.IV of this report), there are no provisions which relate specifically to a sole surviving child.

There are, however, certain provisions of the Revised Family Code of 2000, which would apply to a sole survivor child. Article 261 of the Revised Family Code provides that a minor's guardian shall receive any income owing to the minor and use it for the interest of that minor; the guardian is not however bound to render an account of such use. Where the income of a minor is considerable and the guardian is neither the father nor the mother of the minor, the provisions of Article 261 can be set aside by a Court. Article 264(1) of the Revised Family Code states that a person who donates or bequeaths property to a minor by will may order that the income from such property shall not, during the minority of the child, be received and used by the guardian. Instead, it is the provisions laid down in the will concerning the administration and use of such income which must be complied with.

\textsuperscript{443} Aneme (2010), 2.2.5.
\textsuperscript{444} Muradu Abdo and Gebreyesus Abegaz, "Customary Law Teaching Material", p.190
iii. CUSTOMARY LAW

As stated in paragraphs 2.a.iii above and 2.c.iii below, the way in which the succession rights of sole surviving children are ascertained and enforced vary from region to region depending on local religious or customary laws. For example, under certain cultural and religious laws, women cannot inherit property from their parents at all. In other regions women are only entitled to inherit just half or a third of what their male siblings can inherit.\(^{445}\)

C. MECHANISMS FOR FACILITATING CHILDREN’S INHERITANCE CLAIMS

There are a number of different frameworks and provisions under the Constitution and statute, which may enable children to enforce their inheritance rights. This includes the constitutional right to pursue a course of action to defend their entitlement to inheritance.

i. THE FEDERAL CONSTITUTION AND REGIONAL CONSTITUTIONS

The Constitution is the fundamental law of Ethiopia and, given the fact it enshrines principles of non-discrimination and equality, it is, in theory, a basis for challenging discriminatory inheritance laws. The Constitution deals with equal treatment between Ethiopian citizens and contains anti-discriminatory provisions, including those related to women and children born out of wedlock. In addition to this, there are various provisions within the Constitution which set the foundation of children’s inheritance claims by recognising children as rights-bearers and recognising the role of the Courts to ensure that children obtain justice.

Article 37(1) of the Constitution enshrines the principle of access to justice as follows:

"Everyone has the right to bring a justiciable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power".

Importantly, Article 36 of the Constitution also specifically outlines the fundamental rights of children:

"1. Every child has the right:

a. To life;

b. To a name and nationality;

c. To know and be cared for by his or her parents or legal guardians;

d. Not to be subject to exploitative practices, neither to be required nor permitted to perform work which may be hazardous or harmful to his or her education, health or well-being;

e. To be free of corporal punishment or cruel and inhumane treatment in schools and other institutions responsible for the care of children.

2. In all actions concerning children undertaken by public and private welfare institutions, courts of law, administrative authorities or legislative bodies, the primary consideration shall be the best interest of the child.

3. Juvenile offenders admitted to corrective or rehabilitative institutions, and juveniles who become wards of the State or who are placed in public or private orphanages, shall be kept separately from adults.

4. Children born out of wedlock shall have the same rights as children born of wedlock.

5. The State shall accord special protection to orphans and shall encourage the establishment of institutions which ensure and promote their adoption and advance their welfare, and education."

As noted above, the Constitution fundamentally acknowledges that, in all actions concerning children undertaken by, amongst others, the courts of law, "the primary consideration shall be the best interests of the child" and this should be borne in mind when we consider the legal framework for considering children's inheritance claims. That said, we must also bear in mind that, while the rights are stated at a constitutional level, as will be discussed further below, questions remain as to how such rights and principles are applied in practice.446

As well as the general principled approach in the Constitution regarding access to justice and non-discrimination, the Constitution also enshrines a right to own and bequeath property. Again, this is in an important aspect when considering the general, federal principles which one can look towards when examining the framework for facilitating children's inheritance claims.

"Every Ethiopian citizen has the right to the ownership of private property. Unless prescribed otherwise by law on account of public interest, this right shall include the right to acquire, to use and, in a manner compatible with the rights of other citizens, to dispose of such property by sale or bequest or to transfer it otherwise".447

A. Regional Constitutions

As discussed previously, one of the fundamental aspects of the Constitution is the establishment of the federal system, comprising nine regional states based on ethno-linguistic patterns.448 While we have sought to analyse the prescribed mechanisms by which a child's inheritance claims may be made on a regional level, our analysis has been limited in scope by the unavailability of English language translations of certain of the

446 See paragraph for example United Nations Convention on the Rights of the Child, “Concluding observations on the combined fourth and fifth periodic reports of Ethiopia”, (3 June 2015), available at: http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/ETH/INT_CRC_COC_ETH_20797_E.pdf where it is noted that "the [UN] Committee remains concerned that the best interests of the child are not adequately considered with respect to decisions concerning adoption and family reunification processes and legal proceedings"

447 The Constitution, Article 40(1).

regional Constitutions. That said, we have managed to obtain English language versions of the regional Constitutions of the State of Tigray, Amhara and the Southern Nations, Nationalities and People (partial translation obtained). It is apparent from these three regional Constitutions that there is a relatively consistent approach amongst regional States in recognising some of the key principles and rights which can be said to facilitate a child's inheritance claim.

(i) State of Tigray

The Constitution of the State of Tigray ("Tigray Constitution") is formulated in a very similar manner to the Constitution and, at its outset, acknowledges that the Constitution is to be read as "the supreme law of the National State of Tigray".\(^{449}\) That said, many of the rights and freedoms granted at federal level, are supplemented by the codification of these principles at regional level. In particular, and in relation to the mechanisms by which children's inheritance claims may be made, we see that the 'best interests of the child' principle is stated as follows:

"In all actions concerning children undertaken by public and private institutions of social welfare, courts of law, administrative authorities or legislative bodies, the primary consideration shall be the best interests of the child."\(^{450}\)

It should also be noted that general facilitative rights, including the right of access to justice for every Ethiopian citizen and the right of Ethiopian citizens to own and bequest property are also captured within the Tigray Constitution.

(ii) The Southern Nations, Nationalities and People’s Regional State

The Constitution of the Southern Nations, Nationalities and People's Regional State ("SNNPRS Constitution") is similar to the Tigray Constitution in that it is subject to the supremacy of the Constitution.\(^{451}\) However, our analysis of the extent to which we are able to comment on the SNNPRS Constitution is limited in scope by the fact that we have only been able to access what appears to be an incomplete copy of the English language version.

(iii) The State of Amhara

The Constitution of the State of Amhara ("Amhara Constitution") is also subject to the supremacy of the Constitution.\(^{452}\) Similar to the Tigray Constitution, and in relation to the mechanisms by which children's inheritance claims may be made, it also contains the


\(^{450}\) Tigray Constitution, Article 37(2).


'best interests of the child" principle, as well as the rights of every citizen to have access to justice.

In relation to the rights of citizens to own and bequest property, we see that the rights enshrined in the Constitution are not repeated verbatim (as with the Tigray Constitution), but instead that such right is clarified to extend to any Ethiopian residing inside or outside of the Amhara State:

“Any Ethiopian residing inside or outside the regional state has the right to the ownership of private property. Unless otherwise prescribed by law on account of public interest, this right shall include the right to acquire, to use and, in a manner compatible with other citizens, to dispose of such property by way of sale or bequest or to transfer it otherwise”.

“Any Ethiopian residing inside or outside the regional state shall have the full right to the immovable property he builds and to the permanent improvements he brings about on the land by his labour or capital. This right shall include the rights to alienate, to bequeath, and where the right of use expires, to remove his property, transfer his title, or claim compensation for it. Particulars shall be determined by law”.

ii. GENERAL LAW

I. The Revised Family Code of 2000

The Revised Family Code provides a framework by which children are cared for or represented by a guardian or tutor.

"Article 216. — Disability of Minors.

1) A minor, as regards the proper care of his person, shall be placed under the authority of a guardian.

2) In matters concerning his pecuniary interests and the administration of his property, a minor shall be represented by his tutor.

3) The minor shall not perform juridical acts except in the cases provided by law”.

The default position in accordance with Articles 219-220 of the Revised Family Code is that the child's father and mother are joint guardians and tutors, and, if one were to die, the surviving spouse will retain guardianship and tutorship. Article 222 provides that the last surviving spouse may nominate a guardian/tutor for their children in their will; in the absence of such a will, the functions of guardianship and tutorship will devolve on the child's ascendants, any siblings who

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453 Amhara Constitution, Article 36(2).
454 Amhara Constitution, Article 40(1).
455 Amhara Constitution, Article 40(7).
have attained majority or an uncle or aunt, or in the absence of a relative it will be decided by a court.457

The testator appointing the guardian or tutor by will can make further protections for the child by setting out requirements for how the guardian or tutor should act in the will. These instructions must be respected unless they are altered by court order.

If the Court exercises its discretion under Article 227 to appoint a guardian or tutor, it is under a duty to consult and must act in the best interests of the minor:

"Article 227. — Where there is no Relative Enabled in terms of law.

1) Where by applying the preceding Articles, a child remains without a guardian or tutor, the functions may be entrusted to such person as may be appointed by the court.

2) In deciding such case the court may take cognizance of the matter or on the application of any interested party whether he is a relative of the child or not.

3) A government organ who has the authority to follow up the security of children may also lay the matter before the court.

[...]

Article 249. — Duties of the Court.

1) Where the court is to appoint or to remove a person as guardian or tutor of a minor, it shall, before making its decision, consult, in so far as possible, the ascendants and the brothers and sisters of the child who have attained majority.

2) Where it thinks fit, it may hear the minor himself.

3) The court shall decide having regard solely to the interest of the minor and without being bound by the information which it has obtained".

In relation to any successions which devolve to the child, the tutor shall act on behalf of the minor458 and, in relation to such dealings, is under a duty to consult with such child, save for where the child is less than 14 years of age.459 It is unclear from the research conducted the extent to which tutors do, in practice, operate on behalf of a sole-surviving child in matters of inheritance.

457 The Revised Family Code - Chapter 12 - Section 2 - Articles 225-229.
Nevertheless, there are a number of further protections provided for in law:

- The functions of a guardian or tutor are "compulsory for the person who is vested with them".  

  460 The Revised Family Code - Chapter 12 - Section 2 - Article 237.
  
- Where there is a conflict of interest between a tutor and a minor, the court may appoint an ad hoc tutor to perform the tutorship functions.  

  461 The Revised Family Code - Chapter 12 - Section 2 - Article 234.
  
- There are provisions for the removal of a guardian or tutor who performs their duties badly or does not comply with instructions entrusted to them.  

  462 The Revised Family Code - Chapter 12 - Section 2 - Articles 245-246.
  
- The roles of guardian and tutor are unpaid. Even where compensation is paid for duties which take "a considerable part of his time", this can only be taken from income, not capital, and must not exceed one third of such income.  

  The tutor, however, is entitled to the reimbursement of personal expenses.  

  463 The Revised Family Code - Chapter 12 - Section 2 - Article 250.
  
  464 The Revised Family Code - Chapter 3 - Article 296.
  
  465 The Revised Family Code - Chapter 12 - Section 3 - Articles 261-264, and Article 298.
  
- Where the guardian receives the income of a minor, he or she must use it in the interest of the minor. Although he or she does not ordinarily have to render an account of its use, where the income is considerable, the court can fix what money should be paid to the guardian and order the tutor to invest the remainder. Moreover, a testator can specify that income from a bequest cannot be used by the guardian or tutor.  

  466 The Revised Family Code - Chapter 12 - Section 3 - Articles 269-272.
  
- A tutor is under a duty to take the "utmost care" in relation to a minor's property and is required to value and make an inventory of property, including inherited property, and not to merge it with his or her own property. The tutor can also be required to make a report of the management of the minor's property and can be forced to provide that report to certain relatives.  

  467 The Revised Family Code - Chapter 12 - Section 3 - Article 297.
  
- A tutor is liable to pay interest, and possibly damages, to a minor where he or she has failed to invest their property. Moreover, the tutor is liable for any loss caused by his or her mismanagement of the property, a conflict of interest or failure to follow instructions.  

  468 The Revised Family Code - Chapter 12 - Section 3 - Article 282.
  
- Once their tutorship has ended, a tutor must render an account of his administration to the ex-ward. The ex-ward has five years to bring any legal action, but there is no limitation deadline for actions to claim restitution of property.  

  469 The Revised Family Code - Chapter 12 - Section 4 - Article 309.
  
  470 The Revised Family Code - Chapter 12 - Section 5 - Articles 315-319.
II. Other Solutions

Other solutions to facilitate children's inheritance claims:

- Land certification: it seems that joint certification and getting the name and picture of wives on the land certificates can be seen as beneficial by conflict mediators.\(^{471}\)

- Birth registration: Birth registration in Ethiopia is among the lowest in the world. The Committee on the Rights of the Child persistently recommended for Ethiopia to strengthen and further develop measures to ensure that all children born within the national territory are registered. A Vital Events Registration Agency has been established following the proclamation on the Registration of Vital Events and National Identity Card (Proclamation No. 760/2012).\(^{472}\)

- Greater protection of women under marriage law: Elizabeth Cooper notes that "Marriage laws have clearly been demonstrated as essential to women's property and inheritance rights, customary laws often stipulate that women are to access assets through their fathers, husbands or adult sons. As a result, women who are orphaned, unmarried, separated, divorced or widowed can be significantly disadvantaged as are the children who grow up in households headed by divorced, separated or widowed women. Women in polygamous unions may be even more vulnerable. Even women who have property access through other people are disadvantaged by not having their own independent rights to this property. The view and practice of women as embedded in the household without autonomous access to property has led to uncertainty and instability in their lives when their personal status changes due to the death of a husband, divorce or polygamy".\(^{473}\)

- NGOs and Associations: in preparing this report, we came across numerous examples of cases brought by the Ethiopian Women Law Association ("EWLA") until 2009 (for example the EWLA appeared in a case in front of the House of Federation to obtain recognition of the constitutional right of a woman to choose between Sharia court and regular court of law).\(^{474}\) Since the Proclamation No. 621/2009, Charities and Societies Proclamation which came into force upon its publication in the Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia on 13 February 2009, numerous


NGOs have raised their concerns about the impact on their activities.\textsuperscript{475} Amnesty International published a report on 12 March 2012 to highlight the fact that the proclamation “placed significant restrictions on funding for human rights work, granted the government excessive powers of interference in the running of organizations, jeopardized the security of victims of human rights violations, and allowed for the imprisonment of human rights defenders. The proclamation has adversely affected the promotion and protection of the rights of the Ethiopian people”.\textsuperscript{476}

There is a lack of information regarding the availability of civil legal aid in Ethiopia. It is not a right protected by the Constitution (unlike criminal legal aid which is guaranteed by Article 52 of the Constitution) and there is no evidence of legislation implementing a civil legal aid system. One of the few access to justice reviews available online for Ethiopia suggests that free legal assistance is confined to pro bono. NGOs and legal services provided through the Law Faculties of public universities.\textsuperscript{477} Our research has also identified a legal assistance project, which was started in 2008, funded by the Department for International Development and run by the Active Learning Centre and the Centre for Human Rights at Addis Ababa University.

\subsection*{iii. CUSTOMARY LAW}

As mentioned in paragraph 2.a.iii, there are numerous customary law systems in Ethiopia (more than 60) with considerable regional variations. Under customary law, inheritance claims would mainly be dealt with by councils of elders. A useful description of the judicial process of each region is available in the Customary Law Teaching Material of Addis Ababa University.\textsuperscript{478}

In the State of Oromia, inheritance cases and land related disputes are usually subject to the jurisdiction of elderly and respected men. Case proceedings are initiated either by the victims or by elders of the concerned clan or village. Once cases are referred to them, the elders listen to both parties in both parties' presence. If no reconciliation can be found, the case will proceed to the evidence hearing process. The elders can also contact other elders in the neighbourhood of the disputants to verify facts if necessary. If the evidence by the claimant could not establish the truth, the defendant will be required to take an oath which is considered to be very dangerous if he/she has committed a crime. Parties dissatisfied with the decisions of the elders may take their cases to the spiritual leader of the community which is believed to have a capacity to communicate with “God” and as such serves as the highest appellate body of the decisions of the customary institutions.

In the Southern Nations and Nationalities Peoples’ Regional State, most of the studies focus on three groups:

- **Gurage**: there are two levels of institutions, the lower level involving the elders and the other being a general assembly to settle inter-clan and inter-tribe disputes. If disputants are not satisfied by the verdict of the elders, they can take their cases to the general assembly. The verdict of the general assembly is final. Gurage customary law has been codified into the Gurage Customary Law.

- **Kambata**: cases not resolved by the elders can be taken to the courts where elders can appear as witnesses and can have a significant influence on the final decision.

- **Sidama**: cases are presented in front of elders sometimes presided over by a respected elder. Both parties present their case and the elders withdraw to reach a consensual decision. Cases can be taken to the highest level in front of the ritual leader.

While children (or their representatives) should be entirely free to take a dispute to formal courts or to use the customary system, one main issue is the discrimination against women and girls. As described above, it involves councils of elders and family members from which women are rarely invited to take part (in Gurage society, there are no women representatives in their assemblies) and more importantly inheritance is usually patrilineal which means that land is allocated to males and transferred from men to men.

In Oromia, for example, if both parents die, sons will inherit rather than daughters. However, though in the past girls would not inherit anything, today often a girl will be allowed to inherit one or two livestock. For example if there are 20 camels and 10 cattle and there are two boys and one girl, most of the livestock will be given to the boys and the girl may get one cow, goat or sheep. Additionally a daughter will inherit cloth and jewellery from their sister(s) or mother. Further there are some limited properties that a woman/wife transfers to her daughter on marriage including a cow, cultural items such as milk carrying containers and movable pastoral home/materials used for construction. It is said that a daughter cannot inherit her parents’ property because her wealth is at her husband’s home. She cannot inherit her husband’s property because it belongs to the clan.

The majority of women, regardless of marital status, cannot own or inherit land, housing or other property in their own right and a woman becomes part of the estate of her

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deceased husband upon his death to be inherited by his brothers. In some customary dispute resolution mechanisms, such as in the Afar and some parts of the Oromia regions, the amount of compensation (usually in the form of cattle) for female victims/claimants is half of that which may be due for a male victim/claimant.

Many sources also describe a practice of property grabbing and discontinuation of practice of widow inheritance. It is often cited as an example of statutory law being ignored with impunity.

Furthermore, studies have shown that women and girls are unaware of their constitutional, civil land family rights or of the existence of a new penal code.

It could seem that statutory law is the most favourable system to bring inheritance claims, however it would not solve the problem of integration in the community and the verdict may not be recognised or enforceable. Women in particular do not have the option to reject religious and customary laws without encountering stigma and isolation in their communities. The customary system may also offer an option more readily available in terms of cost, vicinity, language, shared culture and values.

To resolve this issue, in some cases, the matter can be dealt with twice: through the formal legal system and then through the customary system for integration in the community.

Finally, it must be noted that there is a lack of empiric evidence to show whether widowed women or orphaned children are successful when turning to the community to obtain support in legitimising their claim on the land. It is also unclear whether any difference is made in customary law between children affected by HIV/AIDS and those who are not.

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affected, whether the clan affiliation of these children is questioned, and whether their right to inherit their own father’s land is often contested or violated. 492

iv. GOVERNMENT POLICY

In 2013 the government of the Federal Democratic Republic of Ethiopia issued its National Human Rights Action Plan. 493 While this report sets out a wide reaching strategy, it does not specifically address the issue of the inheritance rights of a sole-surviving child and in this regard the report’s practical use is questionable.

3. CONCLUSION

The Constitution is the fundamental law of Ethiopia. The Constitution enshrines principles of non-discrimination and equality.

Whilst this is how the system should operate, it is apparent that some 85% of the population is engaged in subsistence agriculture 494 in rural areas where access to the courts is limited and as such there is widespread use of customary courts where customary law consists of religious and ethnic laws to settle disputes. This means that the rights set out in the Constitution are often overlooked. Further, as the Constitution itself provides for customary laws to be used to determine disputes, this can mean that the principles of the Constitution are not adhered to.

Until such time as the principles set out in the Constitution are adhered to, both women and children may not benefit from the inheritance to which they are entitled.


APPENDIX 1 - SHORT SUMMARY TABLE

Note that it will be possible to provide references and narrative explanations in the full table on the next page.

<table>
<thead>
<tr>
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</thead>
<tbody>
<tr>
<td>In the Constitution</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Does not specify</td>
<td>Yes</td>
<td>Yes</td>
<td>Don't know</td>
</tr>
<tr>
<td>In legislation/Civil Law</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Does not specify</td>
<td>Yes</td>
<td>Yes</td>
<td>Don't know</td>
</tr>
<tr>
<td>In Customary Law (codified)</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>In Customary Law (practice)</td>
<td>No</td>
<td>Don't know</td>
<td>Don't know</td>
<td>Don't know</td>
<td>N/A</td>
<td>N/A</td>
<td>Don't know</td>
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</table>

Please answer with one of the following responses only:

**Yes** - The law/practice explicitly mentions equality between the two characteristics (Questions 1-4), or relevant codified law/national provisions exist (Questions 5-7). In relation to Question 1, if gender neutral language rather than specifically mentioning gender equality, please specify ‘Yes’ and include an explanatory footnote to this effect.

**No** - The law/practice explicitly discriminates between the two characteristics (Questions 1-4). Not applicable to Questions 5-7.
**Does not specify** - All relevant material was accessed, but there was no information relevant to the question (Questions 1-7).

**Don't know** - It is not possible to say whether all relevant material was accessed, and so a definitive answer cannot be given (Questions 1-7).

**N/A** - The question is not applicable for this type of law, for example if a country does not have codified Customary Law or a Constitution. It is likely that this answer will apply to Customary Law (practice) for Questions 5-7.
### ADDITIONAL QUESTIONS

<table>
<thead>
<tr>
<th>Question</th>
<th>Response</th>
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</thead>
<tbody>
<tr>
<td>1. How does the legal system define a child? Is the age of majority different for different matters?</td>
<td>The Civil Code defines a minor as a person of either sex who has not attained the full age of 18 years. The same definition is repeated in Article 215 of the Revised Family Code of 2000. Please see paragraph 2.a on 'General Provisions relating to Inheritance Rights' and 2.a.ii.III on 'Children's Rights'.</td>
</tr>
<tr>
<td>2. Does the country have a de jure dual legal system (customary or religious law running parallel to the statutory law or common law)? Whether de jure or de facto, is the customary/religious law related to inheritance and property rights the preferred means of dispute resolution in this area?</td>
<td>There is a codified legal system throughout Ethiopia. However, there is a specific constitutional exemption allowing the application of customary and religious law to personal and family matters, including inheritance. Customary law is practised predominantly although not exclusively in rural areas and is only allowed to be used in the context of personal and family issues. Please see paragraph 2 on the 'National Legal System'.</td>
</tr>
<tr>
<td>3. Does the Country's legal system (ie Civil Law and Customary Law) differentiate between different types of land tenure?</td>
<td>Article 40 of the Constitution provides that all land belongs to the State and is the collective property of the people. However, private persons do have the right to own property and so are able to lease land from the State. Please see paragraph 2A on the 'Constitution' and 2.a.ii.V on 'Land Rights'.</td>
</tr>
<tr>
<td>4. Does the country have legislation governing inheritance rights?</td>
<td>The Civil Code contains provisions on inheritance rights in both testate and intestate succession. Please see paragraph 2.a.ii.IV on 'Succession'.</td>
</tr>
<tr>
<td>5. Does the legal system that governs inheritance rights (if any) ensure equality between male and female children?</td>
<td>Article 837 of the Civil Code states that the &quot;sex, age and nationality of the heir shall not affect in any way the ascertainment of his rights to the succession&quot;. Please see paragraph 2.a.ii.IV on 'Succession'.</td>
</tr>
<tr>
<td>ADDITIONAL QUESTIONS</td>
<td>RESPONSE</td>
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<tr>
<td>6. Does the legal system that governs inheritance rights (if any) ensure equality between biological and adopted children?</td>
<td>Article 836(2) of the Civil Code states that adopted children should be treated the same as biological children. The only exception is that Article 182 of the Revised Family Code states that the rights of an adopted child cannot be enforced against the ascendants of his or her adoptive parent, if those ascendants expressed their opposition to the adoption. Please see paragraph 2.a.ii.IV on 'Succession'.</td>
</tr>
<tr>
<td>7. Does the legal system that governs inheritance rights (if any) ensure equality between children born in and out of wedlock?</td>
<td>Article 36(4) of the Constitution states that children born out of wedlock shall have the same rights as children born in wedlock. Please see paragraph 2.a.i on the 'Constitution'. Article 836(1) of the Civil Code states that the legitimacy or illegitimacy of the heir shall not affect the ascertainment of the heirs or the value of the portion of each of them. Please see paragraph 2.a.ii.IV on 'Succession'.</td>
</tr>
<tr>
<td>8. Does the legal system that governs inheritance rights (if any) ensure equality between children born from a monogamous and polygamous union?</td>
<td>Whilst Article 11 of the Revised Family Code of 2000 states that a person shall not conclude marriage as long as he is bound by bonds of a preceding marriage, Article 34 of the Constitution recognises customary and religious laws. It does not stipulate any minimum requirements for a legally valid marriage. As a result certain regional family laws recognise polygamous marriages whilst others do not.</td>
</tr>
<tr>
<td>9. Are there different legal rules for testate and intestate succession?</td>
<td>Succession may be testate or intestate. Any property which is not disposed of by a will devolves upon the deceased's heirs at law. Please see paragraph 2.a.ii.IV on 'Succession'.</td>
</tr>
<tr>
<td>10. Does the legal system specify the percentages of inheritance to be distributed to children?</td>
<td>Article 842 of the Civil Code states that the children of the deceased shall be the first to be called to his succession and that each child shall receive an equal portion of the succession. Articles 843-851 make provision for intestate succession where there are no children of the deceased. Please see paragraph 2.a.ii.IV on 'Succession'.</td>
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<tr>
<td>ADDITIONAL QUESTIONS</td>
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<tr>
<td>11. Does the legal system address the rights of orphaned children to transact land, houses and property that they inherit?</td>
<td>Article 216 of the Revised Family Code provides that minors under the age of 18 should be placed under the authority of a guardian and be represented by a tutor in relation to their pecuniary interests and the administration of their property. Please see paragraph 2.a.ii.III on 'Children's Rights'.</td>
</tr>
<tr>
<td>12. Does the legal system link inheritance rights to residency/citizenship?</td>
<td>There are no specific provisions in this regard.</td>
</tr>
<tr>
<td>13. Does the legal system provide for automatic inheritance for sole survivor children?</td>
<td>There are no express provisions concerning sole surviving children. In accordance with the Civil Code it would be expected that sole surviving children would inherit the intestate estate of their deceased parent in equal shares, or in a testate estate that property would be devised in accordance with the will. Please see paragraph 2.a.ii.IV on 'Succession'.</td>
</tr>
<tr>
<td>14. Does the legal system mandate the appointment of a trustee/administrator/guardian for sole survivor children?</td>
<td>Article 216 of the Revised Family Code of 2000 provides for a minor under the age of 18 to be placed under the authority of a guardian and to be represented by a tutor in relation to the minor's pecuniary interests and the administration of his or her property. Please see paragraph 2.c.ii.</td>
</tr>
<tr>
<td>15. If such an appointment is mandated, does codified law enumerate:</td>
<td>Article 216 of the Revised Family Code of 2000 states that in matters concerning his pecuniary interests and the administration of his property, a minor shall be represented by his tutor. The rights and responsibilities of the tutor are set out in the subsequent Articles, including a duty to take the &quot;utmost care&quot; in fulfilling those responsibilities.</td>
</tr>
<tr>
<td>i appointee's rights/responsibilities to hold the property of a sole survivor child until he/she ceases to be a minor?</td>
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<tr>
<td><strong>ADDITIONAL QUESTIONS</strong></td>
<td><strong>RESPONSE</strong></td>
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<tr>
<td>ii penalties to be imposed on an appointee who misuses the property/wrongfully deprives a child of property to which they are entitled?</td>
<td>ii Article 282 of the Revised Family Code of 2000 provides that a tutor may be condemned to pay interest and/or damages if he administers badly the property of the child, while Article 309 provides that a tutor should be liable for any loss caused by mismanagement, conflict of interest or failure to follow instructions.</td>
</tr>
<tr>
<td>iii mechanisms for a sole survivor child to challenge an appointee and gain access to court?</td>
<td>iii Whilst not specifically permitting an application by a sole survivor child, Article 246 of the Revised Family Code of 2000 provides for a tutor to be removed by the Court. Article 248 of the Revised Family Code of 2000 states that such an application can be made by any interested person. Please see paragraph 2.c.ii.</td>
</tr>
</tbody>
</table>

16. Is there regulation of the management of inheritance for those sole survivor children with no legal guardian?  
Article 227 of the Revised Family Code of 2000 states that where, having applied the previous articles (being Articles 225 and 226), a child remains without a guardian or tutor, the functions may be entrusted to such persons as may be appointed by the Court. A government organ who has the authority to follow up the security of children may also lay the matter before the Court. Article 229 states that the functions of guardian or tutor may, where necessary, be entrusted by the Court to an institution of assistance established for such purpose.

17. Where is Customary Law applied (in traditional non-State forums, formal State Courts, by local leaders/chiefs etc.)?  
Customary and religious law is applied in Sharia Courts, by personal arbitrators and by local religious elders.  
Please see paragraph 2D on ‘Customary and Religious Law’ and s 2.a.iii, 2.b.iii and 2.c.iii on ‘Customary Law’.
<table>
<thead>
<tr>
<th>ADDITIONAL QUESTIONS</th>
<th>RESPONSE</th>
</tr>
</thead>
<tbody>
<tr>
<td>18. How would you qualify the proportion of property claims resolved under Customary Law? [Nearly all/ High majority/ Small majority/ Minority]</td>
<td>There is a lack of verified information available to answer this question. As a rough estimate, it is likely that a high majority of property claims are resolved under Customary Law, however there will be variations (in both procedure and practice, as well as the content of the law) between different states.</td>
</tr>
<tr>
<td>19. Does the country have a court or tribunal in which orphaned children/their representatives can bring an action enforcing their legal right to property? If so, is there any case law specifically regarding orphaned children's inheritance rights?</td>
<td>There is no specific court or tribunal in which orphaned children can bring an action enforcing their legal right to property. However, there are a number of frameworks under which it may be possible for a child or their tutor to enforce their legal right to property.</td>
</tr>
<tr>
<td>20. Are there national provisions for legal aid in civil/administrative claims, including inheritance? If so: Do these provisions contain special measures or provisions regarding children?</td>
<td>There is a lack of information about legal aid provision in Ethiopia. The right to civil legal aid is not protected by the Constitution (unlike criminal legal aid) and there does not appear to be any relevant legislation. Internationally funded projects seem to provide a certain amount of legal assistance to disadvantaged groups in Ethiopia, however our research has not uncovered any evidence of legal aid being provided to the people of Ethiopia through national or State provision. See paragraph 2.c.ii on 'General Law'.</td>
</tr>
</tbody>
</table>
KENYA

INTRODUCTION

This report examines the inheritance rights of children in Kenya, specifically in relation to children who are orphans, having lost one or both parents to HIV/AIDS. The importance of this issue can be understood in light of the severity of the HIV/AIDS epidemic throughout the country.

HIV and AIDS is developing into a major barrier to development initiatives in Kenya. The HIV infection rate has spread rapidly reaching a prevalence of 20-30% in some areas of the western part of Kenya. In 2000, 1.1 million adults were infected, two-thirds of whom were women, and 100,000 children were living with HIV and AIDS. Total death rates tripled in 2002, and it was estimated that at that time 1.7 million children under 18 years were orphaned. Around two-thirds of these orphans lost one or both of their parents because of HIV and AIDS.\(^495\) UNAIDS estimates that in 2014 there were up to 1.1 million orphans due to AIDS in Kenya aged under 17.\(^496\) The figures compiled by UNICEF place the current number of orphans due to AIDS at 1 million.\(^497\)

Kenya has a relatively new Constitution, which enshrines protections against discrimination on the grounds of age, gender or health status. Kenya also has a statutory regime governing inheritance rights - the Law of Succession Act -, which recognises the right of women to inherit equally with men. Kenya is also generally regarded as having a strong record of ratifying major international and regional human rights instruments. However, customary law is a recognised source of law and, perhaps inevitably in a patriarchal society, contains aspects that often run counter to the principles of gender equality and non-discrimination espoused in both domestic and international human rights instruments. The continued application of customary law in areas such as succession engenders conflict with statutory provisions.

Furthermore, the cultural stigma that surrounds HIV/AIDS is such that children who have lost their parents to the disease are particularly vulnerable to displacement, as well as confiscation of moveable and immovable properties that have been left to them by their deceased parents.

This report is split into the following paragraphs:

1. Compliance with International Law
2. The National Legal System
   A. general provisions relating to inheritance rights
   B. specific provisions relating to sole survivor children and inheritance


C. mechanisms for facilitating children's inheritance claims

3. Conclusion

1. COMPLIANCE WITH INTERNATIONAL LAW

The 2010 Constitution of Kenya (“Constitution”) explicitly recognises the role of international law. In Chapter 1 (Sovereignty of the People and Supremacy of the Constitution), Articles 2(5) and 2(6) state that the general rules of international law and any treaty ratified by Kenya are automatically part of domestic Kenyan law:

“Article 2(5): The general rules of international law shall form part of the law of Kenya.

Article 2(6): Any treaty or convention ratified by Kenya shall form part of the law of Kenya”.

With regards to human rights and fundamental freedoms, Chapter 4 (Bill of Rights), Article 21(4) states:

“Article 21(4): The State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms”.

However, in practice the interpretation of these Constitutional provisions is not clear cut. For example, Article 2(5) of the Constitution fails to create a hierarchy that can be used to resolve conflicts between local legislation and a rule of international law. This not only diminishes the weight that courts should place on international law, but also provides courts with a certain amount of discretion whenever a conflict with an Act of Parliament arises. One school holds that it means the rules of customary international law. The other holds that “general rules of international law” is unclear: there are two competing schools of thought on how to interpret this phrase. One school holds that it means the rules of customary international law. The other holds that “general rules” refers to a wider set of international law principles, which could include customary international law, or the general principles of law in accordance with Article 38(1)(c) of the Statute of the International Court of Justice, or more widely to any logical proposition that is an extension of pre-existing international law and based on judicial reasoning.

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503 E. Oluoch Asher (2013) at p. 268.
Historically, Kenya operated a dualist legal system, which required the incorporation of international treaty obligations into domestic law through national legislation. However, Article 2(6) of the revised Constitution now provides that any treaty which has been ratified by Kenya automatically forms part of domestic law without the need for incorporation. The Treaty Making and Ratification Act 2012 sets out the process and approvals required for Kenya to ratify a treaty.

In general, Kenya is regarded as having a strong record of signing and ratifying major international and regional human rights instruments. However, the effective implementation of international treaty obligations often requires detailed implementation through domestic legislation, even where the overarching obligation is already incorporated. The result is that the full implementation of a number of treaties providing protection from discrimination - through enactment of new laws and amendments to existing legislation - has been the subject of debate and disagreement. Many of the reforms required to bring Kenya’s domestic law into line with its international obligations have been delayed.

Below is the status of Kenya’s commitment to the treaties listed in the introduction to the overall report.

<table>
<thead>
<tr>
<th>International Treaties</th>
<th>Signature Date</th>
<th>Ratification/Accession Date</th>
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<tbody>
<tr>
<td>International Convention on the Elimination of All Forms of Racial Discrimination (&quot;ICERD&quot;)</td>
<td>N/A</td>
<td>13 September 2001</td>
</tr>
<tr>
<td>International Covenant on Economic, Social and Cultural Rights (&quot;IESCR&quot;)</td>
<td>N/A</td>
<td>1 May 1972</td>
</tr>
<tr>
<td>International Covenant on Civil and Political Rights (&quot;ICCPR&quot;)</td>
<td>N/A</td>
<td>1 May 1972</td>
</tr>
<tr>
<td>Convention on the Elimination of All Forms of Discrimination Against Women (&quot;CEDAW&quot;)</td>
<td>N/A</td>
<td>9 March 1984</td>
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</table>


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<tr>
<th>International Treaties</th>
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<tr>
<th>Regional Treaties</th>
<th>Signature Date</th>
<th>Ratification/Accession Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>African Charter on Human and Peoples' Rights (&quot;ACHPR&quot;)(^{512})</td>
<td>N/A</td>
<td>23 January 1992</td>
</tr>
<tr>
<td>Protocol to the African Charter on Human and Peoples' Rights of Women in Africa (&quot;ACRWA&quot;)(^{514})</td>
<td>17 December 2003</td>
<td>16 October 2010</td>
</tr>
<tr>
<td>African Youth Charter(^{515})</td>
<td>28 June 2008</td>
<td>N/A</td>
</tr>
</tbody>
</table>

A number of the provisions of the above instruments have also been recognised directly in the new Constitution, for example:\(^{516}\)

(i) Article 27 on equality and freedom from discrimination domesticates ACHPR Articles 2-5, 28; CRC Articles 2, 37, 39; ICCPR Articles 2 - 4, 18, 20(2); IESCR Articles 2, 3; ACRWC Articles 3, 26; ICERD - various Articles and CEDAW - various Articles;

(ii) Article 40 on protection of right to property domesticates ACHPR Article 14, IESCR Article 15; CEDAW Articles 15, 16 and ICERD Article 5; and

(iii) Article 53 on children's rights strengthens the provisions made in the Children's Act, 2001 that domesticated CRC and the African Child Charter and in addition domesticates ICCPR Articles 8(1)(2)(3a), 14(4), 24; IESCR Articles 10(3), 13; ACHPR Articles 4, 5, 16-18; CEDAW Articles 5, 16(2); ACRWA Article 13(g); CRC - various Articles and ACRWC - various Articles.

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2. NATIONAL LEGAL SYSTEM

Sources of Law

The Republic of Kenya is a multi-party democratic sovereign republic. The Kenyan Constitution, the current version of which came into force in 2010, is the supreme law of the land, and any other law that is inconsistent with the Constitution, is, to the extent of the inconsistency, void.

"2. Supremacy of this Constitution

(1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

...

(3) The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ.

(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid."

Chapter 4 of the Constitution is formulated as a Bill of Rights, which protects the rights and fundamental freedoms of individuals. The Bill of Rights applies to all laws, and binds all State organs and all persons.

The primary sources of law in Kenya are set out in the Judicature Act, and read together with the Constitution, include:

(a) the Constitution;

(b) Acts of Parliament;

(c) specific Acts of Parliament of the United Kingdom;

(d) certain Acts of Parliament of India;

(e) English Statutes of General Application in Force in England on 12 August 1897;

(f) the substance of Common Law and the doctrines of equity;

(g) African Customary Law;

(h) Islamic Law; and

(i) international instruments.

519 The Constitution of Kenya, Article 20(1).
The Judiciary

Article 162 of the Constitution establishes a two tier court system: superior courts and subordinate courts. The superior courts include: the Supreme Court, the Court of Appeal, the High Court, the Environment and Land Court, and the Industrial Court. Subordinate courts include Magistrates’ Courts, Kadhis’ Courts and Courts Martial.

According to the Constitution, the Supreme Court heads the hierarchy of the judicial system.\footnote{The constitution of Kenya, Article 163.} The Supreme Court Act makes further provision with respect to the operation of the Supreme Court as a court of final judicial authority and the final interpreter and guardian of the Constitution.\footnote{The Supreme Court Act No. 7 of 2011, available at: 
http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/SupremeCourtAct_No.7of2011_2.pdf.} Appeals to the Supreme Court are heard only with the leave of the Supreme Court, except for appeals from the Court of Appeal in respect of matters relating to the interpretation or application of the Constitution.\footnote{The Supreme Court Act, section 15.}

The Court of Appeal does not have inherent jurisdiction: the Constitution provides that it has appellate jurisdiction to hear appeals from the High Court and from any other court prescribed by law in both civil and criminal cases, including customary law matters.\footnote{The Constitution of Kenya, Article 164.} The decisions of the Court of Appeal are binding on all other subordinate courts, including the High Court.

The High Court is established under Article 165 of the Constitution and has both civil and criminal jurisdiction, serving as an appellate tribunal in some cases and as a court of first instance in others. It has unlimited original jurisdiction in criminal and civil matters.\footnote{The Constitution of Kenya, Article 165.} Though not specifically stated, this jurisdiction includes customary law jurisdiction. It also has appellate jurisdiction in both civil and criminal matters, in that appeals from the subordinate courts are referred to the High Court. The High Court does not have jurisdiction in respect of matters reserved for the Environment and Land Court or the Employment and Labour Court or those reserved for the exclusive jurisdiction of the Supreme Court.\footnote{The Constitution of Kenya, Article 163(5).}
The subordinate courts include the Magistrates’ Courts, Kadhis’ Courts and any other court or local tribunal as may be established by an Act of Parliament\textsuperscript{[527]}, other than the Environment and Land Court and the Employment and Labour Court (which have the status of the High Court).\textsuperscript{[528]} The district Magistrates Court has jurisdiction and powers in proceedings of a civil nature where the proceedings concern a claim under African customary law.\textsuperscript{[529]} Under section 2 of the Magistrates Courts Act, a “claim under customary law” is defined to mean a claim concerning any of the following matters under African customary law:

(i) Land held under customary tenure;

(ii) Marriage, divorce, maintenance or dowry;

(iii) Seduction or pregnancy of an unmarried woman or girl;

(iv) Enticement of or adultery with a married woman;

(v) Matters affecting status, and in particular the status of women, widows and children, including guardianship, custody, adoption and legitimacy; and

(vi) Intestate succession and the administration of intestate estates, so far as not governed by any written law.

African customary law is used as a guide in civil cases affecting people of the same ethnic group, so long as this is not repugnant to justice and morality and does not conflict with statutory law.\textsuperscript{[530]}

Islamic law is applied by the Kadhis’ Courts, whose jurisdiction is limited to the determination of questions of Islamic law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhis’ Courts.\textsuperscript{[531]} There are eight such Courts, presided over by a Chief Kadhi or a Kadhi appointed by the Judicial Services Commission. Appeals lie to the High Court, sitting with the Chief Kadhi or two other Kadhis as assessor(s). The role of an assessor is to ensure that the judiciary understand the customs and practices of the individuals participating in the case. They give their opinion to the presiding judge before the final judgment, but the presiding judge is not required to follow their opinion nor to explain whether he or she has departed from it.\textsuperscript{[532]}

The legal system has also made provision for Tribunals, which are quasi judicial bodies that listen to matters specifically allocated to them. For example, the Children’s Court forms a part of the subordinate courts in Kenya and has jurisdiction in respect of charges against any person

\textsuperscript{[527]} The Constitution of Kenya, Article 170(5).
\textsuperscript{[528]} The Constitution of Kenya, Article 169.
\textsuperscript{[530]} The Judicature Act, section 3(2).
accused of an offence under the Children's Act. However, the Children's Act does not expressly deal with the issue of inheritance rights.

**Customary Law**

The Judicature Act makes it clear that customary law is a source of law in Kenya. Customary law is unwritten and is passed on through the practices and oral traditions of the community concerned. It has been argued that in Kenya it is often difficult to distinguish between customary law and customary practices due to the ever-evolving nature of customary practices, which makes it difficult to ascertain the content of customary law at any given time. There was an attempt at codifying customary law in Kenya, however the project did not fully materialise, but instead took the form of restatements of the customary laws of marriage, divorce and succession which were published in 1968.

Customary law has always, by virtue of being unwritten, been treated as a question of fact which must be proven in court as a matter of evidence. Thus, despite being a source of law, customary law is treated differently from legislation, and inferior to common law and principles of equity, which the courts take judicial notice of under section 60 of the Evidence Act 2014.

In proving customary law in courts, the courts mostly rely on the evidence of witnesses who are usually elderly males. These witnesses may have biased views, particularly in relation to gender relations. Women are often unable to give their perspectives of what constitutes customary law, which results in a distortion of the content of customary law. This means that the courts apply rigid or narrow conceptions of customary law stated from a predominantly male perspective without considering changes that have taken place on the ground or in disregard of the socio-economic context in which a particular customary practice is observed.

As African customary law developed out of the customs and practices of the people in response to their circumstances, it differs from one ethnic community to the other. The term "African customary law" does not therefore imply that there exists a single custom followed by all African communities, although there is general consensus on certain fundamental principles which

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536 Questions therefore arise as to whether a particular customary practice has achieved the status of customary law. See paragraph Winifred Kamau (2014) at p. 12.


include: the centrality of the family, supremacy of the group over the individual, and the importance of kinship ties.\textsuperscript{541}

It should be noted that customary, religious and statutory laws operate within the same social context and cover similar ground, particularly in the areas of personal law, which include marriage, divorce, inheritance, custody and guardianship of children and land tenure. However, there is a clear distinction between customary law and religious law. For example, while Islamic law (Sharia) may govern similar areas as customary law, such as marriage, divorce and inheritance, it is treated by the courts as a separate source of law and is dealt with by the Kadhis’ courts.

Traditional African societies are governed on the basis of patriarchal structures where women’s individual interests are subsumed under the interests of the group. Hence customary law contains aspects that often run counter to the principles of gender equality and non-discrimination espoused in both domestic and international human rights instruments.\textsuperscript{542} The continued application of customary law in areas such as succession engenders conflict with statutory provisions. For example, the right of women to inherit equally with men granted under section 38 of the Law of Succession Act\textsuperscript{543} contradicts customary law practice that dictates against women inheriting immovable property, particularly land.

Although customary law is a statutorily recognised source of law in Kenya, its application is limited in a number of ways:

(i) The application of customary law is restricted to civil cases only, where at least one of the parties is subject to customary law.

(ii) Customary law should not be inconsistent with written law. Article 2(4) of the 2010 Constitution clearly provides that any law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency. This section clearly subordinates customary law to the Constitution and removes the ambivalence in the former Constitution with regard to customary and religious laws in the realm of personal law. Therefore customary law cannot be used to trump the provisions of the Bill of Rights in the new Constitution, including freedom from discrimination.

(iii) Customary law must not be repugnant to justice and morality.\textsuperscript{544} There is no definition or guidance as to what justice and morality entail. The application of this test is dependent on judicial discretion. More often than not, judicial officers use their own models of justice and morality or borrow from other areas and use them as standards to evaluate customary laws. This approach ignores that different tribes, communities and ethnic groups have different customs, which may conflict with international standards or even

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{541} M. Ndulo (2011), at p. 2.
\item \textsuperscript{542} M. Ndulo (2011), at p. 2.
\item \textsuperscript{543} Law of Succession Act Chapter 160 (1948, revised edition 2012), available at: \url{http://faolex.fao.org/docs/pdf/ken106441.pdf}.
\item \textsuperscript{544} The Constitution of Kenya, Article 159(3).
\end{itemize}
\end{footnotesize}
each other. For example, this test has been applied by the courts to a custom that operated to bar women from inheritance (and hence discriminated against women) and was found not to be repugnant to ordinary notions of justice. Some judges have expressed disquiet about declaring customary law as repugnant to justice and morality: they have opined that customs and traditions are time tested and based on wisdom and experience, hence they should not be brushed aside lightly, however tempting it might be to do so, unless there are sound reasons for it, which have to be judicially determined.

Although the Law of Succession Act ("Law of Succession Act") is intended to be the universal law applicable in matters of succession and inheritance, customary law is to some extent also applicable. As later discussed in paragraph 2.a.ii of this report, some geographical regions of the country have been exempted from the application of the Law of Succession Act and in these regions, customary law is the applicable law relating to succession to agricultural land and livestock. Discretion has also been left to individuals to indicate in their wills any religious or customary law that they would wish to govern the administration of their estates. Customary law is also applicable to estates of people who died before the commencement of the Law of Succession Act in April 1981.

Therefore, Kenya’s law of succession is characterised by plurality with three regimes potentially applying, namely statutory law, customary law, and Islamic law. The main challenges relating to children’s rights arise from the conflict of such laws and the divergent applications of customary law in succession matters. It should be noted that the law of succession is intricately connected to the law of marriage and divorce and property law in general. Hence, conflict in these areas is likely to affect the application of the law of succession. In this context of legal pluralism, customary law continues to be a significant aspect of legal and social regulation in Kenya.

A. GENERAL PROVISIONS RELATING TO INHERITANCE RIGHTS

Following the enactment of a new Constitution in 2010, Kenyan law is undergoing a fundamental shift towards a modern and progressive legal framework. A number of rights are enshrined within the country’s Constitution, in addition to general legislation. As previously mentioned, the Constitution is the supreme law of the Republic of Kenya and any law, including customary law, that is inconsistent with the Constitution is void and any act or omission in contravention of the Constitution is invalid.

546 For a discussion of the case law on this issue see paragraph Winifred Kamau (2014), at p. 11-12.
549 Winifred Kamau (2014), at p. 27.
550 The Constitution of Kenya, Article 2(1).
551 The Constitution of Kenya, Article 2(5).
Provisions concerning land and succession are included in the Bill of Rights, which recognises equal rights for men and woman under law and includes other anti-discrimination provisions. However, in practice, Kenya remains a patriarchal society: women continue to be marginalised and discriminated against in almost all aspects of their lives.

Inheritance for all citizens is codified within the Law of Succession Act. The only exception to this is the possibility for members of the Muslim community to regulate inheritance in accordance with sharia law. Under the Law of Succession Act, men and women, married or unmarried, have the capacity to make a will. All wives and children of a deceased man, whether or not he had been maintaining them at the time of his death, are considered dependants and are able to inherit under the intestacy rules. Although the Law of Succession Act grants widows a life interest in the matrimonial home, the Government has failed to enforce this protection adequately, especially in rural areas. The result of this is that widows and their children are often evicted from their homes.

Customary law takes effect only in limited circumstances, having been superseded where it conflicts with the provisions of the laws of Kenya. The Matrimonial Property Act and the Marriage Act respectively govern the ownership of property within a marriage or at the dissolution of a marriage, as well as the equal rights of women and men in marriage with religious, civil, and customary marriages all accorded equal status. Notably, neither the Matrimonial Property Act or the Marriage Act discriminate between the rights of female and male heirs.

Finally, Kenyan law that deals with land is currently undergoing a comprehensive review, giving effect to changes implemented by the Kenyan Constitution. Some laws have already been enacted, such as the Land Act, Land Registration Act, and National Land Commission Act. Others, such as the Law on Community Land, are yet to be finalised.

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552 The Constitution of Kenya, Chapter 4.
557 This aims to protect Kenyan women and children from customary practices which may be discriminatory. For a discussion on the hierarchy of sources of law, see paragraph Landesa Rural Development Institute, “Women's Land and Property Rights in Kenya”, section 2, available at: http://landwise.landesa.org/guides/8/generate_pdf.
i. THE CONSTITUTION

The Constitution deals with equal treatment between Kenyan citizens and contains anti-discrimination provisions. These provisions apply to women and children, and also include children born out of wedlock.

Article 10 of the Constitution sets out a series of "national values and principles of governance", which include:

"(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised, amongst others".  

The Bill of Rights is a fundamental part of Kenya’s democratic state and is the framework for social, economic and cultural policies. Article 27 guarantees the equality and freedom from discrimination for all Kenyan citizens under the law:

"(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4)."

Additionally, Article 21 seeks to give effect to the implementation of the above rights and fundamental freedoms, particularly those of vulnerable groups:

"(1) It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights […]

(3) All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities".

In accordance with Article 2(6) of the Constitution, any treaty or convention ratified by Kenya will form part of the laws of Kenya. Given that Kenya has supported or ratified many international treaties, conventions and other instruments concerning the equality of women's and children's rights, it is a noteworthy provision.

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560 The Constitution of Kenya, Article 10(2).
561 For example, the Universal Declaration on Human Rights (1948); the International Covenant on Economic, Social and Cultural Rights (ICESCR 1966); the Convention on the Elimination of All Forms of Discrimination Against Women
Specifically in relation to property rights, the Constitution affords the right of every person to acquire and own property of any description, regardless of gender or age. When determining the rights of children, Article 53 states that:

"(2) A child’s best interests are of paramount importance in every matter concerning the child."

The Constitution has a section - Chapter 5 - dedicated to land rights. Under Article 60 of the Constitution:

"(1) Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles - […]

(b) security of land rights; […]

(f) elimination of gender discrimination in law, customs and practices related to land and property in land."

Furthermore, Article 68 states that the Parliament of Kenya shall:

"(a) revise, consolidate and rationalise existing land laws;

(b) revise sectoral land use laws in accordance with the principles set out in Article 60 (1); and

(c) enact legislation - […]

(iii) to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage; […]

(vi) to protect the dependants of deceased persons holding interests in any land, including the interests of spouses in actual occupation of land; and

(vii) to provide for any other matter necessary to give effect to the provisions of this Chapter."

ii. GENERAL LAW

I. Laws Relevant to Land

The issue of land rights is highly contested in Kenya and in Kenyan politics. Unresolved land issues in Kenya were widely viewed as the main contributing factor to the post-election violence that Kenya experienced in 2007 and 2008 (CEDAW 1979); and the African Charter on Human and People’s Rights (ACHPR 1981). See paragraph section 1 of this report for more detail.


and its ownership, use and management was one of the key issues that drove the need for a new Constitution.\textsuperscript{565} There has been substantial change and reform in the land laws of Kenya in recent years following the adoption of the new Constitution in 2010. A number of new laws governing the use and ownership of land came into force in mid-2012. Due to their recent introduction and wide ranging application, there is some uncertainty around the operation of these new laws and how they interact with existing legislation and customary law.

Formal legal land rights are not, however, the only relevant consideration. One of the main barriers to land rights in Kenya is the complex procedures involved in registering the transfer of land – this has been estimated to take an average of 64 days and to cost 4.2% of the property value. As a result, many cases of land sale and succession are not reported.\textsuperscript{566}

The Kenyan Constitution recognises three broad categories of land:\textsuperscript{567}

(i) \textit{Public land} includes government owned or occupied land as well as land in respect of which no individual or community ownership can be established by any legal process or which is not classified as private or community land.\textsuperscript{568} Land in respect of which no heir can be identified by any legal process is also designated public land.\textsuperscript{569} The National Land Commission is responsible for the administration of public land.\textsuperscript{570}

(ii) Private land consists of land registered under freehold or leasehold tenure.\textsuperscript{571}

(iii) Community land is land held by communities identified on the basis of ethnicity, culture or similar community interest. It includes land legally registered to a group such as hunter-gatherer communities, or designated by an Act of Parliament for "forests, grazing or shrines".\textsuperscript{572} The Constitution provided for a five year period within which legislation to govern the management of community land must be enacted. In 2013 the Government


\textsuperscript{567} The Constitution of Kenya, Article 61(2).

\textsuperscript{568} The Constitution of Kenya, Article 62(1).

\textsuperscript{569} The Constitution of Kenya, Article 62(1)(e).


\textsuperscript{571} The Constitution of Kenya, Article 64.

\textsuperscript{572} The Constitution of Kenya, Article 63(2).

The National Land Policy (\textit{"NLP"})\footnote{Ministry of Land, Republic of Kenya, "Sessional Paper No. 3 of 2009 on National Land Policy", 2009, available at: http://www1.uneca.org/Portals/pi/CrossArticle/1/Land\%20Policy\%20Documents/Sessional-paper-on-Kenya-National-Land-Policy.pdf.} was adopted in 2009 with the intention of guiding Kenya towards sustainable and equitable land use and replacing the existing set of wide ranging and often incompatible laws with more streamlined legislation. Its objectives (which are helpful when interpreting the subsequent new legislation) were to:

\begin{enumerate}
\item recognise and protect customary rights to land;
\item outline principles of sustainable land use and provide productivity and conservation targets and guidelines;
\item call for reform of land management institutions to ensure devolution of power, increased participation and representation, justice, equity, and sustainability;
\item establish the National Land Commission, District Land Boards, and Community Land Boards;
\item call for the development of a legal and institutional framework to handle land restitution and resettlement for those who have been dispossessed; and
\item call for reconsideration of constitutional protection for the property rights of those who obtained their land irregularly.\footnote{Ministry of Land (2009), Chapter 1.4.}
\end{enumerate}


These new laws introduced a number of reforms to enact the provisions of the Constitution and the objectives of the NLP, including introducing one registration system and one Land Registry (although, at the time of writing the report, this has not yet been implemented).\footnote{M Doshi (2012) at p. 3.} They require all existing laws relating to land to be applied with the necessary alterations and adaptation to give effect to the new
laws. However, since a number of the existing laws are not explicitly repealed, these have remained in force, causing some uncertainty and inconsistency.578

The key pre-2012 statutes that have not been repealed are set out below:

- The 1968 Land (Group Representatives) Act ("LGRA") governs group ownership of land. The LGRA states that land may be held communally and in accordance with applicable customary laws and practices.
- The 1962 Land Control Act ("LCA") governs transactions in agricultural land. Under the LCA, local Land Control Boards must approve all transactions in agricultural land including sale, lease, mortgage, and division.
- The 1948 Transfer of Property Act ("TPA") governs individual ownership of land. The TPA governs land in settler and formerly settler-occupied areas, which were designated during the colonial period as the white highlands.
- The 1939 Trust Land Act ("TLA") also governs group ownership of land. The TLA states that land in areas that were occupied by indigenous Kenyans during the colonial period and that has not been consolidated, adjudicated, and registered in individual or group names, and indigenous land that has not been taken over by the Government, is governed by the TLA. These lands are vested in local authorities designated as community councils.

The existing legal framework for land in Kenya is therefore a collection of the new laws passed in 2012 as well as a number of colonial and post-colonial statutes that remain in force and as a result is very complex.579

II. Land Rights on Marriage and Land Ownership by Women

In 2004 it was estimated that women held approximately 1% of registered land titles in Kenya and that 5 to 6% of registered titles were held in joint names.580 However, one of the most significant problems for women in Kenya is not the right to formal ownership of land, but the weak control and insecure access to land in practice.581 In rural areas, people rarely have access to formal or legal ownership of land due to the complexity and cost involved, and this combined with traditional beliefs and perceptions that consider land ownership to be the preserve of male members of society place women in a position of insecurity with regards to land

rights. This is particularly the case in areas where customary law is widely applied.582

The Land Registration Act introduced a requirement for the first time that certain land transactions require the consent of the spouse. Purchasers are now under a duty to inquire whether the spouse has consented to a sale, transfer, charge, lease or other disposition of land or a dwelling house. If consent has not been obtained, or the non-consenting spouse challenges the sale, then the transfer to the purchaser is void.583

The Land Registration Act also provides that a spouse will acquire an interest in his/her spouse’s land if that spouse contributes by labour or other means to the productivity, upkeep and improvement of the land. This interest is recognised as if it is registered against the title to the land.584 There is no guidance on exactly what constitutes spousal contribution and this will require guidance and interpretation from the courts.585 The Land Registration Act also does not define ‘spouse’ although ‘marriage’ is defined as a “civil, customary or religious marriage”.586

The English Married Women’s Property Act 1882 ("Married Women’s Property Act") and the TPA both contain provisions which appear to conflict with the Land Registration Act, and both statutes remain in force. The provisions of the Married Women’s Property Act are ambiguous and have been the subject of inconsistent interpretation by the courts. Previous cases had held that women are entitled to half of the family property on death or divorce, if they can prove that they contributed to the household through direct or indirect contribution. However, more recent cases have held that only direct financial contribution to the purchase of the property would be relevant.587 The TPA contains certain limits on the rights of married women to own property individually.588 While the provisions can be disregarded by the courts in furtherance of the requirement that all existing laws relating to land are to be applied with the necessary alterations and adaptation to give effect to the new laws, these provisions remain valid law and questions of interpretation are therefore likely to be required.

The Law of Succession Act establishes equal inheritance rights for female and male children, whether married or unmarried, on their parents’ property.589

583 M Doshi (2012) at p. 5.
584 M Doshi (2012) at p. 5.
588 Transfer of Property Act 1948.
589 Law of Succession Act, section 38.
is a surviving spouse and a child(ren), then the spouse is entitled to an absolute interest in the deceased’s personal and household effects and a life interest in the rest of the estate (including land and business) which can only be disposed of with the court’s permission. This protects surviving female spouses, although the interest of a widow is invalidated, if she remarries whereas a surviving husband retains his interest on remarriage. Children inherit when a surviving spouse dies or, in a woman’s case, remarries. In polygamous marriages, the estate is divided between households according to the number of children in each household.

The Law of Succession Act does not apply to persons who at the time of their death were Muslims - in these circumstances Islamic law applies. Under Islamic law (which is defined in the Law of Succession Act as the law applicable to a person who is a Muslim at the time of his death) a widow receives 25% of her husband’s estate, whilst women in polygamous marriages receive 1/8 if they are childless. Any remaining property is divided among the children so that sons receive twice as much as daughters.

The Land Registration Act, therefore, provides for the rights of spouses (including women) to acquire interests in land, but, as the Married Women’s Property Act TPA contain conflicting provisions and remain in force, these rights are not clear cut and must often be enforced through the courts, where questions of interpretation need to be resolved. Inheritance rights of women to land are protected, but are not equal to those of men as under the Law of Succession Act they can only retain a life interest, which is invalidated on remarriage.

III. Marriage Regimes

Marital Co-ownership of Land

Part IX of the Land Registration Act deals with the co-ownership of land as either joint tenants or tenants in common. There is a rebuttable presumption that when a spouse obtains land for co-ownership with his/her spouse that it will be held as joint tenants, meaning they will automatically inherit that property on the death of their spouse. Section 91(4) of the Land Registration Act provides that:

“If land is occupied jointly, no tenant is entitled to any separate share in the land and, consequently—

(a) dispositions may be made only by all the joint tenants;

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590 Law of Succession Act, sections 35 and 36.
591 Law of Succession Act, section 35(1).
592 Law of Succession Act, section 35(1).
595 Land Registration Act, section 93(1).
(b) on the death of a joint tenant, that tenant’s interest shall vest in the surviving tenant or tenants jointly; or

(c) each joint tenant may transfer their interest inter vivos to all the other tenants but to no other person, and any attempt to so transfer an interest to any other person shall be void."

Where matrimonial property is acquired during the course of a marriage in the name of one spouse, there is a rebuttable presumption that the property is held in trust for that person’s husband or wife, and, where property is held jointly by spouses, there is a rebuttable presumption that the beneficial interests in that property are equal. However, property held in trust does not form part of the matrimonial property and parties to a marriage may elect to enter into an agreement before they marry to otherwise determine their property rights so that such property does not form part of the matrimonial property.

Section 6 of the Matrimonial Property Act defines matrimonial property as including:

"…(a) the matrimonial home or homes;
(b) household goods and effects in the matrimonial home or homes; or
(c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage."

According to section 7 of the Matrimonial Property Act, ownership of matrimonial property vests in the spouses according to the contribution of each person and should, in the event of divorce, be divided in accordance with their contribution.

In the case of the dissolution of a polygamous marriage, matrimonial property which was obtained during the first marriage resides within that marriage. Subsequent contributions made by other wives to the matrimonial property should be taken into account as being owned by the man and the later wife or wives. "Contribution" in this context does not solely concern financial contributions - what is included remains unclear, though it does seem to include non-financial contributions to the matrimonial property:

"The term contribution has been clarified to mean both monetary and non-monetary contributions, including domestic work, child care and companionship, making it significantly more inclusive of the types of contributions typically made by women to the household. It remains to be seen how the courts will apply the Act, and its inclusive definition of contribution, in future divorce cases".

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596 Matrimonial Property Act, section 14.
597 Matrimonial Property Act, section 8.
The Marriage Act

Marriage is widely defined by section 3(1) of the Marriage Act 2014 as “the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with [the Marriage] Act.”

The Marriage Act recognises five different types of marriage which are all accorded equal legal status. The types of marriage recognised in Kenya are: i) Christian marriage; ii) civil marriage; iii) customary marriage; iv) Hindu marriage; and v) Islamic marriage.

The minimum age to marry is 18 years for men and women in all types of marriage and all marriages require the voluntary consent of both parties, as well as their presence at the marriage ceremony. Both widows and widowers are free to re-marry in Kenya.

Marriages registered under the Marriage Act must be monogamous, if they are to be entered into as Christian, Hindu or civil marriages, whereas marriages which are entered into under customary or Islamic law are presumed to be polygamous or potentially polygamous.

Polygamy is defined within the Marriage Act as "the state or practice of a man having more than one wife simultaneously". Therefore, a marriage where a woman takes on more than one husband would not be a valid polygamous marriage in Kenya.

Christian Marriage

Christian marriage applies to a marriage where one of the parties to the marriage professes the Christian relation. Notice - by way of a notice being placed at the place of worship where the marriage is intended to take place - is required before a Christian marriage is entered into. It must be officiated by a licensed church minister. Once married, a party to a Christian marriage may apply to the court to dissolve the marriage on the basis of one of the grounds in section 61 of the Marriage Act, which include adultery, physical or mental cruelty, desertion or breakdown of the marriage.

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599 Marriage Act, section 3(3).
600 Marriage Act, section 4.
601 Marriage Act, sections 11 (e) and (f).
602 Marriage Act, section 15(1).
603 Marriage Act, section 6(2).
604 Marriage Act, section 6(3).
605 Marriage Act, section 2.
606 Marriage Act, section 17.
608 Marriage Act, sections 18 and 50.
Civil Marriage

Civil marriage requires that notice be given to the Registrar of a couple's intention to marry between 21 days to three months prior to the marriage. The ceremony should be presided over in the presence of a Registrar who must complete the formalities for the marriage to be valid. A party to a civil marriage may not petition the court for a dissolution of their marriage until three years have elapsed since the marriage was celebrated. The grounds for an application are, in substance, the same as for the dissolution of a Christian marriage.

Customary Marriage

Customary marriage is a marriage which is celebrated in accordance with the customs of the communities of one or both/all of the parties to the marriage. Notice of the marriage must be given to the Registrar within three months of completion of the steps required to confer the status of marriage on the parties to the marriage in accordance with that community's custom and must specify which customary law has been applied to the marriage. The notice of the marriage must include a declaration by the parties to the marriage that those customary steps have been complied with in order to validly enter into the marriage. Section 68 of the Marriage Act allows for a customary marriage to undergo a customary form of dispute resolution process before the court determines a petition for dissolution of the marriage, but any such process must adhere to the principles of the Kenyan Constitution. The grounds for a dissolution of the marriage are the same as that of a civil marriage, save that they also include a ground relating to the customary law of the person petitioning for divorce.

Hindu Marriage

Hindu marriages under the Marriage Act appear to require both parties to the marriage to profess the Hindu faith. However, the legislation defines a Hindu as also including a "Buddhist of Indian origin; or a Jain or a Sikh by region". A valid Hindu marriage in Kenya should be officiated by a person authorised by the Registrar and in accordance with the Hindu religious rituals of one of the parties to the marriage, who should deliver a record of the marriage to the Registrar for

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609 Marriage Act, section 35.
610 Marriage Act, section 66(1).
611 Marriage Act, section 66(2).
612 Marriage Act, section 43(1).
613 Marriage Act, section 45.
614 Marriage Act, section 69(1)(f).
615 Marriage Act, section 46.
616 Marriage Act, section 2.
registration. A Hindu marriage may be dissolved on the grounds of marital breakdown, desertion, religious conversion of the other party, adultery and a number of other reasons including rape (although it is unclear in the legislation if that would include marital rape or only relates to a crime involving a third party).

