

**The impact of the common law and legislation on African indigenous laws of
marriage in Zimbabwe and South Africa**

By

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ABSTRACT

The study sought to examine the development of customary law, primarily focusing on the extent to which the true African marriage has been preserved by its incorporation in, and regulation by legislation and the constitutions of Zimbabwe and South Africa. Today, colonial legislation has either been repealed or revised. However, evidence persists suggesting the inclusion of western principles within frameworks governing African marriages such as the Customary Marriages Act and the Recognition of Customary Marriages Act of post-independence Zimbabwe and South Africa respectively.

To understand the true purpose of custom, the study initially investigates the classical customary law position drawing deeper insights into the main features of the African marriage. From an African perspective, the research revealed whether legislation satisfactorily dealt with aspects such as registration of customary marriages, determination of minority and capacity to marry, payment of bride wealth, grounds for divorce, proprietary consequences of marriage during and after termination of marriage by death or divorce and women's rights to communal land tenure and immovable property among others. Apart from legislation it became imperative to determine the role of constitutionalism and human rights law in the regulation and preservation of custom.

A comparative study was motivated not only because Zimbabwe and South Africa share a border but also because migration between the two countries in the past decade due to various socio-economic forces has led to inter-marriages and cultural diversity. In addition, historically, both jurisdictions have Roman-Dutch law as the basis for the formation of their legal systems. The methodology remained largely a qualitative type research based on documentary analysis.

Several findings emerged among which was the fact that, women in traditional African marriages had property rights contrary to popular belief however they continue to be most disadvantaged when it comes to having real rights in ownership of communal land. The African marriage generally sought to preserve marriage more than its western

counterpart, the civil marriage. Legislation was the main vehicle for attaching customary law to western principles of law thus losing its intended purpose. Other findings were that polygamy and widow inheritance are prevalent and continue to face condemnation in today's society; constitutionalism and international human rights law do not readily find acceptance among traditionalists; bride wealth payments persist among rural and urban folk alike and continue to symbolise a marriage between respective parties and their families; and spouses omit to register customary marriages mainly because bride wealth payments adequately legitimise their unions. Initiation ceremonies persist among some ethnic groups particularly the South African Xhosa who have adhered to circumcision for boys as determining their capacity to marry.

The study concludes by making recommendations that could assist in harmonising customary law and common law. These include educational initiatives; advocacy and advice giving; regulation of unregistered customary marriages; improving access to justice; eradication of child marriages; improving the status of rural women; and constitutional reform. It is hoped that these recommendations will bridge the gap between customary law and western law as we endeavour to determine the future of the African marriage in a contemporary traditional context.

DECLARATION

I declare that this dissertation is a presentation of my own work and effort and has not been submitted to any other university/institution for the fulfillment of any degree. Where contributions by others have been made, due acknowledgement and reference has been made.

Signed.....



Date.....

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TABLE OF CONTENTS

Abstract.....	i
Declaration.....	iii
Acknowledgments.....	iv
List of Cases.....	xi
Acronyms.....	xx
 CHAPTER ONE	
BACKGROUND TO THE STUDY.....	1
1.1 INTRODUCTION.....	1
1.2 BACKGROUND TO AFRICAN MARRIAGES IN ZIMBABWE AND SOUTH AFRICA IN A HISTORICAL CONTEXT.....	3
1.3 ISSUES TO BE EXAMINED	8
1.4 JUSTIFICATION OF THE STUDY	18
1.5 AIMS AND OBJECTIVES	21
1.6 DELIMITATION OF THE STUDY	22
1.7 RESEARCH METHODOLOGY.....	23
1.8 OUTLINE OF THE THESIS	25
 CHAPTER TWO	
MAIN FEATURES OF THE AFRICAN INDIGENOUS LAW OF MARRIAGE: THE SHONA, NDEBELE, ZULU AND XHOSA OF ZIMBABWE AND SOUTH AFRICA	
2.1 INTRODUCTION	27
2.2 THE ESSENTIALS FOR A VALID CUSTOMARY MARRIAGE	28
2.2.1 Capacity to marry	28

2.2.1.1 Marriageable Age: Zimbabwean Shona and Ndebele	28
2.2.1.2 Marriageable Age: the Xhosa and Zulu of South Africa	31
2.2.2 Restrictions on Blood Relationships and Affinity.....	34
2.3 NEGOTIATION AND PAYMENT OF BRIDE WEALTH	38
2.3.1 The Zimbabwean Shona: <i>Roora</i>	38
2.3.2 The Zimbabwean Ndebele: <i>Umtimba</i>	44
2.3.3 South African Zulu and Xhosa: <i>Lobola</i>	47
2.3.4 Conclusion.....	52
2.4 ELOPEMENT.....	55
2.4.1 The Zimbabwean Shona: <i>Kutizisa</i> and <i>Kutizira</i>	55
2.4.2 The Zimbabwean Ndebele.....	57
2.4.3 South African Zulu and Xhosa: <i>Ukuthwala</i>	58
2.5 CHILD PLEDGING	59
2.5.1 The Zimbabwean Shona: <i>Kuzvarira</i>	59
2.6 POLYGAMY AND WIDOW INHERITANCE: The Shona and Ndebele of Zimbabwe and Zulu and Xhosa of South Africa	60
2.6.1 The Zimbabwean Shona: <i>Kugara Nhaka</i>	63
2.6.2 The Zimbabwean Ndebele: <i>Ukungenwa</i>	64
2.6.3 South African Zulu: <i>Ukungena</i>	65
2.6.4 South African Xhosa: Quasi ukungena	67
2.7 SERVICE MARRIAGE	69
2.7.1 The Zimbabwean Shona: <i>Kugarira</i>	69
2.8 COHABITATION AND PRESUMPTIONS.....	71
2.9 CONCLUSION	73
2.10 RIGHTS AND OBLIGATIONS ARISING OUT OF MARRIAGE	74
2.10.1 Introduction.....	74
2.11 DETERMINATION OF PROPERTY RIGHTS AND THE STATUS OF WOMEN	78
2.11.1 An Overview	78
2.11.2 The Matri-Estate: The Zimbabwean Shona and <i>Mombe Youmai</i>	80
2.11.3 South African Zulu and Xhosa: <i>Ubulunga Beast</i>	82

2.12 TERMINATION AND DISSOLUTION OF MARRIAGE	85
2.12.1 Grounds for divorce	85
2.12.1.1 Barrenness.....	85
2.12.1.2 Adultery.....	88
2.12.1.3 Other Instances.....	90
2.13 GUARDIANSHIP/AFFILIATION OF CHILDREN AND RETURN OF BRIDE WEALTH.....	92
2.14 CONCLUSION.....	95

CHAPTER THREE

THE IMPACT OF COLONIAL LAW AND LEGISLATION ON AFRICAN INDIGENOUS LAW OF MARRIAGE IN ZIMBABWE (Southern Rhodesia).....	98
3.1 INTRODUCTION	98
3.2 COLONIAL LEGISLATION	99
3.2.1 Native Marriages Ordinance (1901).....	99
3.2.2 Natives Adultery Punishment Ordinance (1916).....	103
3.2.3 Native Marriage Ordinance (1917)	107
3.2.4 Land Apportionment Act (1930).....	113
3.2.5 Native Land Husbandry Act (1951).....	117
3.2.6 African Marriages Act (1951).....	121
3.2.7 CONCLUSION.....	125
3.3 POST-COLONIAL LEGISLATION	126
3.3.1 Introduction.....	126
3.3.2 Legal Age of Majority Act (1982)	128
3.3.3 The Communal Land Act 1982	131
3.3.4 Matrimonial Causes Act 1985.....	134
3.3.5 Customary Law and Local Courts Act (1990)	156
3.3.6 Maintenance Act (2001).....	165
3.4 CONCLUSION.....	173

CHAPTER FOUR

THE IMPACT OF COLONIAL LAW AND LEGISLATION ON AFRICAN INDIGENOUS LAW OF MARRIAGE IN SOUTH AFRICA.....	176
4.1 Introduction	176
4.2 COLONIAL LEGISLATION	177
4.2.1 The Natal Code 1878.....	177
4.2.2 The Native Law Commission 1883	181
4.2.3 The Natal Code of Native Law 1932.....	183
4.2.4 The Black Administration Act 1938.....	186
4.2.5 Transkei Marriages Act 1978.....	195
4.2.6 KwaZulu Act on the Code of Zulu Law (1985)	205
4.2.7 Natal Code of Zulu Law (1987).....	206
4.2.8 Land Tenure Laws and Women's Rights to Property.....	209
4.3 CONCLUSION.....	216
4.4 POST COLONIAL LEGISLATION	219
4.4.1 Introduction.....	219
4.4.2 Recognition of Customary Marriages Act 1998	220
4.4.2.1 Equality of Spouses	221
4.4.2.2 Grounds for Divorce	222
4.4.2.3 Registration of Customary Marriages.....	227
4.4.2.4 Polygamy	229
4.4.2.5 Matrimonial Property Regimes	234
4.4.3 The Divorce Act 1979	240
4.4 CONCLUSION	244

CHAPTER FIVE

THE AFRICAN MARRIAGE IN THE CONTEXT OF CONSTITUTIONALISM AND INTERNATIONAL HUMAN RIGHTS LAW IN POST INDEPENDENCE ZIMBABWE AND SOUTH AFRICA.....	247
5.1 INTRODUCTION	247

5.2 CONSTITUTIONAL MODELS	250
5.2.1 Cultural Relativism: Constitution of Zimbabwe 1980	250
5.2.1.1 Women's Rights under the Constitution: An Overview of Jurisprudence in Zimbabwe.....	255
5.2.2 Universalism: Constitution of the Republic of South African Constitution	259
5.2.2.1 Women's Rights under the Constitution: An Overview of Jurisprudence in South Africa	263
5.2.3 CONCLUSION.....	278
5.3 CUSTOMARY LAW AND INTERNATIONAL HUMAN RIGHTS LAW.....	279
5.3.1 Introduction.....	279
5.3.2 The African Charter	280
5.3.3 The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)	282
5.3.3.1 Article 1: General;	283
5.3.3.2 Article 2: Discrimination;.....	283
5.3.3.3. Article 5: Sex Role Stereotyping;.....	291
5.3.3.4 Article 7: Political and Public Life;	292
5.3.3.5 Article 13: Economic and Social Benefits;.....	292
5.3.3.6 Article 14: Rural Women;	293
5.3.3.7 Article 16: Marriage and Family;.....	298
5.3.3.8 Article 17: Committee on the Elimination of Discrimination Against Women;.....	303
5.3.3.9 Article 21: Committee Reports;	303
5.3.4 Protocol to the African Charter on Human and People's Rights on the Rights of Women (Protocol on the Rights of Women)	304
5.3.5 The International Covenant on Civil and Political Rights (ICCPR).....	307
5.3.6 The International Covenant on Economic, Social and Cultural Rights.....	308
5.3.7 The Draft Declaration on the Rights of Indigenous Peoples (DDRIP).....	308
5.3.8 The SADC Gender and Development Declaration 1997.....	309
5.4 PROBLEMS OF HUMAN RIGHTS LAW	309
5.5 CONCLUSION	312

CHAPTER SIX

THE FUTURE OF CUSTOMARY LAW: Findings and Recommendations	314
6.1 FINDINGS	314
6.1.1 Introduction.....	314
6.1.2 Capacity to Marry	315
6.1.2 The Role of Bride wealth	317
6.1.3 Property Rights of Women and Division of Matrimonial Property	318
6.1.4 Land Rights and Rural Women.....	320
6.1.5 Constitutional Perspectives	322
6.1.6 Customary Law in the Realm of International Human Rights Law.....	324
6.1.7 Prevalence of Unregistered Customary Marriages	326
6.1.8 CONCLUSION.....	327
6.2 RECCOMENDATIONS	328
6.2.1 Educational Initiatives, Advocacy and Advise Giving.....	328
6.2.2 Regulation of Unregistered Customary Marriages.....	330
6.2.3 Improving Access to Justice	331
6.2.4 Capacity to Marry and Eradication of Child Marriages.....	332
6.2.5 Proprietary Consequences of Marriage	333
6.2.6 Improve the Status of Rural Women.....	334
6.2.7 Constitutional Reform	335
6.2.8 Customary Law and International Human Rights Law.....	336
BIBLIOGRAPHY.....	339
LEGISLATION.....	369
INTERNATIONAL AND REGIONAL TREATIES/INSTRUMENTS	372

LIST OF CASES

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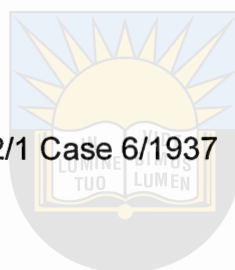
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ACRONYMS

ACHPR	African Charter on Human and People's Rights
ACRC	African Charter on the Rights of the Child
AULAI	Association of University Legal Aid Institutions
BAA	Black Administration Act
BCLR	Butterworths Constitutional Law Reports
BPA	Beijing Declaration and Platform for Action
CAACC	Court of Appeal for African Civil Cases
CBO	Community Based Organisations
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Convention on the Elimination of Racial Discrimination
CGE	Commission for Gender Equality
CLRA	Communal Land Rights Act
CLRDC	Community Law and Rural Development Centre
CRC	Convention on the Rights of the Child
DDRIP	Draft Declaration on the Rights of Indigenous Peoples
DRA	Deeds Registry Act
DWCPD	Department of Women, Children and people with disabilities
FHR	Foundation for Human Rights
ICCPR	The International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
JENDA	Journal of Culture and African Women Studies
JMC	Joint Monitoring Committee
LAMA	Legal Age of Majority Act
LEAA	Law of Evidence Amendment Act
MCA	Matrimonial Causes Act
MCDWA	Ministry of Community Development and Women's Affairs
MYDGEC	Ministry of Youth Development Gender and Employment Creation
NAC	Native Appeal Court
NADA	Southern Rhodesia Native Affairs Department Annual

NADCAO	National Alliance for the Development of Community Advice Offices
NAPO	Native Adultery Punishment Ordinance
NC	Native Commissioner
NEPAD	New Economic Partnership for Africa's Development
NGO	Non-Governmental Organisations
OSW	Office on the Status of Women
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
PIE	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act
PMG	Parliamentary Monitoring Group
RLR	Rhodesia Law Reports
RMCA	Recognition of Customary Marriages Act
SADC	Southern African Development Community
SRNC	Southern Rhodesia Native Court
SRNAC	Southern Rhodesia Native Appeal Court
TPD	Transvaal Provincial Division
TTLs	Tribal Trust Lands
UDHR	Universal Declaration of Human Rights
UNICEF	United Nations Children's Fund
WLSA	Women and Law in Southern Africa
ZHRC	Zimbabwe Human Rights Commission
ZLR	Zimbabwe Law Reports
ZWHHC	Zimbabwe Harare High Court
ZWSC	Zimbabwe Supreme Court

CHAPTER ONE

BACKGROUND TO THE STUDY

1.1 INTRODUCTION

The Zimbabwe and South African legal systems are descendants of their colonial past and as such, they are characterised by dual systems of law running side by side.¹ A duality of laws often results in a conflict of laws scenario and legal uncertainty with undesirable consequences, as choices have to be made as to which system of law prevails over the other.² The customary law conflict reflects in many laws in both countries, and historically, aspects of the indigenous law of marriage as a traditional institution faced either total or partial non-recognition, through the colonial policies of the 20th century into the new millennium with emerging “progressive constitutions” and human rights paradigms.³ We therefore, intend to examine whether customary law has been discarded or preserved in its entirety and the reasons thereof.⁴

From a constitutional perspective, Donnelly has made comments on the distinctions between culturally ‘relative’ and ‘universalist’ type constitutions, in Zimbabwe and South Africa respectively.⁵ The ‘relativist’ theory seemingly defends African culture and the

¹ Kane *et al* “Reassessing Customary Law Systems as a Vehicle for Providing Equitable Access to Justice for the Poor” 2005 Arusha Conference at 5;

[Http://siteresources.worldbank.org/INTRANETSOCIALDEVELOPMENT/Resources/Kane.rev.pdf](http://siteresources.worldbank.org/INTRANETSOCIALDEVELOPMENT/Resources/Kane.rev.pdf) (Accessed 10/03/2010), The British colonized Zimbabwe and today, its legal system combines African customary law and the received English or written law, while on the other hand South Africa applied the English law mixed with Roman-Dutch law as a reflection of its colonial history.

² Referring to the legal duality that exists between customary law and modern law. On the one hand, customary law dictates the observance of various customs as binding on those who practice them, whilst on the other hand; citizens are meant to conform to the dictates of formal law and legislation.

³ By reference to ‘human paradigms’ we attempt to have an understanding of the way of looking at life from a constitutional or human rights oriented approach or perspective.

⁴ Mcfadden and Mvududu *Reconceptualizing the family in a changing southern African environment* (2001) 28 - 29, where the authors writing on Zimbabwean family law say, “Some believe that the debate on customary and the popular perception that customary law has by and large survived colonialism intact has been misconstrued. The argument is that the state reconstructed the law and by so doing forced existing social organizations to serve the new order, thereby legitimizing itself by appearing to recognize the indigenous order.”

⁵ Donnelly *Universal Human Rights in Theory and in Practice* (1989) 16ff.

'universalist' theory emphasises western notions of individual rights.⁶ In this context today, and in an effort to stimulate national solidarity and pride, it maybe necessary for African governments to emphasise and preserve what is valuable in the African past. Allott is of the view that, parallel with this feeling of solidarity and national pride, is the desire to break away from the overpowering influence of introduced European modeled constitutions and values.⁷

South Africa has already made inroads towards adopting a policy framework aimed at legislative reform and harmonisation of customary law and the common law in general.⁸ Criticism is being leveled at policy and legislative interventions by the state, for example the Recognition of Customary Marriages Act⁹ in South Africa, which has been attacked for being a half-hearted acceptance of the true African customary marriage.¹⁰ Similarly in Zimbabwe, the Customary Marriages Act¹¹, the Matrimonial Causes Act¹² and the Customary Law and Local Courts Act¹³ have formalised the African Marriage and distorted it by attaching western principles of law to it, for example in terms of determination of capacity to marry; proprietary consequences of marriage and registration of marriages among others.

⁶ Jansen M "Family Law" in Bekker *et al Introduction to Legal Pluralism in South Africa* (2006) 31, who is of the view that, the family is the essence of customary law of marriage, and that family relationships are fundamental.

⁷ Allott A N "The Future of African Law" in Kuper and Kuper *African law: adaptation and development* (1965) 219, who makes an observation of a distinction made between culturally relative and universalist type constitutions in Zimbabwe and South Africa respectively, the first seemingly defending African culture and the other reflecting western notions of individual rights; see also Donnelly *Universal Human Rights* 89.

⁸ The South African Law Commission *Harmonisation of the common law and the indigenous law: report on customary marriages* (1998) 34 - 35, various aspects of customary law including marriages and succession formed the main focus culminating in the enactment of the Recognition of Customary Marriages Act of 1998.

⁹ Act No. 120 of 1998.

¹⁰ Malefane "South African Customary Law at the Crossroads: what is our customary law of marriage?" (2005) *WSU Law Journal* 16, where the author states that, "the Recognition of Customary Marriages Act defeats its own purpose of recognition when it adds principles of the western law of marriage like community of property to the customary marriage, something which the African people will neither understand or abide by."

¹¹ Act No. 6 of 1997 [Chapter 5:07].

¹² Act No. 33 of 1985 [Chapter 5:13].

¹³ Act No. 2 of 1990 [Chapter 7:05].

1.2 BACKGROUND TO AFRICAN MARRIAGES IN ZIMBABWE AND SOUTH AFRICA IN A HISTORICAL CONTEXT

The African marriage is essentially a union between two families whose relationship results from and is cemented by the marriage between a boy and a girl. Marriage has never been perceived as a personal undertaking by the prospective spouses and as such, custom facilitates involvement of familial relations as integral to the negotiations preceding consummation of marriage, dispute resolutions processes during the marriage until its dissolution by death or divorce. This demonstrates customary law as being communal in nature as opposed to the emphasis on individualism of its Western law counterpart.

In addition, the African marriage gives precedence to reconciliation of parties and again places great significance to the roles played by relatives in mediation processes.¹⁴ So entrenched are some practices that even the majority of urbanised Africans have chosen not to discard practices such as *lobola/roora*¹⁵ never mind the fact that on average, urbanites tend to exercise a greater degree of autonomy away from familial intervention unlike their fellow rural folk.

Early attitudes towards the African customary marriage can be traced back to the times of early missionary teachings and the advent of the colonial administration in the late 19th century. In South Africa, colonial policies were inclined at non-recognition of the customary marriage, on account of its difference with the Western marriage.¹⁶ Colonial

¹⁴ Among the Shona of Zimbabwe, the husband's sister (*vatete*) has the power to facilitate discussion between quarrelling spouses with the objective of bringing the parties to some logical understanding and ultimately reconcile.

¹⁵ Referring to the 'bride wealth' among the Zulu, Xhosa of South Africa and the Shona of Zimbabwe respectively, being cattle or money paid by a prospective son-in-law or his family to the bride's family to ask for her hand in marriage.

¹⁶ See section 84(b) of the Recommendations of the Cape Government Commission on Native laws and Customs; Sir Jacob Dirk Barry, Cape of Good Hope Commission on Native Laws and Customs, *Report and proceedings: with appendices of the government Commission on native laws and customs. Presented to both houses of Parliament by His Excellency the governor, January, 1883* (1883), which mentioned among other things, "Dealing with the question of marriage in its broadest aspect, we cannot accept the view extensively held, that in dealing with people among whom civilization and Christian Law have but lately come, marriage can only be recognized and regarded as legal and valid when such marriage has been duly registered. We recognize the essential element of marriage to be a contract

authorities relied on the missionaries to convert the people and create an environment conducive to the facilitation of introduction of changes to the legal system, some of which could be initially perceived as insults to custom.¹⁷ On the other hand, converted/educated blacks echoed similar sentiments with the missionaries as indicated by some of their teachings in their communities.¹⁸ Customs such as *lobola*¹⁹ were misconstrued as a sale of daughters.²⁰ However the people themselves adhered to their respective customs and usages then, and on until now, so much that even educated blacks today continue to adhere to some aspects of custom like *lobola* and initiation ceremonies, let alone the vast of majority of uneducated blacks who do not argue but carry on with customary law.²¹

Apart from the attack on bride wealth payments (*lobola*), the potentially polygamous nature of the customary marriage with its tolerance of multiplicity of wives was perceived to be incompatible with many aspects of western life. Even today, polygamy is deemed to create insurmountable problems upon the death of a spouse, particularly where there are limited resources for the ongoing subsistence of remnant families.²²

between a man and a woman, into the celebration of which a certain denied social, or civil, or religious ceremony enters, while at the same time we hold that the Christian Law of marriage sets forth the truest and purest ideas of such a union, and fixes what should obtain amongst those who have accepted Christianity as a religion, or in States ruled by Christian Law."

¹⁷ See Brown *Fathers of the Victorians: the age of Wilberforce* (1961) 120, where speaking on behalf of the London Missionary Society, he says, "Christianity teaches the poor to be humble, diligent, patient and obedient and accept their lowly position in life", which in our view is a clear indication of a general negativity towards indigenous customs.

¹⁸ See Appendix C of the Report by the Cape Government Commission 152, an example can be drawn from one Rev. Gway Tyamzashe, then ministering to the Congregational Church in Kimberley who whilst responding to questions put by the Cape Government Commission, came out strongly against customs of circumcision and *lobola* and vouched for their non-recognition, he was quoted saying that *lobola* customs should be "put down" and referred to them as "evils" which the government should remove and refuse to recognise.

¹⁹ Referred to as *lobola/ikhazi* among the Zulu and Xhosa of South Africa respectively, and *roora* among the Shona of Zimbabwe, refers to the livestock or the monetary value paid by a young man to his father in law or guardian on the occasion of marriage, sometimes referred to as bride wealth.

²⁰ Jeater *Marriage, Perversion and Power: the Construction of Moral Discourse in Southern Rhodesia 1894-1930* (1993) 148.

²¹ Carothers "The Rule of Law Revival" 1998 *Foreign Affairs* 95-107, who says, "...it is clear that strong legal institutions also assure a better human rights record and deepen democracy within countries"; see further Carothers *Critical mission: essays on democracy promotion* (2004) 121ff.

²² Bekker *Seymour's Customary Law in Southern Africa* (1989) 105; see also Bennett and Peart *A Sourcebook of African Customary Law in Southern Africa* (1991) 167 - 223; see further the case of

Kisembo justifies the negative attitudes by the missionaries' encounter with polygamy in the late 19th century by saying it was the Victorian age when British family morality was marked by an exaggerated sense of its own worth and self-righteousness.²³

Joireman notes that the question of whether particular types of legal institutions influence the effectiveness of the rule of law has long been answered with speculation.²⁴ Weinrich echoes some of these sentiments and says that, nowadays, the setting in which polygamy can be accommodated can no longer be sustained.²⁵ Subsequent to the establishment of Christianity, the colonial era brought about a more formal administrative governance approach. The scope of the non-recognition of the customary marriage widened to include Acts of Parliament and judicial decisions. Decisions such as in *Nkambula v Linda*²⁶ held that where a man was party to both a civil marriage and a customary union, regardless of which one came first, the customary marriage was not a valid marriage. In 1978, the former homeland of the Transkei passed the Transkei

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Sishuba v Sishuba 1940 NAC (C&O) 123 where it was held that, a civil marriage is a marriage between one woman and one man. In this case, the husband was in a civil marriage but still wanted to invoke the aid of customary law by being free to live away from his wife and have love affairs. The court castigated him for this saying he could not have it both ways.

²³ Kisembo *et al African Christian Marriage* (1977) 81, where the author justifies the missionary attitudes towards polygamy saying that, it is therefore understandable that missionaries who had grown up in this society declared at a Protestant missionary conference held in Edinburgh in 1910 that polygamy was "one of the gross evils of heathen society which, like habitual murder or slavery, must at all cost be ended." The deduction here is that the missionaries' negative reaction to polygamy derived from their European theological traditions.

²⁴ Joireman "Effectiveness of the Rule of Law in Common Law and Customary Law Countries in Africa" (2001) *Journal of Modern African Studies* 571ff.

²⁵ Weinrich *African marriage in Zimbabwe and the impact of Christianity* (1983) 67, the author says, "Having grown up in western countries, they had come to conceive their own form of family life as the only valid form in which Christianity could be lived. Apart from these considerations the missionaries were also convinced that monogamous families were most conducive to the economic well-being of the people in the emerging capitalist society of the country and so they thought they were acting in the interest of the people when they opposed polygamy."

²⁶ 1951 (1) SA 377 (A) where Fagan CJ said, "A Native Union is not a legal marriage", this meant that, a widow and children from a customary law marriage did not have legal grounds to lodge a claim for the inheritance of a deceased male's estate where such marriage coexisted with a civil marriage see also in this regard.

Marriages Act²⁷ of the modern world, and attempted to give full recognition of the customary marriage by giving it equal status to the common law marriage.

In 1998, following the report by the South African Law Reform Commission on Customary Marriages, the South African parliament passed the Recognition of Customary Marriages Act²⁸. The Act grants recognition to customary marriages and places them on an equal footing with civil marriages an aspect that had been begun in terms of the Transkei Marriages Act in 1978. Although colonial policy in the early 1900s seemed to be similar in South Africa and Zimbabwe, there were some distinctions.²⁹ Common was the fact that indigenous laws were subjected to the repugnancy clause.³⁰ British policy at the period of occupation of the then Rhodesia was to leave the laws of the conquered as intact as possible particularly in the realms of family law.³¹ When the British South African Company (BSAC) was granted the Royal Charter in 1889, provision was made for the recognition of African custom and law, in the administration of justice to the indigenous people.³² The Charter provided for caution when dealing with the customs and laws of the natives including marriage customs.³³ For example, in

²⁷ Act No. 21 of 1978, which gave full recognition to the customary marriage and gave it equal status to the common law marriage. The wife and children of a customary marriage were now able to inherit equally with the wife and children of the civil marriage. The Act thus overthrew the position established in the case of *Nkambula v Linda*, which held that a widow and children from a customary law marriage did not have legal grounds to lodge a claim for the inheritance of a deceased male's estate where such marriage coexisted with a civil marriage. It also did away with the scourge of illegitimacy in respect of the children of a wife not married by civil rights.

²⁸ See the RCMA *op cit*, also labeled as a half-hearted acceptance of polygamy and customary law as whole. It declared full recognition of customary marriage, but introduced rules of civil marriage into it. It thus became, in important respects, 'old medicine in a new bottle with beautiful labels' in that it followed in the footsteps of Transkei Marriages act in key aspects whilst it introducing principles alien to the African customary marriage.

²⁹ May *Zimbabwean Women in Colonial and Customary law* (1983) 42, however similar was the fact that customary law would be recognised only where it was not 'repugnant to natural law, justice or morality.'

³⁰ Palley *The constitutional history and law of Southern Rhodesia, 1888-1965: with special reference to imperial control* (1966) 511, who says, the repugnance clause was used for the most part to deal with issues pertaining to the status of women.

³¹ See the University of Guelph. Development Education Program *Women and development: beyond the decade : proceedings of the conference, 26-29 September, 1985, Guelph, Ontario, Canada* (1986).

³² The British Royal Charter of 1889, the Charter was granted to the British South Africa Company (BSAC) in 1889 paving the way for the initial occupation of Zimbabwe (then Rhodesia).

³³ In terms of section 14 of the Royal Charter of 1889, "careful regard shall always be had to customs and laws of the class or tribe or nation to which the parties respectively belong, especially with regard to the holding, possession, transfer and disposition of land and goods, marriages, divorce, legitimacy and other

1917, in terms of the Native Marriage Ordinance³⁴, polygamy was recognised and a man was entitled to succeed to/inherit the wife of his deceased brother.³⁵ However, western law remained the yardstick for the application of customary law.³⁶

The demise of the customary marriage has not, however, been absolute. Concerning the issues around the consequences of non-registration of marriages, and contrary to the position taken in *Nkambula's*³⁷ case, in Zimbabwe in the case of *Chawanda v Zimnat Insurance*³⁸, the court held that a woman living with a man in an unregistered customary union had the right to compensation for loss of support if that man is unlawfully killed. It based its decision on the Customary Law and Local Courts Act, which it concluded, gave the wife in an unregistered customary union the right to receive support from her husband. This case involved a wife suing the insurance company that insured the driver responsible for her husband's death in a traffic accident.

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rights of property and personal rights, but subject to any British laws which may be in force in any of the territories aforesaid and applicable to the people and inhabitants thereof."

³⁴ Native Marriage Ordinance No. 5 of 1917, providing that, "when under any prevailing law or custom, a man entitled to take to wife the widow or widows of a deceased relative, and should as soon as the inheritance ceremony has been completed, appear before a Marriage Officer, with such widows as he may desire to take to wife, and register a marriage with each of them." This can justifiably be hailed as a victory for the customary marriage in the early days although requirements for registration still attached western principles to it.

³⁵ Schmidt *Ideology, Economics, and the Role of Shona Women in Southern Rhodesia* (PHD-thesis, University of Wisconsin-Madison, 1987) 743, the writer says, women's oppression was further institutionalised and customary law was reaffirmed by relegating a woman to the status of minor under the control of her father, guardians or husband.

³⁶ Weinrich *Women and Racial Discrimination in Rhodesia* (1979) at 120, the author made an observation that, "when conflicts arose between the need to keep women working both on the farms and export crops and the desire of the state or church to challenge what was considered repugnant in terms of African patriarchal rule, African patriarchal power over women was upheld in the interest of colonial profit."

³⁷ See *Nkambula's case op cit*.

³⁸ 1990 (3) ZLR 143 (S), in this case the court recognised an unregistered customary union in the face of precedent that defined marriage strictly in terms of proper licensing procedures. Older common-law and legislative authorities defined marriage strictly in terms of written licensing requirements for fear of unfettered liability in the context of marital disputes and lack of procedural efficiency. Moving away from formalistic notions of marriage as a written license, the *Chawanda* case chose to redefine marriage as a series of partnership-like, familial obligations between man and woman.

In Zimbabwe, parliament has gone to great lengths in reforming the law on marriages in terms of the Customary Marriages Act, the Matrimonial Causes Act³⁹, and in terms of the Customary Law and Local Courts Act. In an effort to deal with as many aspects about the customary marriage as possible, modern statutes in both South Africa and Zimbabwe set out the proprietary consequences, defines the status of the parties to these marriages and lays down requirements for their validity and customary marriages are defined as marriages concluded in terms of customary law.

The drawback to legislative intervention has mainly been that of attaching western concepts of family law to the traditional marriage by, for example, placing customary marriages in community of property, making irretrievable breakdown of marriage grounds for divorce and requiring an application to be made before a Judge for leave to take a second wife. On the other hand, legislation can be praised for allowing institutions like polygamy, failure to register the marriage does not affect its validity, customary marriages are to be celebrated in terms of custom among others. This state of affairs invokes the argument that legal dualism and legal pluralism have been the main sources of disharmony between state law and indigenous law as it is often found that what the states dictates as law is not necessarily what the populace adheres to from a social point of view.⁴⁰

1.3 ISSUES TO BE EXAMINED

Various aspects regarding customary marriages in the legislation of both South Africa and Zimbabwe have been identified as lacking in giving a true reflection of traditional practices. Key to this sentiment is the problem that, although the Acts seem to recognise customary marriages, their regulation and formalisation of it has been the root cause for discord between formal law on the one hand, and recognition and preservation of custom on the other. One may argue that in a bid to recognise

³⁹ The Act seeks to amend the law relating to marriage, judicial separation and nullity of marriage.

⁴⁰ Mcfadden and Mvududu *op cit* 28, the writers acknowledge that African family law has been distorted when they say, "...the state does not have the monopoly over regulations and laws. The state can only adopt and implement. This paradigm acknowledges that apart from the state, other sources of regulation exist which members of society recognise as binding."

customary marriages in terms of legislation, it is an opportune time to reflect on and sanitise those practices that we may perceive to be out of touch with modern life. Ultimately, it is the extent/degree to which harmonisation has been achieved that will determine how successful we have been in striking a balance between the two.

Firstly, there is the problem of legal dualism and legal pluralism inherent to the Zimbabwean and South African legal systems respectively. Both countries incorporate aspects of African customary law and the received western law in statute law which causes legal uncertainty as to which system of law prevails over the other. However, in Zimbabwe, two distinct forms of marriage exist, that is, the civil marriage (Chapter 5:11) governed by the Civil Marriages Act and the registered customary marriage governed by the African Marriages Act. The former is a monogamous marriage whilst the latter is regulated by customary law rules and allows polygamy.

However in South Africa, the Recognition of Customary Marriages Act seems to provide for a more blended type of marriage that incorporates both aspects of common law and customary in one piece of legislation. The country's constitution promotes the legal pluralism approach by endorsing everyone's freedom to conclude a marriage in terms of the law of their choice.⁴¹ It is contended that legal pluralism can be viewed as a combination of legal, social and cultural norms, values and institutions which provide individuals and groups with variety of options and choices as to how to achieve their aims and goals.⁴² However, the ensuing conflict of laws and choice of law prescribed by statute are themselves sometimes the root of confusion in the litigation process and

⁴¹ The Constitution of the Republic of South Africa Act No. 108 of 1996, in terms of section 15(3) legislation must recognize marriages concluded under any tradition, or a system of religious, personal or family law. Section 30 speaks of everyone's right to language and participate in the culture of their choice. In addition section 31 on cultural, religious and linguistic communities gives persons belonging to a cultural, religious or linguistic community the right to enjoy their culture, practise their religion and use their language, and right which may not be limited by others.

⁴² Bentzon *et al Pursuing grounded theory in law : South-North experiences in developing women's law* (1998) 101, where the authors expand and say, "the reinforcement of change of gender boundaries through rights and obligations, freedoms and restrictions is seen as a continuous process of action, negotiation and argumentation."

dispensing of justice particularly where litigants who conclude customary marriages by paying bride wealth find themselves at the crossroads of different systems of law.⁴³

Secondly, legislation in both countries has failed to fully recognise and preserve principles of the African customary marriage and has gone further to attach western notions to it.⁴⁴ The Recognition of Customary Marriages Act of 1998 (RMCA) in South Africa places the burden and duty to register these marriages on the spouses for their validity before the law.⁴⁵ In Zimbabwe, in terms of the Customary Marriages Act⁴⁶, marriages are not valid unless registered whilst in South Africa the failure to register will not affect the validity of such marriage.

The problem lies in the introduction of principles of prescription and timeframes that are alien to the African tradition marriage.⁴⁷ It is questionable if the majority of rural people are going to comply with these formal requirements in terms of the law.⁴⁸ In view of the intricacies accompanied by registration or solemnisation, such as lodging of applications in terms of prescribed forms and furnishing of relevant particulars, it will not be surprising that the objectives of the legislation may not be met as required. Thus, the customary marriage has been distorted and perverted by becoming a private affair

⁴³ Church *et al Human Rights from a Comparative and International Law Perspective* (2007) 49 – 50, who defines legal pluralism as entailing "... laws of a cultural or religious group practised by such community and recognised by the state as well as those religious and other norms so practised but which are not recognised or adopted by the state." The author goes on and defines legal dualism as the application of two legal systems alongside each other where one system is regarded as the general law and the other being sanctioned as a special or personal law.

⁴⁴ Manji "Imagining Women's Legal World: Towards a Feminist Theory of Legal Pluralism in Africa" 1994 *Social and Legal Studies* 435ff, who argues that formal law is of little use to most African women whose lives are far removed from any interaction with the state or norms generated by it.

⁴⁵ RCMA *op cit* section 4(8) and (9).

⁴⁶ See the Customary Marriages Act *op cit* section 3(1) to (5).

⁴⁷ See the RCMA section 4(1), (2), (4), (5) and (6); the result is that customary marriages entered into before November 2000 have to be registered within a period of 12 months or within such period as determined by the Minister from time to time. Those that were concluded after commencement of the Act have a requirement dictating their registration within three months after conclusion or any such time that the Minister may determine. Again, customary law is placed in a context to which it does not belong as it does not adhere to strict timeframes and prescription does not apply.

⁴⁸ Smart *Feminism and the power of law* (1989) 22, 160 where the writer views the law as a system of knowledge with the potential to exercise power and use its discourse to refute and disregard alternative discourses due to the logic of supremacy and yet it may be irrelevant to many people's everyday lives.

between couples and the formal system.⁴⁹ McFadden⁵⁰ has shown that one of the most difficult areas for the state to intervene into effectively is the family.

Thirdly, the South African Recognition of Customary Marriages Act raises another problem by setting out requirements as to what is a marriageable age by law, and holds that, the prospective spouses must be above 18 years of age. The determination of specific age of minority is not a true reflection of custom and specific age is not a strict consideration.⁵¹ Various mechanisms and customary rites determined the maturity of a boy or girl to mark adulthood and thus readiness to marry in both South Africa⁵² and in Zimbabwe.⁵³ It is submitted that the determination of a legal age to marry by these Acts undermines the significance of these rituals at customary law.

Fourthly, statute law in both South Africa and Zimbabwe makes provision for divorce on the grounds of irretrievable breakdown of marriage relationship upon the granting of a decree for divorce by a competent court. This feature again, is a departure from the true customary law position. According to the RCMA all customary marriages contracted before or after the commencement of the Act, may be dissolved only by court order.⁵⁴ The Zimbabwean Matrimonial Causes Act makes similar provision and holds that a

⁴⁹ Posselt "Native Marriage" 1928 *Southern Rhodesia Native Affairs Department annual (NADA)* 35, here the author says, "marriage is the creation of a bond of kinship between the families of the two contracting parties, and on the members of these families. The individuals contracting the marriage itself are merged into the family groups."

⁵⁰ Mcfadden and Mvududu *op cit* 29, the authors present an interesting dimension to the relationship between private and public spheres of law and go on to say; "Whatever interventions come from the state often rarely change the practice on the ground, because of the capacity of the family as a social institution to withdraw from the domain of the state law and state control. There are several dynamics and pressures which come into play within the family setup, which make it relatively easy for individuals to avoid the dictates of state law and or any efforts at law reform."

⁵¹ Aschwanden *Symbols of life: an analysis of the consciousness of the Karanga* (1982) 94 ff, the author describes in some detail various symbolisms that marked the maturity and readiness to marry of young Shona boys and girls.

⁵² Among the Nguni ethnic groups of South Africa, we see the rite of circumcision for boys being performed, to mark their transition into adulthood and the coming of age ceremonies such as *intonjane* or *thombisa* for girls.

⁵³ See Bozongwana *Ndebele Religion and Customs* (2000) 20, see also in this regard, Woods "Extracts from Customs and History; Amandebele" 1931 *Southern Rhodesia Native Affairs Department annual (NADA)* 17, among the Ndebele of Zimbabwe, *ukuthomba* marked the coming of age for boys and *dunduzela* for girls and certain rites were performed as a symbolic transition from adolescence to a marriageable age. The *Dunduzela* was a ceremony for initiation for a girl on her reaching adolescence.

⁵⁴ See section 8 of the RCMA.

marriage can only be dissolved by a competent court on grounds of irretrievable breakdown.⁵⁵ By so doing, the customary marriage is placed in the public arena contrary to the private sphere of the family, which had its emphasis on the reconciliation of the parties and perpetuation of marriage according to custom.⁵⁶ Bekker is of the view that, legislation has opened the gates to divorce at the first provocation on the one hand while custom seeks to close these gates owing to its reconciliatory nature.⁵⁷

Fifthly, the two Acts in South Africa and Zimbabwe raise the problem regarding matrimonial property regimes and the proprietary consequences of the customary marriages upon dissolution of marriage by divorce or death. In terms of the RMCA, customary marriages are now in community of property meaning that the property of spouses is divided in half upon dissolution of marriage.⁵⁸ In Zimbabwe, in terms of the Matrimonial Causes Act (MCA), all customary marriages are automatically out of community of property unless varied by an antenuptial contract. In terms of the MCA⁵⁹, the property of the spouses, irrespective of who acquired it, is pooled together, and the court exercises its discretion following set guidelines in the division of matrimonial property.

The problem is that because of the economically disadvantaged position of rural women and their inability to acquire material property, their contributions are generally regarded

⁵⁵ See section 4(a) providing that, "a marriage may be dissolved by a decree of divorce by an appropriate court only on the grounds of irretrievable breakdown of the marriage"; see further in similar fashion section 16 of the Customary Marriages Act of Zimbabwe stating that, "no marriage solemnized in terms of the Act shall be dissolved except by order of a court of competent jurisdiction."

⁵⁶ There is no doubt that these new grounds for divorces undermine the customary remedies that ensured that divorce rates were kept at a minimum together with the trauma that it brings to the children. For example among the Xhosa of South Africa, in terms of *ukutholeka*, a wife to customary marriage is held by her father or guardian from her husband, to force him to pay a fine for her ill-treatment, or outstanding *lobola* among the Xhosa; in response to the *theleka*, when the offender husband wishes to pay up in cash or kind, the process of receiving his wife back and awarding of damages is in terms of *phuthuma*.

⁵⁷ See also in this regard Bekker *Seymour's Customary Law* 105.

⁵⁸ See the South African case of *Gumede v President of the Republic of South Africa and Others* 2009 (3) SA 152 (CC) at 12, where in an application for half of the matrimonial property, a customary union was held to be in community of property. Theron J said: "It is not the Recognition of Customary Marriages Act that creates discrimination, it is customary law in its various manifestations that does so" The judgment theoretically affects all the millions of customary marriages in South Africa.

⁵⁹ See section 7 of the Matrimonial Causes Act providing that those with registered marriages may be allocated marital property equitably by the courts.

as minimal, and are awarded less than the husband is.⁶⁰ Another problem arises where women are in unregistered customary marriages and upon divorce seek relief in terms of statute law and common law remedies. This is despite the fact that the courts may apply the common law of equity or recognise a wife's indirect contribution in terms of housework as significant.⁶¹ Traditionally, all customary marriages were generally out of community of property and the husband got most of the matrimonial property upon dissolution of the marriage, however not to say women had no property rights in terms of custom.⁶²

Sixthly, is the problem that women married according to customary law in the rural areas have no rights to ownership of immovable property and land tenure. In Zimbabwe, women are allocated land use rights within the households, as wives in patrilineages in terms of the Communal Land Act.⁶³ Similar provision is made in terms of the Communal Land Rights Act⁶⁴ of South Africa. In terms of these Acts, Chief's have the right to allocate rights for usage on pieces of land to adult males, and women can only acquire access to land through their husbands or male relatives much to the disadvantage of widowed, single or divorced women who may find themselves unable to own communal

⁶⁰ See the Zimbabwean case of *Masocha v Masocha* HC-H-183-87 (unreported), where in a claim for a half share in the matrimonial home, and where a wife's gross salary was marginally lower than that of her husband the court observed that; "it is quite apparent from the disparity in the parties' salaries that her contribution directly or indirectly must have been minimal." She had based her claim on indirect contributions that she had made by shouldering the responsibility for the buying of groceries and furniture. The court refused her claim for a half share and awarded her a lump sum payment representing the estimated value of the household contents.

⁶¹ Ncube "Re-Allocation of Matrimonial Property at the Dissolution of Marriage in Zimbabwe" 1990 *Journal of African Law* 1, "Virtually all civilised countries have accepted marriage as an equal partnership of two legally equal individuals to which each one of them contributes in one way or another. Most policy makers agree that the partners contribute to the marriage through their division of labour and that these contributions although not equal in absolute terms are nonetheless of equal relative value to the welfare of the family."

⁶² Section 7(1) of the Matrimonial Causes Act; "...subject to the provisions of this section, in granting a decree of divorce, judicial separation or nullity of marriage, or at any time thereafter, an appropriate court may make an order with regard to; (a) the division, apportionment or distribution of the assets of the spouses including an order that any asset be transferred from one spouse to the other and; (b) the payment of maintenance whether by way of a lump sum or by way of periodical payments, in favour of one or other of the spouses or of any child of the marriage."

⁶³ Act No. 20 of 1982 [Chapter 20:04].

⁶⁴ Act No. 11 of 2004.

land.⁶⁵ Holleman⁶⁶ says, to a certain extent this position is not a true reflection of custom. In terms of Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁶⁷, states are obliged to establish equal property rights for women in relation to marriage, divorce and death.⁶⁸ The Women and Law in Southern Africa (WLSA) notes that at the judicial level the shakiness of married women's land rights is exemplified by the judgment in *Khoza v Khoza*⁶⁹ where at divorce the woman was denied the parties' communal lands matrimonial home which had been built and maintained entirely through her efforts over 23 years of marriage.

Seventh, is the problem inherent in the modeling the constitutions in both Zimbabwe and South Africa and the extent of their preservation of customary law versus protection of individual rights. One may argue and say that the influence of international human rights law and inadequate rights education of traditional communities have failed to provide harmony in the dual system of laws problem.⁷⁰ Attention will be directed towards criticisms leveled against 'universalist' and 'culturally-relative' constitutions such as that of South Africa and Zimbabwe respectively.⁷¹ The 'universalists' are criticized for their over-emphasis on equality for all before the law and the individual's relationship to the

⁶⁵ Section 8 of the Act states that, when allocating land in communal areas of Zimbabwe Rural District Councils (the responsible local Authorities) must consult and co-operate with the local chiefs. They must also have regard to customary law relating to land allocation, occupation and use of land to those people who are customarily permitted to use the land and occupy the land.

⁶⁶ Holleman *Shona customary law: with reference to kinship, marriage, the family and the estate* (1952) 7, who describes the rights that individuals could exercise over land and the principles underlying those rights. He says, "although every individual cultivator has a full and indisputable right to the crops he/she raises and is entitled to the full use of his field without the interference of others, the land itself is never regarded as individual property."

⁶⁷ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), 18 December 1979, United Nations, Treaty Series, vol. 1249; <http://www.unhcr.org/refworld/docid/3ae6b3970.html> (Accessed:16/01/2010).

⁶⁸ See also Article 1 of the Convention which prohibits discrimination against women, whether direct or indirect.

⁶⁹ H-H-106 (1987) (unreported), see also WLSA "Proceedings of the Regional Meeting on 'Reconceptualizing Rights' and 'Phase III findings' 1997 26-28 May Zimbabwe 54.

⁷⁰ Stewart *Gender, law and social justice: international perspectives* (2000) 96 who puts forward the argument that the courts on the rights of individuals ignores the fact that African societies are said to be communal.

⁷¹ Santos B S "Towards a Multicultural Conception of Human Rights" in Featherstone and Lash *Spaces of culture: city, nation, world* (1999) 214ff, the author questions the whole universal/relativist dichotomy, see also Nzegwu "Gender Equality in a Dual-sex System" 2001 *JENDA: A Journal of Culture and African Women Studies* 14.

state rather than the group, contrary to custom.⁷² The 'relativists' are criticized for placing customary law behind a shield that gives it immunity to constitutional scrutiny in core areas of customary family law. The question is then, which constitutional model best protects women's rights in the current African context?⁷³

Eighth, is the problem with human rights instruments such as the Universal Declaration of Human Rights⁷⁴ (UDHR) and the African Charter.⁷⁵ The UDHR and its ancillary conventions and covenants are in some respects incompatible with African culture.⁷⁶ Whilst it speaks of the equality of all before the law, it recognizes that people are free to follow their respective cultural practices.⁷⁷ Even the broad character of the rights articulated in the UDHR reflect normative values, inspirations and interests of western culture of a specific stage of historical evolution, and thus, the 'human rights' discourse emanates from a specific historical context that may not necessarily echo sentiments of custom.⁷⁸

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⁷² Cook "Women's International Human Rights Law: The Way Forward" 1993 *Human Rights Quarterly* 230ff, who is of the view that, "the distinction between the 'public' and 'private' spheres of society can present obstacles to women's rights. The public sphere or sector of legal and political order is contrasted with the private arena of home and family where states may claim it is outside their responsibility to intervene. Abuses of women's rights often occur in the 'private' sphere where states are reluctant to act. The dominant focus on political and civil rights in the understanding of international human rights law is therefore biased to the male-dominated public sphere."

⁷³ Ibhawoh "Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State" 2000 *Human Rights Quarterly* 838ff.

⁷⁴ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III); <http://www.unhcr.org/refworld/docid/3ae6b3712c.html> (Accessed 21/03/2010).

⁷⁵ Organization of African Unity, *African Charter on Human and Peoples' Rights* ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982);

<http://www.unhcr.org/refworld/docid/3ae6b3630.html> (Accessed: 21/03/2010).

⁷⁶ An-Na'im "Human Rights in the Arab World: A Regional Perspective" 2001 *Human Rights Quarterly* at 701 where the writer says that, "the approach of the UDHR as narrowly focusing on the individual's relationship to the state rooted in a Western liberal philosophy."

⁷⁷ Article 27 of the 1948 Universal Declaration of Human Rights (UDHR) guarantees the right for everyone to freely participate in the cultural life of the community. The right to culture is also an integral part of other fundamental rights enunciated in the UDHR such as freedom of conscience, expression and religion.

⁷⁸ Shivji *The concept of human rights in Africa* (1989) 3, where the author notes that, the exclusion of many African states from the drafting of the foundational United Nations human rights instruments has resulted in the charge that these instruments are not representative of southern concerns and indeed that they reflect the perspectives of those in the north, see also in this regard, Banda and Chinkin *Gender, Minorities and Indigenous Peoples* (2004) 24.

The African Charter is also inadequate in addressing the rights of women.⁷⁹ While Article 18 prohibits discrimination against women, it does so only in the context of the family.⁸⁰ Explicit provisions guaranteeing the right of consent to marriage and equality of spouses during and after marriage are completely absent.⁸¹ These omissions are compounded by the fact that the Charter places great emphasis on traditional African values and traditions without addressing how many customary practices, including marriages, can be harmful or life-threatening to women.⁸² Nhlapo⁸³ says if customary norms were properly understood for their intended purposes, they could be seen to enhance rather than diminish human rights ideals in family law.

In addition, there is the problem of self-contradictions within human rights instruments themselves, and the apparent conflict and imbalance resulting from the establishment of and equalization of competing human rights. For example, the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁸⁴ calls for the elimination of discrimination against women and “the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.”⁸⁵ It also

⁷⁹ Nherere “The Limits of Litigation in Human Rights Enforcement” 1994 *Zimbabwe Legal Forum* 30 - 31, who makes an assessment that, international conventions tend to be couched in exhortative generalities meant to set standards and goals to be attained rather than concrete rules.