Muslim Marriage

Muslim marriage only applies to persons who profess the Islamic faith. In Kenya a Muslim marriage is presumed to be polygamous or potentially polygamous. Although there does not appear to be a statutory limit to the number of wives that a Kenyan Muslim man may take as a wife, it is assumed that the Islamic limit of four wives applies to Muslim marriages in Kenya. The marriage must be officiated by a Kadhi, Sheikh, Mukhi or Imam and celebrated in accordance with the Islamic faith. That person must be authorised by the Registrar to conduct marriages and must provide the Registrar with a record of the formalities for the marriage for it to be valid. Where a provision of the Marriage Act is inconsistent with Islamic law and practice, those provisions of the Marriage Act do not apply to Kenyan Muslims. Property rights in polygamous Muslim marriages are governed by Islamic Law in relation to all matrimonial property.

D. Law of Succession Act

The Law of Succession Act provides for testamentary and intestate testamentary succession.

Testate Succession

The formalities required for a will to be valid under the Act are contained within sections 5 - 22 and include the following:

- wills may be made either orally or in writing;
- in order for an oral will to be valid, two or more witnesses to the will must be present when the oral will is made and the testator must die within three months of making that will;
- an oral will is invalidated by a written will whether or not the written will pre-dated the oral will;

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617 Marriage Act, section 47.
618 Marriage Act, section 70.
619 Marriage Act, section 48.
620 Marriage Act, section 6(3).
621 Marriage Act, sections 49 and 57.
622 Marriage Act, section 49 (3).
623 Matrimonial Property Act, section 3.
624 Law of Succession Act, section 2.
625 Law of Succession Act, section 8.
626 Law of Succession Act, section 9.
– written wills must be signed or marked by the testator, or signed or marked by another person at the testator’s direction and in the testator’s presence, and must be attested by two or more witnesses,627 and
– a will is revoked by the marriage of a testator unless the will was made in contemplation of that marriage.628

**Intestate Succession**

Section 34 of the Law of Succession Act establishes the definition of intestate succession as "a person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect".629

When a person dies intestate leaving one surviving spouse and a child or children, the surviving spouse is entitled to the personal and household effects and a life-interest in the net intestate estate. However, where that surviving spouse is a woman, that life-interest falls away if she remarry.630

The surviving spouse has a power of appointment over all of the capital assets of surviving children. Where such a power has been unreasonably exercised, a child of the deceased (or in the case of a minor, his or her representative) may apply to court for a variation of the appointment of the estate.

The estate should be held in trust in equal shares for any surviving children of the intestate who attain the age of 18 years or who, being female, marry under that age. Where a child of the deceased predeceases them, any grandchildren of the deceased receive in equal shares the share which their parent would have received had they not died before the deceased.631

In the event that the surviving spouse dies, or, in the case of a widow if she remarries, then the whole residue of the net estate is divided equally among the surviving children of the couple.632

The hierarchy of inheritance where an intestate dies leaving no surviving spouse or children is as follows:

"…. (a) father; or if dead
(b) mother; or if dead
(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

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627 Law of Succession Act, section 11.
628 Law of Succession Act, section 10.
629 Law of Succession Act, section 34.
630 Law of Succession Act, section 35(1).
631 Law of Succession Act, section 41.
632 Law of Succession Act, section 38.
(d) half-brothers and half-sisters and any child or children of deceased half-
brothers and half-sisters, in equal shares; or if none

(e) the relatives who are in the nearest degree of consanguinity up to and
including the sixth degree, in equal shares.

(2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of
subsection (1), the net intestate estate shall devolve upon the State, and be paid
into the Consolidated Fund.

In the case of validly entered polygamous marriages, an intestate’s estate is
divided among the wives’ households according to the number of children each of
those women had by the deceased. Each widow is also included in the household
count, meaning that a widow who has not had any children still receives a share of
the estate. The property is then shared within the household according to the
general rules of succession set out in sections 35-38 of the Law of Succession
Act.

The Law of Succession Act does not apply to the intestate succession of
agricultural land and crops or livestock in certain Kenyan districts. In these
districts the customary or tribal laws control inheritance rights.

**Provision for Dependants**

Part II of the Law of Succession Act deals with provision for dependants. A
dependant is defined within section 29 of the Act as:

“...(a) the wife or wives, or former wife or wives, and the children of the deceased
whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased’s parents, step-parents, grand-parents, grandchildren,
step-children, children whom the deceased had taken into his family as his own,
brothers and sisters, and half-brothers, half-sisters, as were being maintained by
the deceased immediately prior to his death; and

(c) where the deceased was a woman, her husband if he was being maintained by
her immediately prior to the date of her death.”

The Law of Succession Act allows for dependants to apply to court for portions of
the deceased's estate where the provision made to them under any will or in
accordance with the intestacy rules are found to have failed to make reasonable
provision for that dependant out of the deceased's estate.

The court has discretion to order a share of the estate to be made to dependants
who it finds to have been insufficiently provided for, either by way of a lump sum of

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633 Law of Succession Act, section 39.
634 Law of Succession Act, section 40.
635 Law of Succession Act, sections 32 and 33.
the estate or periodic payments. The factors that the court will consider in making their judgement will include:

"…a) the nature and amount of the deceased’s property;
(b) any past, present or future capital or income from any source of the defendant;
(c) the existing and future means and needs of the dependant;
(d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;
(e) the conduct of the dependant in relation to the deceased;
(f) the situation and circumstances of the deceased’s other dependants and the beneficiaries under any will;
(g) the general circumstances of the case, including, so far as can be ascertained, the testator’s reasons for not making provision for the dependant."  

Islamic Law and the Administration of Estates

The jurisdiction of the Kadhis’ Courts is limited to the determination of questions of Islamic law where it concerns family law including matters relating to marriage, divorce or inheritance and where all the parties to such matters profess the Muslim faith and submit to the jurisdiction of those courts. This means that the Kadhis’ Courts have jurisdiction to consider matters relating to the estate of deceased Muslims where such matters concern any questions regarding the administration or determination of such estates.

iii. CUSTOMARY LAW

The Judicature Act Chapter 8 of the Laws of Kenya states that African customary law is one of the sources of law in Kenya, to the extent that it is not repugnant to justice and morality or inconsistent with any written law.

The Law of Succession Act allows for the application of African customary law in (i) estates of persons dying before the application of the Law of Succession Act, (ii) testamentary dispositions in accordance with African customary law, and (iii) distribution on intestacy of certain agricultural land and crops thereon and livestock, in each case situated in the following districts: Marsabit, Narok, Tana River, Samburu, West Pokot, Turkana, Isiolo, Mandera, Wajir, Lamu and Kajiado. These districts are mainly desert areas inhabited by nomadic communities and cover roughly 60% of the territory and 15%
of the population of Kenya.\textsuperscript{642} This land is considered to be owned communally and therefore difficult to apportion to individuals. In these cases, in the event of intestacy, the law applicable to distribution shall be the law or custom applicable to the deceased’s community or tribe as the case may be.\textsuperscript{643}

Aside from these communal land holdings recognised by statute, and although not part of the formal land system, customary land holding systems continue to exist in Kenya and vary among ethnic groups. They can include lending/borrowing of land for residential or cultivation purposes, ownership of buildings separately from the land, land subleasing, squatting and traditional easements. The elders and other local leaders monitor these informal arrangements, often together with local authorities.\textsuperscript{644}

Membership in a community through kinship ties and common descent is the primary basis for acquiring customary rights to land. Loss of such membership means loss of access, which is particularly difficult for women whose membership usually depends on their relationship to male members and, in particular, is invalidated by marriage.\textsuperscript{645}

Customary law is recognised by the general principles dealing with land in the Kenyan Constitution as a method of settling land disputes: “Land in Kenya shall be held, used and amended... in accordance with the following principles – (g) encouragement of communities to settle land disputes through recognised local community initiative consistent with this Constitution.”\textsuperscript{646} The NLP also recognises and protects customary rights to land.\textsuperscript{647}

As an example, Gikuyu customary law is patrilineal and generally representative of the customary law that applies to inheritance rights in Kenya. Under Gikuyu customary law, “family” refers to the widow of the deceased, children of a deceased mother or father, brothers and sister of the deceased and father, mother and co-wives and children in a polygamous household and members of the clan who can be traced to the same ancestor.\textsuperscript{648} If a person dies intestate then the eldest son of the first wife is usually appointed as the representative of the estate - any preceding daughters would not be appointed. If the representative is a minor, then the community elders will assist him in distributing the land. In a monogamous marriage, land is divided among the sons with the widow obtaining cultivation rights on the land until her death. Daughters cannot inherit land or livestock, but do get cultivation rights and a life interest if they remain unmarried.

\textsuperscript{643} Law of Succession Act, section 33.
\textsuperscript{646} The Constitution of Kenya, Article 60(1)(g).
(as part of the widow’s household). Once married, daughters move from their mother’s household to their husband’s household and therefore lose the life interest.\(^{649}\) In polygamous marriages the household of each wife is awarded an equal share of property irrespective of the number of children (with the same rules governing shares to sons and life interest to widows and unmarried daughters).

Where customary law governs inheritance, and in particular in cases of intestacy, women are generally disadvantaged because they cannot benefit from or seek protection of their statutorily protected rights.\(^{650}\) As customary law in Kenya generally follows the patrilineal systems, under which women are perceived as transients who will eventually marry away from their husbands’ patrilineage, women are unable to formally inherit land in case of intestacy.\(^{651}\) Even when a will explicitly grants an inheritance of land to a female (and therefore statutory rather than customary law should apply), it is common for the male relatives of the deceased to challenge this disposition on the basis of custom. Although this should not be permitted, women do not always have sufficient knowledge and education in relation to their rights to ensure the correct law is applied.\(^{652}\)

The courts have been called on to interpret customary law in inheritance cases and interpret it in conjunction with statutory law (in particular the requirement of justice and morality) in a number of cases. The courts have not always been consistent in their decisions on whether customary law is applicable in succession matters and controversy remains in this area. For example, in *Wambugi w/o Gatimu v. Stephen Nyaga Kimani* a custom that barred a woman from inheriting her father’s land was found not to be repugnant to ordinary notions of justice meaning that there was no bar under statute from the application of customary law.\(^{653}\) There is, however, an increasing body of case law which holds that customary law should not apply where it breaches the principles enshrined in international human rights instruments to which Kenya is a party. For example, in *Mbinga v. Mbinga*\(^ {654}\) the court disapplied a customary law that permitted discrimination against married daughters in inheritance matters on the basis that this was contrary to international law and associated treaties which had the purpose of eliminating discrimination on the grounds of gender.\(^ {655}\)

Similarly, some courts have insisted on the exclusive applicability of the Law of Succession Act, whereas others have held that customary law is generally applicable in succession matters despite no express statutory provision.\(^ {656}\) This has led to a denial of

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652 Justice for the Poor (2010), at p. 2.
653 Winifred Kamau (2014), at p. 18.
655 Winifred Kamau (2014), at p. 16.
656 Winifred Kamau (2014), at p. 17.
women’s inheritance rights, for example to prevent women inheriting their father’s or husband’s estate.\(^{657}\) In other cases, the court has held that customary law which excludes a woman from inheritance is discriminatory and contrary to the Law of Succession Act.\(^{658}\) The continuing validity of customary law to govern inheritance and land rights has added to the uncertainty in this area as demonstrated in a judgment handed down in Mwangi v Mwangi in 2013: “This appeal is yet another illustration of the enduring tension between statutory law and customary law. It is a case of competing claims to land in which one party asserts rights founded on the fact of registration as proprietor and the other asserts rights founded on customary law.”\(^{659}\) The final judgment of the Court stated that a customary trust had been formed, and that this trust formed under customary law overrode the ownership rights of the legally registered proprietor.

**B. SPECIFIC PROVISIONS RELATING TO SOLE SURVIVOR CHILDREN AND INHERITANCE**

**i. THE CONSTITUTION**

The Constitution does not contain any specific provisions relating to sole surviving children.

**ii. CODIFIED LAW**

**I. Law of Succession**

As discussed above the Law of Succession Act provides for the inheritance rights of sole survivor children in the event that the deceased parent dies testate or intestate. If the deceased was testate they are free to leave their property as they wish,\(^{660}\) subject to the discretionary powers of the court in respect of children set out below.

If the deceased dies intestate and leaves sole survivor children, the surviving children receive the deceased’s property in equal shares, with property being held on trust for any children under the age of 18.\(^{661}\) Section 41 of the Law of Succession Act provides for how the trust should operate:

“Where reference is made in this Act to the “net intestate estate”, or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case

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657 Winifred Kamau (2014), at p. 17.
660 Law of Succession Act, section 5.
661 Law of Succession Act, section 38.
the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate”.

Section 42 of the Law of Succession Act also provides that previous benefits should be taken into account when determining the share of an intestate estate that should accrue to a sole surviving child (or grandchild or household). This includes lifetime gifts of property, as well as any property awarded at the court's discretion where it is considered that the will or intestacy rules did not make adequate provision for that child.

Where the deceased was polygamous, their property is divided among each household, according to the number of children in each household and then shared within the household in accordance with the general rules set out in sections 35-38 of the Law of Succession Act (see above).

The Law of Succession Act also gives the courts discretion to make provision for children, including sole survivor children, if they consider that any combination of a deceased's will, intestacy provisions and/or gifts made in contemplation of death do not make sufficient provision for those children.

II. Children Act

The Children Act makes provision for the appointment of a guardian by the courts (where there is no testamentary appointment) to safeguard either the sole surviving child’s physical wellbeing, their estate and property or both. It sets out the various duties that are incumbent upon the guardian and also makes an offence of the mismanagement and misapplication of the child’s estate, which includes a monetary penalty of up to 50,000 Kenyan shillings (approximately USD 488) and a term of imprisonment not exceeding one year.

iii. CUSTOMARY LAW

Although the application of customary law in Kenya is permitted by the Constitution to the extent that it does not conflict with any codified law and to the extent that it is not “repugnant” to justice, in practice it is not uncommon for customary laws to conflict with

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662 Law of Succession Act, section 41.
663 Law of Succession Act, section 42.
664 Law of Succession Act, section 40.
666 The Children Act, sections 105 and 109.
667 All conversions are approximate and were made at the time of writing the report using a commercial exchange rate available at www.xe.com.
668 The Children Act, sections 110 and 111.
these requirements.670 Tribal and Islamic laws can vary, however, typically property should pass to sole survivor children in accordance with the following inheritance rules:

- Succession to the property of a man in a patrilineal community - children are considered descendants of the father. Although sons may inherit, daughters have a right of use and not a right of inheritance.
- Succession to the property in a matrilineal community - children are considered descendants of the mother. The land and household items such as pots and pans remain with her family.
- Succession under Shari’a law - female heirs are entitled to 50% of what a male heir would inherit. Adopted children are not entitled to anything.

In reality, because of their vulnerable position, sole survivor children can suffer from the loss of both personal and real property, commonly known as ‘land grabbing’. Because Kenya is mostly patriarchal and patrilineal, sole survivor female children are the most vulnerable in Kenya as they are not even technically considered heirs under customary law. Historically, there was a strong extended family culture in Kenya under which any sole survivor children were taken in by relatives and their property taken alongside a duty to provide and care for those sole survivor children.671 With the breakdown of this extended family structure the customary laws permitting the taking of property are still applied, but there are fewer examples of the adoption of the accompanying duties to care for the sole survivor children. Reportedly, it is not uncommon for relatives to seize the property of sole survivor children672 with any disputes raised being resolved by a local council of elders. Because of the lack of statutory oversight of such a council, such a system is open to abuse. One study found that because of the prevalence of members of such local councils being related to family of the deceased, the tendency was to favour the deceased’s relatives (and thus not sole survivor children or widows) in assessing to whom the deceased’s property should belong.673

One study into the prevalence of land grabbing suggested that one in eight sole survivor children had experienced land grabbing.674 The study (which included interviews with widows who are also reputedly often subject to land grabbing) suggested that the most common types of property loss were the house, with 100% of those interviewed stating this had been taken, followed by 85% having lost death certificates (this is a key document required to make transactions with the deceased’s property), 75% had had land and trees taken, 70% had lost household goods and others had lost livestock, cash, payslips, vehicles, tools and rental plots.675 Furthermore, the issue is perhaps even more serious

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671 Food and Agriculture Organisation (2008), at p. 6.
672 Francisca Akwanalo Mate (2005), at p. 13.
673 Francisca Akwanalo Mate (2005), at p. 15.
674 Francisca Akwanalo Mate (2005), at p. 13.
675 Francisca Akwanalo Mate (2005), at p. 13.
than the figures above suggest, as it is considered that land grabbing is not even particularly widely reported\textsuperscript{676} and the proportion of those that are reported are sometimes difficult to resolve due to overstretched resources as detailed below.

The cases of land grabbing which are, however, addressed are first done so at community level (which relies heavily on volunteers\textsuperscript{677}). More complex cases are progressed to district level branches of the Children’s Department (which falls under the remit of the Ministry of Labour, Social Security and Services) for investigation, but such branches are underfunded,\textsuperscript{678} which constitutes a barrier to the administration of sole survivor child rights. Even where the deceased has left a will leaving their property to sole survivor offspring, the children are still dependent on the goodwill of the deceased’s family to uphold that will and ensure the children receive their rights. Although land grabbing is clearly a societal problem that applies despite the presence of codified law, and it can and does occur even where the deceased parent was testate, it seems that customary law practices combined with inadequate provisions to address the infringement of a child’s rights are primary factors in allowing instances of land grabbing to perpetuate.\textsuperscript{679}

There are funds and committees within Kenya (notably the 47 district HIV/AIDS control committees and the constituency AIDS control committees) that are tasked by the Kenyan government with administering monies and AIDS related activities within local communities, but reports suggest that this money does not reach the most vulnerable, ie the sole survivor children of those affected by AIDS. One report suggested that out of 72 individual interviews with sole survivor children, none had received any benefit from any of the HIV/AIDS control committees or constituency funds.\textsuperscript{680}

Although steps have been taken in respect of both codified law and customary law (as detailed above) criticism of the codified law (in particular the Children’s Act) centres on its lack of provision specifically in relation to sole survivor children (bracketing them instead as children in need of protection) and the absence of a mechanism to monitor land grabbing or severely punish those who engage in land grabbing.\textsuperscript{681} Mechanisms for the appointment of a guardian under both the Children Act and the Law of Succession Act are also lacking a proper administrative framework with externally appointed and, crucially, accountable guardians who are subject to external oversight that would make land grabbing much more difficult to accomplish. It has been suggested that, beyond the funds administered by the HIV/AIDS control committees and used for AIDS related activities, there is a need for a specific budget to address these particular children’s rights issues.\textsuperscript{682}

Although some statutory reform is desirable, it is administrative reform that is crucial to

\begin{footnote}
\textsuperscript{676} Food and Agriculture Organisation (2008), at p. 34.
\textsuperscript{677} Food and Agriculture Organisation (2008), at p. 34.
\textsuperscript{678} Food and Agriculture Organisation (2008), at p. 35.
\textsuperscript{679} Francisca Akwanalo Mate (2005), at p. 14.
\textsuperscript{680} Francisca Akwanalo Mate (2005), at p. 25.
\textsuperscript{681} Francisca Akwanalo Mate (2005), at p. 25.
\textsuperscript{682} Francisca Akwanalo Mate (2005), at p. 25.
\end{footnote}
ensure that sole survivor children are better able to benefit from existing statutory protections and access the channels that enable them to receive their rights.

C. MECHANISMS FOR FACILITATING CHILDREN'S INHERITANCE CLAIMS

i. CONSTITUTION

As noted above, the Constitution is the "supreme law of the Republic and binds all persons and all State organs at both levels of government". It is therefore, in theory, a basis for challenging discriminatory inheritance laws, particularly given the commitment to the principles of equality and non discrimination which run throughout the Constitution.

The following should be noted:

(a) in accordance with Article 2(4), "[a]ny law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid";

(b) pursuant to Article 27, every person is equal before the law and has the right to equal protection and equal benefit of the law;

(c) pursuant to Article 40, every person has the right, either individually or in association with others, to acquire and own property of any description, and in any part of Kenya;

(d) Article 53 creates obligations upon the State to fulfil social-economic rights of children;

(e) Article 60 provides for the elimination of gender discrimination in respect of land;

(f) Article 14(5) extends the right to citizenship to a child found in Kenya who is, or appears to be, less than eight years of age, and whose nationality and parents are not known; such a child is presumed to be a citizen by birth. This provision will clearly assist HIV/AIDS orphans who will not face the challenge of proving citizenship as a first hurdle.

Pursuant to Article 22(1), every person has the right to institute Court proceedings, claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. In addition to a person acting in their own interest, Court proceedings under Article 22(1) may be instituted by (a) a person acting on behalf of another person who cannot act in their own name; (b) a person acting as a member of, or in the interest of, a group of class of persons; (c) a person acting by the public interest; or (d) an association acting in the interest of one or more of its members. This means that charities, NGOs and other organisations will in theory be able to bring Court proceedings on behalf of HIV/AIDS orphans.

683 The Constitution of Kenya, Article 2(1).
684 The Constitution of Kenya, Article 27(1).
685 The Constitution of Kenya, Article 40(1).
687 The Constitution of Kenya, Article 60(1)(f).
Further, the Constitution states that formalities relating to Article 22 proceedings are kept to a minimum and no fee may be charged for commencing the proceedings. The High Court is given jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. The relief which can be granted by the Court includes a declaration of rights, an injunction, a declaration of invalidity, an order for compensation or an order for judicial review.

The Constitution is still a relatively new piece of legislation and at this stage there appear to be limited cases in which individuals have asserted their rights pursuant to the Constitution.

In the case of Samson Kigora Rukunga v. Zipporah Gaiti Rukunga, the Court upheld the right of a married daughter to inherit from the parents’ estate, the objector having been evicted from the land left to her by her late father on the grounds that she was married. The Court's decision was based on Articles 27 and 60 of the Constitution.

We have not been able to locate any specific cases concerning HIV/AIDS orphans seeking to assert their rights under the Constitution. Whilst the new constitutional framework gives a framework for children's rights and claims, in practice, children will struggle to do so without the assistance or support of family or third party organisations.

**ii. CIVIL LAW**

Decisions relating to the inheritance of property in Kenya are normally heard by the Family and Probate Division of the High Court of Kenya. This Court hears all proceedings relating to the estate of a deceased and follows the procedures and provisions of the Law of Succession Act. This would include claims under section 26 of the Law of Succession Act that an individual dependant's inheritance (whether a lifetime gift in contemplation of death, a testamentary disposition, or succession by intestacy) does not make adequate provision for that dependant.

In the case of intestacy, the Law of Succession Act sets out how the deceased's property should devolve. A surviving spouse is entitled to the personal household effects of the deceased. If only children are left with no surviving spouse then the estate devolves upon the children equally. Pursuant to section 41, property is to be held on trust for sole surviving children.

Pursuant to section 47, the High Court has jurisdiction to entertain any application and determine any dispute under the Law of Succession Act.

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688 The Constitution of Kenya, Article 22(3).
689 The Constitution of Kenya, Article 23(3).
In 2014 Kenya passed the Marriage Act legalising polygamy, which brought civil law where a man was only allowed one wife into line with customary law, where some cultures allow multiple partners.\(^{693}\) It is not clear to what extent the Marriage Act 2014 is compatible with the aims and objectives of the Law of Succession Act as an orphan’s right to the estate may be subject to claims or challenges from additional wives. Perhaps unsurprisingly given how recent the legislation is, we have not been able to identify any case law concerning this potential conflict.

The Kenyan Government has set up at the Supreme Court a special tribunal to handle legal issues relating to the HIV and AIDS Prevention and Control Act 2006.\(^{694}\) In the 2013-2017 Strategic Plan for the HIV and AIDS Tribunal\(^{695}\) there are references to setting up special mechanisms for children and other vulnerable groups. However, the HIV and AIDS Prevention and Control Act itself does not refer to inheritance rights, and the prohibited grounds of discrimination only include an individual’s own HIV status or perceived HIV status.

### iii. CUSTOMARY LAW

As set out above, the Constitution states that any customary law that is inconsistent with the Constitution is void. However, we have not been able to locate any cases where a customary law ruling has been overruled as unconstitutional.

### iv. NGO WORK/STATE INITIATIVES

Papers produced for the World Bank’s Justice for the Poor programme have argued\(^{696}\) that the energy and focus around inheritance rights should shift from assessing the tension between legislative and customary approaches to instead looking at the "social context within communities, whose members must be pressed to reject attempts to ‘hijack’ custom".\(^{697}\) More specifically, the problem is that community leaders are key in local power structures and practices, and control access to formal systems so that even where mechanisms exist, in principle, to help women, women are prevented from accessing them. It is assumed that the same cultural and social challenges apply to the inheritance rights of children.


\(^{697}\) T Chopra and A Harrington (2010), at p. 2.
Although in the context of Kenya's election violence in 2007/08 (and the likely contributing factor of unresolved land issues), the necessary cultural change may seem unlikely, there are examples of the social approach advocated by the Justice for the Poor programme in practice. In Nyanza province, for example, the Kenya National Commission for Human Rights has been providing a framework for widows to challenge community elders by telling the story of being chased from their lands. The elders respond with solutions such as ensuring the women receive a life interest in the land but any sons also receive a portion as required by patrilineal tradition.

The World Bank also notes the creation of two institutions in Kenya to "formalise" customary land concepts: Land Control Boards and Land Dispute Tribunals. However, work done prior to the establishment of Kenya's new Constitution suggests that outcomes may be subject to the same local power dynamics that undermine women's and children's rights.

v. LEGAL AID

There is limited access to legal aid in Kenya. The Government of Kenya developed a National Legal Aid (and awareness) Programme, NALEAP, as a pilot scheme. A number of the pilot areas appear to be of relevance for inheritance claims: for example, the Family Division of the Nairobi High Court and the Nairobi Children's Court. It is unclear whether the Programme is still operating. A Legal Aid Bill was introduced into the National Assembly in June 2015 (reported in the Kenya Gazette Supplement No. 90, dated 26 June 2015). Section 36 of the Bill states that 'a person is eligible to receive legal aid services if that person is indigent, resident in Kenya and is ... (b) a child'.

3. CONCLUSION

Kenya has an adequate legislative framework which enshrines protections against discrimination on the grounds of age, gender or health status in its Constitution, the Law of Succession Act and the Land Registration Act. Moreover, although Kenya has made clear attempts to recognise the role of international law in relation to human rights, and in particular in respect of the rights of children, it can still do more. The full implementation of a number of treaties has yet to occur and many of the reforms required to fulfil its international obligations has been delayed. Unequal rights are still present with regard to marriage. The Marriage Act and the Law of Succession Act fail to give women equal rights to men, particularly in relation to polygamous relationships and rights on re-marriage. Mothers, who are at times the only adults capable of protecting the children's inheritance rights are often marginalised through the application of customary law and the patriarchal and patrilineal practices that are entrenched within it. Women are the most vulnerable group when inheriting property, have limited rights of ownership of land or other real

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700 T Chopra and A Harrington (2010), at p. 11.
estate, and have very narrow protections not only within the marriage but also at termination of a marriage. There are also insufficient protections in respect of the rights of sole survivor children.

The conflict between customary law and modern legislation in protecting equality and promoting non-discrimination is highlighted in the law relating to inheritance. On the one hand, the Law of Succession Act provides for the inheritance rights of the sole surviving children and gives the courts discretion if they feel a will does not make sufficient provisions for these children. On the other hand, the place of customary law and Islamic law in the hierarchy of sources of law, as well as the judicial application of these laws with their inherent patriarchal and patrilineal bias in inheritance cases, can result in the prejudicial treatment of children, and, in particular, female children.

The conflict between customary law and legislative protections is exacerbated by the issues surrounding the enforcement of the rights of vulnerable claimants, namely access to courts and inconsistent application of the hierarchy of customary law and statute. More needs to be done to increase awareness not only amongst the vulnerable groups, but also within the judiciary.

Furthermore, the social context within which women and children seek to protect their rights is an important factor in protecting and enforcing the inheritance rights of children. There is a need for clear policy guidance at both the state and county government levels to address the consequences of AIDS/HIV in the context of children's inheritance rights.

Overall, it is clear there have been positive movements within Kenya to afford the citizens basic human rights, including property ownership and non-discrimination. However, there is still some way to go until vulnerable groups such as children are adequately protected.
APPENDIX 1 - SHORT SUMMARY TABLE

Note that it will be possible to provide references and narrative explanations in the full table on the next page.

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<tr>
<td>In the Constitution</td>
<td>Yes</td>
<td>Does not specify</td>
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<td>In legislation/Civil Law</td>
<td>Yes</td>
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<td>Yes</td>
<td>No</td>
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<tr>
<td>In Customary Law (codified)</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Don't know</td>
<td>No</td>
<td>Don't know</td>
<td>Don't know</td>
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<tr>
<td>In Customary Law (practice)</td>
<td>No</td>
<td>Don't know</td>
<td>Don't know</td>
<td>Yes</td>
<td>N/A</td>
<td>N/A</td>
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Please answer with one of the following responses only:

**Yes** - The law/practice explicitly mentions equality between the two characteristics (Questions 1-4), or relevant codified law/national provisions exist (Questions 5-7). In relation to Question 1, if gender neutral language rather than specifically mentioning gender equality, please specify 'Yes' and include an explanatory footnote to this effect.

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702 Although there is no explicit reference to equality, gender neutral language is used.
**No** - The law/practice explicitly discriminates between the two characteristics (Questions 1-4). Not applicable to Questions 5-7.

**Does not specify** - All relevant material was accessed, but there was no information relevant to the question (Questions 1-7).

**Don’t know** - It is not possible to say whether all relevant material was accessed, and so a definitive answer cannot be given (Questions 1-7).

**N/A** - The question is not applicable for this type of law, for example if a country does not have codified Customary Law or a Constitution. It is likely that this answer will apply to Customary Law (practice) for Questions 5-7.
<table>
<thead>
<tr>
<th>ADDITIONAL QUESTIONS</th>
<th>RESPONSE</th>
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<tbody>
<tr>
<td>1. How does the legal system define a child? Is the age of majority different for different matters?</td>
<td>Article 260 of the Constitution states that a child means an &quot;individual who has not attainted the age of 18 years&quot;.</td>
</tr>
</tbody>
</table>
| 2. Does the country have a de jure dual legal system (customary or religious law running parallel to the statutory law or common law)? Whether de jure or de facto, is the customary/religious law related to inheritance and property rights the preferred means of dispute resolution in this area? | Yes. Islamic law and customary law are both recognised.  
Religious law: The Law of Succession Act, which generally governs inheritance, does not apply to persons who at the time of their death were Muslims (Statute Law (Misc. Amendment) Act No. 2 of 1990). Islamic law applies and the Kadhis’ Courts have jurisdiction to consider matters relating to the estates of deceased Muslims.  
Customary law: Customary law is recognised in both the general principles dealing with land in the Constitution of Kenya (Article 60(1)(g)) and as a general source of law in Kenya, to the extent that it is not repugnant to justice and morality or inconsistent with any written law (Judicature Act Chapter 8).  
The Law of Succession Act allows for the application of African customary law to (i) the estates of persons dying before the application of the Law of Succession Act, (ii) testamentary dispositions in accordance with African customary law, and (iii) agricultural land, crops and livestock in certain named districts of Kenya. |
| 3. Does the Country's legal system (ie Civil Law and Customary Law) differentiate between different types of land tenure? | Yes. The Constitution of Kenya recognises three broad categories of land: (i) public land; (ii) private land registered under freehold or leasehold tenure; and (iii) community land (Article 61(2)).  
It is also possible to hold a life interest in land. |
<p>| 4. Does the country have codified legislation governing inheritance rights?         | Yes. The Law of Succession Act governs inheritance rights and provides for intestate and testamentary succession.                                                                                         |</p>
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<tr>
<th>ADDITIONAL QUESTIONS</th>
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<tr>
<td>5. Does the legal system that governs inheritance rights (if any) ensure equality between male and female children?</td>
<td>Yes. A deceased is entitled to make a will leaving their property in any way they choose. If they die intestate, the Law of Succession Act provides for the inheritance of the deceased’s children generally, ie there is no distinction between male and female children. This stance is also in line with the provisions on equality set out in the Kenyan Constitution. The exception to this is inheritance under Islamic law, some forms of which prescribe an uneven distribution of property between male and female children (for further details see question 10 below).</td>
</tr>
<tr>
<td>6. Does the legal system that governs inheritance rights (if any) ensure equality between biological and adopted children?</td>
<td>Yes. For the purposes of applying the provisions the Law of Succession Act adopted children are not distinguished from biological children and would thus have a statutory right to share in the deceased parent’s estate. The exception to this is inheritance governed by Islamic law, under which adopted children do not have a right to inherit the deceased’s property.</td>
</tr>
<tr>
<td>7. Does the legal system that governs inheritance rights (if any) ensure equality between children born in and out of wedlock?</td>
<td>Yes. The Law of Succession Act applies to children born to a female out of wedlock and children born to a male out of wedlock, provided that he expressly recognises that child as his, or voluntarily assumes responsibility for that child.</td>
</tr>
<tr>
<td>8. Does the legal system that governs inheritance rights (if any) ensure equality between children born from a monogamous and polygamous union?</td>
<td>Yes. The Law of Succession Act 1981 provides that where the marriage is polygamous, any intestate property shall be divided amongst each household in shares based on each child per household, thus equally between each child. Likewise, property is divided up between children of a monogamous union in equal shares.</td>
</tr>
<tr>
<td>9. Are there different legal rules for testate and intestate succession?</td>
<td>Yes. The Law of Succession Act provides for both intestate and testamentary succession. The formalities required for a will to be valid under the Act are contained within sections 5-22. Alternatively the Act contains various provisions relating to intestate succession.</td>
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**ADDITIONAL QUESTIONS**

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<tr>
<td>Note, the Act does not apply to the intestate succession of agricultural land and crops or livestock in certain Kenyan districts. In these districts the customary or tribal laws control inheritance rights.</td>
</tr>
</tbody>
</table>

| 10. Does the legal system specify the percentages of inheritance to be distributed to children? | The Law of Succession Act (which applies for all except the Muslim community) establishes equal inheritance rights for female and male children, whether married or unmarried, on their parents’ property. If there is a surviving spouse and a child(ren), then the spouse is entitled to an absolute interest in the deceased’s personal and household effects and a life interest in the rest of the estate (including land and business) which can only be disposed of with the court’s permission. Children inherit when a surviving spouse dies or, in a woman’s case, remarries. In polygamous marriages, the estate is divided between households according to the number of children in each house. Under Islamic law, for the Muslim community, a widow receives 25% of her husband’s estate and women in polygamous marriages receive 1/8 if they are childless. Any remaining property is divided among the children so that sons receive twice as much as daughters. |

<p>| 11. Does the legal system address the rights of orphaned children to transact land, houses and property that they inherit? | The rights of orphans in relation to property which they have inherited are not specifically addressed. There is however vaguely-worded protection for vulnerable groups. Article 21 of the Bill of Rights states that all state organs and public officers have a duty to address the needs of vulnerable groups including children. Article 68 of the Constitution states that the Parliament of Kenya shall revise and enact laws to protect the dependants of deceased persons holding interests in any land. |</p>
<table>
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<tr>
<th>ADDITIONAL QUESTIONS</th>
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<tbody>
<tr>
<td>12. Does the legal system link inheritance rights to residency/citizenship?</td>
<td>No. The Law of Succession Act only refers to children and spouses.</td>
</tr>
<tr>
<td>13. Does the legal system provide for automatic inheritance for sole survivor children?</td>
<td>The Law of Succession Act permits a deceased to leave their property according to their will. If the deceased was intestate however, sole survivor children will automatically inherit a proportion or all of their parent’s estate, dependant on the existence of any other children, or, if the deceased was polygamous, other families (see paragraph 2.b).</td>
</tr>
<tr>
<td>14. Does the legal system mandate the appointment of a trustee/administrator-guardian for sole survivor children?</td>
<td>The Children Act 2010 provides that a guardian may be appointed for a child, to safeguard either the child’s physical wellbeing, their estate and property or both (see paragraph 2.b).</td>
</tr>
<tr>
<td>15. If such an appointment is mandated, does codified law enumerate:</td>
<td>i appointee’s rights/responsibilities to hold the property of a sole survivor child until he/she ceases to be a minor?</td>
</tr>
<tr>
<td></td>
<td>where a guardian is appointed only in respect of the estate of the child, he need not have actual custody of the child but he shall have:</td>
</tr>
<tr>
<td></td>
<td>(a) the power and responsibility to administer the estate of the child and in particular to receive and recover and invest the property of the child in his own name for the benefit of the child;</td>
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<td>(b) the duty to take all reasonable steps to safeguard the estate of the child from loss or damage;</td>
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<td>(c) the duty to produce and avail accounts in respect of the child’s estate to the parent or custodian of the child or to such other person as the court may direct, or to the court, as</td>
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<tr>
<td>ADDITIONAL QUESTIONS</td>
<td>RESPONSE</td>
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<tr>
<td>the case may be, on every anniversary of the date of his appointment;</td>
<td>(d) to produce any account or inventory in respect of the child’s estate when required to do so by the court.</td>
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<tr>
<td>(d)</td>
<td></td>
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<tr>
<td>ii penalties to be imposed on an appointee who misuses the property/wrongfully deprives a child of property to which they are entitled?</td>
<td>ii Any guardian who neglects their statutory duty to safeguard the estate and/or assets of the sole survivor child or causes the estate to suffer any loss or damage is liable to make good the loss to the sole survivor child and may also be liable to a fine not exceeding 50,000 Kenyan shillings and a term of imprisonment not exceeding one year (see paragraph 2.b).</td>
</tr>
<tr>
<td>iii mechanisms for a sole survivor child to challenge an appointee and gain access to court?</td>
<td>iii Although a child may, with the leave of the court, apply for the guardianship to be terminated it is not clear how this is effected in practice.</td>
</tr>
<tr>
<td>16. Is there regulation of the management of inheritance for those sole survivor children with no legal guardian?</td>
<td>There is no centralised management of inheritance for sole survivor children.</td>
</tr>
<tr>
<td>17. Where is Customary Law applied (in traditional non-State forums, formal State Courts, by local leaders/chiefs etc.)?</td>
<td>Formal state courts can be called on both to interpret customary law and in particular to interpret it in conjunction with statutory law and the requirement that it only apply where it is not repugnant to justice and morality or inconsistent with any written law. In practice local leaders and chiefs also play an important role in applying customary law. Khadis’ courts apply Islamic law.</td>
</tr>
<tr>
<td>18. How would you qualify the proportion of property claims resolved under Customary Law? [Nearly all/ High majority/ Small majority/ Minority]</td>
<td>Given the recent and wide ranging changes to the statutory land law system in Kenya it is not possible to tell as the country is in a transition period. Once all new legislation is in force and has had time to be implemented the number of property claims under Customary Law should reduce as traditional customary rights to land</td>
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<tr>
<td>ADDITIONAL QUESTIONS</td>
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<tr>
<td>19. Does the country have a court or tribunal in which orphaned children/their</td>
<td>We could not find evidence of a special tribunal for orphans, but the Kenya Government has set up at the Supreme Court a special tribunal to handle legal issues relating to the HIV and AIDS Prevention and Control Act 2006. In the 2013-2017 Strategic Plan for the HIV and AIDS Tribunal (available here) there are references to setting up special mechanisms for children and other vulnerable groups. However, the HIV and AIDS Prevention and Control Act itself does not refer to inheritance rights, and the prohibited grounds of discrimination only include an individual's own HIV status or perceived HIV status.</td>
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<tr>
<td>representatives can bring an action enforcing their legal right to property? If so,</td>
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<tr>
<td>is there any case law specifically regarding orphaned children's inheritance</td>
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<tr>
<td>rights?</td>
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</tr>
<tr>
<td>20. Are there national provisions for legal aid in civil/administrative claims,</td>
<td>There is limited access to legal aid. The Government of Kenya developed a National Legal Aid (and awareness) Programme, NALEAP, as a pilot scheme. A number of the pilot areas appear to be of relevance for inheritance claims: Family Division of the Nairobi High Court, Nairobi Children's Court. It is unclear whether the Programme is still operating. A Legal Aid Bill was introduced into the National Assembly in June 2015 (reported in the Kenya Gazette Supplement No. 90, dated 26 June 2015). Section 36 of the Bill states that 'a person is eligible to receive legal aid services if that person is indigent, resident in Kenya and is ... (b) a child'.</td>
</tr>
<tr>
<td>including inheritance? If so:</td>
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<tr>
<td>Do these provisions contain special measures or provisions regarding children?</td>
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INTRODUCTION

This report examines the inheritance rights of children in Namibia, specifically in relation to children who are orphans, having lost one or both parents to HIV/AIDS.

The importance of this issue can be understood in light of the severity of the HIV/AIDS epidemic throughout the country. Namibia’s first reported case of HIV infection was in 1986, with incidence estimated to have peaked in the late 1990s. Prevalence in adults aged between 15 and 49 peaked in 2002 at an estimated 22%. Following that peak, incidence is understood to have fallen sharply up until 2010, since when there has been a degree of levelling off. Clearly there has been significant progress in incidence rates in recent years, however the adult HIV prevalence rate remained at 14.3%, with 6,600 deaths from HIV/AIDS per year in 2013. In 2012 there was an estimated 95,811 children living as orphans of HIV/AIDS.

Whilst there have been a number of programmes in recent years to address both health and cultural issues, there remains a certain cultural stigma that surrounds HIV/AIDS such that children who have lost their parents to the disease are particularly vulnerable to displacement, as well as confiscation of movable and immovable properties that have been left to them by their deceased parents.

This report is split into the following sections:

1. Compliance with International Law
2. National Legal System
   A. general provisions relating to inheritance rights
   B. specific provisions relating to sole survivor children and inheritance
   C. mechanisms for facilitating children’s inheritance claims
3. Conclusion

1. COMPLIANCE WITH INTERNATIONAL LAW

Namibia has adopted a monist approach to international law. Article 144 of the Constitution of the Republic of Namibia ("Constitution") explicitly and unequivocally declares that:

"Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under the Constitution shall form part of the law in Namibia". 703

The effect of this provision is to accord both the general rules of public international law and international agreements direct and automatic application in Namibian law.

As a result of this monist approach, all international human rights treaties ratified or acceded to by Namibia are part of its domestic law and should be applied as such, unless they are in conflict with an existing Act of Parliament or they are in conflict with the supreme law of the land being the Constitution.

Below is the status of Namibia’s commitment to the treaties listed in the introduction to the overall report.

<table>
<thead>
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### Regional treaties

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#### 2. NATIONAL LEGAL SYSTEM

The Republic of Namibia is a unitary, presidential constitutional republic with a mixed legal system of uncodified civil law based on Roman-Dutch law and customary law. Due to the colonial occupation of Namibia by Germany and South Africa, the common law in Namibia has been influenced by the legal systems in both countries.

The influence of South African law is particularly strong, given that South Africa remained in occupation of the territory that now comprises Namibia, and exercised legislative control over it, from 1915 to 1989. Article 140(1) of the Constitution provides that many South African laws continue to remain in force in Namibia:

"Subject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court".

#### A. The Constitution

Namibia achieved its independence in 1990 and the Constitution was published on 21 March 1990. The Constitution begins by setting out the constitutional supremacy in Article 1(6): "This Constitution shall be the Supreme Law of Namibia". It provides for a sovereign, secular, democratic and unitary State founded on the principles of democracy and the rule of law.

A key component of the Constitution is the Bill of Rights set out at Chapter 3. Article 10(1) states that "all persons shall be equal before the law". Discrimination based on gender is prohibited in

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716 The Constitution, Article 1(1).

717 The Constitution, Article 10(1).
accordance with Article 10(2), which states that: "[…] no person may be discriminated against on grounds of sex, race, colour, ethnic origin, religion, creed, socio-ethnic status". Article 14 goes further in that it provides for equal rights for men and women on the dissolution of marriage.

Article 15 sets out the rights of children specifically stating that:

"(1) Children shall have the right from birth to a name, the right to acquire a nationality and, subject to legislation enacted in the best interests of children, as far as possible the right to know and be cared for by their parents".

Article 16 of the Constitution addresses the ownership of property and the right to devise property to heirs:

"All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens".

Article 19 outlines the right of individuals to maintain their own cultures and traditions:

"Every person shall be entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest".

This right to maintain traditions is further supported by Article 66 of the Constitution, which provides for the application of customary law in Namibia as long as it does not conflict with the Constitution or any other statutory law:

"(1) Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.

(2) Subject to the terms of this Constitution, any part of such common law or customary law may be repealed or modified by Act of Parliament, and the application thereof may be confined to particular parts of Namibia or to particular periods".

Academics have described customary law as the unwritten rules and practices under which African societies conduct matters such as their marriages, divorces, inheritance, land tenure and other such affairs which develop over time, usually reflecting the ‘collective consciousness’ of the society at that moment in time. A formal definition is provided by section 1 of the Traditional Authorities Act 2000, which defines “customary law” to mean:

“The customary law, norms, rules of procedure, traditions and usages of a traditional community in so far as they do not conflict with the Namibian Constitution or with any other written law applicable in Namibia”.

There are three branches of government outlined in the Constitution - the executive, the legislature and the judiciary.\textsuperscript{719}

**B. The Executive**

Chapters 5 and 6 of the Constitution set out the powers of the President and Cabinet, together the Executive. The primary role of the Executive is to make policy. In addition to policy-making, the Executive is responsible for the negotiation and agreement of international treaties.

The Executive has very limited legislative powers, which can be summarised in four areas:

i. The validity of an Act of Parliament is certified by presidential signature. The President can withhold his consent, if in his opinion the bill would conflict with the Constitution. However, the President is compelled to assent to a bill, if it is passed by a two-thirds majority in the National Assembly.

ii. The President has the power to promulgate Proclamations, as well as to initiate bills in the National Assembly. Both these powers are subject to review or reversal by the National Assembly.

iii. The President has the further power to declare martial law by way of Proclamation. This power has only been invoked twice since independence, during the Caprivi secession on 1999.

iv. The Executive's responsibility for signing international treaties, which, on entry into force (ie when they become binding on Namibia as a matter of international law), automatically enter domestic law by virtue of Article 144 of the Constitution.

**C. The Legislature**

Chapters 7 and 8 of the Constitution outline the role and functions of the legislature. The National Assembly is the principal legislative body in Namibia with the power to make or repeal laws. The National Council, which comprise two members from each of the regions of Namibia, supports the National Assembly in that it reviews all bills passed by the National Assembly in order to propose amendments. Its other functions include reporting on subordinate legislation and making recommendations for legislation in relation to matters of regional concern. Legislation passed by the National Assembly, confirmed by the National Council and certified by the President is referred to as 'Acts of Parliament'.

**D. The Judiciary**

The judiciary is maintained as an independent body and is subject only to the Constitution and the law. The separation of powers of the judiciary from the other organs of state was underlined by the Supreme Court in *Ex-Parte Attorney General, Namibia: In re the Constitutional Relationship between the Attorney General and the Prosecutor General* 1995 (8) BCLR 1070 (NmSC).\textsuperscript{720} Judicial power is shared amongst the Supreme Court, a High Court and the lower courts.

\textsuperscript{719} The Constitution, Article 1(3).

\textsuperscript{720} *Ex-Parte Attorney General, Namibia: In re the Constitutional Relationship between the Attorney General and the Prosecutor General* 1995 (8) BCLR 1070 (NmSC).
The Supreme Court is the highest national court in Namibia. In accordance with Article 79 of the Constitution, it hears appeals from the High Court, including appeals relating to the Constitution and Bill of Rights; it can also hear cases which have been referred to it by the National Assembly or the Attorney General. The judgments of the Supreme Court are binding on all other courts, unless they are reversed by an Act of Parliament or a subsequent judgment by the Supreme Court itself.

The High Court exercises inherent original jurisdiction across Namibia. It acts as both a court of first instance and a court of appeal in civil, criminal and administrative proceedings. Decisions of the High Court are binding on lower courts. These lower courts, which have been established through statute, include the Magistrates Courts and community courts.

The community courts, which apply customary law, have long operated in Namibia, but were only recognised as part of the formal legal system in 2003. This development was based on Article 66 of the Constitution which provides that customary law applicable in Namibia before independence was to remain valid, provided that it did not conflict with the Constitution or any other statute.

According to the US Department of State’s Country Report on Human Rights Practices for 2014, customary courts continue to be the primary point of access to the legal system for rural areas across Namibia. However, customary law is not consistent across Namibia and has evolved over time. It has been reported that "The [community] courts have no reporting system as the laws that they apply are very dynamic and may not be applied the same in any number of cases heard before them".

The Constitution also provides for the appointment of an Ombudsman on the recommendation of the Judicial Service Commission (the Judicial Service Commission is also responsible for the appointment of judges). The Ombudsman is responsible for investigating complaints against government officials, such as corruption, abuse of power or the violation of fundamental rights and freedoms.

**E. Land Tenure**

Land in Namibia is subject to a complex web of ownership and occupation rights. This is the result of historical inequality generated during the apartheid era, where black Namibians were excluded from the freehold land ownership system, as well as more recent reforms enacted in order to deal with the challenges of mass migration from rural areas to urban centres.

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Article 16(1) of the Constitution recognises the right of all people, whether individually or in association with others, to acquire, own and dispose of all forms of property (both land and movable property), including bequeathing that property to their heirs as part of a deceased estate. Article 100 of the Constitution provides that any land which is not lawfully owned belongs to the State.

The National Land Policy 1998 is based on a unitary land system, which ascribes equal status to different forms of land rights and different categories of land rights holders, regardless of whether the land is located in an urban or a communal area.

In general, rights to land can be assigned to four categories:

- **State land**, for example conservation areas, military bases or other government land.
- **Urban land**, where standard concepts of State, municipal and private ownership apply within proclaimed boundaries in accordance with statutory law.
- **Commercial farm land**, i.e., agricultural land which is privately owned as freehold property.
- **Communal land**, which is occupied and used by local communities, but which is owned by the State in trust for those communities.

There are also a variety of types of tenure:

1) **Freehold**: Owners of freehold land hold the land in perpetuity and have the right to use, transfer and dispose of the land at will. Most urban land is privately owned, as is all commercial farming land. Historically, commercial farms were owned almost exclusively by the white minority, however the Agricultural (Commercial) Land Reform Act No. 6 of 1995 ("Agricultural Commercial Land Reform Act") provided that the Government could purchase agricultural land for redistribution to black Namibians as part of its land reform programme. Owners of freehold title have the common law right to grant leasehold rights over their freehold property.

2) **Communal land**: Communal land is subject to the Communal Land Reform Act, which provides for the allocation by traditional authorities of rights to land outside the boundaries of certain named towns. This system is administered by Communal Land Boards. Communal land cannot be sold, but may be transferred or leased subject to approval by the traditional authorities and Communal Land Board. For more details see the paragraph below.

3) **Flexible Land Tenure System ("FLTS")**: This system of land rights, which exists in parallel to the formal system of freehold tenure, was introduced by the Flexible Land Tenure Act No. 4 of 2012 ("Flexible Land Tenure Act"). For more details see the paragraph below.

i. **COMMUNAL LAND RIGHTS**

Section 19 of the Communal Land Reform Act No.5 of 2002 ("Communal Land Reform Act") provides for the allocation of "customary land rights" and "rights of leasehold" over communal land.

The power to allocate customary land rights vests in the Chief or traditional authority of the relevant community. These rights include the right to a farming unit, the right to a residential unit and the right to any other form of customary tenure that is recognised by the Minister in the Government Gazette. Aside from these rights, there is a communal right of grazing over the "commonage", ie the portion of the communal land of a traditional community which is traditionally used for the common grazing of livestock.  

The Communal Land Board also has the power to grant a leasehold for a term not exceeding 99 years over a portion of communal land. The grant of a leasehold is contingent on the payment of money to the Communal Land Board.

ii. FLEXIBLE LAND TENURE SYSTEM

The concept of the FLTS, which applies only within the boundaries of urban or settlement areas, was driven by the "need by the Government to create upgradeable alternative land tenure options to informal settlements, which complement the current formal system of freehold tenure". The specific objectives of the Flexible Land Tenure Act were to:

"(a) to create alternative forms of land title that are simpler and cheaper to administer than existing forms of land title;

(b) to provide security of title for persons who live in informal settlements or who are provided with low income housing;

(c) to empower the persons concerned economically by means of these rights".

The characteristics that set the FLTS apart from other forms of land ownership is that it exists in parallel to the formal system of freehold tenure, and it provides an opportunity to register individual rights within a system of group ownership. Its key benefit is that it offers security of tenure to vulnerable communities without the cost and complexity of assuming ownership of the freehold title.

In practical terms, there are a number of steps required to implement the FLTS. First, the external boundaries of a particular block of land would be professionally surveyed and registered under the formal freehold system at the Deeds Registry in Windhoek. The owner of that block of land could be the municipality, a private developer or a community based organisation. Second, once the block is registered, a FLTS scheme can be initiated on that block, whether by the owner, the local authority or the people living on the block in informal settlements. The scheme is then entered as an endorsement on the freehold title.

728 Communal Land Reform Act, sections 30-36.
731 Flexible Land Tenure Act, section 2.
of the block. Third, individual rights within the block are registered locally as part of the scheme at a Land Rights Office. Each individual titleholder receives a certificate of their title, and becomes eligible to elect the management committee which will manage the scheme and block.

The two different forms of title recognised within the block are 'starter title' and 'land hold title'.

Starter title is the right of an individual to erect and permanently occupy a house on an undefined site within the block. The right is connected to the individual and not to a particular geography. The exact site of the land to be occupied is not part of the right, but is subject to agreement by the management committee or local authority within their agreed layout of the block. Because of this, the individual can sell his or her title, and can also bequeath it on death, but cannot, for example, mortgage it. Section 9(1) of the Flexible Land Tenure Act states that the holder of starter title has the right:

"(a) to erect a dwelling on the block at the specified location of the specified size and nature;

(b) to occupy the dwelling referred to in paragraph (a) in perpetuity;

(c) on his or her death to bequeath the dwelling to his or her heirs and to lease to another person;

(d) subject to subsection (3), to utilise such services as may be provided to the scheme as a whole by a local authority or any other person;

(e) to transfer his or her rights to any other person, (whether that person is the heir of the holder of that rights or whether the transfer is another transaction recognised by law);

(f) to be a member of the association of the scheme concerned".

Land hold title confers most of the rights enjoyed by a freehold owner, but without the complications of full ownership. The title holder has rights over a designated plot, which he or she can occupy in perpetuity and which he or she can transfer, devise on death and also use as collateral. Section 10(1) of the Flexible Land Tenure Act provides that the holders of land hold title have the following rights:

"(a) has, subject to the provisions of this Act, all the rights in the plot concerned that an owner has in respect of his or her erf under the common law;

(b) may subject to the provisions of this Act, perform all the juristic acts in respect of the plot concerned that an owner may perform in respect of his or her erf under the common law;

(c) has an undivided share in the common property;

(d) is a member of the association of the scheme concerned".

The concept of FLTS includes the option, subject to the agreement of the group, to upgrade title from starter to land hold, or from land hold to freehold. This would involve the
need to finalise and approve the subdivision of plots within the block, as well as individual costs for the title holders.

Although the Flexible Land Tenure Act was passed in 2012, it was not yet clear at the time of writing whether its provisions have come into operation. It was announced in 2013 that a pilot implementation scheme would be inaugurated, but there is no further detail on the website of the Ministry of Lands and Resettlement and a conference paper co-authored in March 2014 by the Special Advisor at the Ministry stated that the FLTS was not yet fully in operation and that the detailed regulations implementing the Flexible Land Tenure Act were being drafted to take into account the results of the pilot scheme.

A. GENERAL PROVISIONS RELATING TO INHERITANCE RIGHTS

i. GENERAL LAW

In Namibia property and inheritance rights are governed by "a confusing web of civil and customary laws, some of which still cause gender-based discrimination".

To a large extent, the reason for these discriminatory laws and practices is the proprietary consequences of marriage. There are two kinds of marriage in Namibia: civil law marriages and customary law marriages. Civil marriages are conducted by a marriage officer, usually a magistrate or a church leader, and are registered in accordance with the civil law (this includes the issuance of a marriage certificate). Customary marriages take place when a man and a woman are married according to the customs of their community. This takes place without a marriage officer, and there is no legal requirement for customary marriages to be registered. Given Namibia's diverse communities, it is difficult to make generalisations about customary marriage, but in general customary marriage is regarded as an alliance between two kinship groups rather than two individuals and decision-making "authority over family matters may be spread among different members of the two kinship groups". Customary marriage is often polygamous, and it is also the case that certain customary practices are followed, such as the payment of a 'bride price' or 'marriage consideration'.

As both civil and customary marriages are recognised in Namibian communities, general inheritance rights are governed by both civil law and customary rules and practice depending on which system applies to the specific situation. This can be complicated given that the "two forms of marriage are not always kept strictly separate": for example, a couple may marry in a church, but still follow some customs of their community such as

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the exchange of gifts or bridewealth. This can mean that couples may "rely upon different legal and social norms, depending on the situation at hand". 

In addition, within civil marriages, there are two basic property regimes that can be applied. These are categorised as marriages 'in community of property' and marriages 'out of community of property'.

"Marriage in community of property means that all of the belongings and the debts of the husband and the wife are combined into a 'joint estate' [regardless of their initial contribution]. Everything that belonged to the husband or the wife before the marriage took place becomes part of the joint estate, along with any money earned or property acquired by either of them during the marriage. A marriage out of community of property means that the husband and the wife each have their separate belongings and debts. Everything that belonged to the husband before the marriage remains his, and everything that belonged to the wife before the marriage remains hers. They each keep their own earnings, and ownership of property remains with the person who acquired it".

Until 1996, the Roman-Dutch common law provided that all civil marriages were automatically 'in community of property', unless the parties entered into a pre-nuptial contract creating an 'out of community of property' arrangement. This created significant discrimination against women, as the joint estate would automatically fall to the husband to administer as he saw fit - the concept of 'marital power' - and the wife would lose the right to contract or register property in her own name without the consent of her husband; even in 'out of community of property' arrangements the husband would assume marital power over his wife's property. This position was substantially modified by the Married Persons Equality Act No.1 of 1996 ("Married Persons Equality Act"). Section 2 of the Married Persons Equality Act abolished the automatic marital power under the common law of the husband to control solely the joint estate and removed some of the restrictions of a wife to register immovable property in her own name (though, if the property forms part of the joint estate, a wife will still require the consent of her husband to sell or mortgage the property). This means that couples married 'in community of property' must consult each other on major transactions and each has identical powers and restraints. If either spouse unreasonably withholds consent, there is an avenue of redress, and, where the requirement for consent is ignored, the disadvantaged spouse may challenge the action during the existence of the marriage and not just on dissolution. The Married Persons Equality Act also changes the domicile of a wife from that of her husband to her own independent domicile, and the domicile of any children from that of their father to the place with which they are most closely connected. However, it should be noted that

737 CEDAW/C/NAM/1, p.171.
739 CEDAW/C/NAM/1, p.164.
section 16 of the Married Persons Equality Act explicitly states that these provisions do not apply to customary law marriages.

The applicability of these common law rules to the civil marital proprietary rights of indigenous African Namibians depended on the geographical location of the place where the marriage was contracted. As described above, the majority of civil law marriages in Namibia would be deemed ‘in community of property’. However, the Native Administration Proclamation No. 15 of 1928 ("Native Administration Proclamation"), published in the Official Gazette of South West Africa in 1928, stipulated that the default regime for civil marriages between "natives" occurring north of the former so-called ‘Police Zone’ would be ‘out of community of property’. Section 17(6) of the Native Administration Proclamation stated:

"A marriage between Natives, contracted after the commencement of this Proclamation, shall not produce the legal consequences of marriage in community of property between the spouses: Provided that in the case of a marriage contracted otherwise than during the subsistence of a customary union between the husband and any woman other than the wife it shall be competent for the intending spouses at any time within one month previous to the celebration of such marriage to declare jointly before any magistrate, native commissioner or marriage officer (who is hereby authorised to attest such declaration) that it is their intention and desire that community of property and of profit and loss shall result from their marriage, and thereupon such community shall result from their marriage”.

It has been discovered that in practice many declarations made under section 17(6) of the Native Administration Proclamation Act are not properly executed, with the consequent result that some couples intending to enjoy an ‘in community of property’ arrangement are saddled with the default arrangement of ‘out of community of property’ with the consequent ramifications in relation to inheritance rights. Moreover, even where Namibian courts recognise ante-nuptial contracts between spouses to regulate the property consequences of their marriage, in practice such unregistered ante-nuptial agreements can be difficult to enforce against third parties.

On death, what comprises the estate of the deceased will depend on the kind of property regime applied to the civil marriage. If the marriage was ‘in community of property’, then

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743 Section 25 of the Native Administration Proclamation defined the term "native" as "any person who is a member of any aboriginal race or tribe in Africa".

744 According to Amoo and Conteh (2011), p.14, “The Police Zone consisted of southern and central Namibia to which white settlement was directed. Unlike the territories north of this so-called Red Line, which were governed through a system of indirect rule, in the Police Zone the South West African Administration employed policies of direct control”. See paragraph also M. Ovis and R. Gordon, "Customary Laws on Inheritance in Namibia: Issues and Questions for Consideration in developing new legislation", (2005), p.22, available at: http://landwise.landesa.org/record/1681, which describes the Police Zone (or Red Line) as "the area south of (‘within’) an imaginary line drawn through Namibia. The area north of (‘outside’) the Police Zone was primarily viewed as labour reserves. The Germans saw no need in directly ruling the area north of the Police Zone, and when South Africa assumed administration of Namibia, it had no clear policy on how to deal with this area. The area was densely populated and the fear of resistance from especially Owambo speakers played a significant role in applying ‘indirect’ rule”.

745 Ovis and Gordon (2005), p.25.

746 Ovis and Gordon (2005), p.25.
one half of all the household's property belongs to the wife and one half to the husband. Therefore, the surviving spouse takes their half and the other half forms the deceased's estate. This division must take place before any other rules of inheritance, whether testate or intestate, can take place. If the marriage was 'out of community of property', then the husband and wife always retained separate ownership of their own property throughout the marriage. Therefore, the surviving spouse takes their property, and the deceased spouse's property becomes their estate.\(^473\)

In practice, inheritance and succession is further complicated by the low penetration of marriage. In 1997 the Government stated that "[i]t is not uncommon for a man and woman to live together as man and wife without any formalisation in terms of either civil or customary law", i.e. cohabitation, and further identified so-called 'second house' relationships where a married man from a rural area leaves his wife and children behind in search of employment and establishes a second house in an urban centre. Neither cohabitation or 'second house' relationships are legally recognised under civil or customary law.

Traditionally, the age of majority in Namibia was 21 years. This was established by the Age of Majority Act No. 57 of 1972 and reconfirmed in subsequent acts dealing with children's issues.\(^474\) In 2015 the Child Care and Protection Act No. 3 of 2015 ("Child Care Act") lowered the age of majority to 18 years.\(^475\)

### ii. LEGISLATION

The proprietary rights of a surviving spouse or child will depend on the testate status of the deceased, i.e. whether he/she had executed a valid will covering some or all of their estate.

The Wills Act No.7 of 1953 ("Wills Act"),\(^750\) as well as the common law, regulates the execution and operation of testamentary dispositions in Namibia. Section 4 of the Wills Act states:

"Every person of the age of sixteen years or more may make a will unless at the time of the making of the will he is mentally incapable of appreciating the nature and effect his act, and the burden of proof that he was mentally incapable at that time shall rest on the person alleging the same".

Provided that the will is valid, the estate of the deceased will be distributed in accordance with their wishes. There are no rules governing who may inherit by way of a valid will and there is no duty to devise property on a surviving spouse or child - the testator may leave their property to anybody, whether a relative, a friend, a stranger or even an organisation.

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\(^{474}\) Age of Majority Act No. 57 of 1972, section 21.

\(^{475}\) Child Care and Protection Act No. 3 of 2015, section 10, available at: [http://www.parliament.na/index.php?option=com_phocadownload&view=3dcategory%253D520%2520gazette%2520no.%2520574%2520of%25202015%26id%3D139%3A%26Itemid%3D1269%26start%3D80&usg=AFQjCNGZdIMY_Hhx7WrwYhCaZyPVvBhQ&bvm=bv.101800829,d.ZGU](http://www.parliament.na/index.php?option=com_phocadownload&view=3dcategory%253D520%2520gazette%2520no.%2520574%2520of%25202015%26id%3D139%3A%26Itemid%3D1269%26start%3D80&usg=AFQjCNGZdIMY_Hhx7WrwYhCaZyPVvBhQ&bvm=bv.101800829,d.ZGU).

Children born out of wedlock can inherit from both their mother and their father by way of a valid will.

As set out in paragraph 2 of this report on Land Tenure, the Flexible Land Tenure Act provides that the holder of starter or land hold title may bequeath that title on death.

However, the Native Administration Proclamation still maintains some race and gender-based restrictions on the power to make a will:

"The patchwork of overlapping regulations issued in terms of that proclamation have the result that a black person in Kavango, Eastern Caprivi or Ovambo has full power to bequeath his or her estate by will. But a black man in any other part of Namibia does not have full testamentary freedom. He does not have the legal power to leave by will: 1) movable property allotted to or accruing under customary law to any woman with whom he lived in a customary union; or 2) any movable property accruing under customary law to a particular 'house'. Property that falls into these two categories must be distributed according to customary law". \(^{751}\)

If the deceased dies intestate, ie they have failed to make a valid will disposing of all their estate, then the portion of their estate which has not been devised will be subject to the rules governing intestate succession. These rules are complex and there is no uniform legislation applying to all the different communities within Namibia. In general terms, the Intestate Succession Ordinance No. 12 of 1946 ("Intestate Succession Ordinance"), \(^{752}\) as amended by the Intestate Succession Amendment Act No. 15 of 1982 applies to whites, while the provisions of the Native Administration Proclamation mean that customary law applies to blacks. \(^{753}\)

Paragraph 1 of the Intestate Succession Ordinance states that the inheritance rights of a surviving spouse are as follows:

"(a) If the spouses were married in community of property and if the deceased spouse leaves any descendant who is entitled to succeed ab intestato, the surviving spouse shall succeed to the extent of a child's share or to so much as together with the surviving spouse's share in the joint estate does not exceed fifty thousand rand in value (whichever is the greater)\(^{754}\).

(b) If the spouses were married out of community of property and if the deceased spouse leaves any descendant who is entitled to succeed ab intestato, the surviving spouse shall succeed to the extent of a child's share or to so much as does not exceed fifty thousand rand (whichever is the greater)."

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\(^{753}\) See paragraph also Teofilus Mofoka v Josefina Nangula Mofuka, Supreme Court of Namibia, Case No. SA/2/2002.

\(^{754}\) Please note that this would be an equal Namibia Dollar amount today. 50,000 Namibian Dollars is approximately 2,989 US Dollars (this conversion is approximate and was made at the time of writing the report using a commercial rate of exchange available at [www.xe.com](http://www.xe.com)).
(c) If the spouses were married either in or out of community of property, and the deceased spouse leaves no descendant who is entitled to succeed ab intestato but leaves a parent or a brother or a sister (whether of the full or half blood) who is entitled to succeed, the surviving spouse shall succeed to the extent of a half share or to so much as does not exceed fifty thousand rand in value (whichever is the greater).

(d) In any case not covered by paragraphs (a), (b) or (c) the surviving spouse shall be the sole heir of the estate.

An analysis of the Intestate Succession Ordinance is provided by the University of Namibia report:

"In most cases, the estate is shared between the surviving spouse and the children of the deceased in proportions set forth by the statute. In other cases, the basic rules are as follows:

• If there are no children, the surviving spouse will share the estate with other close relatives (such as parents, brothers or sisters); if there are no other close relatives, the spouse inherits everything.
• If there are children but no surviving spouse, the children inherit everything.
• If a child has already died, that child's share will be given to that child's children - who are the grandchildren of the deceased.
• If there is no spouse and no children, the estate will go to the deceased's parents, brothers and sisters, or closest blood relatives.
• If there are no relatives at all, the property will go to the state.

Any part of the deceased's estate which is inherited by minor children is held in trust by the state and given out for the children's needs as necessary." 755

Section 18 of the Native Administration Proclamation provides for the application of customary law to "natives".

"(1) All movable property belonging to a Native and allotted by him or accruing under native law or custom to any woman with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under native law and custom.

(2) All other property of whatsoever kind belonging to a Native shall be capable of being devised by will, Any such property not so devised shall devolve and be administered according to native law and custom".

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Section 18(9) is an enabling provision allowing the Administrator to make secondary regulations prescribing how deceased estates should be administered and distributed. An example of these regulations is Regulation GN70 ("Regulation GN70"). Paragraph 2 of Regulation GN70 provides:

"If a native dies leaving no valid will, his property shall be distributed in manner following:–

(a) If the deceased, at the time of his death, was –

(i) a partner in a marriage in community of property or under ante-nuptial contract; or

(ii) a widow, widower or divorcee, as the case may be, of a marriage in community of property or under ante-nuptial contract and was not survived by a partner to a customary union entered into subsequent to the dissolution of such marriage, the property shall devolve as if he had been a European.

(b) If the deceased does not fall into a class described in paragraph (a) hereof, the property shall be distributed according to native law and custom".

This confusing legislative picture is explained further by Dr LeBeau and colleagues in their 2004 report:

"Regulations on succession were promulgated in terms of this proclamation, but made applicable only to the area north of the Police Zone as from 1 August 1950. These regulations made the type of marriage and the marital property regime the criteria for determining the rules of intestate succession which would apply to 'blacks'. If a black person outside of the old Police Zone dies leaving no valid will, his or her property is to be distributed as follows:

• If the deceased, at the time of his death was: 1) a partner in a civil marriage in community of property or under ante-nuptial contract; or 2) a widower, widow or divorcee of a civil marriage in community of property or under ante-nuptial contract and was not survived by a partner to a customary union entered into subsequent to the dissolution of such marriage, then the property shall devolve as if he or she had been a 'European' (in other words, as if he or she were white).

• If the deceased does not fall into one of these categories, the property will be distributed according to “native law and custom”. So, in other words, if the deceased was at any stage married in a civil marriage in the default position of out of community of property which applies to civil marriages between blacks in the north, then the marital property is probably going to be distributed "according to native law and custom".

Inside the area covered by the old Police Zone, the estates of all black persons, regardless of the circumstances of any marriage they may have entered, are distributed according to "native law and custom". Section 18(3) of the Native Administration Proclamation 15 of 1928 states that, "any dispute or question which may arise out of the administration and distribution of any estate in accordance with native law shall be

determined by the native commissioner", who has been replaced by magistrates. The law applicable to such disputes is the customary law of the area in which the marriage was concluded".  

Because of the way that the Native Administration provisions were implemented, these provisions have never applied to the Kavango, Ovambo and Caprivi regions of Namibia. 

In addition, there were special arrangements for the ‘Baster’ community. Paragraph 10 of the Administration of Estates (Rehoboth Gebiet) Proclamation No. 36 of 1941 ("Rehoboth Proclamation") provided that a deceased estate should be distributed according to the will of the deceased. A valid will must be in writing and signed and witnessed by two people who would not be beneficiaries. Paragraph 19 allows testators freedom of disposition by will, provided that any disposition which was contrary to the "existing laws and regulations of the [Rehoboth Bastard] Community" would be void and the property would be disposed of in accordance with the rules of intestate succession set out at Schedule 2 of the Rehoboth Proclamation. If the deceased did not have a valid will, paragraph 19 provides that the rules of intestate succession in Schedule 2 also apply. The full text of Schedule 2 is:

"When in any estate no valid will is left by the deceased the assets thereof shall be distributed among the heirs in the manner following:-

1. (a) Where the deceased is survived by a wife or husband and children. Half of the estate shall devolve upon the surviving spouse and the other half upon the surviving spouse and the children in equal shares. Children of pre-deceased children shall succeed to the share of their deceased parent per stirpes.

(b) Where the deceased is survived only by children. The whole estate shall devolve upon the children in equal shares, the children of pre-deceased children succeeding to the shares of their deceased parent per stirpes.

(c) Where the deceased leaves only a husband or wife. Half of the estate shall devolve upon the surviving spouse, who shall also be entitled to one third of the remaining half. The remaining two-thirds of the remaining half shall devolve in equal shares upon the mother and father of the deceased, or if there be only a mother or a father surviving, such mother or father shall receive the whole of the remaining two-thirds of one half of the estate. Should both parents of the deceased have pre-deceased him, then the remaining two-thirds of one half of the estate shall devolve in equal shares upon the brothers and sisters of the deceased. provided that in any case the surviving spouse of the deceased

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758 Ovis and Gordon (2005), p.22.
759 The “Basters” are the descendants of Dutch settlers and indigenous African women, who trekked from Cape Colony in the mid 19th century and settled in central Namibia. It is estimated that there are between 20,000 and 40,000 living in and around the town of Rehoboth.
761 Rehoboth Proclamation, 20.
shall be entitled to the full usufruct of all the assets in the estate until such time as he or she dies or remarries.

(d) Where the deceased leaves no surviving spouse or children. The entire estate shall devolve upon the family of the ceased in accordance with the rules set out in (c) hereof.

(e) In cases not falling under paragraphs (a), (b), (c) or (d). The matter shall be placed before the Magistrate and Advisory Council, who may give such directions in regard to the disposal of the assets as may seem to them proper. Provided that an appeal against any such direction shall lie in the manner provided by sections twenty five and twenty six of the Proclamation.

2. Any illegitimate child shall possess the full right of succession to any estate left by its mother, but shall possess no right of succession to the estate of its father except by way of testamentary disposition”.

Until 2005, the administrative procedures relating to deceased estates also depended on the racial classification of the deceased. In short, the Administration of Estates Act No. 66 of 1965 ("Administration of Estates Act") was applicable to whites and "coloured" persons, meaning that their estates were administered under the auspices of the Master of the High Court. If the deceased was classified as a ‘Baster’, then the estate would be administered by a magistrate under the Rehoboth Proclamation, while black estates were administered by magistrates in accordance with the terms of the Native Administration Proclamation.

In 1996 the Government of Namibia conceded that these arrangements were discriminatory and left vulnerable groups, such as widows and children, open to abuse.

"The system applicable to whites and coloureds is clear and easy to understand. There are detailed provisions regulating the succession and administration of these estates. The estates are administered under the supervision of a specialist office, that of the Master of the High Court. The law regulating the estates of blacks who die without leaving a will (the vast majority of cases) is a mass of confusion. There is no proper system of administration, nor is the administration properly supervised. It is difficult to ascertain who the heirs are and this uncertainty is exploited by unscrupulous persons who enrich themselves at the expense of the deceased’s immediate family, particularly women and children".

The arrangements were finally ruled unconstitutional by the High Court in Berendt & Another v Stuurmann & Others 2003 NR 81 (HC), which stated that sections 18(1), 18(2) and 18(9) of the Native Administration Proclamation were unconstitutional, as were regulations which had been made under section 18(9), in that they violated the prohibition on racial discrimination embodied in Article 10 of the Constitution.

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762 Rehoboth Proclamation, s 3-4.
These discriminatory arrangements were altered by the Estates and Succession Amendment Act No. 15 of 2005 ("Estates and Succession Amendment Act"), which repealed certain provisions of the Native Administration Proclamation and the whole of the Rehoboth Proclamation. It confirms that the Administration of Estates Act governs the administration and distribution of all deceased estates, whether testate or intestate, regardless of the racial or ethnic origin of the deceased.

The Estates and Succession Amendment Act empowers the Minister to vest some of the Master of the High Court's powers of administration in the Magistrates' Courts, whilst retaining the Master's ultimate authority over the administration of estates. This means that small estates can be handled by the Magistrates' Courts, which increases accessibility for many people, particularly women. However, although the Estates and Succession Amendment Act has repealed parts of the Native Administration Proclamation, section 1(2) provides that the previous rules of intestate succession in the Native Administration Proclamation "continue to be of force in relation to persons to whom the relevant rules would have been applicable had the said Proclamation not been repealed" and section 2(2) has a similar function for the Rehoboth Proclamation. This is because the substantive rules for distribution were not at issue in Berendt, and so the Namibian Parliament decided to adopt a narrow construction of the High Court's ruling, meaning that the substance of the "native law and custom" rules which governed distribution of intestate estates by virtue of the old legislation remained unchanged. It is in this context, therefore, that the Namibian Government stated in 2013 that "[...] further law reform is required in this area, and the Law Reform and Development Commission is in the process of working on the topic".

The rationale behind further reform is underscored by the Namibian Government's acknowledgement of "the problem of differentiated and discriminatory systems of estates and administration for black, white and baster Namibians with each community being regulated by its own system". Academics have argued that these discriminatory rules "continue[ to perpetuate Namibia’s racial stratification in that separate laws and rules govern the inheritance of different racial groups".

765 Estates and Succession Amendment Act, section 1(1).
766 Estates and Succession Amendment Act, section 2(1).
767 Estates and Succession Amendment Act, section 3(1).
768 Estates and Succession Amendment Act, section 4.
772 Ovis and Gordon (2005).
In a similar context, the Namibian Government stated in 2011 that "[i]nheritance laws will be revised in order to eliminate current inequities in inheritance law (primarily under customary law) for women, girls and children born outside of marriage. The Law Reform and Development Commission is currently in the process of preparing a draft on this issue for further consideration"\(^773\) and in late 2014 that it had "undertaken a lengthy and a thorough review of both policy and legislation to eliminate most vestiges of colonial discrimination. [...] The report on intestate succession which seeks to eliminate racial discrimination in succession laws was finalised and handed over to the Minister of Justice in June 2012".\(^774\) At the time of writing, it is not clear what further actions have been taken to publish or implement the findings of this report on intestate succession.

Reports indicate that, in practice, the Estates and Succession Amendment Act has not made a significant change to the way inheritance works.\(^775\) One academic source indicates that, while the legislation does seek to address criticism of magistrates for failing to ensure fair distribution of estates and the discrimination which arose as a consequence of the requirement for black estates to be administered by magistrates under the previous legislation, it is silent on the substantive aspects of inheritance, particularly the prejudicial treatment of women and children under customary law.\(^776\) This source concludes that "the most likely outcome on administration of estates is that things will continue to work pretty much as they did in the past, unless the Master’s office is robust in its oversight of the administration of estates by magistrates".\(^777\)

Traditionally, the common law held that illegitimate children cannot inherit from their fathers in an intestate estate.\(^778\) This was ruled unconstitutional by the High Court in Frans v Paschke and Others 2007 (2) NR 520 (HC), where an illegitimate son complained that the whole deceased estate had been inherited by the deceased's legitimate daughter:

"[...] the differentiation indeed amounts to discrimination against illegitimate children. By design or result, the social stigma which attached to adulterous and incestuous children was transferred to children born out of wedlock. This appears to be the case simply because the maxim ‘een wyft maakt geen bastaard’ had been echoed from generation to generation, apparently without much legal philosophical reflection; having come to the


\(^{777}\) Ovis (2006), p.2

conclusion, I hold that the common law rule did indeed become invalid, and unconstitutional on 21 March 1990”. 779

This anomaly has now been rectified by legislation. Section 16(2) of the Children’s Status Act No.6 of 2006 (“Children’s Status Act”) 780 states:

"Despite anything to the contrary contained in any statute, common law or customary law, a person born outside marriage must, for purposes of inheritance either intestate or by testamentary disposition, is treated in the same manner as a person born inside marriage”.

Although the Children’s Status Act has now been repealed by the Child Care Act, the Child Care Act retains the same rights to inheritance for illegitimate children as the Children’s Status Act. However, the Child Care Act does state expressly that these rights do not affect the freedom of testamentary disposition so will not automatically create a right to inherit where the testator has made specific bequests of his entire estate, none of which include the illegitimate child:

“(1) It must be presumed that the words “children” or “issue” or any similar term used in a will or other testamentary disposition, apply equally to persons born outside marriage and children born inside marriage, unless there is clear evidence of a contrary intention on the part of the testator.

(2) Despite anything to the contrary contained in any statute, common law or customary law, a person born outside marriage must, for purposes of inheritance, either intestate or by will or other testamentary disposition, be treated in the same manner as a person born inside marriage.

(3) Nothing in this section is to be understood or interpreted as affecting the freedom of testamentary disposition.

(4) In relation to rape or incest which results in the conception of a person born outside marriage, the person or in the case of incest, the persons who committed the crime do not have a right to inherit intestate from the person born as a result of the rape or incest, but the person born as a result of the rape or incest may inherit intestate from the perpetrator or in the case of incest, the perpetrators and are considered to be included in the terms “children” or “issue” or any similar term used in a will or other testamentary disposition”. 781

The position of adoptive children had previously been clarified by the Children’s Act No. 33 of 1960 (“Children’s Act”). Section 74 of the Children’s Act provides that adopted children may inherit the property of their adoptive parents. Section 178(3) of the Child Care Act confirms that: “An adopted child is for all purposes regarded as the child of the adoptive parent and an adoptive parent is for all purposes regarded as the parent of the adopted child”.

779 Frans v Paschke and Others 2007 (2) NR 520 (HC), per Damaseb JP.
781 Child Care and Protection Act, section 105.
The Communal Land Reform Act has also resolved the issue of succession to land rights for women married under customary law. Widows and widowers now enjoy equal treatment, where previously widows in some areas could be dispossessed of their occupation rights in respect of communal land that they used. Section 26(2) of the Communal Land Reform Act states:

"Upon the death of the holder of a right referred to in subsection (1), such right reverts to the Chief of Traditional Authority for re-allocation forthwith:

(a) To the surviving spouse of the deceased person, if such spouse consents to such allocation; or

(b) In the absence of a surviving spouse, or should he or she not consent as contemplated in paragraph (a), to such child of the deceased person as the Chief or Traditional Authority determines to be entitled to the allocation of the right in accordance with customary law".

Therefore, even though spouses are unable to inherit communal land rights in that they revert to the Chief or traditional authority, the legislation means that in practice the rights will be reallocated to them on a priority basis.

Chapter II of the Communal Land Reform Act imposes some statutory control over customary land rights, in that the Communal Land Boards established by the legislation, are empowered to:

"[...] (a) exercise control over the allocation and the cancellation of customary land rights by Chiefs or Traditional Authorities under this Act; (b) consider and decide on applications for a right of leasehold under this Act; (c) establish and maintain a register and a system of registration of customary land rights and leasehold rights; (d) advise the Minister; and (e) perform such other functions as are assigned to a Board by this Act. The President of Namibia may declare unalienated State land to be a communal land area. Communal land areas shall vest in the State in trust for the benefit of the traditional communities residing in those areas and for the purpose of promoting the economic and social development of the people of Namibia, in particular the landless and those with insufficient access to land. Customary land rights shall be allocated upon application for a limited period".

In addition, the Namibian Government has taken further measures to address discrimination outside the rules in inheritance and succession. For example, the Affirmative Action (Employment) Act No. 29 of 1998 gives preference to women, people with disabilities and racially disadvantaged persons in order to bring about equality of opportunity in employment, in accordance with the terms of Article 23(2) of the Constitution.

A 2004 Human Rights Committee Report on the International Covenant on Civil and Political Rights indicates the urgent need for law reform in Namibia in light of the deficiency in inheritance rights as a result of the lack of formal registration of customary
marriages in Namibia.\textsuperscript{782} Namibia’s 2007 Report to the UN Committee on the Elimination of Racial Discrimination states that "Namibia needs a system of intestate succession which accommodates the range of indigenous law and blends it with aspects which promote gender emancipation" and that "[i]t is clear that not everything can be left to indigenous law whose content and impact would be unknown because it is not codified."\textsuperscript{783} The Namibian Law Reform and Development Commission (LRDC) was established to handle and to make appropriate recommendations for remedial action and reform of customary law.\textsuperscript{784}

As stated above, our research indicates that progress has been slow. A 2014 report by the UN Human Rights Committee indicates that the LRDC has undertaken a lengthy review of policy and legislation and envisages future Bills on the Recognition of Customary Law Marriages and on Intestate Inheritance.\textsuperscript{785}

The Bill on the Recognition of Customary Law Marriages was first proposed in a paper produced by the Law Reform and Development Commission ("LRDC") in 2005\textsuperscript{786} and the purpose of the Bill appears to be to provide full legal recognition for customary marriages. However, the UN Human Rights Committee notes, in 2014, its concern that a large number of customary marriages are still not registered and that women and children are deprived of their rights to inheritance as a consequence.

A submission to the UN Committee on the Elimination of Discrimination against Women indicates that, as at July 2015, both Bills remain in draft and have not been adopted.\textsuperscript{787}

\textbf{iii. CUSTOMARY LAW}

Paragraph 2.ii above sets out the statutory provisions which establish which communities in Namibia are subject to the rules of customary law in relation to succession and inheritance. However, information relating to the actual percentage of inheritance claims that are dealt with via customary law as opposed to general codified law could not be located.

Notwithstanding the constitutional and statutory recognition of 'customary law', customary law is not one uniform body of law. Customary laws are unwritten and the content of customary law differs between urban and rural communities, as well as between,

\textsuperscript{782} Human Rights Committee, "Press Release: Human Rights Committee concludes Eighty First Session", available at: \url{http://www.un.org/press/en/2004/hr4783.doc.htm}. The Committee indicated that it "remained concerned by the high number of customary marriages which continued to be unregistered and about the deprivation of rights that women and children experienced as a consequence, in particular with regard to inheritance and land ownership."

\textsuperscript{783} CERD/C/NAM/12, 330.

\textsuperscript{784} CERD/C/NAM/12, 300.

\textsuperscript{785} See paragraph the website of the Centre for Civil and Political Rights, available at: \url{http://www.ccprcentre.org/country/namibia}.


For a more detailed picture of how customary law is developed and applied in practice, please see the 2005 report of the Gender Research and Advocacy Project, which carried out an in depth study of the application of customary law across different regions of Namibia.

Despite the differences in customary law across the different communities in Namibia, the majority of customary laws are thought to prohibit women, younger children, and extra-marital children from inheriting property from their deceased husband or father’s intestate estates. According to a report prepared by the US Department of State, women who are married under customary law continue to face legal and cultural discrimination, including through traditional practices that permit family members to confiscate the property of deceased men from their widows and children. It has been reported that women can be allotted land in some communities, but in practice communal land is usually allocated to the husband. This, in turn, has led to the problem of widows in some communities being stripped of land and household goods by the husband’s extended family members after his death, otherwise known as the practice of ‘property grabbing’ or ‘land grabbing’. Although the sex discrimination which is present in some aspects of customary law is very likely unconstitutional, there do not appear to have been reported cases of any challenges through the courts to customary law on this ground since independence.

Submissions made by NGOs to the Committee on the Elimination of Racial Discrimination in 2007 provide the following illuminating description of the unfair and discriminatory nature of customary inheritance laws in Namibia:

“According to customary law in most communities, men control the process of distributing property. Women are often excluded from this gathering and, if permitted to attend, are not allowed to speak. The eldest son or the deceased man’s brother is selected to oversee the distribution of the estate. If there are no sons or brothers, the allocation of the estate is undertaken by traditional leaders, such as the headman. The administrator, with the help of male relatives, decides who will inherit the estate, as well as responsibility for the widow and children. Although decisions regarding distribution of property are made, many communities require widows to be isolated. Widows are expected to live apart from the rest of the clan for approximately two weeks after their husband’s death, even though that is the time period during which most inheritance decisions are made.

Nearly all communities are similar in that women inherit far less valuable property than men. In most communities, men and women identified land, fields, and cattle to be of greatest importance. In general, customary rules of inheritance do not allow men and

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women equal access to this type of property. For example, customary inheritance laws in most societies prevent women from inheriting items such as land, homesteads, buildings, and cars. Moreover, cattle, guns, and arrows used for hunting are also considered masculine items to be inherited only by men. Communities which permit women to inherit allow them to acquire only small items of little economic value, such as small stock (goats and chickens), kitchenware, and clothing. Thus, women in most communities inherit less property than their male counterparts.

The practice of widow inheritance is also prevalent in Namibian communities, and adversely affects black women, who prefer not to partake in the custom. Upon a man’s death, customary inheritance laws dictate that a widow can be inherited by a family member along with the decedent’s movable and immovable property. In most communities, the widow is expected to have sexual relations with the man who inherits her. If a widow refuses to be inherited, she is forced to leave the household and all of the property, and in some communities, is expected to also relinquish custody of her children. More often than not, these customary inheritance laws leave black widows and children with nothing.²⁹³

As described above, progress of statutory reforms to remedy the discriminatory aspects of customary laws appears to have been slow and relatively ineffective. The example of the Communal Land Reform Act shows that, even where new legislation is enacted which on paper addresses the inequalities inherent in customary law, in practice the legislation does not necessarily remedy the substantive issue of the unfair treatment of women. While the Communal Land Reform Act provides, in non-discriminatory (gender neutral) terms, that customary land rights are allocated for life and upon death are reallocated to the surviving spouse or child of the deceased,²⁹⁴ a source indicates that customary laws preventing a widow from inheriting land rights of their deceased husband continue to be followed, with land consequently passing instead to the deceased’s male relatives.²⁹⁵ The source also indicates that customary law is even upheld by customary courts in preference to the legislative provisions.²⁹⁶

Research undertaken by the University of Namibia has identified that more people are beginning to make use of written wills and, therefore, women and children are being given a degree of protection from the injustices of intestate succession and the potential grabbing of their property by relations of the deceased.²⁹⁷ The increased use of written wills has been publicised and further promoted by the Namibian Legal Assistance Centre which has produced marketing materials promoting inheritance rights amongst the Namibian population and the use of written wills.²⁹⁸ However, the Government of Namibia

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²⁹³ Legal Assistance Centre and International Women’s Human Rights Clinic (2008), pp.7-8.
²⁹⁴ Communal Land Reform Act, section 26.
²⁹⁶ Immigration and Refugee Board of Canada (2012).
has acknowledged that in 2007 it was still "the case that a majority of Namibians, especially among the black community, die without making a will". Furthermore, the majority of wills made by testators state that the customary inheritance laws of their community should be applied to their estates, thereby continuing the inequalities described above. Moreover, even where wills do depart from customary law and make specific provision for a surviving spouse, the research shows that the wishes of the testator are not necessarily followed. These problems are exacerbated by the limits to the rule of law in Namibia: some researchers state that property-grabbing is a growing problem in Namibia, as well as the practice of evicting the widow and her children from the late husband's land (even the matrimonial property). As a result, a widow’s ability to enforce any rights to property she may have – for instance under a will – are adversely affected.

The same research by the University of Namibia shows that even where members of customary communities do not make written wills, they may make an oral will. Nevertheless, the results of the research show that family disputes still occurred even when an oral will had been made. The research also showed that educated and urban people are more likely to handle inheritance differently than less educated or rural people.

An additional problem, compounding the difficulties experienced by widows and children under customary law, is the inconsistent application of the rules in relation to the administration of estates. The Gender Research and Advocacy Project ("Gender Research and Advocacy Project") describes how in Namibia estates are administered in an informal manner with the result that any person can be appointed as an executor of an estate without assuming the responsibilities that are normally associated with such a position. The Gender Research and Advocacy Project found that more than one family member could acquire from various Magisterial districts the letters of administration required to access funds held in bank accounts or payable under insurance policies, because no formal procedure regulates and controls the appointment of administrators and no proper records are kept. Although the purpose of the Estates and Succession Amendment Act was to improve the proper administration of estates of black Namibians, one source notes that this legislation is unlikely to result in significant improvement to the administration of estates unless the Master’s office is robust in its oversight of Magistrates.

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799 CERD/C/NAM/12, 310.
802 Immigration and Refugee Board of Canada (2012). See paragraph also Ruppel and Ambunda (2011), p.86, which notes that matrilineal family members of the late husband are the ones normally involved in property grabbing.
Research conducted by the University of Namibia provides the most comprehensive survey of inheritance rights under customary law across different communities. The research focused on certain regions which were specifically selected because they exhibited high degrees of cultural homogeneity within the region (whilst also ensuring that each descent system was represented in the chosen regions). The key regions selected were as follows:

- **Nama, Karas** and **Damara** communities that follow the patrilineal descent system whereby children are part of the father's family.
- **Owambo** and **Kavango** communities follow the matrilineal descent system. In a matrilineal system, children are part of the mother's family.
- **Herero** and **Omaheke** communities follow the bifurcated descent system.
- **Caprivi** people were matrilineal but have patrilineal influence, a situation referred to as 'cognatic' descent.
- **Khomas** was selected for the study as it is a mixed ethnic area, which primarily represents the attitudes of urban dwellers in the Greater Windhoek Area.

The survey showed that rules of inheritance differ between matrilineal and patrilineal communities. In general terms, in matrilineal communities, the deceased husband’s family (customarily his male relatives and typically his nephews, but in contemporary society all of his relatives) will inherit all the matrimonial property, regardless of who brought the property into the marriage. In patrilineal communities it is frequently the deceased husband’s children, usually his first born son, who will inherit the matrimonial property. In these circumstances, there is more chance that a widow is able to inherit some small items or maintain control over property inherited by her children, if the children are still too young to manage the estate themselves.\(^{808}\)

In most Namibian communities, custom precludes widows from inheriting substantial property such as land, buildings and large movable property such as cars and tractors. In the case where children may inherit their deceased father's property, female children inherit less than male children and there is also a gender division of property whereby male children inherit cattle, immovable property and the deceased's personal items, while female children usually inherit small items such as goats, chickens and household items.\(^{809}\)

In terms of specific communities, the research showed that Khomas region residents and the Nama favour the widow and any children the deceased man leaves behind, while in Kavango, Herero, Owambo and Lozi, a deceased man's natal extended family inherit most of the larger more economically valuable items. Customarily in the Kavango, Owambo, Herero and Lozi societies women are not allowed to inherit from their marital property and they are not allowed to inherit economically valuable items such as land, homesteads, buildings and cars. Some communities are more favourable to the deceased's children in terms of inheritance practice, notably the Lozi community. However, in many cases it appears that the customary law rules on inheritance often discriminate against women,\(^{808}\)\(^{809}\)

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younger sons, daughters and children born outside of marriage in particular, and younger sons and daughters may not receive any inheritance. \(^{810}\)

The following table summarises the customary law position for the different assets comprising a deceased's estate broken down by region:

<table>
<thead>
<tr>
<th>Asset: Land</th>
</tr>
</thead>
<tbody>
<tr>
<td>Region:</td>
</tr>
<tr>
<td>Khomas</td>
</tr>
<tr>
<td>Nama</td>
</tr>
<tr>
<td>Owambo; Kavango</td>
</tr>
<tr>
<td>Herero</td>
</tr>
<tr>
<td>Lozi</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Asset: Homesteads, Buildings and other Immovable Property</th>
</tr>
</thead>
<tbody>
<tr>
<td>Region:</td>
</tr>
<tr>
<td>Khomas</td>
</tr>
<tr>
<td>Nama</td>
</tr>
<tr>
<td>Owambo; Kavango</td>
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<tr>
<td>Herero</td>
</tr>
<tr>
<td>Lozi</td>
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</tbody>
</table>

\(^{810}\) LeBeau et al (2004), p. 27.
### Asset: Large movable property (e.g. cars and tractors)

<table>
<thead>
<tr>
<th>Region</th>
<th>Beneficiary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Khomas</td>
<td>Deceased's widow or natal extended family</td>
</tr>
<tr>
<td>Nama</td>
<td>Deceased's widow and possibly sons</td>
</tr>
<tr>
<td>Owambo; Kavango</td>
<td>Either a man's relatives such a nephew or brothers or one of his sons</td>
</tr>
<tr>
<td>Herero</td>
<td>One of the deceased's younger brothers or nephews or the deceased's eldest son</td>
</tr>
<tr>
<td>Lozi</td>
<td>The man who inherits the land and buildings</td>
</tr>
</tbody>
</table>

### Asset: Money

<table>
<thead>
<tr>
<th>Region</th>
<th>Beneficiary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Khomas</td>
<td>Widow for the maintenance of the children</td>
</tr>
<tr>
<td>Nama</td>
<td>Widow</td>
</tr>
<tr>
<td>Owambo</td>
<td>One of the deceased's younger brothers or nephews or his children</td>
</tr>
<tr>
<td>Kavango; Herero</td>
<td>Widow and possibly the children</td>
</tr>
<tr>
<td>Lozi</td>
<td>Divided amongst the children and possibly the deceased man's other relatives</td>
</tr>
</tbody>
</table>

### Asset: Livestock

<table>
<thead>
<tr>
<th>Region</th>
<th>Beneficiary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Khomas</td>
<td>Widow</td>
</tr>
<tr>
<td>Nama</td>
<td>Widow and children</td>
</tr>
<tr>
<td>Owambo; Kavango</td>
<td>Deceased man's relatives divide amongst themselves although older children may be given some cattle and the younger children some goats</td>
</tr>
<tr>
<td>Herero</td>
<td>Deceased man's entire extended family</td>
</tr>
<tr>
<td>Lozi</td>
<td>Deceased man's brothers and possibly adult sons</td>
</tr>
</tbody>
</table>
### Asset: Household Property (e.g. furniture)

<table>
<thead>
<tr>
<th>Khomas</th>
<th>Widow and any children</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nama</td>
<td>Widow and possibly children</td>
</tr>
<tr>
<td>Owambo</td>
<td>Deceased man's relatives take all household property and widow is given a grain basket</td>
</tr>
<tr>
<td>Herero</td>
<td>Widow</td>
</tr>
<tr>
<td>Kavango</td>
<td>Deceased man's relatives decide</td>
</tr>
<tr>
<td>Lozi</td>
<td>Divided amongst the children</td>
</tr>
</tbody>
</table>

### Asset: Personal Property

<table>
<thead>
<tr>
<th>Khomas</th>
<th>Family members in the greatest need</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nama</td>
<td>Deceased man's sons and younger brothers</td>
</tr>
<tr>
<td>Owambo; Kavango</td>
<td>Deceased man's relatives and children may be given some clothes</td>
</tr>
<tr>
<td>Herero</td>
<td>Deceased man's sons and younger brothers</td>
</tr>
<tr>
<td>Lozi</td>
<td>Children and possibly deceased man's other relatives</td>
</tr>
</tbody>
</table>

### B. SPECIFIC PROVISIONS RELATING TO SOLE SURVIVOR CHILDREN AND INHERITANCE

#### i. THE CONSTITUTION

Paragraph 2 of this report sets out the main features of the Constitution. The Bill of Rights contained in Chapter 3 of the Constitution deals with equal treatment and contains anti-discrimination provisions.

- Article 10(1) guarantees equality before the law.
- Article 10(2) prohibits discrimination of the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.
- Article 15 confirms the rights enjoyed by children, including the right to be free from "economic exploitation".
- Article 16(1) addresses the right to own property and to bequeath property to heirs and legatees:
  
  "All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others"
and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens”.

The Constitution itself does not expressly state how the right to inheritance can be guaranteed nor does it contain specific provisions on sole survivor children.

ii. GENERAL LAW

Paragraph 2.ii of this report sets out the statutory rules regarding inheritance rights in relation to testate and intestate succession. These rules also apply to sole survivor children.

Further details of the protections afforded to sole survivor children through the guardianship provisions of the Child Care Act and the Administration of Estates Act are included in paragraph 2.c.i of this report.

iii. CUSTOMARY LAW

Please refer to the table in paragraph 2.iii above for further detail of how specific property is inherited in accordance with the applicable customary law for different communities.

Sole surviving orphan children are usually considered the responsibility of the extended family and are most often taken in by relatives of the mother, especially their maternal grandmother. However, in Herero and Lozi communities, it is said that the children should go to their father’s extended family.811

The research undertaken by the University of Namibia reported that instances of ‘property grabbing’, whereby the deceased’s family members take all of the property and leave the poverty stricken children to be cared for by other relatives, have become increasingly common.812 It was particularly noted that in several matrilineal societies such as the Kavango and Owambo communities, the matrilineage gets the children, while the patrilineage gets the marital property.813

The reality therefore appears that even in societies where custom dictates that children inherit from their parents, in many cases sole surviving orphans are prevented from receiving a share of any inheritance which may be due.

C. MECHANISMS FOR FACILITATING CHILDREN’S INHERITANCE CLAIMS

i. GENERAL LAW

Currently, any person over the age of sixteen can make out a written will provided it has been witnessed by two independent people, ie not his or her heirs.814 In Namibia, a testator has total testamentary freedom to leave their property to anyone at all, and therefore there

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814 See paragraph the provisions of the Wills Act.
are no safeguarding provisions, such that you might find in some other jurisdictions, protecting the inheritance position of the testator’s children or allowing descendants to petition for maintenance from a deceased’s estate regardless of the bequests made.

A. The Constitution

The Constitution provides two avenues of redress for individuals. Chapter 9 establishes an independent judicial system of courts. Chapter 10 establishes an independent Ombudsman to investigate complaints of corruption or violations of fundamental rights.

The right to bring a complaint to a court or the Ombudsman is clearly set out in Article 25 of the Constitution:

"[...] (2) Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.

(3) Subject to the provisions of this Constitution, the Court referred to in Sub Article (2) hereof shall have the power to make all such orders as shall be necessary and appropriate to secure such applicants the enjoyment of the rights and freedoms conferred on them under the provisions of this Constitution, should the Court come to the conclusion that such rights or freedoms have been unlawfully denied or violated, or that grounds exist for the protection of such rights or freedoms by interdict.

(4) The power of the Court shall include the power to award monetary compensation in respect of any damage suffered by the aggrieved persons in consequence of such unlawful denial or violation of their fundamental rights and freedoms, where it considers such an award to be appropriate in the circumstances of particular cases".

However, even though individuals have the right to bring a case before the courts, the cost of litigation is high in Namibia. This can prevent individuals from accessing justice.

There is constitutional protection for the rights of individuals to receive legal aid: Article 95(h) of the Constitution states that:

"The State shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at [...] a legal system seeking to promote justice on the basis of equality of opportunity by providing free legal aid in defined cases with due regard to the resources of the State".

This has been interpreted as binding on the Government in so far as it impinges on the rights of the individual set out in the Bill of Rights/Chapter 3 of the Constitution.815

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The Legal Aid Act No. 29 of 1990 ("Legal Aid Act") establishes a Director of Legal Aid and gives the Director of Legal Aid the power to grant State-funded legal aid to an individual in a civil matter, where it is "in the interests of justice that the applicant should be legally represented" and "the applicant has insufficient means to enable him or her to engage a practitioner to represent him or her". Legal aid may also be granted to the representative of a deceased estate or a minor, where the representative has "reasonable grounds for instituting or defending the proceedings" and the "means of the estate, trust or legally incapacitated person are insufficient to enable the representative to engage the services of a practitioner".

Although the Legal Aid Act allows litigants with no or minimal income to apply for legal aid, the system is limited in scope and resources. Section 19 provides that in cases where both parties have applied for legal aid, the parties should be compelled to submit to arbitration as a precondition of receiving legal aid. In addition, there are two non-governmental organisations which provide assistance to litigants free of charge. The Legal Assistance Centre, which is funded through donations and sponsors, offers assistance in constitutional cases and other case of public interest. The University of Namibia also runs a legal assistance clinic, which is dependent on lawyers in private practice to offer their services on a pro bono basis.

B. Native Administration Proclamation

Paragraph 18(3) of the Native Administration Proclamation provides that jurisdiction over disputes in relation to the administration and distribution of an estate in accordance with customary law lies with the native commissioner or magistrate, subject to appeal to the High Court. Where a party is not subject to "native law", jurisdiction lies with an ordinary court of competent jurisdiction.

Paragraph 18(5) further states that:

"In connection with any such claim or dispute, the heir or in case of minority his guardian, according to native law, or the executor testamentary shall be regarded as the executor in the estate as if he has been duly appointed as such according to the law governing the appointment of executors".

In relation to the 'Baster' community, paragraph 24 of the Rehoboth Proclamation states that any dispute in relation to the administration of a deceased's estate that "is not capable of amicable settlement between the parties concerned" should be referred to the magistrate.


817 Legal Aid Act, section 3.

818 Legal Aid Act, sections 11-12.

819 Legal Aid Act, section 21.

820 Please note that, although the Rehoboth Proclamation was repealed by the Estates and Succession Amendment Act, section 2(2) of the Estates and Succession Administration Act provides that estates should continue to be administered as if the provisions of the Rehoboth Proclamation had not been repealed.
C. Administration of Estates Act

The Administration of Estates Act (as amended) contains a number of provisions which may facilitate children receiving their inheritance.

Section 43 of the Administration of Estates Act (as amended by section 6 of Act 12 of 1984 and section 1 of Act 25 of 1986) applies to movable property to which minors are entitled. These provisions allow for the Master to require the guardian to give security to the value of the property before the guardian is entitled to receive any movable property from the executor for and on behalf the minor. If the guardian is insolvent, leaves the country or his estate is sequestrated, the Master may require additional security. Section 43(6) states that the executor may pay money to be inherited by a minor direct to the Master.

In accordance with section 44 of the Administration of Estates Act, if the minor is to inherit movable property subject to usufructary or fiduciary rights in favour of a third party, the executor must deal with the property according to the Master's instructions, or, in case of a sum of money, pay the money direct to the Master. If the executor fails to pay over money or property as directed by the Master, he may become liable to pay into the estate double the value.

Chapter 5 of the Administration of Estates Act provides for the continuance of the Guardian's Fund. This is operated by the Master in order to safeguard money received from executors or guardians. The Master is required to open in the books of the Guardian's Fund an account in the name of the person to whom that money belongs or the estate of which that money forms part. Such sums attract interest in accordance with section 88 of the Administration of Estates Act. In accordance with section 89: "The Master shall, upon the application of any person who has become entitled to receive any money out of the guardian's fund, pay that money to that person".

Section 90 provides that the Master may, subject to a maximum limit, pay out from the Guardian's Fund to the natural guardian of a minor for the maintenance, education or benefit of the minor. This maximum limit has been set by regulation at 50,000 Namibian Dollars. If the guardian has provided sufficient security to the Master, he may receive the full credit balance held in the Guardian's Fund in favour of the minor.

The process required has been described as follows:

"Payment of a quarterly allowance, to the guardian, for minors are made in March, June, September and December upon completion of the relevant application form (GF5) and submission of the required certified copy of the ID of the guardian. Allowances are paid on application only (and are thus not automatically paid to the guardian quarterly).

Payment of ad-hoc expenses, like school fees, medical expenses etc. will be considered upon completion of the relevant application form (GF6) and submission of the required certified copy of the ID of the guardian and account(s). Prior approval of the payment of additional expenses is considered on merit taking into consideration the age of the minor and available funds.

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821 Administration of Estates Act, section 86(2).
capital. If approved, payment will be made on the first payment date determined by the Master and will be made in favour of the creditor only.

Payment of remaining inheritance will be made when a minor turns 21 or marries, unless the will provides otherwise e.g. that the minor may only receive his/her inheritance on attaining the age of 25. Payment will only be made upon completion of the relevant application form (GF7) and submission of the required certified copy of the ID of the child.\(^\text{823}\)

Section 91 provides a further protection in that the details of money which is claimable, but has been unclaimed for between one and three years, will be published in the Gazette. However, if the money remains unclaimed for 30 years, section 92 provides that it will be forfeit to the State.

In accordance with section 50 of the Administration of Estates Act, an executor who has made an incorrect distribution of the estate will remain liable to the heirs for any loss sustained.

**D. Child Care Act**

The Child Care Act has been passed by the Namibian Parliament in order to give effect to the rights of children protected by the Constitution, the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.\(^\text{824}\) The legislation makes clear that decisions should be taken in the "best interests" of the child and that, depending on their age, maturity and stage of development, the child should be able to participate in decision making processes and have their views considered.\(^\text{825}\) Section 7 develops this further by imposing a duty on those with parental or other legal responsibility for a child to protect them from neglect and discrimination.\(^\text{826}\)

Section 11 of the Child Care Act establishes the National Advisory Council ("NAC"). Although this body does not take responsibility for individual cases, its advisory and policy functions, as well as the reports that each Government Ministry must submit to the NAC in accordance with section 23 of the Child Care Act, mean that the rights and interests of children will be taken into account on a strategic policy level.

On a more practical level, section 25 of the Child Care Act establishes a Children's Advocate ("Children's Advocate") within the office of the Ombudsman (see paragraph above on the Constitution). The Children's Advocate is responsible for assisting the Ombudsman to investigate complaints involving children, and, crucially, to help resolve complaints "through negotiation, conciliation, mediation or other non-adversarial approaches". The Office of the

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824 Child Care Act, section 2.
825 Child Care Act, sections 3-4.
826 Child Care Act, section 7.
Ombudsman announced on 22 June 2015 that the first Children’s Advocate had been appointed.827

In addition, Chapter 4 Part I of the Child Care Act provides for additional structures and training so that magistrates’ courts can be used as children’s courts to adjudicate matters relating to the Child Care Act. There are specific provisions designed to resolve children’s issues without a full trial. These include a pre-trial hearing in accordance with section 43 of the Child Care Act, where parties are encouraged to settle their disputes "to the extent possible" and referral to a lay forum in accordance with section 44. Section 44 reads in full:

"(1) The children’s court may, subject to subsections (2) and (5), if circumstances permit, refer a matter brought or referred to the court, to a lay-forum proceeding which may include -

(a) mediation by a social worker or other person with the prescribed qualifications; or
(b) a family meeting convened by a person with the prescribed qualifications; or
(c) a referral to a traditional authority in whose area of jurisdiction the child involved in such matter resides and is subject to, in an attempt to settle the matter out of court.

(2) Lay-forums may not be held in respect of a matter involving the alleged abuse or sexual abuse of a child.

(3) Before referring parties to a lay-forum, the children’s court must take into account all relevant factors, including -

(a) the vulnerability of the child concerned;
(b) the ability of the child to participate in the proceedings;
(c) the power relationships within the family; and
(d) the nature of any allegations made by parties in the matter.

(4) A children’s court ordering the referral of a matter to a lay-forum must -

(a) direct the manner in which a record must be kept of any agreement or settlement reached between the parties and of any fact emerging from the lay-forum process which ought to be brought to the notice of the court;
(b) determine the period within which the lay-forum process must be concluded;
(c) determine how and by whom the lay-forum proceedings must be set up, conducted and by whom it must be attended; and
(d) consider the report on the proceedings before the lay-forum when the matter is heard.

(5) A children’s court may not refer a matter to a lay-forum unless it is satisfied that an appropriate cost-free option is available or that the parent, guardian or care-giver of the child

concerned or any other person involved in the proceedings has the financial ability to bear any costs involved”.

Section 45 provides a further protection for children, in particularly sole surviving children, in that any settlement which is reached out of court must be referred back to the children's court for final approval.

Access to a children's court in order to assist a child is open to a large range of people. Section 52 provides that any of the following may approach a children's court:

"(a) a child who is affected by or involved in the matter to be adjudicated;
(b) any person holding or exercising parental responsibilities and rights in respect of a child;
(c) the care-giver of a child;
(d) any person acting in the interest of a child;
(e) any person acting on behalf of a child who cannot act in his or her own name;
(f) any person acting as a member of, or in the interest of, a group or class of children;
(g) any person acting in the public interest, including the Minister or a staff member of the Ministry who is authorised by the Minister; and
(h) the Children’s Advocate acting on behalf of a child or children generally”.

E. Custody and Guardianship of Sole Surviving Orphans

In the common law, the concept of 'parental authority' refers to the complex of rights, powers, duties and responsibilities vested in or imposed upon the parent, by virtue of their parenthood, in respect of their minor child and his or her property. This concept of parental authority has two components, namely 'custody' and 'guardianship'.

Whilst 'custody' relates to the control and supervision of the daily life and the person of a child, 'guardianship' can used in two senses: one broad the other narrow. In its broad sense, guardianship is equated with parental authority and includes custody. In its narrow sense, guardianship refers, firstly to the control and administration of the child's estate, and secondly, to the capacity to assist and represent the child in legal proceedings. Therefore the role of a guardian is key in terms of a sole surviving child's inheritance as a guardian will assume control of the child's estate until they reach the age of majority and have the capacity to represent the child in any legal proceedings.

Because there is no statutory definition of the terms 'custody' and 'guardianship' in the Child Care Act, nor in preceding Acts related to children's issues, these terms retain their common law meanings.

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Under section 100 of the Child Care Act, any of the following persons may seek an order for sole or joint custody of a child born outside marriage and such proceedings may be brought by or on behalf of the person who is seeking custody of the child:

"(a) the father, regardless of whether he is a major or a minor;

(b) the mother, regardless of whether she is a major or a minor; or

(c) someone, other than the mother or father of the child, who is acting as the care-giver of the child or who can show that he or she is acting in the best interests of the child."

The key provisions of the Child Care Act in respect of guardianship are as follows:

- Section 101(1): "A person with custody of a child… is also the sole guardian of that child, unless a competent court, on application made to it, directs otherwise".

- Section 101(2): "If a parent of a child born outside of marriage is a minor, guardianship of such parent's child, unless a competent court directs otherwise, vests in the guardian of such parent."

- Section 101(3): "The following persons may, in respect of a child born outside of marriage seek an order granting legal guardianship to one or both parents or to some other person or persons or to one or both parents and other person or persons:

  (a) either parent;

  (b) the child;

  (c) someone, other than the mother or father of the child, who is acting as the care-giver of the child or who can show that he or she is acting in the best interests of the child; or

  (d) a person authorised in writing by the Minister to act on behalf of the child."

As confirmed by section 112 of the Child Care Act, on the death of a parent sharing joint custody with another parent, the surviving parent acquires sole custody. Sections 112 to 113 of the Child Care Act set out the position for instances whereby the person with sole custody or the legal guardian of a child dies. 831

Section 105 of the Child Care Act makes specific provision for the inheritance rights of children.

"(1) It must be presumed that the words “children” or “issue” or any similar term used in a will or other testamentary disposition, apply equally to persons born outside marriage and children born inside marriage, unless there is clear evidence of a contrary intention on the part of the testator.

(2) Despite anything to the contrary contained in any statute, common law or customary law, a person born outside marriage must, for purposes of inheritance, either intestate or by will or other testamentary disposition, be treated in the same manner as a person born inside marriage.

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831 Child Care and Protection Act, sections 112 - 113.
(3) Nothing in this section is to be understood or interpreted as affecting the freedom of testamentary disposition.

(4) In relation to rape or incest which results in the conception of a person born outside marriage, the person or in the case of incest, the persons who committed the crime do not have a right to inherit intestate from the person born as a result of the rape or incest, but the person born as a result of the rape or incest may inherit intestate from the perpetrator or in the case of incest, the perpetrators and are considered to be included in the terms “children” or “issue” or any similar term used in a will or other testamentary disposition”.

Further provisions of the Child Care Act relate to the role of a guardian in the control and administration of a child's estate notably the introduction of a further safeguard for the child in question whereby a legal guardian appointed under section 101 of the Child Care Act may not administer property belonging to the child or take care of the child's person as tutor unless he or she has been appointed by the Master of the High Court as a tutor in terms of section 72(1) of the Administration of Estates Act. What is more, in accordance with section 115 of the Child Care Act, any person with “a genuine interest in the well-being of the child” can make a complaint to the children's court where they think that the child's guardian is not acting in that child's best interests.

In addition to the position of legal guardians, the Child Care Act makes reference to kinship care givers. Section 123 confirms that a child is in kinship care if the child has been placed, with the express or implied consent of the child's parent or guardian or by order of court in the care of a member of the child's family or extended family, other than the parent or guardian of the child or a person who has parental responsibilities and rights in respect of the child. Further, section 123 confirms that a legal guardian may conclude a kinship care agreement with the kinship care-giver therefore it appears that in instances where a legal guardian has been appointed, the child in question may be subject to an arrangement where their extended family assumes responsibility and becomes eligible to receive a state maintenance grant or maintenance payments in terms of which the child is a beneficiary provided such agreement complies with the requirements under the Child Care Act.

Section 240 of the 2015 Act provides for state maintenance grants to be paid to a parent, guardian, kinship care-giver or a child heading a household (only where such an instance conforms to the provisions specified by section 225 of the Child Care Act) otherwise to the adult designated to supervise such a child-headed household or NGO on behalf of the children in that household.

The Child Care Act has also introduced further safeguards to protect children from abuse, neglect or abandonment by a guardian or other person who has parental responsibilities in the form of fines not exceeding 50,000 Namibian Dollars and/or imprisonment for a term not exceeding ten years.

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832 Child Care and Protection Act, section 114.
833 Child Care and Protection Act, section 254.
ii. CUSTOMARY LAW

The research carried out by the University of Namibia refers to the increasing number of children-led households in Namibia. This may be a direct consequence of the HIV/AIDS epidemic, as often, where sole surviving orphans are under age but have older brothers or sisters, the older siblings will take care of the younger siblings.\textsuperscript{834}

Before the parents die, they may specifically state who they want to take their children and how they want the children's property to be handled.\textsuperscript{835} As referenced above, according to the report produced by the University of Namibia, most often the person who inherits the majority of the parent's property inherits the orphan children.

However, it is reported that in several matrilineal societies such as the Kavango and Owambo communities, the matrilineage will inherit the children, whilst the patrilineage will inherit the marital property.\textsuperscript{836} According to the same report, some Nama and Owambo representatives interviewed claim that extended family members will take the children and property 'in trust' for the children, but then waste the property before the children are old enough to claim their inheritance.\textsuperscript{837}

Further, the same study reports that in some communities, such as the Khomas Region and Nama, extended family members are less likely to adopt children orphaned by AIDS than by some other disease. This demonstrates the reality that orphan children may be discriminated against by family members due to the fact that their parents died of AIDS.\textsuperscript{838}

3. CONCLUSION

Pursuant to its Constitution, Namibia gives direct legislative effect to a number of international treaties which provide a framework for children’s rights and a number of these rights are reflected in the Constitution. Although the Constitution enshrines principles of equality and property, children’s rights to inheritance are not explicitly protected. There are also a number of national legislative instruments relating to inheritance rights under both Customary and General Law. These apply to minors, and also provide for their maintenance.

However, as can be seen from this report, the interaction between the various pieces of legislation is not always clear, and there seems to be no clear explanation of how intestacy rules operate under General Law. Further, two bills on the recognition of customary marriages and intestacy have been introduced in recent years, however they remain at the ‘consideration’ stage. Still further, it appears that ‘property grabbing’ is a growing problem.

Despite an apparently strong Constitutional framework, which clearly recognises children as rights-bearers, the reality is much more complex and there may be situations where children do not always benefit from their deceased parents’ estates. Furthermore, it is unclear to what extent

\textsuperscript{834} LeBeau et al (2004), p. 35.
\textsuperscript{835} LeBeau et al (2004), p. 36.
\textsuperscript{837} LeBeau et al (2004), p. 36.
\textsuperscript{838} LeBeau et al (2004), p. 36.
codified Customary Law is applied by local courts, or whether unwritten customary principles influence such decisions.

Some organisations are attempting to tackle these barriers by promoting will writing and estate planning.

There is an urgent need for a coordinated approach to protecting the inheritance rights of children. This can partly be addressed through the greater provision of support and legal aid to children who are victims (or potential victims) of property confiscation. Increasing awareness of children's rights in this area also be of benefit. Some steps have already been taken, but invariably more needs to be done to secure the rights of vulnerable, and often stigmatised, children, for whom security of inheritance provides a basis for their future.
# APPENDIX 1 - SHORT SUMMARY TABLE

*Note that it will be possible to provide references and narrative explanations in the full table on the next page.*

<table>
<thead>
<tr>
<th>Question</th>
<th>In the Constitution</th>
<th>In legislation/Civil Law</th>
<th>In Customary Law (codified)</th>
<th>In Customary Law (practice)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Male and female?</td>
<td>Yes</td>
<td>Does not specify</td>
<td>N/A</td>
<td>No</td>
</tr>
<tr>
<td>2. Biological and adopted?</td>
<td></td>
<td>Does not specify</td>
<td>N/A</td>
<td>Don't know</td>
</tr>
<tr>
<td>3. Born from a marriage and born out of wedlock?</td>
<td></td>
<td>Does not specify</td>
<td>N/A</td>
<td>Don't know</td>
</tr>
<tr>
<td>4. Born from a monogamous union and born from a polygamous union?</td>
<td></td>
<td>Does not specify</td>
<td>N/A</td>
<td>Don't know</td>
</tr>
<tr>
<td>5. Does the jurisdiction have codified law governing inheritance rights?</td>
<td></td>
<td>Does not specify</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>6. Does the jurisdiction have codified law mandating the appointment of a trustee/administrator/guardian for sole survivor children?</td>
<td></td>
<td>Does not specify</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>7. Are there national provisions for legal aid in civil/administrative claims, including inheritance?</td>
<td>Yes</td>
<td>Yes</td>
<td>N/A</td>
<td>N/A</td>
</tr>
</tbody>
</table>

Please answer with one of the following responses only:

- **Yes** - The law/practice explicitly mentions equality between the two characteristics (Questions 1-4), or relevant codified law/national provisions exist (Questions 5-7). In relation to Question 1, if gender neutral language rather than specifically mentioning gender equality, please specify ‘Yes’ and include an explanatory footnote to this effect.
- **No** - The law/practice explicitly discriminates between the two characteristics (Questions 1-4). Not applicable to Questions 5-7.
- **Does not specify** - All relevant material was accessed, but there was no information relevant to the question (Questions 1-7).
**Don't know** - It is not possible to say whether all relevant material was accessed, and so a definitive answer cannot be given (Questions 1-7).

**N/A** - The question is not applicable for this type of law, for example if a country does not have codified Customary Law or a Constitution. It is likely that this answer will apply to Customary Law (practice) for Questions 5-7.
## ADDITIONAL QUESTIONS

<table>
<thead>
<tr>
<th></th>
<th>RESPONSE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>How does the legal system define a child? Is the age of majority different for different matters?</td>
</tr>
<tr>
<td></td>
<td>The Child Care and Protection Act No. 3 of 2015 defines a ‘child’ as “a person who has not attained the age of 18 years”. Section 10 also sets the age of majority at 18 years of age. Certain provisions of the Constitution apply solely to children under 16 or 14 years of age. See paragraph 2 of this report for more details.</td>
</tr>
<tr>
<td>2.</td>
<td>Does the country have a de jure dual legal system (customary or religious law running parallel to the statutory law or common law)? Whether de jure or de facto, is the customary/religious law related to inheritance and property rights the preferred means of dispute resolution in this area?</td>
</tr>
<tr>
<td></td>
<td>Namibia operates under a system of legal pluralism that consists of both Common Law and Customary Law functioning simultaneously. Article 66(1) of the Constitution provides that both the Customary Law and Common Law of Namibia in force on the date of Independence shall remain valid to the extent to which Customary Law or Common Law does not conflict with the Constitution or any other Statutory Law. Therefore the Constitution creates more of a hierarchical system than a parallel one, with the Constitution being the highest in the hierarchy, then legislation followed by Customary Law and Common Law on the same tier. Most Namibians live according to customary law and its norms and beliefs. Community courts are the primary point of access to adjudication of disputes. See paragraph 2.i of this report for more details.</td>
</tr>
<tr>
<td>3.</td>
<td>Does the Country's legal system (ie Civil Law and Customary Law) differentiate between different types of land tenure?</td>
</tr>
<tr>
<td></td>
<td>Yes. Ownership of land can be divided into different categories and different types of tenure. The key forms of land tenure are freehold, communal land, and flexible land tenure. Please see paragraph 2 of this report on “Land Tenure” for more detail.</td>
</tr>
</tbody>
</table>
### ADDITIONAL QUESTIONS

<table>
<thead>
<tr>
<th>RESPONSE</th>
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</thead>
<tbody>
<tr>
<td>4. Does the country have codified legislation governing inheritance rights?</td>
</tr>
<tr>
<td>5. Does the legal system that governs inheritance rights (if any) ensure equality between male and female children?</td>
</tr>
<tr>
<td>6. Does the legal system that governs inheritance rights (if any) ensure equality between biological and adopted children?</td>
</tr>
<tr>
<td>7. Does the legal system that governs inheritance rights (if any) ensure equality between children born in and out of wedlock?</td>
</tr>
<tr>
<td>ADDITIONAL QUESTIONS</td>
</tr>
<tr>
<td>--------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>8. Does the legal system that governs inheritance rights (if any) ensure equality between children born from a monogamous and polygamous union?</td>
</tr>
<tr>
<td>9. Are there different legal rules for testate and intestate succession?</td>
</tr>
<tr>
<td>10. Does the legal system specify the percentages of inheritance to be distributed to children?</td>
</tr>
</tbody>
</table>
### ADDITIONAL QUESTIONS

<table>
<thead>
<tr>
<th>QUESTION</th>
<th>RESPONSE</th>
</tr>
</thead>
<tbody>
<tr>
<td>11. Does the legal system address the rights of orphaned children to transact land, houses and property that they inherit?</td>
<td>The Administration of Estates Act No. 66 of 1965 provides for a guardian or tutor to transact property on behalf of a child. See paragraphs 2.ii and 2.c.i of this report for more details.</td>
</tr>
<tr>
<td>12. Does the legal system link inheritance rights to residency/citizenship?</td>
<td>There is no clear link between inheritance rights and residence or citizenship. The Administration of Estates Act No. 66 of 1965 provides that, if a proposed executor of a deceased estate (or a tutor of a minor child) resides outside Namibia, the Master of the High Court can refuse to accept that individual as the executor (or tutor) or can require additional security from him. See paragraph 2.ii of this report for more details.</td>
</tr>
<tr>
<td>13. Does the legal system provide for automatic inheritance for sole survivor children?</td>
<td>There is freedom on testamentary disposition, so, where there is a valid will, there cannot be automatic inheritance for sole survivor children. Where there is no valid will, sole survivor children in communities subject to civil law will inherit the estate. However, in communities subject to customary law, the rules applied will be those of the community in question and may allow for other relatives to inherit all or part of the estate. See paragraph 2.ii of this report for more details.</td>
</tr>
<tr>
<td>14. Does the legal system mandate the appointment of a trustee/administrator/guardian for sole survivor children?</td>
<td>There are provisions for the appointment of a guardian or tutor/curator for a sole survivor minor. There are also further provisions allowing for kinship care, where that might be appropriate. See paragraph 2.ii of this report for more details.</td>
</tr>
</tbody>
</table>
### ADDITIONAL QUESTIONS

<table>
<thead>
<tr>
<th>Question</th>
<th>Response</th>
</tr>
</thead>
</table>
| 15. If such an appointment is mandated, does codified law enumerate:    | **RESPONSE**  
The Administration of Estates Act No. 66 of 1965 and the Child Care and Protection Act No. 3 of 2015 both provide for the responsibilities of guardians/tutors, for safeguards to prevent the misuse of property (including penalties), and for mechanisms to prevent the appointment of an individual or to challenge decisions they have made.  
See paragraph 2.c.i of this report for more details. |
| i appointee's rights/responsibilities to hold the property of a sole survivor child until he/she ceases to be a minor? | **RESPONSE**  
The Administration of Estates Act No. 66 of 1965 and the Child Care and Protection Act No. 3 of 2015 both provide for the responsibilities of guardians/tutors, for safeguards to prevent the misuse of property (including penalties), and for mechanisms to prevent the appointment of an individual or to challenge decisions they have made.  
See paragraph 2.c.i of this report for more details. |
| ii penalties to be imposed on an appointee who misuses the property/wrongfully deprives a child of property to which they are entitled? | **RESPONSE**  
The Administration of Estates Act No. 66 of 1965 and the Child Care and Protection Act No. 3 of 2015 both provide for the responsibilities of guardians/tutors, for safeguards to prevent the misuse of property (including penalties), and for mechanisms to prevent the appointment of an individual or to challenge decisions they have made.  
See paragraph 2.c.i of this report for more details. |
| iii mechanisms for a sole survivor child to challenge an appointee and gain access to court? | **RESPONSE**  
The Administration of Estates Act No. 66 of 1965 and the Child Care and Protection Act No. 3 of 2015 both provide for the responsibilities of guardians/tutors, for safeguards to prevent the misuse of property (including penalties), and for mechanisms to prevent the appointment of an individual or to challenge decisions they have made.  
See paragraph 2.c.i of this report for more details. |
| 16. Is there regulation of the management of inheritance for those sole survivor children with no legal guardian? | **RESPONSE**  
There are provisions for the appointment of a guardian or supervision by the Court, so little information was found on situations of sole survivor children where no such person exists. |
| 17. Where is Customary Law applied (in traditional non-State forums, formal State Courts, by local leaders/chiefs etc.)? | **RESPONSE**  
Customary law is applied in community courts. It can also be applied in civil law courts where appropriate. Certain decisions, which may include the application of customary law or practice, may also be devolved under civil law to a chief or other traditional authority. Customary law can also be applied on a more local ad hoc basis. See paragraph 2 of this report for more details. |
| 18. How would you qualify the proportion of property claims resolved under Customary Law? | **RESPONSE**  
There are no clear figures available. |
| 19. Does the country have a court or tribunal in which orphaned children/their representatives can bring an action enforcing their legal right to property? | **RESPONSE**  
Yes. There are a number of routes that could be used to enforce a child's right to property. This includes the courts, as well as investigation by the Children's Advocate within the Office of the Ombudsman.  
See paragraph 2.c.i of this report for more details. |
| If so, is there any case law specifically regarding orphaned children's inheritance rights? | **RESPONSE**  
Yes. There are a number of routes that could be used to enforce a child's right to property. This includes the courts, as well as investigation by the Children's Advocate within the Office of the Ombudsman.  
See paragraph 2.c.i of this report for more details. |
<table>
<thead>
<tr>
<th>ADDITIONAL QUESTIONS</th>
<th>RESPONSE</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>20.</strong> Are there national provisions for legal aid in civil/administrative claims, including inheritance? If so: Do these provisions contain special measures or provisions regarding children?</td>
<td>There is a limited legal aid system guaranteed by the Constitution and instituted by the Legal Aid Act No. 29 of 1990. See paragraph 2.c.i of this report for more details.</td>
</tr>
</tbody>
</table>
SOUTH AFRICA

INTRODUCTION

This report examines the inheritance rights of children in South Africa who have become orphaned as a result of the HIV/AIDS epidemic. The importance of this issue can be understood in light of the severity of the HIV/AIDS epidemic throughout South Africa. There are nearly 7 million people living with HIV/AIDS in South Africa and in 2014 alone over 138,000 people died from the disease. The Joint United Nations Programme on HIV/AIDS ("UNAIDS") estimates that 18.9% of adults aged 15-49 are living with the disease.

South Africa has the largest antiretroviral treatment rollout programme in the world and the country now invests more than $1 billion annually to run its HIV and AIDS programmes. However, prevalence remains high: in 2012 an estimated 410,000 children aged 0-14 were living with HIV in South Africa and in 2014 UNAIDS assessed the number of infected children aged 0-14 at between 310,000 and 370,000. Figures regarding the numbers of children who have been orphaned by HIV/AIDS vary, but UNAIDS estimate the current number of HIV/AIDS orphans aged 0-17 at 2.3 million.

As a result, many children are left vulnerable. There remains, despite the programmes in place to tackle the problem, huge cultural stigma attached to the disease and those who have lost one or both parents are more likely to face discrimination, displacement and confiscation of property due to them. This report will look at the legal framework surrounding inheritance rights of children in South Africa, and specifically in relation to orphans who have lost one or both parents to HIV.

This report is split into the following paragraphs:

1. Compliance with International Law
2. The National Legal System
   A. general provisions relating to inheritance rights
   B. specific provisions relating to sole survivor children and inheritance

---

C. mechanisms for facilitating children's inheritance claims

3. Conclusion

1. COMPLIANCE WITH INTERNATIONAL LAW

South Africa has a mixed legal system, consisting of a mixture of Roman-Dutch law and English law, as well as indigenous laws. Customary law is part of modern South African law on a par with, and not subordinate to, the common law. In *Alexkor Ltd v Richtersveld Community* it was stated:

"While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common-law, but to the Constitution".

The South African Constitution ("Constitution") was approved by the Constitutional Court on 4 December 1996 and took effect on 4 February 1997. It is the supreme law of the Republic and any law or conduct which is inconsistent with it is invalid.

Chapter 14 of the Constitution regulates the application of international agreements to South Africa:

"Article 231

(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

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845 The 'common law' is made up of the foundational Roman-Dutch legal principles as modified and interpreted by judicial precedent. See, for example, Supreme Court of Appeal of South Africa, "History and Background", available at: [http://www.justice.gov.za/sca/historysca.htm](http://www.justice.gov.za/sca/historysca.htm).


(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

Article 232

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law”.

Any international agreement must therefore be approved by the National Assembly and the National Council of Provinces in order to take effect in South Africa and is only incorporated into domestic law when it is enacted by national legislation, with self-executing provisions coming into force automatically if they have been approved by Parliament. Nevertheless, notwithstanding any domestic implementing legislation, Article 39(1)(b) of the Constitution provides that, when interpreting the constitutional Bill of Rights, a court, tribunal or forum must consider international law.

Below is the status of South Africa’s commitment to the treaties listed in the introduction to the overall report.

<table>
<thead>
<tr>
<th>International Treaties</th>
<th>Signature Date</th>
<th>Ratification/ Accession Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>International Covenant on Civil and Political Rights (&quot;ICCPR&quot;)</td>
<td>3 October 1994</td>
<td>10 December 1998</td>
</tr>
</tbody>
</table>

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848 The Constitution of South Africa, Chapter 14, Articles 231-2.