⁸⁰ see also Article 2, the non-discrimination clause, provides that the rights and freedoms enshrined in the Charter shall be enjoyed by all irrespective of race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status. Article 3, the equal protection clause, states that every individual shall be equal before the laws and shall be entitled to the equal protection of the laws.

⁸¹ The Charter is criticised for its failure to sufficiently address the gaps that exist between culture and women’s rights in the sphere of the customary marriages as it appears silent on the matter. It seeks to combine African values with international norms by not only promoting internationally recognized individual rights, but also by proclaiming collective rights and individual duties. These include the right to self-determination and to full sovereignty over natural resources, the right to peace, the right to a satisfactory environment favourable to a people’s development, but also the duty of individuals to their family, community and state.

⁸² See Delport “The African regional system of human rights – Why a protocol on the rights of women?” <http://www.up.ac.za/chr/gender/sadc%20intro%20african%20system%20and%20draft%20protocol.doc> (Accessed 20/03/2010); the author says, “...by ignoring critical issues such as custom and marriage, the Charter inadequately defends women’s human rights.”

⁸³ See Nhlapo “The African Family and Women’s Rights: Friends or Foes” (1991) *Acta Juridica* 141

⁸⁴ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993;

<http://www.unhcr.org/refworld/docid/3ae6b36c0.html> (Accessed 16/03/2011).

⁸⁵ see Article 3 of the ICESCR.

calls for the self-determination of all peoples, and by virtue of that right, they should “freely determine their political status and freely pursue their economic, social and political development.”⁸⁶

This is also in consonance with the objectives of the Draft Declaration on the Rights of Indigenous Peoples (DDRIP)⁸⁷ of 2007, which also emphasizes cultural rights. Self-determination and women’s equality are thus structured as close, but separate and possibly conflicting rights.⁸⁸ As such, the question of prioritization arises, that is, is the self-determination of a population more valid than the assertion of a global norm of women’s rights? South Africa has not yet ratified this instrument and so it is not binding. Those are some of the questions that remain to be answered.

Finally, there is the problem of delays which may be interpreted as unwillingness by the governments in both Zimbabwe and South Africa to incorporate key human rights instruments into their domestic laws thereby making them binding. Zimbabwe for example has ratified CEDAW and the Convention on the Political Rights of Women. It has also signed the SADC Declaration on Gender and Development⁸⁹ and its addendum on the Prevention of Violence Against Women and Children, which all acknowledge gendered rights as fundamental human rights.⁹⁰ However, these international agreements cannot protect Zimbabwean women in the manner that they

⁸⁶ *Ibid* Article 1.

⁸⁷ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295*; <http://www.unhcr.org/refworld/docid/471355a82.html> (Accessed 17/03/2011).

⁸⁸ See Article 33 of the DDRIP, giving indigenous people the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices without detailing specifically with the protections against discrimination based on sex. Although this document is a draft, it offers important insight into international attitudes towards group rights as human rights and notions of communal self-determination.

⁸⁹ The SADC Declaration on Gender and Development; http://www.sadc.int/index.php/download_file/34/554/ (Accessed 17/03/2011); for the addendum visit, http://www.justice.gov.za/docs/other%20docs/1998_SADC%20declarationaddendum.pdf (Accessed 17/03/2011).

⁹⁰ Zimbabwe also adopted the Dakar Platform for Action and Beijing Declaration in 1995 thereby acknowledging and committing it to take strategic action to promote the human rights of women and eliminate all forms of discrimination.

are meant to because under Section 111B of the Constitution of Zimbabwe⁹¹ they 'shall not form part of the law of Zimbabwe unless incorporated into the law' as Acts of Parliament. Thus, Zimbabwe has generally failed to honour its international duties according to the international treaties that it has ratified by failing to incorporate them in Zimbabwe's law.

South Africa on the other has made some efforts to incorporate human rights instruments in its domestic law, the highlight being the Promotion of Equality and Prevention of Unfair Discrimination Act⁹² (PEPUDA). However, at present, there are calls by South African civil society organizations for the ratification of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Therefore the study investigates whether there can be a model which provides a harmonized integration of customary law and the received western law in order to promote the interests of the family in current African context.



1.4 JUSTIFICATION OF THE STUDY

The study is justified by several considerations. Primarily, there is the need to determine whether certain principles and practices contained in the marriage laws, in the two countries in both the private and public domains can be compromised to initiate a possible process of internal social transformation without the consequences of disharmony with existing dual systems of law.⁹³ However in the process of a social transformation, the objective is to support, encourage and strengthen the efforts put

⁹¹ Constitution of Zimbabwe 1979/1600 also referred to as the Lancaster House Agreement, see also the Constitution Amendment Act No. 5 of 2005.

⁹² Act No. 4 of 2000, in addition other pieces of legislation in line with international conventions include the Children's Act No. 38 of 2005 which seeks to protect the rights of children.

⁹³ An-Na'im 2001 *Human Rights Quarterly* 701 where the writer goes on and makes a persuasive argument for the dynamic concept of internal "cultural transformation" as the most practical guarantee of entrenching human rights in African societies. He argues that culture has a significant impact on human rights paradigms around the world and as such, culture is the best-suited vehicle for protecting rights.

forward by women's and children's rights organisations by encouraging their participation in the legislative processes.⁹⁴

The study proposes the formation and expansion of existing alliances between Non-Governmental Organisations (NGOs) and Community Based Organisations (CBOs) to disseminate information to people especially those in rural areas who are particularly vulnerable and generally lack adequate understanding of what their rights are and popularise to them channels of accessing these rights.⁹⁵ Key areas will be rights education, advocacy, and advice giving. The approach of adopting educational initiatives and formal education of groups may face limitations as the majority of people who continue to rely on customary law are predominantly the conservative rural people who have not yet 'crossed the boundary' into an urban lifestyle as compared to their fellow urbanized African folk. There is no guarantee that these people will receive this 'new knowledge' and law with open hands.⁹⁶ There is evidence however showing the firm commitment by rural folk to continue adhering to integral aspects of customary family law.⁹⁷

The study will also seek to investigate the question whether there is any merit in pursuing either attempts at unification or integration of the African indigenous law of marriage and the civil marriage. Allott introduces an approach to the whole conflict of

⁹⁴ Some of the organizations at the forefront of advocating for women and children's rights are the Women's Legal Centre in South Africa and the Zimbabwe Women Lawyers Association. These are organizations that seek to enable women and children to assert their rights by accessing the relevant legal resources and providing advocacy services in areas pertaining to children/youth; democracy/good governance; education/training; human rights; and women.

⁹⁵ In South Africa, some of these alliances already exist for example, The National Alliance for the Development of Community Advice Offices (NADCAO), Community Law and Rural Development Centre (CLRDC), Association of University Legal Aid Institutions (AULAI) and the Foundation for Human Rights (FHR) among others. These organizations are committed to development and long term sustainability of community advice offices.

⁹⁶ Koyana *Customary Law in a Changing Society* (1980) at 128 where the author says, "...change cannot be forced down the throats." Therefore if customary law is to be maintained within the dual system, while reforming it to better protect women's rights, then it is the customary communities themselves, who will have to change it.

⁹⁷ Koyana *The judicial process in the customary courts of Southern Africa* (1991) 48 where empirical research was done in the customary courts of Chiefs and Headman in the Eastern Cape and the findings were that, cases relating to marriage and *lobola*, *phuthuma* and *theleka* remedies were still observed as they were before advent of colonial rule, see also Bennett *Customary Law in Southern Africa* 167ff.

laws situation between the received western law and the already existing customary law in general. He makes mention of unification and integration and differentiates the two.⁹⁸ According to him, "unification imposes a uniform law while integration creates a law which brings together principles of customary law and civil law, without totally obliterating the laws of different origins.

From this reasoning, integration might be the starting point towards full unification. It implies that variant laws remain in being, but there is an attempt to standardise their effects and remove conflicts between them. Thus one may get married in accordance with customary law or in accordance with statute law, but in the end a marriage will be the same in either case (which has not been the case hitherto with dual systems of marriage law in Africa)." Church also speaks for this scenario of dual systems of law referring to legal dualism and is of the view that the existence of African indigenous law as a whole alongside the Common law is in itself evidence of cultural diversity.⁹⁹ Ultimately, there will be an analysis of various attempts made in South Africa and Zimbabwe in addressing the dichotomy between customary law and the formal law for example, in the form of legislative reform and judicial creativity or conservatism.¹⁰⁰

The study also wishes to expose the strengths and weaknesses of adopting a system of conflict rules to determine the outcome of cases. Tetley suggests that, in jurisdictions such as those in South Africa and Zimbabwe where legal dualism or pluralism exists,

⁹⁸ Allott "What is to be done with African Customary Law" 1984 *Journal of African Law* 56ff, where the author says, "a uniform customary law eliminates issues of conflict between different species of customary law; but this type of conflict, though growing due to the mixing of and even the intermarrying of people subject to different laws, is only a minor problem in comparison with the major problem of internal conflicts between customary law on the one hand, and western-type national law on the other. This form of conflict will still occur even if customary law is made uniform or even codified. What to do with internal conflicts of law is one of the main issues which African governments, and we in our turn, must confront and resolve."

⁹⁹ Church "The Place of Indigenous Law in a Mixed Legal System and a Society in Transformation: A South African Experience" 2005 *ANZLH E-Journal* 95, the author goes on and correctly takes note that previously the problem was that the tendency in the colonial era was that the Common law would be deemed, or rather was by default, the dominant law, whilst indigenous law was the subservient law. This is a position which needs correction and legal certainty, particularly when presiding officers find themselves having to continually rely on judicial discretion.

¹⁰⁰ Dube "Addressing the Gap Between Customary and Statute Law and International Conventions: Zimbabwe's Twists and Turns," 1999 CHOGM Conference Durban.

there is need to adopt a system of internal conflict rules as a measure to alleviate the confusion that may arise as to which system of law best suits the merits of controversial cases.¹⁰¹ Perhaps this may avoid the impact of negative public outcries and ensure that the litigants and affected parties understand the application of these conflict rules and that the interests are ultimately for justice to be done.¹⁰²

Finally, the state should improve access to justice and attach greater importance to the work of paralegals at a community level as protectors of the vulnerable, especially women in marriage laws. South Africa has made head way in this regard in terms of the Legal Practice Bill in 2009 and the Legal Services Charter adopted in 2007 which will become law once the Bill has been asserted as law.¹⁰³

1.5 AIMS AND OBJECTIVES

The study seeks to examine the phenomenon of dual systems of law in the post-colonial states of South Africa and Zimbabwe, particularly those relating to marriage and how they have been shaped in their interaction with the common law based civil marriage. Previously the scenario was such that the indigenous law of marriage suffered partial or total non-recognition and the gap between the customary and colonial law was more apparent though attempts at harmonisation were made. The effectiveness of these attempts will assist in having a deeper understanding of legal duality and possibly draw conclusions as to the extent of the further demise of the traditional marriage principles.

Another aim is to try to determine whether legislative reform is the only tool in the efforts towards harmonization of customary law and the common law spheres of marriage or

¹⁰¹ Tetley "Mixed Jurisdictions: Common law vs Civil law (codified and uncoded)";

[Http://www.unidroit.org/english/publications/review/articles/1999-3.htm#NR2](http://www.unidroit.org/english/publications/review/articles/1999-3.htm#NR2)

(Accessed 21/04/2010); see also Tetley "Mixed Jurisdictions: Common law vs Civil law (codified and uncoded)" 1999 *Uniform law review* 877ff.

¹⁰² see also the RCMA of 1998 *op cit* which is hailed by its proponents as being a pillar of legal pluralism and criticized by some for the very same reason.

¹⁰³ Following recommendations from provincial representations at a National workshop held in Johannesburg in July 2009, the National Alliance for the Development of Community Advice Offices actively engaged the Department of Justice to hear representations by paralegals in terms of the Legal Practice Bill with the aim of seeking regulation of paralegals among other issues.

whether there are other mechanisms such as initiating a process of internal social transformation and other means of undertaking further socio-legal engineering.¹⁰⁴

In addition, the study will endeavour to determine the extent of the roles played by traditional leadership and civil society in the broader policy making frameworks of the legislative process in order to explain if policy makers are in touch with social reality.¹⁰⁵

Finally, the study attempts to challenge some unsubstantiated charges against customary law made by interest groups who seem to misconstrue some fundamental aspects of African tradition. Kaganas and Murray say that customary law openly discriminates against women and that women are practically slaves to their husbands."¹⁰⁶ It is sentiments like these can be viewed as a failure by some to appreciate and understand the context in which customary law social organisation found its efficacy.

1.6 DELIMITATION OF THE STUDY

Geographically the study will primarily focus on the marriage traditions and laws among the Nguni ethnic groups of South Africa, the Zulu and Xhosa and, the Zimbabwean Shona and Ndebele of Zimbabwe. The reason for this choice lies in the cultural commonalities in many South African and Zimbabwean communities, for example, the Nguni comprising of the (Xhosa/Zulu/Swazi/Ndebele) and the Ndebele in western Zimbabwe and Shangani in south-eastern Zimbabwe; the Venda on both sides of the Limpopo River that separates South Africa and Zimbabwe. Also, the Venda who are

¹⁰⁴ Beckstrom "Handicaps of Legal Social Engineering in a Developing Nation" 1974 *American Journal of Comparative Law* 669.

¹⁰⁵ Attempts have already been made in this regard, in South Africa, traditional leadership has since been recognized in terms of the Creation of Houses of Traditional Leaders Act No. 10 of 1997, see also the Traditional Courts Bill which may become law soon and gives scope to traditional leaders to try cases in terms of their traditional rules of procedure.

¹⁰⁶ Kaganas F and Murray C "Law and Women's Rights in South Africa: An Overview" in Murray *Gender and the New South African Legal Order* (1994) 16, The writers present a curious list of complaints by feminists against customary law, saying that husbands control virtually all the family's property, while the wives' rights are confined to items of a personal nature. Further that, women cannot initiate divorce proceedings but must enlist the help of the father/guardian who may have a stake in the continued existence of the marriage.

historically considered to be an off-shoot of the Southern Shona (the Karanga of Great Zimbabwe area). With the movement of migrant labour within the SADC region since the 1950s to date, inter-marriages across ethnic lines has been inevitable, justifying an investigation into how the legal discourse has impacted on people's social lives.

1.7 RESEARCH METHODOLOGY

In essence, the study adopts a qualitative approach and is confined to literature review and documentary analysis incorporating the use of electronic databases or repositories, internet sources and reference to anthropological sources. In order to create a structure/framework inside which the problems stated above can be tested, the study is anchored on various methods. Firstly, documentary analysis including legal instruments such as Ordinances passed in the early days of the colonial administration in the Cape Colony and the then Southern Rhodesia, which subsequently evolved into statute law and Acts of Parliament. Legislation from Zimbabwe and South Africa will also be visited in order to widen the scope and insight into the regulatory frameworks governing African marriages in both colonial and post-colonial administrations.

As a means of tracking legislation on South Africa, use will be made of electronic sources such as the Parliamentary Monitoring Group's (PMG) website which files all pieces of legislation that go through parliament and provides detailed minutes of all Bills and discussions preceding every Act of Parliament. This way one may literally track any Bill from its tabling to the day a Portfolio Committee sends it off for the President to sign.

Precedent and decisions of the early Native Courts, Native High Courts and Appeal Courts of the Zimbabwe and South Africa will be visited. Included are the decisions of the early former homeland courts in the Transkei and KwaZulu to the modern High courts and Constitutional Courts of the new South Africa, shedding light on the judicial attitudes and their evolution when adjudicating upon aspects of African family civil law.

Anthropological sources by the early commentators on African tradition and culture were used in this study, to understand the true features and purpose of the African

marriage. In addition, reference was made to contributions made by various academics in international law journals and books primarily those dedicated to analysing the development of African law. Recommendations made by various Law Reform Commissions that have sat in the past were analysed.

A detailed historical perspective of the evolution of customary marriage was made in terms, to assist in bringing to light the foundations of legislative and judicial attitudes towards the customary marriage.

The study is comparative in nature for the following reasons:

(a) Firstly, Zimbabwe (then Southern-Rhodesia) was colonised through the undertakings of Cecil John Rhodes who was the Prime Minister of the Cape Colony in South Africa and Roman-Dutch law was the basis of the introduction of Western law in both countries unlike other neighbouring British colonies such as Zambia (then Northern-Rhodesia) which had English law.

(b) Secondly, in the wake of the establishment of SADC and regional integration, it is imperative to know the laws of member states in order to eventually develop a common legal framework for such a vital institution as marriage and the family as people are bound to inter-marry within the region, a process which has evidently been taking place already as a result of various socio-economic forces that have been operating in Southern Africa for a long time. In addition the Zimbabwean Constitution awards the courts powers to apply the law that existed in South Africa at the Cape of Good Hope as at 1891. The law is essentially Roman-Dutch law which in turn forms the basis and origins of contemporary Zimbabwean and South African law.¹⁰⁷

¹⁰⁷ See section 89 of the Constitution of Zimbabwe (as amended by Act No. 5 of 2005) which states that:

“Subject to the provisions of any law for the time being in force in Zimbabwe relating to the application of African customary law, the law to be administered by the Supreme Court, the High Court and by any courts in Zimbabwe subordinate to the High Court shall be the law in force in the Colony of the Cape of Good Hope on 10th June, 1891, as modified by subsequent legislation having in Zimbabwe the force of law.”

(c) Personal circumstances surrounding me as the researcher placed me in a context in which Zimbabwe and South Africa are the most significant States in my development. I am most acquainted with these two countries.

(d) A comparative approach gives insight into the impact of Western law on customary law and the relationship between the two in fundamentally similar societies. Constitutions of South Africa and Zimbabwe as well as International Conventions and Charters are also examined in light of the new constitutional dispensations and influences from human rights paradigms that seek to safe-guard the interests of African women from so-called discriminatory traditional practices inherent to the African Marriage.

(e) Finally, a comparative study gives rise to a basis upon which a legal comparison can be made further assisting in our understanding of the development of legal pluralism. Menski¹⁰⁸ writes extensively on the theories of comparative law and advances the term, comparative framework, as a tool for the development of legal pluralism. What comes to light here is that comparative law does not entail the study of one foreign legal system or its components, but extends to the interaction of the rules of two or more legal systems in order to comprehend factors influencing legal development.

1.8 OUTLINE OF THE THESIS

The research is presented in six chapters. Chapter one will deal with the introduction, historical background, statement of the problem, justification of the study and research methodology.

Chapter two looks at the features of the African customary marriage as they were before the advent of colonisation. Emphasis is placed on aspects such as the essentials for a valid marriage, capacity to marry, rights and obligations arising from marriage, the

¹⁰⁸ Menski *Comparative law in a global context: the legal systems of Asia and Africa* 2nd (2006) 46, see also in this regard, MacConville *Research methods for law* (2007) 96, who is of the view that, "comparative study of law presents legal scholarship not simply as the scholarly dimension of the practice of law but as part of the world of scholarly dimension of the practice of law but as part of the world of scholarship itself."

issue of polygamy, property rights and affiliation and custody of children as well as the rules surrounding divorce.

Chapter three examines the impact of colonial law and legislation together with case law right from the early influence of Christianity and missionary sentiment. In the case of Zimbabwe the period extends to the time independence in 1980 into the post-colonial state to date. In terms of South Africa, the period under examination extends to 1994 and thereafter post 1994 to date.

Chapter four examines the impact of the new constitutional dispensation with special emphasis on Zimbabwean and South African marriage laws and customary law at large in the post-colonial state.

Chapter five investigates the relationship between human rights law and customary law, including an examination of selected international human rights instruments relating to women and customary law.

Chapter six being a concluding chapter makes the findings and recommendations of the research including suggestions for possible law reform policies and a prediction as to the future of customary law.

CHAPTER TWO

MAIN FEATURES OF THE AFRICAN INDIGENOUS LAW OF MARRIAGE: THE SHONA, NDEBELE, ZULU AND XHOSA OF ZIMBABWE AND SOUTH AFRICA

2.1 INTRODUCTION

Contrary to the Common law concept that a marriage comes into existence at a particular point in time, Zimbabwean and South African customary laws alike have never held such a view of marriage. According to the customs, marriage has always been regarded as a slow process, a steady growth, beginning with the first acquaintance of the young people, the gradual involvement of their families, the transfer of *lobola/roora* (bride wealth) to the woman's father, the birth of children and finally the establishment of a new and independent household.¹⁰⁹ This steady growth of a new family unit and the inability of fixing a particular point at which the new union is to be termed 'a valid marriage' is in harmony with the traditional communal mode of production and the society's emphasis on continuity.

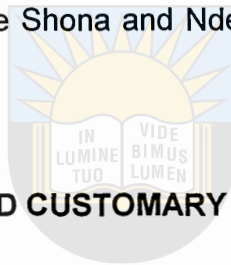
The more a society values continuity, the more it must guarantee the stability of each marital union through the support given to it by the extended family group, parents and kinsmen.¹¹⁰ As we make an effort to understand the marriage customs of the Shona and Ndebele of Zimbabwe on the one hand and their South African Zulu and Xhosa counterparts on the other, marriage through negotiation between two kinship groups is a common and clear expression of this wish for continuity. It is still most certainly the usual procedure adopted to establish a new household although today's greater freedom of the young to choose their own marriage partners brought through changed

¹⁰⁹ Weinrich *African marriage in Zimbabwe and the impact of Christianity* (1983) 43.

¹¹⁰ Mbiti *African Religions and Philosophy* (1990) 130, where the author says, "for African peoples marriage is the focus of existence. It is the point where all the members of a given community meet, the departed, the living and those yet to be born. All the dimensions of time meet here and the whole drama of history is repeated, renewed and revitalized" see also Mbiti J "African Philosophy in African Traditional Religions" in Makhumba *An Introduction to African Philosophy: Past and Present* (2007) 166.

economic circumstances, has had a negative impact on this aspect of traditional marriage norms.

As shall be seen, the processes of marriage vary between the traditional long and elaborate series of negotiations between two families to a brisk affair between a young man and young woman, over which their respective families have little control.¹¹¹ Marriages may result in a number of wives living together with their husband to whom they all defer, or occasionally, a marriage may result in a man and woman equally supporting their shared family life. Bearing in mind such variations, we can look at the traditional ideals and practices of the Shona and Ndebele marriage, and see how they relate to traditional family life.¹¹²



2.2 THE ESSENTIALS FOR A VALID CUSTOMARY MARRIAGE

2.2.1 Capacity to marry

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2.2.1.1 Marriageable Age: Zimbabwean Shona and Ndebele

The question of what was perceived to be the right age to marry under the Shona and Ndebele of Zimbabwe differed considerably with that of the Common law. While western marriages were governed by strict rules with regards to age of majority and legal capacity, the situation was not the same among indigenous ethnic groups.

Under Shona customary law, practical training aimed at attaining a successful marriage is given at *mahumbwe*¹¹³ where the young boy and girl from about the age of twelve

¹¹¹ Bourdillon *The Shona Peoples: an ethnography of the contemporary Shona, with special reference to their religion* (1987) 36.

¹¹² Posselt "Native Marriage" 1928 *Southern Rhodesia Native Affairs Department annual (NADA)* 35, where the author says "marriage is the creation of a bond of kinship between the families of the two contracting parties, and on the members of these families. The individuals contracting the marriage itself are merged into the family groups."

¹¹³ Towards the close of the harvest season a little millet and maize is left in the fields, and there begins a happy time for the 10-14 year olds, which is called *mahumbwe* (to play house), being a traditional children's game where children emulate adult roles and the more grown up boys perform fatherly roles. Girls of the same age group would also be carrying out their motherly chores and the younger boys and girls in the same age group take roles of "children" in respective "families."

onwards are paired off and allowed to pretend to be man and wife.¹¹⁴ The girl learns all she knows her mother does, that is, she cooks food, grinds the grain, fetches the water and so on, whereas the boy goes out to hunt for mice and looks after the cattle. He does all that he has seen his father doing. He builds his selected partner a little shelter.¹¹⁵ All this is done openly under the eyes of the parents. This is the so-called trial marriage,¹¹⁶ without however, any sexual contact. In the evening, they return to their proper homes to sleep and on no account is any intimacy permitted.¹¹⁷ It is merely to allow the boy and girl to carry out what they have learned from their parents, so that in a few years time that great moment of happiness comes to each one when they marry the correct partner.

The fields provide them with daily food. The “men” sit at the “place of the men” and let the “women” wait on them. In each household, the “parents” and their “own” children live together. These trial marriages last two to three weeks and are repeated every year after the harvest. Every time the same boy and girl play together at being married, and the old Karanga remember that frequently this used, in time, to result in a real marriage. The custom of *mahumbwe* has today disappeared almost entirely. Nevertheless, once it used to be an important event during puberty, giving the young people a good idea of the pleasant and unpleasant things held in store for them.¹¹⁸

Among the Ndebele of Zimbabwe, *dunduzela* was performed for girls who were considered to be of marriageable age. This initiation ceremony for a girl on her reaching adolescence was marked when a girl started menstruating. Her father brewed beer, killed one or two head of cattle, and sent invitations to all friends and relatives. Men and women arrived, carrying dancing shields and after drinking a considerable amount of

¹¹⁴ Gelfand *Shona Ritual: with special reference to the Chaminuka cult* (1959) 183.

¹¹⁵ Outside the kraal, the boys build their own huts out of twigs and grass and the girls shape clay-pots and collect firewood.

¹¹⁶ Gelfand *African background: the traditional culture of the Shona-speaking people* (1965) 31.

¹¹⁷ Aschwanden *Symbols of Life: An Analysis of the Consciousness of the Karanga* (1982) 94, where the author says, “In the evening, the “married couple” return to the village and sleep with their parents.”

¹¹⁸ *Ibid* 76.

beer and feeling 'lively,' the women begin to dance. The men beat their shields with sticks and the women waved calabashes.¹¹⁹

Meanwhile some the women relatives took the girl into a hut. The women would smear her face and body with red earth called *isibuda*. She would then leave the hut and join the other women in the dance. Next day the girl's father would give her a male goat and her other relatives would give her beads.¹²⁰ This ceremony of giving presents is called *uku kunga*, and the girl was then held to be of marriageable age. The *dunduzela* ceremony is now practically extinct. This was due to strong opposition on the part of missionaries and their native teachers. The latter's objection to the custom was that women and girls sang lascivious songs at the initiation, and this resulted in a perversion of female morals and the commission of acts of indecency.¹²¹

The *ukuthomba* ceremony in the case of boys corresponds to the *dunduzela* custom with regard to girls. When boys reached the age of puberty, they were sent out to stray in the veld. They were first stripped naked, forbidden to speak and were only allowed to eat pumpkins. They were summoned to the gate of the cattle kraal, where a herbalist *inyanga* met them. The doctor made some medicine called *izembe*, which he burnt and blew the smoke into each boy's mouth through a reed.¹²² After this ceremony all the successful candidates were told that they were old enough to carry blankets for the regiment, *impi*, when it went to war. Each boy was also given an assegai by his father, who told him to wash it in the blood of his enemies, and if possible, to kill a lion. The *ukuthomba* and *dunduzela* ceremonies for boys and girls respectively, alike the practice of *mahumbwe* among the Shona, have now become practically obsolete.

¹¹⁹ Woods "Extracts from Customs and History; Amandebele" 1931 *Southern Rhodesia Native Affairs Department annual (NADA)* 17 – 18.

¹²⁰ *Ibid* 17, where it mentioned that she stitched these beads up in a goatskin, with which she would bind her breasts.

¹²¹ *Ibid* 18.

¹²² Woods *op cit* says, should the boy cry out, he would be called a coward, *igwala*, and rejected. Also, each boy in turn was beaten by the other boys with switches or *uswazi*, and was supposed to endure the pain without a sound.

2.2.1.2 Marriageable Age: the South African Xhosa and Zulu

Predominantly among the Xhosa of the Eastern Cape in South Africa is the custom of circumcision (*ukwalusa*) that is said to mark the transition for a boy from adolescence into adulthood.¹²³ The idea at first was that, boys between the ages of 16 and 22 lived in their lodges away from their homes, in groups, and were isolated from the general population. They received instructions from a praise singer (*imbongi*) and they wore white sheepskins and painted their bodies white. Teachings included those of patience and determination. Gifts could be made to the praise singer if desired and in *Nqayi Klaas v Xhelo Ntsangani*¹²⁴ it was held that it is not the custom that fathers of the individual boys should pay the *imbongi* anything though they may do so if they wish.¹²⁵

Under Thembu custom, a sub-ethnic group of the Xhosa, an uncircumcised boy may not marry and if such a boy seduces a girl and offers to marry her, the marriage is deferred until the boy has been circumcised.¹²⁶ The beehive shaped circumcision house (*isuthu*) in which the boys stayed could at times be named after the chief boy who is among those circumcised, he being regarded as the head of the other boys. Unfortunately, the rights of illegitimate children were undermined and they could not be heads of the *isuthu* as held in the case of *Lize v Bushula*.¹²⁷ Although among westernised people the custom may be closely followed, it is however, without the ceremony and publicity of the olden days. On the other hand, though, some westernised people, even in the urban areas, adhere to the original method of sending the boys to an *isuthu* in some bush near the township and make a big ceremony on the day the boys return from the *isuthu*.¹²⁸

¹²³ Koyana *Customary Law in a Changing Society* (1980) 60, who says, "Originally the custom was not of universal application and was known to the Thembu and Gcaleka, both very large subdivisions of the Xhosa."

¹²⁴ 3 NAC 1 (Willowvale).

¹²⁵ The boys stayed in small groups ranging from three to six per lodge and it is otherwise for the owner of the lodge in which the boys were gathered to pay the bard or instructor.

¹²⁶ Koyana *op cit* 60.

¹²⁷ 2 NAC (1910-11) 180, a case from the Tsolo district, it was found that a lodge had never been named after an illegitimate boy.

¹²⁸ Koyana *op cit* 61, see further Afolayan *Culture and customs of South Africa* (2004) 200, who observes initiation customs in a contemporary setting and comments that, "the pressures of modernisation and urbanisation have also brought changes in many aspects of sexuality and marriage. In the relatively open

Similar to the Xhosa, a young Zulu man was only allowed to court a girl after his circumcision when he became fit to be a member of the warrior class, owing to the Zulu strong military organization. The young man made series of indirect approaches, often through his sisters. The girl would indicate her acceptance by sending the young man a gift of betrothal beads. If her family was approving, the young man went ahead to erect a white flag outside his hut, as a symbol of his intention to marry soon.

On the other hand, to mark the marriageable age for girls is the custom of *ukhuthombisa*. The custom relates to the education of Xhosa girls. The girl undergoes a period of semi-isolation differing thus from that of the boys because she occupies a separate hut within the confines of the homestead. Also unlike boys, the girls are individualised for the purpose of the *thombisa* custom therefore each household sees to its own girl.¹²⁹ Like the boys, she does not take part in the daily chores of the home and has her meals brought to her in her hut. In claims for guardianship of a girl, the question may arise whether the claimant who has had custody of the girl all along, performed the *thombisa* ceremony, and celebrated the *intonjane* rites relating to the girl.¹³⁰

However, it is common practice that a man may celebrate the *intonjane* rites of the daughter of another and even give her in marriage. If, however, the man, not being a relative, does so without the consent of the father or guardian, he then has no claim for any expenditure he may have incurred. On a similar question in the case of *Muru v Piki*¹³¹, a case that came from Idutywa, the view of the assessors was accepted that a man has the right to *thombisa* his granddaughter without authority from the father or actual guardian. It was further held that, any beast he may have spent for the ceremony must be replaced by a beast from the *lobola* cattle (*ikhazi*) of the girl. Unlike *ukwalusa*

and anonymous society of the urban centers, many of the taboos connected with sexuality and marriage have been violated and ignored." The author also comments on how young boys and girls are now exploring their sexuality independent from the guidance of traditional elders as in the past. The roles of elders in preparing the young into adulthood are thus diminishing.

¹²⁹ The essence of the custom is that the girl does not go out of the hut unless it is extremely necessary.

¹³⁰ This is considered *prima facie* proof that he always regarded the girl as his own and is not merely laying a claim to her.

¹³¹ 4 NAC 346 (1919).

the *thombisa* custom has not commended itself to westernised people and it is not observed by them.¹³²

Among the Zulu, puberty for a girl was celebrated and symbolised by dancing, feasting and the slaughter of sacrificial animals to ancestors. The puberty ceremony (*umemulo*) is a transition to full adulthood. During the period immediately preceding the ceremony, the girl who was coming of Age together with her friends, were separated from other people for sometime in a Hut meant for them alone. All the girls in the homestead, have to walk around the village or area singing, this is a sign of inviting people that there would be a ceremony in the area. All the girls have to smear red soil on their faces as a sign of the ceremony. After the ceremony, the girl was declared ready for marriage. The courting days then begin. The girl may take the first step by sending a 'love letter' to a young man who appeals to her. Zulu love letters are made of beads. Different colors have different meanings, and certain combinations carry particular messages.

While the incidence of women's initiation ceremonies may vary in different traditional South African and Zimbabwean societies, its cultural religious significance remains the same.¹³³ Common is the fact that initiation involves the transfer of knowledge and expertise from one generation to another through the preparation of the initiates in sexual, domestic, and broader social responsibilities, and includes the major structural markers that designate phases of the individual's life cycle.¹³⁴

¹³² Koyana *op cit* 62 where the author goes on says, "...even among the others, its popularity appears to be waning."

¹³³ Young *Initiation Ceremonies: A Cross-Cultural Study of Status Dramatization* (1965) 1ff, see also Paige and Paige *The Politics of Reproductive Ritual* (1982) 15, the author although acknowledging that initiation ceremonies in different African communities generally serve the purpose of facilitating sexual transition, observes the issue from a Eurocentric stand point and fails to comprehend their intricate nature and ritual significance.

¹³⁴ This does not mean that male initiation rites have declined in all instances. Clearly, the South African custom circumcision has proved resilient as compared to the *thombisa/intonjane* rites as evidence of the persistence of male initiation despite urban transition and alternative Western educational forms. In Zimbabwe however both among the Shona and Ndebele initiation rites have generally fallen away.

Some are of the view that men's initiation rites have a political focus in training males to assume prominent leadership responsibilities in their respective communities. As Jules-Rosett says, "they often entail instruction in the group's lore and oratorical skills."¹³⁵ In contrast, women's initiation rites focus on domestic responsibilities and are structurally linked primarily to the family rather than to the community at large. This distinction could explain the relative decline of women initiation rites in urbanized settings in contrast to the persistence and revitalization of some men's ceremonies.

2.2.2 Restrictions on Blood Relationships and Affinity

Marriage between affines, or people related by blood was deemed to upset the ranking system and introduced contrary norms of behaviour. Thus, among the Shona, a man could not, and today may not marry a woman from a lineage that provided a wife for his father's lineage. The man calls such a woman, 'mother' and is supposed to show her respect unsuited with that kind of intimacy between a man and his wife.¹³⁶ Such marriages are forbidden and perceived as incest and taboo, although no blood relationship exists between the partners a position that is not embraced by the common law that only restricts marriage to people related by blood.

The Shona elders declare again and again that "blood is the most important thing in life", referring to people who are related by being of the same blood and thus possessing the same totem. Therefore, consanguinity¹³⁷ means descending from the same (male) ancestral spirit and having the same totem. The totem is firstly, the common bond between members of a family. Even separate sections of a family that have become independent are still united by their totem.¹³⁸ Two separate family groups

¹³⁵ Jules-Rosette "Changing Aspects of Women's Initiation in Southern Africa: An Exploratory Study" 1980 *Canadian Journal of African Studies* 390.

¹³⁶ Holleman *Shona Customary Law: with reference to kinship, marriage, the family and the estate* (1952) 54, similarly a man may not marry a woman classified as 'daughter in law' who would be involved in a similar conflict between respect and intimacy.

¹³⁷ Consanguinal relations in this regard refer to relationships by blood.

¹³⁸ Aschwanden *Symbols of life: an analysis of the consciousness of the Karanga* (1982) 107, an example will illustrate this point; "when people are praying to their ancestral spirits (*vadzimu*) they are invoking their dead father and grandfather, normally not going back any further because it is assumed that only those

with the same totem thus pray to quite different ancestral spirits. However, the founder of the tribe, the so-called *tateguru* or common ancestor, from whom the totem often originates, can appear in a child of any of these separate family units. This brings in the members of the different sections in worship of the *tateguru* who now lives in this particular child, hence they are all united under the same totem. The deduction is therefore that, the Shona do recognise endogamous bars to marriage and sexual relations within one's own circle or totem are prohibited.

An example of totemism (*mutupo*) in this case is the leg, a symbol of something that is forbidden. Since the symbol also includes identification, the rule is more easily secured if people are not simply confronted with a prohibition, that is, a law, but with a symbol comprising that prohibition. Thus, the *mutupo* is here a symbol of the prohibited sexual relations within the tribe. *Gumbo*, as the leg of the cow, is in this context the phallic symbol of a brother's penis. The Shona may say: "I do not eat the leg because it symbolises the prohibition which tells me not to 'eat' my brother."¹³⁹

Totemism could be held to explain one peculiarity of the Shona extended Family. Kinship terms have much wider meanings than European ones. For instance, a child has many fathers because his own father's brothers are also his "fathers" and are addressed as such. In the same way, a man has, any more children than he has actually begotten because his brother's children are to him like his own.

The Shona also realised that marriage with outsiders brought advantages too.¹⁴⁰ This statement expresses what one has called the politico-economical interests of a society, from which the notion of incest-taboo is said to have evolved. Schelsky's definition is: "The incest-taboo is only the negative side of a social law (exogamy), which became

two spirits are still on earth, protecting the descendants and their homes." See also in this regard Shoko *Karanga indigenous religion in Zimbabwe: health and well-being* (2007) 10.

¹³⁹ *Ibid* 113.

¹⁴⁰ *Ibid* 109 where one old member of the Karanga ethnic group expressed this as follows: "when we used to practice incest we all had one and the same *mudzimu* (ancestral spirit) since we were all of the same blood. But that was no good because one wants to be honoured by more than one kind of blood, that way one becomes a more powerful ancestral spirit. Now that we have abolished incest, I shall be honoured not only by my sons but also by my daughter and her husband and children. Accordingly the respect paid to me will be much greater."

necessary in all societies in order to achieve and secure the social structure and co-operative unity which transcend the family unit"¹⁴¹ The totem (*mutupo*) is the official name by which a tribe is known. It can apply to an animal, or part of an animal. *Mutupo* is said to derive from the kind of animal the Karanga is forbidden to eat and by which he swears not to marry a woman of his own family.

Traditionally if two cousins want to marry, their parents are reluctant to allow this and have to ensure to see that the suitor should pay a fine for breaking the rule. Even distant relatives are not allowed to marry without first paying the fine for breaking the rule. Among the Shona, he must pay an ox, a piece of black cloth and some money in terms of the rite of *kucheka ukama*.¹⁴² Apart from practicing the rite that severs the kinship ties, they must pay bride wealth as well. It was noted that, a nation's tribe grows and when a certain size has been reached, they must separate. Before separation, a ceremony called "the cutting of kin (*kucheka ukama*), take place. A bull is killed, and the two family sections about to separate each hold one end of a piece of meat. This piece is then cut in two. By this action, the kinship blood has, symbolically, been separated. Although the two groups retain the same totem, marriage between them is allowed.

In a case involving what is known among the Shona as *makunakuna*, or incest, in Sipolilo District in 1960, the *mhondoro*, or spirit medium, was to be given a head of cattle in order to propitiate the ancestors. In this particular case, on appeal from Chief Sipolilo's court (*dare*), the appellant was instructed to pay the *mhondoro* 5 Pounds. However, custom also seemed to perceive the objection to marriage between remote affines as merely matters of formality or personal taste. Thus, a woman could for example, object to being married to a remote affine that is wrongly related to her, simply on the ground that her friends may tease her. In such a case her objections may be

¹⁴¹ Schelsky *Soziologie der Sexualität* (1958) 89.

¹⁴² Referring to the ritual cutting of kinship ties. In terms of the rite of *kucheka ukama*, the ox is killed and the meat shared between the two families. The piece of cloth is cut in half to show that the relationship between the two families has been broken. The money is used by the girls family. When this has been done, the marriage customs follow the usual course.

overcome if her suitor gives her token gift to 'drive away her shame', a matter which concerns the couple on the eve of their marriage rather than their respective families.¹⁴³

Central to common belief, it must be born in mind that marriages which reinforce existing unions and existing affinal relations are regarded with favour. The Shona were known to embrace this notion and as such, a satisfactory son-in-law may be given a younger sister of his wife as a second wife with little or no bride wealth payable. Subsequently, in a quest to honour his son-in-law, after a family head had given a daughter, he had to ask his sons in law for permission to negotiate the marriage of other daughters to other families. Nowadays things seem to have somewhat taken a turn and young people generally marry outside the existing organizations of their families.¹⁴⁴

On the other hand, the Ndebele had endogamous and exogamous bars to marriage.¹⁴⁵ In terms of endogamy, a *Zansi* could not marry a *Zansi*. However, on the male side the process of breaking down this rule began early. A son of Mzilikazi, Makwelambila, is an example. His mother was a slave and he was always regarded as one of the minor princes.¹⁴⁶ It is well-known that another of Mzilikazi's successors, Lobengula, had illicit relations with female slaves.¹⁴⁷ As a result at the time European occupation of Rhodesia in the late 19th century, there were a number of half-breeds who bore their fathers' *Zansi izibongo* or surnames. Unions of this sort were becoming increasingly common. Although relationships occurred between *Zansi* women and slaves, such were regarded as abnormal and disgraceful, and were sometimes punished with death.¹⁴⁸

¹⁴³ Holleman *Shona Customary Law* 58.

¹⁴⁴ *Ibid.*

¹⁴⁵ Jackson "Notes on the Marriage laws of the Amandebele, With Endogamous and Exogamous Bars to marriage" 1925 *Native Affairs Department Annual (NADA)* 35-36.

¹⁴⁶ Mzilikazi was the founder of the Ndebele Kingdom in western Zimbabwe and with his emphasis on a strong military organization, the Ndebele systematically raided the Shona of grain and women and children were taken as slaves.

¹⁴⁷ Jackson *op cit* quoting Lobengula's dictum that, "A woman is not a slave, a man is different, a cow raided from afar may be milked."

¹⁴⁸ See also Jackson *op cit*, "...it may be doubted whether the Ndebele if left to themselves, would have been able, despite their pride of race, to postpone fusion much longer."

In terms of exogamous bars, the first rule was that people of the same cognomen (*isibongo*) or surname cannot intermarry. To this rule, however there is an exception.¹⁴⁹ Secondly, people may not intermarry if the *isibongo* of one is the same as the surname of the other's mother. For example, Smith may not marry Smith, nor may he marry Brown whose mother was Smith.¹⁵⁰ Thirdly, the children of two sisters may not marry each other as they are first cousins. It goes without saying that, as with the Shona, there can be no marriage with ascendants and descendants. Concerning affinal relationships, a man may not marry his father's stepdaughter nor his paternal uncle's stepdaughter. He may however marry his maternal uncle's widow, but not his paternal uncle's widow.¹⁵¹ The Shona and Ndebele kinship systems find similarity with those of the Zulu, who have a patrilineal kinship system and marriage was patrifocal and exogamous, that is, one could not marry anyone with the same *isibongo* (clan name) as one's father or mother.¹⁵²

2.3 NEGOTIATION AND PAYMENT OF BRIDE WEALTH

2.3.1 The Zimbabwean Shona: *Roora*

For the traditional Shona, marriage is essentially a contract between two families.¹⁵³ Although the choice of spouses may now usually be left to the persons concerned, the negotiations towards marriage normally require participation by senior representatives of each family.¹⁵⁴ The way in which these families establish contacts to arrange new

¹⁴⁹ Some of the main Ndebele families have spread and increased until district branches have been formed. Thus the family bearing the *isibongo* or surname 'Nkosi' although of common origin is divided into the 'Ndiweni' and Hlabangani' branches. People of these two branches may intermarry. For purposes of marriage law, they are regarded as distinct and separate *isibongo*. The Shona make similar though not identical distinction.

¹⁵⁰ See Jackson *op cit*, during King Lobengula's reign, the rule was relaxed to permit a member of the Khumalo family marrying one of another family whose mother was Khumalo of a separate branch.

¹⁵¹ He may marry his stepmother's sister, but not his stepmother's daughter for she is his sister.

¹⁵² McClendon "Tradition and Domestic Struggle in the Courtroom: Customary Law and the Control of Women in Segregation-Era Natal" 1995 *International Journal of African Historical Studies* 542.

¹⁵³ Weinrich "The Group Aspect of the Karanga Marriage" 1967 *Native Affairs Department Annual (NADA)* 28-38.

¹⁵⁴ Although young people today try to choose their own spouses, their marriages remain the concern of their respective families and hardly any spouses dare to marry without their families' approval. They may

marriages is through marriage negotiators, men and women acceptable to the family of both the young man and woman.

The marriage process began with the informal courting that moved into a private engagement by the exchange of love tokens between the boy and the girl, often passed through a third person. The tokens are small objects of little commercial value, perhaps a small coin or something intimate such as a piece of her underclothing, providing each partner with a concrete token of their intimacy which can if necessary be produced as evidence in a traditional court. Although sexual intercourse is not strictly allowed at this stage and the girl should certainly not be made pregnant, this exchange is often a prelude to sexual intercourse and nowadays does not always indicate intention to marry.¹⁵⁵

The Shona and the Ndebele in Zimbabwe have special names for the marriage negotiators. The Shona call him *munyai* and the Ndebele *idombo* (rock). Among the Shona, a marriage negotiator is always a man, but among the Ndebele both men and women are eligible and the Shona are more inclined than the Ndebele to choose a blood relative than a neighbour. Once the boy's family had appointed a marriage negotiator it was then time to approach the girl's family. The *munyai* (intermediary) in the ensuing talks would be an accredited middle-man or intermediary who publicly guarantees the serious intention of the young to marry.

The intermediary enters the homestead of the girl and initially without stating the names of the persons concerned, explains the nature of his visit to a responsible member of the family, handing him a token gift such a hoe, some snuff, or more commonly nowadays a few dollars in cash. This is passed on to the head of the girl's family, usually the girl's father, who indicates his agreement by accepting.¹⁵⁶ The intermediary

exchange love tokens without informing their elders, but before finalising their choice, they seek the consent of their families.

¹⁵⁵ Gelfand "The Shona Attitude to Sex Behaviour" 1967 *Native Affairs Department Annual (NADA)* 61-64, nevertheless, should either party break off the engagement after the exchange without good reason, the other may sue for damages in a traditional court.

¹⁵⁶ The girl should also show her agreement by touching the gift or accepting part of it.

introduces the purpose of his visit with the words, "I am looking for someone to cook for my young man." To show their superiority, the girl's family always turns down an intermediary's request on his first visit, even if they like their prospective son-in-law.

From this point the reciprocal terms *mukuwasha* and *tezvara*¹⁵⁷ are adopted indicating that the affinal relationship has been established, but the prospective son-in-law groom is still a long way from having full rights over his wife to be. All he can claim at this stage is that the girl is betrothed to him, which means that he can sue for damages should she commit adultery or should her family start negotiating her marriage to another man.

The intermediary makes a second visit with a further gift to 'open the mouth' of the girl's father, that is, to induce him to state the *roora*¹⁵⁸ he wants for his daughter. The heads of the two families or their representatives, in the presence of the messenger, negotiate the amount. *Roora* has always involved two payments, the first called *rutsambo* which traditionally consisted of some utility article such as a hoe or, in some areas, a goat, but is now usually a substantial amount of money. This payment is associated with sexual rights over the woman and is abolished or considerably reduced if the girl has had children prior to the marriage.¹⁵⁹ The substitution of cattle for cash as *roora* has come with problems as demonstrated in *Muzira v Matiyapa*.¹⁶⁰ This was a dispute regarding the question whether the right bull or cow was returned in an action for divorce.

Once an agreement has been reached between the two families, the 'door is closed' and the young people are publicly regarded as husband and wife, even though they do

¹⁵⁷ Referring to son-in-law and father-in-law respectively.

¹⁵⁸ Referring to bride wealth in Shona, The *roora* in the past amounted to a *badza* (hoe) which was not worth much materially and was kept as a symbol or proof of marriage and in the future, if any serious difficulty arose between the couple it was produced. It is therefore a symbol of marriage. Also, many years ago rare mice (*mbeva*) were given instead of the hoe. Another known form of *roora* in the olden days was mice. When a young man had come to terms with a young woman of his liking, he would proceed to set traps to catch mice. If he was fortunate and caught three or five he would quickly go to the mother of the girl, present her with the mice and ask for the daughter. The mother, who was usually happy with the gift, presented the matter to the father without responding to the proposal. If the father did not object, the young man was allowed to go away with their daughter as his wife.

¹⁵⁹ In the olden days *rutsambo* was payable only if the girl was a virgin.

¹⁶⁰ NAZ CR 25/54 Sipolilo 1 October 1954, S 2033, in this case the defendant had offered money in place of the cattle but the plaintiff insisted, "I want my cattle."

not yet establish a joint household. Again, the official nature of this agreement gives great stability to the new marriage. In all cases, the transfer of the bride follows a uniform pattern among the Shona as it does among other ethnic communities of Zimbabwe such as the Ndebele. The bride shows an extreme reluctance to leave her parents and sits down at every cross-road and every obstacle on the road to express her regret at leaving her parents. Each time the groom has to coax her with small sums of money to move on until they reach his village.

The transfer of *roora* from the man's family to the woman's family represents her severance from her natal home and her integration into the home of her husband. Nowadays the social control of the lineage has diminished substantially and often relatives have little say in the choice of spouses of the younger generations, especially in urban area.¹⁶¹ A second payment of *roora* followed, which was a more substantial payment in cattle, but now it has become a second substantial cash payment, often stated in terms of the equivalent in head of cattle thus keeping a symbolic association with the traditional type of payment.¹⁶²

Variations on and additions to the use of the *roora* cattle appear to date from at least the colonial period. For example, a man named Mapondera received from one son-in-law 7 head of cattle, 3 guns plus 5 Pounds during Howman's period of office as Native Commissioner at Lomagundi.¹⁶³ The cash element persisted, and indeed later overtook the cattle element although the value may have continued to be expressed in terms of head of cattle. Indeed in the 1950s it became standard on the marriage registration forms to record the *roora* as the number of livestock and amount of cash, or the equivalent. In *Rusere v Chirata*¹⁶⁴, a case from Sipolilo district in 1933, the Native court

¹⁶¹ Meekers "The Noble Custom of Roora: The Marriage Practices of the Shona of Zimbabwe" 1993 *Ethnology* 35-54.

¹⁶² See also in this regard Bourdillon *The Shona Peoples* 40, where the author remarks incisively, "there is no clear point at which the couple can say they are now married whereas they were not married before. The transfer of livestock occurred over many years, sometimes extending beyond the lifetime of the husband, in which case his son was held responsible for its completion."

¹⁶³ See *Nyande v Ndimu* NAZ CR 106/33 Lomagundi 10 January 1934, S 306. Howman was Native Commissioner at Lomagundi during the years (1919-1926).

¹⁶⁴ NAZ CR 15/36 Sipolilo 23 October 1936, S 2033.

heard testimony that the Plaintiff demanded 17 Pounds in addition to nine head of cattle. After a few years, for the fact he was unable to deliver the bride wealth as required, the husband opted for divorce owing to his inability to make the transfers as quickly as the father-in-law wished.