### Regional Treaties

<table>
<thead>
<tr>
<th>Regional Treaties</th>
<th>Signature Date</th>
<th>Ratification/Accession Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>SADC Protocol on Gender and Development[^59]</td>
<td>17 August 2008</td>
<td>August 2011[^60]</td>
</tr>
</tbody>
</table>

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### 2. NATIONAL LEGAL SYSTEM

#### Sources of Law

South Africa has a mixed legal system consisting of the written Constitution, legislation, uncodified Roman-Dutch law, common law and customary law, to which indigenous people may choose to be subject, provided that it does not conflict with the Constitution.

**The Common Law**

Roman-Dutch law was the dominant legal system in Holland during the 17th and 18th centuries. When the Cape was settled by the Dutch in the 17th century, this became the applicable legal system in South Africa. When the Cape then became occupied by the British, Though Roman-


Dutch law remained the common law of the country, English law influenced the common law system. The common law is thus seen as a 'hybrid system'.

The Constitution

South Africa has a written Constitution, which took effect from 3 February 1997 by virtue of the the South African Constitution Act 1996. The Constitution is the supreme law of the country and is binding on all levels of government. It applies both horizontally and vertically.

Chapter 2 of the Constitution contains the Bill of Rights which "is a cornerstone of democracy in South Africa…[and] enshrines the rights of all people in [South Africa] and affirms the democratic values of human dignity, equality and freedom". The Bill of Rights also binds the State. The common law and customary law are to be interpreted in a manner which promotes the spirit and objects of the Bill of Rights.

The South African Human Rights Commission is a Constitutional Commission which is an independent national human rights institution. It was created to support constitutional democracy by promoting, protecting and monitoring human rights in South Africa.

Customary Law

Customary law relates to the legal systems originating from particular tribes. For some matters (such as marriages, succession, guardianship and land tenure) people can request to be judged by customary law, provided that it does not conflict with the Constitution.

The Judiciary

The Constitution vests the judicial authority of the Republic in the courts which are independent and subject only to the Constitution and the law. The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts. The Constitution provides for the following courts:

- Constitutional Court;
- Supreme Court of Appeal;

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865 The Constitution, Chapter 2, Article 7(1).
866 The Constitution, Chapter 2, Article 7(2)
867 The Constitution, Chapter 2, Article 39(2)
870 The Constitution, Chapter 8, Article 165.
871 The Constitution, Chapter 8, Article 165(6).
High Courts (including any High Court of Appeal);
Magistrates’ Courts; and
Any other court established or recognised in terms of an Act of Parliament.872

The Constitutional Court and the Supreme Court of Appeal uphold and enforce the Constitution including the Bill of Rights, which is binding on all State organs and all people.873 Complaints about violations of rights under the Bill of Rights can be lodged with the South African Human Rights Commission. The Constitutional Court is the highest court in all constitutional matters and is the only court that can adjudicate disputes between organs of State or that can decide on the constitutionality of any amendment to the Constitution, any parliamentary or provincial Bill, or any Act of Parliament.874 The Constitutional Court consists of the Chief Justice of South Africa, the Deputy Chief Justice and nine Constitutional Court judges.875

The Supreme Court of Appeal is the highest court for any matter which is not constitutional. It is located in Bloemfontein in the Free State. The Supreme Court of Appeal consists of the President and Deputy President of the Supreme Court of Appeal and 23 other judges. Decisions of the Supreme Court of Appeal are binding on all lower courts and decisions of High Courts are binding on Magistrates’ Courts.876

Additionally, there are 13 High Courts, certain specialist High Courts, circuit local divisions, regional courts, Magistrates’ Courts, small claims courts, equality courts, traditional courts and community courts (on a pilot basis).877

A. GENERAL PROVISIONS RELATING TO INHERITANCE RIGHTS

Testate succession occurs where heirs to an estate are determined in a valid will. The Wills Act 7 of 1953 ("Wills Act") sets out certain formality requirements.878 If no valid will exists, succession rights are governed by the Intestate Succession Act 81 of 1987 ("Intestate Succession Act"), which applies to persons dying intestate (in whole or in part) on or after that date.879 The Act explicitly outlines which surviving relatives will inherit the intestate estate.

Before the decision in Bhe and Others v Magistrate Khayelitsha and Others,880 the estates of black members of the population who died intestate and were married by customary law were not treated as falling under the Intestate Succession Act. However, following the decision in

872 The Constitution, Chapter 8, Article 166.
874 The Constitution, Chapter 8, Article 167.
875 The Constitution, Chapter 8, Article 167.
876 The Constitution, Chapter 8, Article 168.
880 Bhe and Others v Magistrate Khayelitsha and Others, 2005 (1) SA 580 (CC)
Bhe, estates of all persons irrespective of race, gender or culture will be governed by the rules of intestate succession as per the Intestate Succession Act where the deceased has died intestate.881

"(2) Notwithstanding the provisions of any law or the common or customary law, but subject to the provisions of this Act and sections 40(3) and 297(1)(f) of the Children’s Act, 2005 (Act No. 38 of 2005), having been born out of wedlock shall not affect the capacity of one blood relation to inherit the intestate estate of another blood relation".882

The common law of intestate succession embodied in the Intestate Succession Act has been extended to all persons by Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 ("Reform of Customary Law of Succession Act").883 All persons are subject to the legislation relating to inheritance.

The Wills Act governs testate individuals who executed a will and any codicil or other testamentary writing subject to the provisions set out within the Act.884 The Act outlines the formalities required for execution,885 its interpretation,886 the competency of the testator,887 the power the court has to revoke a will,888 the effects of divorce or annulment of marriage on a will,889 the benefits that spouse and descendants of certain person will be entitled to890 and the validity of certain wills executed in accordance with the law of certain other states.891

The Constitution ensures equality before the law892 and prohibits discrimination by the State on the grounds of gender.893 There does not, however, seem to be any reference to gender in the Intestate Succession Act. Nevertheless, the landmark judgement in Bhe ruled that any preference given to a male over a female for the purposes of inheritance constitutes discrimination before the law and classified all legislation that allows for such discrimination as unconstitutional and therefore invalid.894 This means all South African females, regardless of age or social status, are on an equal footing with any male person to inherit from the

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883 Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009, Section 2(1).
884 The Wills Act 7 of 1953, Section 2(1).
885 Wills Act, Section 2.
886 Wills Act, Section 2D.
887 Wills Act, Section 4.
888 Wills Act, Section 2A.
889 Wills Act, Section 2B.
890 Wills Act, Section 2C.
891 Wills Act, Section 3.
892 The Constitution, Chapter 2, Article 9(1).
893 The Constitution, Chapter 2, Section 9(3).
894 Bhe and Others v Magistrate Khayelitsha and Others, 2005 (1) SA 580 (CC).
After this decision, the Reform of Customary Law of Succession Act was enacted so as to give widows and daughters equal inheritance rights with widowers and sons.

The Intestate Succession Act states that an adopted child is deemed to be the descendant of its adopted parents, but not of its biological parents save in certain circumstances. The Children's Act 38 of 2005 ("Children's Act") also states that a parent includes an adoptive parent, so it would appear that the relationship between adoptive parents and children is treated by law as equal to that between biological parents and children.

The Intestate Succession Act ensures equality between children born in and out of wedlock. The Act clearly stipulates that if children are born out of wedlock, it shall not affect the capacity of one's blood relation to inherit the intestate estate of another blood relation. This is further supported by provisions within the Children's Act.

The only apparent differentiation between lands of different tenure is where the property/land is "in community". Marriages in community of property" occur when any previous or future property, land or debt is split equally between spouses upon marriage and becomes a joint estate. Where community of property occurs, different rules apply as to intestate succession; the estate must be divided into half before the rules of intestate succession can be applied to the deceased's half.

Polygamous marriages are a product of customary law. All customary marriages, which were deemed as valid under customary law when the Recognition of Customary Marriages Act 120 of 1998 ("Recognition of Customary Marriages Act") came into force, are recognised as treated as valid marriages for all legal purposes. Any customary marriage entered into after the Recognition of Customary Marriages Act is treated as a valid marriage so long as it complies with the requirements of the Recognition of Customary Marriages Act.

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898 Intestate Succession Act 81 of 1987, Section 1(4)(e).
899 Children's Act 38 of 2005, Chapter 1(1).
900 Intestate Succession Act 81 of 1987, Section 2.
901 Children's Act 38 of 2005, Section 297(1)(f).
905 Recognition of Customary Marriages Act, Section 2(1).
906 Recognition of Customary Marriages Act, Section 2(2).
All children of the deceased are entitled to inherit, with no distinction made between children born from a civil marriage or customary marriage, whether polygamous or not.

i. THE CONSTITUTION

The Constitution contains no express inheritance rights. However, the Constitution deals with equal treatment and contains anti-discriminatory provisions, including those related to age and women.

Article 1(a) states that the Republic of South Africa is founded on the value of "[…] human dignity, the achievement of equality and the advancement of human rights and freedom".

Article 9 states that:

"(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

Article 9(3) provides that age and gender are both factors on the grounds of which the State, or any other person as stated in Article 9(4), cannot discriminate. Subsequently, children should have the same rights as adults, regardless of their age and/or gender.

Regarding equality rights, Article 9(4) also provides that equality is a matter for the State to legislate on.

Article 25(1) states that: "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

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908 The Constitution, Chapter 1, Article 1(a).

909 The Constitution, Chapter 2, Article 9.

910 The Constitution, Chapter 2, Article 9(3).

911 The Constitution, Chapter 2, Article 9(4).
Consequently, under these provisions it seems that children's property rights are equal to those of adults.

Article 28(1)(d) again provides that every child has the right to basic shelter and Article 28(2) provides that: "A child's best interests are of paramount importance in every matter concerning the child". Note, that in accordance with Article 28(3), a child is defined as a person under the age of 18.

Article 33(1) states: "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair".

The Constitution establishes a Human Rights Commission and a Commission for Gender Equality under Articles 181(1)(b) and (d) respectively.

The South African Human Rights Commission ("SAHRC") is annually obliged, under Article 184(3), to:

"... require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment".

Article 187(1) provides that: "The Commission for Gender Equality must promote respect for gender equality and the protection, development and attainment of gender equality".

ii. CODIFIED LAW

There are a number of statutes that contain specific provisions relating to children and their inheritance rights.

Under section 1 of the Children’s Act 38 of 2005, a "child" is defined as "a person under the age of 18 years" and an "orphan" as a "child who has no surviving parent caring for him or her".

Previously, the Age of Majority Act 57 of 1972 stipulated that 21 was the age of majority, however it is now understood that in 2007 the Children’s Act brought the statutory age of

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912 The Constitution, Chapter 2, Article 25(1).
913 The Constitution, Chapter 2, Article 28(1)(d).
914 The Constitution, Chapter 2, Article 28(3).
915 The Constitution, Chapter 2, Article 33(1).
916 The Constitution, Chapter 9, Articles 181(1)(b) and (d).
917 The Constitution, Chapter 9, Section 184(3)
918 The Constitution, Chapter 9, Section 187(1)
majority into line with Article 28(3) of the Constitution, which states that a child, whether male or female, attains majority on reaching the age of 18.

The terms “infant”, “minor” or “youth” are not expressly defined or used in the Children’s Act.

However, the Wills Act refers to a minor in section 2C(1) where it states that:

"If any descendant of a testator, excluding a minor or mentally ill descendant, who, together with the surviving spouse of the testator, is entitled to a benefit in terms of a will renounces his right to receive such a benefit, such benefit shall vest in the surviving spouse."

A similar section can be found in the Intestate Succession Act which states in section 1(6):

"If a descendant of a deceased, excluding a minor or mentally ill descendant, who, together with the surviving spouse of the deceased, is entitled to a benefit from an intestate estate renounces his right to receive such a benefit, such benefit shall vest in the surviving spouse."

The Administration of Estates Act 66 of 1965 ("Administration of Estates Act") also refers to minors with respect to the appointment of curators or tutors. It further states that Masters shall have jurisdiction over:

"… property belonging to a minor, including property of a minor governed by the principles of customary law, or property belonging to a person under curatorship …".

There are a number of statutes concerning inheritance rights, which are, in turn, discussed below.

I. Administration of Estates Act 66 of 1965, as amended by the Administration of Estates Act Amendment 2002

Sections 43 and 44 of the Administration of Estates Act provide for moveable property monies to which minors are entitled to be transferred to the minor’s natural guardian, tutor or curator. The statutory provisions include protections for the minor, such as the provision of security to the court.

"Section 43

(1) The natural guardian of a minor shall, subject to the provisions of subsections (2) and (3) and to the terms of the will (if any) of the deceased, be entitled to receive from the executor for and on behalf of the minor, any movable property to
which the minor is, according to any liquidation and distribution account in any deceased estate, entitled.

(2) Subject to any express provision to the contrary in the will-

(a) no sum of money shall be paid to any such guardian in terms of subsection (1); and

(b) if the Master so directs, no other movable property shall be delivered to any such guardian under that subsection,

unless payment of such sum of money or payment, in default of delivery, of the value of such movable property according to a valuation by an appraiser or any other person approved by the Master, as the case may be, to the minor, at the time when he is to become entitled to the payment of such sum of money or delivery of such property, has been secured to the satisfaction of the Master.

(3) Any such guardian shall, if called upon to do so by the Master by notice in writing, lodge with the Master, within a period specified in the notice or within such further period as the Master may allow, a statement in writing, signed by him in person and verified by an affidavit made by him, giving such particulars in respect of any such property or sum of money as may be indicated in the notice.

(4) If the estate of any such guardian or of his surety is sequestrated, or if such guardian or surety commits an act of insolvency, or is about to go or has gone to reside outside the Republic, or if in the opinion of the Master the security given under subsection (2) has become inadequate, the Master may, by notice in writing, require such guardian to provide within the period stated in the notice, such additional security as the Master may specify, and if the guardian fails to comply with the notice within the said period or within such further period as the Master may allow, the amount in question shall, unless the notice has been withdrawn by the Master, forthwith become payable into the hands of the Master.

(5) The Master may-

(a) if any payment or delivery referred to in subsection (2) has been made to any minor entitled thereto; or

(b) if any minor entitled to any such payment or delivery at any time after his majority, consents thereto in writing after he has attained majority,

reduce the amount of the security to an amount which would, in his opinion, be sufficient to secure any other such payment or delivery still to be made by the guardian.

(6) Subject to the provisions of subsection (1) and to the terms of the will (if any) of the deceased, an executor shall pay into the hands of the Master any money to which any minor, absentee, unknown heir or person under curatorship is entitled according to any liquidation or distribution account in the estate of the deceased: Provided that the Court may, upon consideration of a report by the Master and of
the terms of the will (if any) of the deceased, make such order exempting the executor from compliance with the provisions of this subsection as it may deem fit.

Section 44

(1) If according to any distribution account a minor is, or an unborn heir will when born be, entitled to any movable property out of a deceased estate, subject to usufructuary or fiduciary rights or any other like interest in favour of any other person including the natural guardian, tutor or curator of the minor or unborn heir, then, subject to the provisions of subsection (3) and any express provision to the contrary in the will-

(a) the executor shall, in the case of a sum of money, pay such sum of money into the hands of the Master, and, in the case of any other movable property, deal with such property in such manner as the Master may direct; and

(b) such sum of money and, unless the Master otherwise directs, such other movable property shall not, during the minority of the minor or before the birth and during the minority of the heir, as the case may be, be paid or delivered to such person unless such person has given security mutatis mutandis as provided in subsection (2) of section forty-three, for the payment of such sum or the delivery of such property to the minor or heir at the time when the minor or heir is to become entitled to such payment or delivery.

(2) Subsections (3), (4) and (5) of section forty-three shall mutatis mutandis apply in respect of any security given under subsection (1).

(3) The provisions of subsection (1) shall not apply in relation to any disposition in a will executed in the Republic prior to a date twelve months after the date of commencement of this Act."

Section 45 states that, if a minor is domiciled outside of South Africa, they are entitled to any sum of money held on their behalf by the Master to be paid to their guardian in that country.

Importantly, section 46 provides that any executor who fails to pay over any money to the Master/any other person, or who uses any property in the estate except for the benefit of the estate, shall pay into the estate an amount equal to double the amount which he has failed to pay over, or to double the value of the property so used.

Sections 71-73 provide for tutors and curators to administer the property of minors. The High Court issues letters of tutorship/curatorship to confer authority on the tutor/curator to administer the estate (section 71).

The High Court will grant letters of tutorship or curatorship to any person that has been nominated by will or written instrument. There are also specific provisions relating to the granting of letters of tutorship or curatorship if the person has been nominated by will or written instrument by:
“the parent of a legitimate minor who has not been deprived, as a result of an order under subsection (1) of the said section 5 of the Divorce Act, 1979, of the guardianship of such minor and who immediately before his death was the sole natural guardian of such minor;\textsuperscript{924} or

- the mother of a minor born out of wedlock who has not been so deprived of the guardianship of such minor or of her parental powers over him or her;\textsuperscript{925} or

- the parent to whom the sole guardianship of a minor has been granted under subsection (1) of the said section 5 or under the Divorce Act, 1979”\textsuperscript{926}

The Act also provides for the Court itself to appoint someone to administer the property of a minor.\textsuperscript{927}

There are also provisions at section 73 that set out how property/monies that rightfully belong to a minor should be dealt with if, for whatever reason, the nomination of a tutor/curator fails. These include the Master advertising for members of the minor’s family to come forward to recommend a new tutor/curator, or using the Court’s own discretion to appoint a new tutor/curator.\textsuperscript{928}

In addition, the Administration of Estates Act provides that, if any property that a tutor or curator has been appointed to administer is purchased by the tutor or curator or the spouse, parent, child, partner, employee, employer or agent of any tutor or curator, then the purchase is considered void unless it has been consented to or is confirmed by the Court or the Master.\textsuperscript{929}

Section 94 states that if the Master is satisfied that it is expedient to partition any immovable property which is registered in the name of any minor, or in which they have an interest, and that the sub-division is fair and equitable, then he may consent on behalf of the minor to the sub-division and to any exchange of property, payment of money, or mortgage incidental to the sub-division.

II. Intestate Succession Act 81 of 1987\textsuperscript{930}

The Intestate Succession Act contains provisions relating to the distribution of property where the deceased has died intestate, either wholly or in part. An intestate estate is defined in the Act as “...any part of an estate which does not devolve by virtue of a will”.\textsuperscript{931}
Section 1(1)(a) of the Intestate Succession Act states that a spouse shall inherit the intestate estate, where the deceased dies, either wholly or in part, intestate. If no spouse survives the deceased, a descendant shall inherit the intestate estate in its entirety. However, if the deceased is survived by both a spouse and a descendant, the spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed the value outlined by the Minister of Justice by notice in the Gazette and any descendant shall inherit the residue (if any) of the intestate estate.

Where a deceased is not outlived by a spouse or dependent, but is survived by both parents, the parents inherit the intestate estate in equal shares. If survived by only one parent, the surviving parent shall inherit half and the descendants of the other parent shall inherit the other part of the intestate estate. If there are no descendants of the deceased parent, the surviving parent inherits the intestate estate in its entirety.

Section 1(1)(e)(i) provides that, if the deceased is not survived by a spouse, descendant or parent, but is survived by descendants of the deceased mother and father who are related to the deceased through him/her, or descendants of the deceased parents related to him through both such parents, then the intestate estate will be divided into two equal shares with descendants from the mother's side inheriting one half and descendants from the father's side inheriting the other half.

If the deceased is not survived by a spouse, descendant, parent or a descendant of a parent, the other blood relation(s) of the deceased who are related to him nearest in degree shall inherit the intestate estate in equal shares.

Under section 1(2) of the Intestate Succession Act, the right to inherit an intestate estate is not affected by the blood relative having been born out of wedlock, notwithstanding the provisions of any law or the common law or customary law.

III. Wills Act 7 of 1953

The Wills Act governs the inheritance of those citizens who die testate, ie who have drafted and executed a valid will. The Wills Act outlines the formalities required in the execution, including the required presence of two witnesses to attest the will; the formal requirements for valid amendments to the will; how

932 Intestate Succession Act, Section 1(1)(b).
933 Intestate Succession Act, Section 1(1)(b).
934 Intestate Succession Act, Section 1(1)(c)(i).
935 Intestate Succession Act, Section 1(1)(d)(i).
936 Intestate Succession Act, Section 1(1)(d)(ii).
937 Intestate Succession Act, Section 1(1)(f).
938 Subject to Sections 40(3) and 297(1)(f) of the Children's Act 2005.
the will should be interpreted;\textsuperscript{941} the competency of the testator;\textsuperscript{942} the power the court has to revoke a will;\textsuperscript{943} the effects of divorce or annulment of marriage on a will;\textsuperscript{944} the benefits that the spouse and descendants of certain person will be entitled to;\textsuperscript{945} and the validity of certain wills executed in accordance with the law of certain other States.\textsuperscript{946}

Section 2B provides that if a person dies within three months after his marriage was dissolved by divorce or annulment by a competent court and the person executed a will before the date of such dissolution, the will shall be implemented as if the previous spouse had died before the dissolution, unless the will makes it apparent that the testator's intention was to benefit his previous spouse notwithstanding the dissolution of marriage.\textsuperscript{947}

Section 2C(1) provides that if a descendant of a testator, excluding a minor or a mentally ill descendant, renounces his right to receive a benefit under a will then the benefit shall vest in a surviving spouse. Section 2C(2) provides that if a descendant of a testator would have been entitled to a benefit under a will if he had been alive at the time of death of the testator, or had not been disqualified from inheriting, or had not after the testator's death renounced his right to receive such a benefit, the descendants of that descendant shall, subject to subsection (1) be entitled to the benefit, unless the context of the will otherwise indicates.

Section 2D provides that when interpreting a will:

- unless the context otherwise indicates, an adopted child is to be regarded as being born from his adoptive parent(s) and is to be considered the child of his adoptive parent(s), not his natural parent(s) or any previous adoptive parent(s).\textsuperscript{948}

- The fact a person is born out of wedlock is to be ignored for the purposes of determining his relationship to the testator or another person for the purposes of a will.\textsuperscript{949}

- Any benefit allocated to the children of a person, or to the members of a class of persons, shall vest in those children or members of that class who are

\textsuperscript{940} Wills Act, Section 2(1)(b).
\textsuperscript{941} Wills Act, Section 2D.
\textsuperscript{942} Wills Act, Section 4.
\textsuperscript{943} Wills Act, Section 2A.
\textsuperscript{944} Wills Act, Section 2B.
\textsuperscript{945} Wills Act, Section 2C.
\textsuperscript{946} Wills Act, Section 3.
\textsuperscript{947} Wills Act, Section 2B.
\textsuperscript{948} Wills Act, Section 2D(1)(a).
\textsuperscript{949} Wills Act, Section 2D(1)(b).
alive (or have already been conceived and are later born alive) at the time of the devolution of the benefit.\textsuperscript{950}

Section 4A(1) provides that any person who attests and signs a will as a witness, or who signs a will in the presence and by direction of the testator, or who writes out the will or any part thereof in his own handwriting, and the person who is the spouse of such a person at the time of the execution of the will, shall be disqualified from receiving any benefit under the will subject to certain exceptions, including for a person or his spouse who would have been entitled to inherit from the testator if the testator had died intestate.\textsuperscript{951}

IV. Births and Deaths Registration Act 51 of 1992

According to the Births and Deaths Registration Act 51 of 1992 ("Births and Deaths Registration Act"), it is compulsory to give notice of deaths, as well as a notice of birth, for South African citizens.\textsuperscript{952} The estate of a deceased person must be reported to a Master. The reporting documents include, among others, a death certificate.\textsuperscript{953} Without such reporting documents an estate cannot be liquidated or distributed.


The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("Equality Act") provides that neither the State nor any person may unfairly discriminate against any person.\textsuperscript{954} In particular, no person may unfairly discriminate against any person on the grounds of gender, including “… preventing women from inheriting family property” or “… any practice which impairs the dignity of women and undermines equality between men and women, including the undermining of the dignity and well-being of the girl child” or “any policy or conduct that unfairly limits access of women to land rights, finance, and other resources”.\textsuperscript{955}

VI. Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009

The Reform of Customary Law of Succession Act was introduced following the Bhe and Others v The Magistrate, Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa case, where the Constitutional Court declared the African customary rule of male
primogeniture, as well as section 23(7) of the Black Administration Act (which unfairly discriminates against women and others with regard to the administration and distribution of black deceased estates), unconstitutional and invalid and requested the Department of Justice and Constitutional Development to make the necessary changes in statutory law to align it with the Constitutional Court decision.956

The aim is to "protect certain children born out of customary marriage" as everyone has the right to equal protection and the benefit of the law.957 Women in polygamous marriages and their children have equal succession rights as well as extra-marital children. The law no longer recognises the concept of "indlalifa" or universal heir.958

Section 1 defines a descendant as

"[…] a person who is a descendant in terms of the Intestate Succession Act and includes – (a) a person who is not a descendant in terms or the Intestate Succession Act, but who, during the lifetime of the deceased person, was accepted by the deceased person in accordance with customary law as his or her own child".

This is an all-embracing provision and would include children of a spinster, children of a wife, children born of a widow (ukungena unions), children of a widow (as a result of extra-marital intercourse), adopted children and the children of a 'seedraiser'.959

Section 2 states that,

"(1) The estate or part of the estate of any person who is subject to customary law who dies after the commencement of this Act and whose estate does not devolve in terms of that person's will, must devolve in accordance with the law of intestate succession as regulated by the Intestate Succession Act, subject to subsection (2)."

(2) In the application of the Intestate Succession Act -

(a) …


959 De Jure, "The judicial and legislative reform of the customary law of succession", by JC Bekker and DS Koyana, pp. 577-8, available at: http://www.dejure.up.ac.za/index.php/volumes/45-vol-3-2012/articles/bekker-jc-a-koyana-ds. Please note that an ukungena union occurs where a widow enters into a relationship with one of her late husband's relatives (or occasionally a stranger) in order to raise her children; in these cases, the children are legitimate and treated as belonging to her house and so may be her late husband's heirs. A seedraiser is a new wife whom a man marries in order to bear and raise children, where his principal wives have failed to produce an heir through death, barrenness or absconding; in these cases the seedbearer does not create a house of her own, but is treated, and any children are treated, as part of the house of the main wife (if the main wife has died or been divorced, the seedraiser will take her place in all respects).
(b) a woman, other than the spouse of the deceased, with whom he had entered into a union in accordance with customary law for the purpose of providing children for his spouse’s house must, if she survives him, be regarded as a descendant of the deceased;

(c) if the deceased was a woman who was married to another woman under customary law for the purpose of providing children for the deceased’s house, that other woman must, if she survives the deceased, be regarded as a descendant of the deceased”.

Furthermore, section 3(3) of the Reform of the Customary Law of Succession Act provides that,

“[…] in the determination of a child’s portion for the purpose of dividing the estate of a deceased in terms of the Intestate Succession Act, paragraph (f) of section 1(4) of that Act must be regarded to read as follows:

(f) a child’s portion, in relation to the intestate estate of the deceased, shall be calculated by dividing the monetary value of the estate by a number equal to the number of children of the deceased who have either survived the deceased or have died before the deceased but are survived by their descendants, plus the number of spouses and women referred to in paragraphs (a), (b) and (c) of section 2(2) of this Act.”

And section 4(2) (a) and (b) include that:

“[…] any reference in the will of a woman referred to in subsection (1) to her child or children and any reference in section 1 of the Intestate Succession Act to a descendant, in relation to such a woman, must be construed as including any child –

(a) born of a union between husband of such a woman and another woman entered into in accordance with customary law for the purpose of providing children for the first-mentioned woman’s house; or

(b) born to a woman to whom the first-mentioned woman was married under customary law for the purpose of providing children for the first-mentioned woman’s house”.

It is interesting to note that one article seems to suggest that the Bhe case had virtually no impact, even on the adjudication of disputes concerning inheritance rights, as knowledge of the case was virtually non-existent in rural and semi-urban areas of South Africa.960 It further states that as a “practical matter, this means that a widow’s access to her deceased husband’s home and property depends on the inclinations of the male heir […]”.961 The date of this article, which was:


published just two years after the decision in that case, suggests that the context and circumstances may now have changed.

VII. Children’s Act 38 of 2005 962

While the Children’s Act does not specifically refer or relate to any inheritance rights, it sets out, among others, the principles relating to care and protection of children as well as the responsibilities and rights of parents. It also refers to a child’s property and property interest in different sections.

Care in relation to a child is defined “[…] (d) respecting, protecting, promoting and securing the fulfilment of, and the guarding against any infringement of, the child’s rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act”. Care can be given by a number of people, including any person other than a parent or guardian who factually cares for a child, including foster parents or a child at the head of a child-headed household.

A parent of a child includes the adoptive parent of a child. Parental responsibilities shouldered by both parents and any other person who acts as a guardian of child include:

(a) “administer and safeguard the child’s property and property interests;

(b) assist or represent the child in administrative, contractual and other legal matters; or

(c) give or refuse any consent required by law in respect of the child, including –

(v) consent to the alienation or encumbrance of any immovable property of the child”. 964

Chapter 9 of the Children’s Act deals with a child in need of care and protection, which includes children who have been abandoned or orphaned and are without visible means of support or children living or working on the streets. A child in a child-headed household may be considered a child in need of care and protection. 965

Section 242(2)(d) states that an adoption order does not affect any rights to property the child acquired before the adoption. 966

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963 Children’s Act, Section 1.

964 Children’s Act, Section 18.

965 Children’s Act, Chapter 9.

966 Children’s Act, Section 242(2)(d).
iii. CUSTOMARY LAW

The application of customary law to inheritance rights was dramatically altered by the decision in Bhe and Others v. Khayelitsha Magistrate and Others ("Bhe"),967 which changed the intestate succession rules applying to South Africa and the way that the South African Department of Justice and Constitutional Development supervise the administration of deceased estates (see paragraph 2.a.ii above).

I. Position prior to Bhe

Prior to Bhe, the intestate inheritance regime under customary law was different to that under codified law. Section 23 of the Black Administration Act No. 38 of 1927 ("Black Administration Act") contained the rules governing when the customary laws of succession were applicable to a deceased’s estate and these were the rules generally applied to black South Africans. The Intestate Succession Act only applied to estates where customary law was not applicable.

Section 23(1) of the Black Administration Act stipulated that:

"All movable property belonging to a Black and allotted by him or accruing under Black law or custom to any woman with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under Black law and custom".968

The rationale for section 23(1) was based on the notion that all household property belonged to the family head.969

Section 23(2) of the Black Administration Act stipulated that:

"All land in a tribal settlement held in individual tenure upon quitrent conditions by a Black shall devolve upon his death upon one male person, to be determined in accordance with tables of succession to be prescribed under subsection (10)".970

Section 23(2) related to quitrent land in the Eastern Cape Province and the tables of succession were laid out in Annexure 24 of the Bantu Areas Land Regulations.971

"(3) All other property of whatsoever kind belonging to a Black shall be capable of being devised by will".972

968 Bhe, 35.
970 Bhe, para 35.
972 Bhe, para 35.
Section 21(3) ensured that black Africans retained the right to devolve their property in a will. Customary rules on succession differed from region to region but some basic principles relating to succession were generic. Succession in customary law was universal and onerous: the heir took on the rights of the deceased and his duties. The heir was therefore expected to maintain the surviving dependants of the deceased. Succession flowed through the male lineage. For example, if a man died in a polygamous family, he would be succeeded by his son. In the event that his son was no longer alive he would be succeeded by the oldest surviving grandson. If the eldest son of the deceased did not have a son, then the estate would move to the second son of the deceased. If there were no male descendants at all, then the estate would pass to the father of the deceased, or to the deceased’s eldest brother, if the deceased had no surviving father. In the event there were no males in the family to inherit the estate, it would devolve to the Paramount Chief of the deceased’s tribe.

Under the customary law principle of male primogeniture, the eldest male descendant of the deceased had the right to inherit the family estate, in preference to their siblings. This rule effectively prevented women with male siblings from inheriting an intestate estate. The only right a woman could claim under customary law was one of maintenance against the male heir. In *Mthembu v Letsele* the court found that primogeniture was not discriminatory, because, although the females were not allowed to inherit the estate, they were entitled to claim maintenance out of the estate. Intestate succession under customary law was further complicated in situations of polygamous marriages (marriages that are divided into houses, with each new marriage bringing a new house into existence). The male heir would be defined as the oldest son of the first wife of the deceased. If the son of the first wife was deceased, then his son would be the heir. If he had

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978 [1997] (2) SA 936 (T).
no sons, the second son of the first wife would inherit. If there were no male heirs in the first house, then an heir would be sought in the second house.  

As society developed, where the male heir may have been remote, both in the geographical and familial sense, or had limited capacity to take on the responsibilities that may follow an inheritance, there was potential for hardship of any dependants of the deceased.

Since 1996 the Constitution has established customary law within the South African legal system and confirmed that both codified and customary law should be treated as equal. In establishing customary law within the legal system of South Africa, it was expected to conform to the basic human rights enshrined under the Constitution.

Chapter 1 of the Constitution states that:

"The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

(b) Non-racialism and non-sexism.

(c) Supremacy of the constitution and the rule of law.

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness".

Sections 9(2) and 9(3) of the Constitution specifically called for legislative measures to promote equality.

Despite the Constitution's aims at ensuring equality, many magistrates saw their role as being bound by customary law, even if the result was likely to lead to discrimination. As customary law was largely uncodified, there was a difficulty in knowing what the correct interpretation was. Each magistrate would have their own interpretation of it. Some of the magistrates interviewed by the COHRE Women in Housing Rights Programme felt that, in disputes relating to black South Africans, they had no option but to apply customary law under which women had


981 The Constitution, Chapter 12.


no property rights.\textsuperscript{984} Not much was done to keep the customary law of succession in line with social and economic changes.

As mentioned above, under the customary law regime, codified by Section 23 of the Black Administration Act, different intestate succession rules applied to different people, depending on a person's skin colour.\textsuperscript{985} As a result, the customary law regime was subject to severe criticism as conflicting with the human rights enshrined under the Constitution. On the back of such criticism, the rules were challenged in Bhe where two minor girls sought to inherit their deceased father's estate in light of the fact, under ‘black’ law and custom, their grandfather was due to inherit the estate. The estate comprised of:

- a temporary informal shelter and the property on which it stood; and
- miscellaneous items of movable property that Ms Bhe, the girls' mother, and the deceased had acquired jointly over the years, including building materials for the house they intended to build.\textsuperscript{986}

Their grandfather had previously indicated his intention to sell the girls' home to pay for the funeral expenses of burying his son.\textsuperscript{987} If the grandfather had succeeded Ms Bhe and her daughters would have been destitute. The girls sought a court order that the rule of primogeniture under customary law must be interpreted and developed in line with the Constitution.

In its judgment, the Constitutional Court decided to strike down:

- section 23 of the BAA as unconstitutional on the basis that it was discriminatory on the grounds of race, colour and ethnic origin; and
- the customary rule of male primogeniture on the basis that it was unconstitutional due to being against the notion of equality.

The Constitutional Court described it as:

"a comprehensive exclusionary system of administration imposed on Africans specifically crafted to fit in with notions of separation and exclusion of Africans from the people of 'European' descent" and with the result of ossifying customary law.\textsuperscript{988}


The violation of equality and human dignity caused by section 23 of the Black Administration Act was so serious that it could not be justified and accordingly was struck down.\textsuperscript{989} The customary rule of male primogeniture was ruled to be out of

http://landwise.resourceequity.org/record/1907.

\textsuperscript{985} Black Administration Act, Section 23.

\textsuperscript{986} Bhe, 14.

\textsuperscript{987} Bhe, 17.


\textsuperscript{989} Bhe, 73.
pace with changing social conditions and values and against the notion of equality, and accordingly it was also struck down.

The customary law of succession can now only be applied if so chosen by means of freedom of testation - a freedom which is fairly unpopular and unknown to most indigenous communities. Following Bhe, the Court also decided that the codified law, namely the Intestate Succession Act 81 of 1987 (see above), would be amended to also deal with inheritance rights under customary law, so that it would apply to:
- all people irrespective of their skin colour; and
- any polygamous marriages.  

This was achieved by the enactment of the Reform of Customary Law of Succession Act. As a result, all estates are to be administered under the terms of the Administration of Estates Act.

The result of intestate deceased estates being distributed under the terms of the Intestate Succession Act means that the order of preference of estate beneficiaries is:
- the spouse of the deceased;
- the descendants of the deceased;
- the parents of the deceased (only if the deceased dies without a surviving spouse or descendants); and
- the siblings of the deceased (only if the spouse and one or both of the deceased's parents are predeceased).

B. SPECIFIC PROVISIONS RELATING TO SOLE SURVIVOR CHILDREN AND INHERITANCE

i. THE CONSTITUTION

As discussed above at paragraph 2.a.i, there are no specific provisions in the Constitution relating to the inheritance rights of sole survivor children. One point worth noting, however, is that Article 28 of the Constitution provides that:

"Every child has the right to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result".


991 Bhe, 137(7).


993 South African Constitution, Section 28 (h)
ii. CODIFIED LAW

The inheritance rights of sole survivor children (as distinct from the inheritance rights of children of one deceased parent) are not specifically mentioned in the core legislative acts governing succession, ie the Administration of Estates Act, the Intestate Succession Act, the Wills Act, the Equality Act, the Reform of Customary Law of Succession Act and the Children's Act.

iii. CUSTOMARY LAW

It seems to have been the case historically that, in the case of intestate succession under customary law, sole surviving male children have been placed in a better position than their female counterparts. Following the ruling in Bhe and the enactment of the Reform of Customary Law of Succession Act, any sole surviving children will have inheritance claims under Section 1(1)(b) of the Intestate Succession Act, which stipulates that if a person dies intestate and is survived by a descendant and not a spouse, the descendant will inherit their estate.

It makes no difference if the descendants were born from a civil marriage, a customary marriage, were adopted or born out of wedlock. Under the Intestate Succession Act 81 of 1987, the position of a sole surviving child doesn’t appear to differ from that of multiple descendants. Please see paragraph 2.a.ii.II for further details on the Intestate Succession Act 81 of 1987.

C. MECHANISMS FOR FACILITATING CHILDREN'S INHERITANCE CLAIMS

i. THE CONSTITUTION

The Constitution, as the supreme law in South Africa, provides for non-discrimination and equality, as has been detailed above, but no specific provisions in the Constitution relate to the mechanisms of children's inheritance claims.

Article 34 of the Constitution provides that:

"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".

Furthermore, Article 38 provides the right to approach a competent court alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief including a declaration of rights. This can be exercised by someone acting in their own interest, someone acting on behalf of another person who cannot act

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994 Intestate Succession Act 81 of 1987, Section 1(2)
995 The Constitution, Articles 1(a), 2, 7(1) and 9.
996 The Constitution, Article 38(a).
in their own name (such as a guardian of a child)\textsuperscript{997} or anyone acting in the public interest.\textsuperscript{998}

It is also worth noting that Article 28 of the Constitution states:

*"Every child has the right to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result."*\textsuperscript{999}

\textbf{ii. CODIFIED LAW}

\textbf{I. Administration of Estates Act 66 of 1965}

The inheritance rights of sole survivors can be enforced through a tutor, guardian or curator as set out in the Administration of Estates Act.

Guardian is not defined in the Administration of Estates Act. Guardianship is dealt with in the Children’s Act and usually means a parent or other person who has guardianship. Section 24 of the Children’s Act states that any person who has an interest in the care of a child may apply to the High Court for an order granting guardianship.

The Administration of Estates Act defines a tutor as being "a person who is authorised to act under letters of tutorship granted or signed and sealed by a Master or under an endorsement made under section 72". Letters of tutorship are then defined as "any document issued by which any person named or designated therein is authorised to act as the tutor of a minor, or to administer property belonging to a minor as tutor".

The Administration of Estates Act defines a curator as "any person who is authorised to act under letters of curatorship granted or signed and sealed by a Master or under an endorsement made under section 72". Letters of curatorship are defined as "any document issued by which any person named or designated therein is authorised to act as curator of any property belonging to a minor or other person". The distinction between a tutor and curator is not however entirely clear.

A Master is the individual who has jurisdiction in respect of the matter, property, or estate, and who is subject to the control and supervision of the Chief Master. The Master is appointed by the Minister of Justice and is a Master of the High Courts.

The Administration of Estates Act sets out how estates are to be managed by the executor(s). It provides that a notice by the executors must be published in the Gazette and in a local newspaper, and claims against the estate must then be made within three months.\textsuperscript{1000} Furthermore, under section 30, the executor is not

\textsuperscript{997} The Constitution, Article 38(b).
\textsuperscript{998} The Constitution, Article 38(d).
\textsuperscript{999} The Constitution, Article 28(h).
\textsuperscript{1000} Administration of Estates Act, Section 29(1).
permitted to sell any property in the estate before the expiry of the three month period.

Section 35(12) provides the instructions for distributing the estate after the necessary formalities have occurred (including leaving the accounts open for inspection), and states:

"[...] the executor shall forthwith pay the creditors and distribute the estate among the heirs in accordance with the account, lodge with the Master the receipts and acquittances of such creditors and heirs and produce to the Master the deeds of registration relation to such distribution".

If the executor fails to comply with this section then, under section 102(f) of the Administration of Estates Act, the executor shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a maximum of 12 months.

In accordance with section 82, every tutor or curator is obliged to pay to the Master all moneys belonging to the minor, except if the money is needed for the payment of any debt of the minor, for the preservation of property, for education of the minor, or to meet any business expenditure of the minor. The Master pays such moneys into the "Guardian's Fund", which was established by section 91 of the Administration of Estates Act 1913.

Section 89 of the Administration of Estates Act states that the Master shall, upon the application of any person who has become entitled to receive any money out of the Guardian's Fund, pay that money from the Guardian's Fund to that person. Section 90 allows for payments to be made to guardians, tutors or curators on behalf of a minor as may immediately be required for the maintenance, education of other benefit of the minor (including investment in property) as approved by the Master.

Importantly, section 80(1) provides that no natural guardian is entitled to alienate or mortgage any immovable property belonging to his minor child, and no tutor or curator shall be entitled to alienate or mortgage any immovable property which he has been appointed to administer, unless he is authorised thereto by the Court or by the Master under the Administration of Estates Act or, in the case of a tutor or curator, by any will or written instrument by which he has been nominated.

II. Domestic Violence Act 116 of 1998

The Domestic Violence Act does not specifically protect children’s property rights, although it does provide a sufficiently broad and open-ended definition of "domestic violence" which includes ".... (d) economic abuse; .... (h) damage to property", such that economic abuse and property damage seem to be covered where the conduct harms or may cause imminent harm to the safety, health or
wellbeing of the complainant. This seems to be wide enough to cover children’s property rights.\textsuperscript{1001}

Economic abuse is defined as:

“[…] (a) the unreasonable deprivation of economic or financial resources to which a complainant is entitled under law, such as denial of funds; (b) the unreasonable disposal of household effects or other property in which the complainant has an interest”.

Complainant means any person who is or has been in a domestic relationship with a respondent and who is or has been subjected "[…] to an act of domestic violence, including any child in the care of the complainant".\textsuperscript{1002}

Domestic relationship means a relationship between a complainant and a respondent, where "[…] they are the parents of a child or are persons who gave or had parental responsibility for that child or they are family members related by consanguinity, affinity or adoption or they share or recently shared the same residence”.

Application for a protection order may be brought by the complainant or on behalf of the complainant by any other person, including a counsellor, health service provider, social worker, teacher or a member of the South African Police Service, who has a material interest in the wellbeing of the complainant. An application by such a third party must be with the written consent of the complainant, unless he/she is a minor. A minor, or someone on behalf of a minor, can apply for a protection order either with or without the assistance of a parent, guardian or other person.\textsuperscript{1003}

III. Communal Land Rights Act 11 of 2004\textsuperscript{1004}

South Africa’s Communal Land Rights Act 11 of 2004 ("Communal Land Rights Act") scarcely mentions children or orphans. However, section 22 of the Communal Land Rights Act states that "[…] one member of a land administration committee must represent the interests of vulnerable community members, including women, children and the youth, the elderly and the disabled". Furthermore, in the exercise of its powers and the performance of its duties, it must take measures to ensure "[…] to persons, including women, the disabled and the youth in accordance with the law".\textsuperscript{1005} With respect to the composition of the Board, it is provided that the Board must consist of a number of members of the

\begin{thebibliography}{99}
\item Domestic Violence Act, Section 4.
\item Communal Land Rights Act 20 of 2004, Section 24(3)(a)(i), \url{available at: http://www.ruraldevelopment.gov.za}.
\end{thebibliography}
affected communities, of whom at least "[…] one must represent the interests of child-headed households […] and one must represent the interests of the youth as defined in section 1 of the National Youth Commission Act 19 of 1996". The Communal Land Rights Act does not indicate whether a minor can directly participate in the committee’s or board’s proceedings and represent his/her own interests.


Every High Court serves as an Equality Court for the area of its jurisdiction and the Magistrates Courts are designated as Equality Courts. Proceedings may be instituted by any person acting in his/her own interest, any person acting on behalf of another person who cannot act in his/her own name as well as any person as a member of a group or class of persons.

V. Children’s Act 38 of 2005

Children with the assistance of their representatives may bring cases in domestic courts to challenge violations of children’s rights. Under section 14 of the Children’s Act, "[…] every child has the right to bring, and to be assisted in bringing, a matter to court, provided that matter falls within the jurisdiction of that court". The legal guardian or curator of a child may bring a private prosecution for an offence committed against the child where the Director of Public Prosecutions declines to prosecute.

This right is of general application and not limited to the Children’s Act only. Section 15 states that children have the right to bring a case to the competent court alleging that a right in the Bill of Rights or the Children’s Act has been infringed or threatened.

It is stated that Section 14 and 15 did not change the common law rules with respect to a child’s capacity to litigate, where children have no standing to appear on their own in civil proceedings in court without the assistance of a

1006 Communal Land Rights Act, Sections 26(2)(d)(i) and (iii).


guardian or a curator ad litem. A child older than seven may sue in his/her own name, assisted by his/her guardian or curator ad litem. Under seven years of age, the practice is that the guardian or curator ad litem sues on their behalf.

The Promotion of Administrative Justice Act 3 of 2000 ("Promotion of Administrative Justice Act") allows any person to institute proceedings in a court or tribunal for the judicial review of an administrative action or the failure to take a decision.\textsuperscript{1013}

According to section 45(3) certain courts have exclusive jurisdiction over the following matters "[…] (g) the safeguarding of a child’s interest in property". The Promotion of Administrative Justice Act, however, makes no explicit reference to inheritance claims or disputes involving the distribution of estates.

Section 55 of the Children’s Act states that where a child is involved in a matter before the children’s court and is not represented by a legal representative, and the court is of the opinion that it would be in the best interest of the child to have legal representation, the court must refer the matter to Legal Aid South Africa. In addition, the Constitution provides civil legal aid for children where a "substantial injustice would otherwise result" if the child were not to be given legal aid.\textsuperscript{1014}

Legal Aid South Africa was established by the Legal Aid Act 39 of 2014 and its objects are to make legal aid and legal advice available and to provide legal representation at the expense of the State.\textsuperscript{1015}

Under the Children’s Act, a child or anybody acting in the best interest of the child or anybody acting as a member or in the interest of a group, is entitled to approach the competent court alleging that a right in the Bill of Rights or the Children’s Act has been infringed or threatened.\textsuperscript{1016}

The Children’s Act further states that a child involved in a matter before the Children’s Court has the right to adduce evidence.\textsuperscript{1017}

The Maintenance Act 99 of 1998 states that complaints can be made to the effect that any person legally liable to maintain any other person fails to do so. The Maintenance Court can issue a maintenance order against any person proved to be legally liable to maintain any other person.


\textsuperscript{1016} Children’s Act, Section 15.

\textsuperscript{1017} Children’s Act, Section 58.
iii. CUSTOMARY LAW

As in Bhe, provided that customary law (in particular the rule of primogeniture), is interpreted in line with the Constitution, discriminatory practices that historically were common as a matter of previous customary law in South Africa will not be applied. Furthermore, the Intestate Succession Act now applies to all estates, meaning that customary law will bear no difference in respect of the skin colour of a deceased.

The newly enacted Reform of Customary Law of Succession Act states that the estates of persons subject to customary law who die intestate will devolve under the terms of the Intestate Succession Act, thereby modifying the customary law position and facilitating children’s inheritance claims under the Intestate Succession Act. For further information on mechanisms for facilitating inheritance claims, please see paragraph 2.c.ii.

3. CONCLUSION

South Africa has ratified all the international treaties as listed in paragraph 1. The Constitution itself entrenches several key human rights and, in particular, gives a number of inalienable rights to children in South Africa which, while not specifically addressing issues regarding inheritance rights, goes a long way to protecting children with regards to their right to shelter, education and legal assistance. The Constitution ensures equality before the law and prohibits discrimination by the state on the grounds of gender.

The codified laws of South Africa ensure that there is clear legislative framework which governs those that die both intestate and with a will. While there are various provisions in relation to how the inheritance of “minors” is to be treated, there still appears to be a large reliance on the conduct of the appointed “tutors,” “curators,” and “masters” who have significant powers in relation to the inheritance of children and how property and money is administered. Importantly, statute has been introduced to recognise the decision in Bhe which now ensures that discrimination against women and others with regard to the distribution of black deceased estates is not permitted.

The intestacy position under customary law is now identical to that under codified law. Following the Constitutional Court's decision in Bhe, previous discriminatory customary law rules were declared invalid and it was decided that all inheritance rights claims under customary law would be dealt with under the Intestate Succession Act. This decision was confirmed with the enactment of the Reform of Customary Law of Succession Act. The previous discriminatory customary law rules are now only applicable if specific reference is made to them in a deceased's will. Thus, the Wills Act of 1953 governs the estates of all testate individuals who have executed a valid will and the Intestate Succession Act governs the estates of those who die intestate.

However, it has been noted that Bhe has had virtually no impact on the adjudication of disputes concerning inheritance rights in rural and semi-urban areas of South Africa, as knowledge of the case was virtually non-existent in rural and semi-urban areas of South Africa. In practice then, although codified law applies to all, this has not necessarily filtered to all areas within South Africa.

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1018 The Constitution, Article 9(1).
1019 The Constitution, Article 9(3).
Africa. Despite the supposed supremacy of codified law over customary law, the reality, according to some sources, is that statutory law is poorly implemented and possibly completely ignored.  

However, it has been noted that South Africa is increasingly recognising the importance of addressing the legal rights of children living with HIV/AIDS, as well as those who have been orphaned as a result. The National Strategic Plan 2012-2016 aims to lessen the impact of HIV on orphans, vulnerable children and youths by ensuring they have access to vital social services, including basic education. However, with prevalence of HIV/AIDS as high as it is and the cultural stigma surrounding the disease, particularly in rural areas of the country, more could certainly be done to address this in practice.


## APPENDIX 1 - SHORT SUMMARY TABLE

Note that it will be possible to provide references and narrative explanations in the full table on the next page.

<table>
<thead>
<tr>
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<tr>
<td>In the Constitution</td>
<td>Yes</td>
<td>Does not specify</td>
<td>Does not specify</td>
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<tr>
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<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Does not specify</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
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<td>N/A</td>
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<tr>
<td>In Customary Law (practice)</td>
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<td>No</td>
<td>No</td>
<td>No</td>
<td>N/A</td>
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</table>

Please answer with one of the following responses only:

**Yes** - The law/practice explicitly mentions equality between the two characteristics (Questions 1-4), or relevant codified law/national provisions exist (Questions 5-7). In relation to Question 1, if gender neutral language rather than specifically mentioning gender equality, please specify ‘Yes’ and include an explanatory footnote to this effect;

**No** - The law/practice explicitly discriminates between the two characteristics (Questions 1-4). Not applicable to Questions 5-7;
**Does not specify** - All relevant material was accessed, but there was no information relevant to the question (Questions 1-7);

**Don't know** - It is not possible to say whether all relevant material was accessed, and so a definitive answer cannot be given (Questions 1-7);

**N/A** - The question is not applicable for this type of law, for example if a country does not have codified Customary Law or a Constitution. It is likely that this answer will apply to Customary Law (practice) for Questions 5-7.
### ADDITIONAL QUESTIONS | RESPONSE

1. **How does the legal system define a child? Is the age of majority different for different matters?**

   Both the Children's Act and the South African Constitution state that a child means a person under the age of 18 years old. The Children's Act also goes on to say that a child attains majority when they reach the age of 18 regardless of gender. However, majority status can be acquired by a child under 18, if they get married or are emancipated by order of a Court.

   While the child protection provisions set out in the Bill of Rights and the Children's Act are afforded to all persons under the age of 18, it is still a question for debate as to whether a child under 18 who acquires majority status through marriage remains a 'child' for these purposes and is afforded such protection.

2. **Does the country have a de jure dual legal system (customary or religious law running parallel to the statutory law or common law)?**

   The country has a mixed legal system. Modern South African law consists of a conglomeration of so-called transplanted laws made up of a mixture of Roman-Dutch law and English common law, as well as indigenous laws, referred to as customary law. Customary law is part of modern South African law on a par with (and not subordinate to) the common law (Roman-Dutch law). In Alexkor Ltd v Richtersveld Community it was stated:

   "While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common-law, but to the Constitution".

   The Constitution states that "courts must apply customary law when that law is applicable,

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1023 Children's Act 38 of 2005 Section 1(1) and Constitution of the Republic of South Africa 1996 Section 28(3)
1024 Children's Act 38 of 2005 Section 17
1026 Constitution of the Republic of South Africa 1996 Chapter 2 Section 28
<table>
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<tr>
<th>ADDITIONAL QUESTIONS</th>
<th>RESPONSE</th>
</tr>
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<tbody>
<tr>
<td>subject to the Constitution and any legislation that specifically deals with customary law.</td>
<td>Testate succession occurs where heirs to an estate are determined in a valid will, in which case the Wills Act 7 of 1953 (&quot;Wills Act&quot;) sets out certain formality requirements. If no valid will exists it is referred to as Intestate succession and is governed by the Intestate Succession Act 81 of 1987 (&quot;Intestate Succession Act&quot;) and applies to persons dying intestate (whole or in part) on or after that date. Before the decision in Bhe and Others v Magistrate Khayelitsha and Others (&quot;Bhe&quot;), black members of the population who died intestate and were married by customary law were not treated as falling under the Intestate Succession Act. However, the decision in Bhe changed this and now estates of all persons irrespective of race, gender or culture will be governed by the rules of intestate succession as per the Intestate Succession Act where the deceased has died intestate.</td>
</tr>
<tr>
<td>(2) Notwithstanding the provisions of any law or the common or customary law, but subject to the provisions of this Act and sections 40(3) and 297(1)(f) of the Children’s Act, 2005 (Act No. 38 of 2005), having been born out of wedlock shall not affect the capacity of one blood relation to inherit the intestate estate of another blood relation.</td>
<td>The common law of intestate succession embodied in the Intestate Succession Act has...</td>
</tr>
</tbody>
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1029 Constitution of the Republic of South Africa 1996 Section 211(3)
1032 Bhe and Others v Magistrate Khayelitsha and Others, 2005 (1) SA 580 (CC)
1034 Intestate Succession Act 1897
### ADDITIONAL QUESTIONS

<table>
<thead>
<tr>
<th>Question</th>
<th>Response</th>
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<tbody>
<tr>
<td><strong>3. Does the Country's legal system (ie Civil Law and Customary Law) differentiate between different types of land tenure?</strong></td>
<td>The only apparent differentiation between lands of different tenure is where the property/land is 'in community.' Marriages in community of property occur when any previous or future property, land or debt is split equally between spouses upon marriage and becomes a joint estate. All persons are subject to the legislation relating to inheritance. Where community of property occurs, different rules apply as to intestate succession: the estate must be divided into half before the rules of intestate succession can be applied to the deceased's half.</td>
</tr>
<tr>
<td><strong>4. Does the country have codified legislation governing inheritance rights?</strong></td>
<td>Both the Wills Act and the Intestate Succession Act govern the inheritance rights of the citizens of South Africa. The Wills Act governs citizens (testate), who have drafted and executed a valid will. The Wills Act outlines the formalities required in the execution of the will, its interpretation, the competency of the testator, the power the court has to revoke a will, the effects of divorce or annulment of marriage on a will, the benefits that spouse and descendants of certain person will be entitled to and the...</td>
</tr>
</tbody>
</table>

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1035 Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 Section 2(1)
1038 The Wills Act 7 of 1953 Section 2
1039 The Wills Act 7 of 1953, Section 2D
1040 The Wills Act 7 of 1953, Section 4
1041 The Wills Act 7 of 1953, Section 2A
1042 The Wills Act 7 of 1953, Section 2B
1043 The Wills Act 7 of 1953, Section 2C
### ADDITIONAL QUESTIONS

<table>
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<tr>
<th>Question</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>5.</strong> Does the legal system that governs inheritance rights (if any) ensure equality between male and female children?</td>
<td>The Constitution ensures equality before the law and prohibits discrimination by the state on the grounds of gender. There does not, however, seem to be any reference to gender in the Intestate Succession Act. Nevertheless, the landmark judgement in <em>Bhe</em> ruled that any preference given to a male over a female for the purposes of inheritance constitutes discrimination before the law and classified all legislation that allows for such discrimination as unconstitutional and therefore invalid. This means all South African females regardless of age or social status, are on an equal footing with any male person in terms of inheritance rights. After this decision, the Reform of Customary Law of Succession Act was enacted so as to give widows and daughters equal inheritance rights with widowers and sons.</td>
</tr>
<tr>
<td><strong>6.</strong> Does the legal system that governs inheritance rights (if any) ensure equality between biological and adopted children?</td>
<td>Yes. The Intestate Succession Act states that an adopted child is deemed to be the descendant of its adopted parents and not of its biological parents save in certain circumstances. The Children's Act also states that a parent includes an adoptive parent, so it would appear that the relationship between biological and adopted parents is equal.</td>
</tr>
<tr>
<td>ADDITIONAL QUESTIONS</td>
<td>RESPONSE</td>
</tr>
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<tr>
<td>7. Does the legal system that governs inheritance rights (if any) ensure equality between children born in and out of wedlock?</td>
<td>The Intestate Succession Act ensures equality between children born in and out of wedlock. The Intestate Succession Act clearly stipulates that if children are born out of wedlock, it shall not affect the capacity of one’s blood relation to inherit the intestate estate of another blood relation.(^{1053}) This is further supported by provisions within the Children’s Act 2005.(^{1054})</td>
</tr>
<tr>
<td>8. Does the legal system that governs inheritance rights (if any) ensure equality between children born from a monogamous and polygamous union?</td>
<td>Polygamous marriages are a product of customary law. All customary marriages which were deemed as valid under customary law when the Recognition of Customary Marriages Act 1998 (&quot;Recognition of Customary Marriages Act&quot;)(^{1055}) came into force are recognised and treated as valid marriages for all legal purposes.(^{1056}) Any customary marriages entered into after the Recognition of Customary Marriages Act is treated as a valid marriage so long as it complies with the requirements of the Recognition of Customary Marriages Act.(^{1057}) All children of the deceased are entitled to inherit and no differentiation is made between children born from a civil marriage or customary marriage,(^{1058}) whether polygamous or not.</td>
</tr>
<tr>
<td>9. Are there different legal rules for testate and intestate succession?</td>
<td>The Wills Act governs testate individuals who executed a valid will and any codicil or other testamentary writing subject to the provisions set out within the Wills Act.(^{1059}) The Wills Act provides for any amendments made after the will was executed(^{1060}) and if the Court is satisfied</td>
</tr>
</tbody>
</table>

\(^{1053}\) Intestate Succession Act 81 of 1987 Section 2

\(^{1054}\) Children’s Act 38 of 2005 Section 297(1)(f)

\(^{1055}\) Customary Marriages Act 120 of 1998

\(^{1056}\) Customary Marriages Act 120 of 1998, Section 2(1)

\(^{1057}\) Customary Marriages Act 120 of 1998, Section 2(2)


\(^{1059}\) The Wills Act 7 of 1953, Section 2(1).

\(^{1060}\) Wills Act, Section 2(1).
that a document or an amendment of a document, either drafted or executed, by the deceased was intended to be his will or an amendment of his will, the Court shall order the Master to accept that document or the amended document as set out in the Administration of Estate Act 66 of 1965 ("Administration of Estates Act").

The Intestate Succession Act governs all intestate individuals (those who did not execute a will), either wholly or in part. The Intestate Succession Act outlines the following:

- If survived by a spouse, but not by a descendant, such spouse shall inherit the intestate estate.
- If survived by a descendant, but not by a spouse, such descendant shall inherit the intestate estate.
- If survived by a spouse as well as a descendant, the spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed the value outlined by the Minister of Justice by notice in the Gazette and such descendant shall inherit the residue (if any) of the intestate estate.
- If the deceased does not have a spouse or a descendant, but is survived by both his parents, his parents shall inherit the intestate estate in equal shares, or if survived by one of his parents, the surviving parent shall inherit one half of the intestate estate.

1061 Wills Act, Section 2(3).
1062 Intestate Succession Act 81 of 1987, Section 1.
1063 Intestate Succession Act, Section 1(a).
1064 Intestate Succession Act, Section 1(b).
1065 Intestate Succession Act 81 of 1987 Section 1(c).
1066 Intestate Succession Act, Section 1(c)(i).
1067 Intestate Succession Act, Section 1(c)(ii).
1068 Intestate Succession Act, Section 1(d)(i).
and the descendants of the deceased parent the other half. However, if there are no such descendants, the surviving parent shall inherit the whole intestate estate.\textsuperscript{1069}

- If the deceased is not survived by a spouse or a descendant or a parent, but is survived by descendants of the deceased mother and father who are related to the deceased through him/her, or descendants of the deceased parents related to him through both such parents shall divide the intestate estate into two equal shares with descendants from the mother’s side inheriting one half and descendants from the father’s side inheriting the other half.\textsuperscript{1070}

If the deceased is not survived by a spouse, descendant, parent or a descendant of a parent, the other blood relation(s) of the deceased who are related to him nearest in degree shall inherit the intestate estate in equal shares.\textsuperscript{1071}

10. Does the legal system specify the percentages of inheritance to be distributed to children?

The Intestate Succession Act specifies the inheritance distribution given to children. If the deceased is survived by their child, and not by their spouse, then such child shall inherit the intestate estate.\textsuperscript{1072} If the deceased is survived by both his spouse and child, then the spouse shall inherit a child's share of the intestate estate or so much of the intestate estate that does not exceed in value the amount fixed issued by the Minister of Justice by notice in the Gazette, whichever is the greater, and the child shall inherit the residue (if any) of the intestate estate.\textsuperscript{1073}

\textsuperscript{1069} Intestate Succession Act, Section 1(d)(ii).
\textsuperscript{1070} Intestate Succession Act, Section 1(e)(i).
\textsuperscript{1071} Intestate Succession Act, Section 1(f).
\textsuperscript{1072} Intestate Succession Act, Section 1(b).
\textsuperscript{1073} Intestate Succession Act, Section 1(c).
ADDITIONAL QUESTIONS | RESPONSE
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11. Does the legal system address the rights of orphaned children to transact land, houses and property that they inherit? | The Intestate Succession Act states that if a deceased dies intestate and is survived by a descendant, but not a spouse, such descendant shall inherit the deceased’s estate. This means orphaned children are entitled to inherit the estate. The procedure which must be followed to administer a deceased estate is prescribed by the Administration of Estates Act. The Master has jurisdiction in respect of “the property belonging to a minor, including property of a minor governed by the principles of customary law”. The natural guardian of a minor is entitled to receive movable property on behalf of the minor with the guardian being accountable to the Master. If the Master becomes aware that a minor owns property which is not under the care of a guardian, tutor or curator, he may initiate a process (by Notice in the Gazette) to appoint one. A guardian or tutor needs the Master’s consent to alienate the minor’s immovable property.

12. Does the legal system link inheritance rights to residency/ citizenship? | The Intestate Succession Act does not mention residency or citizenship. The Administration of Estates Act allows remittance of monies to minors or persons under curatorship domiciled outside South Africa. All property located in South Africa is subject to the three main statutes governing inheritance:

- The Administration of Estates Act.
- The Wills Act.
- The Intestate Succession Act.

There is no separate law for foreigners. Immovable property is not treated any different to other types of moveable assets for inheritance purposes. Inheritances issues of

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1074 Intestate Succession Act, Section 1 (b).
1076 Administration of Estates Act, Section 43.
1077 Administration of Estates Act, Section 73.
1078 Administration of Estates Act, Section 80.
1079 Administration of Estates Act, Section 45.
### ADDITIONAL QUESTIONS | RESPONSE
--- | ---
**13. Does the legal system provide for automatic inheritance for sole survivor children?** | The Intestate Succession Act states that if a deceased dies intestate and is survived by a descendant, but not a spouse, such descendant shall inherit the deceased’s estate.  

**14. Does the legal system mandate the appointment of a trustee/administrator/guardian for sole survivor children?** | If the Master becomes aware that a minor owns property which is not under the care of a guardian, tutor or curator, he may initiate a process (by Notice in the Gazette) to appoint one. A guardian or tutor needs the Master’s consent to alienate the minor’s immovable property.  

**15. If such an appointment is mandated, does codified law enumerate:**

i. appointee’s rights/responsibilities to hold the property of a sole survivor child until he/she ceases to be a minor?  

ii. penalties to be imposed on an appointee who misuses the property/wrongfully deprives a child of property to which they are entitled?  

iii. mechanisms for a sole survivor child to challenge an appointee and gain access to court?  

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<tr>
<td>The Master of the High Court supervises the administration of deceased estates to ensure an orderly winding up of the financial affairs of the deceased, and the protection of the financial interests of the heirs. The Administration of Estates Act requires the Master to be notified (by prescribed form) when someone dies (within 14 days if the person dies in South Africa) or at any time (for a person who dies outside South Africa). The Master has jurisdiction in respect of the property belonging to a minor, including property of a minor governed by the principles of customary law, or property belonging to a person under curatorship or to be placed under curatorship. The natural guardian of a minor is entitled to</td>
<td></td>
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</tbody>
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1081 Intestate Succession Act, Section 1(b).  
1082 Intestate Succession Act, Section 73  
1083 Intestate Succession Act, Section 80  
1085 Administration of Estates Act, Section 7.  
1086 Administration of Estates Act, Section 4.
receive movable property on behalf of the minor1087 with the guardian being accountable to the Master. The money or movable property is only paid/ delivered to the guardian if the Master is satisfied that this will be given to the minor “at the time when he is to become entitled to the payment of such sum of money or delivery of such property”.1088 If the Master becomes aware that a minor owns property which is not under the care of a guardian, tutor or curator, he may initiate a process (by Notice in the Gazette) to appoint one.1089 A guardian or tutor needs the Master’s consent to alienate the minor’s immovable property.1090

The Master can also remit money abroad to where the minor is domiciled.1091

Section 46 of the Administration of Estates Act requires an Executor who fails to pay over money as mandated under the Administration of Estates Act to pay into the estate double the amount. Under Section 50, an executor can be personally liable for making the wrong distribution.