Another example of the enforcement of *roora* transfers in similar fashion to commercial debt payments, was seen in the case of *Gupa v Kanyuchi*.¹⁶⁵ A certain Gupa, brought his sister's husband, Kanyuchi, to court in 1933, demanding from him further transfers of cash and cattle or alternatively, that his sister's marriage be dissolved. Kanyuchi had made a initial payment of 8 Pounds and believed he was entitled to the benefit of satisfying the balance of *roora* at a future date in accordance with custom. However, Gupa had visited him five times over seven months demanding further transfers, finally taking him to the Native Commissioner's court after only seven months of marriage. The Native Commissioner ordered Kanyuchi to pay the balance of *roora*. The ways in which Kanyuchi (son-in-law) and Gupa (brother-in-law) understood the debt appear to have been different, and the same may be said of the case involving *Rusere* and *Chirata* above. These cases above resemble the transition of *roora* from being seen as binding families by creating lineage debt as opposed to commercial debt.¹⁶⁶

The Native Courts continued to hear cases involving the enforcement of payment of *roora* well into the mid-20th century Zimbabwe. In 1962, in the case of *Manyika v Kapomba Makorichi*¹⁶⁷ in which a certain Manyika used the courts to enforce the transfer of outstanding *roora*. He claimed 4 head of cattle or 20 Pounds being *roora* outstanding in respect of marriage with his daughter. The defendant, Kapomba Makorichi, admitted both the debt and liability, promising it would be paid. A perversion of custom continued to be apparent, demanding the hasty payment of *roora* as again

¹⁶⁵ NAZ CR 70/33 Lomagundi 15 August 1933, S 306, in his testimony the defendant, Kanyuchi is quoted as saying, "I have no relatives on whom I can call to pay this *lobola* for me. I can only earn 10 Pounds a month."

¹⁶⁶ Smith "Money Breaks Blood Ties: Chiefs' Courts and the Transition from Lineage Debt to Commercial Debt in Sipolilo District" 1998 *Journal of Southern African Studies* 518 see also in this regard, Iliffe *Famine in Zimbabwe 1890-1960* (1990) 82 who says, 'It should be noted that both these cases occurred in the 1930s in the middle of a period of scarcity and depression.'

¹⁶⁷ GURUVE CR 117/62 15 August 1962.

happened in *Stanley Gora v Jane Muzinde*¹⁶⁸, which was a rather extreme case. The terms of the contract made the transfer of *roora* due within three and a half months of marriage registration, and not more than five months after the marriage was contracted.

The material value and amount of *roora* gifts has differed over time and space. Among the Shona, according to Schmidt, “immediately prior to the European occupation, typical marriage payments included four to five head of cattle supplemented by other gifts such as hoes, blankets, and baskets of grain.”¹⁶⁹ In the 1870s, trade with the Portuguese resulted in the use of gold and guns among the Shona *roora* payments.¹⁷⁰ Channock is noted making an observation of the new state of affairs when he made a remark that, “no longer could it be argued that new demands were being made of old relationships.”¹⁷¹

There have been different viewpoints about the purpose of *roora*. One may argue that it is a payment that has the effect of giving the woman some value or “worth” in the eyes of all, especially the man, someone who cannot just be taken. Another may claim that it is a sign of love for the woman by the man, just as in the western world where the man provides jewellery for the woman he loves.¹⁷² The woman’s father may maintain that the payment of bride wealth is in return for what he expended in raising and caring for her. Bride wealth has also been looked upon as a payment to the wife’s father in return for a certain number of children, associating *roora* with rights over the children born to the woman. This is however not to mean that the wife is bought in a commercial transaction, even though a certain amount of bargaining may be involved.¹⁷³

¹⁶⁸ Guruve CR 1/69 3 March 1969, the marriage certificate contained therein states the marriage was contracted in 1966, registered on 9 March 1966, and that the *roora* was due in May 1966.

¹⁶⁹ Schmidt *Peasants, Traders and Wives: Shona Women in the History of Zimbabwe (1870-1939)* (1992) 17.

¹⁷⁰ *Ibid* 52.

¹⁷¹ Chanock *Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia* (1998) 22.

¹⁷² Andifasi J “An Analysis of Roora” in Kileff and Kileff *Shona customs: essays by African writers* (1976) 28, “*Roora* is of vital importance because it is an outward manifestation of a young man’s love for his fiancée and it is a safeguard against groundless divorce.”

¹⁷³ Bullock *Mashona Laws and Customs* (1913) 21ff.

Traditionally, the major part of the necessary *roora* was paid from the family cattle herd of the son in law, into the family herd of the father in law. A young man could often expect help from his father and brothers in making *roora* payments. Another means of obtaining the required livestock was by using those cattle acquired through the marriage of a sister. The father-son or sister-brother relationship created a special link between two siblings illustrating how the raising of *roora* created debts within households.¹⁷⁴ Today, as was the case in the past, the families' involvement in a marriage is still one of the strongest factors facilitating for its stability.

However having seen the importance of *roora/lobola* in a patrilineal society, a distinction can be made with matrilineal kinship systems or societies where bride wealth does not command similar significance. Schneider¹⁷⁵, whilst writing on matrilineal kinship observes that bride wealth is paid in matrilineal societies but is regarded as primarily giving the man exclusive sexual rights over his wife and secondary rights over the children. Writing on Namibia, Dusing¹⁷⁶ also notes exceptions to patriarchal systems and identifies the Oshiwambo-speaking communities and those of the Kavango region of Namibia where a wife never loses her affiliation to her natal family. In this matrilineal system, women are able to inherit property including cattle through the matri-line. Similar emphasis on women can also be found in parts of Malawi where households are centred on the wife who has primary rights to the land through her natal lineage.¹⁷⁷

2.3.2 The Zimbabwean Ndebele: *Umtimba*

The Ndebele have often been portrayed as a warlike people who channelled most of their energies towards the war effort with their emphasis on a strong military organisation. Consequently, some believe that their social functions may have suffered and have been down played. It is however not unbelievable that the Ndebele engaged

¹⁷⁴ Smith 1998 *Journal of Southern African Studies* 515.

¹⁷⁵ Schneider and Gough *Matrilineal Kinship* (1961) 568, the author goes on to say, if the man would have primary rights in the children, this would be a negation of matrilineal descent.

¹⁷⁶ Dusing *Traditional leadership and democratisation in Southern Africa : a comparative study of Botswana, Namibia, and Southern Africa* (2002) 254.

¹⁷⁷ Kevane *Women and development in Africa: how gender works* (2004) 56.

in elaborate and protracted marriage ceremonies.¹⁷⁸ Similar to the Shona, marriage was a contract not between two individuals but between two families. Among the Ndebele an *umtimba* (marriage by negotiation) was a festive occasion in the past. It was the normal way in which a virgin girl married her groom who was in turn forbidden to visit her before this ceremony had taken place. The elaborate celebrations of *umtimba* constantly referred to the ancestral spirits adding a spiritual symbolism to marriage rites, similar to the Shona sentiments about the institution. However today the ritual has been greatly simplified and most references to the ancestors are omitted.¹⁷⁹

When finally a girl accepted her suitor's advances she sent her sister to the young man with the good news. As a token of her love for him, she removed her waistband, *ukhalo*, and put it around his neck. The young man would also present a gift, similar to the western concept of exchanging engagement rings, but some time would lapse before they got married. Exchange of these tokens of love and commitment among the Ndebele showed a strong resemblance to the way a young Shona boy and girl would exchange pieces of underclothing. The young man informed his girl about his wish to initiate marriage proceedings and in turn, the betrothed girl told her elder sisters and grandmother who all sought to learn more about the young man.¹⁸⁰ The girl's grandmother would then inform the girl's father.

In typical Ndebele tradition, the father of the bride deliberately would delay, for about a week, to give his consent.¹⁸¹ Secretly however, the girl would pass the information to the boy. It is only then that the young man informed his parents that he had fallen in love with a certain girl, and wished to marry her. In addition, common to marriage rites between the Shona and the Ndebele was the use and role of marriage intermediaries. Although the rules and procedures dictating their appointment might differ, among the Ndebele, the groom's parents would assign an elder brother of the groom's father or

¹⁷⁸ Nyathi *Traditional Ceremonies of amandebele* (2001) 112.

¹⁷⁹ Weinrich 1967 *Southern Rhodesia Native Affairs Department Annual* 53.

¹⁸⁰ Among the Shona it is the girl's paternal aunt, her father's sister, who conveyed the news and the girl's intention to marry to her father.

¹⁸¹ Nyathi *amandebele* 113.

cousin, to accompany him to the home of the prospective in-laws, *ukuyavela*.¹⁸² Like the Shona *munyai*, the young man's father looked for someone to be his go-between or envoy to the girl's father, *umkhongi*.¹⁸³

In typical traditional fashion, the girl's father would initially pretend to be uncooperative and continuously asked for further information. The emissary would continue nevertheless. The girl's father, when finally consenting to the request, would reply, "We can cement the relationship."¹⁸⁴ Today, the Ndebele make payment at this stage, the *igangaziwe*, which is similar to the Shona *rutsambo*, giving the young people the right to legitimate sexual intercourse. These payments never involved livestock, and in the past, the Shona paid them in the form of goats and hoes.¹⁸⁵

The girl belongs not to her father and mother, but to several relatives on the father's side and the mother's side. As such, the girl would visit her relatives to bid them farewell. During these visits she would receive marriage counselling from her relatives. After counselling her, the relatives would usually present with various gifts, in the form of mats, plates, baskets, goats or chickens. She would take these gifts to her home and would collect them on her first visit after the marriage. The marriage counselling was the cornerstone of all stable marriages among the Ndebele. Most of the problems she encountered during marriage would usually have been alluded to during the counselling sessions. This was her survival and "fall-back-on-kit."¹⁸⁶ However, custom dictated that before the marriage came into being, the girl was required to visit her prospective in-laws. During such visit, her close relative, *umfowabo*, usually an older sister or cousin would accompany her.

¹⁸² *Ibid* 112, where the Nyathi says, "The young man and his aide arrived at the girl's homestead in the afternoon. The girl's father would then call them in. As a sign that they are welcome, a reed mat, *icansi*, was offered for them to sit on."

¹⁸³ *Ibid*.

¹⁸⁴ *Ibid* 114.

¹⁸⁵ It is from these that the very word *rutsambo* (bracelet) is derived.

¹⁸⁶ Nyathi *op cit* 116, "When the girl left her parent's home to go away, her mother went to sit where she had been sitting, till she had left the homestead. This was meant to stabilise her marriage and when she left, she was not allowed to look back."

After both families have agreed to a marriage, the groom's family prepares a feast to welcome the bride. The bride, on saying good-bye to her relatives, is presented with gifts of money, clothing, and household utensils before she sets out in solemn procession for her husband's home. Her relatives carry her possessions. During the ensuing meal during which an ox from the husband's herd is slaughtered, the two families seal their new bond by commensality.¹⁸⁷

Many Europeans have judged the transfer of the bride as the point at which a new family comes into being contrary to the way in which the African people viewed this rite. The transfer of the bride and the bride-wealth payment are important elements in establishing a new family, but the contractual obligations entered into by the two families are not thereby fulfilled. The new union has still to prove itself fruitful and children must be born. For this reason the Ndebele like their Shona counterparts, even refrain from paying all bride wealth until children have been born. In the past, it is said, the last instalment of bride wealth was made only at the marriage of a couple's eldest granddaughter.¹⁸⁸ By the mid 1950s, Hughes and Van Velsen claimed that delayed payments had become the norm and that no bride wealth was paid until a marriage had existed for some years and proved itself as fruitful.¹⁸⁹

2.3.3 South African Zulu and Xhosa: *Lobola*

The *lobola* custom is easily the most important one of the customs of the Xhosa and Zulu of South Africa. Whereas westernised blacks, such as teachers, clerks, doctors and lawyers, have wittingly or unwittingly discarded completely the majority of the

¹⁸⁷ *Ibid* 117, Before reaching the grooms homestead, her party halts and sends a little girl, usually the bride's sister, to announce to waiting elders that she is looking 'for a place to stay.' She then hands over to them some money and a man from the party shouts: 'we have brought you an orphan. Are you willing to keep her?' the little girl then returns to her party, and the bride and her entourage solemnly enter the groom's homestead. The description of the bride as an orphan marks her symbolic severance from her own family.

¹⁸⁸ Weinrich *African Marriage in Zimbabwe* 54.

¹⁸⁹ Kuper *et al The Shona and Ndebele of Southern Rhodesia* (1955) 98.

customs and are never heard to be involved with *ukuthwala*, the payment of *ikhazi* is still a feature of the marriage of their daughters and of themselves.¹⁹⁰

The Government Commission on Native Laws and Customs appropriately defined *lobola* among the Zulu and Xhosa back in 1883. It held that *lobola* is “a contract between the father and the intending husband of his daughter, by which the father promises his consent to the marriage of his daughter, and to protect her, in case of necessity, either during or after such marriage, and by which in return he obtains from the husband valuable consideration, partly for such consent and partly as a guarantee by the husband of his good conduct towards his daughter as wife.”¹⁹¹

The cattle paid as bride wealth are called *ikhazi* in Xhosa and *ilobola* in Zulu. According to the Native Commission of 1883, the *lobola* custom is not peculiar to African society. It was held that among other definitions that, “we have endeavoured to trace its history.....traces of it appear among the Hebrews, also among the Greeks of Homer, the Romans, and the early German monogamists, while remnants of it are, even to this day, to be found in Norway.”¹⁹² While it can be argued that, the Commission was simplistic in its statement of the position and viewed the *lobola* custom as purely African, quite different from the dowry system of the Roman, Greeks or Norwegians. It is said that the *dos*¹⁹³ came from the woman’s guardian to the husband, and the aim

¹⁹⁰ Koyana *Changing Society* 3.

¹⁹¹ See Sir Jacob Dirk Barry, Cape of Good Hope. Commission on Native Laws and Customs, *Report and proceedings: Cape of Good Hope Commission on Native Laws and customs* (1883) 30ff, see also at 394 and 404, where there is evidence of the then Reverend Dr Callaway, Bishop of St Johns, and of petty chiefs and headman from the Engcobo district was obviously found helpful by the Commission; [Http://books.google.co.za/books?Id=R1MUAAAIAAJ&q=404#search_anchor](http://books.google.co.za/books?Id=R1MUAAAIAAJ&q=404#search_anchor) (Accessed 20/03/2010).

¹⁹² *Ibid* 29.

¹⁹³ Hunter and Gaius, *A systematic and historical exposition of Roman law in the order of a code* 4 ed (1803) 29, referring to the (dowry) *dos*, a contribution made by the wife’s family for her support during the time of her marriage. Such provision from the wife’s side was made by the *dos*, the property contributed by the wife or someone on her behalf towards the expenses of the new household. *Dos* might be given before or after marriage, or might be increased after marriage. It was a duty enforced by legislation to provide *dos* where the father possessed a sufficient fortune. *Dos* was of three kinds, *profectitia*, contributed by the father or other ascendant on the male side and *adventitia* if by the wife herself.

thereof was to save the husband the *onera matrimonii*¹⁹⁴, quite contrary to the source and purpose of *ikhazi* as explained.¹⁹⁵

In terms of Xhosa custom which bears great similarities to the Shona and Ndebele of Zimbabwe, *ikhazi* has always been paid in cattle or alternatively their monetary value. The number of cattle payable has always depended on the amount sought by the girl's guardian on the day of negotiations and is said to range between six and ten head of cattle. Young men of the groom's home drive the agreed number of *ikhazi* or a sizeable portion thereof, in broad daylight to the home of the girl.

There are rules governing this transfer and *lobola* is regarded as incomplete unless the respective families have concluded the formalities. It was customary that the bridegroom, often at the negotiations, describes the *ikhazi* cattle by their colours and sexes and ages. Alternatively he could request that the cattle be brought from their grazing areas to the father-in-law's homestead where the talks are taking place and he points out those he is paying out as *ikhazi* to his father in law. Custom regarded this mode of transfer as binding and ownership passed on to the bride's family there and then, and it made no difference whether he fetched the cattle after a day or month or a quarter.¹⁹⁶

In the case of *Moyeni v Nkuhlu*¹⁹⁷ a case that came from Kentani district, Sleigh P had no difficulty in finding that, 'payment of dowry cattle by word of mouth or by description constitutes sufficient delivery to pass ownership to the payee.' On a similar issue, in the

¹⁹⁴ Referring to the property contributed by the husband *ad sustinenda onera matrimonii*, also known as arras. The husband is under no obligation to give arras and the donation is entirely voluntary. The husband is also not permitted to give in arras a portion exceeding a tenth of his property and remains his wife's property subject to the husband's usufruct right during his life.

¹⁹⁵ Koyana *op cit* 3.

¹⁹⁶ Hosten *Introduction to South African law and legal theory* (1995) 639, where the author equates such transfer to the Roman-Dutch law that also recognises the passing of ownership as a result of *tradition longa manu*, that is, where the intending transferor points at the item, or describes it in full so that the new owner can go and take physical possession of it on a later and more convenient date.

¹⁹⁷ 1946 NAC (C & O) 2 where M Nel, agreeing with the findings of the learned president, submitted the following remarks, "I submit, illustrate the harmony of Roman-Dutch law and customary law on the aspects of modes of delivery."

case of *Ngcuzwana v Zimeno*¹⁹⁸, a case that came from the Mqanduli district, A agreed in 1952 to settle his debt to B with *ikhazi* he was to receive for his daughter. After that *ikhazi* was paid to A in 1958, he failed to honour the agreement and instead paid over those cattle to a third party, C, as *ikhazi* for his son. B then caused the cattle to be attached from C and the district court held that the cattle were not executable. When the matter went on appeal the question arose as to whether there was a pledge by A in favour of B.

As with the Zimbabwean Shona and Ndebele counterparts, the question whether the *roora/lobola* custom and its transactions constitute a sale of the woman or whether it is payment in trust to ensure the proper treatment of the bride in her new home have arisen.¹⁹⁹ The Commission of 1883 reported that, "a woman is not the slave of her husband. He has no property in her. He cannot, according to native law, kill, injure, or cruelly treat her with impunity. He cannot legally sell or prostitute her. It is only the abuse of parental and marital authority, and not the Kafir law of marriage, or the contract of *ukulobola*, which justifies the erroneous opinion that Kafir women are by Kafir law slaves to their husbands and parents, and can be treated as property."²⁰⁰

As Seymour accurately points out that, the woman can always go back to her father or guardian in the event of ill-treatment, to seek protection, something which could not happen if the woman were on the same category as 'goods sold and delivered.' The *lobola* custom goes like a thread through all the black communities of Southern Africa. Because the communal character of customary law, the nearest male relatives of the parties to date play such a prominent part at all stages of negotiations that it might be thought that the consensus is between the two families.²⁰¹ However, Kerr clearly

¹⁹⁸ 1959 NAC 49 (S) at 50 where Yates applied the case of *Kogini Nkalitshana v Mdyogolo* 3 NAC (1912-17) 208 (Umtata), with the aid of assessors who said, 'in the event of a pledge the cattle must be pointed out. Here they were not even in existence at the time, so there was no pledge. 'The claimant came into possession of the cattle bona fide and without notice of any prior claim, and they remained in his possession for three months before they were attached. It is clear that according to Native Law the claimant's rights in such a case as this are protected.'

¹⁹⁹ Seymour *Bantu Law in South Africa* 3 ed (1970) 142.

²⁰⁰ *Report and proceedings Commission on native laws and customs op cit* 30.

²⁰¹ *Koyana Changing Society* 5.

demonstrates that in Southern Africa customary law has gradually developed away from the concept of family 'ownership'.²⁰² Accordingly, the early customary law idea of the wife being the wife of the family is gradually disappearing.

Among the Zulu, marriage was effected by the exchange of bride wealth cattle for rights in a woman, who moved from the homestead of her father to that of her husband's father.²⁰³ As with all other system of marriage in Southern Africa, the most significant aspect of the transfer of bride wealth among the Zulu was that all children subsequently born to the woman became members of her husband's lineage. It similarly seems again that, African marriages resembled traits the colonial past. The colonial era in Natal introduced significant changes in marriage practices among Africans resulting in the creation of wage labour and a money economy, which caused a significant inflation in *lobola* in the mid-nineteenth century. As with their Zimbabwean counterpart, similar changes also took place among the Shona where *roora* among was misinterpreted to resemble traits of commercial debt rather than lineage debt.

Lobola paid by men who were socially regarded as commoners could amount to ten head of cattle, plus the *nquthu* beast, which was given to the bride's mother. This quickly became the standard amount demanded by fathers. On another social level, fifteen herd of cattle could be transferred as *lobola* for the daughters of headmen (*izinduna*) or men of status. However, there was no limit for the daughters of chiefs. As with the position adopted in Zimbabwe by the colonial administration in the mid 20th

²⁰² Kerr *The Customary Law of Immovable Property and of Succession* (1990) 49ff, see further in this regard, Cornell and Muvagua *Ubuntu and the Law: African Ideals and Postapartheid Jurisprudence* (2011) 227 who say, "under African customary law there is room for extended family members to participate in whatever decision that has to be taken, as long as the property is communally held." Although the writer makes this remark in the context of tangible property and customary law of inheritance, in a marital context his assertion qualifies as the wife is not only seen as belonging to her husband, but to the clan, the marriage is between two families and not individuals.

²⁰³ Ngubane H S "Marriage, Affinity and the Ancestral Realm: Zulu Marriage in Female Perspective," in Krige and Comaroff *Essays on African Marriage in Southern Africa* (1981) 84ff, the author says, "the journey of the bride (*umakoti*) was therefore both physical, in that the woman moved to her husband's family's homestead, and spiritual, in that she arrived as a member of a strange lineage but was progressively incorporated into her husband's lineage; at the end of her life she assumed the status of an ancestor in her husband's lineage."

century, the marriage regulations of 1869 in Natal required that the entire amount be transferred prior to formalisation of the marriage.²⁰⁴

2.3.4 CONCLUSION

By examining *roora* and *lobola* among the Shona and Ndebele of Zimbabwe and the Xhosa and Zulu of South Africa, it is evident that both played similar material, social, lineage and identity control functions. It is understood that the importance of establishing a new household as a constituent part of the wider extended family structure, continued to emphasise the notion of continuity of the group. Moreover, the dominance of this principle of communality and togetherness, guaranteed future co-operation in agricultural tasks among the individual households that were part-and-parcel of the communal mode of production. Thus although a measure of autonomy is granted to the new family, bonds of cooperation tie it to other units and so the extended family grows and is perpetuated. Bride wealth paid for a Shona daughter in the past went to her elder brother to enable him to pay *roora* for a wife.²⁰⁵ She thereby produced children for her husband's lineage while at the same time through her marriage providing bride wealth cattle for her brother who fathered children for her natal lineage.²⁰⁶

The bond created between the siblings who were members of the same household, meant a reciprocal relationship recognising the concept of *roora/lobola* debt in a traditional context.²⁰⁷ Stoneman and Cliffe however notes that, since commercialisation of the economy in the late nineteenth century, *roora/lobola* has progressively become perceived as a transaction between two men, the husband's father, and bride's father.²⁰⁸ *Roora/lobola* is also meant to accord the elderly a degree of control over the

²⁰⁴ Lambert *Undermining the Homestead Economy and idem, Africans in Natal, 1880-1899: Continuity, Change and Crisis in a Rural Society* (Ph.D. Thesis, UNISA, 1986) 58-59.

²⁰⁵ Gelfand *The genuine Shona: survival values of an African culture* (1973) 45.

²⁰⁶ Schmidt *Peasants, Traders and Wives* 15.

²⁰⁷ See also in this regard Kuper *Wives for Cattle: Bride wealth and Marriage in Southern Africa* (1982) 27, where the author says, "Other kin would also be involved in raising the *lobola*: debts that would need to be reciprocated."

²⁰⁸ Stoneman and Cliffe *Zimbabwe: Politics, Economics and Society* (1989) 73.

younger by assuming advisory and mediatory roles to the newlyweds. In pre-colonial Zimbabwe and South Africa, *roora/lobola* gave elders, not only a degree of control over their new daughter-in-law, but also their son.²⁰⁹

In addition, administratively, colonial authorities in both Zimbabwe and South Africa, actually used *roora* as a tool of control. It was functional to capitalism since men would engage in labour migration in order to pay bride wealth. The elders' concerns about bride wealth encouraged them to control their daughters and preserve their status as potential wives; hence they impeded their daughters' education and migration to towns or work outside the immediate community.²¹⁰ In both countries, colonial authorities co-operated with local elders in including *roora/lobola* as part of codified customary law.

Roora/lobola has long served to symbolise formation of family relations, the existence of a marriage, sexual identity and many other aspects of social identity and relationships.²¹¹ Even today, the practice of bride wealth symbolises the importance of constructing cultural identity among the Shona, Ndebele and their South African Zulu and Xhosa counterparts who, for historical reasons, wish to retain a separate political identity through adherence to particular distinctive customs. Communities in these countries agree on the traditional requirement that even when money is given in place of cattle, it is still referred to as 'cattle'.²¹²

Early colonial interpretations of *roora/lobola* in Zimbabwe and South Africa were misplaced and equated it straightforwardly with the sale of daughters for cattle.²¹³ This was a misinterpretation that reflected European view for property because until European colonisation, bride wealth was not understood to confer property rights. This is not to say that bride wealth did not serve material functions in pre-colonial Southern Africa. Materially, it has served to redistribute both scarce consumption resources like

²⁰⁹ *Ibid* 72, where the authors say, "they controlled land, livestock, marriage and behaviour."

²¹⁰ Schmidt *Peasants, Traders and Wives* 141ff.

²¹¹ Jeater *Marriage, Perversion, and Power: The Construction of Moral Discourse in Southern Rhodesia, 1894-1930* (1993) 14.

²¹² Malahleha *Contradictions and ironies: women of Lesotho* (1984) 5.

²¹³ Jeater *op cit* 148.

cattle as meat or cash and rights over productive resources such as land, cattle and the immediate labour of the young people marrying, and later the labour provided by their offspring.²¹⁴ Therefore, through *roora/lobola*, households secure both material production and reproduction.²¹⁵ The combination of these material functions depends upon the economic context of each family in which they take place.

The widespread observance of the long drawn-out marriage rituals among the ethnic groups of Zimbabwe and South Africa alike, facilitate this cyclical renewal of society, the invocation of ancestors which keeps alive the awareness that marriage customs derive from traditional religion an ideology related to the communal mode of production, indicating that the past is still vitally relevant to the people. Regardless of context, *roora/lobola* serves a multiplicity of purposes within society, with functions relating to the distribution of material resources; the establishment of relationships within and between lineages; the maintenance of social control; and the construction of social identity.²¹⁶ Capitalist penetration of rural areas has undoubtedly threatened the survival of many of African customs. Today, the fact is that African workers are caught up in a dilemma between an urban proletarian lifestyle on the one hand, and a peasant existence on the other, neither of which guarantees their social reproduction, they find themselves with no choice but utilise values and institutions of both systems.²¹⁷

Many young people may feel that *roora/lobola* has now taken a turn for the worse. On the other hand, the older generation are of another opinion and maintain that *roora/lobola* should persist. They still remember why it was established and they are aware of the gains made from it. Nowadays, if a girl is earning a reasonable salary, the parents may increase their demands to delay the marriage and to compensate

²¹⁴ *Ibid* 14, pointing out that, "rights to capacities vested in people are not the same thing as rights to property."

²¹⁵ Malahleha *Contradictions and Ironies* 5.

²¹⁶ Ansell "Because It's Our Culture! (Re)Negotiating the Meaning of 'Lobola' in Southern African Secondary Schools" 2001 *Journal of Southern African Studies* 698.

²¹⁷ Weinrich *African marriage in Zimbabwe* 56, where he goes on and says, "hence the Shona who are the most familiar of all Zimbabwean ethnic groups with the capitalist systems, cling to the traditional values not because of an emotional search for cultural identity, even if the latter is often the reason given by the people for preserving their marriage customs, but simply to achieve the maximum social stability in a period of rapid change. The conservatism of marriage institutions lends itself ideally to the task."

themselves for the prospective loss of income, and the girl may secretly help her suitor to make the payments.²¹⁸ Changes in socio-economic and social organisation that was typically characteristic of the African family have meant that to some extent, *roora* may fail to fulfil the very task for which it was created. Can we safely say the reign of noble *roora* has ended? Time will show if it will continue to be a safeguard for the traditional societies of South Africa and Zimbabwe.²¹⁹ While inconceivable in the past, it now also happens, especially in urban areas, that couples cohabit and live together without attempting to legalise their union by paying *roora/lobola*.²²⁰

2.4 ELOPEMENT

2.4.1 The Zimbabwean Shona: *Kutizisa* and *Kutizira*

There are other forms of traditional marriage, which overcome various difficulties in the normal procedures. One of these is the 'elopement' marriage in which the couple block some of the lengthy formalities of the normal marriage by eliminating control by their respective family heads.²²¹ Although it goes against the acknowledged ideal, even thirty years ago it was in some areas a more common form of marriage among the Shona.²²² In terms of this form of marriage, the bride leaves her home usually assisted by her prospective spouse, but without the consent of woman's father. The groom may instigate the arrangement and the head of his family may or may not be party to the scheme. Although either family may insist that the union be broken off or the girl returned, it is rare that they do not accept the *fait accompli* and start negotiating the

²¹⁸ Bourdillon *The Shona Peoples* 46, however, should this become known, it would be very damaging to the characters of both parties since the man has not shown his worth or his love and the foolish girl did not expect him to prove either.

²¹⁹ *Ibid.*

²²⁰ Nichols *Marriage and Divorce in a Multicultural Context: Multi-Tiered Marriage and the Boundaries of Civil Law and Religion* (2011) 90, 242, also observing that marriage has become far too easy to enter and dissolve. See also Mittlebeeler *African custom and Western law: the development of the Rhodesian criminal law for Africans* (1976) 53.

²²¹ Goody *Production and Reproduction: A Comparative Study of the Domestic Domain* (1976) 14ff, "strict parental control can sometimes be avoided by means of elopements, which may be followed by marriages contracted without parental consent."

²²² Holleman *Shona Customary Law* 113ff, this action may be taken by the girl in order to avoid an undesirable match or simply to avoid the long delay caused by the full negotiations.

payment of *roora/lobola* in the normal way. In practice the stubbornness of the couple or of one or both of the family heads can win the day.²²³

It is important here to say that elopement took two forms. In its first form, the Shona say that an elopement, *kutizisa* (flight), can take place anytime the young couple feel that they want to establish a household. They arrange to meet at night, usually at full moon, outside the woman's village from where the young man and his friends escort her to his village. On arrival at the young man's village, the young woman is assigned a sleeping place in her future mother in law's hut and some days later a marriage negotiator is sent to her village to inform her parents of the event.²²⁴

Her lover often decides on this form of elopement in situations in which the young woman has already become pregnant. For the Shona strongly believe that a young woman's first pregnancy is dangerous to her parents, causing them in some mysterious way, severe back pains resembling those suffered by women in childbirth. For this reason, pregnant women urge their lovers to remove them from their parents' home.²²⁵

In its second form, elopement marriages (*kutizira*), is distinguished from elopements called *kutizira*.²²⁶ In terms of *kutizira*, this is a unilateral action of the girl, without prior knowledge of her suitor (with whom she already has a relationship), with the intention to force the families to start marriage negotiations. Holleman, points out that *kutizira* is usually an act of desperation, hence it is sometimes referred to as 'flight' marriage. A woman elopes (runs away to) to her in-law's family for instance, where she wishes to avoid an arranged marriage with a man she strongly dislikes or because she got

²²³ Burdillon *The Shona Peoples* 43.

²²⁴ Weinrich *African Marriage in Zimbabwe* 58, where it is noted that, "...The young man himself or a representative from his family pretends on arrival to have come for a normal visit, but on leaving throws a token, usually a coin, to the people and shouts that the family may look for their daughter in a certain village. He then runs away as fast as he can, because the young woman's relatives will chase him and, if they catch him, beat him severely. If the woman's parents are prepared to consider the marriage, they accept the token, otherwise they return it. The same amount of bride-wealth is demanded in an elopement marriage as in a negotiated marriage, but it is much faster."

²²⁵ *Ibid.*

²²⁶ *Kutizira* in this instance refers to a situation in which a girl runs away from her home without being accompanied by her lover or his relatives.

pregnant and failed to arrange for an elopement marriage in terms of *kutizisa* above. She may put forward reasons such as the fact that her lover is temporarily absent, or because he is not willing to marry her.²²⁷ Because *kutizisa* is prearranged with the girl's lover while *kutizira* is not, the former is more likely to lead to a regular marriage. Nonetheless, *kutizira* is said to turn public sentiment in the girl's favour, with the result that the host family usually accepts her as a bride. If so, marriage negotiations will be conducted in the same manner as for first type of elopement marriage.

2.4.2 The Zimbabwean Ndebele

Among the Ndebele, marriage by elopement is also practiced and has been ritualized.²²⁸ Once the *igangaziwe*²²⁹ payment has been made, a young man could be assigned a hut in his bride's village and is permitted to sleep with her. Unlike the position in Shona custom, the Ndebele have no beliefs that a young woman's pregnancy will cause harm to her parents. In this case, the groom on one of his nightly visits wakes his bride and quietly leaves with her for his home and decides to elope his bride. To inform his in-laws of the elopement, he leaves a dollar or two under the pillow of his bed. The journey to the groom's home is not a real 'flight' as in a Shona elopement because both the man and woman are consenting parties. This custom is strongly reminiscent of the regular transfer of Shona brides but was alien to the Ndebele *umtimba*. Like the *igangaziwe* payment, this custom is a cultural borrowing from the Shona.²³⁰

The importance of the increase of elopement marriages among the Shona and Ndebele in recent decades is that, although marriage by elopement is a traditional form of

²²⁷ Holleman *op cit* 123 - 124, "When the girl arrives in her lover's village she offers herself as his prospective bride. His family may either accept her or start the marriage negotiations or they may send her back to her family."

²²⁸ Weinrich *African marriage in Zimbabwe* 59.

²²⁹ This is the first payment of *lobola* and similar to the Shona *rutsambo*, that gives the groom entitlement to sexual rights over his bride.

²³⁰ Weinrich *African marriage in Zimbabwe* 52, a few days after the bride's arrival, the groom's family sends their marriage negotiator to the woman's home and, if the young man had already paid his *igangaziwe*, no fine is imposed. The marriage negotiator is not threatened with violence for the simple reason that elopements normally take place after negotiations have at least been initiated.

establishing new families, it is a form particularly suited to a faster moving and more unstable social environment. These marriages are a response and adjustment to modern changes among traditional communities and are deemed legitimate marriages as their conclusion also respects family values.²³¹ One may argue that elders have always been opposed to elopement because it forces their hands and reduces their control over the young.²³²

Today many young labour migrants choose this form of marriage in order to be able to take their wives with them to the cities. Since they earn wages and can unilaterally pay either their *roora* or *lobola* as the case may be, and the fine without their fathers' help, there is little to restrain them from eloping with their brides. As has been observed before, one of the most pertinent reasons for what seems to be internal cultural transformation in practice, nowadays some parents take advantage of the whole concept of bride wealth and make outrageous demands as compensation for what has been spent on clothing and educating the daughter. This is one of the pertinent reasons *roora/lobola* has become a topic for heated debate.²³³

2.4.3 South African Zulu and Xhosa: *Ukuthwala*

The word *ukuthwala* means 'to carry' and is a custom among the Zulu and Xhosa whereby, preliminary to a customary marriage, a young man forcibly takes the girl to his home. For instance, the boy accompanied by one or two friends, will lay in wait for the girl when she goes to the river to fetch water, or to the forest to fetch a head load of firewood. The girl, though immediately aware what this is all about, namely that it is the road to marriage, always puts up resistance, but the resistance differs in degrees and

²³¹ *Ibid.*

²³² *Ibid.*

²³³ Chireshe and Chireshe "Lobola: The Perceptions of Great Zimbabwe University Students" 2010 *Journal of Pan African Studies* 218, the writers carried out a study on a sample of 45 Bachelor of Arts students from the Great Zimbabwe University (Zimbabwe) in an effort to reveal youth perceptions about the *roora* custom. The study revealed an unwavering support for the custom by the youth in general although criticisms were levelled against the practice. Among these was the fact that, *roora* tended to relegate women's status by attaching a value to them thereby facilitating patriarchal holds over women. However, the respondents supported the custom for its role in building family relationships.

no girl is known to have escaped from a *thwala* party.²³⁴ Nevertheless, this is all planned beforehand and does not amount to abduction in the criminal/common law sense.

Later on the day of elopement, messengers are sent from the young man's home to report at the girl's home that the people must not keep on searching, the child is with them. Negotiations about the marriage and *ikhazi* ensue, and if things go smoothly, the girl is already a wife at her husband's home. *Ikhazi* is paid as agreed, and there is no question of damages for the *thwala*. To put it in another way, any damages that might have been payable for the *thwala* come together with *ikhazi*.²³⁵ This custom has all the elements of the common law crime of abduction but has not been declared to be contrary to public policy and where it has been performed, no criminal sanctions have followed.²³⁶

2.5 CHILD PLEDGING

2.5.1 The Zimbabwean Shona: *Kuzvarira*

Another form in which a valid customary marriage could be concluded was in terms of child-pledging called *kuzvarira* by the Shona. It has however become very rare if not obsolete, owing largely to legislation protecting the rights of children. In the past, it was possible for a man to favour a friend or an associate with the promise of a small daughter in marriage.²³⁷ Today, such promises are made rarely and only in times of dire need and are a reflection of the deteriorating economic situation of Zimbabwean

²³⁴ Koyana *Changing Society* 2 where the author says, "if negotiations breakdown, whether because the young suitor is *persona non grata* to the woman's people or for any other reason, the girl soon finds her way to her home. The father or guardian then becomes entitled to a beast known as *thwala*."

²³⁵ *Ibid.*

²³⁶ Koyana *op cit* 2 where the author says, 'the *ukuthwala* custom has made no favourable impression on westernized people, and it is accordingly not practiced by them.'

²³⁷ Andifasi J in Kileff and Kileff *Shona customs* 28, who makes a note that, when the tribes became more settled and people started cultivating crops and rearing cattle, the manner of paying *roora* changed. The son in law was expected to give five goats and a few bushels of corn to the parents of his fiancée. Therefore, the more a man had in crops and livestock, the easier it was for him to pay *roora/lobola*, however for men of little material wealth, pledging their children in marriage to elder men in the future was a way to guarantee livelihood of the woman's family.

peasants. Particularly after a bad harvest, a family without enough to live on may try to relieve the situation by marrying off a small girl and using the *roora* to buy food for the family.

In such a case, the girl stays with her parents until she reaches a marriageable age, and even then, the parties accept that should she reject the man/proposed husband, cannot force her to go ahead with the marriage. In spite of the uncertain future of the marriage, there is an incentive to the husband in that it involves a smaller *roora* payment than is normal without stigmatizing the marriage as cheap. In any case *roora* is returnable should the union not take place. In practice, the girl may well accept her destined husband, proud to have been of service to her family in time of need.

From a poor man's point of view, child-pledging stabilises their own families, for in giving away their daughters, they guarantee the cohesion of their own households. Yet the utter dependence of fathers-in-law on sons-in-law in this marriage arrangement represents an utter reversal of normal in-law relationships.²³⁸ However, legislative intervention such as the African Marriages Act²³⁹ states that, "any contract or arrangement made under which any girl is in consideration of any payment, loan or gift promised in marriage to any man shall not be enforced in law unless the girl is of marriageable age and consents to the union."

2.6 POLYGAMY AND WIDOW INHERITANCE: The Shona and Ndebele of Zimbabwe and Zulu and Xhosa of South Africa

In a traditional Shona family, a man can have as many wives as he could afford, provided that he did not neglect any of them so much as to make them dissatisfied and

²³⁸ Holleman *Shona customary law* 116 - 117 who says, "If he (a Shona household head) runs out of staple food he has to barter a few cattle in order to obtain food needed for the sustenance of his family. If a man has no more livestock he will, as a last resort, borrow the necessary cattle, and by way of 'security' promise his creditor that he can marry his daughter if he is unable to refund the loan. It is a fact that in time of drought and starvation there is a sharp increase in the number of *kuzvarira* marriage arrangements."

²³⁹ African Marriages Act No. 29 of 1951.

ready to sue for divorce. The more wives a man has, the more children he is likely to have, and a large group of descendants meant a large labour force to work in the fields of the family head, which in turn resulted in wealth and high status. In fact, few men are able to afford more than one wife until they were relatively old and influential members of the community, while the rest remained with a single wife throughout their lives, whether by choice or for lack of means. Nowadays, shortage of land in the rural areas and the expense of keeping extra wives and children in the towns, make polygamy an economic burden rather than an asset. According to Balicki and Wells, "in Zimbabwe, polygamy is accepted by the traditional religions and about one in ten women live in polygamous unions."²⁴⁰

The influence of Christianity and European culture has reduced further the incidence of polygamous marriages. In upper-class circles in the cities, people look down on a man who takes more than one wife.²⁴¹ Customary law did not condone a situation where a woman had more than one husband. In the case of *R v Ncube*²⁴², before the Southern Rhodesia High Court, the accused, an African woman, pleaded guilty in a magistrate's court to a charge of bigamy based on the fact that she had entered into a second customary marriage during subsistence of another under the Native Marriages Act.²⁴³ The court held that, in Southern Rhodesia, polygamy under customary law is

²⁴⁰ Balicki and Wells *The Pendulum Culture?: Integration of Young Muslim Immigrants in East London* (2010) 98; see also the Organisation for Economic Co-operation and Development. Development Centre (OECD) *Atlas of gender and development: how social norms affect gender equality in non-OECD countries* (2010) 278, where the centre while reporting on the Zimbabwean family code makes the observation that polygamous marriages are three times more frequent in rural areas than in urban areas. [Http://www.oecd.org/document/0,3746,en_2649_201185_46462759_1_1_1_1,00.html](http://www.oecd.org/document/0,3746,en_2649_201185_46462759_1_1_1_1,00.html) (Accessed 15/11/2011), the OECD was formed on the 14th of December 1960 by the signing of the Convention on the Organisation for Economic Co-operation and Development. The Convention was originally signed by twenty countries and today fourteen countries have become members of the Organisation. The Organisation analyses and compares data to predict future trends. It also states as its mission, the promotion of policies aimed at improving economic and social circumstances of communities around the world. To achieve this, the OECD provides a forum in which governments can work together by sharing experiences in order to find solutions to common problems.

²⁴¹ Bourdillon *The Shona Peoples* 49.

²⁴² 1959 (I) R & N 466.

²⁴³ Act No. 23 of 1950.

recognised, but that customary law does not recognise polyandry and that under customary law the accused would have committed the offence of bigamy.²⁴⁴

When a man had more than one wife, the first one was called *vahosi*. If a man married again he would have to obtain prior approval from the *vahosi* for him to take another wife. Polygamy was a way of life with the Shona. The practice exemplifies the survival imperative that calls for many children, and a big family group. The first reason for polygamy is the desire or almost instinctive wish for the clan to get in numbers so that it could defend itself against attack from outside. Secondly, was the moral aspect whereby the man was allowed to find release for his sexual desires within a marriage arrangement rather than for him having to move outside his family and so bring him into conflict with other men. Monogamy could encourage adultery. For instance, when a wife is breast feeding her husband was not permitted to have sexual relations with her.²⁴⁵

Again, if the wife is barren a husband could seek another wife. Further, after the wife had passed her menopause a husband could have relations with her although there is doubt this practice is strictly adhered to.²⁴⁶ It could well happen that when the first wife is growing older she suggests to her husband to find a younger woman and enter into a polygamous marriage in terms of the *barika*²⁴⁷ custom. If he already has a woman in mind, he might require his wife to meet her and see if the two will get on well together. It is possible too, that the father-in-law may be willing to give a younger daughter to the

²⁴⁴ The Magistrate, having doubts about the correctness of *R v Sigiwe* 1918 SR 69, referred the case to the High Court for review. The learned appeal judge, Beadle J, went on to hold that there is no customary law offence of bigamy. Though polyandry is not recognised and a woman's second marriage during the subsistence of another marriage would be contrary to customary law and thus invalid, the general rule is that the second 'husband' would only be regarded as an adulterer.

²⁴⁵ Gelfand *The Genuine Shona* 177.

²⁴⁶ *Ibid.*

²⁴⁷ Nyoni *et al* "Language change: The special case of Shona in the era of the HIV/AIDS pandemic" 2010 *Zimbabwe International Journal of Languages and Culture* 77, where the writers point out to the prevalence of polygamy in contemporary Shona society by saying, "...people still maintain the traditional names, for example, '*barika*' (polygamous marriage) meant a man married to more than one wife and staying with them in the same homestead. This marriage practice has since assumed a new meaning in the modern word in that married men who have many girlfriends are said to be polygamous as reflected in statements like '*barika remazuva ano*' (the new form of polygamy) or '*barika remashefu*' (the rich men's polygamy) this is because the rich can buy their many 'small houses' (unofficial wives) houses to stay even in different towns and roam from one family to another.

man who married the older one, a custom known as (*bondwe*), and if father-in-law agrees the *roora* payable is reduced. As the man acquired more wives, there was the inherent creation of different houses within a single homestead. The usual practice is for the husband to spend a week with each wife in her home in rotation.²⁴⁸

2.6.1 The Zimbabwean Shona: *Kugara Nhaka*

Another way in which a man can acquire a further wife is in the event of the death of his elder brother whereby he is expected to inherit the deceased's wife in terms of the *kugara nhaka* custom should she be willing to accept him. A widow is provided with a husband from her late husband's family at the *kurova guva* ceremony.²⁴⁹ When a woman accepts the 'new' marriage, she and her children become part of the family of the deceased's brother.²⁵⁰

In practice the *samukadzi*²⁵¹ spreads a mat on the ground and the deceased's younger brother, *babamunini*, is then asked to sit on the mat so he can be given the deceased's wife. The deceased's wife is asked to jump over the prospective husband's weapons or *tsvimbo* in Shona (which traditionally can also comprise of a knobkerrie, spear and axe) and after that she picks up the weapon and hands it to the man who is to be her husband. The women present all ululate and the men clap their hands and personal belongings such as clothes, are now handed over to members of his family.²⁵²

However, women seem to oppose widow inheritance much more strongly than men. One woman was noted saying, "Should my husband die before me, I shall refuse to be inherited. I shall stay without a husband in my husband's home and look after my

²⁴⁸ Gelfand *The Genuine Shona* 178.

²⁴⁹ On this day the wife or wives and all the unmarried children of the deceased, as well as his property, are taken over by members of the family. Thus a younger brother takes over the wife and unmarried children, in as much as he takes over the property.

²⁵⁰ The position is however different under Ndebele custom where such a widow merely raises seed for the house of her late husband.

²⁵¹ The *samukadzi* here is the deceased's eldest sister who was officiator at the *kurova guva* ceremony.

²⁵² Goldin and Gelfand *African law and custom in Rhodesia* (1975) 293 where the writers say, "However if the wife of the deceased has a son who is grown up, even if he is unmarried, she might easily prefer, especially if she is beyond child-bearing age, to remain in her home and look after it and the land and allow her son to be responsible for her."

children. If my husband's relatives make this impossible for me, I shall leave them and go to live with my parents. I have no desire to disturb the peace and freedom of my sister-in-law by entering into her home. If I did, she would surely accuse me of witchcraft."²⁵³

2.6.2 The Zimbabwean Ndebele: *Ukungenwa*

Similar to the Shona concept of *kugara nhaka*, is the Ndebele practice of *ukungenwa*. Under the *ukungenwa* practice, the widow had options availed to her. She was required to choose whether she wanted one or other of the deceased's brothers to become her new husband or she could simply chose remain in her home with her youngest son, but under the general jurisdiction of her eldest son, the new head of the family.²⁵⁴ The Ndebele widow also had the option of going back to her natal home, in which case she would be free to marry anyone whom she desired. In a survey in Matabeleland by the Women and Law in Southern Africa Trust, the majority of the respondents mentioned the fact that the widow had the option of deciding what she wanted to do.²⁵⁵

The widow would be given the freedom to chose whomever she wanted to look after her or be her next husband. She would either choose a husband among the next of kin or give the spear to her child if she does not want *ukungenwa*. This practice is highly similar to the Shona if we substitute the spear for the bowl of water in terms of Shona rites when pinpointing her proposed consort. As with the Shona, if Ndebele custom is to be followed strictly, a situation arises whereby upon the death of a husband whose matrimonial home (*kraal*) was situated in an urban area, the widow would be entitled to retain occupation of the matrimonial house until her death, whereupon the youngest child would be entitled to take over the house.

The communal mode of production under which Zimbabwean marriage institutions and customs evolved required large and stable families. These were guaranteed by social

²⁵³ Weinrich *African marriage in Zimbabwe* 67.

²⁵⁴ Dengu - Zvobgo *et al Inheritance in Zimbabwe Law, Customs and Practices* 2ed (1996) 106.

²⁵⁵ *Ibid* 106.

pressures on every adult to marry and by the values attached to enduring family units within the larger kinship groups. The long negotiations aimed at giving stability to marital unions, and the marriage negotiators, who acted as society's representatives, guaranteed the fulfillment of the marriage contract by the families of both bride and groom. Forms of marriage such as succession to widows reinforced those values that lent permanence to the extended family.

2.6.3 South African Zulu: *Ukungena*

By way of comparison it is worthwhile to shed some light on the traditional practices of the Xhosa and Zulu of South Africa where similar traditional practices find prominence, particularly in the rural setup of KwaZulu Natal and the Eastern Cape regions of the former Transkei and Ciskei. Their traditional laws and practices are not wholly dissimilar from those of the Shona and Ndebele in terms of the practice and principle behind 'widow inheritance' as valid form of concluding a polygamous marriage at customary law.

Amongst the Zulu, the *ukungena*²⁵⁶ practice is the focal point when it comes to dictating the rules of succession to widows in indigenous law. It is also referred to as the levirate custom, finding prominence among the Xhosa speaking Bhaca and Ntlangwini ethnic groups of the Eastern Cape as well as the Zulu and Pondo ethnic groups of KwaZulu Natal. The custom provides that a widow be induced as Koyana²⁵⁷ says, "to accept a consort for the purpose of keeping alive the marriage between her and her late husband's people."

This custom is in essence similar to the Shona custom of *kugara nhaka* and the Ndebele *ukungenwa* custom. It is believed that the desire to make lifelong family bondages could explain the origins of the custom of *ukungena*, as an integral part of Zulu family law, so that if the widow was still of child bearing age she would continue to

²⁵⁶ similar to the Ndebele custom of *ukungenwa* in meaning and purpose.

²⁵⁷ Koyana *Changing Society* 81.

bear children for her late husband's family.²⁵⁸ In this regard therefore, the Shona, Ndebele and the Zulu all believed in the perpetuation of the lineage group.

Bekker²⁵⁹ identifies three main objectives for providing a widow with a male consort, namely; (i) to enrich and strengthen the deceased's family with more children; (ii) to prevent strangers by blood from being attracted to her, which frequently happens if she is not so accommodated, and thus introducing bastards into the family; and (iii) to provide an heir for a man who has died heirless.

According to Krige²⁶⁰, "by the *ngena* a junior takes the wife of his deceased elder in order to 'raise up seed' to the latter, and this is resorted to as a means of preventing the home from being broken up by the marriage of the widows. No cattle pass for *ukungena*, but one head of cattle belonging to the deceased's estate is customarily killed for the occasion. In addition, the raiser of seed is entitled to be paid one head of cattle for the *ukungena*."

In a claim for compensation for one beast in terms of Zulu custom, in the case of *Radebe v Mazibela*²⁶¹, a certain Mazibela entered into an *ukungena* marriage with one Martha, a widow in his father's home (*umuzi*), and eventually fathered three children by her. Being Christians, however, the members of the *umuzi* did not mark this event with the slaughter of a goat or any other formality. Because of this lapse, Mazibela was branded an adulterer and thrown out of court when he sought compensation before the Lions River Native Court in 1937.

²⁵⁸ Davel and Jordaan *Law of Persons* (2005) 6, who says, "...a male is appointed to have intercourse with the widow in order to sire (more) children for the house of the deceased."

²⁵⁹ Bekker *Seymour's Customary Law in Southern Africa* 5ed (1989) 286.

²⁶⁰ Krige *The social system of the Zulus* 4ed (1962) 182, see also in this regard Cape of Good Hope Commission on Native Laws and Customs *op cit* 27.

²⁶¹ NA 1 HWK 2/1/2/1 Case 6/1937 where George Mazibela testified that his father had ordered him to *ngena* the woman, Martha, after the death of her husband, a brother of George and a member of the *umuzi*. He was clear that the reason for *ukungena* was to maintain control over the widow. The idea of the *ukungena* was to prevent the woman leaving the kraal and getting married elsewhere. He argued for compensation because it is native custom that a man who *ngena's* a woman is paid for his services and receives a beast for each child born.