The Master is entitled to appoint a tutor or curator on application1092 or on becoming aware of a minor who owns property in South Africa but is not under the care of a guardian, tutor or curator.1093

The Administration of Estates Act also allows the Master to create a guardian account and "open in the books of the guardian’s fund an account in the name of the person to whom that

1087 Administration of Estates Act, Section 43.
1088 Administration of Estates Act, Section 43(2).
1089 Administration of Estates Act, Section 73.
1090 Administration of Estates Act, Section 80.
1091 Administration of Estates Act, Section 45.
1092 Administration of Estates Act, Section 72.
1093 Administration of Estates Act, Section 73.
### ADDITIONAL QUESTIONS

| **16. Is there regulation of the management of inheritance for those sole survivor children with no legal guardian?** | **RESPONSE**
<table>
<thead>
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<tbody>
<tr>
<td>Yes. If the Master becomes aware that a minor owns property which is not under the care of a guardian, tutor or curator, he may initiate a process (by Notice in the Gazette) to appoint one.¹⁰⁹⁷</td>
<td></td>
</tr>
</tbody>
</table>

| **17. Where is Customary Law applied (in traditional non-State forums, formal State Courts, by local leaders/chiefs etc.)?** | **RESPONSE**
<table>
<thead>
<tr>
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<tbody>
<tr>
<td>The Constitution states that &quot;courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law&quot;.¹⁰⁹⁸</td>
<td></td>
</tr>
</tbody>
</table>

| **18. How would you qualify the proportion of property claims resolved under Customary Law?** | **RESPONSE**
<table>
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<tbody>
<tr>
<td>Information not available.</td>
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</table>

| **19. Does the country have a court or tribunal in which orphaned children/their representatives can bring an action enforcing their legal right to property? If so, is there any case law specifically regarding orphaned children's inheritance** | **RESPONSE**
<table>
<thead>
<tr>
<th></th>
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<tbody>
<tr>
<td>Section 14 of the Children's Act 38 of 2005 gives every child the right to bring, and to be assisted in bringing, a matter to a court which falls within the jurisdiction of that court.</td>
<td></td>
</tr>
</tbody>
</table>

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¹⁰⁹⁴ Administration of Estates Act, Section 86.
¹⁰⁹⁵ Administration of Estates Act, Section 90.
¹⁰⁹⁶ Administration of Estates Act, Section 102.
¹⁰⁹⁷ Administration of Estates Act, Section 73.
¹⁰⁹⁸ The Constitution, Section 211(3).
<table>
<thead>
<tr>
<th>ADDITIONAL QUESTIONS</th>
<th>RESPONSE</th>
</tr>
</thead>
<tbody>
<tr>
<td>20. Are there national provisions for legal aid in civil/administrative claims,</td>
<td>The Legal Aid Act 39 of 2014 established a national public entity as provided for in the Public Finance Management Act, known as Legal Aid</td>
</tr>
<tr>
<td>including inheritance? If so:</td>
<td>South Africa. The Legal Aid South Africa website states that legal aid is available to children only if their family meets the means test (ie earn less than R6,000.00 per month). Otherwise Legal Aid is available to children in a criminal case.</td>
</tr>
<tr>
<td>Do these provisions contain special measures or provisions regarding children?</td>
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</tbody>
</table>
INTRODUCTION

This report examines the inheritance rights of children in Swaziland, specifically in relation to children who are orphans, having lost one or both parents to HIV/aids. This issue is most significant in Swaziland given that the country is ranked first in the world in terms of the HIV/aids adult prevalence rate. Life expectancy is one of the lowest in the world, leaving a very young population; with more than 30% of the populace under 14 years old and only 10% over 65. As a result, many children have become orphaned or vulnerable; in 2010 an estimated 104,026 children in Swaziland were classified as such, given the cultural stigma surrounding HIV/aids, children who have lost parents to this disease are at the highest risk of displacement and confiscation of movable and immovable properties left to them.

This report is split into the following paragraphs:

1. Compliance with international law
2. The national legal system
   A. general provisions relating to inheritance rights
   B. specific provisions relating to sole survivor children and inheritance
   C. mechanisms for facilitating children's inheritance claims
3. Conclusion

1. COMPLIANCE WITH INTERNATIONAL LAW

Swaziland is a dualist state, and therefore views international law and domestic law as two separate legal systems. As such, the ratification of or accession to international treaties does not in itself provide protection for individuals in Swaziland. Section 238(1) of The Constitution of the Kingdom of Swaziland Act 2005 ("the Constitution") states:

"unless it is self-executing, an international agreement becomes law in Swaziland only when enacted into law by Parliament".

Indeed, Swaziland has ratified or given accession to a number of international treaties, but has since failed to take any further steps to implement many of their provisions domestically.
Below is the status of Swaziland's commitment to the treaties listed in the introduction to the overall report.

<table>
<thead>
<tr>
<th>International Treaties</th>
<th>Signature Date</th>
<th>Ratification/Accession Date</th>
</tr>
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<tbody>
<tr>
<td>Convention on the Rights of the Child (&quot;CRC&quot;)</td>
<td>22 August 1990</td>
<td>7 September 1995</td>
</tr>
<tr>
<td>International Covenant on Economic, Social and Cultural Rights (&quot;IESCR&quot;)</td>
<td>n/a</td>
<td>26 March 2004</td>
</tr>
<tr>
<td>International Covenant on Civil and Political Rights (&quot;ICCPR&quot;)</td>
<td>n/a</td>
<td>26 March 2004</td>
</tr>
<tr>
<td>Convention on the Elimination of All Forms of Discrimination Against Women (&quot;CEDAW&quot;)</td>
<td>n/a</td>
<td>26 March 2004</td>
</tr>
<tr>
<td>UN General Assembly Special Session (&quot;UNGASS&quot;) Declaration of Commitment on HIV/AIDS</td>
<td>n/a</td>
<td>June 2001</td>
</tr>
<tr>
<td>(&quot;Declaration&quot;)</td>
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</tbody>
</table>

<table>
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<tr>
<th>Regional treaties</th>
<th>Signature date</th>
<th>Ratification/ Accession Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>African Youth Charter</td>
<td>n/a</td>
<td>5 Oct 2012</td>
</tr>
</tbody>
</table>

2. NATIONAL LEGAL SYSTEM

Swaziland has a dual legal system comprised of Civil Law and Swazi Customary Law, with the Constitution as the overarching legal authority.

All law is subject to the Constitution of Swaziland, the current version of which came into force on 26 July 2005. The Constitution makes provision for constitutional supremacy, with section 2(1) stating, "this Constitution is the supreme law of Swaziland and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void."

The Civil Law system is drawn from a variety of sources, namely legislation, common law, judicial precedent, authoritative texts and royal decrees. Civil Law is universally applicable within Swaziland and is administered by the Magistrates' Courts, High Court and Supreme Court.

1103 “Committed” (rather than ratified/acceded to)
Customary Law is traditionally unwritten and has been maintained by oral tradition. It applies to those who are ethnically Swazi, a proportion that makes up more than 90% of the population of the country and administered by both the Swazi National Courts\(^{106}\) ("Swazi Courts"), and by community courts which are presided over by local Chiefs ("Chiefs’ Courts"). Customary Law is also applied by family councils that convene on an ad hoc basis to deal with various matters affecting the homestead.\(^{107}\) These councils are usually comprised of every adult member of the family group, including cousins, parents (if still living), eminent neighbours and the Chief.\(^{108}\)

Despite the fact that Customary Law is not a written law, its application is sanctioned by the Constitution\(^{109}\) and by national legislation\(^{110}\) and it is given legal status in the same manner as Civil Law. Further, both Civil Law legislation and statutory instruments direct certain matters to the Swazi Courts; for instance, the High Court issued a Practice Directive in 2011 stating the following:

> Where both parties are Swazis, and the cause of action is, in the opinion of the clerk of the court, one suitable to be heard in a Swazi Court of appropriate jurisdiction established or recognised under the Swazi Courts Act 1950, or the Swazi Administration Act, 1950 or its successor and permissible under the Constitution, the clerk may refuse to issue summons, and may order the plaintiff to commence the action in such Swazi court or other court.

> At any time after the issue of summons commencing action in any case where both parties are Swazis, the court may order that the action be transferred to a Swazi court of appropriate jurisdiction or to such other court as specified in this section.\(^{111}\)

Although Customary Law is elevated to equal legal status as Civil Law, it does not seem to be subject to the same accountability mechanisms. In theory, sentences passed by the Swazi Courts are officially subject to review by the Courts of Appeal and the High Court.\(^{112}\) However, in practice, cases are very rarely approved by the Judicial Commissioner to be referred to the High Court. There is also no clear avenue of appeal or review on decisions made by the Chiefs’ Courts, even though many people are sentenced in the Chiefs’ Courts, even after they have been convicted or acquitted in a Civil Court.\(^{113}\) Given the importance placed by the community on these

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106 Established by the Swazi Courts Act 80 of 1950, section 7; from Adinkrah, K.O., “Folk Law is the Culprit: Women’s ‘Non-Rights’ in Swaziland” (1990), available at: [http://www.jsp.bham.ac.uk/volumes/30-31/adinkrah-art.pdf](http://www.jsp.bham.ac.uk/volumes/30-31/adinkrah-art.pdf)


109 Section 252(2), Swaziland Constitution


111 Practice Direction No. 2 of 2011 at s 6 and 7


decisions made under Customary Law, evidenced by the ostracism of individuals found guilty, the lack of safeguards and ‘double jeopardy’ sentencing is problematic. 1114

For the purposes of this report, both Civil Law and Customary Law are addressed, insofar as the information could be accessed.

A. GENERAL PROVISIONS RELATING TO INHERITANCE RIGHTS

Both Civil and Customary Law address inheritance rules for orphaned children.

Whether Civil or Customary Law governs the inheritance of a particular child depends on how the marriage of the parents was concluded; a customary marriage would be governed by Customary Law, whereas a civil marriage would be subject to the provisions of Civil Law. However, as couples often have both civil and customary ceremonies when they marry, it is often unclear under which system the marriage ought to operate. This in turn leads to a lack of clarity in terms of the inheritance rights of the children from the marriage. 1115

Neither the Civil nor Customary systems provide guidance on percentages of a parent(s)’ estate to be distributed amongst surviving children. However, it is important to note that under Customary Law such apportionments would only take into account male children (see below paragraph 2.a.iii).

It must also be noted that the age of majority in Swaziland varies for different purposes (for instance, the age of criminal responsibility or the age of consent for marriage), with no consistent definition of a child. The UN Committee on the Rights of the Child has expressed concern at this lack of consistency, leading to confusion about which laws and practices apply to young people of a certain age. 1116

i. THE CONSTITUTION

The Constitution distinguishes two types of land in relation to which citizens may be granted rights; privately held (“Title Deed Land”) and communal land (“Swazi Nation Land”). Customary Law regulates access to communal land, whereas Civil Law governs privately-owned land. It is worth noting that two-thirds of Swazis live on Swazi Nation Land, which is owned by the King and held on trust. 1117

Section 14(1)(c) and (d) of the Constitution grants every citizen the right to “protection of the privacy of the home and other property rights of the individual [and] protection from deprivation of property without compensation”. Under these provisions, children are granted equal property rights along with every other Swazi citizen.

1117 See paragraphs 211(1) of the Constitution which states that “all land (including any existing concessions) in Swaziland, save privately held title-deed land, shall continue to vest in iNgwenyama [the King] in trust for the Swazi Nation”.
Section 14(3) of the Constitution furthers states that: "A person of whatever gender, race, place of origin, political opinion, colour, religion, creed, age or disability shall be entitled to the fundamental rights and freedoms of the individual […]"

Section 19(1) of the Constitution ensures each person has "the right to own property either alone or in association with others", thereby including children in the general right to own property.

Section 20(2) of the Constitution states that:

For the avoidance of any doubt, a person shall not be discriminated against on the grounds of gender, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion, age or disability.

Under this clause, children have the basic right to equal treatment, and this could be construed to be regardless of whether they are born from a polygamous union, out of wedlock or adopted. No distinction may be made between male and female.

Section 28(1) of the Constitution further states that: "Women have the right to equal treatment with men and that right shall include equal opportunities […]"

Further, the Constitution explicitly guarantees equal rights for children born out of wedlock through sections 29 (4) and 31, which state respectively:

Children whether born in or out of wedlock shall enjoy the same protection and rights.

For the avoidance of doubt, the (common law) status of illegitimacy of persons born out of wedlock is abolished.

In addition, section 29(7)(b) of the Constitution states that "a child is entitled to reasonable provision out of the estate of its parents". Although this does not go so far as to expressly confer a right of inheritance, it does establish a constitutional right of care.

The Constitution seems to provide protection to non-citizens as section 14(3) (above), states that "place of origin" will not be a ground for discrimination. However section 2(2) states that "all the citizens of Swaziland have the right and duty at all times to uphold and defend this Constitution" (emphasis added).

ii. CIVIL LAW

Inheritance rights are dealt with in a number of Civil Law instruments, the main ones being:

- A. the Administration of Estates Act 1902 ("Administration Act"), which governs the process of inheritance in cases where the deceased has made a will;

- B. the Intestate Succession Act 1953 ("Succession Act"), where no will has been drawn; and

- C. to some extent, the newly passed Children's Protection and Welfare Act 2011 ("Children's Protection Act") which confers the right of maintenance.
I. The Administration Act

The Administration Act governs the administration of a person’s estate when a will has been made.

At the time of writing this draft report, the core provisions of the Administration Act could not be located, but may be found upon further research. However, it seems as though, as with the Succession Act, the provisions of the Administration Act exclude “Africans” who are governed by Customary Law, and thus it is unclear to what extent its provisions would apply to the majority of the population. 1118

In practice, this Act does not appear to be a piece of legislation that is commonly referred to in establishing or enforcing inheritance rights.

II. The Succession Act

The Succession Act governs circumstances where a person dies without leaving a will. However, it is important to note that the Succession Act was not drafted with the intention of protecting the inheritance rights of the Swazi majority in the country, but rather were drafted with the European settlers in mind. This is made evident in section 4, which states:

This Act shall not apply to any African if the estate of such African is required to be administered and distributed according to the customs of the tribe or people to which the African belonged […]

Consequently, where a Swazi couple marries in a civil ceremony, or with a traditional and civil ceremony, it is unclear whether the surviving spouse of a deceased person, or their children, would benefit from the provisions of the Succession Act.

Under the Act, sections 2(2) and 2(3) guarantee protection of a child’s share (biological or adopted1119) in their parent’s estate, whether the husband and wife are joint owners or otherwise. The surviving spouse’s share of the deceased person’s property is prevented from encroaching on the child/children’s entitlement past a certain monetary limit.

Children born out of wedlock or born from polygamous marriages are not specifically provided for under the Succession Act. The Act also does not mention residency as a requirement for inheritance.

III. The Children’s Protection Act

The Children’s Protection Act defines a child as “a person under the age of eighteen years”1120. This relatively new Act seems an important piece of legislation to safeguard the welfare of children through the protection of property (sections 42

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1119 Succession Act, Section 2(6)
1120 Children’s Protection Act, Section 2
to 47) and provision of maintenance (sections 212 to 213) by family members or legally appointed guardians.

The Act also upholds the principles of equality established in the Constitution by stating that:

A child shall not be discriminated against on the grounds of gender, race, age, religion, disability, health status, custom, ethnic origin, rural or urban background, birth, socio-economic status, refugee status or other status. 1121

The Act goes further to explicitly ensure the equality of rights of children born in and out of wedlock, stating that:

A child has a right to a reasonable provision out of the estate, life insurance or pension fund of a deceased parent whether or not born in wedlock or orphaned. 1122

More importantly perhaps, in contrast to earlier legislation discussed above, the Act also decrees its superiority to any discriminatory practices within Customary Law, stating that whilst the Act is not intended to “prevent, discourage or displace the application of informal and traditional regimes”, 1123 its provisions will apply “where there is anything to the contrary or less protective or less promotive in any law”. 1124

However, despite these important provisions, the Act does not specifically establish a right of inheritance or provide a mechanism by which property can be vested in children, so its utility for promoting such rights is limited.

It must also be noted that this Act was only brought into force in November 2012, so evidence of its application and effectiveness is scarce, and it is still unclear how it interacts with the pre-existing Administration Act and Succession Act and with Customary Law in practice.

iii. CUSTOMARY LAW

Despite the existence of the above legislation, in practice, Customary Law remains the system that governs inheritance matters for the large majority of the population of Swaziland.

Customary Law establishes and maintains traditional norms around inheritance. Women and children are viewed as belonging to, and under the protection of, the male head of the family (being either the husband or the father) and are therefore not granted the right to own property. As such, upon the death of the male head, the responsibility for his widow and children, along with the estate, is passed on to his extended family (in the first instance being his brothers). Correspondingly, upon the death of a child’s mother,

1121 Section 4, Children’s Protection Act
1122 Section 17, Children’s Protection Act
1123 Section 3(3), Children’s Protection Act
1124 Section 3(4), Children’s Protection Act
responsibility for their care remains with the father, and the estate remains intact as all property is held under his name.

Matters of inheritance under Customary Law are predominantly administered through family councils. A family council comprises every adult member of the particular family group of the deceased, usually including siblings, maternal cousins, parents (if still living), eminent neighbours, and the Chief. The wife/wives of the deceased and their respective children are also given a place on the council, although it is unclear how much input they have into the decision making process.  

The family council seems to hold the ultimate power within the homestead to administer a man's estate. This can be seen, for example, in the process of appointing a successor; a man may indicate his preferred heir during his lifetime and may even choose his son or daughter as the heir. However, his choice must be confirmed by the family council, which can ignore his wishes if they so decide.

Under Customary Law, there is a clear right of inheritance, the application of which is determined by order and status of birth, and by gender. The principle of primogeniture guarantees a right to inheritance for sons of the deceased (with the eldest son from a monogamous union and the eldest son of each house in a polygamous household acquiring the most significant share of the estate). Female children have no right of inheritance to the estate of the deceased father, although responsibility for their care and provision theoretically is passed to other family members.

It is noteworthy that whilst male children of a polygamous marriage are granted inheritance rights, male children who were born out of wedlock are usually denied such rights. However, in some indigenous communities it is accepted that a man may appoint a son born out of wedlock to be his successor, subject to the man paying the son’s mother damages. If the man subsequently marries the son’s mother, the son instantly becomes ‘legitimised’ and is entitled to a share in his father’s estate as with a son born within marriage.

Under Customary Law, there is often no obvious distinction between the way that an estate is dealt with if the deceased has made a will and if they have not. Wills are not usually written documents, rather verbal statements witnessed by family members, and these are considered but can be disregarded by the family council when dealing with the estate. This leaves the child of the deceased vulnerable to the will of the family council rather than the child's parent(s).

Even in situations where a written will has been made and observed to the extent of moveable property, the widow and children of the deceased may still be forcibly evicted by the family council from their family home if it is located on Swazi Nation Land (belonging to

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1127 Social Institutions & Gender Index: Swaziland, available at: www.genderindex.org/country/swaziland
the King). Although the Constitution vests the power to manage Swazi Nation Land in a Land Management Board, in practice the family council administers it and it usually does not form part of the estate of the deceased man.

B. SPECIFIC PROVISIONS RELATING TO SOLE SURVIVOR CHILDREN AND INHERITANCE

i. THE CONSTITUTION

The Constitution does not contain provisions specific to sole survivor children (ie whose parents are both deceased).

ii. CIVIL LAW

I. Succession Act

The Succession Act does not contain provisions specific to sole survivor children.

II. The Children's Protection Act

The Children's Protection Act does provide a general framework for the maintenance of sole survivor children and the administration of any property that the child owns (whether through inheritance or otherwise), although, as mentioned above, does not actually grant a right of inheritance.

In particular, the Children's Protection Act:

1) Provides for the appointment of a legal guardian of an orphaned child.

Section 203 (1) provides for the appointment of a guardian for a child or child's estate, through a will made by the child's parent(s), a court order, the child's family, the Master of the High Court or a Chief.

Section 206 grants further powers to the Court to appoint a guardian, stating that:

The Children's Court may appoint a guardian on the application made by any person where the child's parents are no longer living, or cannot be found and the child has no guardian and there is no other person having parental responsibility for him or where the parents of the child are no longer living together.

The duties of a guardian are to extend until the child reaches 18 years of age. After this, only under exceptional circumstances and with the permission of the court may guardianship be extended.

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1128 Section 211, Swaziland Constitution
1129 Section 212, Swaziland Constitution
1131 Children's Protection Act, section 203(1)
1132 Children's Protection Act, section 208(1)
2) Imposes a duty of responsibility for and maintenance of the child.

Section 203(6) states that the guardian need not have actual custody of the child, but will have:

The power and responsibility to administer the estate of the child and in particular to receive and recover and invest the property of the child in his own name for the benefit of the child;

The duty to take all reasonable steps to safeguard the estate of the child from loss or damage;

The duty to produce and avail accounts of the child's estate to the parent or custodian of the child or to such other person as the Children's Court may direct, or to the Children's Court, as the case may be, on every anniversary of the date of his appointment; and

To produce any account or inventory in respect of the child's estate when required to do so by the Children's Court.

Further, section 212 imposes a duty of maintenance, stating that:

A parent or any other person who is legally liable to maintain a child or contribute towards the maintenance of the child is under a duty to supply the necessities of food, clothing, health, life, education and reasonable shelter for the child.

An application for a maintenance order in respect of a child may be made to the court by a child, or by: their parent; their guardian; their relatives; a Chief; a social worker; or “any other person”.1133 The application can be made against any person who is liable for the child's maintenance or for a contribution towards such maintenance. Section 221 provides for the enforcement of a maintenance order in the event that it is not satisfied.

3) Provides legal recourse in the event that the guardian fails to fulfil their duties.

Section 211 of the Act states:

Any guardian of the estate of a child who -

(a) neglects to receive and safeguard any asset forming part of the estate, misapplies any such asset to loss, waste or damage; or

(b) fails to produce to the Children's Court or the parent or guardian of the child any account or inventory required by the Children's Court; or

(c) produces any such inventory which is false,
commits an offence and is liable on conviction to a fine not less than fifteen thousand emalangeni or to imprisonment for a term not exceeding five years or to both.

iii. CUSTOMARY LAW

Due to the great emphasis traditionally placed on the family unit within Swazi culture, it is expected that the orphaned child will be cared for by their extended family until the child reaches an age at which they can inherit their father's property (if they are male) or marry into another family (if they are female). The child does not have input into the decision to determine the member of the family who is to care for them.

As part of a 'Community Leaders' programmatic response to the problem of the vulnerability of AIDS orphans, the government has urged community leaders to influence decisions by the family councils to allow orphans to remain on land that would otherwise be redistributed after their parents' death.\(^{1134}\)

C. MECHANISMS FOR FACILITATING CHILDREN'S INHERITANCE CLAIMS

There are no frameworks within Civil or Customary Law that specifically facilitate the enforcement of children's inheritance rights; however, children (or their representatives) have the constitutional right to, in theory, pursue a course of action to defend their entitlement to inheritance.

No information was found on the precise percentage of cases dealt with under each system, though as indicated previously, it seems that the great majority of issues in family and property matters, including inheritance law, are dealt with under Customary Law by family councils.

i. THE CONSTITUTION

As noted above, the Constitution makes provision for constitutional supremacy, with section 2(1) stating, "this Constitution is the supreme law of Swaziland and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void."

This provision endows the people of Swaziland with the rights set out in the Constitution and provides an official recourse for those who are placed in a disadvantaged position by other laws. As such, there is, theoretically at least, recourse for children (or their representatives) to challenge both Civil and Customary Law that denies them their right to inheritance.

Equally section 14(1)(a) of the Constitution sets out the fundamental human rights and freedoms enshrined by the Constitution as being: "Respect for life, liberty, right to fair hearing, equality before the law and equal protection of the law."

In reality though, the effectiveness of the Constitution for the protection of the rights of children in relation to inheritance rights appears to be limited. Attempts have been made to bring legislation relating to women's property rights in line with the principles of equality enshrined in the Constitution, but none have been ultimately successful, and all legislative provisions in relation to family and domestic matters remain unchanged.  

ii. CIVIL LAW

Although the Children's Protection Act provides for enforcement of maintenance rights, no legislation provides for specific enforcement of children's inheritance rights, nor was any case law specifically relating to children's inheritance rights found.

Even if children had recourse within the courts to enforce their inheritance rights, most would still be barred from taking further action due to accessibility issues. There is no discrete children's court in Swaziland, and no national provision for a legal aid programme to assist children to bring matters before the Court. Although there are a limited number of NGOs and other private institutions which provide general legal aid in such matters as maintenance and inheritance, their resources are greatly constrained and the capacity in which they can provide support, particularly to children, is unclear.

Indeed, the NPA (defined at paragraph 2.c.iv. below) advocates for the establishment of a 'National Children Coordination Unit', which, among other responsibilities, would assist in facilitating co-operation with existing legal aid providers and NGOs to give support to children within the court system.

iii. CUSTOMARY LAW

As noted, the great majority of inheritance rights matters are dealt with under Customary Law by the family council. Given Customary Law has traditionally been passed down orally from generation to generation, the system has not been comprehensively documented; however, it is clearly an environment in which many children are denied the right to inheritance without challenge, and even for those that have such a right, there seems to be no means of enforcement available.

iv. GOVERNMENT POLICY

In 2010 Swaziland's National Children Co-ordination Unit drafted a National Plan of Action for Most Vulnerable Children ("NPA") for 2011-2015. The NPA aligns itself with goals 65, 66 and 67 of the UNGASS Declaration and is intended to provide a bridge between the National Children's Policy of 2008.

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1137 The final draft National Plan of Action for Children 2011-2015 can be found at the following address: http://www.washinschoolsmapping.com/projects/pdf/Swaziland%20National%20Plan%20of%20Action%20for%20Children.pdf
This NPA is still in draft form and has not been implemented, and does not include specific provision for inheritance, so its utility is questionable. However, it does provide an indication of the framework within which defects in children's inheritance rights issues may be addressed in the future.

Notably, part 3.7.4 of the NPA addresses the children's policy issue of care and support, including their right to basic needs including shelter. The broader outcomes following this objective are:

Improved co-ordination and monitoring of quality care and support services for children;

Improved capacity for government, community leaders, caregivers and families on their roles and responsibilities that affect children; and

Improved capacity for provision of vulnerable children with basic needs such as health, emotional support and a safe environment to foster security and belonging.
3. **CONCLUSION**

Despite the particularly vulnerable position of children in Swaziland, it appears that the country is making some progress in terms of their protection. The government of Swaziland was ranked number 9 in the 2013 Child-Friendliness Index Rankings, which is a significant improvement from their 43rd ranking in the first survey of 2008.\(^{1138}\)

Swaziland has readily ratified and given accession to a number of international treaties which provide children with fundamental rights. The government has reflected these principles in the Constitution, taking the further step of granting specific rights relating to the care of children, their maintenance and protection, and the prohibition of discrimination on the grounds of gender or birth status.

However, there remains a gap in the Civil Law in terms of the codification of a legal right to inheritance, and the provision of mechanisms for enforcement of this right. The Succession Act and the Administration Act remain limited and outdated; a remnant from the colonial influence on Swaziland's history when the laws were formed by a ruling minority of ethnic Europeans. The provisions of the newly passed Children's Protection Act are an important step in the protection of and provision for orphaned children, however, do not fill that gap in relation to the basic right and its enforcement.

Perhaps more important though, given that in practice Customary Law governs the majority of inheritance matters, is the unclear relationship between Civil Law and Customary Law and the discriminatory nature of the latter. If administered properly, Customary Law provides for the protection of all orphaned children by members of the extended family, and a right of inheritance for male children born in wedlock. However, it clearly discriminates against females and children born out of wedlock in terms of legal right to inherit, and is administered by each family council without accountability or recourse for appeal. Steps need to be taken (in consultation with the leaders of the local communities) to bring Customary Law in line with the principles of equality enshrined in the Constitution, provide accountability to decisions and to clearly define the nature of its relationship with Civil Law.

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APPENDIX 1 - SHORT SUMMARY TABLE

Note that it will be possible to provide references and narrative explanations in the full table on the next page.

<table>
<thead>
<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>In the Constitution</td>
<td>Yes</td>
<td>Does not specify</td>
<td>Does not specify</td>
<td>Does not specify</td>
<td>Does not specify</td>
<td>Does not specify</td>
<td>Does not specify</td>
</tr>
<tr>
<td>In legislation/Civil Law</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Does not specify</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>In Customary Law (codified)</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>In Customary Law (practice)</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
</tbody>
</table>

Please answer with one of the following responses only:

**Yes** - The law/practice explicitly mentions equality between the two characteristics (Questions 1-4), or relevant codified law/ national provisions exist (Questions 5-7). In relation to Question 1, if gender neutral language rather than specifically mentioning gender equality, please specify ‘Yes’ and include an explanatory footnote to this effect;

**No** - The law/practice explicitly discriminates between the two characteristics (Questions 1-4). Not applicable to Questions 5-7;

**Does not specify** - All relevant material was accessed, but there was no information relevant to the question (Questions 1-7);

**Don’t know** - It is not possible to say whether all relevant material was accessed, and so a definitive answer cannot be given (Questions 1-7);

**N/A** - The question is not applicable for this type of law, for example if a country does not have codified Customary Law or a Constitution. It is likely that this answer will apply to Customary Law (practice) for Questions 5-7
## APPENDIX 2 - EXTENDED SUMMARY TABLE

<table>
<thead>
<tr>
<th>ADDITIONAL QUESTIONS</th>
<th>RESPONSE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. How does the legal system define a child? Is the age of majority different for different matters?</td>
<td>Definitions vary - please see paragraph 2.a.</td>
</tr>
<tr>
<td>2. Does the country have a de jure dual legal system (customary or religious law running parallel to the statutory law or common law)? Whether de jure or de facto, is the customary/religious law related to inheritance and property rights the preferred means of dispute resolution in this area?</td>
<td>Yes (please see paragraph 2). Customary Law is used to resolve the majority of inheritance matters - please see paragraph 2.a.iii.</td>
</tr>
<tr>
<td>3. Does the Country's legal system (ie civil law and customary law) differentiate between different types of land tenure?</td>
<td>Yes, in the Constitution - please see paragraph 2.a.i.</td>
</tr>
<tr>
<td>4. Does the country have legislation governing inheritance rights?</td>
<td>Yes - please see paragraph 2.a.</td>
</tr>
<tr>
<td>5. Does the country have additional legislation that would affect a child’s inheritance?</td>
<td>Yes, for example The Children's Protection Act - please see paragraphs 2.a.ii.II and 2.b.ii.II.</td>
</tr>
<tr>
<td>6. Are there local practices that differ from both legislation and Customary Law?</td>
<td>For the purposes of this report, Customary Law and practice are essentially the same.</td>
</tr>
</tbody>
</table>
| 7. Does the legal system that governs inheritance rights (if any) ensure equal rights for children: (1) born from a polygamous union? (2) born out of wedlock? (3) adopted? | The Constitution  
1 Yes - please see paragraph 2.a.i  
2 Yes - please see paragraph 2.a.i  
3 Yes - please see paragraph 2.a.i  
Civil Law  
1 No provisions to the contrary - please see paragraph 2.a.ii.  
2 No provisions to the contrary and some explicit protection - please see paragraph 2.a.ii.  
3 No provisions to the contrary and some explicit protection - please see paragraph 2.a.ii. |
<table>
<thead>
<tr>
<th>ADDITIONAL QUESTIONS</th>
<th>RESPONSE</th>
</tr>
</thead>
<tbody>
<tr>
<td>**8. Does the legal system that governs inheritance rights (if any) ensure equality</td>
<td><strong>Civil Law</strong> &lt;br&gt; Please see paragraph 2.a.ii.I for testate succession and 2.a.ii.II for intestate succession.</td>
</tr>
<tr>
<td>between children born from a monogamous and polygamous union?</td>
<td><strong>Customary Law</strong> &lt;br&gt; No - please see paragraph 2.a.iii.</td>
</tr>
<tr>
<td>**9. Does the legal system specify the percentages of inheritance to be distributed</td>
<td>No specific provisions found in either Civil or Customary Law - please see paragraph 2.a.</td>
</tr>
<tr>
<td>to children?</td>
<td><strong>10. Does the legal system discriminate between male and female children?</strong></td>
</tr>
<tr>
<td></td>
<td>Civil Law &lt;br&gt; No provisions to the contrary and some explicit protection - please see paragraph 2.a.ii.</td>
</tr>
<tr>
<td></td>
<td>Customary Law &lt;br&gt; Yes - please see paragraph 2.a.iii.</td>
</tr>
<tr>
<td>**11. Does the legal system address the rights of orphaned children to transact land,</td>
<td><strong>Civil Law</strong> &lt;br&gt; No specific provisions found. For information on guardian responsibilities under Civil Law please see paragraph 2.b.ii.</td>
</tr>
<tr>
<td>houses and property that they inherit?</td>
<td>Customary Law &lt;br&gt; No specific information found.</td>
</tr>
<tr>
<td>**12. Does the legal system link an orphan child's property and inheritance rights to</td>
<td><strong>The Constitution</strong> &lt;br&gt; Unclear - please see paragraph 2.a.i</td>
</tr>
<tr>
<td>residency/citizenship?</td>
<td>Civil Law &lt;br&gt; No specific information found - please see paragraph 2.a.ii.II.</td>
</tr>
<tr>
<td></td>
<td>Customary Law &lt;br&gt; No specific information found.</td>
</tr>
<tr>
<td>ADDITIONAL QUESTIONS</td>
<td>RESPONSE</td>
</tr>
<tr>
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</tr>
<tr>
<td>13. Does the legal system provide for automatic inheritance for sole survivor children?</td>
<td>Government initiative to prevent child displacement - please see paragraph 2.b.iii.</td>
</tr>
</tbody>
</table>
| 14. Does the legal system mandate the appointment of a trustee/administrator/guardian for sole survivor children? | Civil Law
No, but there is a right to maintenance and protection - please see paragraphs 2.a.ii.III and 2.b.ii. |
| 15. Is there regulation of the management of inheritance for those sole survivor children with no legal guardian? | Civil Law
No - legislative provisions only cover management of parent(s)’ estate for the maintenance of the child - please see paragraph 2.b.ii. |

- Appointee's rights/responsibilities to hold the property of a sole survivor child until he/she ceases to be a minor?
- penalties to be imposed on an appointee who misuses the property/wrongfully deprives a child of property to which they are entitled?
- mechanisms for a sole survivor child to challenge an appointee and gain access to court?

- No specified right to receive deceased spouse's share - please see paragraph 2.a.ii.

Customary Law
No - although responsibility for children with no legal guardian passes to a family member of
<table>
<thead>
<tr>
<th>ADDITIONAL QUESTIONS</th>
<th>RESPONSE</th>
</tr>
</thead>
</table>
| the deceased - please see paragraph 2.b.iii.  
Yes - male children are entitled to inherit their parent(s)’ estate - please see paragraph 2.a.iii. | |
| 16. Where is customary law applied (in traditional non-State forums, formal State Courts, by local leaders/chiefs etc.)? | Swazi National Courts, community courts with local chiefs and family councils - please see paragraph 2. |
| 17. How would you qualify the proportion of property claims resolved under customary law? | No specific information found - please see paragraph 2.c. |
| [Nearly all/ High majority/ Small majority/ Minority] | |
| 18. Does the country have a court or tribunal in which orphaned children/their representatives can bring an action enforcing their legal right to property? | Civil Law  
Yes, but there are obstacles - please see paragraphs 22, 2.c and 2.c.ii.  
No case law specifically regarding orphaned children's inheritance rights was found. |
| If so, is there any case law specifically regarding orphaned children's inheritance rights? | Customary Law  
Yes - there is limited recourse in the Swazi Courts - please see paragraphs 2 and 2.c.iii.  
No documentation found of cases under Customary Law principles. |
| 19. Are there national provisions for legal aid in civil/administrative claims, including inheritance? If so: Do these provisions contain special measures or provisions regarding children? | Some limited recourse to legal aid - please see paragraph 2.c.ii. |
UGANDA

INTRODUCTION

This report examines the inheritance rights of children in Uganda, specifically in relation to children who are orphans, having lost one or both parents to HIV/AIDS.

The issue is important in light of the severity of the HIV/AIDS epidemic in Uganda. In 2014, an estimated 1,500,000 people were living with HIV and the total number of people dying from AIDS numbered 33,000. An estimated 650,000 children had been orphaned due to AIDS. 1139

There remains social stigma surrounding HIV/AIDS with victims becoming the subject of discrimination. A report in 2013 noted that social stigma has negatively impacted the uptake of HIV/AIDS healthcare services. 1140

This report is split into the following paragraphs:

1. Compliance with International Law
2. The National Legal System
   A. general provisions relating to inheritance rights
   B. specific provisions relating to sole survivor children and inheritance
   C. mechanisms for facilitating children’s inheritance claims
3. Conclusion

1. COMPLIANCE WITH INTERNATIONAL LAW

Uganda is a dualist country: international law is not recognised as a source of domestic law and requires "a process of domestication and incorporation into the domestic legal system". 1141

Article 123 of the Constitution of the Republic of Uganda (as amended) (“Constitution”) 1142 empowers the President to make international agreements and for Parliament to make laws governing how the treaties should be ratified.

"(1) The President or a person authorised by the President may make treaties, conventions, agreements or other arrangements between Uganda and any other country or between Uganda and any international organisation or body, in respect of any matter.

(2) Parliament shall make laws to govern ratification of treaties, conventions, agreements or other arrangements made under clause (1) of this article”.

Pursuant to this power, the Ugandan Parliament passed the Ratification of Treaties Act 1998 ("Ratification Act"), which provides as follows:

"2. All treaties shall be ratified as follows -

(a) by the Cabinet in the case of any treaty other than a treaty referred to in paragraph (b) of this section;

(b) by Parliament by resolution - (i) where the treaty relates to armistice, neutrality or peace; or (ii) in the case of a treaty in respect of which the Attorney General has certified in writing that its implementation in Uganda would require an amendment of the Constitution.

[...]

4. All treaties ratified by the Cabinet shall be laid before Parliament as soon as possible”.

The speed of the ratification process is dependent on a number of political, economic and social factors, including whether the treaty is compatible with Ugandan domestic law. Where a treaty is incompatible with domestic law, the Government may decide against ratification or propose a bill to amend the domestic law. Amending domestic law can be a cumbersome and lengthy process. Consequently, some international treaties may not be implemented for some time.

The Constitution also provides that Uganda continues to be bound by international agreements which were entered into by Uganda before the Constitution came into force in 1995. This means, for example, that Uganda continues to be bound by the major international human rights treaties which it became party to in the 1980s, such as the International Covenant on Economic, Social and Cultural Rights.

"Where—

(a) any treaty, agreement or convention with any country or international organisation was made or affirmed by Uganda or the Government on or after the ninth day of October, 1962, and was still in force immediately before the coming into force of this Constitution; or

(b) Uganda or the Government was otherwise a party immediately before the coming into force of this Constitution to any such treaty, agreement or convention, the treaty, agreement or convention..."
shall not be affected by the coming into force of this Constitution; and Uganda or the Government, as the case may be, shall continue to be a party to it. 1146

Below is the status of Uganda’s commitment to the treaties listed in the introduction to the overall report.

<table>
<thead>
<tr>
<th>International treaties</th>
<th>Signature date</th>
<th>Ratification/accession date</th>
</tr>
</thead>
<tbody>
<tr>
<td>International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”) 1147</td>
<td>N/A</td>
<td>21 November 1980</td>
</tr>
<tr>
<td>International Covenant on Economic, Social and Cultural Rights (“IESCR”) 1148</td>
<td>N/A</td>
<td>21 January 1987</td>
</tr>
<tr>
<td>International Covenant on Civil and Political Rights (“ICCPR”) 1149</td>
<td>N/A</td>
<td>21 June 1995</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Regional Treaties</th>
<th>Signature Date</th>
<th>Ratification/Accession Date</th>
</tr>
</thead>
</table>

1146 Constitution of Uganda, Article 287.
Regional Treaties | Signature Date | Ratification/Accession Date
--- | --- | ---
African Youth Charter | N/A | 6 August 2008

* Please note that Uganda is not party to the Southern African Development Community due to its geographical location.

2. **NATIONAL LEGAL SYSTEM**

Uganda is a republic that recognises both customary law and general law. Customary law is traditionally unwritten and is derived from the customs and practices of the people of Uganda. General law is comprised of both received common law, based on Uganda's colonial past, and statutory law passed by Parliament. The Judicature Act 1996 ("Judicature Act") provides for the application of multiple sources of law by the Ugandan judiciary. These include:

- "written law" - statutory legislation passed by the Ugandan Parliament since independence.
- "applied law" - certain statutes passed by the Westminster Parliament in the 19th century which are listed in the first and second schedules of the Judicature Act and which continue to have force in Uganda by virtue of section 47 of the Judicature Act.
- common law and the doctrines of equity, which are applied concurrently, but, in case of conflict, the doctrines of equity will prevail.
- customary law, provided that it is not "repugnant to natural justice, equity and good conscience and is not incompatible either directly or by necessary implication with any written law".
- the "principles of justice, equity and good conscience", which are applied where there is no express law or rule relevant to the matter.

In addition, all law in Uganda is subject to the Constitution, which provides for the principle of constitutional supremacy. Article 2 states the following:

"(1) This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.

(2) If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void."

The Ugandan judiciary is comprised of the Supreme Court, the Court of Appeal, the High Court and such subordinate courts as Parliament may by law establish, including Magistrates Courts.

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1156 Constitution of Uganda, Article 5.
Qadi’s Courts for marriage, divorce, inheritance of property and guardianship.\(^{1158}\) The judiciary is headed by the Chief Justice and deputised by the Deputy Chief Justice.

Magistrates Courts handle the bulk of civil and criminal cases in Uganda. There are three levels of Magistrates Courts: Chief Magistrates, Magistrates Grade I and Magistrates Grade II. Given their status as subordinate courts, their decisions are subject to review by the High Court.\(^{1159}\)

The Land Act 1998 ("Land Act")\(^{1160}\) made provision for the creation of district land tribunals. Each district in Uganda was to have its own land tribunal, consisting of a chairperson and two other members.\(^{1161}\) Due to problems with implementation and a backlog of cases, district land tribunals were suspended in December 2007 and the approximately 8,000 pending cases were transferred to the Magistrates Courts.\(^{1162}\) Magistrates Courts presided over by Magistrates of Grade I and above therefore have jurisdiction to deal with those disputes that would have been dealt with by district land tribunals.\(^{1163}\)

Customary law applies only to the extent that it does not conflict with general law. The Judicature Act 1996\(^{1164}\) specifically provides that nothing in that Act shall:

"[...] deprive the High Court of the right to observe or enforce the observance of, or shall deprive any person of the benefit of, any existing custom, which is not repugnant to natural justice, equity and good conscience, and incompatible either directly or by necessary implication with any written law".

Customary law is widely practised in Uganda, particularly in rural areas. For example, customary tenure rights dominate in rural areas and represent 70-80% of all land. There is a wide range of customary tenure systems among Uganda's more than 60 ethnic groups. Customary tenure systems vary from strongly individualistic tenure patterns to highly communal systems.\(^{1165}\) Given the multiplicity of systems and the undocumented nature of customary land rules, most policymakers have limited knowledge about specific rules and authorities governing land rights under these systems. However, customary law is often discriminatory against women. By way of example, women grow 70-80% of the food in Uganda, but own less than 8% of the land.\(^{1166}\)

The Land Act recognises that occupancy of customary land conveys legal rights.\(^{1167}\) Citizens owning land under customary tenure may acquire certificates of ownership\(^{1168}\) and all customary

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1158 Constitution of Uganda, Article 129.
1161 Land Act, section 74.
1164 Judicature Act, section 15.
1167 Land Act, section 2.
tenure may be converted to freehold ownership.¹⁶⁶ More than 90% of land owners would like to receive a certificate of customary ownership, but few have been issued. Only 15-20% of land in Uganda is registered. The process of land registration is complex, taking about 227 days to complete and costing several million Ugandan Shillings.¹⁷⁶ Unregistered land is particularly vulnerable to expropriation by the Government and land grabbing by political and economic elites.¹⁷⁷

The Local Council Courts apply customary norms and are designated in every village, parish and sub county to function as courts.¹¹⁷² They have jurisdiction to determine, inter alia: "...causes and matters of a civil nature governed only by customary law...matters specified under the Children Act...[and] matters relating to land...".¹¹⁷³

For the purposes of this report, both general and customary law are addressed insofar as the information could be accessed.

A. GENERAL PROVISIONS RELATING TO INHERITANCE RIGHTS

Initially it is important to note that Uganda's land tenure system comprises four types of system, namely customary, freehold, mailo and leasehold.¹¹⁷⁴ Mailo is a customary form of freehold. Land held under mailo tenure can be held similarly to freehold, but cannot be disposed of in a way that prejudices the interests of customary tenants.¹¹⁷⁵ Land held under mailo tenure comprises approximately 9,000 square miles and is confined to Buganda (central Uganda) and Bunyoro (western Uganda). Little land is held under registered freehold tenure.¹¹⁷⁶ As will be seen, customary law on inheritance remains largely unregulated.

Land conflicts are common throughout Uganda. Land-grabbing is on the rise in certain parts of the country, particularly in the oil regions in western Uganda. In the north, civilians, having been ordered into camps by the Government during conflict, are returning to their homes. Many have returned to find that their land is occupied by others.¹¹⁷⁷

It is also the case that there are a number of different types of marriages that are recognised in Uganda. These include civil or formally registered monogamous marriages registered

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¹¹⁶⁸ Land Act, section 4.
¹¹⁶⁹ Land Act, section 9.
¹¹⁷⁰ At the time of writing this report, the approximate exchange rate available at www.xe.com was 3,500 Ugandan Shillings to 1 US Dollar.
¹¹⁷⁴ Land Act, section 2.
under the Marriage Act 1904 ("Marriage Act")\textsuperscript{1178} and customary law marriages, which are registered under the Customary Marriage (Registration) Act 1973 ("Customary Marriage Act").\textsuperscript{1179} Customary marriages must be registered not later than six months after the date of the marriage ceremony.\textsuperscript{1180} Customary marriages in Uganda can be polygamous.\textsuperscript{1181}

Information relating to the actual percentage of inheritance claims dealt with under customary law rather than general law could not be accessed. However, it has been stated that customary inheritance practices continue to be applied even where they conflict with statutory law:

"In the context of Uganda’s land laws, the 1995 Constitution and 1998 Land Act have enshrined legal pluralism by recognising customary laws, which describe women’s rights to land as derived and patrilineal, while defining new statutory land tenure laws that legalise women’s property rights. To mitigate areas of conflict between the customary system and state laws, the Constitution mandates that state law prevails where it contradicts with customary law. However, this stipulation is often unheeded, resulting in continued gender inequality and discrimination in the ownership of land and other assets, as is observed in many Ugandan communities today".\textsuperscript{1182}

i. THE CONSTITUTION

As discussed in paragraph 2 of this report, the Constitution is the supreme law of Uganda. As set out below, the Constitution includes a number of overarching rights and principles, which are related to a child’s right to inherit property.

Article 21 of the Constitution deals with equal treatment and contains anti-discrimination provisions, including those relating to women and children:

"(1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.

(2) Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.

(3) For the purposes of this article, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability."
However, Article 21(4) does allow Parliament to override these provisions in certain circumstances:

"Nothing in this article shall prevent Parliament from enacting laws that are necessary for—

(a) implementing policies and programmes aimed at redressing social, economic, educational or other imbalance in society; or

(b) making such provision as is required or authorised to be made under this Constitution; or

(c) providing for any matter acceptable and demonstrably justified in a free and democratic society."

Article 26 provides protection for the right to own property:

"(1) Every person has a right to own property either individually or in association with others.

(2) No person shall be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied—

(a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health; and

(b) the compulsory taking of possession or acquisition of property is made under a law which makes provision for—

(i) prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property; and

(ii) a right of access to a court of law by any person who has an interest or right over the property."

Article 31(2) states that Parliament should guarantee specific protection for spouses whose partners die:

"Parliament shall make appropriate laws for the protection of the rights of widows and widowers to inherit the property of their deceased spouses and to enjoy parental rights over their children."

Article 33 recognises the rights of women and the need for equal treatment:

"(4) Women shall have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities.

(6) Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by this Constitution."

Article 34 recognises that children are a special group entitled to specific protection, particularly sole survivor orphans:
"(4) Children are entitled to be protected from social or economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education or to be harmful to their health or physical, mental, spiritual, moral or social development.

(5) For the purposes of clause (4) of this article, children shall be persons under the age of sixteen years.

(7) The law shall accord special protection to orphans and other vulnerable children."

Furthermore, Article 51 of the Constitution establishes the Uganda Human Rights Commission ("UHRC").

The functions and powers of the UHRC are outlined in Articles 52-53 of the Constitution. The UHRC has the power of a court to undertake the following: summon or order any person to attend before it and produce any document or record relevant to any investigation it is conducting; question any person in respect of any subject matter under its investigation; direct any person to disclose any information within his or her knowledge relevant to any investigation by the Commission; and commit persons for contempt of its orders.

If the UHRC is satisfied that there has been a violation of human rights or freedoms, it may order the release of a detained or restricted person, payment of compensation or any other legal remedy or redress. However, any person or authority dissatisfied with an order made by the UHRC has the right of appeal to the High Court.1183

As can be seen from these provisions, the Constitution does not specifically enshrine the right of children to inherit their parents' property.

ii. GENERAL LAW

I. The Land Act 1998

The Land Act previously included a restriction on the transfer of land, on which (minor) orphans resided and in which they had an inheritance interest. However, the restriction was removed by the Land (Amendment) Act 2004.1184

II. The Succession Act 19061185

Under the Succession Act 1906 ("Succession Act"), the terms "child", "children", "issue" and "lineal descendant" include legitimate, illegitimate and adopted children.1186 Section 2 also includes further definitions, which may safeguard the inheritance rights of children:

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1185 Succession Act 1906 (Chapter 162); available at: http://www.ulii.org/ug/legislation/consolidated-act/162
1186 Succession Act, section 2.
"Customary heir" is defined as a person recognised by the rites and customs of the tribe or community of a deceased person as being the customary heir of that person.

"Dependent relative" is defined to include (i) a wife, a husband, a son or a daughter under 18 years of age who is wholly or substantially dependent on the deceased, (ii) a parent, a brother or sister, a grandparent or grandchild who, on the date of the deceased's death, was wholly or substantially dependent on the deceased for the provision of the ordinary necessities of life suitable to a person of his or her station.

"Daughter" is defined to include a stepdaughter, an illegitimate daughter and a daughter adopted in a manner recognised as lawful in Uganda.

"Son" is defined to include a stepson, an illegitimate son and a son adopted in a manner recognised as lawful by the law of Uganda.

Section 22 of the Succession Act provides further protection for vulnerable children, including children whose father dies after their conception but before their birth, in that it provides that:

"For the purposes of succession, there is no distinction between those who are-
(1) related to the deceased by the full blood and those who are related to the deceased by the half blood; or

(2) born during the deceased's lifetime and those who are conceived in the womb at the date of death and subsequently born alive".

(i) Testate Succession

In Uganda it is possible to bequeath property on death by will. The Succession Act includes a number of provisions relating to wills, including requirements for the validity of wills.

Section 36(1) provides that every person of sound mind and who is not a minor may dispose of their property by will. Section 36(2) specifically provides that a married woman may dispose of any property which she could properly dispose of during her life.

Section 37 requires that provision be made in every will for the maintenance of dependents.

"Dependent Relation" includes - "(i) a wife, a household a son or daughter of or above eighteen years of age who is wholly or substantially dependent on the deceased; (ii) a parent, a brother or sister, a grandparent or grandchild who, on the date of the deceased's death was wholly or substantially dependent on the deceased for the provision of the ordinary necessaries [sic] of life suitable to a person of his or her situation."

In the absence of "reasonable provision" for the maintenance of dependent relatives, rules under section 38 apply. Under section 38, a dependent relative may apply to a court if that dependent believes that the testator's will
does not make reasonable provision for him or her in the will. The court retains wide discretion to make an order for maintenance out of the estate of the deceased. Under section 39, such applications must be made within six months from the date on which a representative to deal with the estate of the deceased is first made, except where an interim order is made by a court or when a grant of probate is made. An application beyond the time limit will require permission from the court.

(ii) Intestate Succession

In the event of a person dying intestate, Part IV of the Succession Act deals with inheritance rights.

Section 27 of the Succession Act provides for the distribution on the death of a male intestate. Subject to provisions relating to occupation rights and the deceased's principal residential holding (discussed in more detail below), the estate of a male dying intestate is divided in the following manner:

"[...](1)(a) where the intestate is survived by a customary heir, a wife, a lineal descendant and a dependent relative - (i) the customary heir shall receive 1 per cent, (ii) the wives shall receive 15 per cent, (iii) the dependant relative shall receive 9 per cent; (iv) the lineal descendants shall receive 75 per cent of the whole of the property of the intestate, but where the intestate leaves no person surviving him capable of taking a proportion of his property under paragraph (a)(ii) or (iii) of this paragraph, that proportion shall go to the lineal descendants;

(2) where the intestate is survived by a customary heir, a wife and a dependent relative but no lineal descendant— (i) the customary heir shall receive 1 per cent; (ii) the wife shall receive 50 per cent; and (iii) the dependent relative shall receive 49 per cent, of the whole of the property of the intestate;

(3) where the intestate is survived by a customary heir, a wife or a dependent relative but no lineal descendant— (i) the customary heir shall receive 1 per cent; and (ii) the wife or the dependent relative, as the case may be, shall receive 99 per cent, of the whole of the property of the intestate;

(4) where the intestate leaves no person surviving him, other than a customary heir, capable of taking a proportion of his property under paragraph (a), (b) or (c) of this subsection, the estate shall be divided equally between those relatives in the nearest degree of kinship to the intestate;

(5) if no person takes any proportion of the property of the intestate under paragraph (a), (b), (c) or (d) of this subsection, the whole of the property shall belong to the customary heir;
(6) where there is no customary heir of an intestate, the customary heir’s share shall belong to the legal heir.

(2) Nothing in this section shall prevent the customary heir from taking a further share in the capacity of a lineal descendant if entitled to it in that capacity.

(3) Nothing in this or any other section of this Act shall prevent the dependent relatives from making any other arrangement relating to the distribution or preservation of the property of the intestate provided that the arrangement is sanctioned by the court”.

There are specific rules relating to a deceased's principal residence. Should a wife or child of an intestate have certain rights of occupation relating to the deceased's principal residence, in accordance with sections 26 and 29 of the Succession Act, their occupation shall not be brought into account in assessing any share the wife or child may be entitled to under section 27 of the same act.

The Second Schedule deals with occupation rights. In the case of a principal residential holding, any wife or husband and any children, under 18 years of age if male, and under 21 years of age and unmarried, if female, who were normally resident in the residential holding shall be entitled to occupy it. In the case of a residential holding owned by the intestate as a principal holding but not occupied by him or her because he/she was living in premises owned by another person, any wife or husband and any children, under 18 years of age if male, and under 21 years of age and unmarried, if female, who were normally resident with the intestate shall be entitled to occupy it. In the case of any other residential holding owned by the intestate, any wife or children under 18 years of age if male, and under 21 years of age and unmarried, if female, who were normally resident in the residential holding shall be entitled to occupy it.

The Succession Act contains no explicit reference to or provision for female intestacy. This has been the subject of legal challenge. In 2007, the NGO Law and Advocacy for Women in Uganda (“LAW-Uganda”) petitioned the Constitutional Court to declare a number of clauses in the Succession Act unconstitutional (in particular, section 27, Rule 8(a), section 43, section 2(n)(i), section 44, section 14 and section 15). LAW-Uganda argued, inter alia, that section 27 provided only for male intestacy and only granted a widow 15% of the deceased's estate, and was therefore unconstitutional. LAW-Uganda's case was successful. In April 2007, the Constitutional Court declared all the impugned sections of the Succession Act unconstitutional.

1187 Law and Advocacy for Women in Uganda v the Attorney General, Constitutional Petition No.05 of 2006, available at: https://www.law.georgetown.edu/rossrights/docs/cases/lawa.html.
and void. Our research indicates that this declaration has created a lacuna, which has not yet been filled by enactment of a new law. 1188

III. The Children Act 1997 1189

Section 53 of the Children Act provides that "an adopted person shall not be entitled to inherit from or through his or her natural parents if they die intestate."

The First Schedule of the Children Act enshrines in law the "welfare principle". It provides that:

"Whenever the State, a court, a local authority or any person determines any question with respect to—
the upbringing of a child; or
the administration of a child’s property or the application of any income arising from it,
the child’s welfare shall be of the paramount consideration".

Further, it specifically deals with custody of sole survivors in section 6(2), which provides that:

"Where the natural parents of a child are deceased, parental responsibility may be passed on to relatives of either parent, or by way of a care order, to the warden of an approved home, or to a foster parent".

It also provides for foster care arrangements (section 43), and the appointment of a custodian where the previous guardian(s) are dead (section 80). An academic has noted that:

"The Children Act also provides for the maintenance of a child where one or both parents neglects to provide for maintenance irrespective of whether the parents are married, staying together, separated or divorced, which should include maintenance of orphans." 1190

However, the Children Act does not deal specifically with the inheritance rights of orphans or sole survivor children (or indeed children in general) other than in relation to the rights of adopted children. Section 52 provides that "where an adopter dies intestate, his or her property shall devolve in all respects as if the

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adopted child were the natural child of the adopter." It also empowers the High Court to order such provision out of devolved property as it thinks equitable, where it considers the disposition has been exercised unfairly against an adopted child.

Another potentially relevant provision is section 7, which provides that "It shall be unlawful to subject a child to social or customary practices that are harmful to the child’s health."

There is anecdotal evidence of the Children Act being applied to children’s benefit, in one instance, to allow a widow suffering from abuse and property confiscation by the relatives of her deceased husband to obtain two acres of land, which now belong to her seven children.\textsuperscript{1191}

However, it is not clear whether these provisions would operate effectively to preserve inheritance rights of orphans in the face of Customary Law or statutory law to the contrary. It has been noted in the context of widows’ rights, for example, that:

\textit{The Children Act expressly prefers the child's biological parent in custody matters, and it permits the passing of parental responsibilities to a relative other than the parents only when both "natural parents of a child are deceased," or under a lawful judicial order that such a move is in the best interest of the child. The current Succession Act, however, takes custody away from the mother and thereby impedes the realization of the rights promised to mothers under the Children Act.}\textsuperscript{1192}

\textbf{iii. CUSTOMARY LAW}

\textbf{I. Property Law}

In order to better understand the inheritance systems in Uganda, it is worth briefly mentioning how land is treated under Customary Law. There are four types of tenure in Uganda:

(i) Customary,
(ii) Leasehold,
(iii) Freehold, and
(iv) Mailo (customary form of freehold).\textsuperscript{1193}

\textsuperscript{1191} Thomson Reuters Foundation, "Ugandan widows left landless, caught in web of statutory law and traditional practices", available at: http://www.trust.org/item/20140619214209-l7f40/?source=spotlight


\textsuperscript{1193} USAID (2010), p. 5.
Customary tenure accounts for 70-80% of land and the majority of landholdings in Uganda. The form of customary tenure system varies considerably among Uganda's more than 60 ethnic groups, from strongly individualistic tenure patterns to highly communal systems. Customary law is therefore an important source of authority in Uganda regarding the use, ownership, transfer and inheritance of land.

Customary tenure is regulated by customary principles and practices administered by clan, village, or family leaders. Although under the Constitution statutory law ought to trump customary law, customary law is often followed even where it contradicts statutory law or case law.

II. Inheritance Law

Due to the wide application of Customary Law and the diverse nature of Ugandan society, inheritance practices vary throughout the country.

Inheritance and succession law are often governed by Customary Law rather than General Law. The distribution of estates is therefore overseen by clan elders, religious leaders or relatives. People are frequently unaware of their rights under General Law and many Ugandans do not write a will believing it is a precursor to death.

Customary Law and its application to inheritance rights are rooted in a tradition of patrilinealism, under which the father’s family and clan determine a person’s identity and status in the community. Bennett, Faulk, and Eres provide the following explanation of patrilinealism in Uganda:

"A newborn child, whether male or female, belongs to his or her father’s clan. Women are disregarded in matters of property, because the traditional notion is that the men of the community will support the women. When a girl grows into a woman and marries, she then becomes the property of her new husband, and any children she has are also considered to belong to her husband. The woman is essentially "purchased" by her husband's clan through the payment of 'brideprice' or 'bridedeath', … The payment of brideprice 'gives the husband proprietary rights over his wife, allowing him to treat her more or less like a chattel'. By treating her as an outsider, as property instead of family, the clan can deny her inheritance rights when her husband dies and condition her continued occupancy of the home on her agreement to be 'inherited' by a male member of her deceased husband’s clan".

Pursuant to the customary rule of primogeniture, the closest male heir is the customary heir and is both administrator and successor to the estate. If there are

1194 USAID (2010), p. 5.
no male descendants, the deceased’s father or the father’s closest male
descendant succeeds him.\textsuperscript{1198}

Under many systems of customary law in Uganda, women, whether single,
moved, divorced or widowed, cannot own or inherit land in their own names.\textsuperscript{1199} A
widow is not allowed to inherit automatically the matrimonial home from her late
husband and, since the vast majority of husbands die intestate, it is the first-born
son of the deceased, who usually inherits the matrimonial home.\textsuperscript{1200}

Customary laws and tradition only rarely allow daughters to inherit.\textsuperscript{1201} In most
cases it is the nearest male relative rather than a daughter who inherits when a
man dies without leaving a son.\textsuperscript{1202}

Bennett, Faulk and Eres note that:

"Inheritance practices in Uganda have a profoundly negative impact on children of
the deceased. Because children of a deceased man are considered to belong to
his clan, members of the clan commonly take the children away from their mother
or move into the home with the children and force the mother out. Such practices
are rooted in traditional customary law, under which the male heir not only inherits
the deceased’s property rights, including the right to own and occupy the home,
but also inherits custody of his children".\textsuperscript{1203}

Muslims make up a sizeable minority of Uganda's population, estimated at 12.1%
of the total.\textsuperscript{1204} As a form of customary law, Islamic law often discriminates against
wives and daughters in matters of inheritance. In a non-polygamous marriage
where there are children, a surviving husband will receive twice the share that a
wife would have received had her husband been the deceased, being one quarter
as opposed to one eighth of the deceased’s estate. In a polygamous marriage,
that one eighth is shared between all the wives. Islamic law also discriminates
against female children in favour of male children. While all children inherit from
their parents, grandparents, siblings, and other relatives, males are entitled to
twice the share of females under Islamic law.\textsuperscript{1205}

\begin{itemize}
\item Schroth (2008), p. 609.
\item Florence Asiimwe and Owen Crankshaw, "The impact of customary laws on inheritance: A case study of widows in urban
\item Marjolein Benschop, "Rights and Reality: Are Women's Equal Rights to Land, Housing and Property Implemented in East
\item Bennett et al (2006), pp.480-1.
\end{itemize}
B. SPECIFIC PROVISIONS RELATING TO SOLE SURVIVOR CHILDREN AND INHERITANCE

i. THE CONSTITUTION

The Constitution recognises the rights of children generally (section 34), the right not to be deprived of property (section 26(1)), the right not to be discriminated against on various grounds including sex, race, colour, ethnic origin or tribe (section 21) and the right to equal treatment before the law (section 21(1)). The Constitution also provides that the law shall accord special protection to orphans and vulnerable children (section 34(7)). However, the Constitution does not contain specific provisions relating to the inheritance rights of sole survivor children.

ii. GENERAL LAW

This paragraph will consider provisions in the legislation discussed so far which would apply to sole survivor children.

I. The Land Act

There are some provisions under the Land Act which apply to a sole survivor child.

Section 27 addresses decisions taken in respect of land held under customary tenure. It provides that any decision which denies children access to ownership, occupation or use of any land or imposes conditions which violate articles 33\(^\text{1206}\), 34\(^\text{1207}\) and 35\(^\text{1208}\) of the Constitution on any ownership, occupation or use of any land shall be null and void.

When enacted, the Land Act placed restrictions on the transfer of land by family members on which orphans, below majority age and with an interest in the inheritance of the land, reside. However, these restrictions were subsequently deleted by the Land (Amendment) Act 2004.

II. The Succession Act

When dealing with the distribution of a male intestate’s estate, a sole survivor child may fall into certain of the categories specified at section 27. However, following the successful constitutional petition by LAW-Uganda (see paragraph 2.ii.II of this report), the current position on inheritance in these circumstances is unclear.

A sole survivor child may benefit from rights of occupation as set out at section 29 and the Second Schedule.

\(^{1206}\) Article 33 deals with the rights of women.
\(^{1207}\) Article 34 deals with the rights of children.
\(^{1208}\) Article 35 deals with the rights of persons with disabilities.
Section 33 could also be applicable to a sole survivor child such that no money paid by an intestate during their life for the advancement of the child shall be taken into account in the calculation of the child's share.

If a will is created, sections 37 and 38 could apply to sole survivor children. In the event that a will does not make reasonable provision for the maintenance of any dependant relatives, the court may order payment out of the estate of the deceased for the maintenance of dependents. An application must be made to court by or on behalf of the dependent relative and the time scales set out at section 39 would apply to any such application.

For more information please see paragraph 2.ii.II above.

III. The Children Act

Sections 4 and 5 of the Children Act would apply to sole survivor children. For more information on this please see paragraph 2.ii.III above.

iii. CUSTOMARY LAW

As noted in 2.iii above, in practice, Customary Law will often take precedence over codified law in Uganda and the tradition of patrilinealism is likely to determine inheritance rights under customary law – meaning that orphans’ rights to land will generally be determined by their relationship to a man. For example, it is common under Customary Law for children of a deceased man to be considered as belonging to his clan.1209

Further, evidence exists of widespread property grabbing based on Customary Law in Uganda, particularly by the paternal family of orphans and widows.1210

The Landesa Center for Women’s Rights describes specific aspects of customary law in relation to sole survivors’ inheritance rights:

"In the case of orphans, a guardian – most often the uncle of the children – is appointed by the clan to manage the individualised land in "trust" for the children. Girl orphans are considered valuable to the family because [they] will fetch a bride price when…married. However, if all the orphans are girls, then the clan will appoint a boy cousin as head of the family for the purpose of managing the land. In some cases, if there are not male children, the eldest girl may be asked not to marry and is appointed head.

As Internally Displaced Persons (IDP) returned to their family land, orphans are especially susceptible to border encroachment by other male clan members. Since the family [may have] spent many years in IDP camps, the orphans may have never seen their family land; it is the orphans’ parents who know the boundaries of their land which [are] often identified by hills, trees, and other natural demarcators which may have shifted or degraded over time.