In both Zulu and Pondo customs the widow does not go to the family home of her consort, but to the contrary he is required to come to her at the family home of her late husband.²⁶² Usually he does not reside with her but merely visits her from time to time. However, no son of a deceased family head is permitted to contract an *ukungena* marriage with any of his father's widows as this is regarded as taboo.²⁶³ The early Native Appeal Courts (NAC) made many observations regarding the *ngena* custom. In the case of *Manyosine v Nonkanyezi*²⁶⁴, Stanford J, of the former NAC in South Africa, was quoted saying, "*ukungena* is one of great antiquity, and it probably originated in former times owing to the preponderance of females over males caused by frequent inter-tribal wars and the desire to keep the same descent or blood in the families."

Whilst one may argue that polygamy has no place in contemporary African families, it must not be overlooked that in the appropriate setting the institution may actually present economic benefits. Traditionally, if a man had many wives the family's crop yields increased, as the labour to cultivate the land was abundant. Perhaps a more imperative reason for the emergence of polygamy was that a man with many children apart from being economically well off, enjoyed a feeling of safety in numbers, consolidating the relationship between polygamy and the concept of self-preservation.

2.6.4 South African Xhosa: Quasi *ukungena*

In his book, Koyana²⁶⁵ talks about *quasi ukungena* and takes note of three ethnic groups among the Xhosa, the Thembu, Gcaleka and Bomvana who, according to him, adopt a puritan attitude in sex matters. Seemingly, sex between a man and a woman married to the same clan is deemed incestuous. The conclusion to be drawn from this is

²⁶² *Makaula v Matatu* 2 NAC 44 (1910) (Libode).

²⁶³ *Ngiyana v Jomose* 1949 NAC (S) 147 (Port St. Johns).

²⁶⁴ 1 NAC 114 (1906) (Ngqeleni).

²⁶⁵ Koyana *op cit* 83.

that once a woman is married into the family of her husband, this cuts the ties she had with her maiden family and becomes part of her husband's clan until she dies.²⁶⁶

Interestingly the Xhosa do not practice the *ngena* custom. According to De Ridder²⁶⁷, "among the Xhosa for example, widows of a man usually remain at the deceased's *umzi* (home), others establish their own *umzis* with their grown children and yet others and yet others return to their childhood home to join the *dikazi* - the husbandless women who have borne children." If the widow did not desire to remain at her late husband's home, she had an opportunity to leave. This issue found application in the case of *Nolwatshu v Tshikitshwa*²⁶⁸ where it was held that, "the woman by her departure from the plaintiff's 'kraal', had broken the *ngena* union and was liberty to marry another man so the plaintiff's claim for damages for adultery should be dismissed."

However, it was expected that a widow satisfy her sexual desires from men outside the clan to which she belonged and there was no hindrance placed in her way, but it was deemed proper for her to engage in intercourse at her late husband's family home. Children so conceived were regarded as entirely legitimate, and considered to be born "on the mat", that is, the mat on which she used to sleep with her late husband. On the other hand, children conceived while the widow lived away from the deceased husband's family home were referred to as born 'off the mat'.²⁶⁹ All children born to a widow belong to her late husband's heir and he is entitled to any *lobola* paid for them.²⁷⁰ This is because *lobola* was paid for the widow and 'cattle beget children' it is said.²⁷¹

²⁶⁶ When saying that ties were cut this does not mean that she was no longer part of her maiden family's life but for the purposes of traditional legal reality.

²⁶⁷ De Ridder *The personality of the urban African in South Africa: a thematic apperception test study* (2003) 19.

²⁶⁸ 3 NAC 290 (1916) (Ntabankulu).

²⁶⁹ *Noseyi v Gobozama* 1 NAC 214.

²⁷⁰ *Dumezweni v Kobodi* 1971 BAC (S) 30.

²⁷¹ Eekelaar and Šarčević *Parenthood in modern society: legal and social issues for the twenty-first century* (1993) 43, where whilst writing on the Southern Bantu ethnic groups, the writers say, "although a man acquires a woman with his cattle, the Bantu only refer to the children that woman will bear." See also in this regard, Kuper *The Social Anthropology of Radcliffe-Brown* (2004) 277, who says, possession of children is determined by the marriage payment; see further Isichei *A history of African societies to 1870* (1997) 146.

2.7 SERVICE MARRIAGE

2.7.1 The Zimbabwean Shona: *Kugarira*

Apart from child-pledging (*kuzvarira*) as a way of concluding a valid customary marriage among the Shona, there was another type of traditional marriage for a poor man who had no means of raising sufficient marriage payments.²⁷² This marriage is known as *kugarira*²⁷³ in Shona. In this case, the husband did not deliver *roora* (bride wealth) for his wife. However, he remained entitled to a rightful claim in any children ensuing from the union. The woman did not leave her home upon marriage and instead the husband would take up residence with his wife's family.²⁷⁴ Such a man could arrange to work for his father-in-law instead of paying *roora*. The husband was in the position of a bondsman to his father-in-law's family. However, he could later be freed of his service obligations and allowed to set up an independent homestead after many years of marriage. This used to be the normal marriage in areas where cattle were scarce. Interesting to note was the fact that the son-in-law's had to set up residence at his in-law's homestead thereby suggesting what can be argued as a shift from a patrilineal to matrilineal kinship.²⁷⁵

The service marriage (*kugarira*) came with symbolisms of its own. A ceremony was performed and the 'penniless' son-in-law would climb up a tree as a sign to the woman's

²⁷² Chigumi "Kugarira," or "Ugariri" 1923 *Southern Rhodesia Native Affairs Department Annual (NADA)* 79, where the writer says, "The custom of *kugarira* means literally 'to wait for' or 'to stay.' Briefly, it is the practice by which a man of a native tribe wishing to marry resides at the village of a parent or guardian with a marriageable daughter, and there serves personally, in return for which he is given the daughter to wife."

²⁷³ Chitando A and Madongonda A M "Intricate space: the father-daughter relationship in Zimbabwean Literature and culture" in Muchemwa and Muponde *Manning the nation: father figures in Zimbabwean literature and society* (2007) 175, the writers describe the marriage by saying, "the son-in-law pays brideprice through provision of free labour to his in-laws for a stipulated period of time....after this period the husband takes his wife to his own homestead."

²⁷⁴ Schapera "Matrilocal Marriage in Southern Rhodesia" 1929 *Man* 114, where the author says, "in such cases marriage becomes matrilocal in contrast to the patrilocal marriage which normally prevails among the southern bantu."

²⁷⁵ Chigumi 1923 *Southern Rhodesia Native Affairs Department Annual* 79, where the writer says, "...the origins of system among the natives is not definitely known, but it is suggested that it had a vogue in most Bantu races who were not rich in cattle or small stock. One is familiar of course, with the instance from the bible of Jacob and his seven years service for Rachel."

folk that he was in future a bondsman to them. His head was shaven as he hung from the tree the symbolism here being, he was now a son of the place (*muranda*).²⁷⁶ For the duration of his servitude, the husband was expected to respect and take commands/orders from his father-in-law, and to perform various services, such as tending the gardens, fetching firewood for his mother-in-law, taking the place of his father in law when the latter was absent, and so on. The bondsman could at some point wish to break away for certain reasons in which case custom required him to hand over any rights in his first born daughter to his father-in-law or pass on the *roora* for such girl child.²⁷⁷ An agreed payment in cattle obtained from the son-in-law's own labour was also acceptable.

A case heard in 1945 indicates that the son-in-law had to wait a considerable time for his emancipation. In *Nyahonodo v Mbarika*²⁷⁸, a certain Nyahonodo married Mbarika in 1923. He had paid 3 Pounds to his father-in-law and was a 'bondsman' (a man engaged in brideservice), and remained so until 1945. His wife had borne three children, two of whom survived. He now claimed a divorce and the custody of both children, stating he was willing to offer a further 2 Pounds for them.

The true position in terms of custom was that although the husband continued to reside at his father-in-law's home for considerable time, he always had full claim to his children. The mother's people had no rights in them although it might happen that owing to the dynamics of their residence, the in-laws could exercise considerable control over such children. Actually, children of such a marriage could inherit from their father and take their father's totem (*mutupo*), and in the event that the father (or bondsman) died before completing his term of service, the son, who was heir to his father, had to compensate his mother's people. If the son was too young, the brother of the bonded

²⁷⁶ Schapera 1929 *Man* 116, the author goes on to note that, "even a term of bondage does not release the *mugariri* (one lying in wait) from his condition of bondage. Only the payment of another female or the means of getting one makes him free to move to a kraal of his own choice."

²⁷⁷ By passing on the rights in his daughter, the bondsman gave his father-in-law the right to receive bride wealth when such daughter got married, cancelling the *roora* debt he incurred by entering into the service marriage.

²⁷⁸ NAZ CR 10/45 (Sipolilo) 16 May 1945 S 2033.

husband could take the deceased's place by inheriting both his rights, liabilities, including the widow.

The essence of bringing to light the *kugarira* marriage, lays in the fact that matrilocal residence may be primarily determined by economic factors, and also that, in the same society patrilocal and matrilocal institutions may coexist. Some have correctly noted that the husband's service did not dispense with the requirement for *roora* for the validity of marriage but rather served as a temporary substitute for the payment of bride wealth.²⁷⁹

Kugarira could have appealed to the peoples' notions of the ideal marriage relationship, the bride remained with her father and mother, the children grew up under the maternal grandparental eyes, the addition of the husband to the kraal, and his service increased the importance of the father. Moreover, the proximity of the bride's parents assured her fair treatment. Now that all men could earn cash in wage employment, however, marriages based on long-term service, as opposed to bride wealth payments, have now practically died out.²⁸⁰

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2.8 COHABITATION AND PRESUMPTIONS

Although the marriage by payment of *roora/lobola* (bride wealth) is the traditional way of marriage, it sometimes happens that couples form consensual unions that are unregistered and for which no bride wealth has been paid.²⁸¹ The unions in which a couple cohabits without any form of payment to the bride's family, are known as *mapoto*²⁸² unions among the Shona. *Mapoto* unions are viewed with disfavour and it is said that in a rural area a man's relatives would not allow him to bring a woman to his home without paying *roora* for her.²⁸³

²⁷⁹ Schapera 1929 *Man* 117, "....it is possible that from this point of view we may even be able to regard the custom of *kugarira* as a contract for the ultimate payment of *lobola*."

²⁸⁰ Bourdillon *The Shona Peoples* 44.

²⁸¹ Mittlebeeler *African custom and Western Law* 43, who writes that it often happens in urban areas, where custom has been 'badly battered', that a couple will live together without attempting to legalise their marriage.

²⁸² Literally meaning 'pots' implies here that the parties living together, sleep and cook together.

²⁸³ Gaidzanwa *Images of women in Zimbabwean literature* (1985) 68ff.

Women living in consensual unions in urban areas have often been stigmatised and called prostitutes because they behave in an unconventional manner. Nonetheless, one may argue that long cohabitation resembles regular marriages in many respects, as they are often stable unions that may last for many years or even a lifetime. The partners regard each other as husband and wife with the man being responsible for providing for the woman and her children and the woman is expected to be faithful to her partner.²⁸⁴ Sometimes a girl's family may try to break up her *mapoto* union or try to get the husband to pay bride wealth. In most cases, however, these girls may find it difficult to get married often because they are divorcees or because they have illegitimate children. Where the girl has already entered a *mapoto* union, her family often has little choice but to accept the husband.

Thus, the tendency to avoid the meticulous formalities of a traditional marriage complying with customary law requirements is particularly visible among professional, better-educated urban and wealthy women. Rather than contracting a formal marriage, these women prefer unmarried cohabitation or prefer to have lovers who do not live with them because this allows them to maintain their liberty. Should the male partner attempt to curtail the woman's autonomy, then she can leave him without the complications that normally arise in cases where bride wealth has been transfer and needs to be returned.²⁸⁵

Similarly, among the South African counterparts, the right to an entitlement to cohabit may become implied. The position is therefore that long cohabitation, with or without the receipt by the woman's guardian of substantial number of cattle, raises a presumption that the woman's guardian has given his consent to the arrangement. Bekker²⁸⁶ has pointed out that what results from the cohabitation is similar to the estoppels of Roman-Dutch law, where the guardian allows the couple to live together and be regarded as husband and wife bearing children. It would be strange if the guardian suddenly

²⁸⁴ Bourdillon *op cit* 319 – 320.

²⁸⁵ Oppong "From Love to Institution: Indications of Change in Akan Marriage" 1980 *Journal of Family History* 197ff.

²⁸⁶ Bekker *Seymour's Customary Law* 116.

terminated their cohabitation only to disrupt family life in which his daughter and her children are comfortable. In any event, there is no likelihood of him suddenly taking over the duty to maintain the wife and children of another man.

2.9 CONCLUSION

In the past, Zimbabweans and South Africans alike, paid bride wealth in cattle. When the herd of cattle from a son-in-law was driven into his father-in-law's homestead, the father-in-law would call upon his ancestors to announce to them solemnly that cattle had been handed over to him for his daughter. The symbolism behind this was that his daughter would go to another village to bear children for their lineage and that the ancestors should bless her and make her fruitful. Even today, when money is paid instead of cattle, many ethnic groups take the cash they receive into the cattle byre to tell their ancestors, 'here are the cattle that will continue the line.' It follows from the hypothesis postulated that if lineage continuity is little valued, a bride wealth payment made to enshrine this value will lose in importance. It will become smaller and often cash will replace the livestock. A monetisation of this payment necessarily involves a transformation of its ritual significance. It will be less closely associated with lineage continuity and rather resemble remuneration for the parents of a bride, a payment given to them, which they use for any purpose they like.

The communal mode of production under which African marriage institutions and customs evolved, required large and stable families. These were guaranteed by the social pressure on every adult to marry. Long drawn out negotiations aimed at giving stability to marital unions, and the marriage negotiators, who acted as society's representatives, guaranteed the fulfilment of the marriage contract by the families of both bride and groom. Other forms of marriage, such as child-pledging and widow inheritance, reinforced those values. Child-pledging aimed at stabilising the domestic units of the poor and widow inheritance lent permanence to extended families. Elopement marriages however were unpopular with the elders. They lessened the

control of the elders over the marrying couples and gave the young a tool with which they could force their families to consent to the marriage partners of their choice.

For whereas the other forms of marriage were aimed at stability, elopement marriages introduced a flexibility which accommodated change, especially in ethnic communities whose traditional economic base had been thoroughly destroyed. The vitality of traditional values and institutions can thus be judged by their adaptability to new social conditions.²⁸⁷ A young man can no longer approach the parents of his fiancée directly. An intermediary has to be employed and he may be paid a small sum for his service.²⁸⁸

2.10 RIGHTS AND OBLIGATIONS ARISING OUT OF MARRIAGE

2.10.1 Introduction

Contrary to some misconceptions, the wife is not simply bought as property for example as a slave, but the husband's family have obligations too towards the wife and her family beyond the mere payment of bride wealth. The payment of bride wealth gives rise to a series of rights and obligations with respect to the woman. In the case of divorce, the woman's family may not pass her to another family and she must be returned to her kin. The husband's family can complain to the woman's family if she fails to perform her duties, and the woman's family should defend her and protect her if she is badly treated.

By payment of bride wealth, a man establishes his right to have children within his marriage contract and even those children begotten by another man with his wife are his. On the other hand children of an unmarried woman are retained by her own family and regarded as members of her lineage and clan. Thus, central to the Shona and Ndebele marriage and bride wealth payments, is the transference of rights over the

²⁸⁷ Weinrich *African marriage in Zimbabwe* 69.

²⁸⁸ Andifasi J in Kileff and Kileff, *Shona Customs* 30.

offspring of the woman. Both marriages also confer on the husband exclusive sexual rights over his wife.²⁸⁹

The husband is obliged to treat his wife in the correct manner. He must remember to behave in a correct and considerate manner towards her, even though he has the right to sexual relations whenever he so desires. If he is cruel to his wife, she may leave him. Therefore, she is not in a fit state to have sexual relations when she is menstruating, or when she is feeding her baby. It would simply seem to be that a woman cannot bear children in this state and the purpose of marital relations is for issue to be produced. Sex is not simply a pleasurable or natural act; its purpose is to lead to conception.²⁹⁰

It is believed that children are wanted for various reasons. As the father and mother grow, it is comforting to know that their children can help them. In this context, the first-born son has a special responsibility towards his parents. A daughter is also welcomed because she establishes an alliance with another family, affinal relationship. Perhaps the most potent reason for having children is that through them the parents and grandparents are remembered in the next world. A marriage must provide sons to pray to the ancestors and daughters to provide the sons and daughters for the next generation.²⁹¹ According to Dennis²⁹², "Africans desire to have many children who will remember them and with whom they can ritually communicate." He further makes a note that for leaving kin, an ancestor is believed to procure benefits, such as health, long life and the begetting of children.²⁹³

²⁸⁹ Bourdillon *op cit* 48, this does not apply to those daughters of Chiefs for whom no bride wealth is or was paid, a fact which supports the relationship between sexual rights and transfer of bride wealth.

²⁹⁰ Gelfand *The genuine Shona* 170ff, where the author goes on and says, "Indeed when she is menstruating she is considered to be dangerous or harmful state and those who come into contact with her, like strange children may be adversely affected. Should her husband have relations with her it was reckoned that he might easily become ill."

²⁹¹ Ampofo A A "Whose 'Unmet need'? Dis/Agreement about Childbearing among Ghanaian Couples" in Arnfred *Re-thinking sexualities in Africa* 2ed (2004) 122, who says, "the importance of children makes childlessness an important reason for divorce."

²⁹² Dennis *Living, Dying, Grieving* (2008) 22.

²⁹³ *Ibid* 22 and 25.

Also central to the marriage contract was the obligation on part of the bridegroom to pay *roora/ikhazi* to his father-in-law within a reasonable time after he had taken his wife. The timeframes were not rigidly stipulated, however it was not unusual that the girl would often be at her husband's home for three to five years without the full *ikhazi* having been paid. Here the bride's father invoked a remedy provided by custom, the *ukutheleka*²⁹⁴ remedy. In terms of *ukutheleka*, the wife would visit her home and did not return to her husband after what was perceived as the normal time for a visit lapsed. In response, the husband would send messengers to fetch her and they are informed why she is held.²⁹⁵ It is argued that this remedy brought stability during subsistence of the marriage relationship.²⁹⁶

However, it was not only the father of the bride who was entitled to invoke the *ukutheleka* remedy. It was held in the case of *Kiva v Sifuba*²⁹⁷ that among the Xhosa in Pondoland, a man was entitled to *theleka* the girls born of his daughter if she and her husband had already died while there was *ikhazi* still outstanding. In another case, *Gama v Gama*²⁹⁸, the Native Appeal Court (NAC) held that the plaintiff caused the separation by refusing to meet his obligation to pay *lobola* and the desertion could not be deemed to be malicious as the wife had sufficient cause for refusing to go to him because he had not paid any *lobola* whatsoever.

²⁹⁴ Mqeke *Basic approaches to problem solving in customary law: a study of conciliation and consensus among the Cape Nguni* (1997) 115ff, who whilst writing on the Cape Nguni, defines *ukutheleka* as the lawful 'impounding' of a married woman by her legal guardian at her maiden home to enforce payment of balance of dowry (bride wealth) and secondly as a way to punish a husband for ill-treatment of his wife. See also in this regard Mager *Gender and the making of a South African Bantustan: a social history of the Ciskei, 1945-1959* (1999) 29.

²⁹⁵ Koyana *Changing Society* 12, where the author says, "Even if the balance of *ikhazi* was four cattle, the girl has to be released on payment of one beast and so the process can go on till the agreed balance is fully paid."

²⁹⁶ Dewar and Parker *Family law: processes, practices, pressures : proceedings of the Tenth World Conference of the International Society of Family Law, July 2000, Brisbane, Australia* (2003) 494.

²⁹⁷ 12 NAC (1940) (C&O) 161.

²⁹⁸ 1937 NAC (N & T) 77 see also in this regard *Mbani v Mbani* (1939) NAC (C. & O.) 91 which arose two years later.

To the contrary, in 1949 the same court departed from custom and earlier decisions in *Ntsimango v Ntsimango*²⁹⁹, and said that the impounding of a wife under the custom of *ukutheleka* was no defence to a claim for restitution of conjugal rights as the wife could not be impounded for payment of dowry. It was held that a wife was generally under the marital power of her husband and was expected to obey him, and if she made her return conditional upon the payment of *ikhazi* she made herself a party to the enforcement of a demand against her husband, and such conduct was nothing else but malicious desertion. With regard to the frequency of this remedy, evidence showed that there was no limit to the number of times the *theleka* remedy could be invoked.

In *Mdizeni v Ngqolosi*³⁰⁰, a case that came from Mount Fletcher district, the plaintiff invoked a remedy called *ukuphuthuma*³⁰¹ for several occasions and the wife eventually returned to him and remained for a period of five months. In Xhosa custom, there is no limit as to the number of times one can be use the *ukuphuthuma* remedy. She then quarrelled with her mother-in-law and left for her father's home again and this time the plaintiff took no steps to take her. Balk P held that, the return followed by a stay of five months was a genuine one, and the plaintiff was not absolved from his legal obligation to *phuthuma* despite the several *phuthumas* in the first instance. One can therefore conclude the emphasis on preservation of marriage that the *ukutheleka* and *ukuphuthuma* remedies bring particularly under Xhosa customary law.

²⁹⁹ 1949 (1) NAC (S) 143, the learned President, Sleigh P said that although under the native law of certain tribes a husband's failure to pay *ikhazi* was an affront to his wife and entitled her father to impound her, nevertheless the custom was entirely opposed to the mutual obligations of husband and wife married according to Christian rites.

³⁰⁰ 1960 NAC (S) 29 (Mount Fletcher).

³⁰¹ Masina N "Xhosa Practices of Ubuntu for South Africa" in Zartman *Traditional Cures for Modern Conflicts: African Conflict "Medicine"* (2000) 174, the writer notes that, "in this case the husband sends representatives from his family to negotiate his wife's return....both families meet in a forum and usually the wife's family persuade their daughter to remain with her husband."

2.11 DETERMINATION OF PROPERTY RIGHTS AND THE STATUS OF WOMEN

2.11.1 An Overview

It is a common misconception that women had little or no status in traditional African societies. There are many reasons given for this misconception. Women are said to be bought and sold in marriage like chattels; at the death of a husband, his widows are inherited with his estate; since women could not represent themselves in traditional courts but had to be represented by a senior male relative, and were minors all their lives. It is interesting to note that women have more influence in the homestead than they dare, or their men folk care to admit.

For example, the attitudes of wives are more influential in bringing about changes in medical practices, hygiene and even in agriculture than those of their husbands. This kind of subtle influence and authority may have worked well enough in a relatively stable traditional society, but it is liable to be eroded as society changes. When a woman loses her role as supporter of the family through agriculture, and instead becomes totally dependent on her husband's salary, it might not be immediately apparent that traditional norms governing the relationship between husbands and wives begin to be inapplicable.³⁰²

At customary law, women were said to have no *locus standi in judicio* and were supposed to be incapable of conducting a court case properly. When bringing a dispute to a traditional court, a woman was supposed to be accompanied by a male relative to represent her and to speak on her behalf. He was supposed to advise her on how to present her evidence and on acceptable terms for the solution of the dispute. On the other hand, a woman traditionally had limited responsibility for offences, particularly obvious in cases of adultery, which were treated by tribal courts as the sole responsibility of men. In practice, a husband might punish an unfaithful wife in private, and adultery with a woman known to be morally loose was not taken seriously. Although a court could occasionally deride a woman for trying to conduct her own case, even in

³⁰²Bourdillon *op cit* 54.

the 1970s women did sometimes take complete responsibility for the cases they brought before Chiefs' courts, to the effect that practice did not strictly accord with the idea that women were legally minors.³⁰³

In the Zimbabwean case of *Mabigwa v Matibini*³⁰⁴, one of the points for consideration was whether or not the woman Matibini, a widow, had a right of action to claim for the custody of her late husband's children. The defendant, Mabigwa pleaded that she had no *locus standi in judicio* under Native law and that her natural guardian, who was her brother, should have instituted the action. The Native Court held that, In Native (Tebele) law, a widow has always had the right to appeal for the protection of her husband's estate, and it is not uncommon for widows to inherit in trust for their own sons.³⁰⁵ In another case, *Nozara v Nerera*³⁰⁶, a widow was similarly permitted without comment or objection to sue for an inheritance unassisted.³⁰⁷ A widow's refusal to be inherited by her deceased husband's brother or a member of his family in no way affects her ownership of cattle in her own right.³⁰⁸

In contemporary, Southern Africa, many women have in practice generally acquired parity with men. Women can become owners and managers of businesses and farms. The elevated legal status of women has been upheld in light of the official recognition of their part in the war of liberation. In Zimbabwe for example, the Legal Age of Majority³⁰⁹

³⁰³ Child "Family and Tribal Structure and Status of Women" *Southern Rhodesia Native Affairs Department Annual (NADA)* 65ff.

³⁰⁴ 1946 SRN 117 (Unreported), Heard on 30th July 1946 in an appeal from a decision of the Assistant native Commissioner, Lupani, N Robertson further held that, "Where the guardian refuses to do his duty, it would be competent for a court to investigate the matter on behalf of the widow and to place the estate under proper control." See also Hopley J in *Rex v Gutayi and Others* 1915 SR 49, 61 in this regard, emphasizing the issue of women's emancipation.

³⁰⁵ See also Whitfield South African Native Law 34 "...every Native woman has right of action, unassisted, against the guardian of her late husband's estate, to protect herself, her children and property, from improper administration."

³⁰⁶ SRNC 21/1/44.

³⁰⁷ Jackson "Notes on Matabele Customary Law" 1926 *Southern Rhodesia Native Affairs Department Annual* 34, where the writer says, "...women were in many instances appointed as guardians among the Matabele. There is thus sound precedent for the continuance of the practice in cases where the court making such order is satisfied as to the fitness of the woman seeking appointment. The future happiness and well-being of the children must naturally be considered."

³⁰⁸ See *Nyongwana v Mapiye* 1947 SRN 423.

³⁰⁹ Act No. 15 of 1982.

officially gave all people, including women, full adult status on reaching the age of eighteen. In practice, legal rights are of little use if social and economic pressures can be used to prevent women from asserting their rights.

Therefore, the subtle traditional influence of women is changing into an open force for progress and change. Although women are losing something of their traditional standing that relates to their position in the extended family rather than in a nuclear family of husband, wife and children, they often acquire social and economic independence which improves their position in relation to their husbands. Bourdillon is of the view that some women are able to improve their position through the changes that are taking place, but many find themselves losing their traditional position without being able to find a new one.³¹⁰

2.11.2 The Matri-Estate: The Zimbabwean Shona and *Mombe Youmai*

In the traditional Shona family, the husband was normally the head of the household. In particular, all family property belonged to him and his wife could claim little in the case of dissolution of marriage by death or divorce. Sometimes, the husband successfully claimed even the clothes he had given to his wife when the marriage broke up. Nevertheless, a woman could always acquire some property of her own such as by trading in pottery or basketwork, and many professional diviners and healers were women who could earn a healthy income from their art. A woman could build up a small herd from the *mombe youmai* (cow of motherhood) she received at the marriage of a daughter. Her children or patrilineal kin and not the husband, inherited a woman's property.³¹¹

Apart from bride wealth, which is universal in Zimbabwe, the Shona have preserved two other livestock protestations linked with fertility. 'The cow of motherhood' seems to be customary among the Ndebele as well but has been preserved in practice only among

³¹⁰ Bourdillon *op cit* 57.

³¹¹ Holleman *Shona Customary Law* 350 - 368 see also in this regard Howman "The Matri-Estate" 1961 *Southern Rhodesia Native Affairs Department Annual* 38ff .

the Shona.³¹² The two payments are *masungiro* (a pregnancy ritual) and *mombe youmai* (cow of motherhood). Both are linked to matrilineal ancestral spirits. Weinrich quoting one researcher, Esterhuysen, who in the 1970s worked among a Shona group, the Karanga, found that 81 percent of his informants still observed the *masungiro* ritual.³¹³ Traditionally the *masungiro* ritual takes place as soon as a young wife discovers that she is pregnant. The marriage negotiator who helped arrange her marriage is sent to her parents to announce the pregnancy and a formal meeting is arranged. The young expectant mother, accompanied by her husband, brings two goats to her parents' village, a male goat that is killed for a meal and a female goat that is dedicated to her mother's (mother-in-law) female ancestors.³¹⁴

Esterhuysen, found that the *mombe youmai* is still given by 89 percent among the Karanga.³¹⁵ This cow is not part of the bride wealth proper, but a special gift made by the son-in-law to his mother-in-law and through her to her ancestral spirits.³¹⁶ As Goebel³¹⁷ observes, nowadays the gift may take the form of a suit of clothes, a head of cattle or payment of cash although considerably lower than that which is paid for the *roora* (bride wealth). It is believed that if the cow is not given, the wife would become barren or mad, or children born out of the union would die. According to Shoko³¹⁸, "the spirit of a mother-in-law who dies without having received her cow is believed to cause illness. A young husband must pay this cow to his mother in law reasonably early in his marriage, and his mother in law must remain the sole owner of it and its offspring.

³¹² Weinrich *African Marriage in Zimbabwe* 40.

³¹³ *Ibid* 41.

³¹⁴ Campbell *et al Household livelihoods in semi-arid regions: options and constraints* (2002) 64; see further on the ritual significance of *masungiro*, Hansson Mwana *ndi mai: toward an understanding of preparation for motherhood and child care in the transitional Mberengwa District, Zimbabwe* (1996) 146-148, since fertility is believed to be handed down from mother to daughter, the *masungiro* goat is given as a seal that fertility has once again been passed on to a new generation.

³¹⁵ Weinrich *African Marriage in Zimbabwe* 42.

³¹⁶ Sylvester *Producing women and progress in Zimbabwe: narratives of identity and work from the 1980s* (2000) 51.

³¹⁷ Goebel *Gender and land reform: the Zimbabwe experience* (2005) 99, also noting that upon divorce the woman may take such property with her.

³¹⁸ Shoko *Karanga indigenous religion in Zimbabwe: health and well-being* (2007) 60, who further explains that, the son-in-law's family could suffer from long-term illness and to resolve the anomaly, a ritual is performed to appease the mother-in-law's spirit or consult a traditional healer.

Under no circumstances may a member of her family use this cow or its offspring, and if this should be done, the cow must be replaced as soon as possible.

2.11.3 South African Zulu and Xhosa: *Ubulunga* Beast

Similar to Shona custom and the *mombe youmai* we find the *ubulunga* beast among the South African Xhosa. The *ubulunga* is described as, 'a small portion of hair plucked from the tail-brush of cattle, signifying a state of right, property, or ownership in these cattle.'³¹⁹ A mother may make small necklaces and fasten these round a sick infant's neck or arms to protect the child or cure any ailments troubling him/her.³²⁰ The *ubulunga* is intended to cheer the girl by making her an owner of cattle, and it is believed to ward off misfortune from the wearer and is given to the married daughter or married sister for its ritual significance.³²¹ So important is the beast that it is sacred and may not be taken, nor even confiscated by the chief.

The wearing of hairs from the tail-brush of the beast is a way of appealing to the ancestral spirits for their salvation in times of pain, sickness and danger.³²² It is part of custom that even the husband is not allowed to drink the milk from this beast. Anyone could do the plucking of the hairs but a mystic characteristic of the ritual was that it had to be done on a cloudless morning after which the hairs were weaved into a necklace and worn. Soga³²³ firmly finds that the purpose of the *ubulunga* is twofold. Firstly, it is used by an unmarried girl to counteract any circumstances inducing heart soreness or hysteria and secondly, it is worn by a married woman to prevent any illness or evil from

³¹⁹ Koyana *op cit* 47.

³²⁰ Radcliffe-Brown and Forde *African systems of kinship and marriage* (1987) 80.

³²¹ Hunter *Reaction to Conquest 2ed* (1961) 235ff, the author also discovers the *ubulunga* beast as being of great ritual significance, namely a means of influencing the ancestral spirits (*amathongo*) in similar manner to ritual killings. According to the author, the beast of the brush or the beast of the ancestors is found at every household among the Pondos.

³²² *Ibid* the author notes that, when diagnosed sickly and in need of an *ubulunga* beast, the young woman will go to her maiden home. There beer will be made for her and a heifer calf driven out for to take to her married home.

³²³ Soga *The Ama-Xosa: life and customs* (1932) 205, the author shows further that, the great significance of the *ubulunga* custom among the people observing it, inasmuch as the woman will of her own accord betake herself to her maiden home to ask for an *ubulunga* beast if she has not been given one.

coming upon her or her children and to dispel illness to which they are already subject. According to Kuper³²⁴, a mother may protect her children from sickness by making them necklaces from the tail-brush of the *ubulunga* beast which belongs to the ancestral herd of her own lineage. In the case of *Siduli v Nopoti*³²⁵ in the Transkeian Native Appeal court, the President of the Court rightly described the *ubulunga* beast as a sacred pledge or protection of woman's interests.

In addition, the *ubulunga* beast can be a temporary or permanent beast. It is temporary where the bride's father or guardian wishes to have the beast returned within a reasonably short time. In this case, the cow is handed over to the bride and as soon as it has had a female calf (for it to give more progeny), the bride's father approaches his son-in-law and makes an allocation of the heifer which now becomes the permanent *ubulunga* beast.³²⁶ The mother cow reverts to the full ownership and control of the father or guardian. On the other hand, the guardian may simply allocate a particular heifer or a cow as a permanent *ubulunga* beast. That beast will then, with its progeny, remain at the married home of his daughter until the dissolution of the marriage when she could leave with the beast to her natal family as it was her personal property.

On the other hand, among the Zulu, we find *endis* cattle that may be distinguished from the *ubulunga* beast. Seymour has been criticised for equating the two. The submission, however, in this regard is that the two though, similar to the extent that the cattle are contributed by the father or guardian of a married woman and are identified with the house of the woman, they differ in material respects and should not be

³²⁴ Kuper *Social Anthropology* 277, further that, the wife drinks the milk from the *ubulunga* beast during the initial stages of her marriage and her children are more attached to her as the tail-brushes of the beast protect them. The writer also points out that it is only at adolescence that children born of the marriage become fully incorporated into their father's lineage.

³²⁵ 1 NAC 20 (1897) (Idutywa).

³²⁶ See also in this regard the case of *Jakavula v Melane* 2 NAC 89 (1910), in the Elliotdale district of the Bomavanas the plaintiff claimed a beast and its three increases after the death of his daughter, saying they were a temporary *ubulunga* beast and its progeny. Headman Ngaba gave evidence in the court above, giving details of the nature and operation of the temporary *ubulunga* custom. The court relied on his evidence and laid down that when a temporary *ubulunga* beast has been given, its first heifer calf must be allocated, as soon as it has been weaned, as the final *ubulunga* beast.

assimilated as has been done.³²⁷ The two customs only correspond to the extent that the cattle are contributed by the girl's father or guardian and are identified with the girl's lineage.

Dealing with *endisa* cattle, the learned President of the Bantu Appeal Court of Natal in the case of *Vilakazi v Nkambule*³²⁸ stated that, "it was customary to send one, two, or three head of cattle to the bridegroom's kraal at the time of the marriage." It was further established that, according to Zulu law and custom, there was never an obligation imposed on the father to handover the gift, he had a choice whether to make or not make the gift. In another case, *Mtshali v Mhlongo*³²⁹ the court held that in terms of true Zulu custom, *endisa* cattle given by a bride's father on her marriage become property of the bride's house. Upon dissolution of marriage, Whitfield³³⁰ mentions that a father is entitled to set-off *endisa* cattle he may have paid against the *lobola* cattle he is required to return upon dissolution of marriage.

Indicative of the *mombe youmai* among the Shona, the *ubulunga* beast is always a cow or a heifer. Like the *ubulunga* beast, the *umai* beast is allowed to increase but there are few cases where a sizeable herd of cattle are found, having originated from the *umai* beast. Whilst sometimes the *umai* beast is used in sacrifice, this is unknown to the *ubulunga* custom. Unlike the *ubulunga* beast, the *umai* beast is used for helping the woman's own blood relatives to obtain a wife if they need assistance. The *ubulunga* is never used for *ikhazi* (bride wealth). Furthermore, the *umai* beast is not returnable to the contributor whereas the position is different with the *ubulunga* beast when it is a temporary allocation.

³²⁷ Koyana *op cit* 51.

³²⁸ NAC 1944 (N & T) 57, putting the matter beyond doubt, the President held that, 'Zulu law and custom has ever imposed an obligation on the father in this respect. He is perfectly free to make or not make a gift.'

³²⁹ 1944 NAC (T & N) 71.

³³⁰ Whitfield *South African native law* (1948) 535.

2.12 TERMINATION AND DISSOLUTION OF MARRIAGE

2.12.1 GROUNDS FOR DIVORCE

2.12.1.1 Barrenness

To the traditional Shona, the main purpose of a marriage contract was the continuation and growth of the family group, and for the modern Shona man it remains important to have sons to support him in old age and to carry his name to prosperity. The importance of children to Shona marriage was illustrated by the practice that the wife only acquired her own cooking fire after the birth of her first child as a symbolism of her new marriage.³³¹ For that reason barrenness on the part of the wife, or her early death before she had given birth to many children, was regarded as failure by her family to fulfil their side of the contract. In such a case, either they would provide another daughter or the marriage was dissolved with a return of bride wealth, or a portion of it if the deceased wife had born some children before she died.

In the case of *Mapfumo v Mangoma*³³², husband and wife had been married for 16 years, *roora* of 10 head of cattle and 6 Pounds having been paid. Seven children were born of the marriage, of whom five had been born alive but all had died at the date of claim. The defendant wife then deserted her husband. The trial court allowed a deduction of two head of cattle from *roora* returnable on divorce in respect of the wife's services. The emphasis that flows out of the practice of bride wealth is on the number of children or siblings born of the union. Should the man fail to have issue from his wife and he feels he is not responsible for this, he might expect another wife to be given to him by his father in law. The practice by which the father-in-law is expected to give a younger sister of the wife is known as *bondwe*.

³³¹ Prior to this she shared the kitchen and food supplies of her mother in law.

³³² Heard on the 15th July 1946 Salisbury where Kelly N.C held on appeal, that a deduction of four head should be allowed because it is not contrary to Native custom to deduct for the number of children born alive, but not reared; Kerr N.C further held that, because the wife was the cause of the divorce and further, it is reasonable to deduct for children born alive but deceased at date of claim.

Sterility on the husband part, although not in itself a sufficient cause for the dissolution of marriage is a shameful condition. If this is suspected, the husband may make secret arrangements with a close kinsman to impregnate his wife in his name.³³³ If however, the husband cannot satisfy his wife sexually, relations between them may become intolerable and result in the dissolution of the marriage.³³⁴ Similarly, where the husband has more than one wife, if one of his wives becomes jealous of her husband's relations with her co-wives and she feels neglected as a result, she may raise such as an acceptable ground for divorce.³³⁵

Among the South African Xhosa and Zulu, it was possible that the impotence of the husband counted as a fault for which the wife and her guardian could claim forfeiture of the *ikhazi*.³³⁶ Perhaps custom here was in consonance with a feature of Roman-Dutch Law under which, if at the time of entering into marriage a party is impotent the marriage is voidable.³³⁷ Roman-Dutch law goes on to provide that if at the time of entering into marriage one of the parties was aware of the position, such party cannot approach the court.³³⁸ Some decisions were thus in keeping with the principle that divorce here is dependent on fixed grounds and is judicially controlled.

³³³ Gelfand *The genuine Shona* 175, where the author says, "so strong is the insistence on issue that if the husband finds for some reason that he is unable to perform the sexual act or that his semen appears abnormal and that the failure of the wife to fall pregnant rests with him, his younger brother or nephew may have sex relations with his wife provided that she agrees *kupindira* (to enter). After all the blood is the same as his and a child resulting from this arrangement belongs to him."

³³⁴ Gelfand *Medicine and magic of the Mashona* (1956) 238, where it is stated that a boy may before marriage undergo a traditional test for fertility in which he is made to masturbate and his semen is dropped into the water, if the semen sinks it is thought to be strong and fertile, but if it floats it is considered weak and infertile and the boy may be given traditional medicines to improve his fertility.

³³⁵ May *Zimbabwean women in colonial and customary law* (1983) 26, see further in this regard, lebeau *et al Women's property and inheritance rights in Namibia* (2004) 183, citing cultural reasons for either party asking for divorce as, infidelity by the husband or the wife, obsessive jealousy, or alcohol abuse by either party.

³³⁶ Carton *Blood from your children: the colonial origins of generational conflict in South Africa* (2000) 76, the author writes that, homestead wives might leave their husband because of sexual problems as in the case of woman in southern Zululand who in 1903 left her husband citing his attempts to compel her to take herbal drugs to enhance her fertility as a cure for his impotence; see further Sinclair, Heaton and Hahlo *The law of marriage* (1996) 390.

³³⁷ *B v B* 1964 (1) SA 717 (T).

³³⁸ *D v D* 1964 (3) SA 598 (E).

In the case of *Ndatambi v Ntozake*³³⁹ this Roman-Dutch law approach on this issue was witnessed in Xhosa law. The court held that both the dissolution of the marriage and failure of issue were due to the impotence of the husband and that through that inability to discharge the duties of a husband the respondent's daughter had sustained grievous wrong for which the appellant was wholly responsible. The woman had lived for twelve months with the man. In another case, *Siyekile v Qike*³⁴⁰ a case that came from Tsomo, native assessors expressed the opinion that an impotent person is not entitled to recover the whole of the *ikhazi* paid by him as the marriage is annulled on account of his defect. In this case, the husband alleged that his defect was since cured, but the *ikhazi* was still apportioned between the husband and the wife's guardian.³⁴¹

Sometimes a husband declares the reason for his repudiation of his wife. Barrenness of a wife is very serious and unpopular among traditional Zulu and Xhosa and when a wife turns out to be barren the husband and/or her relatives speak of her as an ox (*inkabi*) and she can hardly expect a happy married life. In spite of this popular feeling against barrenness, the wife and her guardian are consoled with the husband's forfeiture of *ikhazi*. The issue arose in *Natu v Tshati*³⁴² a case that came from the Flagstaff district. The wife was deliberately driven away because of her barrenness and when a meeting of the relatives was later convened the husband failed to take advantage to reconcile. It was held that the wife was entitled to an order of dissolution of the marriage and forfeiture of all *ikhazi* by the husband. According to Koyana, these decisions are in full accord with customary law.³⁴³

³³⁹ 1 NAC 3 (1895) (Willowvale), where the court made the order that only six out of ten cattle should be refunded to the husband.

³⁴⁰ 1 NAC (1904) 73.

³⁴¹ See also *Ncose v Nandile* 4 NAC (1920) 197 in a case from Kentani district, where the assessors to whom the point was referred, stated that according to custom, as the girl had returned to her father intact, the appellant was entitled to the return of all his *ikhazi*. Here the woman had lived with her husband for three years. The court's reasoning was in accord with Xhosa law but the court recalled and applied *Siyekile's* case and apportioned the returnable cattle.

³⁴² 1937 NAC (C & O) 167.

³⁴³ Koyana *Changing Society* 34.

2.12.1.2 Adultery

Adultery with a married woman is always unlawful, and if the husband finds out, he may beat his wife and sue the man for compensation that is higher than compensation for a betrothed girl.³⁴⁴ However, it is not unknown for a couple in need of money to arrange for the wife to seduce a more wealthy man at a prearranged spot where he can be caught in the act and will have to pay compensation to the husband. On the other hand, a man who commits adultery with the wife of another is believed to have a dangerous influence over him, and should the latter fall ill, the adulterer must keep away, since his presence, it is believed, might cause death.³⁴⁵

Especially sinister is adultery with the wife of a close kinsman. Some say if one sleeps with the wife of his brother or father, it is as if you wanted to kill him so that you could marry the wife. It is something like practicing witchcraft.³⁴⁶ In such a case, compensation may or may not be claimed depending on the proximity of the relationship, but the mythical threat to the husband must be averted by a symbolic gesture and solemn promise to leave the woman alone, followed by a public act of reconciliation such as eating, drinking or taking snuff together.

Similarly, incestuous adultery was a taboo among the South African Xhosa and Zulu and was a ground for dissolution of a customary marriage and return of *ikhazi* and *lobola* respectively. In the case of *Gulwa v Jim*³⁴⁷ it was said that, 'incest among most Native tribes is regarded with abhorrence and constitutes a serious offence against the husband and his people.'³⁴⁸ If he should condone her conduct, he is indeed not permitted to have intercourse with her.

Adultery could be inferred if a strange man enters the village and is caught living with one of the villager's wives. Her husband could exclaim that, 'I have been put to shame.'

³⁴⁴ Howman "Witchcraft and the Law" 1948 *Southern Rhodesia Native Affairs Department Annual (NADA)* 7ff.

³⁴⁵ *Ibid.*

³⁴⁶ Holleman *op cit* 230.

³⁴⁷ 17 NAC 1945 (C & O) 58.

³⁴⁸ *Ibid* 58.

This means that although married, he has lost his marital dignity and his wife has become common.³⁴⁹ In Shona customary law, it seems that the woman's confession of adultery or naming the seducer, frequently when in labour, or her action in striking the adulterer or seducer with her under-apron, constituted strong, practically irrefutable evidence of who committed the seduction or the adultery.

However, the attitudes of the colonial seemed to reverse the true position of custom. In 1938, in the case of *Nyamina v Samson*³⁵⁰, the majority of the court apparently held that "the circumstances disclosed did not constitute sufficient corroboration of the woman's confession." Marital fidelity on the part of the husband is not essential to Shona marriage, but the husband is supposed to keep his wife informed of his extra-marital relations, and a failure to do this may be regarded as endangering his children

Again in the same year, in *Makonsenkenyi v Paradzanvi*³⁵¹, court stated that, "... the Appeal Court considers it desirable to record its view that, in modern circumstances when many natives are sufficiently sophisticated to take advantage (of the custom that the woman's striking a man with her apron constitutes sufficient evidence of adultery), it cannot accept this action as an irrefutable presumption." The inference of an occurrence of adultery was also dealt with in *Joshua v Fani*³⁵² where the court held that the custom of striking the adulterer with an under-apron "should in these days be accepted as corroboration with great reservations."

However, the position seemed to have changed in the 1970s when the judiciary corrected its position on Shona custom concerning standards of proof for adultery. In *Masembura v Yawo*³⁵³, a case that arose in 1972, the court held that new rule requiring corroboration was unknown and constituted an importation of South African civil law,

³⁴⁹ A woman is regarded as the support of a village and should she commit adultery it is tantamount to destroying the whole village.

³⁵⁰ 1938 SRN 96.

³⁵¹ 1938 SRN 117.

³⁵² 1940 SRN 180, 182, see also *Ginger v Kamjariwa* 1942 SRN 277, where in 1942, the court rejected an adultery case for lack of proof, one judge stating that the record did not contain "proof of adultery beyond a reasonable doubt."

³⁵³ 1972 NAC 28.

which was taken with no great value even in its original system a further that, the rule was a basis for dissatisfaction for Zimbabweans practicing customary law.

Among the South African Xhosa and Zulu, the husband in a customary marriage was never permitted to commit adultery blatantly and in disregard of his wife's emotions. In such a case, customary law offered the wife a remedy which, while meant to ensure that the marriage would continue, nevertheless made the husband realise his error and amend his ways. In *Jas v Mpunga*³⁵⁴, a case that came from Mount Fletcher, it was held that, a man was not entitled to keep a concubine at the common home. The wife was entitled to take steps to secure her removal if she came, and if the husband refused that she should do so, the wife then had a substantial complaint against him and could return to her father.

In that event, the husband was obliged to invoke the *ukuphuthuma* remedy before she could return and on the occasion of such *phuthuma* the complaint would be investigated. The husband would naturally undertake to remove the concubine if he had not done so already at the time of *phuthuma*. It follows that if the husband were to refrain from *phuthuma* the customary marriage could eventually be dissolved because of the adultery of the husband.

2.12.1.3 Other Instances

Although sexual rights and rights over children are important to the African marriage, there are other important aspects in the relationship between husband and wife. One such important aspect is the duty to provide food for her husband and their children. An inability to cook on the part of the wife is a serious shortcoming that may lead to the breakup of the marriage. In a traditional Shona rural household, a woman's cooking hearth is symbolic of marriage. If a husband throws out the cooking stones or hands

³⁵⁴ 1946 NAC (C & O) 5.

them in a basket to his wife, this is a clear token of rejection and the breakup of the marriage.³⁵⁵

In terms of Zulu law, the failure of one party to the marriage to render the other his/her conjugal amounted to malicious desertion and a sufficient ground for divorce. The issue arose in a case from Lions River, *Ngubane v Mtshali*³⁵⁶, where a certain Senzagabi Ngubane sought a divorce from his wife Nomkosi Mtshali, whom he had married by Native custom. The husband sought a divorce on the grounds of desertion and her refusal to render him his conjugal rights. He complained that she had left five years previously and was living with another man. They initially appeared before an *induna*³⁵⁷ who failed to reconcile the parties after finding the wife at fault. The wife who was duly assisted by her *umalume* (maternal uncle) did not oppose the divorce. The native commissioner granted the divorce, and ordered that seven head of *lobola* cattle be returned to the husband together with a costs order against the wife.

Another known reason for divorce in terms of Zulu custom was accusations of witchcraft. In *Ngubane v Langa*³⁵⁸, a case from Weneen in the Natal midlands, it was the man who initiated proceedings and he was successful in obtaining a divorce. He was especially concerned about the movements of his wife back to her father's home (*umuzi*) for fear that she would 'get medicine from them and kill him.' The husband, Mahlatini was concerned not just over possible witchcraft, which was serious enough, but also over the loss of his wife's labour in his *umuzi* while he was away in Johannesburg as a migrant labourer. The husband had continuously threatened his wife

³⁵⁵ Shropshire *The church and primitive peoples: the religious institutions and beliefs of the southern Bantu and their bearing on the problems of the Christian missionary* (1938) 269.

³⁵⁶ NA 1 HWK 2/1/2/1 Case 9/1932, where the Native Commissioner found that the wife was at fault because she left her husband and refused to return and 'render Plaintiff conjugal rights.' Furthermore, Nomkosi's conduct was troublesome to Plaintiff because she 'persisted in going to beer drinks' and was 'keeping company with another man.'

³⁵⁷ Meaning a tribal councillor or headman who could a mediator being someone with a degree of authority.

³⁵⁸ NA 1 WEN 2/1/2/1 Case 23/1941, See testimony of Tatawi Langa who quoted Ngubane saying, "Ntakonshana killed a girl and nothing was done to him, so he could kill me." He said he wanted her to "tell him I did not want him as he wanted to get his cattle back." In other words, if she could be blamed for the dissolution of the marriage, the *lobola* would be restored to him.

with violence in order to induce her to divorce him so that he could claim return of all his *lobola* cattle. The divorce was granted with costs and the commissioner ordered that all ten head of *lobola* cattle be returned to the plaintiff, and that Langa to return to the kraal of her father and to remain under his guardianship until remarriage.³⁵⁹

2.13 GUARDIANSHIP/AFFILIATION OF CHILDREN AND RETURN OF BRIDE WEALTH

Upon the dissolution of marriage by divorce came the issue of who was to be the guardian/custodian of the children. In terms of custom, the woman goes back to her lineage or parents' home where she is readily accepted. In the event that her parents have predeceased her, she goes to her eldest brother where she explains her predicament to him. In the event that there are still infant children between the divorcing parties, the wife takes them with her and looks after them up until such a time when they were no longer dependent on their mother. It is at this time that their father comes to take them to his own home and lineage. According to Zvobgo³⁶⁰, "delivery of *lobola* is the essence of the transfer of the custody of the children to their father." If the divorce is initiated by the wife, or is because of the wife's fault, the husband then sends his messenger to demand back the bride wealth, which at times might turn out to be difficult to claim.³⁶¹

However, it must be borne in mind that the colonial courts would at times misinterpret custom by introducing common law rules and principles of equity. In *Miki v Emely and Mbgadzawa*³⁶², the court held that the determination of the amount of *roora* that a

³⁵⁹ *Ibid.*

³⁶⁰ Zvobgo *A History of Christian Missions in Zimbabwe, 1890-1939* (1995) 109, the author further states that, in the event that the wife predeceased her husband without any children, the husband was entitled to demand the *lobola* he had paid for his wife or alternatively demand that another female from his deceased's wife family be given to him to bear children for his lineage.

³⁶¹ Ansell 2001 *Journal of Southern African Studies* 706, the writer observes that, "the young women recognise that *lobola* makes it difficult for a woman to escape a marriage, even if ill-treated by her husband. *Lobola* has long been implicated in domestic violence, as a result of women's fear of returning to the natal home without being able to repay bride wealth, which may have already been consumed."

³⁶² (1928-1962) SRN 591.

father-in-law had to return on a divorce rested on a number of different factors.³⁶³ The amount returned depends on factors such as the number of children born to the couple and the fault between the respective parties. If there are no children, little or none of the bride wealth is returned. Among the Shona, the *umai* beast given to the wife's mother is not returned.³⁶⁴

Kuper³⁶⁵ has commented on Southern African bride wealth systems that, the payment of bride wealth cattle gives the husband legal rights to the children his wife bears.³⁶⁶ Some have even gone to the extent of saying that *lobola* is 'childprice' because it supports the patrilineal system of descent. More precisely, the transfer of bride wealth cattle is necessary to the birth of a legitimate person. Thus, the transfer of livestock may be conceived of as collateral against a successful marriage. The failure of marriage, depending on various factors, of which one of the most important was the number of living children, resulted in the return of the *roora*, or collateral livestock.³⁶⁷

For example, a divorce case brought before the Assistant Native Commissioner's court in *Tarupiwa v Arutura*³⁶⁸, a case from the northern Zimbabwean district of Sipolilo, provided the following testimony. The plaintiff, Tarupiwa, stated he had paid 9 Pounds *roora* and his wife had given birth to a boy in 1945. Subsequently the marriage broke down and Tarupiwa was claiming custody of the child and return of his *roora* less 3 Pounds dowry for the child and 2 Pounds raising fee. Kuper correctly notes that, "the fundamental bride wealth rule was that marital rights in a woman were transferred against the payment of cattle. The Southern Bantu emphasised particularly rights to a woman's children. Should a wife be childless, or should she die or desert her husband

³⁶³ *Ibid* 592 where it was held that, "In all it appears that by taking all these factors into consideration it is really a matter of equity, in other words, what the presiding officer, with few exceptions, considers equitable according to the facts presented to him in each particular case."

³⁶⁴ Andifasi in Kileff and Kileff *Shona Customs* 40 – 41.

³⁶⁵ Sakenfeld and Ringe *Reading the Bible as women: perspectives from Africa, Asia, and Latin America* (1997) 28; see also in this regard, Eekelaar and Katz *Marriage and cohabitation in contemporary societies: areas of legal, social and ethical change : an international and interdisciplinary study* (1980) 50.

³⁶⁶ Kuper *Wives for Cattle* 22.

³⁶⁷ See also Bourdillon *The Shona Peoples* 40 - 42 where he argues in a similar way with special reference to the Shona, stating, '*roora* is associated with rights over children born to the woman'.

³⁶⁸ NAZ CR 9/47 30 June 1947 S 2033.

before bearing children, then either the bride wealth cattle had to be returned or her family had to replace her with another wife.”³⁶⁹

The question of how much *roora* was returnable also arose in 1955 in the case of *Ngareye v Finhai and Another*³⁷⁰, a case from Mutare in Zimbabwe (previously Umtali). The question related to how much *roora* the parents of the divorced wife might retain on account of each child born of the marriage. Two witnesses testified that, amongst Africans in Umtali, a Shona area, no hard and fast rule existed concerning the amount of *roora* that a father might offset for each child. Two other witnesses, however, asserted that “it is generally accepted amongst natives of the Umtali district that two head of cattle or 10 Pounds is the normal value in terms of *roora* of a child”, although the rule did not fix that amount rigidly. Instead, because of the conflict in precedent, the court decided that from the evidence and past decisions of the Native Appeals Court, no hard and fast rule existed.³⁷¹ Cases like these show that the District Officers apparently learned about local custom in somewhat informal ways.³⁷²

The question of custody and guardianship of children sometimes arose in peculiar cases where one party to the marriage was regarded as insane. For example, in *Hlomani v Mjayi and Another*³⁷³, Hlomani, an insane person, killed one of his children and attempted to murder another child still in his wife’s womb. The appeal court ordered that the Native Commissioner enquire about Shangaan customary law on the right of

³⁶⁹ Kuper *op cit* 26, the author goes on and says, “The transfer of rights in children was permanent. Children could not be claimed by the wife’s relatives in the event of divorce or in any other circumstance.”

³⁷⁰ 1955 SRN 765, to resolve the differences between the witnesses, the court cited eight reported cases from Amandas, Sinoia, Mazoe, Salisbury, Selukwe, Goromonzi, Marandellas and Umtali, that is, from all over Mashonaland. They ranged in time from 1935 to 1952, a period in which a marked change in the value of cattle had occurred. These cases made varying decisions about the amount deductible on account of a child.

³⁷¹ Seidman “Rules of Recognition in the Primary Courts of Zimbabwe: On Lawyers’ Reasonings and Customary Law” 1983 *International and Comparative Law Quarterly* 887, who says under the guise of finding law, the court created it. This demonstrates how the colonial courts constantly evolved customary law rules by consulting with locals never mind the authenticity of some of the evidence.

³⁷² See also in this regard *Chingwenyiso v Chitema and Another* 1935 SRN 65, where the District Officer is reported as saying that “the question of reducing the *roora* on account of deceased children is debatable, but local opinion in the person of native messengers resident in Bushu Reserve and other natives resident in this Reserve, support the reduction.... I consulted them before making my award.”

³⁷³ 1933 SRN 43.

the father to custody of the surviving child after birth. A headman testified in part that under Shangaan law as it was "...before the white man took over this country, if a man killed his child, or attempted to do so, he would have been killed. If he left any other children by the mother of the child he had killed, those children would be given to the mother and the mother's guardian. The relations of the husband who had killed his child would get nothing. The *lobola* paid for the wife would be divided by the Chief, and the Chief would keep half and the remaining half would be left with the guardian of the mother of the child. Since the arrival of the white man, we have changed as regards the *lobola* but we do not give him the child. The child belongs to the mother. If the husband was proved to be mad when he killed his child it makes no difference to any surviving child. It would still be given to the mother's people ..."

Questions around custody of children have generally become regulated by the formal law and taken out of the realm of private customary law of within the family unit. Rules regarding prescription and strict timeframes have been imposed just as the 'reasonable' periods imposed by the native courts in Zimbabwe and the enforcement of payment of bride wealth. In *Elisa and Musonda v Lavu*³⁷⁴, the Native Court in Bulawayo held that, when making an order for the custody and maintenance of children, the judgment had to specify clearly the names and ages of the children, the date when the custody begins and ends, the amount of maintenance for each child, and the dates of payment for the persons in whose favour the award was made. One may argue that this resembled the repeated placement of customary law within the highly technical realms of western law where issues of prescription among others were paramount.

2.14 CONCLUSION

Some believe that, in traditional society, bride wealth marriages are the cause of some retrogressive perceptions about African marriages. For example, husbands have authority; husbands expect their wives to be obedient, and they tend to make claims on

³⁷⁴ 1949 SRN 228, the case was heard on 16th December 1949 before C L Rademeyer, in an appeal from the judgment of the Assistant Native Commissioner Bulawayo.

their wives' labour and income.³⁷⁵ Nowadays, women who are educated and engaged in gainful employment often challenge their husband's authority and thrive to manifest greater influence in decision-making. In many cases, husbands oppose their wives' involvement in wage labour because they believe that women who have an independent source of income may become "big headed" and uncontrollable, a situation which is believed to lead to divorce.³⁷⁶ Hence, women's desire to gain status through economic independence is often a source of conflict within the union. In an attempt to avoid such conflicts a growing number of women now try to escape male control by steering clear from bride wealth marriages.³⁷⁷

We have seen that common to the four ethnic groups, were the issues around determination of what was a marriageable age, although the customary rites and symbolisms tended to differ. Payment of *roora/lobola* by a husband to the wife's family was another common and integral feature for the validation of marriage. Particularly among the Shona, marriage took different forms in the case of the service marriage, elopements, child-pledging and so on. The levirate marriage also came under the spotlight and was generally the same among both the Shona and Ndebele and among the Zulu. One of the common characteristics is that, a *kugara nhaka*, *ukungenwa* or an *ukungena* marriage is deemed invalid unless it is sanctioned by the nearest male relatives of the deceased in terms of a meeting that has been expressly convened for the purposes of approving a consort for the widow.

However, as the 20th century progressed, the colonial administration in Zimbabwe and South Africa sought to bring some certainty and formalised customary law although not always with the desirable results. From the initial Ordinances to early legislation and native courts, the Commissioners inherently began another era in the evolution of customary law, by introducing private family law in a public sphere to which it was unknown. In the legal administrative processes, certain aspects of custom became

³⁷⁵ Little African Women in Towns 38.

³⁷⁶ *Ibid.*

³⁷⁷ Obbo African women: their struggle for economic independence (1980) 44.

perverted, a trend that continued well into the late 20th century. Therefore, in the final analysis today, the prevalence and socio-legal position of traditional institutions such as marriage, owe their fate, good and bad, to this long established relationship between customary law and western law.



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CHAPTER THREE

THE IMPACT OF COLONIAL LAW AND LEGISLATION ON AFRICAN INDIGENOUS LAW OF MARRIAGE IN ZIMBABWE (Southern Rhodesia)

3.1 INTRODUCTION

Throughout the greater part of the twentieth century, several acts and regulations were passed to make the African marriage conform to western expectations. The early voices against African traditional institutions such as the African marriage and matters ancillary to it were initially because of missionary influences, particularly older generation clerics who preached on Christianity and codes of morality and how certain aspects of African customs posed an affront to their teachings.³⁷⁸

Some spheres of thought say the connection made between custom and Christianity holds no ground, as the two have no synergy whatsoever.³⁷⁹ Zimbabweans in the colonial period faced the dilemma of having to decide on how to accept or reject those values of Christianity that were derived from the experience of the petty bourgeoisie in Europe. What they had to take into account were those institutions of marriage created by the State and the Church, for unless they complied with certain legal requirements, their social lives were seriously disadvantaged.

In no other field of private law have missionaries and the greater African populous co-operated so closely and fought with each other so intensely as in the field of marriage and legislation.³⁸⁰ The beginnings were marked by the granting of the Royal Charter to the British South Africa Company (BSAC) in 1899 and became a founding provision that

³⁷⁸ Elias *The Nature of African Customary Law* 3ed (1972) 25, who says, "The missionaries, especially those of the older generation, are accustomed to regard African Law and custom as merely detestable aspects of 'paganism' which it is their duty to wipe out in the name of Christian civilisation."

³⁷⁹ Diamond *Primitive law* (1950) 49ff, where the writer asserts that African custom was separate from religion and that as long as tradition is viewed as an undifferentiated mass of customs, rituals and inhuman practices, its recognition in the social order is compromised.

³⁸⁰ Weinrich *African Marriage in Zimbabwe and the Impact of Christianity* (1983) 82.

influenced colonial attitudes towards traditional African institutions including marriage. Section 14 of the Charter provided that:

“...in the administration of justice to the said peoples or inhabitants, careful regard shall be had to customs and laws of the class or tribe or nation to which parties belong, especially with regard to the holding, possession, transfer and disposition of land and goods, testate and intestate succession thereto and marriage, divorce, legitimacy and other rights of property and personal rights, but subject to any British laws which may be in force in any of the territories aforesaid and applicable to the people and inhabitants thereof.”

Consequently, the question that has often been asked is whether the colonial administration actually upheld or rejected the seemingly cautious and wary directives in the Charter. Interaction between western law and African custom brought about the evolution of a hierarchy of marriage forms. Lowest in status was the traditional marriage, followed by a traditional marriage registered by a District Commissioner, and lastly a civil marriage or Christian marriage and solemnized in church. This chapter therefore, seeks to examine the introduction of colonial law and legislation in Zimbabwe from the advent of colonial administration to the post-colonial era and the impact thereof.

3.2 COLONIAL LEGISLATION

3.2.1 Native Marriages Ordinance (1901)

As the advent of the colonial era and its administration made a mark in the 1890s to early 1900s, British policy in Zimbabwe, (then Southern Rhodesia), sought to preserve African traditional institutions. The traditional marriage was recognised with earlier effects of reinforcing the authority of traditional male patriarchies over their women.³⁸¹ The concept of *roora* (bride wealth) as a requirement of marriage and the potentially

³⁸¹ See Southern Rhodesia. Native Affairs Committee of Enquiry *Report of the Native Affairs Committee of Enquiry 1910-1911* (1911) 68, where it becomes apparent that the state therefore did not initially sanction practices such as polygamy and bride wealth payments, customs that were otherwise considered repugnant to European standards of justice and morality.

polygamous nature of some African marriages were thus upheld, with some holding the view that these marriages should be left to die out on their own.³⁸²

To the contrary, initial inquests into the African marriage were not all positive. Other well-grounded features that regulated the capacity and consent to marriage were struck down in a bid to protect the interests of young women and children from what were perceived as forced marriages. As Schmidt³⁸³ notes, the early interventions by the colonial state had a negative impact by providing fertile ground for conflict among the respective stakeholders, all of whom had their respective roles in the formation of the traditional marriage when she says:

“.....as such, they provided a terrain for struggle between older African men, young African women and the colonial state, as European norms were imposed at the expense of African traditional patriarchal power over the control of women in the sphere of marriage.”

The passing the Native Marriages Ordinance³⁸⁴ in 1901 which formalised the regulation of the African family, marked the introduction of ‘official’ customary law governing all marriages between Africans that were not formalised in church as Christian marriages. In terms of the Ordinance, child-pledging of young Africa girls was outlawed and a woman’s consent became a requirement prior to the conclusion of marriage between Africans.³⁸⁵ The impact of the new law was negative in the sense that, the importance of the traditional family’s consent was undermined, a component that was pivotal to binding familial ties according to custom. At one point, missionaries were known to provide safe havens for young African girls who went against family wishes to choose a husband.³⁸⁶

³⁸² *Ibid* 68, see also Schmidt “Negotiated Spaces and Contested Terrain: Men, Women, and the Law in Colonial Zimbabwe, 1890-1939” 1990 *Journal of Southern African Studies* 628.

³⁸³ Schmidt 1990 *Journal of Southern African Studies* 628, she observes again that, “..in other instances, state officials felt compelled to take more immediate action. Despite the general tendency of the administration to support the claims of African male elders, there were some instances in which women gained from state intervention in the legal sphere.”

³⁸⁴ Ordinance No. 2 of 1901.

³⁸⁵ Peadar *Missionary Attitudes in Shona Culture 1890-1923* (1970) 22.

³⁸⁶ Courville C “Re-examining Patriarchy as a Mode of Production” in James and Busia *Theorizing black feminisms: the visionary pragmatism of black women* (1993) 38, from a gender affirmative point of view,

The role of the family was further put in the periphery with provisions to ensure compliance as the Ordinance stipulated that all marriages between Africans were to be solemnised by a Native Commissioner before the prospective spouses could live together.³⁸⁷ Furthermore, the Native Marriages Ordinance defined and quantified *roora* (bride wealth) by imposing a limit on the amount payable by the prospective groom's family to the young woman's guardian.³⁸⁸ In terms of section 3 of the Ordinance, no marriage was to be valid unless *roora* had been transferred to the bride's family within twelve months prior to marriage.³⁸⁹ In what appeared to be an attempt to protect African woman, the administration contended that, their interventions were intended to avert wealthy men from enticing a woman's guardian, thus interfering with her freedom of choice.³⁹⁰

In 1911 as a follow-up on the foundations laid down by the 1901 Ordinance, the Native Affairs Committee of Enquiry defended and consolidated its directives on the regulation of *roora* in the colony. Longden, a Native Commissioner, was of the opinion that the Native Marriage Ordinance "...conferred some measure of certainty to the quantity of bride wealth, an issue previously entwined in vagueness and uncertainty."³⁹¹ As Jeater puts it, sentiments like these by administrators were misplaced. She puts across her argument by saying:

"...he seemed to think that this was something for which local people were grateful but which they had somehow never quite been able to manage for themselves....he entirely overlooked the

the writer explains that, "these actions were part of the positive consequences of the colonisation process of African women."

³⁸⁷ See section 5 of the Native Marriage Ordinance which required the official to satisfy himself that the *roora* had been delivered and the girl had given her personal consent.

³⁸⁸ Section 2 of the Native Marriage Ordinance which defined *lobolo* as "the delivery of stock, or its equivalent in other property, or payment in cash, by or on behalf of an intended husband to the parent or guardian of the intended wife.", see further Rolin Rolin's *Rhodesia* (1978) 134, who mentions that the amount of *roora* (bride wealth) was limited to four head of cattle for the daughter of a commoner and five head for that of a chief, or cash at the rate of five pounds per head of cattle.

³⁸⁹ Mittlebeeler *African Custom and Western Law: the development of the Rhodesian criminal law for Africans* (1976) 47.

³⁹⁰ Rolin *op cit* 133.

³⁹¹ Jeater *Law, Language, and Science: The Invention of the "native Mind" in Southern Rhodesia, 1890-1930* (2007) 88.

possibility that bride wealth agreements were not simple exchanges of property, but were means of creating very long-term relationships in which many circumstances might change.³⁹²

The attempt to regulate bride wealth payments was apparently unsuccessful during the first decade of colonial legislation. Because the law could not be effectively implemented and monitored on the ground, the regulations around *roora* were seldom complied with to the extent that the Committee on Native laws acknowledged this shortcoming and recommended that owing to the shortcomings in the law, the provisions be done away with in that regard.³⁹³ However, noteworthy is the fact that before the discontinuity of the regulation on *roora*, state legislative interventions had already begun destabilising the communality of African families and further compromising preservation of the fundamental roles played by traditional male elders in negotiating and quantifying bride wealth payments between families.³⁹⁴

Finally, in an effort to curb the occurrence of potentially polygamous marriages among Africans, the Ordinance imposed a criminal sanction where a man sought to marry second wife after having contracted an initial civil or Christian marriage. In the case of *R v Kaodza*³⁹⁵, it was held that a marriage by native custom of a person previously married in church was bigamous and thus unlawful. Lewin³⁹⁶ observed that, it was not uncommon that after being converted to Christianity, a man desired to take another woman, usually among the educated minority and often men of property.

³⁹² *Ibid* 88.

³⁹³ See Schmidt 1990 *Journal of Southern African Studies* 628, who says that, "...the perpetuation of unenforceable legislation would not only promote social disorder, it would undermine African respect for the law."

³⁹⁴ Macgonagle *Crafting Identity in Zimbabwe and Mozambique* (2007) 60, who brings to the fore the observation that, in order to raise money for bride wealth payments, young men had to leave their homes and seek wage labour in the emerging colonial economy even as far as the mines of Johannesburg in South Africa. See further, Crush and Tevera *Zimbabwe's Exodus: Crisis, Migration, Survival* (2010) 69, who talk about the '*wenela*' experience where young Ndebele and Shona men emigrated to South African mines to raise money for various colonial taxes and *lobola* at home. The writers give statistics of migrant labour from Southern Africa in the South African mines from the 1920 to 1990. They observe that the move to the mines almost became like a rite of passage to adulthood for these young men.

³⁹⁵ 1912 SR 6.

³⁹⁶ Lewin "Some Legal Consequences of Marriage by Native Christians in British Africa" 1939 *The Modern Law Review* 48.

3.2.2 Natives Adultery Punishment Ordinance (1916)

In the first decade of regulating the African marriage, previous policies had been by characterised by a deliberate effort to grant women the freedom to choose their partners independent from family intervention. This policy inevitably began to clash and posed a threat to traditional patriarchal holds on women particularly in the sphere of marriage. As a result, elders in communities were left ridden with insecurities and traditional structures regulating marriage began to crumble. When the Native Adultery Punishment Ordinance³⁹⁷ of 1916 (NAPO) became law, this marked a turning point in colonial policy as the administration began to tone down on the championing of the emancipation of women. Some argue that the reason why the colonial administration began to adopt policies controlling women and their sexuality in order was to further and ensure the success of its policy of indirect rule. Folbre³⁹⁸ explains and says, “traditional authority of elderly African men over their women was fundamental to their course.”

Already the negativities of policy on the family were being felt as young women and girls declined marriage to men to whom they had been pledged as children, and instead, ran to lovers of their choice, thus causing a crisis of authority in the rural areas. According to Little³⁹⁹, elderly African men as custodians of African patriarchal power and authority blamed the colonial administration for destabilising the restraints that indigenous laws and customs had in place, without substituting any alternative means of control over African women. It is for reasons like these that a reversal of some freedoms became necessary.⁴⁰⁰

³⁹⁷ Ordinance No. 3 of 1916.

³⁹⁸ Folbre N “Patriarchal Social Formations in Zimbabwe” in Stichter and Parpart *Patriarchy and Class: African women in the home and the workforce* (1988) 67, while justifying reactions among African men says that, “the refusal of women to marry their appointed partners, their desertion of unwanted husbands, and their flight to missions, mines, farms, and urban areas posed a serious threat to African male authority, and consequently, to the entire system of indirect rule.”

³⁹⁹ Little *African women in towns: an aspect of Africa's social revolution* (1973) 18, who refers to colonial officials in Northern Rhodesia (Zambia) and Tanganyika (Tanzania) who also expressed a similar understanding of the relationship between patriarchal control over female mobility and sexuality and the survival of the system of indirect rule.

⁴⁰⁰ Chanock M “Making customary law: Men, women, and courts in colonial Northern Rhodesia” in Hay and Wright *African women & the law: historical perspectives* (1982) 53, the writer confirms Little's

To remedy the apparent disharmony, in 1916, African men, and some government officials put before the Native Affairs Committee of Enquiry, recommendations, in an attempt to reinforce the husband's authority over his wife by criminalising adultery in terms of the NAPO. It made adultery between an African male and a married African woman an offence punishable by a penalty of a fine amounting to one hundred pounds or one year's imprisonment with hard labour.⁴⁰¹

According to one Nielson, who was Native Commissioner for Shabani District at the time, female emancipation was not realised by the new law that resembled double standards by the administration because African men were still able to have as many relations with African women as they pleased without fear of criminal sanction.⁴⁰² The impact in this regard was that, the customary law position that permitted men to have sexual relations with other women without taboo was upheld, within customary marriages.⁴⁰³ Most importantly, the NAPO sought to reinstate the hold that African men exercised over the sexuality and mobility of their women in marriage.⁴⁰⁴

This new control over women also served economic benefits by protecting and advancing the administration's interests during a phase when budding commercial farms and mines began to demand the labour of African men. African men thus needed reassurance from the administration that their women would be kept in check during

understanding of the position in Northern Rhodesia (now Zambia) when he notes that women took advantage of similar changes in the law during the early colonial period in Northern Rhodesia and Nyasaland (now Malawi); to see views held by African men see also the "Annual Report of the Chief Native Commissioner Salisbury 1910 at 1 (N9/1/13).

⁴⁰¹ See section 2.

⁴⁰² See Nielson's communication to the Chief Native Commissioner (CNC) in Salisbury (Harare) 9 May 1923 N3/17/2, where he wrote that: "the women who form perhaps more than half of the population were not directly consulted [and that], native women have no say in the shaping of their own destiny, they have always been forced to obey the law laid down by the strong sex, but he felt it was his duty to see that the woman's interests are also taken into account."

⁴⁰³ Mason *The Birth of a Dilemma; The Conquest and Settlement of Rhodesia* (1958) 240, the author also mentions how the law lacked universality and notes that, European men could have sexual intercourse with African women of any marital status without fear of being charged for adultery despite pleas by African men that they also be brought within the ambit of the law.

⁴⁰⁴ Schmidt "Patriarchy, Capitalism, and the Colonial State in Zimbabwe" 1991 *Signs: Journal of Women in Culture and Society* 756, in the early 1990s, the writer embarked on a study to examine patriarchy and capitalism and argues that the State in Southern Rhodesian made a clear alliance with African patriarchy to control African women's mobility.

their absence causing a desperate intersection between gender ideology and economic objectives.⁴⁰⁵ It had been noted that the socio-economic dynamics in the colony were transforming, and the increase in demand for wage employment left some African men reluctant to take-up new economic opportunities fearing the disruptions that their absence would bring to marital life due to potential infidelity by their wives. The authorities themselves acknowledged the situation and one Native Commissioner alluded to this fact.⁴⁰⁶

Fears by African men regarding the preservation of marital life were highlighted in the case of *Shambamuto v Kurewha and Father*.⁴⁰⁷ In this case, the husband brought a divorce case before a civil court in the north central district of Mtoko and gave the following testimony:

"Soon after my marriage to Kurewha (wife) was registered, I proceeded to Salisbury with her. Whilst living in Salisbury, Kurewha disappeared from home on several occasions. On one occasion, she disappeared from home and was about 14 days, until I found her at the Railway Station, attempting to board the train for Hartley. On another occasion she left me and was absent for a few days. I found her at the Transport Camp. On a third occasion, she left me and I found her at Homan's residence. She was living with a native called Shilling. My wife hates me, and is constantly wandering about and attempting to run away. I feel that she will get away for good one day. I therefore decided to return her home to her father and apply for a divorce."

The claim for divorce was granted, as the woman's testimony did not resemble that of a remorseful spouse who, as according to custom, would fight for the preservation and

⁴⁰⁵ Schmidt 1990 *Journal of Southern African Studies* 634, see also in this regard, Acting Native Commissioner Mtoko District, writing to Superintendent of Natives Salisbury 12 May 1914, N3/17/2 No. C68/14, where he mentioned that, "Adultery is becoming more and more frequent amongst Natives, and in almost all cases the women concerned are the wives of absentees at work."

⁴⁰⁶ See communication by Acting Native Commissioner Wankie (Hwange) to Superintendent of Natives Bulawayo 7 May 1914, No. N174/14, where he wrote that, "...Even to the casual observer it must be evident that the family life of the Natives is rapidly being undermined. No lasting progress or development is therefore possible until we secure a healthier family and social life for the Natives. He recommended the criminalisation of adultery for 'moral persuasion has no effect in this instance, last of all on a defiant and obstinate Native woman, often a slave to gross passion, deaf to all reason.'"

⁴⁰⁷ Case 44/1912 Court of the Native Commissioner, Mtoko District 1910-1922, S1004, where the wife, Kurewha, defended herself against charges of desertion by saying, "I only left home once without the knowledge of my husband, that was on the occasion I attempted to go to Hartley. My husband was always ill-treating me. I hate him and will not be his wife any longer. On the occasions I went and lived at Homan's and the Transport Camp I was staying with friends and relatives."

perpetuation of the marital life. Indeed the NAPO may be seen as an occurrence that opened the gates to divorce in this regard. According to Parpart, in the period between 1911 and 1912, roughly 52 percent of all civil cases before the Commissioner's court in Mtoko, involved claims for compensation by husbands against other men who had allegedly committed adultery with their wives.⁴⁰⁸ Barnes explains that elderly African men put across their opinions to the authorities, in a bid to conscientise them on the sanctity of the African marriage, a fundamental institution they were willing to fight for.⁴⁰⁹

According to Phillips, while the NAPO was aimed at disempowering women, it had the impact of giving African women particular social status in the guise of legal regulation. The Ordinance constituted in law the criminality of African women's sexual autonomy, and initiated partial legal subjectivity unto them, a status they did not have under custom. Women were now treated as legal subjects by being criminally sanctioned for committing adultery, but in turn did not have the subjective status to be offended by adulterous behaviour by their male counterparts. Thus, their individual autonomy was only limited to the ability to offend, and nowhere else were they to be given legal subjectivity.⁴¹⁰

Finally, it becomes apparent that the earlier Marriage Ordinance that initiated entitlements to women's mobility caused a rift and a shift in the balance of power in African households. With the addition of the NAPO to the mix, the overall impact was that, in the interests of economic progress and financial well-being of the colony, sexual practices of African women were subdued and patriarchal power reinstated to a certain

⁴⁰⁸ Parpart J L "Sexuality and Power on the Zambian Copperbelt: 1926 - 1964" in Stichter and Parpart, *Patriarchy and Class: African Women in the Home and the Workforce* (1988) 118, the writer notes further that, in the 1910-1919 period, approximately 90 percent of the civil cases were domestic disputes involving adultery by women, divorce, return or payment of *lobola*, or seduction damages.

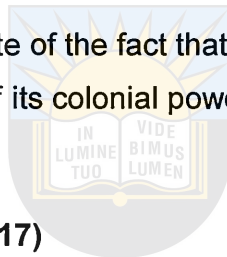
⁴⁰⁹ Barnes "The Fight for Control of African Women's Mobility in Colonial Zimbabwe, 1900-1939" 1992 *Signs: Journal of African Women in Culture and Society* 591, the writer mentions that in 1914, the chiefs and elders of the north-eastern towns of Rusape and Umtali (Mutare) were reported by the local government representative as saying, "Our fathers have asked, we have asked, and you do not help us in the only thing that is vital to our tribe and our family." The elders were sincerely asking the authorities to impose restrictions on the mobility of women and girls who were continuously running away from arranged marriages, and adopting new lifestyles in the colony's mines and towns.

⁴¹⁰ Phillips O "Constituting The Global Gay: Issues of Individual Subjectivity and Sexuality in Southern Africa" in Herman and Stychin *Sexuality in the Legal Arena* (2000) 29.

extent, without, however, guaranteeing an end to the fragility of African families and marriage systems. Mair⁴¹¹ has commented that the control of women's sexuality by the administration imposed an unnecessary sexual code alien to customary law when he says:

"Rules of conduct towards his parents, consort and children, towards other relatives, towards religious or political authority, bind the member of an African tribe as they do the subject of a European State. The conduct prescribed may differ, but the end of orderly social co-operation is the same. Respect for property, for human life, for the sexual code enjoined by the society, are principles of African law as of ours."

Lewin⁴¹², as far back as 1939, took note of the fact that British colonies had the potential of adopting legislation similar to that of its colonial power although these statutes did not apply in the colonies.



3.2.3 Native Marriage Ordinance (1917)

A year after the NAPO became law, the Rhodesian government passed the second Native Marriage Ordinance⁴¹³, providing that a man be entitled in terms of any indigenous law to take a widow of a deceased relative. However, similar to the 1901 Ordinance, there was the precondition requiring registration of the marriage. The impact of the new law was that, it effected a consolidation of the already existing indigenous law by recognising polygamy in terms of its general law. The traditional system of patriarchy and succession whereby the brother of a deceased African man could succeed to his widow, taking her as his new wife, found recognition as a valid way of concluding a customary marriage.

⁴¹¹ Mair *Native Policies in Africa* (1969) 270.

⁴¹² Lewin 1939 *The Modern Law Review* 49, who, while commenting on the law common law position says that, while men could divorce women on the basis of adultery, women were required to prove that their male partners had undertaken adultery and additional offences, such as incest, sodomy, cruelty/domestic violence and other possible reasons.

⁴¹³ Ordinance No. 15 of 1917 held that, provided that, "when under any prevailing law or custom a man entitled to take to wife the widow or widows of a deceased relative, he should as soon as the inheritance ceremony has been completed, appear before a Marriage Officer, with such widows as he may desire to take to wife, and register a marriage with each of them." The Ordinance was further as amended by the Native Marriage Act No. 16 of 1929.

The new Native Marriage Ordinance had the effect of creating some harmony between colonial legislation and the customary law position. Customary law was left to be and to operate as it would, depending on the customs and usages of a particular people. However one may be persuaded to argue that, where the practice of widow inheritance appeared as discriminatory to women, customary law was still held to apply. This could potentially have been one of the downsides of colonial legislation.

According to Schmidt⁴¹⁴, women's oppression was further institutionalised with the Native Marriage Ordinance, which reaffirmed customary law by relegating a woman to the status of minor under the control of her father, guardians or husband. Again as with previous laws, when conflicts arose between the need to keep women working on both the farms and export crops and the desire of the state or church to challenge what was considered repugnant in terms of African patriarchal rule, African patriarchal power over women was upheld. Thus, the same interests of colonial profit were served similar to those economic motives that brought about the NAPO earlier in the decade.⁴¹⁵

On the other hand, the amended Native Marriage Ordinance also furthered the objectives pioneered by its 1901 predecessor by imposing stricter sanctions against child-pledging thereby undermining custom and its recognition of only the consent of the girl's guardian to render valid capacity to marry.⁴¹⁶ According to Ranger⁴¹⁷, missionaries were similarly against the practice of child-pledging and were reported to encourage young girls to seek refuge at mission stations where they were able to work and go to school and the missionaries even went on to the extent of building hostels to accommodate the young girls.

⁴¹⁴ Schmidt *Ideology, Economics, and the Role of Shona Women in Southern Rhodesia* (PHD-thesis, University of Wisconsin-Madison, 1987) 743.

⁴¹⁵ Weinrich *Women and Racial Discrimination in Rhodesia* (1979) 120.

⁴¹⁶ See Native Marriage Ordinance (1917) above, the amendment stipulated that any man who entered into a marriage agreement concerning a girl who was not of marriageable age (twelve years and above), was liable to a fine of fifty pounds or imprisonment with or without hard labour for up to one year.

⁴¹⁷ Ranger "Women in the Politics of Makoni District 1890-1980" 1981 (*Unpublished Paper*) 7, see also in this regard, Courville in James and Busia *Theorizing Black Feminisms* 38 in 3.2.1 *supra* on the role that missionaries played in harbouring 'errant' African girls.

of marrying, by *kutizisa* (elopement) and *kuzvarira* (credit marriage, involving child betrothal).⁴²⁰

Finally, the requirement that all African marriages were invalid unless registered continued to be enforced. The duty to comply with the requirement was placed on the husband to ensure that the marriage was registered, before he could take his bride from her guardian. With registration came the distortion of when a true customary marriage came into existence. The moment of marriage was defined as the time after full bride wealth arrangements had been agreed upon but before the marriage was consummated. If the husband did not fulfil this requirement within 12 prior to the registration of the marriage, he was liable to pay a fine of up to ten pounds or imprisonment with or without hard labour for up to three months.⁴²¹ In the event that the woman's guardian had knowledge of non-compliance by the groom and did not intervene, he too, was considered guilty of an offence and liable to the same penalties.

Noteworthy is the fact that the whole concept of criminality and punitive sanctions in the sphere of traditional marriages was unknown to indigenous people. In fact, as West⁴²² points out, "this legal sleight of hand rendered unregistered customary marriages mere cohabitation but it made little difference to Africans married under native custom, including monogamous recidivists. By their actions, these individuals rejected as an alien cultural imposition the notion of concubinage (and its corollary illegitimacy) that the amended ordinance introduced."

The comment above sheds some light on the scale of frustration on African men that the new marriage regime brought, with its unfamiliar principles of prescription and technical formalities, all which sought to redefine a bride's transfer from her guardian to

⁴²⁰ Holleman *Shona customary law: with reference to kinship, marriage, the family and the estate* (1952) 113, where he observes that, "It is not unlikely that, under the influence of missionary teachings, the percentage of elopement marriages has dropped in favour of an increase in the number of regular proposal..."

⁴²¹ Mittlebeeler *African custom and Western law* 49, see further Schmidt 1990 *Journal of Southern African Studies* 629.

⁴²² West *The Rise of an African Middle Class: colonial Zimbabwe, 1898-1965* (2002) 84.

her husband's family.⁴²³ Spicer, a former native commissioner for Salisbury district (now Harare), is quoted as noting that registration of native marriages brought about advantages for marrying couples when he says, "the advantages of registration are the record of *lobola*, the agreement of the parties and of the woman's free acceptance of the man. There are no disadvantages except of occasional inconvenience to contracting parties, presumably on account of long distances to travel."⁴²⁴

In the final analysis, by calling for the recording of *roora/lobola* payments and making these matters of record, the law actually codified an aspect of the traditional marriage and missed its essential customary nature of negotiability and fluidity. Thus Shropshire, quoting Colonel Carbutt, then Chief Native Commissioner of Southern Rhodesia, acknowledged that the requirement for registration was problematic because indigenous people did not want to expose their agreements regarding *lobola/roora* to the authorities as this had always been seen as a family affair.⁴²⁵ In the case of *Dudzai v Mapanda*⁴²⁶ the Native Appeal Court held that, when both parties have been present at the registration a European court must accept the registration certificate as conclusive evidence of the marriage compensation paid or payable in the transaction.

In 1916, Clarkston Tredgold, the then attorney general of Southern Rhodesia, whilst looking for answers from the Native Affairs Department in order to draft a new law stating specific procedures for marriage registration and identify when exactly a marriage came into existence, showed his lack of depth of the knowledge of custom, law and marriage. He could not find the desired answers from reports and submissions made by native commissioners and showed a degree of frustration when he said,

⁴²³ Child *The history and extent of recognition of tribal law in Rhodesia* (1965) 126 who explains the concept of prescription in a customary law setting and observes that, there is nothing in African law comparable to prescription in terms of Civil law, see also *Ex parte Remigio* 1959 SRN 660 and also that a setback in lodging an action detrimentally affects the plaintiff's case unless his claim is clear and acceptable."

⁴²⁴ Shropshire *Primitive marriage and European law: a South African investigation* (1970) 58.

⁴²⁵ *Ibid* 57 where the writer quotes the Chief Native Commissioner saying that, "the natives have not yet realized the full value of registration to themselves. Hence constant prosecution for non-registration is needed. The chief objection to it on part of the Natives seems to be the recording of the amount of *lobola* paid, if it is not paid in full at the time of their marriage."

⁴²⁶ 1943 SRN 20.

“surely there is some definite condition which is recognized as binding in Native Law which precedes registration. Can you not give the thing a name?”⁴²⁷ To Jeater’s surprise, there was supposed to be a clear-cut answer as the Native Affairs Department had been registering marriages since the requirement was laid down in the 1901 Ordinance.⁴²⁸ It becomes apparent that at the time, the administration had imposed strict formalities to a law they did not fully understand.

The question of prescription and whether a spouse forfeits her right to claim her inheritance by bringing a late application arose in the case of *Gideon v Tawadzadza*.⁴²⁹ It must be borne in mind that prescription was generally a principle unknown to customary law but however if a late claim was unreasonably late, it was denied. In *Tawadzadza’s* case, one Gaza, the co-defendant and the man who made arrangements for the inheritance ceremony (*kurova guva*) stated in evidence that he called all relations and gave due notice and followed Native custom in asking if anyone had a claim against the estate, and he said no claims were lodged. The respondents, Gaza’s brother and two other elder brothers and the deceased’s mother were absent from the inheritance ceremony although their home was eight miles from the kraal. It was held to be established custom that at the ceremony of the division of the estate any person having a claim should then make it, unless there are very good reasons for such omission. The court held that the respondents had forfeited their right of action to claim in the estate of the deceased.

Recently in 2006, in the appeal case of *Muwalo v Mugunga*⁴³⁰, the wife (respondent) defended her late claim for a share of the matrimonial home, which she had made eight years subsequent to the annulment of her marriage with the appellant (husband) in 1996. The husband pleaded that she had taken too long to lodge her claim and that the

⁴²⁷ Jeater *Law, Language and Custom* 125.

⁴²⁸ *Ibid.*

⁴²⁹ 1946 SRN 108, (the case was heard on 15 July 1946 by L. Powys-Jones, Assistant Native Commissioner, Salisbury), where it was also held that, “all relatives must be notified of the date and place of the ceremony and when it takes place all present must be asked if anyone has a claim against the estate and the nature, extent and ground for such claim. In the absence of a good reason for failure to lodge a claim the right to do so is forfeited, see also *Mhlaba v Makuhlane* 1947 SRN 180.

⁴³⁰ (CIV (A) 108/03) [2006] ZWHHC 60 (unreported).

appeal should set aside the order made by the magistrates court for 60% to the husband and 40% to the wife be set aside. Gowora and Bhunu JJ held that the wife had not unreasonably delayed in lodging her claim as prescription was unknown to customary law and that the Prescription Act⁴³¹ did not apply to registered customary marriages. The court held that the Prescription Act did not apply to matters determinable in terms of customary law and based its decision on the case of *Pasipanodya v Muchariwa*⁴³² where the trial magistrate correctly ruled that the Prescription Act does not apply to any legal dispute determinable in terms of customary law. The ruling is sound considering that section 3(2) of the Act provides that, "...in so far as any right or obligation of any person in relation to any other person is governed by customary law this Act shall not apply." The courts' decisions thus upheld customary law in this regard and Child correctly observes that, "...delay in bringing an action never affects the right to institute proceedings and no right may be acquired by long possession under customary law."⁴³³

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3.2.4 Land Apportionment Act (1930)

The enactment of the Land Apportionment Act⁴³⁴ marked the introduction of colonial policy regulating the ownership of land and the rights ensuing thereof, particularly regarding ownership and usage, also had a significant bearing on the lives of Zimbabwean women as wives, divorcees and widows. As shall be seen, these policy measures resembled those in post-colonial Zimbabwe.⁴³⁵ The continuous shift to a capitalist mode of production meant that the agrarian subsistence setup known to indigenous social-economic organization was disrupted, affecting the incidence of marital institutions such as polygamy as a result. Colonialism thus had the impact of intensifying the indirect economic dependence of peasant women on their husbands

⁴³¹ Act No. 31 of 1975.

⁴³² 1997 (2) ZLR 182 (S).

⁴³³ Child *Tribal law in Rhodesia* 127.

⁴³⁴ Act No. 30 of 1930.

⁴³⁵ See for example the Communal Land Act No. 20 of 1982 in 3.3.3 *infra*.

who were often engaged in wage labour on commercial farms and industries in the urban areas.

With the new economy came the repercussions of poor wages, lack of health, retirement and other benefits causing continued susceptibility of African wage labour. In their absence from the communal lands and homes, male migrants relied on their wives and children to set in motion their land use rights for them. It was therefore in the husbands' interest for wives to consent and support their migration to towns, whilst they were expected to stay in the rural areas and cultivate the land owned by men.⁴³⁶

Industrialisation as a different mode of production, to which the general populous was accustomed to, thus had an impact on polygamy that depended largely on the viability of the subsistence agrarian economy. The process began with the structural transformation of rural areas by creating Tribal Trust Lands (TTLs), the main function of which was to provide cheap labour for the urban areas, mines and European owned farms and to re-absorb any 'surplus population' rejected or discarded by these employment centers.

Given that most black women were poorly educated or uneducated altogether, they were unable to purchase freehold land and their rights to land and their economic fate was mediated through men in similar ways to their peasant counterparts in the communal areas. Thus, the TTLs had become the homes of the least productive age groups, the young and the old, and of women and those men who for one reason or another were not wanted in the capitalist sector. The dumping of Africans in the TTLs had resulted in a population density far in excess of their carrying capacity. Hence, land was been over-cultivated and heavily eroded. Under these circumstances only some

⁴³⁶ Gaidzanwa "Women's Land Rights in Zimbabwe" 1994 *Journal of Opinion* 13, where the writer explains the position at custom that, "in patrilineal systems, the final authority in decision making rests with men so the women would be expected to defer to the decisions made by absent men." Further that, "...if women were allowed to desert the reserves which were increasingly impoverished, there would be dramatic undermining of the back-up system for future migrants and the fallback structure for those migrants who were no longer useful to the settler dominated wage labour economy."

food could be grown and the local rural population was dependent on remittances from labour migrants.⁴³⁷

The impact on polygamy and the levirate marriage was that the polygamous household could not be sustained because for its successful operation and efficacy, it was reliant on a sound economic family make-up. The result was that it appeared inherently unattractive for a designated heir to commit to taking his deceased brother's widow as a junior wife under such circumstances. In the event that the widow had been taken, land shortage and consequent food shortage made it difficult for husbands to feed the children born to them by one wife let alone those dependants that might have been left by a deceased male. Hence, polygamous families posed excessive problems and polygamy ceased to be attractive and did not fare well in this regard. Here, again, the impact on the customary law of succession was negative.

Polygamy, however, seemed to fare better amongst a particular group of Africans, the Black elite, who occupied what was referred to as Black Purchase Areas. Weinrich⁴³⁸ conducted a survey among the *Vapostori*, a Shona religious group based on the Old Testament teachings in the Chinamora TTL. According to his survey the incidence of polygamy was over 40% of all households.⁴³⁹ According to Wienrich's findings, some 44% of these villagers received a 'master farmer's certificate' as a sign of agricultural merit and ability.⁴⁴⁰ The impact on polygamy is that there is an almost exact correspondence in that community between polygamy and proficient farming. From a succession perspective, a potentially polygamous union arising from a levirate marriage by an heir may be attractive. This is because these communities were integrated into the capitalist system and as a consequence polygamy fared well in this regard.

⁴³⁷ Weinrich *African Marriage in Zimbabwe* 141.

⁴³⁸ *Ibid* 143.

⁴³⁹ These *Vapostori* inhabit a relatively fertile stretch of land on either side of the major motor road linking the TTL with the capital Harare. Moreover, next to their settlement is one of the oldest agricultural research stations in the country, Domboshava, which specializes in extension work in African areas.

⁴⁴⁰ Weinrich *op cit* 143.

The fact that some Shona communities with the highest polygamy rate were engaged in commercial farming shows that the cash economy was not entirely hostile to polygamy, at least not as long as production remained labour intensive and family based. In such communities, polygamy only declined if labour saving machinery could be afforded and human labour ceased to be of need.

It was further noted that a second phenomena hostile to polygamy existed as time passed on. The sons of the original owners of these Black Purchase Areas had taken over management of these holdings. The trend was that because their fathers were rich they received a decent education, largely from mission schools where Christian notions and perceptions of life were learnt. Modern farming methods were learnt and they accumulated labour saving machinery stressing that their high yields meant that they were doing better than their polygamous fathers were.

Their higher education, moreover, had strongly influenced these men to accept the values associated with the capitalist mode of production and missionary thinking. They believed that smaller families would enable them to give their children a better education and so make them more successful in later life. The apparent distinction between the two generations was greatly attributed to the fact that the one group that had obtained the farms on merit as master farmers did not receive missionary education and thus tended to be more conservative unlike their more educated and liberally minded sons. The effect was that while polygamy might have blossomed in the earlier days of these Purchase Areas, its incidence declined with time.⁴⁴¹ However, as these agricultural areas continue/operate today, it can safely be said that it has not been totally lost.

Only on the Tea Estates was the economic situation different. For the management of these estates, the landowners held out economic rewards to polygamists. In order to have a reserve army at hand during the tea-picking seasons, it encouraged large families among African labourers. They also offered paid employment at very low rates

⁴⁴¹ *Ibid.*

to women and children, their wages, however, had to be collected by their household heads and thus in order to improve a family's income, having many wives and children had economic rewards.

The management of the Tea Estates also gave to every worker a piece of land on which his wives and children could grow food crops. These small gardens did not reduce the tea plantations since the estates had superabundant land, yet they increased the potential for exploitation because the food grown by the workers and their families enabled management to keep their wages low and yet guaranteed the social reproduction of their labour force. Hence the arrangements favoured both managements and household heads, but grossly exploited women and children.

The impact on polygamy was that it tended to subsidise the capitalist economy of the Tea Estates. Polygamous marriages including those of the levirate unions were entered into for the wrong reasons detached from those of the family's economic well-being and social integration to those of profiteering and competitiveness. The basis for the above explanation is that polygamy and succession were inseparable. A polygamous set-up inevitably lead to considerations and rules of succession that were not the same as those of a monogamous marriage.

3.2.5 Native Land Husbandry Act (1951)

Colonial policy regulating the ownership and usage of land continued at the turn of the second half of the century, and had a bearing on the proprietary consequences of marriage, as land was an important determinant to the economic well-being of the majority of peasant wives and women in Zimbabwe. Customarily, Shona and Ndebele peasant women only had access to agricultural land via marriage as wives in patrilineages.⁴⁴² Owing to the communal mode of production, in larger family fields, husbands, wives and children worked as a unit towards food production that was a

⁴⁴² Gaidzanwa 1994 *Journal of Opinion* 12, who observes that, "...unmarried and divorced women, who were returned to their agnatic patrilineages, were allocated some pieces of land in their mother's fields to grow crops and amass some stores in preparation for marriage. Thus every wife grew crops to feed herself, her husband, and her children."

commodity for barter trade, entertainment, hospitality, and a means of paying tribute to chiefs. The cohesion that the social organization demanded meant that women had to maintain strong ties with their husbands, sons, brothers and fathers to avoid the pitfalls of socio-economic marginalisation.⁴⁴³

The Native Land Husbandry Act⁴⁴⁴ of 1951 was passed in an effort to solve problems around scarce land and worsening of the rural areas in the Tribal Trust Lands (TTLs) due to overpopulation brought about by the Land Apportionment Act enacted earlier. The impact of this Act on the customary law of marriage was that it resulted in the individualisation of land tenure by imposing the requirement that land be registered with the authorities. The Act explicitly defined a farmer as a man despite the fact that women were also working and living on the land while the majority of the men between the ages of 16 and 60 migrated to the wage labour market in urban areas.⁴⁴⁵

Thus women now became victims of individual tenure formalised by the law; and in order to access land, they had to show evidence that they had been abandoned or the extra-territorial residence of their husbands or that they held custody of their children. Although African land tenure systems seemed to favour rights of men to own land, this was not individual ownership *per se*. As Elias⁴⁴⁶ says, “whereas the radical title to the land remains with the family or the community, the individual can have, at any rate in theory, a right only to use. In other words, the ownership is that of the group, and the individual member has mere possession.”

Due to the requirement that women had to prove custody of their children in order to access land, the Act made life even more difficult for women upon divorce because Shona and Ndebele systems of *roora/lobola* meant that, by receiving bride wealth, the

⁴⁴³ For this reason those women who were orphaned, had quarreled with or had weak or non-existent ties with men were very vulnerable.

⁴⁴⁴ Act No. 52 of 1951.

⁴⁴⁵ Gaidzanwa *op cit* 12.

⁴⁴⁶ Elias *African Customary Law* 163, who holds further that, “...this possession is really more than sheer physical control by the allottee of his allocated portion of the land; he can exclude from it strangers to the group as well as other group members. Provided that in the latter event he can show that he has committed no breach of customary rules relative to holdings by group members generally.”

woman and her family forfeited their rights in the children to the husband's family group. On the other hand, men did not forfeit their customary land rights upon divorce. According to Garbett⁴⁴⁷, only 16 percent of women were eligible for customary land rights in terms of the Native Land Husbandry Act in the Mangwande Tribal Area. It is for reasons like these that some people are of the view that unjust restrictions were generally imposed on the mobility of women in colonial Zimbabwe.⁴⁴⁸

The broader implication of the Native Land Husbandry Act was that it resulted in the perpetuation of the interests of African men and the administration in their hold/control of women.⁴⁴⁹ Wives were denied basic rights to land that could have been better taken care of under a communal way of life in terms of custom.⁴⁵⁰ The option to return to one's maiden family was not always the best one due to scarcity of land in general and brothers and fathers were hesitant to take them back, thus, divorce turned out to be catastrophic for women peasants.

Nowadays, there is evidence that urban women are making investments in liquid property such as the buying of shares in companies, banks and other dividend-oriented funds without the intervention of men. This is mainly attributed to the fact that, contrary to the position in the past, as a result of government policy on employment equity, many women are nowadays gainfully employed. In 1992, a decade after independence in Zimbabwe, there was evidence that a share issue by a bank was heavily subscribed by black women, some of whom were disadvantaged by legislation and practices such as

⁴⁴⁷ Garbett G K "The Land Husbandry Act of Southern Rhodesia" in Biebuyck *African Agrarian Systems* (1963) 185ff, the overall impact was that, the patrilineal land tenure system, the colonial land appropriation and the subordination of women under colonialism had substantially eroded women's land rights, their economic standing and their human rights.

⁴⁴⁸ Schmidt 1990 *Journal of Southern African Studies* 646, this was due to the coincidence of the interests of the colonial authorities and the men among the colonised. These interests sometimes coalesced and were defended at the expense of the rights of the colonized women.

⁴⁴⁹ Gaidzanwa 1994 *Journal of Opinion* 13, "Their labour was important for sustaining the future migrants and looking after the young, the unemployed, the sick, the old and the indigent labour migrants."

⁴⁵⁰ Moyo *et al* "The National Context: Land Agriculture and Structural Adjustment and the Forestry Commission" in Bradely and Mcnamara *Living With Trees: policies for forestry management in Zimbabwe* (1993) World Bank Technical Paper no. 210 Washington D.C, the writer brings out the point that, communal land was being transacted in untraditional ways and says, "it is also clear that institutionalizing this process through land law will hasten the dispossession of the majority of those who work the land, namely peasant women."

the Deeds Registry Act⁴⁵¹ that denied married women the right to register property without the mediation of their husbands. Thus, shares have become an attractive investment for such women. However, rural peasant women are still far from some of the tangible benefits that the urban lifestyle has thrown across the path of urban women.