This means that the orphans must rely on the benevolence of their uncles and other family members to ensure their rights to their family land.\textsuperscript{1211}

C. MECHANISMS FOR FACILITATING CHILDREN’S INHERITANCE CLAIMS

A number of mechanisms are available to facilitate children’s inheritance claims in Uganda. Mechanisms include enforcing or challenging the Constitution, statutory law and Customary Law. Below is an overview of the facilitating mechanisms, including the discussion of specific courts and procedure.

The ability for people in Uganda to access these mechanisms is reportedly limited.\textsuperscript{1212} This is due to factors including, amongst other things, budgetary constraints, lack of necessary training, poverty, geographic distribution, lack of awareness of the law and the inability to afford legal assistance.\textsuperscript{1213}

Some degree of legal support and funding are also being provided by legal aid, other government organisations and non-government organisations. However, there is currently no government body responsible for the provision of legal aid.\textsuperscript{1214} The Uganda Law Society runs a pro bono scheme with more than 350 advocates enrolled, for areas of law including wills and estates and succession law.\textsuperscript{1215}

i. THE CONSTITUTION

   I. Provisions protecting and affording rights to, children and women

   It was noted above in paragraph 2 of this report that:

   - Article 2(2) of the Constitution provides for the supremacy of the Constitution. In our discussion of the Succession Act below, we will see how certain provisions in that Act have been successfully challenged pursuant to this Article; and

   - There are a number of provisions in the Constitution which could be used to facilitate a property claim by a child or their guardian (e.g. Article 21 (equality and freedom from discrimination), Article 26 (relating to protection from deprivation of property), Article 31 (rights of the family), Article 33 (rights of women) and Article 34 (rights of children)).


\textsuperscript{1215} Uganda Law Society, “The Pro-Bono Project of ULS”, available at: http://www.uls.or.ug/projects/pro-bono-project/pro-bono-project/.
Further, Article 17(c) states that it is the duty of every citizen "to protect children and vulnerable persons against any form of abuse, harassment or ill-treatment."

A "child" is defined in Article 257 of the Constitution to mean "a person under the age of eighteen years" although it may be given a different meaning for specific Articles. For example, a "child" for the purposes of Article 34(4) concerning the protection of children from social or economic exploitation, is a person under the age of 16.

II. Upholding and enforcing the Constitution

Article 99 states that it is the President’s duty to, uphold the Constitution and to promote the welfare of the citizens of Uganda.

Article 129 states that judicial power is to be exercised by the judicature consisting of the Supreme Court, the Court of Appeal, the High Court (each of those being superior courts) and subordinate courts established by Parliament.

Article 139 states that the High Court has unlimited original jurisdiction in all matters and, unless specified elsewhere in the Constitution, appellate jurisdiction to hear decisions of any lower court. Article 134 states that "an appeal shall lie to the Court of Appeal from such decisions of the High Court as prescribed by law."

Article 137(1) states that "Any question as to the interpretation of [the] Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court." A person may, pursuant to Article 137(3), petition the Court of Appeal for a declaration and redress in respect of any law or any act or omission by a person or authority, which are inconsistent with, or in contravention of, the Constitution. The Court of Appeal may determine a petition and where it considers necessary, grant an order of redress or refer the matter to the High Court to investigate to determine the appropriate redress.1216

Article 132 states that the Supreme Court is the final court of appeal1217 and it is the court in which appeals from the Court of Appeal are heard.1218 Interestingly, the Constitution also provides that whilst the Supreme Court treats its "previous decisions as normally binding, [it may] depart from a previous decisions when it appears right to do so; and all other courts shall be bound to follow the decisions of the Supreme Court on questions of law".

1216 Constitution of Uganda, Article 137(4).
1217 Constitution of Uganda, Article 132(1).
1218 Constitution of Uganda, Article 132(2).
III. Bodies established pursuant to the Constitution

_Uganda Human Rights Commission_

The functions of the UHRC include investigating complaints against the violation of human rights, establishing programmes of research, education and information in respect of human rights and increasing the awareness of that the Constitution as the fundamental law of the people of Uganda.

Pursuant to the UHRC Complaints Handling Procedures Manual anyone (not necessarily the victim) "claiming a violation of a fundamental right may bring a complaint before the Commission for redress." Complaints raising a human rights violation may be submitted to the UHRC and may be received by the UHRC in person, by letter, email, facsimile or telephone.

According to the UHRC Complaints Handling Procedures Manual legal claims "which do not directly touch on human rights may not be brought therefore the Commission. Examples are matters relating to...land disputes." The manual further states that where there are specialised institutions that should handle a particular matter, such cases should be so referred to those institutions. It is unclear whether inheritance rights matters (including those involving land) would fall within the jurisdiction of the UHRC.

The powers of the UHRC are discussed above in paragraph 2.i of this report. An appeal relating to an order made by the UHRC made following determination of an infringement can be made to the High Court.

_Land tribunals and District Land Boards_

Article 243 states that Parliament should provide for laws that enable the establishment of land tribunals and provision for the appropriate right of appeal to a court of law in respect of decisions of the land tribunal. Pursuant to the Constitution, land tribunals shall have jurisdiction to determine certain land disputes including disputes relating to the repossession, transfer or acquisition of land by individuals. Section 75 of the Land Act also provides for the creation of land tribunals in Uganda. Please refer to our discussion below relating to the Land Act for further information about land tribunals.

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1219 Constitution of Uganda, Article 52(1)(a).
1220 Constitution of Uganda, Article 52(1)(c).
1221 Constitution of Uganda, Article 52(1)(e).
1225 Constitution of Uganda, Article 53(3).
The Constitution also provides for the establishment of District Land Boards. However their functions appear to be focused more on dealings with land that does not belong to anyone else and land registration. The District Land Office, which is expected to support the District Land Board, is reportedly under-resourced.

ii. GENERAL LAW

I. The Land Act

The Land Act was introduced in part to provide certainty in respect of property rights, to decentralise land administration and to provide for the establishment of certain bodies such as land tribunals. It provides for the establishment of district land tribunals which have jurisdiction to determine disputes relating to land under the Land Act. It also outlines an appeals process for decisions made by land tribunals.

The Land Act appears to provide a mechanism which might facilitate children’s inheritance claims. In particular, section 27 relates to land held under customary tenure.

Disputes can be brought to land tribunals established under the Land Act. Section 87 provides that appeals from a decision of a land tribunal established under section 80 (sub-county land tribunals) or section 81 (urban area land tribunals) would be heard in the district land tribunal, and appeals from a decision of a land tribunal would be heard in the High Court.

Reports cite a number of constraints including budgetary and resource constraints that have hindered the implementation and operation of the Land Act. In 2006 it was observed that “Seven years after its enactment, the provisions of the Land Act have hardly been implemented.” Whilst land tribunals were created pursuant to the Constitution and the Land Act to hear land cases, the handling of land cases has returned to the courts. As noted in paragraph 2 above, due to the challenges faced by land tribunals, Magistrates Courts presided over by Magistrates of Grade I and above now have jurisdiction to deal with disputes previously assigned to district land tribunals. It has been reported that re-

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1226 Constitution of Uganda, Articles 240-241.
1228 Land Act, section 74.
1229 Land Act, section 76.
operationalisation and improvement of the land tribunals have been recommended. However, it is unclear whether this will occur.

II. The Succession Act

Pursuant to the Succession Act, a will may be made by a person who is not a minor and is of sound mind. Where a will is made by a person with dependent relatives, the will must adequately provide for those relatives. If a deceased person domiciled in Uganda disposes of property in a will without making reasonable provision for the maintenance of his or her dependent relatives, section 38 of the Succession Act permits a court to order payment out of the estate of the deceased for the maintenance of dependents. Further, pursuant to section 43, a father "may by will appoint a guardian or guardians for his child during minority".

Section 27 outlines how the estate of a deceased male intestate should be divided.

Section 44 provides that where an infant's father passes away and does not appoint a guardian for the infant by will (or such appointed guardian is dead or refuses to act), the guardian will be, in order of priority, family members of the deceased father, or male relatives of the mother. They may also, pursuant to section 45, remove and replace a guardian. Any guardian appointed under section 44 or 45 has "all such powers over the estate and the person of an infant as a testamentary guardian has under the law for the time being in force in Uganda".

However, pursuant to a petition made by LAW-Uganda, certain sections of the Succession Act including sections 27 and 44, were deemed by the Constitutional Court to be unconstitutional and accordingly null and void. The process to fill this gap has commenced and the Succession Act is currently under revision by the Law Reform Commission of Uganda. See for example the Succession (Amendment) Bill 2011 which states one of its objectives to be to "Fill the lacuna in the Succession Act created by the Constitutional Court ruling".

Section 235 provides that "jurisdiction to grant probate and letters of administration under this Act shall be exercised by the High Court and a magistrate’s court" (such court is referred to throughout the Succession Act as the "district delegate").

Section 246 provides that "an application for letters of administration shall be made by petition".

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1234 Elizabeth Cooper (2011), pp.2-3.
1235 Succession Act, section 36.
1236 Succession Act, section 37.
1237 Succession Act, section 46.
Section 240 provides that "Probate of the will or letters of administration to the estate of a deceased person may be granted by the district delegate under the seal of his or her court" if it appears by a verified petition, that the testator or intestate (as applicable) had, at the time of their decease, a fixed place of abode or any property within the jurisdiction of the delegate. If the deceased had no fixed abode at the time of their death the delegate may at their discretion refuse the application.1239

III. The Administrator General’s Act1240

The Administrator General is responsible for ensuring that management of deceased estates comply with the law. According to the Administrator General’s Act, the Administrator General’s responsibilities include receiving reports of deaths and1241 applying for letters of administration.1242 The International Centre for Research on Women1243 notes that the Administrator General’s powers also include resolution of disputes among beneficiaries or family members of the deceased,1244 and ensuring that the rights of beneficiaries, especially minor children and widows, are not violated.

Pursuant to section 36 of the Administrator General’s Act, nothing in the Succession Act will supersede the powers of the Administrator General under the Administrator General’s Act.

Under section 4 of the Administrator General’s Act, if a person dies intestate in Uganda, the agent of the area in which the death occurred shall report the death to the Administrator General. The same act further provides that:

"…the Administrator General may apply to the court for letters of administration of the estate of the deceased person, whereupon the court shall, except for good cause shown, make a grant to him or her of letters of administration.1245"

If, in the opinion of the Administrator General, the property of the deceased intestate has a gross value of less than 20,000 shillings (equivalent of GBP 4.05),1246 the Administrator General has the power to, without any letters of administration or other formal proceedings or notice, take possession of the state and realise the assets by sale (or otherwise) to pay off debts etc. and deliver any

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1239 Succession Act, section 241.
1241 Administrator General’s Act, section 4.
1242 Administrator General’s Act, section 4.
1244 Administrator General’s Act, section 30.
1245 Administrator General’s Act, section 4(3)(e).
1246 Converted at the rate of £1 = 4,937.39 Ugandan Shillings.
surplus to those persons who the Administrator General considers are entitled to it.\textsuperscript{1247}

\textbf{IV. The Children Act}

An aim of the Children Act is to "\textit{reform and consolidate the law relating to children; to provide for the case, protection and maintenance of children}".\textsuperscript{1248} A child is defined in the Children Act to be a person under the age of 18.\textsuperscript{1249}

\textit{Protection of children}

Section 10 states that it is the duty of each local government council’s duty to "\textit{safeguard and promote the welfare of children within its area}" and to designate a secretary for children’s affairs. The local government council is expected to mediate in situations involving the rights of a child. Such rights expressly include a "\textit{child’s right to succeed to the property of his or her parents}".\textsuperscript{1250} However, this protection mechanism appears to be limited. In section 10(4), the local government council’s power excludes "\textit{any powers of distribution of property by the local government council}".

Section 11 provides that an infringement of a child’s rights may be reported to the local government council and a decision may be made by the secretary for children’s affairs in the best interest of the child. Any refusal to comply with the decision may result in escalation to the village executive committee court,\textsuperscript{1251} and then to a parish and sub-county executive committee court.\textsuperscript{1252}

\textit{Maintenance}

Section 76 of the Children Act provides that an application for a child maintenance order can be made by a mother, father or guardian of a child, who has custody of the child. Further, section 76 provides that "\textit{A child in respect of whom a declaration of parentage has been made may also make an application through a next of friend for a maintenance order}.” Please see paragraph discussion below in paragraph 2.c.i.ii.V on "Civil Procedure Rules, the Judicature Act and Guardianship" regarding suits brought by a ‘next friend’.

A maintenance order under section 76 of the Children Act can be made against the father or mother of the child. The order made may be, for instance, a monthly sum of money or a lump sum as may be determined to be suitable by the court for maintenance (which includes general welfare) of the child.

\textsuperscript{1247} Administrator General’s Act, section 4(5).
\textsuperscript{1248} Children Act, Preamble.
\textsuperscript{1249} Children Act, section 2.
\textsuperscript{1250} Children Act, section 10(3).
\textsuperscript{1251} Children Act, section 11(3).
\textsuperscript{1252} Children Act, section 105.
In the event that the amounts required to be paid under the maintenance order have not been paid within a month of making the maintenance order, the magistrate may, pursuant to section 77 of the Children Act, amongst other things, direct as follows:

"[...] that the sum due, together with any costs incurred, be recovered by distress or sale or redistribution of the property of the father or mother unless he or she gives sufficient security by way of recognisance or otherwise to the satisfaction of the court for his or her appearance before the court on a day appointed for the return of the warrant or distress, but not more than seven days from the taking of the security".

Money payable under a maintenance order shall be paid to the applicant or their custodian (if appointed). 1253

Section 92(1) of the Children Act states that:

"[...] all causes and matters of a civil nature concerning children shall be dealt with by the village executive committee court where the child resides or where the cause of action arises."

V. CIVIL PROCEDURE RULES, 1254 THE JUDICATURE ACT AND GUARDIANSHIP

Guardianship

In addition to the guardianship provisions in the Succession Act discussed above, we understand that a guardian may be appointed for a child by a notice of motion served under Order LII of the Civil Procedure Rules, which relates to motions and other applications, and section 33 of the Judicature Act which relates to general provisions as to remedies which may be granted by the High Court.

Action taken by a guardian on behalf of a child

A guardian may bring an action on behalf of the child by way of Order XXXII of the Civil Procedure Rules which requires such person to attach written authority as a next of friend to the suit. This provision deals with "Suits by or Against Minors and Persons of Unsound Mind" and provides that "Every suit by a minor shall be instituted in his or her name by a person who in the suit shall be called the next friend of the minor". 1255

iii. CUSTOMARY LAW

To analyse the customary practices that exist in Uganda we need to consider the context in which the rules operate and the society that is served by them. The concept of marriage, land ownership and community have an impact on the means by which orphans can access the services available to them.

1253 Children Act, section 79.


1255 Section 1, Order XXXII, Civil Procedure Rules.
Customary marriages are legally recognised in Uganda by the Customary Marriage (Registration) Act 1973 and the Marriage Act 2000. The former requires the registration of customary marriages, while the latter governs all marriages of all faiths in Uganda including polygamous marriages. It is worth noting that the failure to register a customary marriage does not invalidate it.

According to Focus on Land, 80% of land in Uganda is held under customary tenure systems and usually belongs to a family, clan, or tribe consequently the rights to land for many Ugandans are temporary, rather than absolute. Land is a central asset and a means of economic survival.

The majority of Ugandans die intestate. The customary inheritance system is patrilineal (i.e., the idea that property should remain in the male line and be passed from son to son). A new born child, whether male or female, belongs to his or her father’s clan. Women are disregarded in matters of property, because the traditional notion is that the men of the community will support the women. The customary law with respect to land ownership and inheritance is gender biased.

Although the Succession Act makes some provision for women and children to retain the matrimonial home, these rights are also temporary as they expire when the wife remarries or when the children marry or reach the age of majority (male children under 18 years and unmarried female children under 21 years of age).

D. GOVERNMENT ORGANISATIONS

The Ministry of Gender, Labour and Social Development ("MGLSD") is the government department responsible for the welfare of children including orphans. It is supported by the National Council for Children. The National Council for Children’s main objective is "to act as a body through which the needs and problems of children can be communicated to the Government and other decision-making institutions and agencies in Uganda".

In 2004, the MGLSD introduced the National Orphans and other Vulnerable Children ("OVC") Policy and Strategic Programme Plan. The MGLSD acknowledged that the traditional

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This report found that 9 in 10 adults in study districts of Uganda had no written wills.


absorption of orphans into the extended family system in Ugandan communities was overburdened by the HIV/AIDs pandemic and had limited financial resources to provide adequate care and support for orphans.

The OVC motto is "Hope never runs dry" – its goal is “the full development and realisation of rights of orphans and other vulnerable children” by encouraging interventions in eight areas: care and support, child protection, education, health, food security and nutrition, psychological support, socio-economic security, conflict resolution and peace-building, also known as the Core Programme Areas (“CPA”).

The OVC was closely followed by the National Strategic Programme Plan of Interventions for Orphans and other Vulnerable Children in Uganda ("NSPPI") in 2005. The NSPPI is a guide for all the stakeholders involved with orphans. It sets out the 10 core programme areas that the stakeholders should focus their efforts on to ensure that orphans receive services in at least three of the CPAs. A 2010 Situational Review of the NSPPI-1 concluded that "the most supported CPA was education (70%) and health (57%). The least implemented CPA was legal and child protection" and confirmed that there were gaps in the delivery and management of the resources. NSPPI -1 expired 2009/2010 and has now been replaced with NSPPI-2 which is due to expire in 2015/2016. NSPPI-2 aims to provide a framework to resolve some of the failings identified by the 2010 review. NSPPI -2 aimed to focus on seven instead of ten core programmes. We are unable to determine whether or not NSPPI-2 has been successful in meeting its goals.

The government has introduced a number of policies in the last ten years, such as the National International Displaced Persons Policy and the National Youth Policy. The former provided protection for children as a marginalised group whilst the latter aims to establish a framework for youth planning. We are unable to determine whether or not these policies have improved the mechanisms available to enable orphans to pursue inheritance claims.

The Uganda Law Society has a pro-bono scheme in partnership with the Ministry of Justice and Constitutional Affairs. The pro-bono scheme was launched in 2008 and covers nine districts (Kampala, Gulu, Jinja, Kabale, Kabarole, Masindi, Soroti, Aru and Mbarara). This scheme appears to be part of the implementation of the Advocates (Pro Bono Services to Indigent Persons) Regulations, which require all licensed advocates to provide 40 hours of pro bono services per year or make a payment in lieu.

The Government also launched a legal aid project in 2009 called Justices Centres Uganda. The project aimed to bridge the gap between the supply and demand of legal services by providing legal aid services. There are four Justice Centres (Lira, Tororo, Hoima and Mmengo) covering 26 districts between them.

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Both the Uganda Law Society programme and the Justice Centres provide legal aid services that include legal advice, legal representation in court, alternative dispute resolution and human rights awareness campaigns. We are unable to determine whether the legal aid facilities are easily accessible to orphans.

A 2010 study by the Chronic Poverty Research Centre which involved interviewing government representatives and NGOs and a review of the literature on inheritance and property rights of number countries, identified the following:

"The reach of statutory law remains limited in Uganda because of the challenge of access and deference to the customary governance and localised practices; the most common first recourse to resolve these [inheritance or property] issues was through the Local Council Courts; approximately one-quarter of people chose to first approach clan and community leaders; one in five land conflicts went unreported to any dispute resolution body".\(^{1267}\)

A 2011 UN survey report on access to legal aid services in Africa concluded that "most people live outside the reach of lawyers who can provide them with legal services".\(^{1268}\) The first port of call for orphans attempting to access or raise grievances over inheritance are the senior members of their families or clan/tribal leaders because they are "socially legitimate and easy to access".\(^{1269}\)

The next option available for dispute resolution is the Land Tribunals that were set up under the Land Act 1998 as a local and accessible alternative to the Courts. However, the Land Tribunals have proven to be "generally ineffective and expensive".\(^{1270}\)

A study by Ruth Evans and Caroline Day on the inheritance practices and the intergenerational transmission of poverty for widows living with HIV and children caring for them and orphaned young people heading households in Tanzania and Uganda in 2010 concluded that both widows and orphans have a low socio-economic status and weak bargaining power to challenge the customary practices that exist in their communities. Moreover, there were a number of complex factors which contributed to the ability of the widows and orphans interviewed, to access and safeguard their inheritance: social capital within the community or the family clan; written evidence of bequests; property ownership and land titles, awareness of gender and generational inequalities and advocacy.\(^{1271}\)

\(^{1267}\) Cooper (2011).


\(^{1270}\) Cooper (2011).

i. NON-GOVERNMENT ORGANISATIONS

There are a number of non-governmental organisations working in Uganda. The majority appear to be focused on the educational and health needs of orphans. There are others that provide legal aid services that could be accessed by orphans to support them in their inheritance claims. Some of these non-governmental organisations have been listed below.

- Avocats Sans Frontières ("ASF") was founded in 1992, ASF has offices in seven countries including Uganda. ASF Uganda was launched in 2007. The organisation aims to strengthen the capacity of Ugandan lawyers to provide pro-bono services and defend the rights of vulnerable Ugandan citizens.\(^{1272}\)

- Uganda Christian Lawyers Fraternity ("UCLF") was founded in 1987 and provides legal aid services, legal advice, counselling and assistance on non-contentious matters.\(^{1273}\)

- Uganda Women’s Effort to Save Orphans ("UWESO") was founded in 1986 initially to provide support to orphans affected by the war in Northern Uganda and those who lost their parents to HIV/AIDS. UWESO support is concentrated in the Luwero Triangle region. Its areas of focus are health, education and child protection, socio-economic security, and food and nutrition for orphans and their caregivers.\(^{1274}\)

- The Uganda Land Alliance Land Information Centre ("ULA") was founded in 1995, ULA is a consortium of non-governmental organisations that advocate fair land laws and policies that address land rights of poor people and marginalised groups. ULA has Land Rights Information Centres in Mbale, Kibaale, Apac and Luweero Pader, Amuru, Apac, Katakwi, Kotido, Napak and Moroto districts and handles land disputes.\(^{1275}\)

3. CONCLUSION

Uganda is a signatory to a number of international and regional treaties concerning the rights of women and children. The Constitution of Uganda enshrines the principle of equality and the protection of the rights of children and vulnerable people. However, the Constitution does not explicitly provide a framework for inheritance rights and the framework for inheritance rights is contained in General Law and Customary Law.

Two points concerning the legal framework for inheritance rights are important to note. Firstly, inheritance rights are largely governed by Customary Law. While provisions of General Law and Customary Law are in theory void to the extent they contravene the Constitution, for example when they contravene principles of equality, both General Law and Customary Law discriminate


\(^{1274}\) Uganda Women’s Effort to Save Orphans, "UWESO Today", available at: http://uweso.org/uweso-today/.

between heirs particularly on the grounds of gender. Customary Law varies significantly because of the large number of ethnic groups in Uganda with unique inheritance rules.

Secondly, our research indicates that Customary Law on inheritance is applied especially in rural areas, even when in conflict with the Constitution or General Law. While mechanisms exist for the challenge of discriminatory treatment of heirs, the extent to which such legal challenges are successful is unclear.

Notably, however, there has been a successful legal challenge to the parts of the Succession Act by a women’s rights organisation. Provisions of the Succession Act which prescribed the method of distribution of assets upon the death of a male intestate (but were silent in respect of a female intestate) were declared contrary to the Constitution and therefore void. While amendments have been proposed to fill the vacuum left by this, our research shows that there has been no enactment of law to replace the void intestacy rules.

While there are organisations which provide legal aid generally to vulnerable people in areas of law including human rights and succession, access to legal aid remains limited. For example, there is no official government body which provides legal aid to children who wish to enforce their inheritance rights. However, there are several NGOs which may be able to support them in this.

There is an urgent need to develop a large-scale, co-ordinated strategy to protect and enforce the inheritance rights of children in Uganda. A comprehensive approach to the inheritance of children may involve legislative reform to develop a robust legal framework for inheritance rights, which goes beyond broad statements of principle or policy and is potentially more prescriptive. Where appropriate, this framework should replace or clarify the legal position under General Law and its interaction with Customary Law. Equally, there is a need to enforce General Law more effectively especially in rural areas where, in practice, Customary Law on inheritance trumps General Law and entrenched constitutional principles.
APPENDIX 1 - SHORT SUMMARY TABLE

Note that it will be possible to provide references and narrative explanations in the full table on the next page.

<table>
<thead>
<tr>
<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td>In the Constitution</td>
<td>Yes¹²⁷⁶</td>
<td>Does not specify</td>
<td>Does not specify</td>
<td>Does not specify</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>In legislation/Civil Law</td>
<td>No¹²⁷⁷</td>
<td>Yes</td>
<td>Yes</td>
<td>Don’t know</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>In Customary Law (codified)</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
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<tr>
<td>In Customary Law (practice)</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
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</tbody>
</table>

¹²⁷⁶ Article 21 of the Constitution provides that a person shall not be discriminated against on the grounds of sex.

¹²⁷⁷ See paragraph the discussion regarding the Succession Act.
Please answer with one of the following responses only:

**Yes** - The law/ practice explicitly mentions equality between the two characteristics (Questions 1-4), or relevant codified law/ national provisions exist (Questions 5-7). In relation to Question 1, if gender neutral language rather than specifically mentioning gender equality, please specify 'Yes' and include an explanatory footnote to this effect;

**No** - The law/ practice explicitly discriminates between the two characteristics (Questions 1-4). Not applicable to Questions 5-7;

**Does not specify** - All relevant material was accessed, but there was no information relevant to the question (Questions 1-7);

**Don’t know** - It is not possible to say whether all relevant material was accessed, and so a definitive answer cannot be given (Questions 1-7);

**N/A** - The question is not applicable for this type of law, for example if a country does not have codified Customary Law or a Constitution. It is likely that this answer will apply to Customary Law (practice) for Questions 5-7.
## Appendix 2 - Extended Summary Table

<table>
<thead>
<tr>
<th><strong>Additional Questions</strong></th>
<th><strong>Response</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>1. How does the legal system define a child? Is the age of majority different for different matters?</td>
<td>A child is defined under the Constitution as &quot;a person under the age of eighteen years&quot;. However, the Constitution allows the term &quot;child&quot; to be given different meanings for different matters. For example, for the purposes of Article 34(4) of the Constitution concerning the protection of children from social or economic exploitation, a child is a person under the age of 16 years old.</td>
</tr>
<tr>
<td>2. Does the country have a de jure dual legal system (customary or religious law running parallel to the statutory law or common law)? Whether de jure or de facto, is the customary/religious law related to inheritance and property rights the preferred means of dispute resolution in this area?</td>
<td>Uganda recognises General Law and Customary Law. General Law and Customary Law are both applied in practice. The Constitution provides that in the event of conflict, General Law will prevail so that Customary Law becomes void. In practice, however, customary law is sometimes applied even when it contradicts statutory law or legal precedent. In more rural areas, Customary Law is the preferred method of dealing with inheritance and property rights.</td>
</tr>
</tbody>
</table>
| 3. Does the country's legal system (ie Civil Law and Customary Law) differentiate between different types of land tenure? | The Constitution recognises four types of tenure (see paragraph 1.a of this report):  
- Customary  
- Mailo  
- Leasehold  
- Freehold  

Customary tenure rights are gained through historic occupation of land. Rights under customary tenure are determined by the customs of the clans in occupation. Customs vary between the large number of ethnic groups in Uganda.  

Mailo is a particular form of customary tenure which functions similarly to freehold, for |
### ADDITIONAL QUESTIONS

### RESPONSE

<table>
<thead>
<tr>
<th>Question</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>4. Does the country have codified legislation governing inheritance rights?</td>
<td>The Constitution does not enshrine the right of inheritance (see paragraph 2.i). However, other legislation contains provisions governing inheritance rights. The Succession Act contains detailed and prescriptive rules concerning proportions for the distribution of assets of a man who dies intestate. However, parts of the Succession Act have been successfully challenged as discriminatory and declared unconstitutional. The Succession Act also includes provisions relating to the creation of wills which require that reasonable provision be made for the maintenance of dependent relatives. See further paragraph 2.ii.II of this report. There are also prescriptive rules relating to the occupation of the residence of the deceased principal. See paragraph 2.ii.II of this report.</td>
</tr>
<tr>
<td>5. Does the legal system that governs inheritance rights (if any) ensure equality between male and female children?</td>
<td>In principle, the Constitution provides for equality between men and women. In practice, however, some provisions in the Succession Act, for example, do not. Provisions of the Succession Act which favoured men over women have been successfully challenged and declared unconstitutional. Under most systems of Customary Law, women cannot own or inherit land in their own names, with men usually inheriting property. Women are rarely permitted to inherit land. Islamic law, which discriminates against women, is one such form of Customary Law. See paragraph 2.iii.II.</td>
</tr>
<tr>
<td>6. Does the legal system that governs inheritance rights (if any) ensure equality</td>
<td>Based on the information available, it is difficult to determine whether the legal system of</td>
</tr>
<tr>
<td>ADDITIONAL QUESTIONS</td>
<td>RESPONSE</td>
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<tr>
<td>between biological and adopted children?</td>
<td>Uganda ensures equality between biological and adopted children. However, areas of the legislation accessed suggest that biological and adopted children may be treated equally under Ugandan law. For example, section 52 of the Children Act provides that when the adopter dies, the property will devolve to the adopted child as though the child were the natural child of the adopter. See paragraph 2.iii. Furthermore, section 53 of the Children Act provides that an adopted child will be unable to inherit from his or her natural parents.</td>
</tr>
<tr>
<td>7. Does the legal system that governs inheritance rights (if any) ensure equality between children born in and out of wedlock?</td>
<td>Under the Succession Act, legitimate and illegitimate children appear to be treated equally. The definitions of &quot;son&quot; and &quot;daughter&quot; under the Succession Act include illegitimate children. However, treatment under Customary Law may vary due to the different rites and customs of ethnic groups in the Uganda.</td>
</tr>
<tr>
<td>8. Does the legal system that governs inheritance rights (if any) ensure equality between children born from a monogamous and polygamous union?</td>
<td>The legislation accessed did not clearly specify whether children of monogamous and polygamous marriages would have equal inheritance rights.</td>
</tr>
<tr>
<td>9. Are there different legal rules for testate and intestate succession?</td>
<td>If a person dies having made a will, he or she is free to dispose of property as he or she thinks fit. This is subject to the caveat that reasonable provision must be made for dependent relatives. The absence of reasonable provision is subject to challenge in court. If a man dies intestate, the Succession Act prescribes the method of distribution of the assets of the intestate. The Succession Act is highly prescriptive in this regard. See paragraph 2.ii.</td>
</tr>
<tr>
<td>ADDITIONAL QUESTIONS</td>
<td>RESPONSE</td>
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<td>------------------------------------------------------------------------------------</td>
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<tr>
<td>10. Does the legal system specify the percentages of inheritance to be distributed</td>
<td>If there is a will, the only apparent requirement is that reasonable provision be made for dependent relatives.</td>
</tr>
<tr>
<td>to children?</td>
<td>If the deceased dies intestate, there are detailed provisions which prescribe the method/proportion of distribution of the assets of the deceased to dependent relatives. Detailed provisions are contained in paragraph 2.ii.</td>
</tr>
<tr>
<td>11. Does the legal system address the rights of orphaned children to transact land,</td>
<td>In principle, section 34(7) of the Constitution provides that the law should provide special protection to orphans and vulnerable children. However, the sources consulted did not contain specific provisions protecting the rights of orphaned children.</td>
</tr>
<tr>
<td>houses and property that they inherit?</td>
<td></td>
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<tr>
<td>12. Does the legal system link inheritance rights to residency/citizenship?</td>
<td>There is little information available on this point. Non-authoritative sources have suggested that non-citizens can inherit land, subject to the caveat that non-citizens cannot own a freehold interest in land. However, this could not be verified.</td>
</tr>
<tr>
<td>13. Does the legal system provide for automatic inheritance for sole survivor children?</td>
<td>The Constitution recognises the rights of children generally not to be deprived of property. However, it does not provide specifically for the rights of inheritance of sole survivor children.</td>
</tr>
<tr>
<td></td>
<td>Based on the sources available, there does not appear to be an automatic inheritance system dedicated to sole survivor children. However, it is likely that the prescriptive rules on the distribution of the deceased's assets following intestacy will apply to sole survivor children, as they would fall under the definition of &quot;dependent relatives&quot; under the legislation. See paragraph 2.ii.II.</td>
</tr>
<tr>
<td>14. Does the legal system mandate the appointment of a trustee/administrator/guardian</td>
<td>Section 44 of the Succession Act provides that where the deceased has not named a guardian for their children in their will, the responsibilities of guardianship will devolve on certain family members.</td>
</tr>
</tbody>
</table>
**ADDITIONAL QUESTIONS**

<table>
<thead>
<tr>
<th>RESPONSE</th>
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<tbody>
<tr>
<td><strong>Section 6(2) of the Children Act</strong> provides that where the natural parents of a child die, &quot;parental responsibility may be passed on to relatives of either parent, or by way of a care order, to the warden of an approved home, or to a foster parent.&quot;</td>
</tr>
<tr>
<td><strong>A guardian may also be appointed by a notice of motion served under Order LII of the Civil Procedure Rules and section 33 of the Judicature Act.</strong></td>
</tr>
<tr>
<td>However, guardians of sole survivor children are usually appointed by custom.</td>
</tr>
</tbody>
</table>

15. **If such an appointment is mandated, does codified law enumerate:**

   i. **appointee’s rights/responsibilities to hold the property of a sole survivor child until he/she ceases to be a minor?**
   
   ii. **penalties to be imposed on an appointee who misuses the property/wrongfully deprives a child of property to which they are entitled?**
   
   iii. **mechanisms for a sole survivor child to challenge an appointee and gain access to court?**

16. **Is there regulation of the management of inheritance for those sole survivor children with no legal guardian?**

Information could not be obtained from accessible sources.

17. **Where is Customary Law applied (in traditional non-State forums, formal State Courts, by local leaders/chiefs etc.)?**

Customary Law is applied largely in local communities by local leaders/elders. Local Council Courts apply Customary Law in villages, parishes and sub-counties and function similarly to courts. See paragraph 2 for a more detailed discussion.

18. **How would you qualify the proportion of property claims resolved under Customary Law?**

High majority as 70-80% of land tenure is customary and so is in practice governed by customary law.
<table>
<thead>
<tr>
<th>ADDITIONAL QUESTIONS</th>
<th>RESPONSE</th>
</tr>
</thead>
<tbody>
<tr>
<td>[Nearly all/ High majority/ Small majority/ Minority]</td>
<td>The Uganda Human Rights Commission can investigate human rights abuses. However, under the UHRC Complaints Handling Procedures Manual, claims which do not directly touch on human rights (including land disputes) cannot be brought to the UHRC. The precise position in respect of inheritance rights in unclear. Land tribunals and district land boards can deal with disputes arising out of land. Inheritance claims relating to land will fall within the remit of land tribunals and district land boards. However, it has been reported that the land tribunals and land boards have not been used effectively, and the handling of land cases has largely been returned to the courts. See paragraphs 2.c.i-2.c.ii. The regular court route is available for enforcement of property and inheritance rights. Case law regarding the inheritance rights of orphaned children could not be found.</td>
</tr>
<tr>
<td>19. Does the country have a court or tribunal in which orphaned children/their representatives can bring an action enforcing their legal right to property? If so, is there any case law specifically regarding orphaned children’s inheritance rights?</td>
<td>While there is no specific legislation pertaining to the provision of legal aid services, the Uganda Law Society maintains a pro bono scheme in conjunction with the Ministry of Justice and Constitutional Affairs. The scheme provides legal aid services for a number of areas of law, including wills, estates and succession. The Ugandan Government also launched the Justice Centres Uganda project in 2009 which established Justice Centres in certain regions of the country. Both the Uganda Law Society and the Justice Centres provide services including legal advice, representation and alternative dispute resolution.</td>
</tr>
<tr>
<td>20. Are there national provisions for legal aid in civil/administrative claims, including inheritance? If so: Do these provisions contain special measures or provisions regarding children?</td>
<td></td>
</tr>
<tr>
<td>ADDITIONAL QUESTIONS</td>
<td>RESPONSE</td>
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<tr>
<td></td>
<td>Based on available information, legal aid providers do not appear to have special measures relating to children.</td>
</tr>
</tbody>
</table>
ZAMBIA

INTRODUCTION
This report examines the inheritance rights of children in Zambia and particularly the rights of children who have been orphaned by the loss of one or both parents through contracting HIV/AIDS. The issue is of great significance in Zambia, which had an estimated HIV/AIDS prevalence amongst adults between the ages of 15-49 of 12.62% in 2013 down from its peak of 15.6% in 2001. Zambia's 2002 report to the Committee on the Rights of the Child states that:

"As HIV/AIDS epidemic matures into its second decade in Zambia, child-headed households are rapidly emerging. In these households, the oldest child assumes responsibility for the care of younger siblings after the death of parents. Children in such households are at economic and social risks because they lack adult supervision, guidance and support".

Zambia has recognised the need to control and reduce the spread of HIV/AIDS, but, as the statistics show, progress has been slow over the last decade. In 2012, there were an estimated 170,000 children infected with HIV/AIDS and in 2009 more than 690,000 were described as being orphaned by HIV/AIDS. Those figures have reduced according to UNAIDS such that in 2014 the number of children suffering from HIV/AIDS was 100,000 and the number of children between 0-17 years of age orphaned by HIV/AIDS was 380,000. There is still a great deal of stigma attached to individuals suffering from or orphaned as a result of HIV/AIDS, which results in these orphaned children being particularly vulnerable to confiscation of property, particularly in rural areas where tribal law is most strongly adhered to.

This report is split into the following paragraphs:

1. Compliance with International Law
2. The National Legal System
3. General provisions relating to inheritance rights
   A. specific provisions relating to sole survivor children and inheritance
   B. mechanisms for facilitating children's inheritance claims
   C. conclusion

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1. **COMPLIANCE WITH INTERNATIONAL LAW**

Zambia has a dual legal system based on the common law derived from its British colonial history. International law and domestic law are considered as separate. International legal rights and obligations arising from the signing and **acceding** to of international treaties are not automatically incorporated into domestic law in Zambia and legislation is required for that to happen. Despite the clear language of the Constitution of Zambia adhering to the fundamental rights and freedoms of the individual, such legislation largely remains to be enacted.

Below is a summary of Zambia’s commitment to the treaties listed in the introduction to the overall report.

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<tr>
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<td>4 February 1972</td>
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<td>10 April 2008</td>
<td>16 September 2009</td>
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<tr>
<td>Southern African Development Community (&quot;SADC&quot;) Founding treaty</td>
<td>17 August 1992</td>
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<tr>
<td>SADC Protocol on Gender and Development</td>
<td>17 August 2008</td>
<td>n/k</td>
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2. NATIONAL LEGAL SYSTEM

Zambia has a dual legal system that recognises statutory law based on English common law and customary law based on the cultures and customs of the different tribes in Zambia. The statutes are based on the UK legal system and some legislation is still in effect within Zambia.1283

The Constitution of Zambia of 2016 ("the Constitution") is the supreme law of the Republic of Zambia and any law (written law, customary law and customary practice) which is inconsistent with the Constitution is stated to be void to the extent of the inconsistency.1284 Part III of the Constitution contains the Bill of Rights. Both codified law and customary laws are administered through a single court system consisting of a Supreme Court, High Court, Industrial Relations Court, Subordinate Court and Local Court. The Local Courts largely apply and enforce customary laws, particularly in relation to matrimonial and inheritance rights issues, as well as minor criminal matters. It is the Local Court system that most citizens of Zambia will naturally expect to be applicable to them, especially in rural areas.

As previously stated in this report, international treaties are not automatically applied at national level. Although certain treaties such as the Convention on the Rights of the Child have been partially incorporated into domestic law through the Juveniles Act and the Anti-Gender-Based Violence Act, there is no consistency in the domestication of international law. This can largely be blamed on the failure of the Constitution to specify the status of international law and Zambia's post-colonial reliance on the English common law system of precedent.1285

A. GENERAL PROVISIONS RELATING TO INHERITANCE RIGHTS

i. THE CONSTITUTION

Article 11 of the Constitution contains a general provision affording every person in Zambia the fundamental rights and freedoms of the individual.1286 This provision includes a non-discriminatory provision whereby it is understood that the fundamental rights and freedoms of the individual prima facie apply equally to female, as well as male, children. The fundamental rights and freedoms of the individual are both clarified and limited by certain other provisions in Part III of the Constitution. For example, Article 23 of the Constitution includes the right to equality and non-discrimination. It establishes that "a law shall not make any provision that is discriminatory either of itself or in its effect".1287 Furthermore, Article 23(2) states that "...a person shall not 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 definition of "discriminatory", as used in the Constitution, includes different treatment on the basis of sex.1288 As such, it is understood that female children cannot be discriminated against under Zambian law on the basis of gender.

1284 Article 1, Constitution.
1286 Article 11, Constitution.
1287 Article 23(1), Constitution.
1288 Article 23(3), Constitution.
There is legal uncertainty as to whether Article 23 of the Constitution only imposes an obligation on the State to not discriminate, or whether this obligation also applies to private individuals and their behaviour in their private relations. Importantly however, Article 23(2) only applies in relation to "written law". "Written law" is defined by section 3 of the Interpretations and General Provisions Act as "an Act, an Applied Act, an Ordinance and a Statutory Instrument". Following this, the non-discriminatory provision in Article 23(2) does not apply to unwritten customary law. Article 23(4) is also critical here as it specifically excludes certain matters, including the devolution of property on death from the non-discrimination provisions in Article 23(4). These exemptions have the vital consequence that customary law, pursuant to which so many matrimonial, inheritance and family disputes are adjudicated, can be discriminatory in both its form and effect.

23.

[...] a law shall not make any provision that is discriminatory either of itself or in its effect. [...] a person shall not 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.

In this Article the expression "discriminatory" means affording different treatment to different persons attributable, wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions, colour or creed [...].

Clause (1) shall not apply to any law so far as that law makes provision- [...]

[...] with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;

(b) 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 persons;

[...].

The Constitution does not contain any specific provisions relating to property ownership that are obviously relevant for the purposes of this report. However Article 11(d) provides a fundamental right of protection for the privacy of a person's home and other property and from deprivation of property without compensation. Additionally, Article 16(1) provides that no interest or right in property of any description may be compulsorily acquired unless by Act of Parliament, and that "adequate compensation" should be paid, if this occurs. Both rights should apply to orphans. Article 16(2)(h)(i) provides that it is not inconsistent with Article 16(1) to take possession and acquisition of property, where provided by law, for the purpose of the administration of the property for the benefit of a person not yet 18 years of age. The Constitution enshrines the fundamental right of

protection of young persons from exploitation at Article 11(c). Equally, at Article 24(2), it is stated that it is a fundamental right that "all young persons should be protected against physical or mental ill-treatment, all forms of neglect, cruelty or exploitation". "Young person" is defined under Article 24(4) as "any person under the age of 15 years", which would include many orphans. As the expression "young person" is not defined elsewhere in the Constitution, the Article 24 definition may apply to Article 11.

Inheritance rights are noticeable by the lack of any reference in the Constitution other than in the exemption in Article 23(4).

**ii. STATUTORY SUCCESSION**

**I. Testate succession**

Where the deceased has made a will, inheritance and succession is governed by the Wills and Administration of Testate Estates Act ("the Wills Act"). Section 3 makes clear that the provisions of the Wills Act apply to spouses (and, by implication, children) from polygamous marriages, and to children that were born out of wedlock. Furthermore, Section 66 of the Wills Act provides that "The High Court shall have original and unlimited jurisdiction in all matters relating to wills". However, the Wills Act does not apply to "(a) land which at the death of the testator had been acquired and was held under customary law and which under that law could not be disposed of by will or (b) property which at the death of the testator was institutionalised property of a chieftainship and had been acquired and was being held as part of chieftainship property".

The general rules governing the making of wills are set out in Part II of the Wills Act (sections 4-19). In particular, section 18 provides that "Unless a contrary intention appears in the will, any bequest which cannot take effect due to the death, fulfillment or non-fulfilment of the conditions upon which it was bequeathed shall lapse and shall be part of the residuary estate of the testator".

If a dependant of the deceased - defined by section 3 as "the wife, husband, child or parent" - believes that the deceased has not made reasonable provision for their maintenance, they may apply to court for an order to make such provision out of the deceased's estate.

20. (1) If, upon application made by or on behalf of a dependant of the testator, the court is of the opinion that a testator has not made reasonable provision whether during his life time or by his will, for the maintenance of the dependant, and that hardship will thereby be caused, the court may, taking account of all relevant circumstances and subject to such conditions

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1292 Section 3, Wills Act

1293 Section 66, Wills Act.

1294 Section 2, Wills Act.

1295 Section 18, Wills Act.
and restrictions as the court may impose, notwithstanding the provisions of the will, order that such reasonable provision as the court thinks fit shall be made out of the testator's estate for the maintenance of that dependant.

(2) The provision for maintenance to be made by an order may include-

(a) payment of a lump sum, whether immediate or deferred or grant of an annuity or a series of payments;

(b) grant of an interest in immovable property for life or any lesser period;

and where the order provides for periodical payments, it shall provide for their termination not later than-

(i) in the case of a husband or wife, his or her remarriage;

(ii) in the case of a child, his attaining the age of eighteen years or upon leaving secondary school or under graduate university, whichever is the later;

(iii) in the case of a child under disability, the cesser of the disability; or

(iv) the death of the dependant.

(3) In determining whether, and in what manner, and as from what date, provision for maintenance ought to be made by an order, the court shall have regard to the nature of the property representing the testator's estate and shall not order any such provision to be made as would necessitate a realisation that would be unwise having regard to the interests of the testator's dependants and of any person who, apart from the order, would be entitled to that property.

21. (1) The court shall, on any application made under this Part, have regard to the testator's reasons for making the dispositions made by his will or for not making any provision or any further provision, as the case may be, for a dependant, and the court may accept such evidence as it considers sufficient, including any statement in writing signed by the testator and dated; so however that in estimating the weight, if any, to be attached to any such statement, the court shall have regard to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement.

(2) The court shall also, upon any application made under this Part, have regard to any past, present or future capital or income from any source of the dependant to whom the application relates, to the conduct of that dependant in relation to the testator and to any other matter or thing which in the circumstances of the case the court may consider relevant or material in relation to that dependant and to the beneficiaries under the will.

22. (1) Except as provided by section twenty-four, an order under this Part shall not be made except on an application made within six months from the date on which representation in regard to the testator's estate for general purposes is first taken out.
(2) For the purpose of the exercise by the court of its discretion as to the persons to whom letters of administration are to be granted, a dependant of the testator by whom or on whose behalf an application under this Part is proposed to be made shall be deemed to be a person interested in the estate.

23. (1) Where an order is made under this Part, the will shall for all purposes, including the purposes of the enactments relating to death duties, be deemed to have had effect, as from the testator's death, as if it had been executed with such variation as specified in the order for the purposes of giving effect to the provision for maintenance made by it.

(2) The court may give such consequential directions as it thinks fit for the purposes of giving effect to an order made under this Part, but no larger part of the estate shall be set aside or appropriated to answer by its income the provision for maintenance made by the order that such part as, at the date of the order, is sufficient to produce by its income the amount of that provision.

(3) An office copy of every order made under this Part shall be sent to the principal probate registry for entry and filing, and a memorandum of the order shall be endorsed on, or permanently annexed to, the probate of the will of the testator or the letters of administration, as the case may be.

24. (1) On an application made on a date after the expiration of the period specified in section twenty-two, the court may make, only as respects property the income of which is at that date applicable for the maintenance of a dependant of the testator:

(a) an order for varying a previous order on the ground that any material fact was not disclosed to the court when the order was made, or that any substantial change has taken place in the circumstances of the dependant or a person beneficially interested under the will in the property; or

(b) an order for making provision for the maintenance of another dependant of the testator.

(2) An application to the court for an order under subsection (1) may be made by or on behalf of a dependant of the testator by the trustee of the property or by or on behalf of a person beneficially interested in it under the will.\[236\]

Part VII of the Wills Act gives extensive powers to the guardian of minors under a will:

55. (1) Where it is known to a court that a guardian of a minor has been appointed by will, the court shall not appoint any other person to be guardian of that minor except in exercise of its powers under section sixty-four.

(2) A court may direct the transfer to, or vesting in, the guardian of a minor of any property of the minor and may authorise or direct the sale of the property or any part of the property belonging to the minor.

\[1296\] Part III, sections 20-24, Wills Act.
(3) A guardian appointed by will or under this Act shall be entitled to represent the interests of the minor in any proceedings in court relating to the administration of the estate in which the minor has a share.

56. A personal representative or guardian may incur expenditure on such acts as may be necessary for the proper care and management of any property belonging to the estate of a deceased person or to a minor.

57. (1) Unless there is express provision to that effect in the will, a personal representative or guardian shall not derive any pecuniary benefit from his office.

(2) If a personal representative or guardian purchases, either directly or indirectly, any part of the property of the deceased or of a minor for whom he is responsible, the sale may be set aside by the court on the application, made within a reasonable time, of any other person interested in the property sold or in the proceeds of sale.

58. (1) A personal representative or guardian who wrongfully deprives a minor of property or a share in property to which the minor is entitled intending to benefit himself or any person, other than the minor, shall be guilty of an offence and liable upon conviction to a fine not exceeding five hundred penalty units or to imprisonment not exceeding one year, or both.

(2) When any person is convicted of an offence under subsection (1), the court may, in addition to any penalty which may be imposed-

(a) order the restitution to the minor of the property which has passed in connection with the commission of the offence; or

(b) if such property cannot be restituted or cannot be found, order the convicted person to make compensation to the minor of such sum as the court may assess as the value of the property-

(3) A court shall have jurisdiction to try an offence under this section although it has previously dealt with an application relating to the property in question.\textsuperscript{1297}

64. On application in the prescribed manner, by an interested person, a court shall have jurisdiction in relation to a deceased person’s estate-

(a) to decide whether a document purporting to be a will is a valid will and whether or not the deceased person died testate;

(b) to decide what is the property to which a deceased person was entitled at the date of his death;

(c) to order the sale or other disposition of property belonging to a deceased person’s estate for the purpose of paying the debts of the deceased or for the purposes of distribution;

(d) to appoint a guardian in place of a guardian who has acted improperly.\textsuperscript{1298}

\textsuperscript{1297} Sections 55-59, Wills Act.

\textsuperscript{1298} Section 64, Wills Act.
II. Intestate succession

Intestate succession is governed by:

i) the intestate succession act of 1989 (the “intestate act”)\textsuperscript{1299}, and where relevant

ii) the law in force in England on 17 August 1911.

The Intestate Act applies to "all persons who are at their death domiciled in Zambia and to a member of communities to which customary law would have applied if [the] Act had not been passed".\textsuperscript{1300} For the purposes of this report, the review of intestate succession will be limited to the Intestate Act as it is generally understood to apply to indigenous Zambians.\textsuperscript{1301}

Most importantly, the Intestate Act does not apply to land held under customary law or "family property".\textsuperscript{1302} This is an important point as customary tenure is the dominant system governing land administration on 94% of the land mass in Zambia.\textsuperscript{1303} This means that intestate succession of land for most Zambians is governed by customary law.

However, where:

i) the deceased was domiciled in Zambia at the time of their death; and

ii) the deceased was a member of a community to which customary law would have applied if the intestate act had not been passed; and

iii) the deceased's land is not subject to customary tenure; and

iv) the deceased had not written a will dealing with his land

then the Intestate Act would apply to the deceased’s land.

Sections 5-11 of the Intestate Act include the basic rules of distribution. In these sections "dependant" is defined as "a person who was maintained by that deceased person immediately prior to his death and who was - (a) a person living with that deceased person; or (b) a minor whose education was being provided for by that deceased person; and who is incapable, either wholly or in part of maintaining himself" and "priority dependant" is defined as a "wife, husband, child or parent".\textsuperscript{1304}


\textsuperscript{1300} Section 2(1) Intestate Act.


\textsuperscript{1302} Section 2(2)(a) Intestate Act.


\textsuperscript{1304} Section 3 Intestate Act.
5. (1) Subject to sections eight, nine, ten and eleven the estate of an intestate shall be distributed as follows:

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

(b) fifty per cent of the estate shall devolve upon the children in such proportions as are commensurate with a child's age or educational needs or both;

(c) twenty per cent of the estate shall devolve upon the parents of the deceased;

(d) ten per cent of the estate shall devolve upon the dependants, in equal shares:

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

(2) In respect of a minor, the mother, father or guardian shall hold his share of the estate in trust until he ceases to be a minor.

6. 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 of the deceased;

(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 shall be bona vacantia and shall devolve upon the State;

7. 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.

8. Notwithstanding section five 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.

9. (1) Notwithstanding section five where the estate includes a house the surviving spouse or child or both, shall be entitled to that house: Provided that-

(a) where there is more than one surviving spouse or child or both they shall hold the house as tenants in common; and

(b) the surviving spouse shall have a life interest in that house which shall determine upon that spouse's remarriage.

(2) Where the estate includes more than one house the surviving spouse or child or both shall determine which of the houses shall devolve upon them and the remainder shall form part of the estate.

10. Notwithstanding section five 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 property of the intestate; and

(b) in equal shares to the common property of the intestate.

11. Notwithstanding section five, where the total value of the estate does not exceed K30,000 the estate shall-

(a) devolve upon the surviving spouse or child of the intestate or to both; or
(b) where there is no surviving spouse or children, devolve upon the surviving parent”.

iii. CUSTOMARY LAW

Due to the fact that Article 23(4) of the Constitution specifically excludes matters of personal law, inheritance and other personal law matters such issues are, more often than not, governed by customary law.

There is not one set of clear, written customary laws in Zambia; the laws are based on tribal traditions and customs and are orally passed down through each indigenous ethnic group. There are however certain common principles which apply across the various customary laws across Zambia.  

I. Property Law

The 1995 Land Act ("Land Act") provides that all state land in Zambia vests in the President, but also recognises the historic nature of customary land and requires that before customary land can be converted into state land, local customary laws must be considered and local chiefs and affected persons must be consulted.

Approximately 94% of the land in Zambia is held under customary tenure. Under customary law, land is held by individuals, families, communities and clans and is passed down by each generation. The rights of tenure are governed by customs and traditions and can vary from area to area. Although customary land is usually undocumented, it has been historically considered by the Zambian population to be relatively secure.

Customary land is distributed by the local chief or headman. The right of access to customary land generally differs depending on gender. Young men may make a request to the local traditional leader to obtain land. Women usually obtain land through their families and husbands. If a single woman has children, the chief

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may also allocate land to be used for farming purposes. It is noted by the Zambia Law Development Commission that the allocation of land to women is minimal and is usually only to unmarried or single women, as married women are to rely on their husband's interest in the land.

All non-customary land in Zambia is deemed to be land owned by the State. Following the Land Act, a person holding customary land may choose to convert the land into state land and to take a private leasehold interest. Leaseholds of state land may be purchased under one of four types of leases: (1) a 10-year Land Record Card; (2) a 14-year lease for unsurveyed land; (3) a 25 to 30-year Land Occupancy Licence for residential settlements; or (4) a 99-year leasehold for surveyed land. The President is restricted from converting customary land into a leasehold of State land without seeking the permission of the appropriate chief and local authority and considering customary laws. However, generally, in the event that there is a conflict between customary law and the Land Act, the formal statutory law would take precedence.

Customary law has always recognised traditional/tribal occupancy rights which have helped to protect the right of villagers. However, because of the vague nature of the Land Act and the primacy of the codified law, the protection previously offered by customary law is gradually being eroded, leading to villages being subject to forced eviction by Zambian government officials from previously customary land that has been converted to state land.

II. Marital Law

Many married Zambian couples are not subject to the non-discriminatory protections and rights under the Marriages Act 1989, because most marriages in rural Zambia are conducted under customary law and are subject to the tribal


customs of the husband and wife.\textsuperscript{1318} There is no minimum age for marriage; women may be married off once they reach "maturity" which, in itself, has no legal definition. The \textit{Bringing Equality Home} report suggests that young girls under sixteen may be forced to marry or have sexual relationships with men, often from the age of twelve or thirteen. Men are also permitted to have polygamous marriages under customary law.\textsuperscript{1319}

In its Common Country Assessment in 2000, the UN noted the serious consequences that Customary Law marriages may be having in the increase of AIDS amongst young people in Zambia\textsuperscript{1320}:

"\textit{In Zambia, some of the factors contributing to [the spread of AIDS] are imbedded in customary laws and practices, especially in relation to divorce, adultery, child marriages and defilement}."

\section*{III. Inheritance Law}

As noted above, one of the purposes of the Intestate Act was to regulate inheritance laws, but, the inheritance procedures which are applied on the death of a Zambian individual depend on whether the marriage was conducted under customary law or statutory law.\textsuperscript{1321} The Intestate Act does not apply to customary law marriages and so fails to protect the majority of spouses and children living in predominantly rural areas.\textsuperscript{1322}

It is noted that very few Zambians actually write wills\textsuperscript{1323} and it is unclear from the evidence available whether wills are actually upheld under customary law.

Inheritance rights under customary law vary depending on tribal associations, location and gender. Under customary law, a female widow is generally restricted

\begin{itemize}
from inheriting property, although her children may have a right to inherit (as discussed below).\textsuperscript{1324}

There are 73 different ethnic groups in Zambia, which can be generally split into three customary lineal groups: (i) matrilineal, (ii) patrilineal and (iii) bilateral groups.\textsuperscript{1325} Under matrilineal systems, inheritance is through the female line (ie the wife's family); whereas inheritance under patrilineal systems is through the male line (ie the husband's family). The bilateral system combines elements of both the matrilineal and patrilineal systems.\textsuperscript{1326} There is commentary to suggest that children do not belong to their mother and father, but to the families of the mother or the father, depending on the lineal system of their tribe.\textsuperscript{1327}

IV. Matrilineal Systems

Following the death of one spouse, land held in matrilineal groups would be passed through the wife's family, often to male family members.\textsuperscript{1328} The wife's family would also have custody of the children.\textsuperscript{1329}

Matrilineal societies can be further split into two sub-groups: matrilocal and patrilocal systems.

Under a matrilocal matrilineal system, the husband will move to his wife's village on marriage and will obtain approval from the wife's parents by working for his wife's family as part of a "bride price". The husband acquires rights over land in his wife's village but these rights are dependent on the marriage continuing.\textsuperscript{1330}

In contrast, under a patrilocal matrilineal system, the wife would re-locate to the husband's village on marriage. The wife would have the right to cultivate her husband's land, but would have no land ownership rights. An example of a patrilocal matrilineal system is in Tonga in the Southern Province, where the


successor to the husband's estate would traditionally inherit the widow as his wife and would also take responsibility for the children of the deceased.\textsuperscript{1331}

V. Patrilineal Systems

Patrilineal groups are the most common across Zambia.\textsuperscript{1332} Under patrilineal systems, the property of the deceased husband or wife passes through the male family line and the husband (if still alive) or the husband's family would be granted custody of any children.\textsuperscript{1332} One example of a patrilineal system is in Ngoni in the Eastern Province, where the Ngoni inheritance customary laws reflect that customary marriages in Ngoni are often polygamous. The family elders of the male line would select a chosen heir, but this will usually be the eldest adult son of the deceased male.\textsuperscript{1334}

VI. Bilateral Systems

Under bilateral systems, children of the deceased (whether male or female) receive equal shares of any of the deceased's property. Where there are no children, the brothers of the deceased would inherit the deceased's estate equally. A widow does not have any right to inherit her husband's land; she would receive her clothing, cooking utensils and a share of the crops.\textsuperscript{1335}

The bilateral system recognises custody rights for both parents, meaning that the custody of children upon the death of a parent could be granted to either the mother, father or their respective relatives.\textsuperscript{1336}

Regardless of which system applies, women themselves have no direct inheritance rights: the property is either passed to the wife's family, the husband's family or the children.

VII. "Property grabbing"

"Property grabbing" is a key inheritance-related issue in Zambia. Property grabbing is the "unlawful appropriation of the deceased's property by in-laws or..."
other family members”. Property grabbers regularly deprive widows and orphans of their home, personal belongings and land.\textsuperscript{1337}

The issue of property grabbing is highlighted in the case of Tembo v Muchimba\textsuperscript{1338}. Following the death of a husband belonging to the Tonga tribe, the deceased's brother was appointed as successor in accordance with Tonga Customary Law. Rather than taking in the deceased's widow and six children, the brother assumed all of the deceased's property, but made no financial provision for the widow and children.\textsuperscript{1339} It is noted by academics that many widows do not challenge property grabbing because of a lack of knowledge of the law or a belief that they do not deserve the property and/or to challenge their relatives will cause them to be bewitched.\textsuperscript{1340}

It is reported that widows who remain in their deceased's husband's villages, are often allowed to continue to use the land (especially if they have children), but will often have their share of the land reduced.\textsuperscript{1341}

In comparison, where inheritance is governed by statutory law, section 14 of the Intestate Act makes “property grabbing” a criminal offence:

14. Any person who-

(a) unlawfully deprives any person of the use of-

(i) any part of the property 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 by 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 seven hundred and fifty penalty units or imprisonment not exceeding two years, or both.\textsuperscript{1342}

VIII. Cleansing

All ethnic groups in Zambia have historically practised the process of “widow cleansing”. When a husband or wife dies, the surviving spouse may be required to


\textsuperscript{1338} LC 558/81, Lusaka.

\textsuperscript{1339} Chuma Himonga, "Integration of the Laws of Succession in Zambia”, 2011, p.344.


\textsuperscript{1342} Section 14 Intestate Act.
undergo a formal cleansing process to rid him or her of the spirit of the deceased.\textsuperscript{1343} Both men and women are often required to take part in the cleansing process, but a man cannot be cleansed until he has paid the full bride price.\textsuperscript{1344} One common cleansing process was sexual cleansing, although this practice has declined due to the fear of AIDS and Christianity.\textsuperscript{1345}

**B. SPECIFIC PROVISIONS RELATING TO SOLE SURVIVOR CHILDREN AND INHERITANCE**

i. **THE CONSTITUTION**

As previously stated, the Constitution does not expressly deal with the inheritance rights of sole survivor children (that is, children whose parents are both deceased). The following paragraphs detail those Articles which should be considered relevant to sole survivors as persons under the age of 18.

Although the equality of children, and thus sole survivors, is not protected under the Constitution, the preamble to the Constitution recognises the equal worth of men and women, but does not refer to children. Equally, while under Article 23(1) no law which is discriminatory may have effect, Article 23(3) does not refer to age as a characteristic protected against discrimination. In any event, the Constitution explicitly disapplies the prohibition on discriminatory laws regarding inheritance and customary law, respectively under Article 23(4)(c) and under Article 23(4)(d).

Part III of the Constitution (containing the above Articles) cannot be changed without a referendum of 50% of the people supporting the draft bill which changes the Constitution. The recent Government of Zambia Act\textsuperscript{1346}, which amended the Constitution, only amended the non-entrenched provisions and thus did not amend Part III of the Constitution. It is anticipated that a referendum on these clauses will take place at the same time as the general election of 2016.\textsuperscript{1347} The draft bill containing these clauses has not yet been finalised, so it is not known what it may contain. However, given recent drafts of this section of the Constitution, such as in 2013,\textsuperscript{1348}, it is likely that constitutional reform will expand the rights of children, women and sole survivors, and the exceptions regarding customary law detailed above will be reduced or removed.

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ii. CODIFIED LAW

This paragraph outlines what a sole surviving child would be legally entitled to by way of inheritance, either on intestacy or under a will, according to the codified laws of Zambia.

Generally it should be noted that codified laws in Zambia on distribution of property are of limited use when assessing the situation in practice. As noted above, some codified laws in Zambia will not apply to the majority of Zambians, as the distribution and inheritance of property held under customary law will be governed by customary law. Further, research continues to show that law on the division of property is largely ignored in favour of customary law, even where the Intestate Act should apply. \textsuperscript{1349} Whilst many Zambians do not even know of the existence of codified law on distribution of property, others choose to ignore it, citing that such law is "based on Western cultural norms and a betrayal of African traditions". \textsuperscript{1350} Further, local courts prevent lawyers from participating in proceedings governing distribution of property, therefore rendering the Intestate Act futile at local court level.

I. Property division upon intestacy - the codified law in theory

As noted above, there are two systems which apply to Zambian nationals where property is to be divided amongst survivors upon a person dying intestate. In the first instance we consider the Intestate Act as it is generally understood to apply to indigenous Zambians. \textsuperscript{1351}

The Intestate Act seeks to protect the dependents of the deceased by providing for the surviving spouse, children, and other dependents and to protect against the unlawful appropriation of property by relatives. The Intestate Act recognises children born out of wedlock for purposes of inheritance and a 1996 reform of the Intestate Act allows inheritance rights for other wives, such as those under polygamous marriages. This means that sole surviving children may inherit different proportions of their deceased parent's estate, depending whether their parent had been in a monogamous or polygamous marriage.

If the deceased parent had been in a monogamous marriage, this means that there is no surviving spouse. Therefore, the surviving children will be entitled equally and absolutely to the personal chattels of their parent. \textsuperscript{1352} "Personal chattels" are defined as "clothing, articles of personal use or adornment, furniture and furnishing, appliances, utensils and all other articles of household use or decoration, simple agricultural equipment, hunting equipment, books, motor


\textsuperscript{1352} Section 8, Intestate Act.
vehicles and consumable stores but does not include chattels used for business purposes, money or securities for money".\textsuperscript{1353} If the deceased parent owned a house, this will be passed to the surviving children to own as tenants in common; if the deceased parent owned more than one house, the surviving children may choose who will inherit which house, and the remaining houses will form part of the residual estate.\textsuperscript{1354}

In terms of the rest of the estate, the surviving children will be entitled to 50\% of the estate in such proportions as are commensurate with the child's age or educational needs or both\textsuperscript{1355}, an equal share of 10\% of the estate if they meet the definition of dependant\textsuperscript{1356}, and, as there is no surviving spouse, 20\% of the estate in such proportions as are commensurate with the child's age or educational needs or both.\textsuperscript{1357} It is unclear from the legislation what would happen to the 20\% share allocated to the deceased parent's own parents, if they had already died. Because of limited precedent and practical guidance, it is also unclear what constitutes proportions commensurate with age and or educational needs. There is, however, provision under section 5(1) of the Intestate Act for a surviving child to apply to court if they believe that their share of the estate is "unreasonably small having regard to his degree of dependence on the deceased". If any of the surviving children are minors, their guardian should hold their share of the estate in trust until they cease to be a minor.\textsuperscript{1358}

If the total estate of the deceased is less than K30,000, the surviving children will inherit the estate directly.\textsuperscript{1359}

When minors are the sole beneficiaries of an estate, they require a court appointed guardian to ensure that their interests are protected. Guardians may not benefit from this position, and, if they deprive minors of property inherited under the Act, they are liable to fine or imprisonment.\textsuperscript{1360}

If the deceased parent had been in a polygamous marriage, then there may be one or more surviving spouses, even though the child is an orphan. In this situation, the surviving spouses and surviving children of each marriage would be entitled absolutely to the homestead property of the deceased and in equal shares to the common property of the deceased.\textsuperscript{1361} The "homestead property" is defined as "all personal chattels of the deceased and used by him, his wife and children of

\textsuperscript{1353} Section 3, Intestate Act.
\textsuperscript{1354} Section 9, Intestate Act.
\textsuperscript{1355} Section 5(b), Intestate Act.
\textsuperscript{1356} Section 5(d), Intestate Act.
\textsuperscript{1357} Section 6(a), Intestate Act.
\textsuperscript{1358} Section 5(2), Intestate Act.
\textsuperscript{1359} Section 11, Intestate Act.
\textsuperscript{1360} Sections 32-35, Intestate Act.
\textsuperscript{1361} Section 10 Intestate Act.
a particular household to which the deceased was connected by his marriage, not being common property”, whilst the “common property” is defined as “all personal chattels of the deceased which were used in common by him, his wives and children of every household to which the deceased was connected by his marriage, not being household property”. If the deceased had owned a house, the surviving spouses and children would inherit the house as tenants in common; any surviving wife would retain a life interest in the house, which would terminate on remarriage.