The impact of land tenure laws on the status of women as partners in marriage further undermined the roles played by women as constituents of the communal mode of production. Gender was therefore an important determinant of productivity within the family unit. The extended family was the most important production and consumption unit, with women and children forming the economic sub-unit. As Courville⁴⁵² puts it,

“women’s productive and reproductive capacity made them a social and economic resource which provided men with political leverage. African women were primarily responsible for the economic, social and political reproduction of the household; the bearing of and caring for children; the production, storage and preparation of food.”

In conclusion, as most women’s access to land was through marriage, they lacked security as primary landholders compared to their husbands and were curtailed from objectively making decisions to escape from bad marriages for fear of economic alienation. The Native Land Husbandry Act was only the beginning of a land tenure system imposed by the post-colonial state which continues to disadvantage women in communal areas.

Customary law and the ownership of land was therefore misplaced and misunderstood in the final analysis, by the privatization and registration of land ordinarily regulated through ‘accommodative’ patriarchal lines. It is paramount, however, to promote the views and interests of peasant women with regard to unmediated or joint land rights with men in the new Zimbabwe.

⁴⁵¹ Act No. 10 of 1959.

⁴⁵² Courville in James and Busia *Theorizing Black Feminisms* 33, the writer further attaches some worth to women’s status in marriage and says, “...as well women had exchange-value within the context of marriage, forming alliances between households, clans and nations.”

3.2.6 African Marriages Act (1951)

The African Marriages Act⁴⁵³ (later termed the Customary Marriages Act⁴⁵⁴) dealt with the effect of civil marriages between Africans on the property rights of the parties during subsistence and dissolution of the marriage by death or divorce. According to the African Marriages Act:

“...the solemnization of a marriage between Africans in terms of the Marriage Act shall not affect the property of the spouses, which shall be held, may be disposed of and unless disposed of by will, shall devolve according to customary law.”⁴⁵⁵

The effect of the Act was that where an African died intestate, his/her property was to be devolved in accordance with customary law regardless of the fact that the deceased was a spouse in a civil or customary marriage. As such, up until 1992, when an African married in accordance with the provisions of the Marriage Act (Chapter 37) died intestate, his/her movable estate was distributed in accordance with customary law. This was in terms of the provisions of section 13 of the African Marriages Act which provided that, customary law would govern the disposal and devolution of property of Africans even where they had contracted a civil marriage.

The courts changed the position in 1992 and in the case of *Mujawo v Chogugudza*⁴⁵⁶, Manyarara JA while delivering judgment for the Supreme Court, held that section 13 of the African Marriages Act was incompatible with the provisions of the Legal Age of Majority Act⁴⁵⁷ (LAMA) as it denied women who opted to marry in accordance with the

⁴⁵³ Act No. 29 of 1951.

⁴⁵⁴ Act No. 6 of 1997.

⁴⁵⁵ see section 13 African Marriages Act.

⁴⁵⁶ 1992 (2) ZLR 321 where the Supreme Court had ruled that section 13 had been repealed by implication by the Legal Age of Majority Act.

⁴⁵⁷ Act No. 15 of 1982, see section 15(1), see further in 3.3.2 *infra*, in terms of the Act:

“...on and after 10 December 1982, a person shall attain the legal age of majority on attaining eighteen years of age and in terms of section 3(1) shall apply for the purpose of any law and, including customary law and, in the absence of a definition or any indication of a contrary intention for the construction of ‘full age’, ‘major’, ‘majority’, ‘minor’, ‘minority’ and similar expressions in;

(a) Any enactment, whether passed or made before, on or after 10 December; and

(b) Any deed, will or other instrument of whatever nature made on or after that date.”

general law the full effect of this option.⁴⁵⁸ The LAMA gave majority status to all women and men upon attaining the Age of 18 and released women from the chains of perpetual minority in marriage and the law. There seemed to be an inherent conflict between the two Acts. The reasoning was that, section 13 of the African Marriages Act had been repealed by implication by the LAMA, and it was concluded that such estates fell to be determined in accordance with the general law rules of intestate succession. Commendable as the result of the decision may be, namely, that, the general law of succession now applies to the intestate estates of deceased Africans married in terms of the Marriages Act, the Supreme Court's reasoning in reaching the decision is not entirely sustainable.

Only if customary law with regards to a woman's property rights negates her capacity as conferred by the LAMA to deal with property as a major could it be said that section 13 of the African Marriages Act is impliedly repealed by the LAMA. Customary law has been criticised for treating women as minors and placing them in positions where they have no control over property. This interpretation of customary law is however questionable. As in *Mujawo's* case, the superior courts may hold that women are the junior partners as far as proprietary rights are concerned in civil marriages between Africans.

However, in *Chingattie v Munotiyi and Others*⁴⁵⁹ Smith J held that under customary law, property such as a house acquired jointly by spouses during the marriage became the husband's property which gave him the right sell it without his wife's consent. Smith J followed the decision in *Jenah v Nyemba*⁴⁶⁰ where Gubbay CJ similarly held that women at customary law could not own property. In African law and custom, property acquired during a marriage becomes the husband's property whether acquired by him

⁴⁵⁸ See *Mujawo's* case *supra*.

⁴⁵⁹ H - H 207-92 (1992) (unreported).

⁴⁶⁰ 1986 (1) ZLR 138 (SC).

or his wife. To this rule, there are a few exceptions.⁴⁶¹ Child has been cited saying, “should a woman go out to work with the approval of her husband while under his marital control, any money she earns belongs to him under Shona and Ndebele law.”⁴⁶² The exception is that, if a Shona or a Ndebele wife were to keep her earnings, then property acquired with her own money would be hers and would fall into the *mavoko* category of property, which during her lifetime she would have control of it.

In an earlier decision, in the case of *Chiutsi v Garisa*⁴⁶³, Pittman J ruled that:

“...unfortunately for the plaintiff, although in fact some African women may have achieved economic emancipation after marrying by Christian rites, the law of the land is still that, despite the solemnization of such a marriage, the property of the spouses shall be held according to African law and custom.”

In another judgment in *Jirira v Jirira and Another*⁴⁶⁴, Newham J held that a woman’s earnings came under the category *mavoko* property and was therefore her own when, having regard to her modern lifestyle and the justice of the case demanded it. By this decision, it is submitted that the true customary law position that women could in fact own some forms of property was upheld.

In a traditional customary society, ownership *per se* was not the focal point, rather the communal rights prevailed and women actually exercised rights over ‘male controlled property’ through appropriate males, a phenomenon that is often omitted as one of the realities of their access. Thus, the notion in *Mujawo’s* case that section 13 was in conflict with the provisions of the LAMA is questionable because women’s capacity to

⁴⁶¹ Exceptions referred to as *mavoko* are those articles or proceeds accruing to a woman through her own industry. Another category is *umai* property which is property accruing to a woman through the marriage of her daughters see also discussion in 3.3.4 *infra*.

⁴⁶² Child *Tribal law in Rhodesia* 91.

⁴⁶³ 1969 CAACC 70 at 74, where it was held that: “it did not matter whether the two were married by Christian rites, the law of the land is still that, despite solemnisation of such a marriage, the property of the spouses shall be held according to African Law and custom.” CAACC stands for Court of Appeal for African Civil Cases. These courts existed alongside the district commissioners’ courts and dealt with civil cases where only the rights of Africans were concerned. These courts existed alongside the common-law Magistrates’ Courts and High Court of Southern Rhodesia. However, the Appellate Division of the High Court had jurisdiction to hear an appeal from the CAACC.

⁴⁶⁴ 1976 RLR 7 (G) 15 – 17.

deal with property at customary law is not as limited as it is often portrayed. Even more telling is the observation that, under customary law, men also had very limited individual property rights and were unlikely to have any greater rights of disposal of property in real terms than women.

Although the *Mujawo* case was essentially an inheritance case, it was further complicated by the fact that the deceased male had a child by a woman to whom he was married by purely customary rites as well as a child from his union to the woman to whom he was married under civil rites. The progressive decision was reached that the child of the customary law union was also entitled to succeed to his father's estate by virtue of the provisions of section 3 of the African Marriages Act that had the effect of putting the customary union at par with the civil marriage for purposes of intestate succession. The impact of the Act was that it upheld and recognized customary marriages by stating that,

"A marriage contracted according to African law and custom which is not a valid marriage in terms of this section shall, for the purposes of African law and custom relating to the status, guardianship custody and rights of succession of the children of such marriage, be regarded as a valid marriage."⁴⁶⁵

This section had the positive effect of enabling the child for the purposes of general law so that the child could become one of the heirs *ab intestate* under general law. The wording of the section is quite specific and is confined to situations where customary law is to be applied to questions of succession. As is often said, hard cases make bad law and the decision can be understood as the Supreme Court's concern for the future of a child of a deceased African who could not, for the purposes of the general law, be regarded as legitimate and being thereby precluded from sharing in his/her father's estate.

⁴⁶⁵ The same provision in section 3 of the African Marriages Act is retained in section 3(5) of the Customary Marriages Act (1997).

3.2.7 CONCLUSION

It has become apparent that the colonial administration initially embarked on the passage of successive pieces of marriage legislation aimed at restructuring the values and principles of African family relationships including the traditional marriage. As there was an increase in demand for an African labour pool within the changing economic situation/environment, there was the need to entice African men into the labour force as well as reassuring the African male that their women at home remained under control.⁴⁶⁶ According to Ake⁴⁶⁷, "the social relations of the colonial society were based on disparate aggregations of African and European patriarchies accompanied by radically structured domination and subordination."

Chanock⁴⁶⁸ alludes to something very similar when he writes on colonial Zambia and Malawi and says, "...it is clear that the intervention of the state in these matters involved the manipulation, if not the manufacture, of tradition in a swiftly changing social and economic environment." In addition, the dominance of the concept kinship and lineage as regulators of family life was undermined and distorted under colonial rule. This was attributed to factors such as individualisation of land holding and the loss of land by African peasantry to commercial capitalist farming, aspects that changed the essence of traditional women's roles as suppliers of labour for their families.⁴⁶⁹ Women not only experienced a decrease in food production, but also actually assisted with the harvesting and processing of colonial crops.⁴⁷⁰

One has to be critical and wary not to define or situate women's exploitation and oppression only at the level of ideology. Ramphele⁴⁷¹ warns that this is because the two

⁴⁶⁶ Barnes 1992 *Signs: Journal of African Women in Culture and Society* 589.

⁴⁶⁷ Ake *A political economy of Africa* (1981) 43ff.

⁴⁶⁸ Chanock *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (1985) 169.

⁴⁶⁹ Courville in James and Busia *op cit* 37.

⁴⁷⁰ Ramphele "Are Women Not Part of the Problem Perpetuating Sexism? – A Bird's eye view from South Africa" 1990 *Africa Today* 13.

⁴⁷¹ Althusser *Lenin and philosophy and the other Essays* (1971) 164, the author explains that patriarchy as an ideology places women as constituents of society and therefore holds further that, "ideology cannot be disassociated from the economic relations if we are to explain the patriarchal exploitation and oppression of African women."

do not explain how ideology was constructed historically in relation to production and culturally bound. The impact of colonial interventions as a whole on the African marriage was that women's minority in marriage was reinforced and the concept of polygamy was upheld as a valid customary marriage. In addition, the principles around transfer of *roora/lobola* as bride wealth between families was recognised as a means of facilitating negotiations and transfer of brides to their new families although these alienated families and became enforceable in colonial courts.⁴⁷² Finally, the provisions regarding registration of customary marriages distorted its values and attached western concepts of law unknown to it.⁴⁷³

According to Jeater⁴⁷⁴, the Marriage Ordinances marked and defined an African legal procedure. Natives were of the opinion that the civil marriage for them lacked dignity and honour, and was generally taken to escape responsibilities and hide immoral deeds. Further, that it took away the sanctity of marriage and made it cheap for there was no attempt at reconciliation when spouses quarrelled but on the contrary, easy divorce, which again was prohibited by Native law and custom.⁴⁷⁵

3.3 POST-COLONIAL LEGISLATION

3.3.1 Introduction

On attaining independence in 1980, the colonial era became a thing of the past in Zimbabwe, and the new government began refocusing its commitments subsequent to the disruptions of the guerilla war that had taken its toll on family life as young girls and boys left their homes to participate in the war for liberation. Women who had been key

⁴⁷² See also Maxwell *Christians and Chiefs in Zimbabwe: A Social History of The Hwesa People 1870s – 1990s* (1999) 47 where the writer mentions the fact that, there is an argument common to much research on gender in Africa that colonialism intensified the sexual divisions and gender subordination of pre-capitalist modes of production.

⁴⁷³ Ncube W "Released From Legal Minority: The Legal Age of Majority Act in Zimbabwe" in Armstrong and Ncube *Women and Law in Southern Africa (Eds)* (1987) 194.

⁴⁷⁴ Jeater *Law, Language, and Science* 127, who further states that, "by translating African Marriage into terms that made sense within European culture, the legislative Council's Ordinance imposed a different way of thinking about both law and marriage, founded on flexible application of universal rules."

⁴⁷⁵ Shropshire *Primitive Marriage and European Law* 76.

participants in the war had to be rewarded by inclusion in government policy from independence onwards. One of the ways this could be achieved was by their recognition as majors at law and equal partners in marriage. To spearhead the drive, the Ministry of Community Development and Women's Affairs (MCDWA) was formed and among its objectives was to make women stakeholders in national development by doing away with legal, cultural, and socio-economic obstacles in terms of customary law on the one hand, and the legacy of colonial administration on the other.⁴⁷⁶ Alvarez alludes to the roles that women play in the found dynamics of the state when she says,

"...in undertaking the 'modernization of gender relations', the state typically assigns women a gender-specific place within political institutions and restructures gender difference through official ideology and policy."⁴⁷⁷

However, one may be baffled to note that other commentators found the adoption of progressive policies in Zimbabwe strange. Seidman⁴⁷⁸, is quoted as saying that Zimbabwe appeared, "...to be unusual in the extent to which government leaders, especially women, have been willing to declare themselves committed to feminist goals." Among the legislative reforms introduced by the new government was the Customary Law and Primary Courts Act⁴⁷⁹ which recognised the judicial authority of chiefs and headmen and amended the Maintenance Act to ensure financial support for deserted and divorced wives and their children under customary law.

In 1982, the Legal Age of Majority Act⁴⁸⁰ conferred majority status on all Zimbabweans attaining the age of eighteen. The Matrimonial Causes Act⁴⁸¹ followed in 1985, and gave women rights to property in marriage and recognised the right of both spouses to

⁴⁷⁶ Ranchod-Nilsson "Gender Politics and the Pendulum of Political and Social Transformation in Zimbabwe" 2006 *Journal of Southern African Studies* 60, among the key objectives of the formation was to give advice to various ministerial portfolios on the need to adopt comprehensive and gender sensitive policy submissions to parliament.

⁴⁷⁷ Alvarez *Engendering Democracy in Brazil: women's movements in transition politics* (1990) 30.

⁴⁷⁸ Seidman "Women in Zimbabwe: Post-independence Struggles" 1984 *Feminist Studies* 419ff, the American Sociologist's comment here may be viewed as rather a bit too skeptical for an African nation that was embarking on new path towards the emancipation of women.

⁴⁷⁹ Act No. 2 of 1990.

⁴⁸⁰ Act No. 15 of 1982.

⁴⁸¹ Act No. 33 of 1985.

have custody of their children upon divorce changing the practice where fathers were deemed automatic custodians upon dissolution of marriage. Undoubtedly, these sweeping legal reforms promised gains for women in the areas of marriage, inheritance, child custody, and divorce, areas where the official codification of African customary law before independence had tended to disadvantage women.⁴⁸² As Shropshire notes, “unless woman retains this qualitative and proportionate quality as paramount in marriage no amount of material and quantitative equality will secure for her the fullest development of her personality.”⁴⁸³

3.3.2 Legal Age of Majority Act (1982)

The enactment of the Legal Age of Majority Act (LAMA) brought fundamental legal implications to the status of women in post-colonial Zimbabwe. According to section 15(1) of the Act:

“...on and after 10 December 1982, a person shall attain the legal age of majority on attaining eighteen years of age and in terms of section 3(1) shall apply for the purpose of any law and, including customary law and, in the absence of a definition or any indication of a contrary intention for the construction of ‘full age’, ‘major’, ‘majority’, ‘minor’, ‘minority’ and similar expressions in;

(a) any enactment, whether passed or made before, on or after 10 December; and

(b) any deed, will or other instrument of whatever nature made on or after that date”⁴⁸⁴

The Act however found its first application in a succession case in *Chihowa v Mangwende*.⁴⁸⁵ The court held that the legislature by enacting the LAMA, had made women who, in African law and custom were perpetual minors, majors and therefore equal to men upon attaining eighteen years of age, and acquire legal capacity thereof.

⁴⁸² Nhongo-Simbanegavi *For better or Worse? Women and ZANLA in Zimbabwe's Liberation Struggle* (2000) 142. These changes were particularly welcomed by educated urban women especially amid international scrutiny during the UN's Decade on Women that although whilst not coercing for change, had a positive impact on legislative reform in Zimbabwe.

⁴⁸³ Shropshire *Primitive Marriage and European Law* 75.

⁴⁸⁴ Section 3 of Act No. 15 of 1982 (now section 15 of the General Law Amendment Act Chapter 8:07).

⁴⁸⁵ 1987 (1) ZLR 228 (S), it was held that the respondent was rightly appointed the intestate heiress to her father's property.

Locus standi entitles women to be appointed intestate heiresses and all the courts are required to do is to give effect to the intention of the legislature.⁴⁸⁶ The judgment was therefore consonant with the notions of gender equity. However, there is the argument that the question to answer was whether the disabilities and discrimination suffered by women under customary law were based on their perpetual minority.⁴⁸⁷

The shift was now apparent as the move from colonial restrictions began. According to Obbo⁴⁸⁸, “the colonial state sanctioned and institutionalized the political and legal status of African women as minors and/or dependants subject to male control.” However the legal reforms brought by the new Act did not come without controversy and skeptics feared that the ‘innovations’ were detrimental to the preservation of African culture in general.⁴⁸⁹ The automatic implication of the LAMA meant that women now had the right to vote, right to own property, right to contract marriage without parental consent or family consent, right to become guardians of their own children and to initiate civil litigation without assistance.⁴⁹⁰

Rightfully so, the greatest criticisms against the LAMA entailed its implications for the African marriage, especially regarding *roora/lobola* negotiations. Some say the Act’s passage had provoked bitter condemnation in the national press, being depicted as

⁴⁸⁶ The court held further that, “...now the eldest daughter of a father who dies intestate can take the lot, but not herself only but for herself and her late father’s dependents.”

⁴⁸⁷ See the reasoning by Muchechetere JA in *Chihowa’s* case where he expressed the view that, “they were not based on their perpetual minority but on the nature of African society, especially the patrilineal, matrilineal or bilateral nature of some of them. I reasoned that the concepts of minority and majority status were not known to African Customary law but that they were Common law concepts which, in my view, should only be used in customary law situations with great care.” It is submitted that, From my point of view, the learned judge in this regard did therefore surely not appreciate the influence of the Common law.

⁴⁸⁸ Obbo *African women: their struggle for economic independence* (1980) 21.

⁴⁸⁹ In this regard see Alexander *The Unsettled Land: State-Making and the Politics of Land in Zimbabwe, 1893-2003* (2006) 166, who observes that Chiefs joined the chorus of criticism leveled against the Legal Age of Majority Act that granted women new rights, and further that, “...councilors argued that it was a departure from our culture and would increase the stubbornness amongst girls and woman. Chiefs complained that the Act undermined traditional values and it led to baby dumping, divorce and disputes.” See also Hann *Socialism: Ideals, Ideologies, and Local Practice* (2004) 98, who is quoted as saying that the Act “...has been a source of considerable popular disaffection, requiring a Supreme clarification of its intent, though as yet there has been no move to amend it.”

⁴⁹⁰ Ranchod-Nilsson 2006 *Journal of Southern African Studies* 61, where the writer says that the law failed to resolve contradictions in women’s status created by the dual civil and customary legal codes.

corrupting and unAfrican.⁴⁹¹ Others were of the opinion that the new legislation raised concerns about the undermining of parental authority, and further that, at the age of eighteen, girls were too young and still in need of parental guidance.⁴⁹²

Ranchod-Nilsson observes that by the late 1980s, government itself seemed to realize the negative effect that the LAMA was having on the preservation of custom and marital institutions.⁴⁹³ According to Phillips:

"in view of the kinship relations of production that exist around the marriage of a woman, the LAMA is therefore bound to have a profound impact not just on the lives of those women who choose to exercise their legal subjectivity and lead autonomous lives, but it also brings about considerable changes in the relationships and lives of all the men and women in the extended family."⁴⁹⁴

It has become inevitable that recognition of universal and individual rights of women conflicts with communally based rights of the group. This is because individual autonomy is paramount to a person's attainment of rights, liberties and responsibilities on a social level. One may take a look back at the initial Native Marriage Ordinance of 1901 that made similar attempts as the LAMA by doing away with forced marriages and awarded women legal freedom as individuals from their guardian male counterparts.⁴⁹⁵

The LAMA has also brought contradictions within the legislative framework in Zimbabwe in that, on the one hand *roora/lobola* is no longer a legal requirement of a customary marriage, whilst on the other, new Customary Marriages Act assumes that, in most cases, *roora/lobola* will be paid. However, a 1994 survey by UNICEF revealed that while

⁴⁹¹ Alexander *state-making & the politics of land in Zimbabwe* 166.

⁴⁹² Batezat E *et al* "Women and Independence: the Heritage and Struggle" in Stoneman *Zimbabwe's Prospects: Issues of Race, Class, State and Capital in Southern Africa* (1988) 153ff, who remarks that in 1989, the ZANU-PF party congress passed resolutions calling for the government to review the LAMA for it to be more accommodative of the cultural background of the people, and secondly to possibly raise the age of majority to 21 years. Other resolutions at that same congress sought revisions to the Maintenance Act limiting the number of children for which women could claim maintenance from different fathers, and a restoration of the powers of chiefs and headman so that they can preserve and maintain rural family life, as well as control stock theft, deforestation and other social evils.

⁴⁹³ Ranchod-Nilsson *op cit* 61.

⁴⁹⁴ Phillips O "Constituting The Global Gay: Issues of Individual Subjectivity and Sexuality in Southern Africa" in Herman and Stychin *Sexuality in the legal arena* (2000) 25.

⁴⁹⁵ *Ibid* 28.

couples over 18 years of age can choose to marry without *roora/lobola*, this is rare.⁴⁹⁶ In the final analysis, while most Africans may be awarded majority status by the law, various aspects of their family lives in marriage continue to be socialised in the realm of customary law.⁴⁹⁷

3.3.3 The Communal Land Act 1982

Not all legislation carried the 'progressive' spirit of the Legal Age of Majority Act. The Communal Land Act⁴⁹⁸ was enacted to govern access to communal land in Zimbabwe. In terms of the Act, when allocating land in communal areas, the Rural District Councils (the responsible local authorities) are required to consult and cooperate with the local chiefs. In doing so, they must have regard to the customary law relating to land allocation, occupation and use among those people who are customarily entitled to real rights in the land.⁴⁹⁹ Men are thus held to be custodians of communal land rights in the rural areas. The impact of the Act is that peasant women are allocated land use rights within the households as wives and daughters in patrilineages and have to work and earn a living from the same land, thus reinforcing patriarchal hold over women.

The Act carries into post-colonial Zimbabwe provisions very similar to the Native Land Husbandry Act and the Land Apportionment Act of the colonial era, because these too limited women's access to communal land. The belief is that unmarried women under this regime are only allocated land use rights on a temporary basis in the belief that they will one day marry and go to live with their husbands. Men therefore have a direct entitlement to access land on the one hand, while women's entitlement is indirect, that

⁴⁹⁶ Stoneman and Cliffe *Zimbabwe: Politics, Economics and Society* (1989) 74, where the author makes a reference to a survey in Harare conducted in the 1980s which revealed that only five per cent of marriages were registered without bride wealth payments, see also survey by UNICEF, "Children and Women in Zimbabwe: a Situation Analysis Update" (Harare, UNICEF 1994) at 56.

⁴⁹⁷ Woodman G R "A Survey of Customary Laws in Africa in Search of Lessons for the Future" in Fenrich *et al The Future of African Customary Law* (2011) 27, the writer is quoted saying, "the regulation of the relationship between state law and customary laws, taken in its widest possible sense, includes measures by the state to suppress all customary laws. This logical possibility is not, it is suggested, a practical possibility. All experience of state laws in Africa shows that, for the foreseeable future, virtually all people will continue to observe customary laws, at least in some parts of their lives." See further in this regard, Menski *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (2006) 471.

⁴⁹⁸ Act No. 20 of 1982.

⁴⁹⁹ See section 8 of the Communal Land Act.

is, entirely dependant on males. This is much to the demise of widowed/single or divorced women who find themselves unable to fully access communal land. One may then begin to ask if individual ownership of immovable property is a recognized form of ownership at customary law or another distorted codification.

Worthy to note is the fact that owing to colonial influences, individualisation of land tenure, land market pressure and other factors, many customary laws and traditional practices governing people's social life, have eroded over time and the forms of solidarity that used to protect women from exclusion have now disappeared in many ways. Even where statutory laws may attempt to recognise women's rights to land, housing, and other forms of property, traditional conservative values may influence the attitude of judges, police officers, local councillors, and land officials to effectively enforce the law. These officials often interpret statutory laws in what at present is perceived as 'customary ways', as a result of which women are deprived of the rights they should enjoy under statutory law.⁵⁰⁰

In communal land tenure systems, women had significant indirect access and rights to use communal resources including land through their roles as household managers but now they have been further excluded because of individualisation and registration requirements, processes which favour their husbands. According to Benschop⁵⁰¹, the impact is mostly felt among rural women who "without legal protection women are at risk of suddenly becoming landless, as has happened in the many cases where the husband sells the family land."

It is however questionable whether the husband could act unilaterally because although he held the title to the land, he could not pass this to another without consulting his wife. At an administrative level too, which facilitates the implementation of legislation and distribution of land, it has been known that the law has tended to be notoriously

⁵⁰⁰ Benschop "Women in Human Settlements Development - Challenges and Opportunities" *Women's Rights to Land and Property* Commission on Sustainable Development (2004, UN-Habitat) 3; [Http://www.unhabitat.org/downloads/docs/1556_72513_csdwomen.pdf](http://www.unhabitat.org/downloads/docs/1556_72513_csdwomen.pdf) (Accessed 20/06/2010).

⁵⁰¹ *Ibid.*

unaccommodative. For example, the forms and documents for registration of land for example, are known to simply lack spaces to indicate joint registration of both spouses.⁵⁰²

Apart from the Communal Land Act of 1982, women in Zimbabwe also have limited real rights to property in terms of the Deeds Registry Act⁵⁰³ (DRA). The DRA deals with special provisions relating to registration of property rights of women depending on the type of marriage they are party to. In terms of the Act:

"a married woman shall be assisted by her husband in executing any deed or document required or permitted to be; (a) registered in any deeds registry; or (b) produced in connection with any deed or document referred to in paragraph (a); if by virtue of her marriage, she has no legal capacity to execute such deed or document without the assistance of her husband."⁵⁰⁴

The Act goes further requires the registrar to record the change of marital status and any consequent change of name of a woman in a deed or document filed in the deeds registry on written application by such woman accompanied by the relevant deed or document and proof to his satisfaction of such change of marital status.

In the year 2000, when the Zimbabwean government began the reallocation of land to the black majority from white farmers, there is evidence that few women benefited from the scheme.⁵⁰⁵ According to Goebell, less than 20% of the land targeted for resettlement has been allocated to women out of 300 000 small-scale farmers and 30 000 black commercial farmers were women constitute an estimated 52% of the population.⁵⁰⁶ Also subsequent to the 'Fast Track Resettlement Scheme' that displaced many white farmers in Zimbabwe, a report in 2003 made findings that, female-headed households who benefited under Model A1(peasant farmers) constituted only 18% of

⁵⁰² *Ibid.*

⁵⁰³ Act No. 14 of 1999.

⁵⁰⁴ See section 15 (1) of the Deeds Registry Act.

⁵⁰⁵ Goebell *Gender and land reform: the Zimbabwe experience* (2005) 101.

⁵⁰⁶ *Ibid* 143, see also Goebell "Here it is the Land, the two of us": Women, Men and Land in a Zimbabwean resettlement Area' 1999 *Journal of Contemporary African Studies* 75ff, see further, Jacobs S "Zimbabwe: State, Class and Gendered Models of Land resettlement" in Parpart and Staudt *Women and the state in Africa* (1989) 179.

the total number of households while female beneficiaries under the Model A2 (commercial farmers) constituted only 12%.⁵⁰⁷ Clearly, this undermined and overlooked the fundamental roles that women as wives play in subsistence agriculture.⁵⁰⁸ However, there is an observation that whilst policy might not have been explicit on the land rights of vulnerable women, they were in fact afforded these rights in practice.⁵⁰⁹

In the final analysis, while various land reform policies should have brought prospects that are more positive for women to own land equitably as wives and as individuals and reduce the gap between legislation and social realities, women's rights to land still need to be reinforced. According to Jacobs, "...women's needs have either been neglected or indirectly excluded in many spheres of state policy, including the resettlement program."⁵¹⁰ Colonial land tenure arrangements of the past, which discriminated against women, have thus been perpetuated in the present day through the Communal Lands Act.

3.3.4 Matrimonial Causes Act 1985

Zimbabwe recognises two main types of marriages as legal, the first is the civil marriage in terms of the Marriages Act⁵¹¹ (Chapter 5:11), and the second is the registered customary marriage in terms of the Customary Marriages Act (Chapter 5:07). The legal duality of customary law and the general law has brought about undesirable consequences, particularly for woman, in the third type of marriage, the unregistered

⁵⁰⁷ Utete Land Audit Report *The Human Rights Monthly* is produced by the Zimbabwe Human Rights NGO Forum (known as the "Human Rights Forum") and is distributed free of charge through its member ngos. (The Zimbabwe Human Rights NGO Forum is a coalition of 17 Non-Governmental Organisations in Zimbabwe working towards the elimination of organised violence in the country.) See report at: http://www.sarpn.org/documents/d0000622/P600-Utete_PLRC_00-02.pdf (Accessed 21/06/2010).

⁵⁰⁸ Manby "Fast Track Land Reform in Zimbabwe" 2002 *Human Rights Watch* 31, stating that women make up 52 per cent of the population, and 86 per cent of them depend on the land for their livelihoods and those of their families. Women provide approximately 70 per cent of the labour for farming and are in charge of rural households that continue to be characterized by high rates of male migration. <http://www.unhcr.org/refworld/docid/3c8c82df4.html> (Accessed 22/02/2012).

⁵⁰⁹ Izumi *The land and property rights of women and orphans in the context of HIV and AIDS: case studies from Zimbabwe* (2006) 7, observing that, "whilst there was no formal provision for allocation of land to widows and other single women in Zimbabwe's land policy, it would appear that they received de facto priority under the Land Occupation/Fast Track Resettlement Programme."

⁵¹⁰ Jacobs in Parpart and Staudt *Women and the state in Africa* 179.

⁵¹¹ Acts No. 81 of 1964.

customary marriages. Unlike the former two, the unregistered customary marriage is not a valid marriage for purposes of the Matrimonial Causes Act (MCA). Thus, on claiming for equitable distribution of matrimonial property upon divorce, a wife married in terms of an unregistered customary marriage has to prove that she contributed to its acquisition.

The Matrimonial Causes Act sought to provide the courts with set guidelines based on equity, on how to determine reallocation of property rights of spouses subsequent to divorce.⁵¹² Although the Act went against customary law which views matrimonial property as the husband's upon divorce, it may be commended for bringing Zimbabwean law in line with women's rights.⁵¹³ In as much as the Act may be progressive, it has often been up to the courts to exercise judicial creativity or conservatism in dealing with problematic cases, particularly those arising out of unregistered customary marriages.⁵¹⁴

Not all aspects of the Matrimonial Causes Act can, however, be seen in a positive light. By introducing divorce on the ground of irretrievable breakdown, it can be criticised for opening the floodgates to divorce. The move was a shift away from the fault or matrimonial offence principle previously imposed by the early Ordinances of the early 1900s, to a system where the courts began to conduct enquiries and objective assessments into the general state of the divorcing parties' marriage before granting a decree of divorce.

⁵¹² Ncube "Re-Allocation of Matrimonial Property at the Dissolution of Marriage in Zimbabwe" 1990 *Journal of African Law* 1, the writer puts forward the view that, "...this recognition of the equal worth and equal importance of the two spouses to a marriage relationship has had profound effects on the matrimonial property regimes of numerous countries which have had to tackle the problem of the construction of fair and equitable legal formula for the reallocation of matrimonial property rights at the dissolution of marriage."

⁵¹³ Ranchod-Nilsson S C "Zimbabwe: Women's Rights and African Custom" in Walter *Women's rights: a global view* (2001) 204.

⁵¹⁴ In this regard see *Mtuda v Ndudzo* 2000 (1) ZLR 718 (H) where it was held that, "generally speaking the various judgments which have emanated from the higher courts are to the effect that a wife in an unregistered customary law union is entitled to protection in the event that the two part way and that consideration such as her level of contribution, duration of union etc would be pertinent". See further *Matibiri v Kumire* 2000 (1) ZLR 492 (H), *Chapeyama v Matende and Another* 2000 (2) ZLR 356, and *Mashingaidze v Mugomba* HH 3/99 (unreported). The cases are discussed more fully in 3.3.5 *infra*.

In the case of *G v G*⁵¹⁵ the plaintiff (husband) and the defendant were married by civil rites in 1998 and had two children born out of the marriage. In 2007, the plaintiff issued summons praying for a decree of divorce on the grounds that his relationship with the defendant had broken down with no prospects of reconciliation. He alleged that the defendant had denied him conjugal rights for more than three years. On the other hand, the defendant did not agree that their marriage had broken down to such an extent that it was irreconcilable. The trial court applied provisions of section 5(1) of the Matrimonial Causes Act which provides that:

"An appropriate court may grant a decree of divorce on the grounds of irretrievable breakdown of the marriage if it is satisfied that the marriage relationship between the parties has broken down to such an extent that there is no reasonable prospect of the restoration of a normal marriage relationship between them."

Makarau JP made it clear that the courts would not be too persuasive where one party was adamant that a normal marriage could not subsist any longer when she said:

"It is my considered view that once one party to the marriage has expressed an intention to end the marriage and remains of that view at the time of the hearing of the matter, in the absence of any evidence to show that he or she may have changed their mind between the issuance of summons and the hearing of the matter, the court will be hard pressed to order the parties to reconsider their positions. It takes two to tango."

In clarifying the attitude of the courts, the learned Judge stated that the courts would not grant divorces lightly because it changed one's status at law and socially, especially where children were involved. However, caution had to be taken not to act on the mere belief of one of the parties that their marriage "will blossom someday into its former vibrancy and passion."⁵¹⁶

⁵¹⁵ HH 31/08 [2008] ZWHHC 31 (unreported), where it was also held that, a divorce has the effect of impoverishing the divorcing couple as it parcels out jointly held assets into two separate estates, each estate obviously becoming less in worth than the jointly held estate. Thus, where there is evidence that a marriage can be salvaged, or where the justice of the case demands, the court will exercise its discretion against granting a decree of divorce."

⁵¹⁶ See Makarau JP in *G's case* *supra* at 5; <http://www.saflii.org/zw/cases/ZWHHC/2008/31.pdf> (Accessed 20/06/2010).

On the other hand, the court adopted a different approach in the case of *Mashonganyika v Mashonganyika*⁵¹⁷ where the parties were sharing board and bed, including affording each other conjugal rights well up to a fortnight before the date of the hearing. Rather than showing incompatibility, the parties in this case showed that they could continue as husband and wife and for some time the plaintiff only changed their daily routines because the matter had been set down for hearing. The court held that, had the matter taken long before being set down before the court, it is easy to imagine that normal marriage relations would have continued between the parties.

The MCA also deals with matters relating to the division of assets and maintenance of spouses by the payment of lump sums or periodic payments upon divorce. Section 7(1) provides that:

“(1) Subject to the provisions of this section, in granting a decree of divorce, judicial separation or nullity of marriage, or at any time thereafter, an appropriate court may make an order with regard to:

- (a) the division, apportionment or distribution of the assets of the spouses including an order that any asset be transferred from one spouse to the other,
- (b) the payment of maintenance whether by way of a lump sum or by way of periodical payments, in favour of one or other of the spouses or of any child of the marriage.”

In addition to the provision in section 7(1)(b) dealing with payment of maintenance as a lump sum or periodically, section 11(1) of the MCA recognises the Roman-Dutch law concept that entitles a wife to a claim for arrear maintenance in consonance with the decision in the case of *Woodhead v Woodhead*.⁵¹⁸ One may argue that the whole concept of prescription and systematic periodic or monthly payments to beneficiaries of maintenance orders is unknown to customary law. In quantifying these periodic payments, the courts often face challenges, as women have been known to be

⁵¹⁷ HH 10/08 (2008) (unreported), where the court made the finding that, “It is not cynical in the least to suggest that normal marriage relations between the two were interrupted by the set down of the matter.”

⁵¹⁸ 1955 (3) SA 138 (SR) 70, where Beadle J held that: “...I am of opinion therefore that a wife who had maintained children without assistance from her husband ... Should be able to recover from her husband the money she had expended on maintaining the children up to the amount which the court considers could reasonably represent the husband's share of the reciprocal duty of maintaining them.”

dishonest in stating their true incomes in order to have maintenance orders granted in their favour. By making provision for lump sums, the MCA makes another creative diversion from the usual recognition and acceptance of periodic payments, which can be criticised for giving parties against whom court orders are made, room to default.

Another important aspect of the Matrimonial Causes Act is the discretion that the courts may exercise when making an order in terms of section 7(1). According to Ncube, presiding officers are entitled to exercise a judicial discretion in dealing with matrimonial property.⁵¹⁹ In terms of section 7(2):

An order made in terms of subsection (1) may contain such consequential and supplementary provisions as the appropriate court thinks necessary or expedient for the purpose of giving effect to the order or for the purpose of securing that the order operates fairly as between the spouses and may in particular, but without prejudice to the generality of this subsection:

- (a) order any person who holds any property which forms part of the property of one or other of the spouses to make such payment or transfer of such property as may be specified in the order;
 - (b) confer on any trustees of any property which is the subject of the order such powers as appear to the appropriate court to be necessary or expedient.
- (3) The power of an appropriate court to make an order in terms of paragraph (a) of subsection (1) shall not extend to any assets which are proved, to the satisfaction of the court, to have been acquired by a spouse, whether before or during the marriage—
- (a) by way of an inheritance; or
 - (b) in terms of any custom and which, in accordance with such custom, are intended to be held by the spouse personally; or
 - (c) in any manner and which have particular sentimental value to the spouse concerned.

⁵¹⁹ Ncube *Comparative matrimonial property systems: the search for an equitable system of re-allocation of matrimonial property* (1989) 60ff, the powers held by the court extend to both customary law and general law marriages in terms of the definition of the marriage in section 2 of the African Marriages Act of 1951. However, the author cautions that unregistered customary law unions are not included in the definition and thus the courts would have no power to invoke the provisions of section 7 to reallocate the property of parties associated in a customary law union.

In the process of exercising this judicial discretion, section 7(4) contains 'sharing provisions' and lays down the factors to be taken into consideration by the court. It reads as follows:

"In making an order in terms of subsection (1) an appropriate court shall have regard to all the circumstances of the case, including the following:

- (a) the income, earning capacity, assets and other financial resources which each spouse and child had or is likely to have in the foreseeable future;
- (b) the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future;
- (c) the standard of living of the family, including the manner in which any child was being educated or trained or expected to be educated or trained;
- (d) the age and physical and mental condition of each spouse and child;
- (e) the direct or indirect contribution made by each spouse to the family, including contributions made by looking after the home and caring for the family and any other domestic duties;
- (f) the value of either of the spouses or to any child of any benefit including a pension or gratuity which such spouse or child will lose as a result of the dissolution of the marriage;
- (g) the duration of the marriage;

and in so doing the court shall endeavour as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses and children in, the position they would have been in had a normal marriage relationship continued between the spouses."

However, the application of some of the guidelines has limitations. For example, section 7(4)(a) on the determination of present and prediction of future financial resources, makes it difficult, if not impossible, for the courts to ascertain the real economic circumstances of the litigants because the courts have to be well resourced in terms of time and manpower. In practice, divorcing spouses have demonstrated a tendency towards attempting to hide their true financial means and/or resources. By calling on the courts to make orders that would place the spouses and children in a similar position

had a normal marriage relationship continued, the legislation went against what has been termed the 'clean-break' principle of western law in favour of the 'minimal loss' principle.⁵²⁰

The courts continuously seek to define the meaning of the broad discretion in section 7 of the MCA. In *Masimirembwa and Another v Chipembere*⁵²¹ the court held that "section 7(1)(a) does not pertain to the enforcement of strict legal rights. It is concerned rather with the exercise of a judicial power directed at achieving a result or settlement that is deemed just and equitable in all the circumstances."

The Supreme Court of Zimbabwe has also brought some clarity to the interpretation of the provisions in section 7(1) and (4) of the Matrimonial Causes Act when dealing with distribution of assets between spouses married in accordance to customary law. Emphasis is given to the fact that section 7(1) talks about 'assets' and not 'matrimonial property', the implication being that, the court is entitled to exercise its discretion and take into consideration some of the spouses' personal property together with that which is acquired during subsistence of the marriage deemed 'matrimonial property'. Nonetheless, the limitations in section 7(3) a - c regarding exclusion of inherited and other assets should apply.

The issue came into consideration in the case of *Gonye v Gonye*.⁵²² The parties had been married in 1972 and had their marriage solemnized in terms of the African Marriages Act (now the Customary Marriages Act [Chapter 5:07]). Owing to their irreconcilable differences, the parties voluntarily separated in 2002 and the marriage was dissolved by the High Court in 2006. The husband had since taken another wife

⁵²⁰ Banda F "Family Law Reform in Zimbabwe – 1987 to present" in Bainham *The International Survey of Family Law*, 1995 (1997) 553.

⁵²¹ 1996 (2) ZLR 378 (S) at 381 see also in this regard the case of; *Takafuma v Takafuma* 1994 (2) ZLR 103 (S) at 106.

⁵²² (68/06) [2009] ZWSC 13 (unreported), the High Court also made an order for the husband to pay maintenance towards his wife at the rate of \$2 000 000 (Zimbabwe Dollars) per month until her death or re-marriage. However, on appeal, the Supreme Court held that the *court a quo* was not in error and thus there was no ground on which it could interfere with its findings.

after the separation but before dissolution of the marriage, therefore the marriage was potentially polygamous.

The appellant (husband) noted an appeal with the Supreme Court against part of the judgment passed by the *court a quo* where the respondent (wife) was awarded 25% of the value of a certain motor vehicle and two residential properties. The question before the appeal Court was to determine whether the High Court in making its order regarding the division, apportionment or distribution of the spouses' assets, failed to exercise its judicial discretion conferred under section 7(1) of the Matrimonial Causes Act.

Counsel for the appellant argued that the learned Judge had misdirected himself in treating the motor vehicle and two houses as "matrimonial property" because the appellant acquired the motor vehicle and completed construction of the houses long after the parties' separation. It was further submitted further that one of the immovable properties was registered in the name of the appellant's second wife and therefore the first wife had no claim. The effect of the argument was that the court in exercising its broad discretion conferred on it under section 7(1) of the Matrimonial Causes Act, should not have granted the respondent (first wife) the right to a portion of the value of property purchased by the appellant when the parties were on separation.

Malaba JA provided an interpretation of section 7(1) by saying:

"It is important to note that a court has an extremely wide discretion to exercise regarding the granting of an order for the division, apportionment, or distribution of the assets of the spouses in divorce proceedings. Section 7(1) of the Act provides that the court may make an Order with regard to the division, apportionment, or distribution of "the assets of the spouses including an Order that any asset be transferred from one spouse to the other". The rights claimed by the spouses under section 7(1) of the Act are dependent upon the exercise by the court of the broad discretion."⁵²³

⁵²³ *Ibid* at 4, the court also found that a more equitable position was achieved by adopting the concept of "the assets of the spouses" which was clearly intended to have assets owned by the spouses individually

The Judge emphasised that the terms used were “assets of the spouses” and not “matrimonial property” reasoning further that using the concept of “matrimonial property” led to an erroneous view that assets acquired by one spouse before marriage or after separation should be excluded from the division, apportionment or distribution exercise a position that tended to lead to injustices. Malaba J also stressed that section 7(4) of the Act required the court in making its order to have regard to all the circumstances of the case and strive to place the spouses in a position similar to that they would have been had the marriage continued.

The Court found that, because the assets were acquired or created during the period the spouses were on separation did not exclude them from the category of the “assets of the spouses”. In addition, section 7(4)(f) of the Act entitled the court to consider the value of such benefit. In conclusion, it was held that, in order to place the spouses in the position they would have been had their marriage continued, it was just and equitable to award the respondent 25% of the value of the immovable property. The Court supported its finding by stating that, the real rights in the house continued to be vested in the new wife, and the respondent only claimed an amount of money equivalent to 25% of the value of the property. Therefore, the claim did not affect the interests of the appellant and his new wife in the property.⁵²⁴ The appeal was accordingly dismissed.

The provisions of section 7 also found application in the case of *Dzvova v Dzvova*⁵²⁵, where the parties, after reaching consensus as to the distribution of the movables comprising their joint estate, disagreed on the sharing of the matrimonial home to which they were both registered owners according to the Deed of Transfer. The plaintiff (wife) contended that the property in dispute be sold and the proceeds shared equally. The

(his or hers) or jointly (theirs) at the time of the dissolution of the marriage by the court considered when an order is made with regard to the division, apportionment or distribution of such assets.

⁵²⁴ Counsel for the appellant is noted as having actually conceded to the fact that when all the circumstances of the case are taken into account the granting to the respondent of the right to 25% of the value of each of these assets was a proper exercise of discretion by the court *a quo*.

⁵²⁵ HC (753/08) [2008] ZWHHC 87, the learned Judge held further that, “It is on this basis that this court has made orders for custodian parents to remain in occupation of the matrimonial residence after divorce and until the youngest child attains majority. It is on the basis of this that this court has ordered the procurement of new residences or motor vehicles for divorced spouses to achieve the objectives of the Act.”

defendant (husband) on the other hand argued that the immovable was his and that being a pensioner, he lacked the means to purchase the plaintiff's one-half share in the property thereby saving it from being sold immediately upon the granting of the divorce. He also mentioned that he was too old to start his hand at farming and being a contract worker, he could not relocate to the farm which he considered his rural home. Citing these concerns, the defendant husband pleaded that he be allowed to stay in the matrimonial home and that the property be sold only upon his death.

Two issues fell for consideration before the court. Firstly, was whether the court could exercise its discretion under section 7(2) of the MCA by making a deduction from the plaintiff's 50% share in the immovable property and award such to the defendant. In addition, the court sort to determine if any alternative or ancillary relief was justified under the circumstances of the case.

In the first instance, the court found that the plaintiff (wife) indeed had a right to 50% of the value of the immovable property by virtue of being a joint owner in terms of the Deed of Transfer. However, after hearing testimonies from both parties, the court made an order in favour of the defendant's submission that, the sale of the matrimonial home be effected only upon his death because, among other reasons, the plaintiff who was a South African citizen, did not show prospect of staying in Zimbabwe. She was in a position to return to her family where her parents had since passed on, and left a home at which she could reside. On the other hand, the husband (defendant) who was now an elderly man had nowhere to stay, let alone afford decent accommodation with the proceeds from the sale of the house.

To back its findings, the court per Makarau JP held that:

"The parties' positions above in my view bring into focus the contrast between the "clean break" concept in divorces and the objectives of section 7 of the Act that imposes a duty upon the court to view the distribution of the matrimonial assets as if a marriage between the parties continues. The plaintiff's stance is clearly a manifestation of the clean break concept. She would want to break cleanly from him and realize her share of the immovable property upon the granting of the divorce and move on with the remainder of her life. His is the exact opposite. He would not want

the divorce to unsettle his life save as for that which cannot be avoided. In this regard he would want to remain in the property until his death notwithstanding the granting of the divorce.”

The Judge in *Dzvova’s* case acknowledged that the MCA introduces a duty on the court to make an endeavour to maintain, as far as is reasonable and practicable, the status quo of the lifestyle that the spouses had during the subsistence of the marriage. Inevitably though, the undesirable consequence of upholding one obviously frustrates the other. The court also referred to the decision in *Nyatwa v Nene*⁵²⁶ where it was held that, “the clean break principle as its name implies, envisages a situation where after the divorce, there are no strings financial or social, tying the parties one to the other. Each party is given their due from the failed marriage and is left to pick up their lives and move on.”

This discretion by the courts has also been illustrated in an earlier decision, in *Munhenga v Munhenga*.⁵²⁷ The case was an appeal against an order of the High Court where in addition to issuance of a decree of divorce, the respondent (wife) was awarded all the parties’ movable property as well as thirty five percent of the market value of the parties’ matrimonial home being the custodian parent. The appellant (husband) before their marriage had bought the immovable property and the respondent had contributed towards the addition of three rooms.

On appeal, the husband opposed the order of the *court a quo* by arguing that, he had acquired and registered the property in question in his name before the marriage and did not form part of the matrimonial estate. The immovable property should have therefore been excluded from the division of property. He further submitted that the

⁵²⁶ 1990 (1) ZLR 97 (H) where Ebrahim J said, “...the statutory objective as set by s 7 (4) of the Act is foreign to our legislation and militates against the clean break theory or principle towards which the entire statute is geared.” The learned judge went on to note that the Zimbabwean legislation was promulgated very shortly after the repeal from the English equivalent (section 25(2) a – h of the Matrimonial Causes Act 1973 Chapter 18) of a similar provision and our legislature did not take the opportunity to include the clean break principle into the legislation.

⁵²⁷ (62/02) [2003] ZWSC 32 (unreported), the court recognised the women’s contribution but not as equal to that of her husband’s and held further that: “The property that the appellant acquired before his marriage to the respondent had therefore, by the time the marriage came to an end, appreciated considerably, and in a permanent way, in value. An award that ignores the respondent’s contribution in this respect would result in the appellant enjoying an unfair material advantage over the respondent.”

respondent's contribution of an additional three rooms to the house was minimal and the thirty-five percent share she got in the initial order was unfair, inequitable, and tantamount to allowing her to reap where she did not sow.

The court held that the appellants' submissions ignored the fact that while the land, slab and four rooms were acquired and built before the marriage, the addition of three rooms, the plastering of the whole house among other improvements were all effected after the marriage with the respondent's significant contribution. These had the result of permanently increasing the value of the house and thus an order that ignored the respondent's contribution would give the appellant an unfair material advantage at the respondent's expense.

The court also applied provisions of section 7(4) of the MCA and concluded that the issue regarding acquisition of property before the parties' marriage was irrelevant in determining the children's entitlement to a life as close as possible to that they had become accustomed. It was held further that, the respondent as the custodian parent was entitled to an appropriate share in the net value of the matrimonial home. After considering all factors, the appeal court found no anomaly in the High Court's discretion in reaching its findings of an award of 35% to the wife, which it deemed fair and just under the circumstances and dismissed the appeal.⁵²⁸

In a similar case to that of *Munhenga*, in *Muchada v Muchada*⁵²⁹, a wife had not only taken care and supported the children from her own income but also conducted extensions to the matrimonial home with some assistance from her husband who was studying in Britain. It was held that she was entitled to 50% of the proceeds realised upon the sale of the house.

⁵²⁸ *Ibid* at 4, the court per Gwaunza JA held that owing to "the respondent's contribution and the children's entitlement to a comparable standard of life, I do not find that an award of thirty-five percent is, to use the appellant's words "on the high side". To the contrary, I am satisfied that such an award adequately meets the justice of this case."

⁵²⁹ HC-H-346-86 (1986) (unreported).

Jurisprudence applying provisions of the MCA has also shown some positive attributes to the guidelines set out in section 7(4)(e) such as recognition of indirect contributions by housewives who have no earning capacity.⁵³⁰ As Ncube⁵³¹ puts it, this is perhaps the most important and most innovative in the context of Zimbabwean law. Benschop⁵³², warns that Zimbabwean courts should be wary in formulating legal formulae when reallocating property on divorce and avoid attempting to attach a monetary value to intangible and unquantifiable domestic contributions normally made by a wife. One would be tempted to agree with the remark, as custom does not recognise such division of labour as constituting legally enforceable rights.

In line with Benschop's premise, according to Gray, "...a just and realistic evaluation of the wife's efforts depends instead upon the avoidance of the absolute terms of cash value in preference for the relative approach of differential equality between financial and non-financial contributions to the acquisition of matrimonial assets."⁵³³

Judicial creativity has certainly been at the forefront of decisions positively recognising women's efforts and allocating equitable shares in marital property upon divorce contrary to the typical customary law position. In *Murerwa v Murwera*⁵³⁴, the parties were married in 1980 in terms of the African Marriages Act and their marriage lasted for twenty years. The appellant (wife) instituted divorce proceedings against her husband with the High Court in 2001. In addition to a decree of divorce, the court *a quo* awarded certain movable assets including a motor vehicle to the wife and the matrimonial home to the respondent (husband) despite the wife's prayer for 50% of the value of the immovable property. It is on this order that she lodged an appeal with the Supreme Court of appeal.

⁵³⁰ See section 7(4)(e).

⁵³¹ Ncube 1990 *Journal of African Law* 4.

⁵³² Benschop "Women in Human Settlements Development - Challenges and Opportunities *Women's Rights to Land and Property*" *Commission on Sustainable Development* (2004, UN-Habitat) at 3, who also says, "...upon divorce, women still have to prove their contribution to the marital home in court."

⁵³³ Gray *Reallocation of Property on Divorce* (1977) 71.

⁵³⁴ (28/01) [2004] ZWSC 13 (unreported), Gwaunza JA made the provision in his order for the market value of the immovable property to be ascertained by an estate agent in order to facilitate determination of the wife's half share and also made provision for the respondent (husband) to buy out the other 50% share awarded to his wife if he so wished.

The appeal court reviewed the High Court's findings and found that the court erred in refusing the appellant 50% of the matrimonial home because at the time of the initial divorce proceedings, there was no evidence on the net value of the immovable property. Gwaunza JA stated that the court *a quo* should have made an order for valuation of the property by an estate agent before awarding the appellant her 50%.

In addition, the appeal court cited as another reason for upholding the appeal, the fact that the High Court had not given due credit to the wife's contribution to the family, and the duration of the marriage in accordance to section 7(4) (e) and (g) of the MCA respectively. Regarding the duration of the marriage, the court found that the appellant, although she did not bear children in the twenty years of marriage, took care of her husband, looked after the family home and performed household chores.

Evidence was further adduced that the appellant (wife) had contributed directly to the acquisition of the immovable property for a sum of \$1300 in 1983, which was raised in the ratio of \$500 and \$800 between the appellant and the respondent respectively. The appellant further contributed to the family in a number of ways such as, by growing crops at the parties' rural home, which fed the family and participating in the family's income generating poultry project. The respondent did not object to the evidence. The court finally upheld the appeal and held that the cumulative effect of all factors justified the wife's entitlement to one half of the net value of the immovable property, in addition to the movable assets already awarded to her in the court *a quo*. The decision was a clear indication of the commitment by the courts to recognise women's indirect contributions in marriage as equal to those of gainfully employed men.

In another decision, in the case of *Usayi v Usayi*⁵³⁵, where the parties had been married for thirty-nine years, the husband approached the Supreme Court and appealed against an order of the High Court granting to the respondent (wife) one-half share of the sale

⁵³⁵ (49/01) [2003] ZWSC 11 (unreported), the learned Judge held that, "...no monetary value can be placed on the performance of these duties that the Act speaks of the "direct or indirect contribution made by each spouse to the family, including contributions made by looking after the home and caring for the family and any other domestic duties."

price of the matrimonial home. Shortly after divorce proceedings began, the appellant (husband) unilaterally sold and transferred the matrimonial home to a third party in spite of a prior order by the High Court restraining him from doing so pending a determination of the divorce proceedings.

In the initial application, the husband contended that the court *a quo* had wrongfully awarded the respondent the half share in the matrimonial home to whose acquisition she did not contribute. The court applied provisions of section 7(4) of the MCA that enabled the court to make an order placing the parties in a position as close as possible to the position they would have been had the marriage continued to subsist.

Evidence showed that the appellant (husband) was in a better economic position, as he had proceeds from the sale of the matrimonial home as well as another rural home in Chishawasha, including a successful business. On the other hand, the respondent was worse off, relying on her husband for financial support including the upkeep of their handicapped son.

Ziyambi JA reminded the court that the Matrimonial Causes Act recognised direct and indirect contributions by a wife. He went on to attach significant importance to the work women contributed in the household by speaking in rhetoric and said the following:

"How can one quantify in monetary terms the contribution of a wife and mother who for 39 years faithfully performed her duties as wife, mother, counsellor, domestic worker, house keeper, day and night nurse for her husband and children? How can one place a monetary value on the love, thoughtfulness, and attention to detail that she puts into all the routine and sometimes boring duties attendant on keeping a household running smoothly and a husband and children happy? How can one measure in monetary terms the creation of a home and therein an atmosphere from which both husband and children can function to the best of their ability?"

The court referred to Ncube⁵³⁶ who proposes a cautious approach by the courts and says, "the courts should avoid attaching monetary value to indefinable things." In

⁵³⁶ Ncube *Family Law in Zimbabwe* (1989) 178 who says that, "Our courts, when formulating a legal approach to the re-allocation of property on divorce, should not attempt to attach a monetary value to the intangible and unquantifiable domestic contributions of a housewife...", and further that, "...the evaluation

reaching its decision, the court considered that it was the woman's contribution on the domestic front which enabled her husband to work outside the home and without her efforts, the home and family may not have survived. In addition, by virtue of her age, and lack of income, the judgement of the High Court for a half share was upheld as just. Shropshire⁵³⁷ speaking on a wife's place in marriage says that, "the economic value of this work of the woman in the household is obvious, especially the function of maternal education, and gives her the right to her husband's economic value which is also ordained for the good of the family."

Contrary to the position in *Usayi's* case, not all courts have adopted this progressive approach in realising the objectives of the Matrimonial Causes Act. The case of *Mujati v Mujati*⁵³⁸ demonstrates a culturally conservative view that may be seen as undermining the daily roles that women play in the upkeep of the household. The case involved parties that had been married for seventeen years. In the first six years of marriage the wife, who was not formally employed, worked on the parties' communal lands tilling land and growing crops for the consumption of the family. After good harvests, she sold excess produce and used the proceeds to buy family property. Also, during the last nine years of the marriage, she ran the family shop and butchery in the communal lands with no remuneration, handing over all the proceeds to her husband. The husband continued to be formally and gainfully employed in the city.

process should not seek to determine how much a housekeeper is worth in comparison with, for example, a university lecturer, nor should the process seek to determine the value of a wife's cooking, washing and rearing of children as compared to, say, a government minister's work. The proper approach would be to presume that in the majority of marriages the spouses assume equivalent, though different, duties which are equally beneficial to the welfare of the family."

⁵³⁷ Shropshire *Primitive Marriage and European Law* 75 the writer goes further and says, "...this is not to say that she will not have full juridical recognition with equality of rights in every way concerning the institution of matrimony, but rather to remember that she and he are made one that she may realise her functions as a mother and at the same time assist her husband to live according to a more and more profound human economy."

⁵³⁸ HC-H-505-87 (1987) (unreported) where it was held further that, "...the evaluation process should not seek to determine how much a housekeeper is worth in comparison with, for example, a university lecturer, nor should the process seek to determine the value of a wife's cooking, washing and rearing of children as compared to, say, a government minister's work. The proper approach would be to presume that in the majority of marriages the spouses assume equivalent, though different, duties which are equally beneficial to the welfare of the family."

Chidyausiku J, after taking into consideration all factors into cognisance, applied the English one-third rule and awarded the wife a third of the total value of the assets of the family. The decision is criticised for undervaluing the contribution of the wife who had not only been responsible for the care and day-to-day subsistence of the family, but had also worked as an unpaid manager in the family business.⁵³⁹

Similarly, in *Masocha v Masocha*⁵⁴⁰, a wife who earned a quarter of her husband's gross monthly salary per month, lodged a claim for a half share in the matrimonial home. She based her claim on the indirect contributions she had made by amongst other things, buying of groceries and furniture. She argued further that these indirect contributions had relieved the husband of some of the financial burden he would otherwise have borne and thus allowed him to have more money to pay for the house. In rejecting her claim for a half share and awarding her a lump sum payment of two times the husband's monthly salary, representing the estimated value of the household contents, the court observed that, "...it is quite apparent from the disparity in the parties salaries that (her) contribution directly or indirectly must have been minimal."

English Courts, when interpreting similar provisions, have held that conduct of the parties would be relevant only if it is "obvious and gross" to the extent that it would be inequitable not to consider it.⁵⁴¹ It is submitted that this is a sound approach which, regrettably, the High Court did not consider in *Masocha's* case. Chidyausiku J, readily took into account the fact that the wife had improperly associated with other men in scaling down her entitlement to maintenance. According to Ncube, "a careful reading of

⁵³⁹ The position before enactment of the Matrimonial Causes Act was different (a wife had to have made direct contributions before she could have a justifiable claim), see also in this regard the decision in *Chiromo v Katsidzira* 1981 ZLR 481 where the court held that a wife who had made direct financial contributions to the improvement of the matrimonial home originally acquired by the husband, and who also had shouldered the entire responsibility of maintaining the family had no claim to a share of the matrimonial home.

⁵⁴⁰ HC-H-183-87 (1987) (unreported).

⁵⁴¹ See the case of *West v West* 1977 2 WLR 933, *Cuzner v Underdown* 1974 1 WLR 1531, *Harrett v Harrett* 1974 1 WLR 219; the MCA in section 7(4) ends by stating that, "...in so doing the court shall endeavour as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses.

section 7 reveals that conduct is relevant only if the court is seeking to place the parties in the position they would have occupied had their marriage survived.”⁵⁴²

The courts however need to be satisfied that a wife’s indirect contributions are substantial enough to deserve a claim in matrimonial property. In *Dhlamini v Dhlamini*⁵⁴³, on appeal, the appellant (wife) claimed a half share in the farmland in addition to a share in other farm movables including a herd of cattle all bought by the husband’s resources. The parties were in agreement regarding most of the other movables. It was on record that the appellant would on occasion pass insulting remarks to the respondent (husband) about him working like a donkey and smelling of cow dung after his engagement to the farm. It was further submitted that she had only been to the farm twice in a period of thirteen years and never assisted the respondent’s relatives with manual labour on the farm.

The court per Cheda JA, held that a wife who showed a general lack of interest and did not participate in the day to day running and activities on the property, did not have a justified claim for half a share in such property owing to her general non-involvement. The appeal court accordingly upheld the order granted by the court *a quo* that the appellant (wife) be awarded only 12% of the farmland’s value in addition to 54 herd of cattle. A further order was made for the farm to be left intact, and functioning for the benefit of the children.

It is apparent that the courts in exercising their discretion under section 7 of the Matrimonial Causes Act tend to award men greater percentages in division of assets thereby resembling or rather upholding the customary law of ownership to a certain extent, where women did not have rights to own immovable property. The position in

⁵⁴² Ncube *Family law in Zimbabwe* 178.

⁵⁴³ (139/00) [2003] ZWSC 71 (unreported) where the court held that, “...there is no basis for treating her as the only trusted person who can do that. If given a share of the farm there is no guarantee that she will use it, especially as she showed no interest in working on the farm. In the event that she decides to sell her half share the farm could become less viable to the disadvantage of both the respondent and the children.”

earlier decisions was however more prejudicial to women's property rights. In the case of *Jenah v Nyemba*⁵⁴⁴ the court held that:

"....regardless of whether Africans into a marriage in terms of the marriage Act, African law and custom continues to apply to their proprietary rights. It is not open to them to elect to have the property consequences to apply to their marriage governed by the general law."

The decision was in line with the customary law position whereby the husband has all the rights as custodian of marital property and his wife upon divorce, goes away with virtually nothing apart from her personal property, referred to as *umai* and *yohlanga* in Shona and Ndebele respectively.⁵⁴⁵ In addition, the property or proceeds that women acquired through their skills in craft were personal to them, thus the Shona recognise *mavoko* property on the one hand and the Ndebele refer to *zezandla* property.⁵⁴⁶ The misconstruction of custom is therefore that, women in customary marriages are unpaid servants who work for their husbands, and have no claim whatsoever in matrimonial property.⁵⁴⁷

University of Fort Hare

As much as the courts may seek to equitably distribute matrimonial property, there are however certain categories of property that according to customary law cannot be shared owing to its personal nature. Among these is property held by way of inheritance, that is, where a spouse inherits property from a deceased relative and property recognised by custom as individually owned.⁵⁴⁸ Even section 7(3) of the MCA excludes these categories of property acquired in terms of custom from the distribution process. However, there is nothing to prevent a court from exercising its discretion by

⁵⁴⁴ 1986 (1) ZLR 138 (S), where Gubbay JA stated that, "In terms of customary law property acquired during marriage becomes the husband's property whether acquired by him or his wife."

⁵⁴⁵ This property is made up of the cow and all its offspring a mother of a daughter acquires as her share of the *roora/lobola* cattle on the marriage of her daughter.

⁵⁴⁶ Referring to property or proceeds that a woman acquired as a result of using her personal skills such as midwifery, pottery and knitting, in this regard see Holleman *Shona customary law* 351ff, see further Ncube *Family law in Zimbabwe* 141.

⁵⁴⁷ Ncube 1990 *Journal of African Law* 2.

⁵⁴⁸ In such a case, the burden of proof will lay on the spouse who seeks exclusion of the respective property to prove to the court its personal nature.

taking into account these categories of property in its assessment of the means and financial resources of the parties under section 7(4).⁵⁴⁹

The courts have also had deal with cases where men, after entering into civil marriages in terms of the Marriages Act, subsequently contract unregistered customary marriages and upon being brought to court by their customary law 'wives', selfishly raise the existence of another valid marriage as a defence to exclude the latter from acquiring a share in matrimonial property. The Zimbabwean courts have had to apply provisions of section 7(1)(a) when dealing with the distribution of matrimonial property of parties to bigamous marriages.

The ensuing difficulties were dealt with in the 2003 case of *Muringaniza v Munyikwa*⁵⁵⁰ in the Bulawayo High Court. The brief facts of the case are that, the plaintiff (husband) initially instituted proceedings by way of an urgent chamber application against the defendant (wife) for the return of items that he had been dispossessed of by the defendant including, among other things, electronic banking cards, a driver's licence, and a bank chequebook. The plaintiff also sought an order for eviction of the defendant from the family home in Bulawayo. The defendant did not oppose the claim for the items but opposed the order for eviction. She alleged that she was customarily married to the plaintiff and thus entitled to a half share of the matrimonial property, and that she played a significant role in the acquisition and development of the stand at the Selbourne Park home.

In order to resolve the dispute the court essentially had to determine whether a customary marriage existed in the first place. The husband, who had not dissolved his monogamous civil marriage with one Ketinah, alleged that a payment that he had made to the woman's family as a symbol 'for tears' following the death of their child was not tantamount to *roora/lobola* as the defendant believed. The defendant was also under

⁵⁴⁹ Ncube *Family law in Zimbabwe* 149ff.

⁵⁵⁰ HC 2163/2000 [2003] ZWBHC 102 (unreported).

[Http://www.saflii.org/zw/cases/ZWBHC/2003/102.pdf](http://www.saflii.org/zw/cases/ZWBHC/2003/102.pdf) (Accessed 21/06/2010).

the *bona fide* impression that a customary marriage was in subsistence and the husband had registered the Selbourne home in her name.

The court, after hearing testimony of an intermediary in the negotiations, dismissed the husband's defence. The court noted with approval the ruling by Hlope JP in the South African case of *Mabuza v Mbatha*⁵⁵¹ where the Judge agreed with Bennett's averment that:

"In contrast, customary law was always flexible and pragmatic. Strict adherence to ritual *formulae* was never absolutely essential in close knit, rural communities, where certainty was neither a necessity nor a value. So, for instance, the ceremony to celebrate a man's second marriage would normally be simplified, similarly, the wedding might be abbreviated by reason of poverty or the need to expedite matters."⁵⁵²

However, the court concluded that in this case, no valid marriage existed between the plaintiff and the defendant because the plaintiff's civil marriage to Ketinah still subsisted. However, the defendant was not short of protection under the law. In finding that there was no valid marriage between the plaintiff and defendant, Ndou J referred to the case of *Makwiramiti v Fidelity Life Assurance and Another*⁵⁵³ where it was held that a man could not enter into a subsequent marriage for as long the civil marriage had not been dissolved.

The court did not consider the fact that the plaintiff had been deceitful and was acting in bad faith when he adduced a marriage certificate of a civil marriage with a woman who had no interest in the claim. His aim was entirely to prejudice the defendant's case. The

⁵⁵¹ [2003] 1 All SA 706 (C).

⁵⁵² Bennett and Peart *A sourcebook of African customary law for Southern Africa* (1991) 194.

⁵⁵³ 1998 (2) ZLR 471 (S) at 473 where Gubbay CJ held further:

"...the marriage of the deceased and Rosemary was bigamous and, consequently, illegal and of no validity. This was because at the time it was contracted the deceased was married to Rosaria under a monogamous or civil type marriage entered into under the Marriage Act. By embracing a monogamous regime, the deceased was deemed by law to have waived his customary privileges in respect of polygamy and, for as long as he remained married, to have submitted to the general law of the land. He is precluded from marrying another person, not only under the general law, but under customary law as well. He suffered from absolute incapacity to marry."

court's approach is in stark contrast to the approach of Gubbay CJ who warned against opportunists such as the plaintiff in *Makovah v Makovah*⁵⁵⁴ where it was held that:

"...in my view the appellant's defence was generally dishonest. He got involved with an unmarried person when he was married without revealing his marital status. This was in spite of the fact that he was a Chairman of the Youth People's Christian Movement and a member of the Catholic Church. He went as far as registering his marriage fully aware that he was married in church and that his subsequent registered marriage would be bigamous. He even allowed another lie to be entered on the subsequent registered certificate...that the respondent was his first wife. After all that he has the temerity to defend the respondent's suit on the basis that their marriage was bigamous. That, in my view is the height of dishonesty."

In *Muringaniza's* case, an order of nullity of marriage was granted and section 7(1)(a) of the MCA applied in the division of the assets.⁵⁵⁵ The court also concluded that the customary law wife had contributed to the acquisition and development of the home in dispute and that she was entitled to a fair share because a putative marriage existed between the parties. Accordingly, the plaintiff's claim for eviction was dismissed.

In conclusion, the legislative innovations brought about by the MCA have indeed changed the attitudes of the courts by making use of their discretionary powers in divorce cases. Only time will tell if the courts have adopted judicial creativity to a sufficient degree so as to safely declare that legislative goals have been attained.⁵⁵⁶

One may be persuaded to argue that the MCA by making provision for the factors in section 7(4) has introduced western concepts and legal formulae, which leaves the court with too many discretionary powers. In addition, the non-recognition of

⁵⁵⁴ 1998 (2) ZLR 82 (S) at 89.

⁵⁵⁵ see *Muringaniza's* case, Ndou J further said that:

"In my view, the above provisions cover marriage, such as the present one, which is declared null and void. If it were not the case it would work an injustice and hardship on a party, such as the respondent in this case, who laboured and contributed towards the marriage and the accumulation of the matrimonial property under the impression that the marriage was valid. It would also unjustly enrich a dishonest party such as the appellant in this case simply because the property in question is either registered in his name or is under his control."

⁵⁵⁶ *Ibid* the writer says further that, the uncertainty arises because the re-allocation formula adopted has given wide discretionary powers to the courts, and makes an example of the position in New Zealand when he says, "these discretionary powers are tied to unweighted and unstructured guidelines which, in other jurisdictions, most notably New Zealand, have allowed the judiciary to deny women a fair share of matrimonial property."

unregistered customary marriages by the MCA and their exclusion from the sharing provisions is worrisome, a position that the Customary Law and Local Courts Act has tried to resolve but not sufficiently, still leaving the majority of peasant women vulnerable before the law.

3.3.5 Customary Law and Local Courts Act (1990)

The enactment of the Customary Law and Local Courts Act⁵⁵⁷ was an effort by the legislature to bring back the judicial authority of chiefs as local authorities over the rural population.⁵⁵⁸ In general, the Act provided for the application of customary law in the determination of civil cases; for the constitution and jurisdiction of local courts and for a system of lodging appeals against decisions of such courts depending on the monetary value of the judgement required.⁵⁵⁹ The impact of this endeavour was that by making traditional authorities adjudicators over customary law civil cases, there would ensure a greater degree of preservation of culture including matters ancillary to the African marriage.

One of the positive outcomes of the Act was that institutions such as the chief's and headmen's courts would seek to guarantee the development of a system of justice for ordinary rural folk people who could easily relate to these authorities as custodians of tradition. Although the law limits the monetary jurisdiction that the courts may exercise, their decisions are binding and may be registered with the Magistrates' court. Thereafter the decisions may be enforced and appealed against like any other Magistrates' court ruling.⁵⁶⁰

⁵⁵⁷ Act No. 2 of 1990 as amended (Chapter 7:05).

⁵⁵⁸ Madhuku *An Introduction to Zimbabwean Law* (2010) 79.

⁵⁵⁹ The Act provides for two types of local courts, namely (i) a primary court which is presided over by a headman or other person appointed by the minister of justice and (ii) a community court, which is presided over by chief or other person appointed by the minister of justice.

⁵⁶⁰ This means any decision of these courts can be enforced by execution of property, contempt of court proceedings and garnishee orders in the case of maintenance claims.

With the intention of bringing customary law within the courts, marital institutions such as polygamous marriages were recognised and chiefs had jurisdiction to hear cases arising out of such unions. In terms of the Act;

“Subject to section 3 of the Customary Marriages Act [Chapter 5:07] and to any other enactment, if in any civil case a question arises as to the effects of a marriage which was contracted according to customary law by a person at a time when he already had another wife or other wives married to him according to customary law, the court shall treat such marriage as valid for all civil purposes, in so far as polygamous marriages are recognized by customary law.”⁵⁶¹

The effect of this provision is that women in customary marriages have the protection of the courts. For that reason in the case of *Chawanda v Zimnat Insurance*⁵⁶², the court held that a woman living with a man in an unregistered customary union had the right to compensation for loss of support if that man is killed unlawfully. It based its decision on section 3 of the Customary Law and Local Courts Act, which it concluded, gave the wife in an unregistered customary union the right to receive support from her husband. This case involved a wife suing the insurance company that insured the driver responsible for her husband’s death in a traffic accident.

However in as much as the Act seemed a positive attempt at constructing a judiciary in a traditional context, the powers of the courts are severely limited. The ambit of the Act is limited in terms of section 16, where a local court may not adjudicate upon the dissolution of a registered customary marriage, determination of custody or guardianship of minors, determination of maintenance claims and determination of any rights in respect of land.⁵⁶³ It becomes apparent that the courts only have jurisdiction to preside over unregistered customary unions, a position that one may argue to make sense owing to the high prevalence of unregistered marriages among the peasantry.

⁵⁶¹ See section 6 of the Customary Law and Local Courts Act.

⁵⁶² 1991 (2) SA 825, in this case the court recognized an unregistered customary union in spite of precedent that defined marriage strictly in terms of proper licensing procedures. Older common law and legislative authorities defined marriage strictly in terms of written licensing requirements for fear of unfettered liability in the context of marital disputes and lack of procedural efficiency. Moving away from formalistic notions of marriage as a written license, the *Chawanda* case chose to redefine marriage as a series of partnership-like, familial obligations between man and a woman.

⁵⁶³ See section 16 (1) (d); (e); (f) and (g) respectively.

Section 3 of the Act details the circumstances under which customary law is to apply and reads as follows:

- (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 case 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.

The Act has had the impact of accommodating women in unregistered customary marriages and placing them in a more favourable position, as it gives the courts some leeway to apply common law principles of equity and undue enrichment when distributing matrimonial property upon divorce. This is so to safeguard unregistered marriages not recognised by the sharing provisions in the Matrimonial Causes Act.

In the civil appeal case of *Feremba v Matika*⁵⁶⁴ the Harare High Court sought to correct a judgement in which a magistrate had erred in applying provisions of the Matrimonial Causes Act to an unregistered customary union. The brief facts were that in December 2005, the respondent issued summons out of the magistrates' court at Harare claiming division of certain property and costs of suit. In the claim, the respondent (wife) alleged that she was in an unregistered customary union with the appellant (husband) that had since dissolved. She further alleged that during the subsistence of the marriage, the parties jointly acquired certain movable property which she felt should have been distributed equitably.

The magistrate in his reasons for judgment noted that the parties had been in an unregistered customary union for 8 years and that the items in dispute were all acquired during the subsistence of the union. He also held that the respondent as "a wife" had indirectly contributed to the acquisition of the items. As such the magistrate distributed the various movable property between the parties as he deemed fit.⁵⁶⁵ It is this order that the appellant (husband) resisted.

On appeal, Makarau JP and Bhunu J unanimously agreed to revert the matter back to the magistrate court for re-trial and made an instructive judgement that:

"Due to the ambivalence with which the law treats unregistered customary unions, the jurisdiction of magistrates' courts to distribute the assets of such persons must be carefully founded within the provisions of customary law or common law as neither the Customary Marriages Act nor the Matrimonial Causes Act apply to such "marriages."

⁵⁶⁴ [2007] ZWHHC 33 (unreported), <http://www.saflii.org/zw/cases/ZWHHC/2007/33.pdf> (Accessed 22/06/2010) at 3, the trial magistrate also referred to the decision of this court in *Mtuda v Ndudzo* 2000 (1) ZLR 718 (H) before making the award in the *court a quo*. In *Mtuda's* case it was said that, "generally speaking the various Judgments which have emanated from the higher courts are to the effect that a wife in an unregistered customary law union is entitled to protection in the event that the two part way and that consideration such as her level of contribution, duration of union etc would be pertinent."

⁵⁶⁵ After the court heard all submissions from witnesses, the magistrate made an order awarding a bed, kitchen unit, radio, 2-plate stove, wardrobe, 4 stools and a push tray to the respondent (wife). The appellant (husband) was awarded a lounge suite, bicycle, television set, mobile phone, bag, fan, television stand and a coffee table.

The High court acknowledged the lack of a definitive position at law and that judicial creativity was the only relief that disadvantaged women at customary law could rely on, thus the court reiterated the trial magistrate's view that:

"As correctly pointed out by the trial magistrate, decisions of this court and of the Supreme Court on the issue have shown judicial activism on the part of the courts in an effort to find a remedy where none exists at law. It is now the accepted position at law that general law has made no direct provisions for the distribution of estates of persons in unregistered customary unions even if for some purposes, the law recognizes the unions as marriages. Neither has statute law made such provision. While the decisions of this and the Supreme Court are clear that some remedy has to be fashioned for the benefit of women in the position of the respondent, the courts have not been unanimous on the basis of such a remedy."

In deciding whether customary law or the general law should apply in similar cases, the appeal court noted that customary law had the potential of placing women in an unfavourable position and therefore innovations by the bench have the impact of overruling aspects of customary law regarding the distribution of matrimonial property.⁵⁶⁶

Reference was made to the case of *Jengwa v Jengwa*⁵⁶⁷ where it was suggested that the common law principle of unjust enrichment is favourable in order to achieve equity among divorcing spouses in unregistered customary marriages and that the principles of joint ownership remain applicable between such parties.

However, Makarau J remarked with a word of caution and gave some guidance to the lower courts in the future by saying:

"Each of the common law principles that have been suggested and used to achieve equity as between parties to an unregistered union have peculiar essential elements that have to be proved if alleged and result in different distributions of the assets in issue being effected by the court. However, it is the agreed position at law that whatever legal vehicle is used to try and achieve

⁵⁶⁶ The court held further that, "It is trite that customary law applies to the distribution of the movable assets of parties to an unregistered union. Some judges have however said that the remedy available at customary law will lead to injustice as this does not take into account the indirect contributions of the wife and restricts her to claim only that property that directly vests in her in terms of customary law."

⁵⁶⁷ 1999 (2) ZLR 121 (H).

equity between the parties, some legal principle must be pleaded. The union itself is not a cause of action at common law.”⁵⁶⁸

The judges concurred that the trial magistrate in the court *a quo* had erred in his choice of law considerations and did not properly justify his election to apply the common law instead of customary law to the dispute. The court held that because the parties had primarily used customary law to conclude and terminate their marriage therefore it must have been presumed that they had chosen customary law to govern their marriage. The appeal was upheld and the magistrate’s ruling was set aside including an order for a retrial by a different magistrate.

In the same light, the case of *Mashingaidze v Mugomba*⁵⁶⁹ provided some guidance when distributing the property of parties to unregistered customary unions. Gwaunza J observed that, “...however, while I would support the view that a proven unregistered customary law union should be treated like any other marriage when it comes to dissolution and division of assets jointly acquired by the parties during its subsistence, such a view is currently not supported by the law.”

Chatikobo J in *Matibiri v Kumire*⁵⁷⁰ shared similar sentiments. The claim in this case was based on the plaintiff’s evidence that she was married to the defendant in terms of customary law and that matrimonial property acquired whether jointly or separately should be shared equally. The court held that, “..it is a claim which is not cognisable at customary law because, upon dissolution of an unregistered customary law union, the

⁵⁶⁸ See *Feremba’s* case at 4, <http://www.saflii.org/zw/cases/ZWHHC/2007/33.pdf> (Accessed 22/06/2010).

⁵⁶⁹ HH 3-99 (1999) (unreported) at 21.

⁵⁷⁰ 2000 (1) ZLR 492 (H) at 496A-B, where the court applied the provisions of section 3 of the Customary law and Local Courts Act that, “... the section provides that customary law shall apply to the specific areas ‘unless the justice of the case otherwise requires’.” Chatikobo J went further and said:

“ In my view, the truly logical construction to place on the phrase ‘unless the justice of the case otherwise requires’ is that if the application of customary law does not conduce to the attainment of justice then the common law should apply... Held further that, faced with such an unsatisfactory situation and bearing in mind the injustices which would flow from the failure to provide a remedy, the court must do its best to adapt the unsatisfactory and undeveloped concepts of customary law to the changed social and economic circumstances of an African woman who finds herself in a customary law union which disentitles her to a share in the ‘matrimonial property’ even though for all intent and purposes she was a wife in every respect except the non-solemnization of the union.”

property acquired by the parties during the union becomes the property of the husband unless it can be classified as *umai* or *maoko* property.” However, the woman’s claim was recognised in terms of the common law. The court’s reasoning was that, even where the parties elect customary law as the law to govern their dispute, the common law may prevail if customary law results in an unjust resolution of the matter.⁵⁷¹

In *Feremba’s* case brought to the fore a more concrete position as to how the courts should deal with customary marriages and that the solution was provided to some extent by legislation. It was held that:

“...where one party to an unregistered union seeks to have the joint estate distributed before a magistrates’ court, a justification for not applying customary law must be made and accepted by the court using the choice of law considerations listed in section 3 of the Customary Law and Local Courts Act [Chapter 7:05]. When general law is the correct choice, then, a recognized cause of action must be pleaded. Such a cause of action may be unjust enrichment, a tacit universal partnership or joint ownership. An averment merely to the effect that the parties were in an unregistered customary union is not sufficient to found a cause of action at general law. Trial magistrates must be wary of this procedural aspect of the matter.”

Other schools of thought are of the view that the courts should not be carried away and rule ‘progressively’ in the name of judicial creativity. While acknowledging Zimbabwe’s commitments under the Convention on the Elimination of all forms of Discrimination Against Women⁵⁷² (CEDAW), in *Jengwa’s* case, Gillespie J after forewarning against judicial innovation that may misrepresent legal values already in practice, observed that the development of the law towards recognising the property rights of women in unregistered customary marriages should be encouraged.⁵⁷³ He observed that:

“Zimbabwe has acceded to the United Nations Convention on the Elimination of All Forms of Discrimination against Women. This includes the obligation on member states to, ‘take all appropriate measures to eliminate discrimination against women in all matters relating to

⁵⁷¹ See also in this regard, Madhuku *Zimbabwean law* 28.

⁵⁷² UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at: <http://www.unhcr.org/refworld/docid/3ae6b3970.html> (Accessed 10/11/2010).

⁵⁷³ See *Jengwa’s* case *supra* at 131 where he held further that, “In the face of this national desideratum, it would scarcely be appropriate for the court not to subvert the wife suffering gender discrimination.”

marriage and family relations and in particular to ensure on the basis of equality between men and women', and also that, 'the same rights for both spouses in respect of ownership, acquisition, management, administration, enjoyment and disposition of property.'"

Superior courts in Zimbabwe have recently heard a number of appeals resulting from the wrong application of provisions of section 3(1)(a) and (b) of the Customary Law and Local Courts Act by the magistrates courts.⁵⁷⁴ When dealing with unregistered customary unions not covered by the sharing provisions in the Matrimonial Causes Act, magistrates are supposed to ascertain two things at law, that is, firstly ask the parties as to which law they wish to apply to dispute, either customary law or the general law. Secondly, if the nomination is that the general law applies, a valid cause of action must be pleaded in the summons as to either unjust enrichment, or equity is the cause of action. Magistrates have often omitted to satisfy the court as to the cause of action pleaded by applicants.

As in *Feremba's* case, this apparent confusion was dealt with in *Mandava v Chasweka*.⁵⁷⁵ The appellant (husband) party to an unregistered customary marriage, lodged an appeal with the High Court pleading that the order of the magistrate's court be set aside alleging that the distribution of the property between the two parties was unsatisfactory. The Appeal court held that the magistrate had erred in his award, and that he was attempting to effect a just and equitable distribution of the joint estate as if he was dealing with a marriage recognized as such at law. He applied the sharing provisions in section 7 of the Matrimonial Causes Act to an unregistered customary union, which was not a marriage for the purposes of that Act.

⁵⁷⁴ See *Feremba's* case *supra*.

⁵⁷⁵ (CIV Appeal 532/05) [2008] ZWHHC 42 (unreported).

<http://www.saflii.org/zw/cases/ZWHHC/2008/42.pdf> (Accessed 10/11/2010) where it was held that, "in *casu*, no choice of law inquiry was gone into and it is clear that he was not applying customary law' and further that, 'since no cause of action at general law had been pleaded, it is difficult to establish how he came up with the order that he made and which principles of law he applied.' As such, Makarau J and Hlathswayo J reached a unanimous decision that the appeal was allowed and the matter remitted to the magistrate's court for a trial *de novo*.

Makarau J held that:

“...trial magistrates who deal with the estates of parties to an unregistered customary union tend to fall into three errors. Firstly, they tend to proceed to deal with unregistered unions as if they are registered. Secondly, they fail to avert to the choice of law provisions of our law and finally they tend to forget their monetary jurisdictional limit when distributing joint estates at general law.”⁵⁷⁶

The magistrate should have applied the choice of law rules in the Customary and Local Courts Act.⁵⁷⁷ Due to the recurrence of similar ambiguous decisions before the appeal court, the court adopted the position laid down in the case of *Feremba* where the court had formulated the position that the lower courts should take where legislation was inadequate, the judge said:

“I will take the risk of repeating myself again in this judgment and exhort all trial magistrates approached to distribute the joint estates of persons in an unregistered customary union to ensure that the parties before have made the appropriate choice of law between customary and general law. Once a choice of law has been appropriately made, two further issues arise but only if general law is chosen. These are the cause of action and the monetary jurisdiction of the trial magistrate. In view of the fact that the trial magistrate failed to observe any of the above, his decision cannot stand.”

In conclusion, the Customary Law and Local Courts Act made real headway in its accommodation of women in unregistered marriages who often find themselves with no legal remedies at law. The requirements to register marriages are understood by predominantly urban women who are exposed to information dissemination in media and are generally well educated. For the rest, marriage only by customary rites gives them the status they aspire to achieve in the communities they live in. This is not to say the law should not be applied in ways that safeguard those most vulnerable to it.

Zimbabwean law can therefore be applauded for its positive impact in uplifting the rights of women in unregistered customary marriages particularly those led into marriage under misrepresentations. Perhaps the application of these foreign concepts of law may

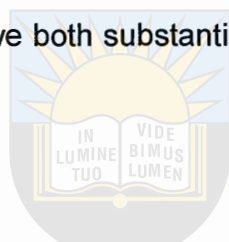
⁵⁷⁶ *Ibid* at 4.

⁵⁷⁷ See section 3 (1) (a) and (b) of the Local Courts Act.

be attributed to disintegration of traditional systems that assured equity and balance was attained in dispute resolution processes. According to Elias⁵⁷⁸, "when the old standards no longer fit the new demands of existence, the process of adjustment may assume one of two forms:

- (a) a workable compromise is found between the old and the new or;
- (b) there is a complete breakdown of the existing order."

The writer goes on and makes an interesting observation that English legal history shows how rules of the common law of equity have been adapted to new circumstances by introduction of legal fictions to evolve both substantive law and rules of procedure in African legal systems.



3.3.6 Maintenance Act (2001)

The concept of maintenance is not alien to customary law although it was regulated within the family rather than through the courts as the situation is today.⁵⁷⁹ With the communal socio-economic organisation that existed before the advent of colonialism, traditional families among the Shona and Ndebele with the assistance of the extended family structures, were responsible for taking care of their children. Due to the gradual disintegration of these structures in the course of time, the roles assumed by family members have changed and western principles governing maintenance of wives and children after divorce have been adopted.⁵⁸⁰

⁵⁷⁸ Elias *African Customary Law* 176.

⁵⁷⁹ Alexander *et al Maintenance laws and practices in Botswana* (1992) 160, Women and Law in Southern Africa (WLSA) defines maintenance as payment given in cash or in kind from one member of a family to support another and includes child support for children born out of wedlock, child support after divorce, alimony payments to an ex-spouse, allocation of income within intact families, and financial support given to parents, brothers, sisters, and other relatives.

⁵⁸⁰ Armstrong "Maintenance Payments for Child Support in Southern Africa: Using Law to Promote Family Planning" 1992 *Studies in Family Planning* 220, the writer acknowledges that, "...However, if this ideal was ever realized in fact, the evolving socio-economic situation of southern Africa has now changed."

According to Gordon, studies in Southern Africa show that men nowadays generally neglect to fulfil their obligation to support their wives and children.⁵⁸¹ This shift in responsibilities in traditional obligations can be attributed to changing socio-economic conditions that prevail nowadays as men flock to urban centres and lose their influence on their families.⁵⁸² The negative impact of the apparent situation on the African marriage is that family resources are no longer pooled; consequently, women must negotiate or fight for their own and their children's share upon divorce.⁵⁸³ Today the conception is that cash wages belong to individuals who work for them.⁵⁸⁴

The Maintenance Act⁵⁸⁵ with its latest revision in 2001 seeks to answer some questions including questions such as who is legally entitled to receive maintenance.⁵⁸⁶ Unfortunately, before 1982, only wives of registered customary and general law marriages could seek relief in terms of the Act, leaving many wives of unregistered customary unions vulnerable and left to fend for themselves. The Act now makes provision for maintenance orders when "a responsible person fails or neglects to provide reasonable maintenance."⁵⁸⁷ A person who is responsible for paying maintenance is defined in as a "person who is legally liable to maintain another", which liability would be determined under common law or customary law and further that, in an

⁵⁸¹ Gordon E "An Analysis of the Impact of Labour Migration on the Lives of Women in Lesotho" in Nelson *African Women in the Development Process* (1981) 60, the writer while commenting on the situation in Lesotho, makes an observation that 40-60 percent of spouses are separated at any one time.

⁵⁸² Standing H "Gender Relations and Social Transformation in Swaziland: Some Comments on Future Research Possibilities" in Neocosmos *Social relations in rural Swaziland: critical analyses* (1987) 143ff, where the author reiterates Gordon's point that, "...moving to work in the cities for work has meant that men are not physically with their families and are therefore less likely to contribute to the needs of the household."; see further Makura – Paradza *Single Women, Land and Livelihood Vulnerability in a Communal Area in Zimbabwe* (2010) 283 who makes an analysis African women's access to property in contemporary Zimbabwe under communal tenure systems.

⁵⁸³ *Ibid* 145.

⁵⁸⁴ Armstrong 1992 *Studies in Family Planning* 220.

⁵⁸⁵ Act No. 51 of 1971 as amended by Act No. 22 of 2001.

⁵⁸⁶ In terms of section 2, the word 'dependent' is used instead of 'child' and dependent here means, "any person whom that responsible person is legally liable to maintain." Inherently the Act appears to be very accommodative as it encompasses a wide category of people as having the potential right to lodge maintenance claims against the estate of a surviving or deceased guardian. The assumption that can be inferred from the provision is that even a party's illegitimate children have a rightful claim to maintenance.

⁵⁸⁷ See section 4 of the Maintenance Act.

action for maintenance, a court must be satisfied that the person is able to contribute to the maintenance of the dependant.⁵⁸⁸

However, in certain circumstances, a maintenance order maybe made subject to certain conditions. Thus, a court may refuse to make a maintenance order where a spouse is proved to have committed adultery.⁵⁸⁹ According to Armstrong, the condition is unfortunate as the maintenance hearing maybe turned into a trial of the wife.⁵⁹⁰ Further, section 11(1) of the Act provides that a maintenance order terminates when:

- (a) the child dies or is adopted by another person; or
- (b) in respect of the marriage between his parents, an order of divorce or judicial separation or decree of nullity is made which includes an order for the maintenance of the child; or
- (c) the child marries; or
- (d) subject to the provisions of subsection (2), the child attains the age of eighteen years.⁵⁹¹

In the case of *G v G*⁵⁹² parties were married and two daughters were born of the marriage. The plaintiff (husband) issued summons praying for a decree of divorce on the ground that his relationship with the defendant had broken down irreconcilably. In praying for maintenance for herself and the minor children, the defendant argued that since the plaintiff was the one who had decided to terminate the relationship, he should

⁵⁸⁸ See section 2 and section 6(2) (b) respectively of the Maintenance Act.

⁵⁸⁹ See section 10 of the Maintenance Act which states that: "...where a spouse is proved to have committed adultery before or after the making of an order and such adultery has not been condoned, the maintenance court may refuse to make an order for maintenance in favour of such spouse or may discharge an order for maintenance made in favour of such spouse."

⁵⁹⁰ Armstrong "Maintenance Statutes in Six Countries in Southern Africa" 1990 *Journal of African Law* 136

⁵⁹¹ An advantage for adult children exists in terms of subsection (2) where the court may extend the order after the child attains the age of 18 if the court deems fit.

⁵⁹² (HC 21/07) [2008] ZWHHC 31 (unreported), where the learned Judge went further to recognise the interests of the children and held that, "...based on the above, the defendant, being gainfully employed, is not entitled to maintenance from the plaintiff. Regarding the maintenance of the minor children, the parties have agreed as between them that the contribution of the plaintiff be in kind and that he provides at least 60 % of the monthly needs of the children." <http://www.saflii.org/zw/cases/ZWHHC/2008/31.pdf> (Accessed 21/11/2010).

See also in this regard *Chiomba v Chiomba* 1992 (2) ZLR 197 where the court held that, women must make efforts to fend for themselves as soon as possible after divorce and further that, an elderly woman who cannot be trained or remarried is entitled to permanent maintenance.

be compelled by law to maintain her and the minor children at a standard of living higher than they were used to during the subsistence of the marriage.

Makarau JP referred to the remarks made in the case of *Kangai v Kangai*⁵⁹³ in denying granting an order for maintenance for the woman. In *Kangai's* case Gowora J held that:

"...A woman who has been divorced is no longer entitled as of right to be maintained by her former husband until her remarriage or death. Where the woman is young and had worked before the marriage, and is thus in a position to support herself, where there are no minor children, she will not be awarded maintenance. If she had given up her job to look after the family she will be awarded maintenance for a short time to allow her time to get back on her feet. Where the divorced woman is middle-aged she will be given maintenance for a period long enough to allow her to be trained or retrained. On the other hand elderly women who cannot be trained or remarried are entitled to permanent maintenance."

The impact of the decision was that the court seemed to uphold the customary law position where a divorced woman was not entitled to maintenance from her husband. The parties however agreed to share costs of maintaining their children who were still of school going age. The Maintenance Act also lays down guidelines that the courts may apply in their determination of maintenance orders. In terms of section 6(4) a – d these factors include:

- (a) the general standard of living of the responsible person and the dependant, including their social status;
- (b) the means of the responsible person and the dependant;
- (c) the number of persons to be supported;
- (d) whether the dependant or any of his parents are able to work and, if so, whether it is desirable that they should do so.

The provisions in section 6(4) were explained in the High Court case of *Kumirai v Memory Kumirai (Nee Bungu)*.⁵⁹⁴ After granting a decree of divorce to the parties, the

⁵⁹³ (HC 211/02) [2007] ZWHHC 51 (unreported).

⁵⁹⁴ (HC11135/2004) [2006] ZWHHC 17 (unreported), where in an issue on the quantum of maintenance that the plaintiff should pay as the noncustodial parent was referred to trial, the court held that, "...these

court granted custody of the one child born of the marriage to the mother as per agreement between the parties. The issue that remained was to determine the quantum of maintenance for one child that the plaintiff (husband) had to pay as the noncustodial parent. The defendant adduced evidence that the child required an amount of \$37 450 000 (Zimbabwe dollars) per month for his subsistence. In response the plaintiff accepted the figure as reasonable considering the parties' lifestyles and the standard of living the minor child was accustomed to. Because the parties had agreed in principle to contribute in equal terms to the maintenance of the child, the court used this as a starting point and ordered the plaintiff to contribute \$18 million per month towards the child's maintenance and further that, the parties would jointly contribute towards such child's school fees, school uniforms, clothing and medical expenses.

The Maintenance Act is similar to the Matrimonial Causes Act in that it makes provision for the payment of arrear maintenance.⁵⁹⁵ Whilst it may appear that these progressive provisions entitle applicants to apply both for both a maintenance order for the future and for reimbursement for monies already spent on support, case law has held otherwise. In the case of *Musakwa v Musakwa*⁵⁹⁶ the court assumed without discussing the matter that the section does not apply where there is no existing maintenance order. Galen criticises the ruling as being legally incorrect and therefore not applicable.⁵⁹⁷

The impact here is that according to customary law, a man did not have the responsibility to maintain his wife after divorce because she was deemed to be under the guardianship of her father or natal relatives. On the other hand, the children of the

expenses, which the plaintiff accepted as reasonable taking into account the parties' lifestyles and the standard of living the minor child was used to, do not include the child's school fees, the cost of his uniforms, his medical expenses and the amount needed to replenish and replace his wardrobe at the beginning of each season.

⁵⁹⁵ section 6(6)(c) where the court may include such award as to the maintenance court seems reasonable for the payment of maintenance which is in arrears.

⁵⁹⁶ SC 11/1984 (unreported).

⁵⁹⁷ Galen "Arrear Maintenance and the Jurisdiction of Community Courts in Custody Disputes" 1983-1984 *Zimbabwe Law Review* 260ff, see further Galen "Internal conflicts between customary law and general law in Zimbabwe : family law as a case study" 1984 *Zimbabwe Law Review* 19, where the author discusses criteria used to determine the choice of governing law depending on the litigants degree of modernization.

marriage would remain with their father. Nowadays however, women are awarded custody of the children and receive maintenance from their former husbands. These women often find themselves economically strained because of men who neglect to honour their obligations under court orders for the maintenance of their spouses never mind the fact that they may have access to resources.⁵⁹⁸

Women have since called for efficient enforcement of maintenance laws considering men's better access to jobs and other financial resources.⁵⁹⁹ According to Maher, this should have the effect of improving women's status and roles in the home as wives.⁶⁰⁰ This came after the writer's study of Moroccan women and the dynamics of their power in the household, where she argues that, "money is the secret of a man's stronghold over women."⁶⁰¹

The courts have heard to be firm and not allow unjust claims for maintenance calling claimants to be honest thereof. In the case of *Dube (Nee Msimanga) v Mavako-Dube*⁶⁰², the wife (applicant), claimed maintenance *pendente lite* in the sum of \$35 000 000 per month. The respondent had offered to and was indeed paying \$15 000 000 per month. The wife was in a more favourable position than the husband as she owned a gown-making business whose income she received in foreign currency and did not adduce before the court. Ndou J held that:

⁵⁹⁸ Dwyer and Bruce *A Home Divided: Women and Income in the Third World* (1988) 115, where the writer observes that studies have shown that increased wealth for men does not necessarily benefit their children.

⁵⁹⁹ Armstrong 1992 *Studies in Family Planning* 220, "...men have more than their share of financial resources, including greater access to jobs, education, land, and so on. Therefore, if maintenance of children is left in the hands of women alone, the children will suffer simply because they have less access to wealth.

⁶⁰⁰ Maher V "Work, Consumption and Authority within the Household" in Young *et al Of Marriage and the Market: Women's Subordination in International Perspective* (1981) 76, she describes how women, with no money of their own, resent the situation and even resort to subterfuge to get more money out of their husbands.

⁶⁰¹ *Ibid.*

⁶⁰² (HC 317/06) [2006] ZWBHC 78 (unreported), <http://www.saflii.org/zw/cases/ZWBHC/2006/78.pdf> (Accessed 21/11/2010), the court made a final order in favour of the husband and held further that, "In the circumstances, and in view of the lack of detail in the applicant's papers of her income, the only order this court can make would be for \$15 000 000,00 for the three minor children per month."

"The applicant has, however, failed to disclose to the court fully what her income is on average, whether per month or per annum. What is clear to me from the papers is that the applicant is not living in indigent circumstances and on charity of others. The onus was on the applicant to lay before the court in full and in detail, her own means, and, since she disputed those of the respondent as laid down by him. She did not. In the circumstances, this court has to go by the respondent's more definitive statement of his means."

It is therefore in the interests of children that the divorcing parties should fully disclose their means to the court. This principle was also applied in the case of *Lindsay v Lindsay*⁶⁰³ where Korsah JA made the following remark:

"I entertain no doubt that the quantum of maintenance, *pendente lite*, or otherwise, which a court may order a husband to pay to a wife ... is at the discretion of the court. In order to ensure the proper exercise of that discretion, the court requires that every party to an application for maintenance shall deal with the court with candour and utmost good faith. Each party must disclose to the court every material fact, whether for or against him or her, which will enable the court to make a fair and just assessment."

The principle of honest disclosure of income and means is well founded in law and it was applied in an earlier decision in *Ansell v Ansell*.⁶⁰⁴ In this case, the court encouraged the parties to prove their income by documentary evidence so as to place the courts in a better position to make orders that fell within the respondent's income bracket. In the final analysis, the progressively individualistic nature of marital and family lives has brought the disintegration of core ties that gave African institutions their identity and purpose. For this reason, each spouse sees his/her earnings as their sole

⁶⁰³ 1993 (1) ZLR 195 (S) at 197.

⁶⁰⁴ 1980 ZLR 416 (GD) at 418 where Dumbutshena J observed that;

"I hold the view that where parties are applying for maintenance for themselves or for the children of the marriage and contribution to costs or opposing the same, they should at least produce documentary evidence of their incomes. Such documentary evidence can be in the form of salary slips or commission payments and/or any other payments made to the parties. To be of assistance to the court, payslips for the last three consecutive months would be most helpful. The mere assertion that a party is in receipt of X dollars per month is, in my opinion, not enough. There is always the temptation to reduce one's actual income in order to qualify for a bigger award or to pay less to the applicant, just as there is a tendency to exaggerate estimates of expenditure in order to gain more or pay less maintenance."

property and, as some contend, this belief is perhaps the root of today's resistance to maintenance payments.⁶⁰⁵

The Act has also introduced the concept of criminal sanction into African family law on maintenance. Maintenance orders may be enforced like any other civil judgement and in the event that a respondent fails or refuses to pay, he/she can be convicted of an offence and imprisoned. The problem is that imprisonment does not benefit his dependents, because men will probably be unable to pay while in prison. Nevertheless, such provisions have been hailed for serving as deterrents and compelling defaulters to fulfil their obligations.