In terms of the rest of the estate, the surviving children would share 50% of the estate in such proportions as are commensurate with the child’s age or educational needs or both and an equal share of 10% of the estate if they meet the definition of dependant. As there is at least one surviving spouse, the children would not be entitled to a share of the 20% of the estate which passes to the spouse(s). If the deceased did not have any parents or dependants, their shares of the estate would devolve in accordance with the provisions in section 7 Intestate Act.

Just as in a monogamous marriage, there is provision under section 5(1) of the Intestate Act for a surviving child to apply to court if they believe that their share of the estate is “unreasonably small having regard to his degree of dependence on the deceased”. If any of the surviving children are minors, their guardian should hold their share of the estate in trust until they cease to be a minor. Finally, if the deceased’s estate is worth less than K30,000, the surviving spouse(s) and children will inherit the estate directly.

II. Property division upon intestacy - the codified law in practice

There are various problems with the Intestate Act which are apparent in the actual practice of distributing the estate upon intestate death. The main problem with the Intestate Act is its limited relevance in practice. It does not apply to family property, i.e., property held jointly by the family, or to land under customary tenure, thus it does not apply to the majority of Zambians. As noted above, when dealing with land administration, customary tenure is the dominant system governing land administration for 94% of the land mass in Zambia as the majority of families have marriages conducted under customary law. The United Nations Common Country Assessment described the deficiencies of Local Courts.
in applying the Intestate Act and instead allowing for customary law to take precedence regardless of whether the Intestate Act applies or not, stating:

“In practice, “property grabbing” by relatives of the deceased man continues to be rampant, particularly when local customary courts have jurisdiction. These courts often use the Local Courts Act to distribute inheritances without reference to the percentages mandated by the Intestate Act, and the fines mandated by the latter for property grabbing are extraordinarily low.”

Further, the Intestate Act is inconsistent as it fails to place an age limit on the definition of children, therefore where there are multiple sole survivors, particularly from polygamous marriages, the older offspring, even though they may be at an age where they have their own houses and means of caring for themselves, are also entitled to be tenants in common on any house the parents may have owned. These provisions are mitigated by section 5(b) of the Intestate Act, which states the general rule that the 50% of the deceased's estate which devolves on the children should be "in such proportions as are commensurate with a child's age or educational needs or both" and section 6(a) of the Intestate Act, which states that where the deceased does not leave a spouse, the portion of the estate that the spouse would have inherited should be distributed amongst the children "in such proportion as are commensurate with a child's age or education needs or both". Therefore, when the Intestate Act applies, the in-laws will have an obvious incentive for assuming responsibility for the children as the children may be entitled to receive 50% of the deceased's estate.

III. Property division under a will - codified law in theory

Division of property under any written will in Zambia is governed by the Wills Act. The provisions relevant to sole survivors are those which allow the courts to intervene where the will in question makes "no reasonable provision" for the maintenance of a dependent, which is defined as a "wife, husband, child or parent" of the deceased. This includes wives and children in polygamous marriages, as well as children born out of wedlock. A sole survivor falls within this definition.

The court may make use its discretion to decide what is reasonable provision for the dependant and it may include lump sum payment, grant of an annuity or grant of a life interest in immovable property.

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1371 Section 20 (1) Wills Act.

1372 Sections 20 (2) (a) and (b) Wills Act.
The Wills Act attempts to prevent property grabbing by making it an offence for an unauthorised person to deprive another of property they are entitled to under the Act, on pain of fine or imprisonment.\(^\text{1373}\)

Thus in theory the Wills Act attempts to provide for sole survivors under the deceased's estate even where they have not been expressly included in the will, by ensuring that they are provided for at the discretion of the court. Further it attempts to deter property grabbing from potentially vulnerable sole survivors.

**IV. Property division under a will - codified law in practice**

An immediate limitation to the Wills Act is the fact that few Zambians actually write wills\(^\text{1374}\), thus they will be covered by the Intestate Act or, more likely, fall under customary law.

As is the situation with the Intestate Act, the Wills Act does not apply to land held under customary law\(^\text{1375}\) and, therefore, the issues explored above continue to be relevant even if there is a valid will in place at the time of the deceased's death.

### iii. CUSTOMARY LAW

As detailed above (paragraph 2.a), the vast majority of Zambian land is held under customary tenure, land being the predominant form of property\(^\text{1376}\). Customary law is therefore the form of law under which the rights of sole survivors on succession will be most affected, particularly in rural areas.

As customary law has not been authoritatively defined in Zambia, the application of this law to sole survivors cannot be definitively laid out, as the law by its nature is oral, mutable, and may differ between tribal groups within the same region. The principles as they apply to sole survivors are therefore detailed according to the dominant systems of kinship and marriage which exist in Zambia as described in some detail in paragraph 2.a of this report.

The application of customary law is normally determined by a family council presided over by the eldest male relative\(^\text{1377}\), the local chief or a Local Court. Adult male sole survivors are more likely to be admitted to these arenas and may therefore be able to influence the outcome of the property division according to the local rules. However, child or female sole

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\(^{1373}\) Part VII, sections 65(1) and (2) Wills Act.


\(^{1376}\) Himonga, "Integration of the Laws of Succession in Zambia", p.348.

survivors are unlikely to be admitted and so will not be able to directly influence the outcome. Children are not referred to as being included either directly or by representation. Given this lack of representation, there is a risk that the interests of child sole survivors will not be properly considered. There is also the history of property grabbing which often results in the disinheritance of sole survivors by other members of the extended family or community. There is some evidence that this practice appears to be slowly on the decrease.

Customary law does not appear to recognise the existence of wills, and the Wills Act does not override customary law applying to land. There is therefore no legal way by which parents may provide for their children as sole survivors under customary law.

The positions for sole survivors are considered under the following systems of customary law:

i) matrilineal (both matrilocal and patrilocal),

ii) patrilineal; and

iii) bilateral.

The risk for orphaned children differs depending on whether they are subject to a matrilineal, patrilineal or bilateral inheritance system. As previously stated, in all three systems, spouses cannot inherit from each other. Except under the bilateral system, daughters do not inherit in their own right and can only be assigned property or a right to use property by the inheriting male. Therefore, under the matrilineal and patrilineal systems, female sole survivors would receive no part of the estate other than the mother's or sister's belongings as determined by the family council, chief or Local Court and will only have a secondary right to use property as determined by the male successor to the estate. In-laws may also claim that they have a right to all of the deceased's property, including the children of the marriage and may justify this on the basis that the husband/family has paid a bride price (known as a "lobola").

Nevertheless, it is important to note that academic commentary suggests that historic customary law traditions which ensured that the heir would protect and provide for the

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1380 Section 2(a) Wills Act.

1381 Himonga, “Integration of the Laws of Succession in Zambia”, p.344.

widow and orphaned children are no longer as prominent in Zambia. This is mainly due to the increase of AIDS and poverty, which makes taking on the additional responsibilities of looking after widows and children additionally burdensome and has led to "property grabbing" (as explained above) being prominent in Zambia.

I. Matrilineal systems

Property devolves on the death of the father to the nearest male relative on the mother's (matrilocal) or father's (patrilocal) side. Matrilineal succession follows a direct female line from the deceased mother's offspring with the order of priority generally being siblings, nephews and collateral males with female successors only considered in the unlikely event that there is no male successor. It should be noted that the husband maintains possession until death and it is only at this point that it will transfer to the wife’s nearest male relative. On the death of the husband, property will devolve as above and may lead to male sole survivors receiving none of the estate. Children cannot inherit directly from the father.

The two sub-types of matrilineal systems are covered below.

II. Matrilocal

This system is generally found among the Bemba of Northern Zambia. The wife’s nearest male relative inherits the estate on the death of the father. Succession is traced down the mother’s line, normally a brother or nephew of the wife. Male sole survivors may, but are unlikely, to inherit a share of the estate.

III. Patrilocal

This system is generally found among the Tonga of Southern Zambia. Property is acquired by the husband upon or prior to marriage. On the death of the husband, priority is given to the brothers and nephews of the deceased.


1387 Chuma Himonga, "Integration of the Laws of Succession in Zambia", p.344.


The wife is obliged to marry her husband's successor, responsibility for the children also passing to the successor. Property does not pass on the death of the wife. Sons will only have such a right if they are the nearest adult male relative.

IV. Patrilineal systems

This system is generally found among the Ngoni of Eastern Zambia. On death of the father, inheritance is on the basis of primogeniture, based on the decision of the family elders. This almost always results in the eldest sane adult male child being the sole heir. Where the husband had several wives, the eldest adult son of the most senior wife will be the heir. Where no sons are adults, the estate may devolve to the father's eldest male relative.1391 It is therefore possible that no male sole survivors will have a right to the estate where they are still children on the father's death.

V. Bilateral systems

This system is generally found among the Lozi of Western Zambia and is the rarest system1392. Inheritance on the death of the father is to both male and female children in equal shares and only to other relatives where there are no children. Thus all sole survivors would be treated equally. The widow has no inheritance rights so has no property except her clothing and cooking utensils to pass on.1393

C. MECHANISMS FOR FACILITATING CHILDREN'S INHERITANCE CLAIMS

i. THE CONSTITUTION

As detailed further below, the Constitution recognises equal rights of men and women, prohibits discrimination based on sex or marital status (amongst other things), and creates the right to a fair hearing. It does not specifically address the equal treatment and rights of children.

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The preamble to the Constitution states that the people of Zambia “recognise the equal worth of men and women in their rights to participate, and freely determine and build a political, economic and social system of their own free choice”.1394

Part III of the Constitution deals with the protection of the fundamental rights and freedoms of the individual. Article 11 states:

It is recognised and declared that every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, sex or marital status, but subject to the limitations contained in this Part, to each and all of the following, namely:

(a) life, liberty, security of the person and the protection of the law;
(b) freedom of conscience, expression, assembly, movement and association;
(c) protection of young persons from exploitation;
(d) protection for the privacy of his home and other property and from deprivation of property without compensation;

and the provisions of this Part shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in this Part, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

Article 18 provides that

Any court or other adjudicating authority prescribed by law for determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.

Article 23(1) provides that “Subject to clauses (4), (5) and (7), a law shall not make any provision that is discriminatory either of itself or in its effect.” The only relevant limitation in clauses (4), (5) and (7) appears to be that Article 23(1) shall not apply to any law which makes provision with respect to non-citizens of Zambia for the devolution of property on death (clause 4(b)(d)). Article 23(3) clarifies that “discriminatory” includes different treatment based on (amongst other things) sex or marital status.

Article 28(1) states that:

Subject to clause (5), if any person alleges that any of the provisions of Articles 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him, then, without

prejudice to any other action with respect to the same matter which is lawfully available, that person may apply for redress to the High Court which shall-

(a) hear and determine any such application;

(b) determine any question arising in the case of any person which is referred to it in pursuance of clause (2);

and which may, make such order, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of Articles 11 to 26 inclusive.

Article 29(2) goes on to clarify that:

(a) If in any proceedings in any subordinate court any question arises as to the contravention of any of the provisions of Articles 11 to 26 inclusive, the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion the raising of the question is merely frivolous or vexatious.

(b) Any person aggrieved by any determination of the High Court under this Article may appeal therefrom to the Supreme Court:

Provided that an appeal shall not lie from a determination of the High Court dismissing an application on the ground that it is frivolous and vexatious.

ii. GUARDIANSHIP

The English common law, equity and pre-1911 legislation seem to be the law that governs the allocation of guardianship in Zambia, together with recent Zambian legislation. The relevant legislation includes the Talfourd’s Act 1839, The Custody of Infants Act of 1873, the Guardianship of Infants Act of 1886 and the Custody of Children Act of 1891. The effects of these Acts on Zambian law were (1) the mother was given rights of custody over her legitimate children until they reached the age of 21; (2) the father could no longer defeat the mother’s right after his death by appointing a testamentary guardian; the mother was now entitled to act jointly with any guardian appointed by the father and the mother was also granted limited powers to appoint testamentary guardians; and (3) emphasis was placed on the welfare of the infant in matters concerning the custody of infants.

At common law, parents are the natural guardians of their minor children, such rights and powers arising automatically. Non-parental guardians are those persons other than the parents who are formally appointed by the parent(s) or the court as guardians of minor children. Once appointed the guardian is vested with most of the rights and duties which a parent would have.

As regards extra marital children, at common law, the mother has sole guardianship of the child to the exclusion of the father. The death of the mother does not automatically confer parental authority on the unmarried father, and he can only assume guardianship if he has been appointed as testamentary guardian by the mother, or by order of the court acting as upper guardian or supreme parent. Sections 14(1) and (2) of the Legitimacy Act 1973 give the unmarried father the right to apply for custody of and access to the child, and the court will grant this if it is in the interests of the child to do so.

The High Court is the upper guardian of all minors and therefore has inherent jurisdiction to appoint any person as guardian of a child when this is in the interests of the child concerned. The principle of the best interests of the child being of paramount consideration in all matters affecting the child is applied increasingly in cases.

The welfare and interests of the child have been incorporated in a number of modern statutes, such as the Affiliation and Maintenance of Children Act and the Matrimonial Causes Act. Section 75 of the Maintenance of Children Act provides that “in proceedings in which application has been made with respect to the guardianship of children of a marriage, the Court shall regard the interests of the child as the paramount consideration; and subject to paragraph (a) the Court may make such order in respect of those matters as it thinks proper”.

The appointment of testamentary guardians is the subject of recent legislation in Zambia. Section 5(d) of the Wills Act provides that a testator may appoint a guardian for his or her minor child only where “the surviving parent of the minor child is incapable, by physical or mental infirmity, to take guardianship of the minor child”. Therefore, neither parent may now appoint a testamentary guardian for a minor save where the surviving parent suffers from a stipulated physical or mental incapacity. Section 64(d) of the Act provides that the court has power to remove a testamentary guardian who has acted improperly in the exercise of his powers to appoint another guardian in his place. The definition of a child in the Act includes extra marital children.

The Intestate Act provides a uniform intestate succession law throughout Zambia and aims to make adequate financial and other provisions for the surviving spouse, children, dependants and other relatives of an intestate. Section 32 of the Intestate Act deals with the appointment of guardians over the intestate’s dependants. Pursuant to this section, the court may appoint any person to be the guardian of a minor and may direct that the property of a minor be transferred or vested in the guardian. The guardian may not derive any pecuniary benefit from his office, and if they wrongfully deprive a minor or property or a share in property to which the minor is entitled they shall be guilty of an offence. However, as previously noted the Intestate Act does not apply to family property or customary land.

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1398 This is alluded to in cases such as R v Gyngall 1893 2 QB 232 at 241-242.
1399 Section 5(d) Wills Act.
iii. MAINTENANCE

Under Zambian common law, the parents have no duty to maintain the child. They may make a binding agreement with each other for the maintenance of the child. This agreement will terminate automatically on the death of the child’s mother (unless otherwise agreed), and therefore the mother’s personal representatives will be unable to claim maintenance from the father of the child. However, such an agreement does not terminate automatically on the death of the father, so the mother can claim for continued maintenance of the child by the father’s personal representatives.

Under Section 20(1) of the Wills Act, the court has discretion to make an order for such reasonable provision as it thinks fit out of the testator’s estate for the maintenance of a dependant, if it considers that the testator has not made reasonable provision whether during his life time or by his will, for the maintenance of the dependant and that hardship will thereby be caused. The provision of maintenance by such an order may include the payment of a lump sum (whether immediate, deferred, by grant of an annuity or a series of payments and the grant of an immovable property (for life or any lesser period)).

Pursuant to section 33 of the Intestate Act and section 56 of the Wills Act, an administrator or guardian may incur expenditure on acts necessary for the proper care and management of any property belonging to the estate of a deceased person or to a minor.

iv. PROCEDURE AND THE COURT

Article 120 of the 2016 Constitution lays out the Court structure, and recognises the following courts: Supreme Court, High Court, industrial relations court, subordinate courts, local courts, and such lower courts as may be prescribed by Acts of Parliament.

The Intestate Act of 1989, specifies any person who denies any person, including a minor child, his/her right to the property to which he/she is entitled under the act shall be guilty of an offence and goes on to specify the penalty (Section 14). In addition, the act specifies the penalty to be imposed on an administrator or guardian "who wrongfully deprives a minor of property or a share in property to which the minor is entitled …" (Section 35).

The Intestate Act (section 43) provides that for matters relating to succession, (1) the High Court shall have jurisdiction (2) a local court shall and may have jurisdiction if the value of the estate does not exceed fifty thousand kwacha, and (3) a subordinate court of the first, second or third class shall, within the territorial limits of its jurisdiction, have jurisdiction to entertain any application if the value of the estate does not exceed one hundred thousand kwacha.

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The Intestate Act also provides for the transfer of applications for orders relating to succession to the High Court from a subordinate or local court if that court is satisfied that an interested party has made an application to the High Court for an order relating to the administration or distribution of the estate of the deceased to which the application relates, and that court is satisfied that the transfer is in the interests of justice or otherwise necessary to seek directions from the High Court as to the correctness or legality of the application or order to be made thereunder, or that court has been ordered to do so by the High Court.

However, the Intestate Act does not specify the means and mechanisms for monitoring the care of minor children and for enforcing the penalty for dereliction of duty to them that is specified in section 35. Further, it does not specify the means and mechanisms for a minor child to challenge the property grabbing that is prohibited in section 35 and to gain access to court.

Not all Zambians are aware of the rights conferred by the Intestate Act. NGOs such as Women for Change and Women and Law in Southern Africa are raising awareness of the Act in local communities.

I. Local Courts

Disputes relating to Customary Law are typically heard in Local Courts. The Local Courts will hear matters of property, marriage, divorce and inheritance. The Local Courts are the lowest courts in the judicial hierarchy and are considered the busiest and most rundown courts in Zambia.

Lawyers are prohibited from participating in proceedings in Local Courts and there is commentary to suggest that Local Court judgements often discriminate against women, particularly in inheritance rights. Even where the statutory provisions of the Intestate Act should apply, the judgments of the Local Court often leave widows without any of her deceased husband's estate, and Local Courts will typically appoint a male relative of the deceased spouse to act as an administrator.

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There is commentary to suggest that widow women often fear that if they try to exercise their property rights, their in-laws could accuse them of being a witch and of practising witchcraft in order to inherit his property. Claims of bewitchment are heard before Local Courts; who will determine whether witchcraft has occurred by consulting with "witch-finders".  

The Bringing Equality Home report notes that there is becoming a distinction between the approach of Local Courts in rural and urban areas. Local Courts in rural areas generally apply a strict interpretation of Customary Law which is often discriminatory against women; whereas Local Courts in urban areas have been adapting to implement principles of fairness and logic when applying Customary Law.

II. Children's access to justice in practice

Children can apply to domestic courts in order to pursue civil claims or claims that their rights have been violated. They can do this through a "litigation friend" or "next of friend" who is generally a parent or guardian appointed by the High Court as described above and in accordance with the Civil Procedure Rules of the United Kingdom which remain applicable in Zambia at the present time. These rules require the litigation friend to be competent to conduct proceedings on behalf of the child and have no conflict of interest with the child being represented. Moreover, anyone below the age of 18 lodging a complaint or seeking redress must also commence proceedings through a "next of friend".

Nevertheless, it seems that in practice the State cannot guarantee legal representation for children due to lack of adequate resources.

Generally a court has discretion to hear a child's evidence assuming it would be in the child's best interests to do so. The State outlined in the 2002 report on its compliance with the Convention on the Rights of the Child that "acceptance of a child's testimony in court in civil and criminal cases is dependent upon the judge's assessment of the child's competence". The judge needs to be satisfied that

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1409 Initial States Parties Report of Zambia to the UN Committee on the Rights of the Child


the child understands the meaning of truth for the child’s evidence to be admissible in both criminal and civil cases.

In essence, the structure and procedure to enable a child to have access to justice exists but there are numerous hurdles to achieving that goal that need to be addressed in Zambia. The two primary issues are the application of customary law to inheritance issues in Zambia and ignorance (especially in rural areas) of the protection that is potentially afforded by the domestic courts in Zambia or, if those routes have been exhausted with respect to breaches of the African Charter on the Rights and Welfare of the Child to which Zambia is a signatory, through a complaint to the African Committee of Experts on the Rights and Welfare of the Child. This latter issue is exacerbated by "physical accessibility, financial accessibility and unreasonable delay in the dispensation of justice".

The fact that many inheritance issues are dealt with within a family, by a local council of tribal elders or at best by a Local Court applying local customs means that children rarely have the opportunity to state their case and, where they do, the declarations of adult family members (especially males such as uncles and male cousins) who promise to care for orphaned children will take precedence. That promise may then be reneged upon following the decisions on the inheritance of assets.

In addition to the hurdles referred to above, female sole survivors, whether they are children or not, still also have to deal with custom and tribal gender prejudice. If there is a conflict with regard to who should be the beneficiary of a deceased person’s assets and a female seeks to state her case she runs the risk of rumour and/or direct accusation of witchcraft (for example bewitching a father or husband to bring about his death).

III. Legal Aid System

The Legal Aid Act 70 (as subsequently amended) states that it is

"An Act to establish the Legal Aid Board and define its functions, to constitute the Secretariat of the Board, to establish the Legal Aid Fund, provide for the granting of legal aid in civil and criminal matters and causes to persons whose means are inadequate to enable them to engage practitioners to represent them; and to provide for matters connected with or incidental to the foregoing".

The Legal Aid Board is a statutory, corporate body which administers and manages the Legal Aid Fund, facilitates representation of persons, assigns practitioners to persons granted legal aid, and advises the Minister on policies

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relating to the provision of Legal Aid and the implementing of government policies relating to the same.

Those who are eligible for legal aid in Zambia are citizens of Zambia, established residents, asylum seekers or transit visitors and who qualify under a means test. Legal Aid is provided in relation to criminal and civil legal matters, including intestate succession disputes. Children can access it but an application will need to be made on his behalf by a person of full age and capacity. Section 15(1) of the Legal Aid Act states that

"an application for legal aid in respect of an infant or other person under disability shall be made on his behalf by a person of full age and capacity, and, where the application relates to proceedings which are required by rules of court to be brought or defended by a next friend or guardian ad litem, that person shall be the next friend or guardian ad litem”.

One online source suggests that due to various constraints including staff shortages, the Board tends to limit the grant of legal aid to those facing serious criminal cases and only handles a very limited number of civil cases.

v. NGOS AND GOVERNMENT INITIATIVES

The National Legal Aid Clinic for Women (NLACW) was established in 1990 as a project under the Women's Rights Committee (WRC) of the Law Association of Zambia (LAZ). NLACW was established to provide affordable legal assistance to women and children from marginalised social sectors at minimum cost. The NLACW runs legal advice clinics at three locations as well as providing counselling, workshops, seminars and printed information in order to raise women’s awareness of their rights.

Other organisations providing advice and information on land issues in Zambia include Women and Law in Southern Africa (WLSA), the Catholic Commission for Justice, Development and Peace, the Young Women’s Christian Association and Oxfam International.

The Justice for Widows and Orphans (JWOP) is a network organisation which was formed in 2001 by seven members to fight against violations of the rights of widows and orphans in Zambia. The members of the network are the NLACW, Women in Law in Southern Africa (WLSA), Zambia Civic Education Association (ZCEA), Victim Support Unit (VSU) of the Police Service, Ministry of Community Development and Social Services (MCDSS), Foundation for Democratic Processes (FODEP) and the Young Women

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Christian Association (YWCA). JWOP’s goal is to promote social, cultural and economic justice amongst widows and orphans in Zambia, through lobbying and advocacy for widows’ and orphans’ rights, improved practices related to inheritance rights, and economic empowerment of widows and orphans.

Further, the Zambia Police Act - (Amendment) Act No. 14 of 1999 amended the Zambia Police Act, chapter 107, to establish the Police Complaints Authority. The Authority is responsible for disciplinary aspects of the Police Services so as to ensure transparency and accountability to the public. The Act also establishes the Victim Support Unit, which handles all types of abuse, including child abuse, violence against women, property grabbing and victimization of the elderly. The unit operates at all police stations across the country.

3. CONCLUSION

Zambia has signed or acceded to the majority of international treaties protecting fundamental human rights and the Constitution clearly recognises the existence of those rights. In addition, Zambia’s codified law also includes legislation which, if consistently applied, has the capacity to go a long way to protect the inheritance rights of sole survivors. However, the principle of fundamental human rights outlined in the Constitution is disapplied in the case of unwritten laws such as customary laws and the relevant pieces of Zambian legislation such as the Intestate Act and the Wills Act specifically do not apply to land or family property. As a result the desired protection for orphans does not apply in the vast majority of inheritance cases in Zambia.

The reality is that inheritance and the distribution of a deceased’s estate in Zambia is more often than not governed by customary laws and adjudicated upon by family councils, local tribal chiefs or Local Courts. There are 72 tribes in Zambia and each applies its own customary inheritance law. That might be matrilineal, patrilineal or bilateral but invariably they directly or indirectly discriminate negatively against women and children with land and other estate assets being distributed among the deceased’s wider family. In principle the quid pro quo for being a beneficiary of an estate is that the person has a responsibility to care of the dependents of the deceased. However, the prevalence of extreme poverty in many areas of Zambia (particularly the rural areas) and the stigma that continues to attach to sole survivors orphaned by HIV/AIDS means that such responsibilities are too often ignored leaving the sole survivors vulnerable and often destitute.

There is recognition within Zambia of the plight of sole survivors orphaned by HIV/AIDS and there are numerous organisations such as JWOP and ZCEA working hard to lobby the government and tribal elders to improve the situation for sole survivors and educate the wider population about their legal rights, discrimination and access to the court system.

The dualist nature of the legal system in Zambia means that many of the international treaties to which Zambia is party do not have the force of law in Zambia. For real progress to be achieved

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these international treaties need to be implemented without any of the current exclusions enshrined in the Constitution being applicable. In addition Zambia's existing codified laws relating to inheritance need to be amended so that they apply universally to all assets forming a deceased's estate so that sole survivors are not exposed to the vagaries of customary law. Lastly, there is a huge education programme required, firstly, to convince family and tribal elders that customary inheritance laws that they have applied for decades are no longer fit for purpose and, secondly, to educate the civilian population of Zambia of their fundamental human rights and how they can be protected.

In August 2015 the Attorney General of Zambia issued the Constitution of Zambia (Amendment) Bill 2015 proposed the enactment of a new Constitution for Zambia and it was adopted on 5 January 2016. The new Constitution, whilst recognising the existence of customary law which is consistent with its Constitution under Article 7(d), does not appear to distinguish between written and unwritten laws and requires the government to enact progressive laws to support the Bill of Rights contained in Part VI of the draft Constitution.


## APPENDIX 1 - SHORT SUMMARY TABLE

Note that it will be possible to provide references and narrative explanations in the full table on the next page.

<table>
<thead>
<tr>
<th>Do the below legal frameworks on inheritance rights (if any) ensure equality between children that are:</th>
<th>In the Constitution</th>
<th>In legislation/Civil Law</th>
<th>In Customary Law (codified)</th>
<th>In Customary Law (practice)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Male and female?</td>
<td>Yes&lt;sup&gt;1425&lt;/sup&gt;</td>
<td>Does not specify</td>
<td>Does not specify</td>
<td>Does not specify</td>
</tr>
<tr>
<td>2. Biological and adopted?</td>
<td>Does not specify</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>3. Born from a marriage and born out of wedlock?</td>
<td>Does not specify</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>4. Born from a monogamous union and born from a polygamous union?</td>
<td>Does not specify</td>
<td>Yes</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>5. Does the jurisdiction have codified law governing inheritance rights?</td>
<td>Does not specify</td>
<td>Yes</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>6. Does the jurisdiction have codified law mandating the appointment of a trustee/administrator/guardian for sole survivor children?</td>
<td>Does not specify</td>
<td>Yes</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>7. Are there national provisions for legal aid in civil/administrative claims, including inheritance?</td>
<td>Does not specify</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>

Please answer with one of the following responses only:

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<sup>1425</sup> The Constitution has no explicit reference to equality beyond general principles applicable to all individuals and uses gender neutral language.
Yes - The law/practice explicitly mentions equality between the two characteristics (Questions 1-4), or relevant codified law/national provisions exist (Questions 5-7). In relation to Question 1, if gender neutral language rather than specifically mentioning gender equality, please specify 'Yes' and include an explanatory footnote to this effect.

No - The law/practice explicitly discriminates between the two characteristics (Questions 1-4). Not applicable to Questions 5-7.

Does not specify - All relevant material was accessed, but there was no information relevant to the question (Questions 1-7).

Don't know - It is not possible to say whether all relevant material was accessed, and so a definitive answer cannot be given (Questions 1-7).

N/A - The question is not applicable for this type of law, for example if a country does not have codified Customary Law or a Constitution. It is likely that this answer will apply to Customary Law (practice) for Questions 5-7.
## Appendix 2 - Extended Summary Table

<table>
<thead>
<tr>
<th><strong>Additional Questions</strong></th>
<th><strong>Response</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>1. How does the legal system define a child? Is the age of majority different for different matters?</td>
<td>There are 26 pieces of legislation in Zambia which provide for the rights of the child and in those numerous words such as child, infant, juvenile and minor are used applying different ages. For example the penal code says a &quot;child&quot; is 16 or under but the Juvenile Act defines a &quot;juvenile&quot; as up to 19 years of age.</td>
</tr>
<tr>
<td>2. Does the country have a <em>de jure</em> dual legal system (customary or religious law running parallel to the statutory law or common law)? Whether <em>de jure</em> or <em>de facto</em>, is the customary/religious law related to inheritance and property rights the preferred means of dispute resolution in this area?</td>
<td>Zambia operates a legal system that includes common law, codified law and largely unwritten customary law. In relation to inheritance issues and property rights most Zambians, particularly in rural areas would expect customary law to be the default for dispute resolution despite the fact that clear codified law exists.</td>
</tr>
<tr>
<td>3. Does the country's legal system (ie Civil Law and Customary Law) differentiate between different types of land tenure?</td>
<td>The Constitution vests all land that is not customary land in the President. The Land Act recognises different types of leasehold interests that a citizen can apply to hold but also recognises customary land rights which must always be taken into consideration.</td>
</tr>
<tr>
<td>4. Does the country have legislation governing inheritance rights?</td>
<td>The Intestate Act and the Wills Act provide clear and comprehensive provisions for both testate and intestate succession.</td>
</tr>
<tr>
<td>5. Does the legal system that governs inheritance rights (if any) ensure equality between male and female children?</td>
<td>The Constitution provides that no law can be discriminatory, either on its face or in its effect. However, this provision does not apply to inheritance or customary law. The codified law contained within the Intestate Act and the Wills Act does not contain any obvious discriminatory language, but the customary laws on inheritance remain discriminatory against women and children in many instances. See paragraph 2.a.</td>
</tr>
</tbody>
</table>
| 6. Does the legal system that governs inheritance rights (if any) ensure equality between biological and adopted children? | Section 3 of the Wills and Administration of Testate Estates Act explicitly states that a child means "a child born in or out of marriage, an
## ADDITIONAL QUESTIONS

<table>
<thead>
<tr>
<th>QUESTION</th>
<th>RESPONSE</th>
</tr>
</thead>
<tbody>
<tr>
<td>7. Does the legal system that governs inheritance rights (if any) ensure equality between children born in and out of wedlock?</td>
<td>Section 3 of the Wills and Administration of Testate Estates Act explicitly states that a child means &quot;a child born in or out of marriage, an adopted child...&quot;. As previously stated, customary laws regularly discriminate against women and children. See paragraph 2.a.</td>
</tr>
<tr>
<td>8. Does the legal system that governs inheritance rights (if any) ensure equality between children born from a monogamous and polygamous union?</td>
<td>The codified law recognises the existence of monogamous and polygamous marriage and legislates in a non-discriminatory fashion for both circumstances. As previously stated, customary laws regularly discriminate against women and children. See paragraph 2.a.</td>
</tr>
<tr>
<td>9. Are there different legal rules for testate and intestate succession?</td>
<td>The Intestate Act and the Wills Act provide clear and comprehensive provisions for both testate and intestate succession.</td>
</tr>
<tr>
<td>10. Does the legal system specify the percentages of inheritance to be distributed to children?</td>
<td>The Intestate Act makes very clear provision for the division of an intestate estate as set out on page 7 of this report. Customary law appears to have no such clear arrangements and the distribution of an estate will depend on the relevant tribal practices. Under a will, the percentages of inheritance is in line with the will. However, as stated, courts can intervene where the will in question makes &quot;no reasonable provision&quot; for the maintenance of a dependent, which is defined as a &quot;wife, husband, child or parent&quot; of the deceased.</td>
</tr>
<tr>
<td>11. Does the legal system address the rights of orphaned children to transact land, houses and property that they inherit?</td>
<td>Zambia's codified law does not specifically refer to orphaned children as opposed to non-orphaned children. A child can inherit land which would be held on trust by a guardian until he/she reached the age of 18. Customary law does not make specific provision for orphaned...</td>
</tr>
<tr>
<td>ADDITIONAL QUESTIONS</td>
<td>RESPONSE</td>
</tr>
<tr>
<td>----------------------</td>
<td>----------</td>
</tr>
<tr>
<td>12. Does the legal system link inheritance rights to residency/citizenship?</td>
<td>The codified law does not explicitly discriminate against individuals who are either non-resident or not citizens although individuals who are not citizens may have greater difficulty accessing the Zambian court system. Customary law very clearly favours individuals that connected through bloodlines and resident locally.</td>
</tr>
<tr>
<td>13. Does the legal system provide for automatic inheritance for sole survivor children?</td>
<td>The codified law in the Intestate Act and the Wills Act expressly provide for the circumstance of sole survivorship. Customary law does not.</td>
</tr>
<tr>
<td>14. Does the legal system mandate the appointment of a trustee/administrator/guardian for sole survivor children?</td>
<td>Both the Wills Act and the Intestate Act provide for the appointment of guardians with express rules as to the duties of guardians. Customary law has traditionally expected inheritor’s of an estate to take care of a deceased individual’s dependents but such responsibility is often ignored.</td>
</tr>
<tr>
<td>15. If such an appointment is mandated, does codified law enumerate:</td>
<td></td>
</tr>
<tr>
<td>i appointee’s rights/responsibilities to hold the property of a sole survivor child until he/she ceases to be a minor?</td>
<td>i The Intestate Act and the Wills Act both contain specific provisions to this effect. No such provisions can be found in customary law beyond the principal that beneficiaries of an estate under customary law have a duty to maintain the dependents of the deceased.</td>
</tr>
<tr>
<td>ii penalties to be imposed on an appointee who misuses the property/wrongfully deprives a child of property to which they are entitled?</td>
<td>ii The Intestate Act and the Wills Act both contain specific provisions to this effect. No such provisions can be found in customary law beyond the principal that beneficiaries of an estate under customary law have a duty to maintain the dependents of the deceased.</td>
</tr>
<tr>
<td>iii mechanisms for a sole survivor child to challenge an appointee and gain access to court?</td>
<td>iii Neither the codified law or customary law specifically provide for a child to challenge the appointment an appointee but Article 28(1) of the Constitution sets out the fundamental right of all persons to apply to the High</td>
</tr>
<tr>
<td>ADDITIONAL QUESTIONS</td>
<td>RESPONSE</td>
</tr>
<tr>
<td>----------------------</td>
<td>----------</td>
</tr>
<tr>
<td><strong>16.</strong> Is there regulation of the management of inheritance for those sole survivor children with no legal guardian?</td>
<td>Both the Intestate Act and the Wills Act contain provisions relating to the duties and obligations imposed on a guardian appointed to manage a minor’s inheritance. In particular it is clear that they cannot take pecuniary advantage of the inheritance. No similar customary law can be found.</td>
</tr>
<tr>
<td><strong>17.</strong> Where is Customary Law applied (in traditional non-State forums, formal State Courts, by local leaders/chiefs etc.)?</td>
<td>Customary law can be applied by family councils, local chiefs and Local Courts. The High Court has jurisdiction to hear appeals against any judgements handed down in these forums but ignorance of this fact means that, in practice, that rarely occurs.</td>
</tr>
<tr>
<td><strong>18.</strong> How would you qualify the proportion of property claims resolved under Customary Law?</td>
<td>High Majority. Most Zambian legislation states that customary land falls outside the ambit of codified legislation and shall be dealt with pursuant to customary law.</td>
</tr>
<tr>
<td><strong>19.</strong> Does the country have a court or tribunal in which orphaned children/their representatives can bring an action enforcing their legal right to property? If so, is there any case law specifically regarding orphaned children’s inheritance rights?</td>
<td>There is no evidence of a specific court in Zambia to which a sole survivor can apply to enforce rights over land beyond the answers given at 16 and 17 above. The only evidence that can be found of any case law is anecdotal through organisations such as the “Justice for Women and Orphans Project” and blogs in the press and on the internet.</td>
</tr>
<tr>
<td><strong>20.</strong> Are there national provisions for legal aid in civil/administrative claims, including inheritance? If so: Do these provisions contain special measures or provisions regarding children?</td>
<td>The Legal Aid Act of Zambia establishes a Legal Aid Board with powers to grant legal aid. Section 15(1) specifically refers to applications on behalf of infants having to be made by a “next friend” or “guardian ad litem”.</td>
</tr>
</tbody>
</table>
ZIMBABWE

INTRODUCTION

This report examines the inheritance rights of children in Zimbabwe, specifically in relation to children who are orphans, having lost one or both parents to HIV/AIDS.

The importance of this issue can be understood in light of the severity of the HIV/AIDS epidemic throughout the country. Although Zimbabwe has made significant progress in incidence rates in recent years, the adult HIV prevalence rate remains at 15%, with 39,000 deaths from HIV/AIDS per year. In 2012 there was an estimated 890,000 children living as orphans of HIV/AIDS.

Moreover, the cultural stigma that surrounds HIV/AIDS is such that children who have lost their parents to the disease are particularly vulnerable to displacement, as well as confiscation of moveable and immovable properties that have been left to them by their deceased parents.

This report is split into the following paragraphs:

1. Compliance with International Law
2. The National Legal System
   a. General provisions relating to inheritance rights
   b. Specific provisions relating to sole survivor children and inheritance
   c. Mechanisms for facilitating children’s inheritance claims
3. Conclusion

1. COMPLIANCE WITH INTERNATIONAL LAW

Zimbabwe is a dualist state in that it views international law and domestic law as two separate legal systems. As such, the ratification of or accession to international treaties does not in itself provide protection for the citizens of Zimbabwe. As illustrated by section 327 of the Constitution of Zimbabwe 2013 ("the Constitution"):

An international treaty which has been concluded or executed by the President or under the President’s authority (a) does not bind Zimbabwe until it has been approved by Parliament; and (b) does not form part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament.

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Although section 34 of the Constitution requires the State to incorporate all international conventions, treaties and agreements to which Zimbabwe is a party into domestic law, the government has failed to do so for a number of such instruments.

Under section 46(1)(c) of the Constitution, when interpreting legislation, the courts is obliged to interpret law in accordance with international conventions to which Zimbabwe is a party. This should apply in theory to the application of Customary Law too.

Below is the status of Zimbabwe's commitment to the treaties listed in the introduction to the overall report.

<table>
<thead>
<tr>
<th>International treaties</th>
<th>Signature Date</th>
<th>Ratification/ Accession Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>International Convention on the Elimination of All Forms of Racial Discrimination (&quot;ICERD&quot;)</td>
<td>n/a</td>
<td>13 May 1991</td>
</tr>
<tr>
<td>International Covenant on Economic, Social and Cultural Rights (&quot;IESCR&quot;)</td>
<td>n/a</td>
<td>13 May 1991</td>
</tr>
<tr>
<td>International Covenant on Civil and Political Rights (&quot;ICCPR&quot;)</td>
<td>n/a</td>
<td>13 May 1991</td>
</tr>
<tr>
<td>Convention on the Elimination of All Forms of Discrimination Against Women (&quot;CEDAW&quot;)</td>
<td>n/a</td>
<td>13 May 1991</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Regional treaties</th>
<th>Signature Date</th>
<th>Ratification/ Accession Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>African Charter on Human and Peoples' Rights (&quot;ACHPR&quot;)</td>
<td>20 February 1986</td>
<td>30 May 1986</td>
</tr>
<tr>
<td>Protocol to the African Charter on Human and Peoples’ Rights</td>
<td>18 November</td>
<td>15 April 2008</td>
</tr>
</tbody>
</table>

### Regional treaties

<table>
<thead>
<tr>
<th>Treaty</th>
<th>Signature Date</th>
<th>Ratification/ Accession Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Human and Peoples’ Rights on the Rights of Women in Africa</td>
<td>2003</td>
<td></td>
</tr>
<tr>
<td>African Youth Charter</td>
<td>n/a</td>
<td>16 March 2009</td>
</tr>
<tr>
<td>Southern African Development Community (&quot;SADC&quot;) Founding</td>
<td>17 August 1992</td>
<td>17 November 1992</td>
</tr>
<tr>
<td>SADC Protocol on Gender and Development</td>
<td>17 August 2008</td>
<td>22 October 2009</td>
</tr>
</tbody>
</table>

#### 2. NATIONAL LEGAL SYSTEM

Zimbabwe is a unitary, democratic sovereign republic with a plural legal system that recognises both Customary Law and General Law. Customary Law is traditionally unwritten and is derived from the customs and practices of people native to Zimbabwe. General Law is comprised of both received common law, premised on Zimbabwe’s colonial past, and statutory law passed by parliament.

All law is subject to the Constitution of Zimbabwe, the current version of which came into force in 2013. The Constitution makes provision for constitutional supremacy, with section 2(1) stating, "this Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency."

The judiciary in Zimbabwe is comprised of the Constitutional Court, the Supreme Court, the High Court, the Administrative Court, the magistrate court, local Customary Law courts and village...
The Customary Law courts were established to preserve the application of Customary Law in civil disputes, and the jurisdiction of these courts is limited to Customary Law. The customary courts are recognised under sections 162(g) and 174 of the Constitution and may be either “primary” or “village” courts, generally presided over by a headman, or “community” or “local” courts, presided over by a chief. Equally section 16(3) states that the "State all institutions and agencies of government at every level must take measures to ensure due respect for the dignity of traditional institutions". Appeals from the village courts are heard de novo before the local court, and from there an appeal can be made to the magistrates court (and then the High Court and Supreme Court).

The Customary Law and Local Courts Act established a unitary court system in Zimbabwe, meaning that the Constitutional Court, Supreme Court, High Court and Magistrate Courts are now permitted to deal with both common law and Customary Law. Most cases are heard by magistrates, who are civil servants, and so are open to corruption and political pressure. Equally lower courts are most accessible, but can be discriminatory towards women.

20 magistrate courts are the main courts for land disputes of low value, while 1100 village court and 50 community courts deal with Customary Law. Under section 171, the Constitution specifies that the High Court has jurisdiction over civil matters. The Administrative and High Court has jurisdiction over land disputes, and the High Court has jurisdiction over inheritance disputes.

In addition to the unification of the court system, both Customary Law and General Law have been considerably revised in recent years by statutory provisions. In some cases Customary Law has been written into statutes (for example the Criminal Law (Codification and Reform) Act which recognises the customary prohibition on incest), while in others Customary Law has been restricted. An example of this was the latest revision of the Constitution, which removed a historic section allowing Customary Law to be exempt from provisions prohibiting discrimination. However the Constitution recognises the role of traditional leaders under section 282(1).

Where Customary Law has not been codified and remains unwritten, individual communities will invariably have their own interpretation of customary principles and as a result, different chiefs will...
administer the law in a variety of ways. Where Customary Law is codified, the extent to which such provisions are actually upheld and enforced need to be considered. Even in instances where uncodified Customary Law establishes a framework and guidelines for handling matters such as inheritance rights, families and communities often devise their own parameters for dealing with such matters, particularly in more rural areas of Zimbabwe. In the customary courts, whether a case is heard in the primary or community court depends on the amount claimed. The judgment is enforceable by registering it with the magistrate's court and then enforcing it through that court. Appeals are made from the primary court to the community court, and from there, appeals can be made to the magistrate court and subsequently the Supreme Court. The procedure in customary courts is informal and lawyers are not present. In 2004, most Zimbabweans' lives were regulated by Customary Law, preserving the authority of traditional leaders to adjudicate on disputes, while in 2008 it was recorded that the vast majority of inheritance cases concerned intestate succession and were handled locally. For the purposes of this report, both General and Customary Law are addressed insofar as the information could be accessed.

A. GENERAL PROVISIONS RELATING TO INHERITANCE RIGHTS

Initially it is important to note that Zimbabwe's land tenure system comprises four types of system, namely freehold (private), state land, communal and leasehold (resettlement, which are generally held on 99 year leases). With the exception of leasehold land, these systems are a product of Zimbabwe's colonial heritage and are to some extent regulated by legislation. In terms of inheritance rights, freehold and leasehold land tenure is most relevant.

Land rights in Zimbabwe are highly insecure and contentious, and much of this stems from its colonial past and land redistribution and compulsory acquisition programmes.
communal land cannot be sold and as a result is sometimes transferred ‘extra-legally’. In some areas there is no regularisation of informal settlements, while administration of land lack transparency, clear assignment of authority and capacity. Management of land was meant to originally be transferred from customary institutions to local government institutions, however it was then restored to local chiefs who were to report to Rural District Councils.

In Zimbabwe, where a person dies testate, General Law will always apply, whereas when a person dies intestate either General Law or Customary Law may apply. When determining which law is applicable on intestacy, regard is given to section 3 of the Customary Law and Local Courts Act which states:

(1) Subject to this Act and any other enactment, unless the justice of the case otherwise requires

(a) customary law shall apply in any civil cases where

(i) the parties have expressly agreed that it should apply; or

(ii) regard being had to the nature of the case and the surrounding circumstances, it appears that the parties have agreed it should apply; or

(iii) regard being had to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply;

(b) the general law of Zimbabwe shall apply in all other cases.

(2) For the purposes of paragraph (a) of subsection (1) “surrounding circumstances”, in relation to a case, shall, without limiting the expression, include

(a) the mode of life of the parties;

(b) the subject matter of the case;

(c) the understanding by the parties of the provisions of customary law or the general law of Zimbabwe, as the case may be, which apply to the case;

(d) the relative closeness of the case and the parties to the customary law or the general law of Zimbabwe, as the case may be.

Thus the deceased's marriage and their way of life will be important in deciding which law applies, and disputes can be decided by a magistrate of the court. There are a number of

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1462 Administration of Estates Act 1907, section 68G(1).
different types of marriages that are recognised in Zimbabwe, including civil or formally registered monogamous marriages, registered under the Marriages Act, registered Customary Law marriages, registered under the Customary Marriages Act, and unregistered Customary Law unions, under which customary rites are followed (e.g. a bride price is paid) but registration legalities are not adhered to. It is worth noting that section 3(5) of the Customary Marriages Act states that even where the registration formalities have not been adhered to, this will not affect "customary laws and custom relating to status, guardianship, custody and rights of succession of the children of such a marriage".

Customary marriages in Zimbabwe can be polygamous, but marriages under General Law cannot.

There are certain other General Law statutes that will apply irrespective of whether the person in question has a 'customary' lifestyle.

Information relating to the actual percentage of inheritance claims that are dealt with via Customary Law as opposed to via General Law could not be located. A United Nations ("UN") report suggests that the majority of inheritance cases in Zimbabwe involve intestate succession, in which case regard will be given to the provisions of the Customary Law and Local Courts Act discussed above.

i. THE CONSTITUTION

The Constitution deals with equal treatment and contains anti-discriminatory provisions, including those related to women and children born out of wedlock.

Sections 1(3)(f) and (g) state that recognition of the equality of all human beings and gender equality are founding values and principles of Zimbabwe.

Section 14(1) states that:

The State and all institutions and agencies of government at every level must endeavour to facilitate and take measures to empower, through appropriate, transparent, fair and just affirmative action, all marginalised persons, groups and communities in Zimbabwe.
Section 17 provides that:

(1) the State must promote full gender balance in Zimbabwean society, and in particular -

(a) the state must promote the full participation of all women in all spheres of Zimbabwean society on the basis of equality with men;

(b) the state must take all measures, including legislative measures, needed to ensure that -

(i) both genders are equally represented in all institutions and agencies of government at every level; and

(ii) women constitute at least half of all Commissions and other elective and appointed governmental bodies established by or under this Constitution or any Act of Parliament; and

(c) the State and all institutions of government at every level must take practical measures to ensure that women have access to resources, including land, on the basis of equality with men.

(2) The state must take positive measures to rectify gender discrimination and imbalances resulting from past practices and policies.

Section 19 states that:

(1) The State must adopt policies and measures to ensure that in matters relating to children, the best interests of the children concerned are paramount.

(2) The State must adopt reasonable policies and measures, within the limits of the resources available to it, to ensure that children -

(a) enjoy family or parental care, or appropriate care when removed from the family environment;

(b) have shelter and basic nutrition, health care and social services;

(c) are protected from maltreatment, neglect or any form of abuse; and

(d) have accessed to appropriate education and training.

(3) The State must take appropriate legislative and other measures -

(a) to protect children from exploitative labour practices; and

(b) to ensure that children are not required or permitted to perform work or provide services that -

(i) are inappropriate for the children's age; or

(ii) place at risk the children's well-being, education, physical or mental health or spiritual, moral or social development.
Section 56 of the Constitution states:

(1) All persons are equal before the law and have the right to equal protection and benefit of the law.

(2) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(3) Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status, or whether they were born in or out of wedlock.

(4) A person is treated in a discriminatory manner for the purpose of subsection (3) if—

(a) they are subjected directly or indirectly to a condition, restriction or disability to which other people are not subjected; or

(b) other people are accorded directly or indirectly a privilege or advantage which they are not accorded.

(6) The State must take reasonable legislative and other measures to promote the achievement of equality and to protect or advance people or classes of people who have been disadvantaged by unfair discrimination, and—

(a) such measures must be taken to redress circumstances of genuine need;

(b) no such measure is to be regarded as unfair for the purposes of subsection (3).

Section 71(2) states, subject to section 72, that:

Every person has the right in any part of Zimbabwe to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of all forms of property either individually or in association with others.

Section 71(3) states, subject to section 71 and section 72 (the State's right to compulsorily acquire agricultural land in certain circumstances) "No person may be compulsorily deprived of their property" except in certain circumstances. Section 72 also grants a superior right to the State to compulsorily acquire agricultural land, in certain circumstances.

Section 80 states:

(1) Every woman has full and equal dignity of the person with men and this includes equal opportunities in political, economic and social activities.

(2) Women have the same rights as men regarding the custody and guardianship of children, but an Act of Parliament may regulate how those rights are to be exercised.
(3) 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.

Section 81 states:

(1) Every child, that is to say every boy and girl under the age of eighteen years, has the right

(a) to equal treatment before the law, including the right to be heard […]

(c) in the case of a child who is born in Zimbabwe or born outside Zimbabwe and is a Zimbabwean citizen by descent, to the prompt provision of a birth certificate

(d) to family or parental care, or to appropriate care when removed from the family environment […]

(f) to education, health care services nutrition and shelter;

(2) A child's best interests are paramount in every matter concerning the child;

(3) Children are entitled to adequate protection by the courts, in particular by the High Court as their upper guardian.

The Constitution establishes a Human Rights Commission and a Gender Commission under sections 242 and 245 respectively.

The Zimbabwean Human Rights Commission ("ZHRC") was first sworn into office on 31 March 2010. The ZHRC was operationalised by the Zimbabwe Human Rights Commission Act in 2012 which outlines the procedures of the ZHRC and the manner of its investigations into possible human rights violations. Delays occurred as a result of budget limitations, availability of offices and an absence of a secretariat.

The ZHRC's functions reflect those functions required under Section 243 of the Zimbabwean Constitution and the ZHRC's programmes include the complaints handling and investigations unit, the education, promotion and research unit and the monitoring and inspections unit.

Concerns have been raised regarding the efficacy of the ZHRC due to role overlaps between the Minister of Justice and the Minister of Constitutional and Parliamentary Affairs and due to other commissions having been effected due to disagreements between political parties as to the role and effectiveness of commissions generally.
As at April 2013, the ZHRC had yet to begin operations due to a lack of commissioners and lack of quorum. In December 2012 the ZHRC's former chair Reg Austin resigned from his post claiming that "the establishment of the ZHRC has been a tale of unreadiness, delay, lack of commitment and serious focus on the part of the government" and that "the ZHRC Act effectively grants the executive a wide discretion, today and in future, to silence the commission on the grounds that its investigation of a complaint may prejudice defence, external relations, internal security or economic interests of the state". It is unclear from the ZHRC's website whether it is now operational, although a complaints handling and investigations workshop was held in September 2014 to train newly recruited members of the secretariat.

The Zimbabwean Gender Commission ("ZGC") has yet to be formed, with the Zimbabwe Gender Commission Bill gazetted on 25 July 2014. Commentators have criticised the Bill for attempting to detract from the ZGC's constitutional independence, instead seeking "to create… a department of the Ministry of Women's Affairs, Gender and Community Development". Commentators have also voiced fears that the ZGC, if formed, would have inadequate funding "as [gender equality] is not viewed as a national priority" and there is "a tradition of expecting foreign aid on these issues". It has also been noted that the Bill's lack of accordance with Constitutional provisions means that the ZGC may fail to get UN recognition and, as a result, will experience difficulty in attracting financial and moral support. As at February 2015, the Gender Commission Bill has had its second reading in Parliament.

Chapter 16 of the Constitution concerns agricultural land. Section 289 states that "subject to Section 72, every Zimbabwean citizen has a right to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of agricultural land regardless of his or her race or colour."

As can be seen from these provisions, the Constitution does not enshrine a express right of inheritance.

Certain sections of the Constitution refer to persons generally, whilst others refer to 'citizens' expressly.

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ii. GENERAL LAW

There are a number of statutes which contain specific provisions relating to children and their inheritance rights. As mentioned above, where a person dies testate, General Law will always apply.

Under section 2 of the Children's Act 1971 (amended 2002), the following definitions are used:

- an "infant" is a person under the age of 7 years;
- a "child" is a person under the age of 16 years;
- a "young person" is a person between the age of 16 and 18 years; and
- a "minor" is a person under the age of 18 years.

The Legal Age of Majority Act 1982 similarly adopts this definition of a minor, but both the terms 'child' and 'minor' are used in the legislation concerning inheritance rights. The Act purports to extend full legal status to women who reached this age.

Case law surrounding the Legal Age of Majority Act shows both negative and positive attitudes to this emancipation of women. In Jenah v Nyemba, the Supreme Court found that the Legal Age of Majority Act gave a woman standing before the Court, but did not give divorced women in communal areas rights to husband's land or housing. They had limited rights of maintenance from a male heir and only informal, non-legal rights to produce from trees on the land. Similarly in Murisa v Murisa the Supreme Court would not extend the equality principle in the Legal Age of Majority Act to women.

In contrast, in Chinhowa v Mangwende the Supreme Court held that the Legal Age of Majority Act changed Customary Law and gave a daughter the right to inherit, even if the deceased had had sons. It is unclear how much influence decisions such as these have on Customary Law in practice.

There are however two exceptions to these definitions of children. Firstly, section 81 of the Constitution defines that a child as "every boy and girl under the age of 18 years" departing from the aforementioned understanding that a "child" is anyone under the age of 16. Additionally, according to traditional and customary practices in Zimbabwe a person is regarded as still being a child as long as he or she remains under parental authority.

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1486 Chinhowa v Mangwende [1987] 1 ZLR 228 (SC).
There are four core General Law statutes concerning inheritance rights, which are discussed in turn below.

I. Deceased Estates Succession Act 1873  

This Act sets out the entitlements of a surviving spouse to provision from the estate of a person who has died intestate on or after 1 April 1977. Section 3A specifies that the spouse will inherit the matrimonial home and household effects related to it. Section 4 states that articles of sentimental value will not be distributed.

Section 3(a) states that if spouses were married in community of property and the deceased has left children who are entitled to succeed, the surviving spouse will receive from the free residue of the joint estate the household goods and effects, and shall also receive the remaining free residue of the deceased spouse's share of the joint estate to the extent of the children's share, or to so much as, together with the surviving spouse's share in the joint estate, does not exceed the specified amount (which is a statutory amount). In practice this means that the spouse will be automatically entitled to ownership of the matrimonial home and household goods and effects. In addition, if the deceased left two children, the estate would be added, liabilities would be paid and the remainder divided by three. The spouse would take a third or the specified amount (whichever is greater), with the remaining two thirds going to the children. If the estate is worth less than the specified amount, the surviving spouse will receive the full amount.

Section 3(b) covers the situation where spouses were married out of community of property and the deceased has left children who are entitled to succeed. The provisions here are the same as for marriages in community of property.

Section 3(c) outlines that which a spouse will inherit the property where the deceased has left a parent, brother or sister who is entitled to succeed, but no descendant (whether or not they were married in community of property). The spouse will receive the matrimonial home plus the household goods and effects,

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1490 This refers to when a couple marry and their property forms part of a joint estate. Under the Married Persons Property Act this will not apply to marriages made after 1 January 1929, unless provisions are made to the contrary. If the parties do not wish for their assets to form part of the joint estate they can "marry out of community of property" which means that during the marriage each spouse controls their own assets and is responsible for their own debts.

1491 In 2004, this was 200,000 Zimbabwean dollars.

and then will receive half the estate or a specified amount (whichever if larger).\footnote{1493}{In 2004, this was 500,000 Zimbabwean dollars.} The remainder will be split between parents of the deceased and their children.

Section 3(d) states that in any other case the surviving spouse shall be the sole intestate heir.

Historically, the common law dictated that only children born in wedlock would be entitled to inherit \textit{ab intestato} and this position was applied to the Deceased Estates Succession Act. However, in the \textit{Bhila} case of 28 May 2015 in the High Court Justice Mwayera ruled that “[…] the common law position of excluding children born out of wedlock violated the constitutional rights to protection of the law and freedom from discrimination”.\footnote{1494}{\textit{Bhila v Master of the High Court \\& Others [2015] ZWHHC 549}, available at: \url{http://www.jsc.org.zw/images/Judgements/harare/2015/hh%20549-15.pdf}.} This ruling was based on section 56(3) of the Constitution which prohibits discrimination on the grounds of “whether they were born in or out of wedlock”. Therefore, it is now likely that the rules of intestate succession, and the right to inherit a deceased parent’s property, will apply to all children irrespective of whether they were born in or out of wedlock.


The Wills Act concerns legal requirements relating to the validity of wills.

Under the Wills Act the term ‘\textit{estate}’ includes rights and duties under Customary Law, and ‘\textit{marriage}’ includes marriages solemnised under the Customary Marriages Act.

Section 5(2) of this Act states that a will shall not be invalid solely because the testator has disinherited or omitted to mention any parent, child, descendant or other relative, or because he has not assigned any reason for such disinheritance or omission.\footnote{1496}{However, p.8 of the UN Report, Laurel L. Rose Ph. D, HIV/AIDS Programme Working Paper 4, Food and Agriculture Organisation of the United Nations, ‘Children’s Property Inheritance in the Context of HIV and AIDS in Zimbabwe’, Rome, (2008) available at: \url{http://www.fao.org/3/a-ai499en/}}

Section 5(3)(a) seems to give primacy to the Deceased Estates Succession Act over a will, while section 5(3)(b) seems to suggest that a testator is not able to vary or prejudice, by way of will, the rights of a child to receive property, maintenance or a benefit due from the estate of the deceased parent under any other law or court order.

Under section 12, oral wills shall be valid in certain circumstances.

Section 18 of the Wills Act concerns the subsequent birth, legitimation or adoption of a child. It states that if a child is born, legitimated (including acknowledged in accordance with Customary Law) or adopted after a testator has made a will then,
unless the will makes a provision for the child or clearly intended otherwise, the child shall be entitled to the following:

i) if the will makes no provision for any child, then the child will get the benefit he would have received if the testator had died intestate.

ii) if provision is made for any other child, then where all children are treated equally, the child shall receive an equal entitlement, or alternatively if any children are treated differently, then the child will be entitled the same benefit as the smallest value granted.

Further under section 18, if the will makes no provision for any child, or if the will provides for a legacy for each of the deceased's other children or for the child who receives the smallest benefit, the entitlements payable to the adopted, legitimated or subsequently born child will be treated as a legacy payable under the will, and will be paid from the same source.

Alternatively, if the benefits payable under the will to each of the deceased's other children or the child who receives the smallest benefit are payable from the residue of the estate after all other legacies have been paid, the entitlement of the adopted, legitimated or subsequently born shall be treated as an inheritance payable from the residue of the testator's estate.

Section 24 states that:

(1) The following Acts and statutory provisions—

(a) the African Wills Act [Chapter 240 of 1974]; and

(b) section 9 of the Administration of Estates Act [Chapter 301 of 1974]; and

(c) section 2 of the Deceased Estates Succession Act [Chapter 302 of 1974]; and

(d) section 5 of the Law of Inheritance Amendment Act [Chapter 304 of 1974]; and

(e) the Wills and Attesting Witnesses Act [Chapter 306 of 1974];

as they existed on the 31st December, 1987, shall continue to apply in respect of wills that were made before the 1st January, 1988, to the extent that this Act does not apply to them.

Unfortunately not all the legislation mentioned in this paragraph was readily accessible, although in any case, the provisions mentioned refer to wills made before 1988.
III. Administration of Estates Act 1907\textsuperscript{1497} ("Administration Act")

This Act contains provisions relating to the distribution of property whether the deceased died testate or intestate. The Master oversees the granting of the letters of administration to the executor when one is appointed under the will (section 24). Alternatively the Master oversees the appointment of an executor where there is no executor named under a will, where the executor has predeceased the testator or the executor cannot or does not act (section 25). If there is a surviving spouse, they shall be the preferred executor. If there is no surviving spouse, the next of kin shall be appointed executor (section 26). If the next of kin is a minor under the guardianship of a duly appointed tutor, then the tutor will act for the minor (section 27).

The Act explains the process which an executor must follow when administering the estate of the deceased. The Act provides that the executor draws up an inventory, and it seems they will collect the debts and pays the creditors of the estate, before paying the heirs in accordance with any existing will (but note the override provisions in section 5(3) Wills Act discussed above).

If the deceased is intestate but is survived by a spouse, the Deceased Estates Succession Act dictates that the spouse receives part of the estate and the children receive the rest in equal shares (see above).

If the deceased is intestate (or is testate with no contrary provision in the will), the Master may decide that a surviving spouse take over the estate if this is for the benefit of minor children (section 49). This seems to mean that the surviving spouse can buy out the estate which she hasn’t received under intestacy or will.

IV. Deceased Person’s Family Maintenance Act 1978\textsuperscript{1498}

This Act permits dependants of persons who die after 19 January 1979 to make applications for an award from the net estate of the deceased (section 3(1)), which will be considered by the provincial magistrate or Master. This must be done within "three months of the date of the grant of the letters of administration to the executor of the deceased estate concerned" (section 3(2)(b)(i)).

The lodging of an application stops the distribution of the estate until the application has been determined (section 3(8)). Due to the definition of 'deceased', this Act applies where someone dies testate or intestate (ie someone not provided for in a will can apply).

A "dependant" includes (a) a surviving spouse, (b) a divorced spouse who was entitled to maintenance at the time of the deceased's death, (c) a minor child, (d) a major child who is by reason of mental or physical disability, incapable of

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maintaining himself and who was being maintained at the time of death, (e) a parent who was being maintained at the time of deceased's death (f) any other person who was being maintained or was entitled to maintenance at the time of the deceased's death.

Under the Deceased Person’s Family Maintenance Act a "child" is defined as including an adopted child and a child born out of wedlock. If polygamous marriage is not recognised under General Law, presumably children from such marriages will be viewed as born out of wedlock. It is evident from these provisions that the estate(s) of the deceased parents can potentially be reduced by other family dependants, decreasing the eventual inheritance of the orphaned children. Conversely the provisions can also be used by children that aren’t entitled to inheritance out of the estate to be supported until they reach majority.

In determining whether it would be fair and equitable to grant an award, the court looks at all of the circumstances under section 7(2):

(a) whether or not the dependant is in need of maintenance, taking into account, where the deceased died leaving a will, the benefits, if any, to which the dependant will be entitled under the will or, where the deceased died intestate, the benefits, if any, to which the dependant will be entitled on intestacy;

(b) the period for which maintenance of the dependant is required;

(c) the ability of the dependant to maintain himself and whether or not it is desirable that he should work;

(d) the number of persons to be maintained by the estate;

(e) the general standard of living of the dependant and, during his lifetime, of the deceased;

(f) the reasons for the deceased failing to make provision for the maintenance of the dependant and, in this connection, whether or not the behaviour of the dependant was responsible in any way for such failure;

(g) where the deceased died leaving a will, the interests of the beneficiaries in respect of whom provision has been made under the will;

(h) where the deceased died intestate, the interests of the persons who would normally succeed on intestacy;

(i) the size and nature of the net estate;

(j) any other matter which, in the opinion of the appropriate court, is relevant to the determination of the issue.

If the applicant is a surviving spouse, the court shall also consider the contribution of the deceased to the welfare of the family of the deceased and the provision the applicant would have received if the marriage had ended due to divorce rather
than death (section 7(3)). Where the applicant is a child, the court will consider their need to be educated and trained (section 7(4)).

Section 8 sets out the form and substance that an award can take and these are varied, including transfer of property.

Any award made to a minor can be directed as being paid into the Guardian’s Fund, (a public fund administered by the High Court) in accordance with section 97 of the Administration Act. It is worth noting that this Act is not limited by the Customary Law in Part III A of the Administration Act (section 68J).

Section 10(1) of this Act provides that notwithstanding any law to the contrary, including Customary Law, any surviving spouse or child of a deceased person shall, subject to section 11, have:

(a) the right to occupy any immovable property which the deceased had the right to occupy and which such surviving spouse or child was ordinarily occupying immediately before the death of the deceased;

(b) the right to use any household goods and effects, implements, tools, vehicles or other things which immediately before the death of the deceased the surviving spouse or child was using in relation to such immovable property;

(c) the right to use and employ any animals which immediately before the death of the deceased were depastured or kept on such immovable property;

(d) to an extent that is reasonable for the support of such surviving spouse or child, the right to any crops which immediately before the death of the deceased were growing or being produced on such immovable property.

However it needs to be noted that these are not ownership rights.

Property grabbing is also criminalised under section 10(2), punishable by fine and/or imprisonment. Additionally section 10(3) states that property must be returned and compensation paid, irrespective of any law (including Customary Law). There are example of property grabbers being sent to prison.1499

Section 11 states that (a) the spouse’s/child’s rights are subject to the rights of mortgagors/creditors, (b) that such rights terminate upon completion of the administration of that portion of the estate to which those rights relate and (c) subjects the surviving spouse/child to an obligation that they must occupy or use the property without detriment or neglect. Section 11(b) seems to suggest that whilst the rights under section 10 are guaranteed during the administration period, the surviving spouse or child may be deprived of them if such property does not pass to them on completion of the administration.

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Under section 12 of the Deceased Person’s Family Maintenance Act, the courts have the power to set aside any disposition of property by the deceased which was made within two years preceding the death, and made with the intention of depriving the dependant of maintenance from the estate. Under section 12(4)(a) The court must however have regard to:

(i) the circumstances in which the disposal was made; and

(ii) the relationship between the deceased and the person in whose favour the disposition was made; and

(iii) the financial resources of the person in whose favour the disposition was made, the extent to which he has benefited and whether or not any consideration was given in respect of the disposition,\(^\text{[and under subsection b]}\)

\(^{(b)}\) may have regard to any evidence which it considers relevant to the issue, whether or not such evidence would be admissible in an action before the court.

This provides recourse for a child who may have been unfairly deprived of maintenance. Such a scenario could arise in circumstances where a relative of the deceased takes advantage of the vulnerability and ill-health of the parent and persuades them to part with property prior to their death.

Under section 13 for an award made under the Act to be varied if a material fact was not disclosed at the time of the award or there has been a substantial change of circumstances in favour of the recipient of the award.

Section 1(2) states that ”the Act shall not be construed as derogating from the rights of any person to maintenance out of a deceased estate which he has in terms of any other law”.

V. Birth and Death Registration Act 1986\(^{1500}\)

In Zimbabwe, birth certificates are an essential aspect of citizenship, and without a birth certificate, a child cannot obtain a deceased parent’s death certificate, nor are they able to claim their rightful inheritance.\(^{1501}\) The Birth and Death Registration Act makes it compulsory for births to be registered (section 10), and makes it a criminal offence for someone to neglect to obtain a birth certificate on behalf of a child (section 27). Despite this legislation, birth registration issues remain a problem in Zimbabwe.

Death certificates are needed to register an estate before it can be distributed and these may be stolen from the spouse of the deceased (although they can approach a District Registry Office in those circumstances).\(^{1502}\)


VI. Children's Act 1971

Section 64 of this Act specifies the effect of an adoption order in relation to inheritance is that an adopted child is treated like a biological child born in wedlock under intestate succession rules. This suggests that a child born out of wedlock may be in a worse position than one born in wedlock, but no specific information was found on this point.

VII. Tacit Hypothecation Amendment Act 1861

This Act amended the law relating to tacit hypothecations, ie the preferential right of a creditor to have his claims paid out of the property subject to the hypothecation. In particular, it restricted the period of time for which hypothecations might exist in certain circumstances and abolished other categories of hypothecation. Although it is one of the numerous administrative acts that need to be adhered to when winding up a deceased estate, if any of the deceased's property was subject to any such hypothecation, it is not directly relevant to the inheritance rights of children orphaned by HIV/AIDS.

iii. CUSTOMARY LAW

Inheritance where the deceased died intestate and Customary Law applies is covered by the amendment to the Administration Act, Part IIIA and this is discussed in detail below. Where a person dies testate, General Law will apply (please see above).

I. Administration of Estates Act 1907 Part IIIA (sections 68-68K) (brought into force by the Administration of Estates Amendment Act No.6 of 1997)

This Part of the Administration Act covers the distribution of an estate under Customary Law and will apply where Customary Law applied at the date of the deceased's death. If the deceased was testate this Part will not apply.

As mentioned above, in order to decide whether Customary Law applies, section 3 of the Customary Law and Local Courts Act is referred to. Where the person is married in accordance with Customary Law (whether registered or unregistered) it

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1505 UN report, Laurel L. Rose Ph. D, HIV/AIDS Programme Working Paper 4, Food and Agriculture Organisation of the United Nations, 'Children's Property Inheritance in the Context of HIV and AIDS in Zimbabwe', Rome, (2008) p7 available at: http://www.fao.org/3/a-ai499ea.pdf states that these provisions are counteracted by the Supreme Court decision in Magaya v Magaya [1998] SC 210-98. However even the judges in the case point out that the deceased died prior to 1997 so the amendments to the Administration Act brought in in 1997 did not apply. Similarly, the constitutional exemption from non-discriminatory provisions was still in force at this time. Section 23 of the Constitution permitted this, but this has been removed from the most recent amended Constitution.

1506 Administration of Estates Act, section 68A.
is presumed that Customary Law will apply, and where they are married under the Marriage Act, it is presumed that General Law will apply.\(^{1507}\)

Part IIIA recognises that the key beneficiaries of an intestate estate subject to Customary Law are the surviving spouse or child (section 68(1)), and only where neither such persons exists, will “beneficiary” mean other relatives of the deceased.\(^{1508}\) The Administration Act requires the Master to summon the deceased's family for the purpose of appointing an executor to pay creditors and administer the estate, and such person must either be registered under the Estate Administrators Act or be a member of the deceased's family (section 68B). If there is no agreement on who should be the executor, preference is given to the surviving spouse (section 68B(2)(i)). Section 68D(1) states that as soon as possible after the death, the executor is required to draw up an inheritance plan providing for:

(a) the conservation/application of the net estate for the benefit of the beneficiaries;

(b) the distribution of all or any part of the net estate to the beneficiaries;

(c) the sale or disposal of any property of the net estate for the benefit of the beneficiaries;

(d) the maintenance of any beneficiary.

In drawing up the inheritance plan, the executor must consult the deceased's family and beneficiaries, and the beneficiaries must approve the plan. The Master will consider whether this has been done when approving the plan (section 68E) and when determining any issues between an executor and a beneficiary, will be guided by the following (section 68F(2)):

(b) where the deceased person was a man and is survived by two or more wives and had one or more children—

(i) one-third of the net estate should be divided between the surviving wives in the proportions two shares to the first or senior wife and one share to the other wife or each of the other wives, as the case may be;\(^{1509}\) and

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\(^{1509}\) It is presumed that the most senior wife, made the largest contribution to the estate.
(ii) the remainder of the estate [ie two thirds] should devolve upon—

A. his child; or

B. his children in equal shares; as the case may be, and any of their descendants per stirpes.

(c) where the deceased person was a man and is survived by two or more wives, whether or not there are any surviving children, the wives should receive the following property, in addition to anything they are entitled to under paragraph (b)—

(i) where they live in separate houses, each wife should get ownership of or, if that is impracticable, a usufruct over, the house she lived in at the time of the deceased person’s death, together with all the household goods in that house;

(ii) where the wives live together in one house at the time of the deceased person’s death, they should get joint ownership of or, if that is impracticable, a joint usufruct over, the house and the household goods in that house;

(d) where the deceased person is survived by one spouse and one or more children, the surviving spouse should get—

(i) ownership of or, if that is impracticable, a usufruct over, the house in which the spouse lived at the time of the deceased person’s death, together with all the household goods in that house; and

(ii) a share in the remainder of the net estate determined in accordance with the Deceased Estates Succession Act [Chapter 6:02];

(e) where the deceased person was a woman whose husband at the time of her death had more than one wife, and she is survived by her husband and had one or more children—

(i) one-third of her net estate should devolve upon her husband; and

(ii) the remainder of her estate should devolve upon—

A. her child; or

B. her children in equal shares; as the case may be, and any of their descendants per stirpes;

(f) where the deceased person is not survived by a spouse or child, the net estate should devolve upon his surviving parents, brothers and sisters, if any, in equal shares;

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1510 This means that if the deceased had two children, one of whom, predeceased him or her, and who had three children of their own, the deceased’s surviving child would receive a half share of the estate and the grandchildren would share the other half equally between themselves (i.e. receive a sixth of the estate each).
(g) where the deceased person is survived by one spouse but no children—

(i) the surviving spouse should get—

A. ownership of or, if that is impracticable, a usufruct over, the house in which the spouse lived at the time of the deceased person’s death, together with all the household goods in that house; and

B. half the remainder of the net estate;

(ii) the balance of the net estate should devolve upon the deceased person’s surviving parents, brothers and sisters, if any, in equal shares;

(h) where the deceased person is not survived by a spouse and had one or more children, the net estate should devolve upon—

(i) that child; or

(ii) those children in equal shares; as the case may be, and any of their descendants per stirpes;

(i) so far as possible, the net estate should be applied to meeting the basic needs of beneficiaries who have no other means of support;

(j) subject to paragraphs (a) to (i), the net estate should devolve according to customary law.

These guidelines seem to establish clear entitlements for children, however it is only the wife who has the right to use the house under section 68F(c)(i) and (ii) and there is no express mention of a child's right to use the house of a deceased parent.

Another issue is that under the Administration Act, prior to the distributions listed above, "any personal articles which under customary law devolve upon a member of the deceased's family, will be given to that member and excluded from the net estate" (section 68F(2)(a)). Additionally section 68C allows "traditional articles" to pass to the heir at Customary Law, ie the deceased's male relative.¹⁵¹¹ It is not clear what "personal" or "traditional" articles consist of, and the ambiguity here could lead to abuse, allowing unscrupulous relatives to ultimately distort what forms the net estate for the remaining children.

Further, the principles of distribution are simply guidelines for the magistrate and are to be applied "to the extent that they are applicable" (section 68F(2)). Thus there is discretion for the magistrate to determine whether or not such principles are applicable based on the issues put before them (for example by other relatives).

II. Polygamous marriages under Customary Law

Under section 68(3) and (4) of the Administration Act, Part IIIA, the order in which the polygamous marriages were contracted affects the inheritance rights of the children from that marriage.

Under section 68(3) of the Act, if a person is already married under General Law (the Marriage Act 1964\(^{1512}\)) or under a foreign law which does not recognise polygamous unions, and subsequently marries another person under Customary Law (the Customary Marriage Act 1917\(^{1513}\)), that second marriage (regardless of whether or not it is registered) is not considered valid for the purposes of Part IIIA of the Administration Act. If this is the case, the deceased's estate will devolve to the spouse and children of the first marriage only, in accordance with section 68. A surviving spouse or child of the second customary marriage will have to seek other means of support, such as under section 10 of the Deceased Person’s Family Maintenance Act (see above).

Conversely, under section 68(4) of the Administration Act, Part IIIA, where a person contracts a second marriage under General Law (the Marriage Act 1964), or under a foreign law which does not recognise polygamous unions, at a time when that party is already married under Customary Law to someone else, both marriages are regarded as valid for the purposes of Part IIIA and the estate will devolve in accordance with section 68 so that the spouses and children of both marriages will inherit.

However, since the decision in Bhila v Master of the High Court & Others (see paragraph 2.a.ii.I of this report), it is likely that an individual would be able to challenge the application of section 68(3) of the Administration Act on the grounds that it discriminates between children on the basis of their birth status. The High Court made clear in Bhila that it was unconstitutional to exclude children from succession on the grounds that they were born out of wedlock.

III. Deceased Person’s Family Maintenance Act

Section 10(1) of this Act provides that notwithstanding any law to the contrary, including Customary Law, any surviving spouse or child of a deceased person shall, have certain rights (which are discussed above). This seems to mean that these rights will where Customary Law applies (mainly where there is a customary union).\(^{1514}\) It is suggested that sections 10(2) and (3), which punish property grabbing are also applied irrespective of Customary Law.\(^{1515}\)


IV. Customary Law (Practice)

UN research suggests that many of these inheritance matters are in fact handled by local leaders and communities rather than magistrates.\(^{1516}\) Delegation from the magistrates to local community courts is permissible under section 68I of the Administration Act, but beyond the aforementioned UN report, no conclusive evidence seems to be available as to whether this happens.\(^{1517}\)

The same UN report also suggests that property inheritance disputes are infrequently referred to the courts for settlement and are often settled privately or by local leaders or chiefs.\(^{1518}\) The lack of literature in relation to this means it is difficult to assess the extent to which local leaders uphold the Administration Act, however a number of case studies suggest enforcement is sporadic.\(^{1519}\)

Equally it seems that females will be discriminated against under Customary Law, although such practices should be void under section 80(3) of the Constitution. A report by Africa for Women's Rights states that under the rules of customary marriage, widows cannot inherit their husband's property and daughters can inherit from their father only if there are no sons, while the Supreme Court in *Magaya v Magaya*\(^ {1520}\) said that only men can inherit under Customary Law.\(^{1521}\) *Magaya v Magaya* was a case where the Supreme Court held that Customary Law could be discriminatory due to a provision of the Constitution to this effect. The provision in question has now been removed from the Constitution.

It also seems that women under Customary Law are not allowed to hold property jointly with their husband, a husband has control over the property and where land is held in the husbands name it will pass to his son on death.\(^{1522}\) Equally, customary practices discourage women from applying for land in their own name and land is generally in the name of the male head of the household. Women are not seen as household heads, and can be expected to leave the property upon divorce or death of their husband.\(^{1523}\)

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\(^{1517}\) Section 68I allows the Minister to designate to any magistrate or any other person all or any of the functions of the magistrate under Part IIIA of the Administration Act.


\(^{1523}\) USAID, Property Rights and Resource Governance Country Profile: Zimbabwe, available at: [http://usaidlandtenure.net/sites/default/files/country-profiles/full-reports/USAID_Land_Tenure_Zimbabwe_Profile.pdf](http://usaidlandtenure.net/sites/default/files/country-profiles/full-reports/USAID_Land_Tenure_Zimbabwe_Profile.pdf) and
Traditionally under Customary Law the family of the deceased played a key role in property distributions, and decisions were often influenced by the relationships between the surviving spouse and children and the family of the deceased.\textsuperscript{1524} Given the manner in which the inheritance plan is drawn up under Part IIIA of the Administration Act, it is clear that the deceased's family do still influence the distribution of an estate. Some Tonga\textsuperscript{1525} customary principles suggest that relatives not only have a right, but a duty to take over the property of the deceased.\textsuperscript{1526}

**B. SPECIFIC PROVISIONS RELATING TO SOLE SURVIVOR CHILDREN AND INHERITANCE**

i. **THE CONSTITUTION**

The Constitution recognises the rights of children generally, for example the right to privacy (section 57), the right not to be deprived of property (section 71(3)), the right not to be discriminated against on various grounds including sex, age and whether they were born in or out of wedlock (section 56(3)), and the right to equal treatment before the law (section 81). The Constitution does not however contain specific provisions relating to sole survivor children.

ii. **GENERAL LAW**

This paragraph will consider provisions in the aforementioned Acts which would apply to sole survivor children. General Law will always apply where the deceased died testate.

I.  **Deceased Estates Succession Act**

This Act does not provide for protection for sole survivor children.

II.  **Wills Act**

There are some provisions under this Act which would apply to a sole survivor child.

Section 5(3)(b) seems to suggest that a testator is not able to vary or prejudice, by way of will, the rights of a child to receive property, maintenance or a benefit due from the estate of the deceased parent under any other law or court order. This would seem to include a sole survivor child.


\textsuperscript{1526} The Tonga people are a Bantu ethnic group of northern Zimbabweans, who are related to the Batoka.

Equally under section 18, concerning the effect of subsequent birth, legitimation or adoption of children on a will would be applicable to a sole survivor child.

For more information please see paragraph 2.a.ii.II.

III. The Administration of Estates Act

Under the Administration Act, the provisions applicable to sole survivors concern tutors. For more information please see paragraph 2.c.ii.III.

IV. Deceased Person’s Family Maintenance Act

As mentioned above, this allows a dependent (including a minor child) to apply for a grant of maintenance. This would include a sole survivor child. For more information on this please see paragraph 2.a.ii.IV.

iii. CUSTOMARY LAW

It is worth noting that some provisions of General Law will apply to those sole survivors living under Customary Law. For example, where Customary Law applies to a sole survivor child, they could still benefit from the General Law rights under section 10 of Deceased Person’s Family Maintenance Act.¹⁵²⁷

I. Administration of Estates Act, Part IIIA

As noted above, Part IIIA of the Administration Act covers the administration of an estate where a person has died intestate under Customary Law. There are provisions of this that would apply to a sole survivor child.

Section 68(1) explains that "beneficiary" in this Part will mean a surviving spouse or child, and will include other beneficiaries only where no such spouse or child exists. Thus a sole survivor would fall within this primary definition of beneficiary.

Section 68D(1) outlines what an executor’s inheritance plan must provide for, and this is extremely favourable to beneficiaries (in this case sole survivors).

Section 68F(2) sets out the guidelines for what the Master must consider when approving the plan. Under section 68F(h), if the deceased is not survived by a spouse and is survived by a child then the guidelines say that the net estate devolves on that child, or those children in equal shares (and to any of their descendants per stirpes). Furthermore, "so far as possible, the net estate should be applied to meeting the basic needs of beneficiaries who have no other means of support".¹⁵²⁸


¹⁵²⁸ Administration of Estates Act Part IIIA, section 68F(2)(i).
Part IIIA also provides for personal and traditional articles to pass to the heir at Customary Law. This may decrease the amount a sole survivor child would receive under the Act, but in turn may be beneficial to a sole surviving male heir.

For more information, see paragraph 2.a.iii.l.

II. Customary Law (Practice)

Although the above is the position under codified Customary Law, there will no doubt be instances where this is not strictly applied by local communities. Following a series of case studies, all interviewees acknowledged that customary patterns of distributing inherited property involved providing for sole survivors, but that it was at times unclear how decisions determining who should provide for their needs were made. Previously extended families looked after sole survivors, but an increase in property grabbing (especially where 'grabbers' lived far away from the children and children were less likely to complain), meant that sole survivors were more insistent on receiving control of inherited property.\(^\text{1529}\)

Sole surviving male children will generally be in a better position than their female counterparts. Although there is some positive case law in this area, in *Magaya v Magaya* it was noted that under Customary Law daughters will only inherit in the absence of sons, while land will generally pass to a son on a husband's death.

For more information, see paragraph 2.a.iii.IV.

C. MECHANISMS FOR FACILITATING CHILDREN'S INHERITANCE CLAIMS

i. THE CONSTITUTION

Section 31 of the Constitution states:

*The State must take all practical measures, within the limits of the resources available to it, to provide legal representation in civil and criminal cases for people who need it and are unable to afford legal practitioners of their choice.*

In addition to this, there are various provisions within the Constitution that set the foundation of children's inheritance claims by recognising children as rights-bearers and recognising the role of the High Court in ensuring that children obtain justice. Equality and non-discrimination provisions are discussed in more detail in paragraph 2.a.i.

Section 56(1) recognises that "*all persons are equal before the law and have the right to equal protection and benefit of the law*."

Section 68(2) states that "*Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.*"

Section 69 recognises a right of access to the courts, and the right:

…in the determination of civil rights and obligations, to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law.

Section 69 also states that "Every person has the right to access to the courts, or to some tribunal or forum by law for the resolution of any dispute."

In relation to women and girls, section 80(3) states that laws, customs, traditions and cultural practices which infringe their rights are void.

Section 81 specifically recognises that children under the age of 18 have the right to "equal treatment before the law, including the right to be heard" and the right "to family or parental care, or to appropriate care when removed from the family environment" (the latter right also being enshrined in section 19).

Section 81 also acknowledges that "a child's best interests are paramount in every matter concerning the child" and that "children are entitled to adequate protection by the courts, in particular by the High Court as their upper guardian".

Section 85 states that:

Any person acting in their own interests; or any person acting on behalf of another person who cannot act for themselves [...] is entitled to approach a court, alleging that a fundamental right or freedom [ie those set out above] has been, is being or is likely to be infringed and the court may grant appropriate relief, including a declaration of rights and an award of compensation.

In addition to the above, section 282 of the Constitution concerns the functions of traditional leaders and states that one such function includes "to resolve disputes amongst people in their communities in accordance with customary law", while section 281 requires traditional leaders to do this whilst "acting in accordance with this Constitution and the laws of Zimbabwe". This is discussed in more detail in paragraph 2.c.ii.

In terms of challenging discriminatory laws and practices, section 2(1) (as mentioned above), states that any law, practice, custom or conduct inconsistent with the Constitution is invalid. This would in theory and discriminatory practices under Customary Law, but the ability for orphans to bring such a challenge is limited. In theory, anyone can bring a constitutional matter directly to the Constitutional Court (section 167(5)).

Under section 46(2), every court, tribunal, forum or body must promote and be guided by Chapter 4 of the Constitution (which covers human rights) when interpreting an enactment or developing common and customary law, and a court can declare any law or conduct unconstitutional, although this must be confirmed by the Constitutional Court (sections 175(6) and 175(1) respectively).
ii. GENERAL LAW

It seems that a sole survivor's inheritance rights would be enforced through a tutor or guardian, (although there are some provisions which apply where no such person is appointed (see below)). Provisions surrounding this are found in the Guardianship of Minors Act, the Deceased Estates Succession Act and the Administration Act. The relationship and difference between guardians and tutors is unfortunately somewhat unclear. The Children's Act for example says that the definition of 'legal guardian' includes a tutor testamentary.

This paragraph also considers statutes surrounding specific courts and procedure relating to inheritance rights of orphans. The Master, who is the upper guardian of all children sits in the High Court and administers estates under General Law. He assists guardians with cases of sole survivors under 16, while those over 16 can approach the Master on their own. The Master has the power to remove guardians who are abusing their office.\(^{1530}\)

Please note that General Law will always apply in cases of testacy.

I. Guardianship of Minors Act 1961\(^{1531}\)

This Act concerns guardianship of minors. It seems that generally guardianship is the father's prerogative and is 'exercised in consultation with the mother' (section 3). It seems that the basic premise is that upon death, the other parent becomes the guardian of the minor (section 4(1)) and looks after the minor's property.\(^{1532}\)

Where a parent has sole custody of a child (e.g. following divorce), the court can order that on that parent's death, someone other than the surviving parent will have custody of the child (section 4(1)).

A parent with sole custody can appoint a guardian by testamentary disposition to look after the child after their death. Where a father has sole custody, his appointed testamentary guardian must act jointly with the child's mother, and where there is disagreement the mother's wishes will prevail over that of the guardian. Where one parent, or a mother and a testamentary guardian have custody of the child the other parent or guardian can apply to the High Court to protect the child.\(^{1533}\)


Section 9(1) of the Guardianship of Minors Act states:

Without prejudice to the rights, powers and privileges of the High Court as upper guardian of minor children and the Master in terms of section 74 of the Administration of Estates Act [Chapter 6:01] the children's court may appoint a fit and proper person to be the guardian of a minor who has no natural guardian or tutor testamentary.

In these circumstances a relative, a person who has custody or care of the minor, or a probation officer can apply to the Children's Court (discussed further below) for the appointment of a guardian (section 9(2)). According to section 9(4) the court will have regard to the welfare and interests of the minor when appointing the guardian. The guardian will have "all or such of the rights, powers and privileges of guardianship as the court may specify", subject to the proviso that if a tutor dative has already been appointed by the Master under the Administration Act (see below) the conditions that the tutor dative is subject to will apply to the guardian.

II. Deceased Estates Succession Act

Section 5(2) allows a minor heir or a person under guardianship, tutorship or curatorship (for more on this, see paragraph the provisions of the Administration Act below) to ask The Master of the High Court ("Master") to consent to an alternative distribution of property for a minor heir having consulted with the heir's curator tutor or guardian. More generally, section 5 allows heirs to agree a division of property where they inherit property in undivided shares.

III. The Administration of Estates Act

The Act provides for a number of safeguards to protect the minor's property.

In relation to a minor’s property rights, the Act states that a surviving spouse from a marriage of community of property cannot, without the Master's consent, transfer or mortgage any land belonging to the joint estate except for the purpose of securing the minor heir's inheritance (section 57). A surviving spouse who is the executor of the deceased's estate is also under an obligation to secure the inheritance of any minor children as directed by the deceased, or in absence of direction, by a deed or by paying the inheritance to the Master (section 61).

There exists a prohibition on re-marriage of the surviving parent until the minor’s shares have been secured (section 90). Failure to comply with such provisions can lead to the surviving spouse being made to forfeit a sum equal to a quarter of their share in the joint estate for the benefit of the child, and they may face a fine and/or imprisonment (section 90(3)).

In the will or deed, a "tutor testamentary" can be appointed by the father, or the mother of a minor whose father is dead or has abandoned the minor, to administer and manage the minor's property, or to take care of the minor until the individual ceases to be a minor (section 69).
In cases where the deceased parents have not appointed a tutor testamentary for the minor who inherits property, maternal and paternal relatives and any other such person may be called upon by the Master to assume these duties. They are known as "tutors dative". However, such persons must either be a relative or they must be registered under the Estate Administrators Act\textsuperscript{1534} (section 74), and any such appointment may be reviewed and set aside (section 75).

In circumstances where someone wishes to give property to a minor, they are able to appoint a "curator nominate" to administer and manage such property until the minor becomes 18 years old (section 69(2)).\textsuperscript{1535}

An executor is under a duty to inform the Master of any claim that a minor without a guardian, tutor, curator or legal representative may have (section 50), and, unless the will directs otherwise, and must pay any sums due to such minor to the Master (section 51(1)-(2)) who will receive the money into 'the Guardian's Fund' (section 51(3)) (see above). The executor can pay money into an account and withdraw it for the maintenance of the child (section 51(4)).

There are also provisions regarding the disposal of the minor’s property. These allow the Master to subdivide immovable property which a minor has an interest in if he believes it is fair, a person has consented on behalf of the minor (section 121). Similarly the Master can apply for the lease, mortgage sale or other disposition of such property on behalf of the minor (section 122). The Master can also invest money belonging to the minor in immovable property, in consultation with the minor's tutor or guardian (section 123).

Tutors datives are obliged to, and tutors testamentary and curator nominates may (unless otherwise directed), pay to the Master all moneys belonging to the minors, except if needed for immediate debts or maintenance (section 92-93).\textsuperscript{1536} The Master pays such moneys into the "Guardian's Fund" (section 97) where there is no surviving parent. Funds are kept until the minor is 18 years old and then are paid to him/her, with interest (sections 98 and 102). The Master can pay the money in the Guardian's Fund to the tutor or curator (section 102), apply it for the education and maintenance of the minor (section 103) or invest it (section 106) and any disputes over the funds are determined by the High Court.

The duties of tutors and curators are covered by section 89:

\begin{quote}
(1) When letters of confirmation have been granted to any tutor, either testamentary or dative, or to any curator, either nominate or dative, every such tutor shall, in all respects and for all intents and purposes, and every such curator shall, in so far as relates to the particular estate or property
\end{quote}

\textsuperscript{1534} An official copy of this could not be located, but it is presumed that this governs the actions of administrators.

\textsuperscript{1535} Curators dative are used to administer estates of missing persons or those absent from Zimbabwe (sections 79-80), while curators bonis and curators ad litem are used for those with mental incapacity.

which has been placed under his guardianship, have every power, right and privilege, and shall do and cause to be done, every act, matter and thing touching and concerning the making of an inventory, administration and management of the estate or property under his guardianship, and every such tutor or curator and his estate shall, in respect and by reason of every act, matter or thing done or omitted to be done by him, incur and be subject to every liability, obligation and penalty which by any law in force prior to the 5th July, 1907, any tutor testamentary would then respectively have had or have been directed or required to do, and which he and his estate would then in respect and by reason of any such act, matter or thing done or omitted to be done by him, have incurred or been subject to.

(2) Nothing in this section contained shall give any curator, either nominate or dative, any power or authority as to the maintenance, education or custody of the person of any minor, except in so far as the same may have been specially given and committed to him by the decree or order of the High Court or any judge thereof.

(3) Every tutor testamentary and curator nominate shall, in the discharge of their office and in the administration of the estate and property respectively under their guardianship, conform to and obey every lawful direction touching and concerning the same which has been given by the person by whom such tutor or curator has been appointed in the will or deed by which such appointment was made or in any other writing duly executed by such person.

There exist prohibitions on tutors or curators regarding selling, alienating or mortgaging immovable property, unless they are so directed by the person who appointed them, or have the High Court's permission (section 91).

Sanctions are in place against tutors or curators who fail to make and transmit inventories, or make false inventories. These include fines and imprisonment (section 87-88).

The Master performs the supervision of executors, tutors, or curators, and this includes following a complaint from a creditor, heir or legatee. The Master can then call on them to account for their actions and apply to a judge for their removal (sections 116 and 117). Thus if beneficiaries are not satisfied with the way an executor is performing his duties, they can lodge a complaint with the Master who has the authority to remove him.1537

IV. Deceased Person’s Family Maintenance Act

Section 10 of this Act punishes property grabbing and seems to apply irrespective of Customary Law.1538

V. The Children’s Act

The Children’s Act establishes a specialist Children's Court to deal with matters pertaining to children. However the Act makes no explicit reference to inheritance claims or disputes involving the distribution of estates. A number of the provisions in this Act concern criminal matters. There are provisions relating to the prevention of neglect and exploitation of children and provisions making a parent or guardian guilty of an offence if they fail to provide adequate supervision for children, or neglect them (section 7). It is possible to see paragraph how the Children's Court is able to respond to some circumstances an orphaned child may find themselves in. The court can, for example, make protection orders, including ordering that the child resides in such place as the court determines (section 20(iv)). It can also punish guardians who neglect children (section 7) and appoint guardians (under section 9 of the Guardianship of Minors Act) However there are no express provisions in relation to facilitating a child's right to assert inheritance rights.

VI. The High Court Act 19811539 and the Magistrates Court Act 19321540

Both these Acts contain provisions regarding jurisdiction over, and procedures relating to, the guardianship and custody of children. However there are no explicit provisions relating to children bringing claims, such as in relation to their inheritance and property rights. A 2004 report, suggests that a specialist court dealing with complex intestate succession cases would be of huge benefit to the country.1541

VII. The Civil Evidence Act 19921542

This Act does not contain any references to children providing evidence to the court: it states that except as otherwise provided every person shall be competent to give evidence in any civil proceedings. Those who are expressly stated as not being competent are those persons suffering from mental disorders or defects, or those under the influence of liquor or drugs. The omission of reference to children, together with the aforementioned provisions in the Constitution, suggests that children are entitled to give evidence to the court.


VIII. Legal Aid Act 1996\textsuperscript{1543}

The Legal Aid Act 1996 governs legal aid in Zimbabwe. It established a Legal Aid Directorate, which provides legal aid to eligible persons providing that the Director is satisfied that the applicant (a) has insufficient means of obtaining legal representation, (b) has reasonable grounds for initiating, carrying on, defending or being a party to the proceedings for which he requires legal aid and (c) is in need or would benefit from the legal aid services provided in respect of the proceedings for which he seeks legal aid (section 8).

An alternative means for a person to obtain legal aid is for it to be instigated by a judge, magistrate or Attorney General once proceedings have commenced, if such person sees it to be in the interests of justice.\textsuperscript{1544}

The Legal Aid Act allows for "any form of appropriate legal services" to be made available, so it is under the Directorate's discretion as to whether the applicant gets only legal advice, or both advice and representation in court. Whilst these provisions are definitely positive, and could assist children with inheritance claims the fact that the Legal Aid Directorate is part of the Ministry of Justice raises concerns about its independence and impartiality.

Eligibility for legal aid is not clarified with any great certainty and its availability is subject to the requirement that resources are available (section 7(2)(a)(ii)).

Three tests are conducted to determine whether a client will be provided with legal aid in practice, being the merit test, the type of matter test and the means test.\textsuperscript{1545} Clients are sometimes referred to other bodies following the "type of work" test despite their cases falling within the Legal Aid Directorate's remit. This is because certain bodies such as the Justice for Children Trust and the Zimbabwe Women Lawyers Association are perceived to be more specialised and suited to perform the work, although legal aid lawyers have also admitted to referring cases due to finding them "boring".

The Legal Aid Directorate, legal aid lawyers and clients have commented upon the complexity of the means testing form that must be completed by clients.\textsuperscript{1546} Whilst it is important to determine eligibility, the complexity of the form and lack of assistance available to potential clients may act as a deterrent. Many clients also experience "neglect, poor and/or late filing of documents" and "delays in [...] instituting proceedings" once proceedings are undertaken.

\textsuperscript{1543} Legal Aid Act 1996, available at: \url{http://defensewiki.ibj.org/index.php/Zimbabwe_Legal_Aid_Act}.

\textsuperscript{1544} Legal Aid Act 1996 s10.

\textsuperscript{1545} Priscillah Murinda. 'Access to Legal Aid for Indigent Women: An Analysis of the Services Offered by the Legal Aid Directorate in Harare, Zimbabwe' (2008), pp. 30-33.

\textsuperscript{1546} Priscillah Murinda. 'Access to Legal Aid for Indigent Women: An Analysis of the Services Offered by the Legal Aid Directorate in Harare, Zimbabwe' (2008), p. 32.
Furthermore access to legal aid is not widely publicised, so many citizens may not be aware of their entitlements, a problem acknowledged by Charles Nyatanga, Master of the High Court for Zimbabwe in 2008.\(^\text{1547}\)

Potential clients may also experience logistical problems while accessing legal aid. The Legal Aid Directorate has two offices, one in Bulawayo and another in Harare and claims to be able to make arrangements to assist clients in other locations through "co-operating partners".\(^\text{1548}\) However, clients may still be deterred from accessing legal aid due to the transport costs incurred travelling back and forth to follow up on matters.\(^\text{1549}\)

"Societies" also exist in Zimbabwe which offer legal representation to their members in exchange for a low monthly fee (ranging from US$5 to US$100), although the quality of representation received appears to be variable.\(^\text{1550}\)

IX. Magistrates Court (Civil) Rules, 1980, Order 5 and the High Court Rules Order 4

Both the Magistrates' Court and the High Court have rules governing legal aid (the Magistrates Court (Civil) Rules, 1980, Order 5 and the High Court Rules Order 4 respectively). Requirements for Magistrates' Court legal aid is that the applicant has a right of action/defence and has no means sufficient to pay court fees and messenger's costs. The court may then appoint a lawyer or allow the pleading to be served free of charge. In the High Court, people with assets below a specified amount (1000 Zimbabwean dollars in April 2014 excluding household possessions) will generally receive access to legal representation.\(^\text{1551}\)

X. Maintenance Act 1971\(^\text{1552}\)

Under this Act Magistrates Courts are established as 'maintenance courts'. Complaints of failure to pay maintenance by dependants are made to 'maintenance officers', and they can then bring such a complaint to the maintenance court, which can make a maintenance order under section 6. It seems that an orphan could make such a complaint in relation to maintenance received from the estate of the deceased. Orders are treated like a civil judgment and it is a crime not to comply with them.\(^\text{1553}\)

\(^\text{1547}\) Address to the Registrars’ Workshop Held in South Africa 5th-9th December 2007 by Charles Nyatanga, Master/Registrar and Sheriff for Zimbabwe.


\(^\text{1549}\) Priscillah Murinda. 'Access to Legal Aid for Indigent Women: An Analysis of the Services Offered by the Legal Aid Directorate in Harare, Zimbabwe' (2008), p. 47.


\(^\text{1553}\) Sections 22-23.
iii. CUSTOMARY LAW

Again, it is worth remembering that certain provisions relating to enforcement (such as those under section 10 of the Deceased Person’s Family Maintenance Act which punishes property grabbing), will apply irrespective of Customary Law.

It is possible that, as mentioned above in relation to General Law, where a child has a surviving parent inheritance rights would be enforced through that parent, at least under codified Customary Law. 1554

I. Administration of Estates Act, Part IIIA

The guidelines relating to the distribution of an estate under Customary Law under Part IIIA of the Administration Act will only be considered by the magistrate in circumstances where a surviving spouse or child disputes an inheritance plan (section 68F(1)). This presupposes that the surviving spouse or child has knowledge of their entitlements, and that they have the means for disputing an inheritance plan. Knowledge and means could act as genuine barriers to children securing their rightful inheritance.

It should also be noted that, although the executor is under an obligation to draw up an inheritance plan that conserves the net estate for the child and maintains the child (section 68D), there are no express provisions regarding guardians or tutors within the provisions on Customary Law estates.

Under Part IIIA, the Magistrate Court has certain powers to deal with the administration of intestate estates of those subject to Customary Law, with a right of appeal to the Master (section 68E-68F) and a further appeal to the High Court (section 68J). Presumably appeals from the High Court are treated in the normal way. There does not seem to be a provision excluding a minor’s right to appeal. It seems that if beneficiaries are not satisfied with the way an executor is performing his duties, they can lodge a complaint with the Master who has the authority to remove them. 1555

It has also been mentioned that local leaders or chiefs may have delegated powers under the Administration Act, and are often the first port of call for overseeing property inheritance disputes.

II. Customary Law (Practice)

At this point it is worth reiterating that traditional practice is recognised under Chapter 15 of the Constitution. 1556

Section 280-282 states as follows:

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1556 Chapter 14 covers local and provincial government, but this report focusses on local judicial functions rather than governance.
280 Traditional leadership

(1) The institution, status and role of traditional leaders under customary law are recognised.

(2) A traditional leader is responsible for performing the cultural, customarily and traditional functions of a Chief, head person or village head, as the case may be, for his or her community.

281 Principles to be observed by traditional leaders

(1) Traditional leaders must -

(a) act in accordance with this Constitution and the laws of Zimbabwe;

(b) observe the customs pertaining to traditional leadership and exercise their functions for the purposes for which the institution of traditional leadership is recognised by the Constitution; and

(c) treat all persons within their areas equally and fairly.

(2) Traditional leaders must not -

(a) be members of any political party or in any way participate in partisan politics;

(b) act in a partisan manner;

(c) further the interests of any political party or cause; or

(d) violate the fundamental rights and freedoms of any person.

282 Functions of traditional leaders

(1) Traditional leaders have the following functions within their areas of jurisdiction-

(a) to promote and uphold cultural values of their communities and, in particular, to promote sound family values;

(b) to take measures to preserve the culture, traditions, history and heritage of their communities, including sacred shrines;

(c) to facilitate development;

(d) in accordance with an Act of Parliament, to administer Communal Land and to protect the environment;

(e) to resolve disputes amongst the people in their communities in accordance with customary law; and

(f) to exercise any other functions conferred or imposed on them by an Act of Parliament.
(2) Except as provided in an Act of Parliament, traditional leaders have authority, jurisdiction and control over the Communal Land or other areas for which they have been appointed, and over persons within those Communal Lands or areas.

(3) In the performance of their functions, traditional leaders are not subject to the direction or control of any person or authority, except as may be prescribed in an Act of Parliament.

(4) An Act of Parliament must provide for the regulation of the conduct of traditional leaders.

Section 283 concerns the appointment and removal of traditional leaders. Chapter 15 also establishes a National Council of Chiefs and a provincial assemblies of Chiefs under section 285. Section 286 states that their functions are to:

(a) to protect, promote and develop Zimbabwe's culture and traditions;

(b) to represent the views of traditional leaders and to maintain the integrity and status of traditional institutions;

(c) to protect, promote and advance the interests of traditional leaders;

(d) to consider representations and complaints made to it by traditional leaders;

(e) to define and enforce correct and ethical conduct on the part of traditional leaders and to develop their capacity for leadership;

(f) to facilitate the settlement of disputes between and concerning traditional leaders;

(g) to perform any other functions that may be conferred or imposed on it by an Act of Parliament.

The National Council of Chiefs does not appear to have a website or online presence. References to the National Council can be found in relation to the composition of the Zimbabwean Senate, which is noted to include the President and Deputy President of the National Council of Chiefs. References to the National Council of Chiefs can be found dating back to 2005, so it seems the Council is established.

Similarly, the various provincial assemblies of chiefs do not appear to have websites or an online presence. Section 16 of the Chiefs and Headmen Act provides for the creation of the provincial assemblies of chiefs. References to

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the provincial assemblies can also be found in relation to the composition of the Zimbabwean Senate, which includes sixteen traditional chiefs as elected by the provincial assemblies of chiefs in the eight provinces. This appears also to be the case in practice, with sixteen traditional chiefs mentioned as being sworn in with Zimbabwe's Eighth Parliament on 22 August 2013.

Under section 287, an Integrity and Ethics Committee is established to:

(a) to develop and enforce integrity and ethical conduct on the part of traditional leaders;

(b) to resolve disputes between traditional leaders;

(c) to deal with complaints against traditional leaders.

No Integrity and Ethics Committee appears to have been established as at October 2013.

Customary Law is administered through the magistrates' courts and they can also remove guardians abusing their power. Although magistrates have assumed power to override legal wills where a wife and children are excluded, the majority of cases concern intestacy and are handled locally. Magistrates use informal settlement mechanisms, such as round table discussions, but in the specific case no one attended and in the end violence ensued. The case was taken to the High Court, where the widow was appointed executor (the case concerned in-laws taking the widow's property). Some magistrates work in collaboration with local chiefs to settle issues, but in many cases disputes are settled locally.

Practice as to administration of estates and dispute resolution varies. In some areas, people are keen to register estates of the deceased, while in others they are not and property grabbing is common. This is because locals:

"are not aware of their inheritance rights and the importance of writing wills; they do not know about the protocols for registering the property of a deceased person at the Magistrate's Office; they hesitate to claim property for fear of exacerbating existing rivalries within polygamous marriages; they hesitate to claim property for fear of rupturing relationships within extended families; and they prefer to report property inheritance cases to the chiefs because of being "attached to customary practice"."

However, there is reference to sole survivors being protected and looked after by local communities.\textsuperscript{1565}

At magistrate court level, it seems Customary Law is discussed rather than General Law, but decisions are often made more in line with General Law.\textsuperscript{1566}

UN research flags a number of issues that prevent children inheriting their parents' property.\textsuperscript{1567} These include a parent's estate being too small for a child to inherit or a child having no place to live because they have no entitlement to their parents' house. Similarly unscrupulous persons may assume guardianship of children to benefit from inheritance, while there are also instances where a deceased parent's property could become absorbed into a larger household. Some widows and children are chased off the estate of a deceased.\textsuperscript{1568}

Among the other barriers to children enforcing their rights are the changes in many African communities, caused by contemporary lifestyles, migration and worsening poverty. In some cases this has contributed towards an erosion of family ties and social safety nets.\textsuperscript{1569} It is important that any policy proposals that aim to protect children's inheritance rights do this in a way that is compatible with communities' preference for customary practices and traditions, such as the role of the extended family, the existence of polygamous marriages and the practices of community leaders.\textsuperscript{1570} A number of case studies suggest that community chiefs need more practical guidance to help them implement the law in this area.\textsuperscript{1571} Such an approach would help guarantee that all children, including those who live in rural Zimbabwe within communities that follow customary traditions, are guaranteed equal protection under the law.

In addition to enforcement issues and a shortage of mechanisms facilitating children's inheritance claims, many are not fully aware of their legal rights, so they may not know that they are entitled to dispute an inheritance distribution in the first


Even if children are aware of their legal entitlements, there are a number of obstacles to overcome when trying to realise their rightful inheritance. These include a potential lack of support from their guardians, community practices that restrict their rights, as well as the administrative burden, cost, and the time associated with disputing an estate distribution. For a child to actually benefit from these provisions they require assistance in navigating the judicial system and having their voices heard. Time and cost are also issues here. More clarity around the way in which minors can use the legal system to dispute inheritance distributions would be beneficial, including guidelines as to whether minors can engage advocates to pursue disputes without their guardian's consent.

The 2004 report titled ‘Bringing Equality Home - Promoting and Protecting The Inheritance Rights of Women’ listed the following as key obstacles to women enforcing their inheritance rights:

- **Lack of resources** — women lack time and/or money to bring their cases either to the formal court system or even to the informal dispute-resolution mechanism; heavy workloads keep women too busy to claim their rights;

- **Often, fear is also involved:** not only do women fear the systems themselves, they also fear ‘venturing out into the unknown’ and the potentially negative consequences that may result from interference by other family members;

- **Widows are often accused of having caused their husband’s death** — a superstition that does nothing to assuage the fear that ‘avenging spirits’ of the deceased will punish them if they try to ‘gain’ from their husband’s death;

- **Access to justice is limited; the patriarchal courts discriminate against women;**

- **There is a strong culture of silence, mystification and stigmatisation of sexuality and gender-roles (women are coerced into and kept in traditional caring roles);**

- **There is a huge disparity between the law in books and the law in practice, mainly due to persistent negative attitudes towards women. These are manifest in practices such as polygyny, son preference in education, and payment of lobola (bride price). Such practices keep women in subordinate social positions.**

In addition, the report also mentions the difficulty of registering title to property as an obstacle to obtaining property. It can take years to transfer title, which means the a dependent may have no collateral for bank loans, and thus may be forced to give up the land they are entitled to.

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Some legislation enforces women's inferior status in Zimbabwe. For example the Deeds Registries Act 1996, which allows joint registration of property, says that a woman will be assisted by her husband with executing deeds where she has no capacity by virtue of marriage.

As mentioned above, many sole survivors are now more insistent on managing their own property in light of property grabbing practices.

III. NGO Assistance

In practice, non-governmental organisations and charities play a key role in the provision of legal aid in Zimbabwe, and there are a number of groups providing support to children in relation to their inheritance rights. These include the Justice for Children Trust, the Zimbabwe Women Lawyers Association, the Girl Child Network Zimbabwe, the Farm Orphan Support Trust and the Zimbabwe Widows and Orphans Trust. As an example of the type of work these organisations undertake, the Justice for Children Trust runs a legal aid programme, providing legal advice to children, drafting legal documents and representing children in court. Other organisations such as Women and Law in Southern Africa and The International Federation of Women's Lawyers works on advocacy and lobbying for change in relation to discrimination against women.

Other organisations such as The Legal Resources Foundation, Seke Rural Home-Based Care and Ntengwe for Community Development have carried out various community outreach programs aiming to raise awareness about property and inheritance rights. They have also provided practical training such as will-writing sessions and birth certificate campaigns. Such campaigns and training programs are vital to empowering vulnerable families and sole survivor children, as a lack of awareness about legal inheritance rights are a key factor preventing children from inheriting their parents' property.

Other private institutions, such as, Catholic Commission for Justice and Peace, Zimbabwe Council of Churches (Justice and Peace Department) and Msasa Project (and also the Legal Resources Foundation) offer legal aid and education.

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1574 See also the Guardianship of Minors Act 1961.


1576 The Legal Resources Foundation, homepage: http://www.lrfzim.com/.


However these organisations do not have state funding and often lack resources.\textsuperscript{1580}

\textbf{D. GOVERNMENT POLICY - ZIMBABWE NATIONAL PLAN OF ACTION FOR ORPHANS AND VULNERABLE CHILDREN, PHASE II (2011-2015)}\textsuperscript{1581}

This National Plan of Action ("NPA") was drafted by the Ministry of Labour and Social Services and is implemented through the Child Protection Fund. The Plan aims to give sole survivors, vulnerable children and their families access to basic services to ensure that they are protected from abuse and exploitation. One key aim is that by December 2015 the most vulnerable children in Zimbabwe will be able to secure their basic rights through the provision of quality social protection and child protection services.\textsuperscript{1582} This NPA is a central vehicle by which Zimbabwe fulfils its commitments under the UNGASS Declaration, as well as the other international, national and regional laws mentioned above.

The NPA recognises that the "non-traditional family" is now common place in Zimbabwe, with many children being raised by themselves, their siblings, or by grandparents or neighbours. One of the four strategic pillars of the NPA is child protection. The NPA suggests that there is a need to eventually revisit laws relevant to children and close the gaps that make children vulnerable.\textsuperscript{1583} Children’s access to inheritance is cited as a "critical issue", and the NPA notes the complications that lack of birth certificates can cause to sole survivor children trying to secure their basic rights.

\textbf{3. CONCLUSION}

Zimbabwe has ratified and acceded to a number of international treaties which provide a framework for children's rights and a number of these rights are reflected in the Constitution. Although the Constitution enshrines principles of equality and property, children's rights to inheritance are not explicitly protected. There are also a number of national legislative instruments relating to inheritance rights under both Customary and General Law. These apply to minors, and also provide for their maintenance.

However, as can be seen from this report, the interaction between the various pieces of legislation is not always clear, and there seems to be no clear explanation of how intestacy rules operate under General Law. Similarly much of the legislation is generally unclear and it is difficult to decipher exactly what provisions mean. A lack of political will to change such issues is another barrier to inheritance rights.\textsuperscript{1584}

\begin{itemize}
\item \textsuperscript{1580} Hauser Global Law School Program, Update: The Law in Zimbabwe (2014), available at: \url{http://www.nyulawglobal.org/globalex/Zimbabwe1.htm}.
\end{itemize}
Despite an apparently strong Constitutional framework, which clearly recognises children as rights-bearers, the reality is much more complex and there may be situations where children do not always benefit from their deceased parents’ estates. This is in part due to issues with implementation and enforcement, lack of resources and apparent gaps in the framework, such as the absence of mechanisms facilitating a child’s right to be heard by the court. Furthermore, it is unclear to what extent codified Customary Law is applied by local courts, or whether unwritten customary principles influence such decisions.

Some organisations are attempting to tackle these barriers by providing training around birth registration, will writing and estate planning. Others focus on raising awareness among families and children in relation to what their legal rights are and how they can assert them.

There is an urgent need for a coordinated approach to protecting the inheritance rights of children, particularly those who have lost one or both parents. This can partly be addressed through the greater provision of support and legal aid to children who are victims (or potential victims) of property confiscation. Increasing awareness of children's rights in this area would also be of benefit. Some notable steps have already been taken, but invariably more needs to be done to secure the rights of vulnerable, and often stigmatised, children, for whom security of inheritance provides a basis for their future.
APPENDIX 1 - SHORT SUMMARY TABLE

Note that it will be possible to provide references and narrative explanations in the full table on the next page.

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<tr>
<td>In the Constitution</td>
<td>Yes</td>
<td>Does not specify</td>
<td>Yes</td>
<td>Does not specify</td>
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<tr>
<td>In legislation/Civil Law</td>
<td>Yes(^{1585})</td>
<td>Yes</td>
<td>Yes</td>
<td>Does not specify</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>In Customary Law (codified)</td>
<td>Yes(^{1586})</td>
<td>Does not specify</td>
<td>Does not specify</td>
<td>Yes</td>
<td>Yes</td>
<td>Don’t know</td>
<td>Don’t know</td>
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<tr>
<td>In Customary Law (practice)</td>
<td>No</td>
<td>Don’t know</td>
<td>Don’t know</td>
<td>Don’t know</td>
<td>N/A</td>
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\(^{1585}\) Although there is no explicit reference to equality, gender neutral language is used.

\(^{1586}\) Although there is no explicit reference to equality, gender neutral language is used.
Please answer with one of the following responses only:

Yes - The law/ practice explicitly mentions equality between the two characteristics (Questions 1-4), or relevant codified law/ national provisions exist (Questions 5-7). In relation to Question 1, if gender neutral language rather than specifically mentioning gender equality, please specify 'Yes' and include an explanatory footnote to this effect.

No - The law/ practice explicitly discriminates between the two characteristics (Questions 1-4). Not applicable to Questions 5-7.

Does not specify - All relevant material was accessed, but there was no information relevant to the question (Questions 1-7).

Don't know - It is not possible to say whether all relevant material was accessed, and so a definitive answer cannot be given (Questions 1-7).

N/A - The question is not applicable for this type of law, for example if a country does not have codified Customary Law or a Constitution. It is likely that this answer will apply to Customary Law (practice) for Questions 5-7.
### ADDITIONAL QUESTIONS

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<tr>
<td><strong>1.</strong> How does the legal system define a child?  &lt;br&gt; Is the age of majority different for different matters?</td>
<td>Under General Law, the term ‘minor’ is a person under 18 years of age, while a 'child' refers to a person under 16 (although in the Constitution this is someone under 18). The terms ‘minor’ and ‘child’ are both used in inheritance rights legislation.  &lt;br&gt; Under Customary Law and tradition, a person is generally a child while they remain under parental authority.  &lt;br&gt; Please see paragraph 2.a.ii.</td>
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<tr>
<td><strong>2.</strong> Does the country have a <em>de jure</em> dual legal system (customary or religious law running parallel to the statutory law or common law)?  &lt;br&gt; Whether <em>de jure</em> or <em>de facto</em>, is the customary/religious law related to inheritance and property rights the preferred means of dispute resolution in this area?</td>
<td>Zimbabwe has a dual legal system and the surrounding circumstances will generally decide which type of law applies. In some cases General Law will always apply (e.g. on testacy).  &lt;br&gt; Please see paragraphs 2 and 2.a.  &lt;br&gt; Some Customary Law is codified, such as the Administration of Estates Act Part IIIA (please see paragraph 2.a.iii.I).  &lt;br&gt; In 2004, most Zimbabweans' lives were regulated by Customary Law, preserving the authority of traditional leaders to adjudicate on disputes, while in 2008 most inheritance cases concerned intestacy and were dealt with locally (and thus under Customary Law). Please see paragraph 2.</td>
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<tr>
<td><strong>3.</strong> Does the Country's legal system (ie Civil Law and Customary Law) differentiate between different types of land tenure?</td>
<td>Yes - freehold (private), communal land, leasehold (resettlement) and state land. Please see paragraph 2.a.</td>
</tr>
<tr>
<td><strong>4.</strong> Does the country have codified legislation governing inheritance rights?</td>
<td>There are four main Acts covering inheritance under General Law, while Part IIIA of the Administration of Estates Act codifies some Customary Law on inheritance rights. However the interaction between these Acts is extremely unclear. Please see paragraphs 2.a.ii.I - 2.a.ii.IV and 2.a.iii.I. Please see also paragraphs 2.a.ii.V - 2.a.ii.VI.  &lt;br&gt; Customary Law is also applied throughout</td>
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<tr>
<td>ADDITIONAL QUESTIONS</td>
<td>RESPONSE</td>
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<td><strong>5. Does the legal system that governs inheritance rights (if any) ensure equality between male and female children?</strong></td>
<td>There are a number of provisions in the Constitution ensuring equality between male and female children, and the Constitution goes so far as to say that laws, customs, tradition and practices which infringe women's rights are void. Please see paragraph 2.a.i.</td>
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<td>Under General Law, inheritance rights legislation seems to be gender neutral. The Legal Age of Majority Act gives full legal status to both male and female 18 year olds. Please see paragraph 2.a.ii.</td>
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<td></td>
<td>Although the codified provisions of Customary Law are gender neutral, practices seem to discriminate against women. Please see paragraphs 2.a.iii.IV, 2.b.iii.II and 2.c.iii.II.</td>
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<tr>
<td><strong>6. Does the legal system that governs inheritance rights (if any) ensure equality between biological and adopted children?</strong></td>
<td>Although the Constitution has general equality provisions (see paragraph 2.a.i), it does not specifically mention adopted children.</td>
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<td>Most importantly, under General Law, the Children's Act states that an adopted child will be treated like a biological child in relation to intestate succession. The Wills Act protects children that are adopted after a testator has made a will where no provision is made for that child and no provision is made to the contrary. Similarly the Deceased Person's Family Maintenance Act explicitly states that the definition of 'child' includes adopted children. Please see paragraphs 2.a.ii.II, 2.a.ii.IV and 2.a.ii.VI.</td>
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<td></td>
<td>Beyond this, no mention is made of equality between biological and adopted children in General Law, Customary Law or practice.</td>
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<tr>
<td><strong>7. Does the legal system that governs inheritance rights (if any) ensure equality between children born in and out of wedlock?</strong></td>
<td>Section 56(3) of the Constitution ensures equality between children born in and out of wedlock. Please see paragraph 2.a.i.</td>
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</table>
The case of Bhila made clear that there should be equality between children born in and out of wedlock in relation to intestate succession, a ruling based on section 56(3) of the Constitution. The case states that children born out of wedlock were previously precluded from inheriting intestate property. Please see paragraphs 2.a.i.I and 2.a.iii.II.

Equality is also provided for by the Deceased Person's Family Maintenance Act in General Law (please see paragraph 2.a.ii.IV). The Wills Act protects children that are legitimated after a testator has made a will where no provision is made for that child and no provision is made to the contrary (please see paragraph 2.a.ii.II).

It is worth noting that the Children’s Act (General Law) suggests (but does not explicitly say) that children born out of wedlock may be in a worse position than those born in wedlock (please see paragraph 2.a.ii.VI).

Beyond this, no mention is made of equality between children born in and out of wedlock in General Law, Customary Law or practice.

8. Does the legal system that governs inheritance rights (if any) ensure equality between children born from a monogamous and polygamous union?

Although the Constitution has general equality provisions (see paragraph 2.a.i), it does not specifically mention children born from polygamous unions.

As polygamous unions are not recognised under General Law, it may be that those children are treated in the same way as children born out of wedlock (please see paragraphs 2.a and 2.a.iii.II).

Customary Law allows polygamy and the Administration of Estates Act Part IIIA protects children born from polygamous unions (although not where a marriage is contracted where the spouse is already married under General Law). Please see paragraph 2.a.iii.I.

It is unclear whether customary practices would
### ADDITIONAL QUESTIONS

<table>
<thead>
<tr>
<th>NUMBER</th>
<th>QUESTION</th>
<th>RESPONSE</th>
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<tr>
<td>9.</td>
<td>Are there different legal rules for testate and intestate succession?</td>
<td>Testate succession is always dealt with under General Law, which in this case would be the Wills Act. Intestate succession is covered by the Deceased Estates Succession Act. The Administration of Estates Act and Deceased Person's Family Maintenance Act apply to both situations. However the legislation does not seem to be comprehensive enough to cover all eventualities. Please see paragraphs 2.a.ii.I and 2.a.ii.IV. Under codified Customary Law, the Administration of Estates Act Part IIIA gives some guidelines on intestate succession. Please see paragraph 2.a.iii.I. It is unclear to what extent these statutes are respected in practice, but it seems they are often not. Please see paragraphs 2.a.iii.IV, 2.b.iii.II and 2.c.iii.II.</td>
</tr>
<tr>
<td>10.</td>
<td>Does the legal system specify the percentages of inheritance to be distributed to children?</td>
<td>Under General Law there is guidance on distribution percentages under the Deceased Estates Succession Act for intestate succession, and guidance for testate succession under the Wills Act, although both are subject to applications made under the Deceased Person’s Family Maintenance Act. Please see paragraphs 2.a.ii.I, 2.a.ii.II and 2.a.ii.IV. Customary Law guidelines on distribution percentages in intestate succession are provided for under the Administration of Estates Act Part IIIA. Please see paragraph 2.a.iii.I. It is unclear to what extent these statutes are respected by local communities, but it seems they are often not. Please see paragraphs 2.a.iii.IV, 2.b.iii.II and 2.c.iii.II.</td>
</tr>
<tr>
<td>11.</td>
<td>Does the legal system address the rights of orphaned children to transact land, houses and property that they inherit?</td>
<td>No specific information was found on this point. It seems that under codified law, where the child has one surviving parent, the rights would</td>
</tr>
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### ADDITIONAL QUESTIONS

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<tr>
<th>QUESTION</th>
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<tbody>
<tr>
<td>12. Does the legal system link inheritance rights to residency/citizenship?</td>
<td>Some of the Constitution’s provisions relate only to citizens, but in any case it does not include an express right to inheritance. Please see paragraph 2.a.i.</td>
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<td></td>
<td>Under General Law it is difficult to enforce any rights without a birth certificate. Please see paragraph 2.a.ii.V.</td>
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<td>No specific information was found on this point under Customary Law or practice.</td>
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<td>13. Does the legal system provide for automatic inheritance for sole survivor children?</td>
<td>Under General Law on intestacy and testacy, there is no automatic inheritance provision for sole survivor provision <em>per se</em>, but the distribution under the will or intestacy rules is subject to challenges from dependents (including children) under the Deceased Person's Family Maintenance Act. Please see paragraphs 2.b.ii.I-2.b.ii.IV.</td>
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<td>Customary Law <em>guidelines</em> on distribution percentages are provided for under the Administration of Estates Act Part IIIA and if followed strictly would provide for the estate to pass to a sole survivor child, or be shared amongst sole survivor children and their descendants <em>per stirpes</em>. The factors that need to be considered when distributing property are also favourable to sole survivors. Please see paragraph 2.b.iii.I.</td>
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<td>It is unclear to what extent these statutes are respected by local communities, but it seems they are often not. Please see paragraphs 2.a.iii.IV, 2.b.iii.II and 2.c.iii.II.</td>
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For sole surviving children, transactions would seem to take place through the guardian or tutor (see paragraphs questions 14 and 15 below).
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<th>14. Does the legal system mandate the appointment of a trustee/administrator/guardian for sole survivor children?</th>
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<td>The Constitution provides that children have the right to appropriate care where they have been removed from the family environment and that the State has the responsibility to ensure this. The High Court will be a child's &quot;upper guardian&quot;. Please see paragraph 2.a.i. Under General Law, a guardian or tutor will be appointed for sole survivor children, although the difference and interaction between these two titles is somewhat unclear. Please see paragraphs 2.c.i.i. and 2.c.i.iii. The provisions of the Administration of Estates Act that deal with estates of persons subject to Customary Law do not contain provisions regarding guardians. However magistrates seem to be able to replace ineffective guardians under Customary Law. Please see paragraph 2.c.iii.i. In practice, sole survivor children were generally provided for by the local community. However now older sole survivors are more insistent on managing their own inherited property. Please see paragraphs 2.b.iii.ii and 2.c.iii.ii. It is worth noting that property grabbing is punishable under General Law, irrespective of other laws including Customary Law (please see paragraphs 2.a.ii.iv, 2.a.iii.iii and 2.c.ii.iv).</td>
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<th>15. If such an appointment is mandated, does codified law enumerate:</th>
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<td>i appointee's rights/responsibilities to hold the property of a sole survivor child until he/she ceases to be a minor?</td>
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<td>i Under General Law, the rights and responsibilities of a guardian or tutor are enumerated in The Guardianship of Minors Act and the Administration of Estates Act. Please see paragraphs 2.c.i.i. and 2.c.i.iii. No specific information was found on this point under codified Customary Law.</td>
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<td>ii penalties to be imposed on an appointee who misuses the property/wrongfully deprives a child of property to which they are entitled?</td>
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<td>iii mechanisms for a sole survivor child to challenge an appointee and gain access to court?</td>
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<td>minor heir can ask the Master for an alternative distribution of property (please see paragraph 2.c.ii.II). Under the Maintenance Act (General Law), a dependent can make a complaint to a maintenance officer about a failure to pay maintenance, presumably including maintenance from an estate, which can then be brought before the maintenance court. Please see paragraph 2.c.ii.X. No specific information was found on this point under codified Customary Law.</td>
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16. *Is there regulation of the management of inheritance for those sole survivor children with no legal guardian?*

<p>| | |
|  |  |
| General Law provides for the appointment of a guardian or tutor, so little information was found on situations of sole survivor children where no such person exists. However certain duties are imposed on an executor under the Administration of Estates Act (General Law). Under this Act a curator nominate can be appointed to manage the property of a minor. The Master also has rights in relation to disposal of a minor’s property. Please see paragraph 2.c.ii.III. Property grabbing is punishable under General Law, irrespective of other laws including Customary Law (please see paragraphs 2.a.ii.IV, 2.a.iii.III and 2.c.ii.IV). Under codified Customary Law, an executor under the Administration of Estates Act is subject to duties to provide for a child of the deceased. Please see paragraph 2.c.iii.I. In practice, sole survivor children are generally provided for by the local community. However now older sole survivors are more insistent on managing their own inherited property. Please see paragraph Please see paragraph 2.b.iii.II and 2.c.iii.II. |  |</p>
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<td>17. Where is Customary Law applied (in traditional non-State forums, formal State Courts, by local leaders/chiefs etc.)?</td>
<td>From local (primary or village) customary courts up to the Constitutional Court. The High Court has jurisdiction over inheritance disputes. Customary Law can also be applied on a more local ad hoc basis. Please see paragraph 2.</td>
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<td>18. How would you qualify the proportion of property claims resolved under Customary Law?</td>
<td>Unclear as sources are old.</td>
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<td>[Nearly all/ High majority/ Small majority/ Minority]</td>
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<td>19. Does the country have a court or tribunal in which orphaned children/their representatives can bring an action enforcing their legal right to property?</td>
<td>In theory, under the Constitution, a person can challenge any unconstitutional laws and practices (including those which are discriminatory), but it seems unlikely that this would be a realistic avenue for orphans. More importantly, the Constitution provides for access to the courts system for all and specific rights for children before the court, including a right to adequate protection and a right to be heard. Please see paragraph 2.c.i.</td>
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<td>If so, is there any case law specifically regarding orphaned children’s inheritance rights?</td>
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<td>Under General Law the Children’s Court, Magistrates Court and High Court would be most appropriate. The Master sits in the High Court and can remove guardians. Please see paragraphs 2.c.ii and 2.c.ii.V-2.c.ii.VI.</td>
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<td>The High Court has jurisdiction over inheritance disputes and land disputes, while the Administrative Court has jurisdiction over land disputes. Please see paragraph 2.</td>
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<td>In relation to written Customary Law, the Administration of Estates Act contains provisions regarding approaching the Master and subsequently the High Court in the event of a dispute, while magistrates can remove guardians. Please see paragraphs 2.c.iii.I - 2.c.iii.II.</td>
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<td>In practice, Customary Law disputes can be settled locally and informally, or through local courts. Please see paragraphs 2 and 2.c.iii.II.</td>
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<td>In general, access to the court system can be extremely difficult. Please see paragraph 2.a.iii.IV and 2.c.iii.II.</td>
<td>Some case law exists on the effect of the Legal Age of Majority Act and the case of Bhila clarified inheritance law provisions related to children born out of wedlock. Please see paragraphs 2.a.ii, 2.a.ii.i and 2.a.iii.II.</td>
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<td>The case of Magaya v Magaya was decided under a Constitutional provision allowing discrimination which has since been removed. Please see paragraphs 2.a.iii.i and 2.a.iii.IV and 2.b.iii.II.</td>
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<td>20. Are there national provisions for legal aid in civil/administrative claims, including inheritance? If so:</td>
<td>Section 31 of the Constitution explicitly says that the State must take measures to provide legal representation to those who can’t afford it. More generically, the Constitution enshrines a right of access to justice for all. Please see paragraph 2.c.i.</td>
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<td>Do these provisions contain special measures or provisions regarding children?</td>
<td>Both the Legal Aid Act and the Magistrates and High Court Rules provide for legal aid, although there are practical issues around claiming it. Please see paragraphs 2.c.ii.VIII and 2.c.ii.IX.</td>
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<td>NGOs are providing support aimed at children, and it is worth noting the Government policy for Orphans and Vulnerable Children. Please see paragraphs 2.c.iii.III and 2.d.</td>
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