The Act also provides for safeguards against defaulters by making provision for garnishee orders where employers may be required to fulfil a court order as determined by deducting a specific sum of money from the defaulting party's salary. In the event that an employer opposes such an order, the onus is on the employer to show just cause why the direction should not be made.⁶⁰⁶ It is a criminal offence for the employer to fail to comply once the order has been made warranting a fine and or imprisonment for a year.⁶⁰⁷

Some conclusions may be drawn on the new concepts of maintenance from a customary law point of view. Custodians of custom will find the Maintenance Act a departure from tradition as it undermines traditional dispute resolution systems and authority by including the courts. There could, however, be common acceptance from

⁶⁰⁵ Armstrong (1992) *Studies in Family Planning* 224.

⁶⁰⁶ section 6(5)(b)(i) of the Maintenance Act, it provides that:

(5) The maintenance court may direct that the whole or any portion of the payments required to be made in terms of an order shall be paid by the employer of the responsible person from earnings due to that responsible person by the employer:

Provided that no such direction shall be made against an employer unless—

(a) in the case of a direction to pay a sum which amounts in the aggregate to less than ten dollars per month, he consents to the making of the direction;

(b) in any other case —

(i) he has been given notice of the proposal to make such direction and a

Reasonable opportunity to appear to show cause why such direction should not be made; or

(ii) he consents to the making of the direction.

⁶⁰⁷ See section 24 of the Maintenance Act.

both a traditional and western perspective of the principle that parents must support their children.

Secondly, one may argue that the Act promotes the removal of a father's right over his children. These sentiments come from the traditional belief that the children belong to their father's family owing to the rights attached after payment and transfer of *roora/lobola* cattle.⁶⁰⁸ Another point of interest is that the payment of maintenance in cash is a departure from tradition where resources such as land could be passed by a family head to his children for their upkeep.⁶⁰⁹ It should be borne in mind also that children themselves were a source of labour and therefore contributed greatly to their own upkeep although they stayed with their father. A married woman on the other hand was given land to plough, and grew food to feed her husband and children on the family land. Nowadays, the value of children as labour is diminishing and they have become an economic liability.

3.4 CONCLUSION

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In the final analysis, the status of Zimbabwean women has been shifted dramatically due to the impact of colonial rule and legislation. Traditionally, women's land rights and access to resources was guaranteed via family ties according to clan-based allocations a position that began to change with advent of colonial rule.⁶¹⁰ Owing to this premise, pre-colonial Zimbabwean women held relatively higher social positions that were honored and respected by customary laws and traditional patriarchies. Earlier effects

⁶⁰⁸ Armstrong 1992 *Studies in Family Planning* 224, where the writer draws an example from Shona custom whereby, if the father wanted to claim custody of an illegitimate child, he paid a cow (*mombe yechiredzwa*) as an appreciation token to the mother's parents for bringing up and caring for his child. Although customary laws differ in their details in each country, there are certain principles that appear to be present throughout Southern Africa that influence the effectiveness of maintenance laws.

⁶⁰⁹ *Ibid* 224, the writer holds further that, "cash is the subject of personal ownership, while the traditional forms of maintenance, land, animals subsistence production were not."

⁶¹⁰ Holleman *op cit* 7 who describes the rights that individuals could exercise over land and the principles underlying those rights, he says, "although every individual cultivator has a full and indisputable right to the crops he/she raises and is entitled to the full use of his field without the interference of others, the land itself is never regarded as individual property." This further explains the conflict that existed between application of even post-colonial legislation and customary law as individual property rights were generally an alien concept to customary law.

were the efforts at controlling the mobility and sexuality of women. British colonial influence reduced women's access to economic and natural resources, including access to land and in this way, colonial authorities and administrators had much to do with the subjugation of women. So did postcolonial legislation, such as the Communal Land Act of 1982. On the other hand, the infusion of English law comprising the common law and equity in the Customary Law and Local Courts Act may have been some of the few positive aspects for women's rights in addition to acknowledging the role that traditional leadership had to play in the judiciary.⁶¹¹

Post-colonial Zimbabwe thus seemed determined to improve the status of women by creating a Ministry and department of women's affairs. Additionally, was the passage of legal reforms that immensely benefited women such as the Legal Age of Majority Act though it came under attack as compromising values essential to people's social organization. For others therefore, transformation is not always equated with improvement.⁶¹² According to Urdang, tensions between inclusive social mobilisations that precede political transformation and independence on the one hand and the 'imagined community' of the gendered nation will always clash.⁶¹³

In South Africa, however we find a few exceptions to the reception of gendered rights. The long history of women's involvement in the anti-apartheid struggle combined with industrialization, urbanization and related influences on the organization of work and family has meant that the post-apartheid government has had to face gender specific demands from groups of women who refuse to subsume questions of gender subordination under appeals to national unity.⁶¹⁴ In the ensuing Chapter we therefore

⁶¹¹ Lewin 1939 *The Modern Law Review* 48.

⁶¹² Ranchod-Nilsson 2006 *Journal of Southern African Studies* 51, where the author says "Periods of transition can mean that states update patterns of inequality or power relations to fit new circumstances and gender becomes one means of articulating these patterns."

⁶¹³ Urdang S "Women in National Liberation Movements" in Hay and Stichter *African Women South of the Sahara* (1984) 156 ff, who says the conflict is inherent in post-independence states regardless of ideological commitments towards women's emancipation that are professed by liberation movements.

⁶¹⁴ Seidman G "No Freedom Without Women: Mobilisation and Gender in South Africa 1970-1992" in Laslett et al *Rethinking the Political: Gender, Resistance and the State* (1995) 210ff.

endeavor to look at the legislative framework that affected African marriages and the lives of women in that regard.



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CHAPTER FOUR

THE IMPACT OF COLONIAL LAW AND LEGISLATION ON AFRICAN INDIGENOUS LAW OF MARRIAGE IN SOUTH AFRICA

4.1 Introduction

An insight into the historical development of Anglo-Boer colonial policy in South Africa is necessary if one is to understand the relationship that emerged between customary law and the received common law. The relationship began with the annexation of the Cape by the British in the early 19th century when Roman-Dutch law was imposed on the Khoi and San indigenous communities.⁶¹⁵ Colonial policy expanded and shifted as British rule extended northward to Natal and the Transkei, Zulu and Xhosa territories respectively. Administration of the colony tended to be territorial and differed in the four main provinces of the Transvaal, Orange Free State, the Cape and Natal.⁶¹⁶

The impact of colonial law and administration on traditional family law and way of life resulted in a conflict of laws situation where one system had to give way. The recognition and acceptance of various aspects of customary law such as marriages became conditional as long as they were within specified boundaries of approval hence the 'repugnancy clause'.⁶¹⁷ With the shortcomings that came with a duality of laws in South Africa, the colonial administration began revising its perceptions on the application of indigenous laws by moving towards some form of recognition. The change in attitude began with the codification of customary law in Natal in the late

⁶¹⁵ This was done under the 1806 Treaty of Capitulation whereby the Netherlands ceded the Cape to Britain, and traditional customary laws were totally disregarded.

⁶¹⁶ The provinces of Orange Free State and the Transvaal were predominantly Boer territories where colonial policy tended to be more harsh with a total disregard for customary laws. On the other hand, in the territories of Natal and the Cape under British influence, a milder approach was adopted with recognition given to indigenous law however subject to it conforming to principles of morality observed in the 'civilized world'.

⁶¹⁷ Hooker *Legal pluralism: an introduction to colonial and neo-colonial laws* (1975) 129ff, who says the term repugnant meant that customary law was not recognised if it was found to be contrary to principles of justice, morality and good conscience, notions that the colonial administration imposed in the name of civilization.

1800s.⁶¹⁸ At the subsequent formation of the Union amalgamation of British and Boer territories in 1910, limited legislative recognition of customary law was accorded in form of the Black Administration Act in 1927.⁶¹⁹

In the former Transkei, commendable reforms around recognition of customary marriages came with the Transkei Marriages Act⁶²⁰ in 1978. During its time it was the first bold attempt towards harmonising the conflict of laws situation between customary law and the common law. The study therefore demonstrates the development and interaction between customary law and common law while noting some of the material effects on traditional marriages such as gendered roles, rights and obligations of men and women in marriage especially around matrimonial property, *locus standi* (legal status) and the imposition of legal formalities requiring validation of marriages by registration. In doing so, distinctions will be made to identify points of departure or intersection in the development of policy on customary law in South Africa and Zimbabwe.⁶²¹

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4.2 COLONIAL LEGISLATION

4.2.1 The Natal Code 1878

In 1843, when the British took over Natal, Roman Dutch law was deemed the law of the land. Aspects of customary law were generally relegated as inferior with the issue of polygamy, (*lobola*) bride wealth and determination of marriageable age being struck

⁶¹⁸ Right through to its the last codification in 1987, the Natal Code of Zulu Law provided guidance for the courts on the substance of matters ancillary to customary law such as marriages. However in post – colonial South Africa, in addition to the Constitution, various pieces of legislation such as the Recognition of Customary Marriages Act (1998) and the Repeal of the Black Administration Act and Amendment of Certain Laws Act (2005), have struck down the codes especially where customary law appears discriminatory along gender lines.

⁶¹⁹ Act No. 38 of 1927, the Act became the principal Act that regulated the reception and application of customary law and its institutions for the greater part of the 20th century.

⁶²⁰ Act No. 21 of 1978, a decade later the Law of Evidence Amendment Act No. 45 of 1988 also sought to uphold the significance of *lobola* (bride wealth) payments. Most importantly, post-colonial South Africa has made drastic inroads in its efforts towards recognising customary marriages in terms of the Recognition of Customary Marriages Act No. 120 of 1998.

⁶²¹ While parts of South Africa came under British administration as early as 1806, the British colonial administration in Zimbabwe became formally recognised in 1890.

down in so far as they were not repugnant to the general principles of humanity observed throughout the civilised world.”⁶²² By 1869, efforts towards adopting ‘official’ customary law began with the implementation of regulations that set maximum amounts of *lobola*.

Various considerations including that of pursuing a policy of indirect rule, which required participation by traditional leadership, a Board of Native administration convened in 1875 to address these pertinent issues by proposing a codification of customary law.⁶²³ Shepstone became the main architect who spearheaded the new policy on recognition and regulation of customary law, by using chiefs and magistrates as tools for achieving the administration’s goals.⁶²⁴ The efforts and deliberations culminated in the passing of the first Natal Code in 1878.⁶²⁵

Within the Code came new constructions of custom. Firstly, the new regulations on *lobola* deviated from custom by making it a requirement for the entire bride wealth amount to be transferred prior to formalisation of a marriage.⁶²⁶ In addition, the administration gave effect to a policy that determined and inflated the maximum amount of *lobola* payable to a girl’s family.⁶²⁷ Traditionally, a commitment to pay *lobola* in the future alone was enough for consummation of marriage. Marriage negotiations were in a male domain and a private arrangement by the respective families was sufficient. Only

⁶²² See Ordinance No. 3 of 1849; among the Xhosa of the Kei river area, similar policies were adopted thirty years later in 1879 in terms of section 23 of Proclamations 110 and 112 of 1879, which held that customary law was recognised provided it conformed to “the general principles of humanity observed throughout the civilized world.”

⁶²³ Bennett and Peart *A Sourcebook of African Customary Law for Southern Africa* (1991) 111ff, only Natal codified customary law whilst the extent of recognition in other provinces varied.

⁶²⁴ Ordinance No. 3 of 1849 *supra* it gave powers to the Lieutenant governor as the supreme chief, to establish a system for the administration of customary law. This became Shepstone’s mandate as the secretary for native affairs. From a legalist point of view, there was justifiable need to inform and guide magistrates on the content of custom as more and more African came before western courts.

⁶²⁵ In 1891, the code was made law by Parliament in terms of Law No. 19 of 1891 and became known as the Natal Code of Zulu law. It was later enforced in Zululand after it was conquered and incorporated into Natal in 1897. Subsequently, a new version of the code applied to both Natal and Zululand in 1932.

⁶²⁶ Lambert “The Undermining of the Homestead Economy in Colonial Natal” 1990 *South African Historical Journal* 58, see also section 87 of the revised 1932 code where the policy regulating *lobola* was consolidated in 4.2.3 *infra*.

⁶²⁷ Generally the amount payable was set at ten head of cattle plus a *nquthu* beast (a beast given by the bride’s father to her daughter for her upkeep and maintenance in her new home) making this the norm demanded by fathers for their daughters hand in marriage.

they had the discretion to determine how much *lobola* was payable by the prospective groom's family. The initial impact was traditional family law was placed in a public arena to which it did not belong and the true meaning of *lobola* was lost as a result.

According to McClendon⁶²⁸, change in the substance of bride wealth was also attributed to a shift in the population's socio-economic dynamics that came with industrialisation and the capitalist economy. The change gave rise to mobility of migrant labour and a perceived 'ability to pay'.⁶²⁹ Acknowledging that codification brought some degree of legal certainty for the administration, Shepstone himself is reported to have advised the government in Natal that codification would have a negative impact of bringing an undesirable level of rigidity to customary law, which would make it difficult to adapt to changes in society.⁶³⁰

In addition to the regulation of *lobola*, colonial intervention in marriage practices also sought to liberate women by ending the practice of 'forced' marriages of young girls to older men. The law now required the girl's consent in the presence an official witness.⁶³¹ While stating the position among the Xhosa and Zulu, Bennett elucidates on the matter and says:

"Given their strong commitment to spousal consent, the colonial authorities were bound to take up the cause of unwilling brides. Hence, in the Transkeian Territories, forced marriages were prohibited and the guardians responsible for them were subject to criminal penalties. In Natal, and later KwaZulu, an 'official witness' had to attend a customary wedding, where he was obliged to ask the wife whether she was marrying of her own free will. If a guardian coerced his ward into marriage, he was guilty of an offence. In other parts of South Africa, where there was no specific legislation banning forced marriages, the courts, as a matter of policy, deemed them null and void."⁶³²

⁶²⁸ McClendon "Tradition and Domestic Struggle in the Courtroom: Customary Law and the Control of Women in Segregation-Era Natal" 1995 *International Journal of African Historical Studies* 543, where the writer notes that, "...the colonial presence, resulting in the creation of wage labour and a money economy, caused a significant inflation in *lobola* in the mid- nineteenth century."

⁶²⁹ *Ibid.*

⁶³⁰ Welsh *The roots of segregation; native policy in colonial Natal, 1845-1910* (1971) 159ff.

⁶³¹ Bennett and Peart *customary law for Southern Africa* 176.

⁶³² Bennett *Customary law in South Africa* (2004) 201.

British policy in Natal to this extent resembled the position in Zimbabwe when the Native Marriage Ordinance was passed in 1901 and among other things, made 'child-pledging' illegal. In addition, similar to the regulation of *lobola* among the Zulu, the Native Marriage Ordinance of Zimbabwe formally regulated aspects of *roora/lobola* among the Shona and Ndebele respectively during the early years of the colonial administration.⁶³³

However not all aspects of colonial policy in South Africa and Zimbabwe at the time found similarity. Unlike in South Africa, the Zimbabwean Native Marriage Ordinance of 1901 was more embracing to practices like polygamy. The administration made recommendations to leave such marriages as they were in anticipation that they would fade away on their own.⁶³⁴ In addition, the Native Marriage Ordinance⁶³⁵ of 1917 upheld the rights of African men to take more than one wife by recognising succession to widows (levirate marriage).

On the other hand, in South Africa, the position tended to differ owing to the potentially polygamous nature of customary marriages.⁶³⁶ The subjection of customary law to the repugnancy clause enabled administrators to disapprove of certain practices and encouraged ongoing debates among policy makers as to the repugnancy or non-repugnancy of customs like *ukulobola* (bride wealth), polygamy, and *ukungena* (levirate marriage).⁶³⁷

The code also had the impact of changing relationships between African men and women by identifying new gender roles that determined property rights within the traditional family. For the policy on indirect rule to work, male traditional leaders were appointed as the general custodians of the people. In terms of the code, "all natives are either kraal head, or are subject to a kraal head except married males or widowers as

⁶³³ In 1911 as a follow-up on the foundations laid down by the 1901 Ordinance, the Native Affairs Committee of Enquiry defended and consolidated its directives on the regulation of *roora* in the colony.

⁶³⁴ See the *Report of the Native Affairs Committee of Enquiry 1910-1911* in 3.2.1 Chapter 3 *supra*.

⁶³⁵ Ordinance No. 15 of 1917.

⁶³⁶ As held in the case of *Seedat's Executors v The Master* (Natal) 1917 AD 302.

⁶³⁷ McClendon 1995 *International Journal of African Historical Studies* 532.

regards their private and personal dealing with their third parties.”⁶³⁸ The status of women was relegated by being made subject to their husbands and in all village matters subject to the respective village head.⁶³⁹ The village head was recognised as the absolute owner of all property belonging to his jurisdiction, as long as it did not belong to a particular house. He also had control his family property and could use it at will.⁶⁴⁰

The Natal Code therefore introduced a concept of individual property rights because instead of administering property for the family’s common good, it gave the village head powers he never had traditionally thus distorting custom in the process.⁶⁴¹ Women as minors under their husband were the most disadvantaged. Some writers have gone as far as assenting to the fact that, the imposition of western law and Roman Dutch law on customary law in colonial Africa was replacing it with an equally patriarchal system.⁶⁴²

4.2.2 The Native Law Commission 1883

As the colonial administration continued with the partial recognition of customary law, there came a time in the late 19th century when a platform was set to here submissions on the reform of colonial attitudes towards aspects of customary law by officials and magistrates. In 1883, submissions from various stakeholders including African traditional leaders were heard before the Native Laws and Customs Commission.⁶⁴³ Among the recommendations was the proposal that recognition be given to uncodified/unofficial customary law alongside the common law contrary to the developments in Natal and the Code. The commission sought to take the advantage and correct some misconceptions on true custom, and curb further misconstructions of traditional values and practices.

⁶³⁸ See section 90 of the Natal Code.

⁶³⁹ section 91.

⁶⁴⁰ section 68.

⁶⁴¹ Chanock *Law, Custom and Social Order, the colonial experience in Malawi and Zambia* (1985) 45.

⁶⁴² Mqeke “The ‘Rainbow Jurisprudence’ and the Institution of Marriage with emphasis on the Recognition of Customary Marriages Act 120 of 1998” 1999 *Obiter* 52.

⁶⁴³ Sir Jacob Dirk Barry, Cape of Good Hope Commission on Native Laws and Customs, *Report and proceedings: with appendices of the government Commission on native laws and customs. Presented to both houses of Parliament by His Excellency the governor, January, 1883* (1883) 18 – 20.

An example is the Zulu King, Cetshwayo who while making a submission on the patrimonial aspects of customary law, is reported to have mentioned that a woman could hold property independently of her father or husband, contrary to the principles that the Natal Code portrayed about custom.⁶⁴⁴ This position can also be confirmed among the Shona of Zimbabwe with their concept of *mavoko* property were women acquired personal wealth and proceeds through efforts of their own hands.⁶⁴⁵ Likewise, among the Zulu of South Africa, women acquired property through work as *izangoma* (diviners), through the sale of stock and produce, and in the form of gifts from fathers and husbands.⁶⁴⁶

A more passionate defence of the African Marriage sought to defend it from Christian influences of the western world. In one section it was held that:

"Dealing with the question of marriage in its broadest aspect, we cannot accept the view extensively held, that in dealing with people among whom civilisation and Christian Law have but lately come, marriage can only be recognised and regarded as legal and valid when such marriage has been duly registered. We recognise the essential element of marriage to be a contract between a man and a woman, into the celebration of which a certain defined social, or civil, or religious ceremony enters, while at the same time we hold that the Christian Law of marriage sets forth the truest and purest ideas of such a union, and fixes what should obtain amongst those who have accepted Christianity as a religion, or in States ruled by Christian Law."⁶⁴⁷

⁶⁴⁴ *Ibid* para 234.

⁶⁴⁵ See the Zimbabwean cases of *Jenah v Nyemba* 1986 (1) ZLR 138 (SC) and *Chingattie v Munoti* H - H 207-92 (1992) (unreported) in 3.2.6 Chapter 3 *supra*; see also in this regard, Child *The history and extent of recognition of tribal law in Rhodesia* (1965) 91 who says "should a woman go out to work with the approval of her husband while under his marital control, any money she earns belongs to him under Shona and Ndebele law."

⁶⁴⁶ *Welsh Roots of Segregation* 169; see also the testimony by Violet Sibusisiwe Makanya at a later stage before the Native Economic Commission (NEC) 1930 - 1932, Vol. 4, 6315, 4 April 1931, where she argued that, "...under the tribal system 50 years ago women would not submit to whatever the men wanted...they were not entirely suppressed at any time under the old tribal system; they always had something to say."

⁶⁴⁷ Section 84 (b) of the Report and Recommendations, held further that:

"But we cannot on this ground hold that marriage celebrated in this or in other countries where Christianity has not been established, or where the civilisation is not Christian, are not in reality marriages, whether such marriages are monogamous or not, so long as certain essential conditions are fairly fulfilled, viz, mutual life, fidelity, mutual support, and recognition of certain

Unfortunately, the Cape government did not give effect to any of the recommendations. The partial recognition and demise of customary law on marriage continued, as Magistrates continued to apply unofficial and official customary law in civil cases between Blacks. However, the Cape High Court refused to apply that law in the absence of statutory indication to that effect.

4.2.3 The Natal Code of Native Law 1932

Further misconstructions of custom were incorporated into a subsequent version of the Natal Code⁶⁴⁸ in 1932. This time around, the fundamental change to traditional family law was in the sphere of divorce. The Code formalised dissolution of marriage by outlining what were lawful grounds for at customary law. Among them was adultery, continued refusal of conjugal rights, wilful desertion among others.⁶⁴⁹ According to custom, a wife could not easily divorce her husband in the event of cruelty, ill-treatment, accusations of witchcraft, or other serious allegations by her husband. Furthermore, provision was made for the wife's family to return to the husband's family, at least one *lobola* beast if the divorce was attributed to the wife's wrongdoing.⁶⁵⁰

Divorce matters were taken out of the family context by the requirement that such cases be taken directly to the Native Commissioner as a court of first instance.⁶⁵¹ The 1932 case of *Ngubane v Mtshali*⁶⁵² that arose in the Lions River district was a divorce action that illustrates efforts by husbands and fathers, together with the state to control the movements and sexuality of African women. One Senzagabi Ngubane (plaintiff) sought

duties to the offspring of such unions or marriages for were this not recognised, at least two-thirds of the entire population of the globe would be in the position of being illegally married, and therefore without any of the rights of marriages and responsibilities to children which belong to marriage, and the children without their just and natural rights."

⁶⁴⁸ Proclamation No. 168 of 1932.

⁶⁴⁹ *Ibid* section 76.

⁶⁵⁰ Section 81 of the Natal Code of 1932.

⁶⁵¹ In the event of divorce actions involving Christian or civil marriages, these were heard in the regional Native Divorce Courts.

⁶⁵² Native Appeal Court (NAC) Case 18/1 of 1932, the wife who was duly assisted by her maternal uncle did not oppose the divorce in accordance with provisions of section 11(3)(b) of the Black Administration Act.

to divorce his wife Nomkosi Mtshali to whom he was married in terms of custom, after previous attempts by an *induna* to reconcile them after finding the wife at fault.

The parties' marriage of fourteen years had produced only one child, who was now deceased. Because his wife had left for five years and lived with another man, the husband stated desertion and refusal of conjugal rights as the main reasons for the divorce. The native commissioner granted the divorce, with costs to be born by the wife, and ordered that seven head of *lobola* cattle be returned to the husband. He found that the wife was at fault because she left her husband and refused to return and render him with conjugal rights. Furthermore, the wife's conduct was troublesome to Plaintiff because she persisted in going to beer drinks and was keeping company with another man.

In another divorce case in *Mkize v Ngqalanga*⁶⁵³, from Weenen district, one Nompepe Mkize, the second wife of Hlupizwe Ngqalanga, petitioned for a divorce from her husband of eight years on the statutory grounds of failure to render conjugal rights, malicious desertion, and conduct making living together insupportable. The brother, her legal guardian, as required by the Natal Code supported her in the action. Both the native commissioner's court and the Native Appeal Court found that the grounds presented for divorce were inadequate and dismissed the case, with costs to be paid by the plaintiff wife.

Criticism has been made against the impact of these interventions by the code. It is held that the new legalities brought an unhealthy strategizing between the two lineages involved in the marriage contract, as wives and their guardians made efforts to blame husbands for breakdown of marriage to avoid returning *lobola* cattle, whilst on the other hand husbands blamed their wives in order to retain *lobola* cattle.⁶⁵⁴ State intervention is also blamed for being responsible for the frequency of divorce litigation in Natal.

⁶⁵³ Case No. 31/1940.

⁶⁵⁴ McClendon 1995 *International Journal of African Historical Studies* 544.

Similarly, in Zimbabwe in the early 1900s there was an influx of women filing for divorce before Native Commissioners' courts.⁶⁵⁵

In addition, similar to the loss of control over their wives that African men experienced in Zimbabwe in the period preceding the passing of the Native Adultery Punishment Ordinance in 1916, African chiefs and elderly men among the Zulu of South Africa began criticising the effects of colonisation in the 1930s. To them their wives were becoming disobedient because colonial courts gave women alternatives that hindered men's efforts to restrain and control women.⁶⁵⁶ As such, wives began approaching the courts with their concerns instead of consulting with the family head.⁶⁵⁷ According to McClendon:

"the ambiguous role of the state, which tinkered with the "customary" institution of marriage in ways designed to grant more freedom of choice to women, but occasionally demonstrated its anxiety over the breakdown of patriarchal controls by criticizing women's disregard of "native custom" concerning limitations on their movement. The state thereby displayed its contradictory support of liberal ideology and of the traditional order that underpinned mid-twentieth century capitalism in South Africa."

It leaves no doubt that interaction of the two legal systems almost always left African women in a predicament that was really not of their making, but due to clashes between African men and White colonialists.

⁶⁵⁵ At the time, colonial courts in Zimbabwe experienced increased divorce litigation as a result of the administration's focus on policies that 'emancipated' women from what were perceived to be unjustified patriarchal holds within customary law; see also the case of the divorce of *Shambamuto v Kurehwa and Father* Case 44/1912 Court of the Native Commissioner, Mtoko District 1910-1922, S1004 in 3.2.2 Chapter 3 *supra*.

⁶⁵⁶ Booth "European Courts Protect Women and Witches': Colonial Law Courts as Redistributors of Power in Swaziland 1920-1950" 1992 *Journal of Southern African Studies* 253ff.

⁶⁵⁷ McClendon *op cit* 538, where the writer quotes an African court messenger who while testifying to the Native Economic Commission in 1931 talked about a loss of authority for those who held it 'traditionally' and complained that courts undermined the authority of husbands and fathers.

4.2.4 The Black Administration Act 1927

About two decades after the Union of South Africa came into being in 1910, the Black Administration Act⁶⁵⁸ (BAA) was passed by the Apartheid government in 1927 to resolve the lack of coherent legislation regulating the application of customary law among blacks in the four main provinces of South Africa. It brought territorial uniformity to the application of customary law and aspects of African marriages now came under a single legislative framework.⁶⁵⁹ The Natal Code continued to be in force in Natal however. In general, the impact of the BAA was that it gave partial recognition to customary law and added to its misconstructions with undesirable consequences for the legal status of indigenous law and women in customary marriages.

The Act commendably upheld the role of traditional leadership in dispute resolution by giving local chiefs limited jurisdiction to try civil cases between blacks.⁶⁶⁰ Perhaps the impact of this provision was that, because chiefs were seen as custodians of indigenous communities, custom was considerably preserved at the chief's court level. In addition these powers, Commissioners courts and their courts of Appeal had discretion to apply customary law in cases between Blacks as long as the customs in question were not repugnant to the principles of public policy and natural justice.⁶⁶¹ As was the case with the Natal codes, *lobola* was recognised as an essential to a valid customary marriage. Also, the Act sought to protect the concept of *lobola* by prohibiting courts to declare the practice contrary to the notions of public policy and morality.⁶⁶²

In similar fashion, the Law of Evidence Amendment Act⁶⁶³ (LEAA) was enacted in 1988 and further regulated the customary law of marriage by taking cognisance of *lobola*.⁶⁶⁴

⁶⁵⁸ Act No. 38 of 1927.

⁶⁵⁹ As such, the BAA put an end to the fragmented legislation in the provinces of Natal, the Transvaal, Orange Free State, and the Cape Colony.

⁶⁶⁰ section 12 of the BAA.

⁶⁶¹ Section 11 (1) of the BAA held that: "it shall not be lawful for any court to declare the custom of *lobola* or *bogadi* or other similar custom repugnant to such principles", meaning the principles of contained in the repugnancy clause. Section 11(1) was subsequently repealed by section 2 of the Special Courts for Blacks Abolition Act No. 34 of 1986.

⁶⁶² *Ibid.*

⁶⁶³ Act No. 45 of 1988.

The Act entitled any court to take judicial notice of customary law in so far as it readily ascertainable with sufficient certainty and not contrary to the principles of public policy and natural justice.⁶⁶⁵ The repugnancy clause was contained in section 1(1) of the LEAA, which provided that, customary rules may not be applied if they are “opposed to the principles of natural justice.”⁶⁶⁶ As with section 11(1) of the BAA, the LEAA held that no court could declare the custom of *lobola* or *bogadi* to be repugnant to these principles. More recently in the case of *Mabuza v Mbatha*⁶⁶⁷ the court held that the test for the validity of customary law is no longer consistency with public policy and natural justice, but consistency with the constitution.

Apart from the jurisdiction of traditional leadership and acceptance of *lobola*, early provisions dealing with the registration of customary marriages in South Africa can be found in the 1960s.⁶⁶⁸ The regulations made provision for the registration of existing and valid customary marriages, the annulment of the registration of customary marriages, and the registration of the *lobola* due. Registration was not mandatory and non-registration did not render the marriage invalid.⁶⁶⁹ There were ways by which the validity of customary marriages was determined.⁶⁷⁰ Precedent in the Native Appeal courts gave some clarity to the position as to which factors were taken into consideration. In the

⁶⁶⁴ In 1983, the Hoexter Commission convened to investigate and make recommendations regarding the functioning of courts previously established to deal with cases between Blacks and brought under the jurisdiction of Magistrates Courts. This culminated in the enactment of the Special Courts for Blacks Abolition Act 34 of 1986.

⁶⁶⁵ Section 1 of the LEAA.

⁶⁶⁶ Another clause adds that, “Provided further that it shall not be lawful for any court to declare that the custom of *lobola* or *bogadi* or other similar custom is repugnant to such principles.” This clause was designed to prevent a return to early decisions by Transvaal courts, whereby *lobola* agreements were deemed uncivilised and thus unenforceable, see also *Kaba v Ntela* 1910 TPD 964 969.

⁶⁶⁷ [2003] 1 All SA 706 (C); 2003 (7) BCLR 743; 2003 (4) SA 218 at 32.

⁶⁶⁸ See in this regard the regulations in the Government Notice R1970 published on the 25th October 1968 which were promulgated in terms of section 22 of the BAA.

⁶⁶⁹ Maithufi “*Kambule v The Master* 2007 3 SA 403 (E)” 2009 *De Jure* 193, where the writer says: “...thus, an unregistered customary marriage could be valid if all the requirements for its validity were met. Registration merely served as proof of the existence, annulment, or dissolution of a customary marriage or of the amount of *lobola* due”; [http://www.up.ac.za/dspace/bitstream/2263/13282/1/Maithufi_Kambule\(2009\).pdf](http://www.up.ac.za/dspace/bitstream/2263/13282/1/Maithufi_Kambule(2009).pdf) (Accessed 20/05/2010).

⁶⁷⁰ Bekker *Seymour's Customary Law in Southern Africa* 1989 105ff, for as long as the requirements or formalities for a customary marriage, whether they were codified or uncoded were met, such marriage was regarded as valid despite its non-registration.

case of *Kumalo v Kumalo*⁶⁷¹ a valid marriage subsisted where two people lived openly together as husband and wife. In *Mabuza's* where all the usual rites and ceremonies were performed a valid marriage had been contracted.⁶⁷²

All minor positives of the Act aside, the BAA did not do much as far as parity of customary marriages and civil marriages was concerned. Polygamy was not recognised and a man could not contract a subsequent civil marriage without dissolving the other.⁶⁷³ The apparent conflict came up in the case of *Nkambula v Linda*⁶⁷⁴ where the court held that, if a husband in a customary marriage entered into a subsequent civil marriage with another woman, it was as if he had deserted his customary wife. The wife was entitled to leave him without her guardian being liable to return any *lobola* paid. As such, the woman and children from the customary marriage could not inherit property from the deceased.

On a similar issue, in the case of *Bucwa v George*⁶⁷⁵, the Southern Bantu Appeal Court gave further clarity to the matter. The Appellant (husband) instituted an action against his wife's guardian (defendant) for the return of his customary law wife, failing which he demanded the return of *lobola* cattle according to the relevant rules regarding subtractions for children born during subsistence of the marriage. The husband alleged that his wife had deserted him three years earlier and that she and her guardian had taken their two surviving children out of his custody without his consent.

⁶⁷¹ 1942 NAC (N & T) 31.

⁶⁷² 2003 4 SA 218 (C).

⁶⁷³ section 22(1) and (2) read as follows:

"No man and a woman between whom a customary union subsists are competent to contract a marriage with each other if the man is not also a partner in a subsisting customary union with another woman."

In terms of subsection (2) the Act stated that: "subject to subsection (1), no person who is a partner in a customary union shall be competent to contract a marriage during the subsistence of that union."

⁶⁷⁴ 1951 1 SA 377 (A) where Fagan CJ held that "a native customary union is not a legal marriage"; in an earlier decision in the case of *Guma v Guma* 4 NAC 220 (1919) the Native Appeal Court held that, "whether it may be, a marriage by Native Law is not equivalent to a marriage by Common Law"; see also *Ndhlovu v Ndhlovu* 1937 NAC (N&T) 80 where the court concluded that the subsequent customary marriage would be invalid.

⁶⁷⁵ 1964 BAC 1 10 (S) (King Williams Town).

The Appellant confirmed before the court that he had concluded a civil marriage with another woman and was of the impression that his customary law wife was willing to accept a second woman in the house. O'Connell, President, held that it was settled law that the celebration by the husband of a civil marriage with a woman other than the wife of his customary union automatically dissolves the union and he therefore forfeit the dowry and it follows that the present applicant has no prospects whatsoever of success on appeal.

Accordingly, the BAA had the negative impact of partially recognising customary marriages and on top of it all, referring to them as unions.⁶⁷⁶ The Act referred to 'dissolution of customary union', because only civil and Christian unions were recognized as marriages and terminable by divorce. A marriage was deemed to be between one man and one woman in terms of any law but not including any union entered into in terms of custom.⁶⁷⁷ Impliedly, polygamy was given limited recognition and did not enjoy full recognition in the eyes of the common law.

A phenomenon then prevailed throughout 20th century South Africa that disadvantaged customary law wives. Women were divorced without their knowledge as husbands continued to exercise their traditional rights to take second and subsequent wives outside the bounds of legislation.⁶⁷⁸ Lewin elaborates and says, "during the subsistence of a 'customary union', a native may contract a marriage, which apparently has the

⁶⁷⁶ Section 35 of the BAA; see also in this regard, Hlophe "The kwazulu Act on the Code of Zulu Law, 6 of 1981, a guide to intending spouses and some comments on the custom of Lobolo" 1984 *Comparative and International Law Journal of Southern Africa* 164; 173, the terminology changed in terms of the kwazulu Act on the Code of Zulu Law enacted in 1985, where a 'union' between blacks according to customary law was described as a customary marriage and not a customary union.

⁶⁷⁷ The Act referred to a 'customary union' which was an association between a man and a woman in a conjugal relationship according to Black law and custom, where neither of them was a party to a subsisting marriage.

⁶⁷⁸ Maithufi "Do we have a new type of voidable marriage?" 1992 *Journal of Contemporary Roman-Dutch Law (THRHR)* 628, women in customary marriages who had their marriages automatically annulled generally became known as the discarded wives.

effect of dissolving the customary union; but a native who is 'married' may not contract a customary union without running the risk of prosecution for bigamy."⁶⁷⁹

To remedy this anomaly in the law, subsequent legislation intervened to remedy the scenario and do away with the insecurities of the 'discarded customary wives'.⁶⁸⁰ In 1988, the Marriage and Matrimonial Property Act⁶⁸¹ amended section 22 of the BAA to read as follows:

"no marriage contracted after commencement of this Act [on 1 January 1929] but before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988 [on 2 December 1988] during the subsistence of any customary union between the husband and any woman other than the wife shall in any way affect the material rights of any partner of such union or any issue thereof, and the widow of any such marriage and the issue thereof shall have no greater rights in respect of the estate of the deceased spouse than she or they would have had if the said marriage had been a customary union."

Thus, before the enactment of the Marriage and Matrimonial Property Act in 1988, when spouses in a customary marriage entered into a marriage by civil rites with each other or with another person, the result was that the prior customary marriage as dissolved automatically.⁶⁸² In light of the positive impact that the amendment brought by uplifting the status of customary law wives, it however remained a requirement for a marriage officer to witness and ascertain a declaration by a black man that he was not a partner in a customary marriage with any woman other than the one he intended to marry.⁶⁸³ According to the Act:

⁶⁷⁹ Lewin "Some Legal Consequences of Marriage by Native Christians in British Africa" 1939, *Modern Law Review* 49.

⁶⁸⁰ Peart "Civil or Christian marriage and customary unions: The legal position of a discarded spouse and children" 1983 *Comparative and International Law Journal of Southern Africa* 39, see also Bonthuys and Pieterse "Still unclear: the validity of certain customary marriages in terms of the Recognition of Customary Marriages Act" 2000 *Journal of Contemporary Roman-Dutch Law* 618.

⁶⁸¹ Act No. 3 of 1988.

⁶⁸² Sinclair *The law of marriage* (1996) 219.

⁶⁸³ Maithufi "The Recognition of Customary Marriages Act 1998: A commentary" 2000 *Journal for contemporary Roman-Dutch Law* 629, the intention of the legislature in enacting this legislation was to provide greater protection to the female spouse of the customary marriage. In terms of the Act, a man was required to make a declaration before a court before taking another wife. This was an effort by the administration to ascertain how men dealt with the proprietary consequences of their marriages when

“No male Black shall, during the subsistence of any customary union between him and any woman, contract a marriage with any other woman unless he has first declared upon oath, before the magistrate or commissioner of the district in which he is domiciled, the name of every such first-mentioned woman; the name of every child of any such customary union; the nature and amount of the movable property (if any) allotted by him to each such woman or house under Black custom; and such other information relating to any such union as the said official shall require.”⁶⁸⁴

The declaration became a precondition for the limited recognition of a man's right to take another wife by giving the courts powers to determine how he would men allot house property to his wives. However, a disadvantage remained for women married by customary rites because the man was not required to allocate any property to his customary wife/wives or houses.⁶⁸⁵ Unfortunately, the customary law wife and her children had no rights in the deceased men's estate, except a claim to that which was allocated to a wife or house in terms of the Act.⁶⁸⁶

In addition, an omission by a man to make the declaration did not affect the validity of the civil marriage although it was an offence to contract a civil marriage without such pronouncement.⁶⁸⁷ According to Olivier and Joubert, in theory, this meant that the previous problems caused by the conflict between dual or multiple marriages also involving civil marriages were done away with.⁶⁸⁸

The has changed and in terms of the Matrimonial Property Act, customary marriages entered into after its commencement were not dissolved or superseded by a subsequent civil marriage contrary to the position adopted in *Nkambula's* case.⁶⁸⁹ In the

they took a potentially polygamous nature, especially where customary marriages existed concurrently with civil marriages.

⁶⁸⁴ Section 22(1) of the BAA.

⁶⁸⁵ Olivier and Joubert *Indigenous law* (1995) 91.

⁶⁸⁶ Maithufi 1992 *Journal of Contemporary Roman-Dutch Law* 628.

⁶⁸⁷ *Ibid*, see also section 22(5) of the BAA.

⁶⁸⁸ Olivier et al *Indigenous Law* 92, in practice this was not the case. It should be noted that section 22(1) - (5) of the Black Administration Act was repealed by the Recognition of Customary Marriages Act and replaced by similar provisions in sections 3(2), 10(1), 10(4), and 11 of the Act, see in 4.4.2 *infra*.

⁶⁸⁹ Maithufi 2000 *Journal for contemporary Roman-Dutch Law* 511.

case of *Thembisile v Thembisile*⁶⁹⁰ the court referred to the amended section 22(1) and (2) of the BAA and held that, the subsequent civil marriage was nullified because the second wife (civil law spouse) could not prove that the prior customary marriage had been dissolved.⁶⁹¹

The brief facts of the case were that, after death of her husband in 2001, the first respondent (civil marriage wife) arranged for his body to be transferred to a funeral parlour (the second respondent) to prepare him for burial. At the same time, the applicant (customary law wife), who had entered into a customary law marriage with the deceased in 1979, was joined in the proceedings by the eldest son of the marriage and together laid a claim for the right to bury the deceased. The applicants therefore sought a declaratory order that they were entitled to bury the deceased at his ancestral home in a locality of their choice. The first respondent alleged that the customary marriage between the deceased and first applicant had been dissolved prior to the second civil marriage, which was contracted in 1996.⁶⁹² The first applicant denied this.

The court per Bertelsmann J, held that the first respondent failed to prove the dissolution of the prior customary marriage of the first applicant and granted the relief sought by her. The court further declared the first respondent's civil marriage a nullity⁶⁹³ and held further that, even if she and the deceased had entered into a subsequent customary marriage, it was common cause that the applicant's rights as first wife and first-born male heir (to bury the deceased) were stronger than any claims she might have.⁶⁹⁴ Because the deceased died without a will, the rules governing customary law of succession were applicable.⁶⁹⁵ According to Jansen, the way in which the court

⁶⁹⁰ 2002 2 SA 209 TPD.

⁶⁹¹ *Ibid* para 30 – 32.

⁶⁹² *Ibid* para 33, the civil marriage was duly documented by a marriage certificate, and it was alleged that it had been followed by a customary marriage in 1999 although this was doubted by the court.

⁶⁹³ *Ibid* see para 32.

⁶⁹⁴ See at para 33 where it was held that the rights of the customary law wife further compromised those of the civil law wife who was unable to lodge a claim to the pension benefits from the Rustenburg Platinum Mine where the deceased was employed, unless the existence of the subsequent customary marriage which she alleged to have entered into with the deceased in October 1999 could be proved.

⁶⁹⁵ Para 25, Section 2 of Government Notice R200 of 1987 provides that if a black person dies leaving no valid will and is survived by any partner with whom he had entered into a customary marriage, customary

emphasised the value, status, and full recognition of a customary marriage deserves praise although the question remains whether it is fair to the woman and children involved in the civil marriage if the marriage is simply nullified.⁶⁹⁶

The *Thembisile* case was therefore a radical shift from the 1950s case of *Nkambula v Linda*. The interpretation of section 22(1) and (2) of the Marriage and Matrimonial Property Law Amendment Act in *Thembisile's* case left no room for doubt that the legislation intended that the subsequent civil marriage was invalid.⁶⁹⁷ Maithufi⁶⁹⁸ on the other hand contends that the civil marriage should have been voidable and not void because non-compliance with section 22(1) and (2) was coupled with a criminal sanction.⁶⁹⁹ A voidable marriage would mean that, parties are married legally making the children born during such marriage legitimate.⁷⁰⁰ Olivier declares that if that were not the case, "the innocent wife and children would suffer a calamity which was not of their own making."⁷⁰¹

Another school of thought declares that a putative marriage existed in this regard. Their contention is that, "a putative marriage exists when one or both parties are unaware at the time of concluding the marriage of the defect which renders their marriage void and

law of succession rules apply. His estate will therefore devolve on his oldest male descendent (*in casu* the second applicant). In terms of customary law he will also have no concomitant duty to support either the second Mrs Thembisile or her children, *Mthembu v Letsela* 2000 3 SA 867 SCA.

⁶⁹⁶ Jansen "Multiple marriages, burial rights and the role of *lobolo* at the dissolution of the marriage" 2003 *Journal for Juridical Science* 123.

⁶⁹⁷ Cronje and Heaton *South African family law* (1999) 49, the writers contend that a void marriage is one which has simply never come into existence; it does not have the legal consequences of a valid marriage and does not affect the status of the parties. Children born of the marriage are illegitimate and the spouses will not inherit intestate from each other.

⁶⁹⁸ Maithifu 1992 *Journal for Contemporary Roman-Dutch Law* 631 – 632.

⁶⁹⁹ In that regard, section 22(5) held that: "A Black man who wilfully makes a false declaration to a marriage officer with regard to the existence or not of a customary union between him and any woman, shall be guilty of an offence and liable on conviction to the penalties which may by law be imposed for perjury." See also Maithifu 1992 *op cit* who further holds that, the legislator's intention was to visit non-compliance of the act with a penalty and not to declare the subsequent marriage void *ab initio*.

⁷⁰⁰ Sinclair *law of marriage* 403.

⁷⁰¹ Olivier *et al Indigenous law* (1995) 93.

believe in good faith that they are lawfully married.”⁷⁰² It is submitted that in the *Thembisile* case the requirements for a putative marriage were met.⁷⁰³

According to Bonthuys and Pieterse, policy-makers should have adopted the position in the Transkei in terms of the Transkei Marriages Act, where unequivocal recognition was given to customary marriages by placing them at par with civil marriages in 1978.⁷⁰⁴ Accordingly, if a man contracts a civil marriage during the existence of a customary marriage, the civil marriage should be regarded as a valid customary marriage and not a civil marriage.

It is important however to explore the different approaches in solving the conflict of laws problems between customary and civil marriages by not simply declaring the second marriage, be it civil or customary a nullity.⁷⁰⁵ This is because in a country where polygamy prevails as part of the lives, the state should be wary of punishing women and children for the wrongdoings of their husbands and fathers, who themselves may be unaware of the legal implications of their actions.⁷⁰⁶

In addition to the regulation of customary law in its different aspects raised thus far, the BAA determined the equality of spouses and relegated the status of women in customary marriages to that of being minors under the guardianship of their husbands. In terms of the Act, “...a black woman (excluding Black woman who permanently resides in the province of Natal) who is living with her husband, shall be a minor and her

⁷⁰² Cronje and Heaton *South African family law* (1999) 55.

⁷⁰³ There was no evidence to the effect that the first respondent did not *bona fide* believe that she was lawfully married. The marriage was also duly documented by a marriage certificate see also para 12 of the judgement.

⁷⁰⁴ Bonthuys and Pieterse 2000 *Journal of Contemporary Roman-Dutch Law* 624, the Transkei Marriage Act is further discussed in 4.2.5 below.

⁷⁰⁵ Vorster “Legislative reform of indigenous marriage laws” 1998 *Codicillus* 44, where some of the hardships faced by customary wives are discussed.

⁷⁰⁶ Bonthuys and Pieterse *supra* 624, the writers further hold that some men may disagree with the conceptual legal and theoretical separation between these types of marriages and take a realistic perspective to the matter by saying that, to visit the negative consequences of moving between the different legal systems upon women will not stop the practice.

husband shall be deemed to be her guardian.”⁷⁰⁷ The provision consolidated the customary law position where men acquired and exercised greater rights in marriage as representatives of the family and their wives.

In addition, section 23(2) of the BAA had a negative impact on the property rights of women, in this case African widows. In terms of the provision, upon the death of the father, quitrent land would devolve on one male person as dictated by the rules of customary law of succession, which was essentially based on the rule of male primogeniture.⁷⁰⁸ In terms of section 25(1), one could not transfer, mortgage, lease, or sublet land under quitrent holding unless the Chief Commissioner approved.

Because this land were small plots only suitable for nuclear families rather than larger clans as was the case before the impact of the BAA by recognising quitrent land, caused the family to be recognised as an individual unit which was new to Zulu social organisation.⁷⁰⁹ According to Glendon⁷¹⁰, yet again because of industrialisation and emergence of labour migrants, property held by a family head changed from immovable to things like wages, compensation, death benefits, and pensions, further alienating wives rights to property.

4.2.5 Transkei Marriages Act 1978

The Transkei Marriages Act⁷¹¹ was enacted to have territorial application and regulate traditional marriages among the Xhosa in the Transkei, in what is now largely the Eastern Cape Province. Although the Act only had territorial application in the Transkei,

⁷⁰⁷ Section 11(3)(b) of the BAA, the provision meant that a woman's husband or father exercised greater powers over her and because she did not have legal capacity, she was did not have rights to personal ownership of property without assistance of the male guardian.

⁷⁰⁸ Quitrent land was created in terms of the Natives Land Act No. 27 of 1913 when the colonial government allocated certain pieces of land for occupation by blacks as part of the state's policy on segregation. Only men could have title to the land and paid an annual fee for it; see discussion on land tenure laws in 4.2.8 *infra*.

⁷⁰⁹ Mamashela "New Families, New Property, New Laws: The Practical Effects of The Recognition of Customary Marriages Act" 2004 SAJHR 628.

⁷¹⁰ Glendon M A "The New Marriage and the New Property" in Eekelaar and Katz *Marriage and cohabitation in contemporary societies: areas of legal, social and ethical change : an international and interdisciplinary study* (1980) 62.

⁷¹¹ Act No. 21 of 1978.

it has been praised for elevating customary marriages in the legal arena. It made significant reforms in addressing the conflict between customary law and the common law by placing customary marriages at par with civil marriages. The fundamental objective of the Act as a whole was to "...consolidate and amend the laws relating to the solemnization and registration of civil marriages, to the consummation and registration of customary marriages, to the consequences of marriages, to the dissolution of marriages by the court and matters incidental thereto."

Previously, the non-recognition of customary marriages frequently led to severe hardship in that children born of customary marriages were not regarded as legitimate and customary law wives were not given the same status as their civil law counterparts in matters of intestate succession and maintenance upon dissolution of marriage.⁷¹² With the new Act, these children could now inherit property in the same way as children born of civil marriages thus reversing decisions such as those in *Nkambula's* case. Largely, the objectives of the Transkei Act resembled the intention of legislation in Zimbabwe at the time. In terms of its African Marriages Act⁷¹³, "...the solemnization of a marriage between Africans in terms of the Marriage Act shall not affect the property of the spouses, which shall be held, may be disposed of and unless disposed of by will, shall devolve according to customary law."⁷¹⁴

On another level unlike previous legislation, the Transkei Act legalised polygamy thereby acknowledging the potentially polygamous nature of customary marriages.⁷¹⁵ In terms of section 3:

⁷¹² Kaganas and Murray "Law and women's rights in South Africa: An overview" 1994 *Acta Juridica* 16 - 17

⁷¹³ Act No. 29 of 1951.

⁷¹⁴ See section 13 of the African Marriages Act of Zimbabwe, and the supporting cases of *Mujawo v Chogugudza* 1992 (2) ZLR 321; *Chingattie v Munotiyi* H - H 207-92 (1992) (unreported) in 3.2.6 Chapter 3 *supra*.

⁷¹⁵ In earlier decisions such as in the case of *Hyde v Hyde and Woodmansee* (1866) LR & PD 130 a marriage was deemed to be a "union for life of one man and one woman to the exclusion of all others"; years later in *Sishuba v Sishuba* 1940 NAC (C&O) 123 the position remained the same. In this case a fellow who was in a civil marriage still wanted to invoke the aid of customary law by being free to live away from his wife and have love affairs because custom recognised a man's right to take another wife. The court castigated him for this by saying he could not have it both ways.

“(i) Nothing in this Act or any other law contained shall be construed as prohibiting –

(a) any male person from contracting-

(iii) a customary marriage with any female person during the subsistence of any civil marriage which produces the legal consequences of a marriage out of community of property or any customary marriage between such male person and any other female person; or

(b) a magistrate from registering any customary marriage referred to in paragraph (a)(iii).

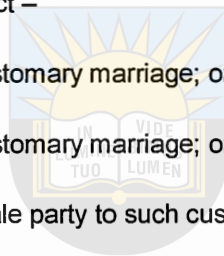
(2) Subject to the provisions of this Act, a civil marriage contracted by any male person with any female person during the subsistence of a customary marriage between such male person and any other female person, shall not affect –

(a) the continued existence of such customary marriage; or

(b) the legal consequences of such customary marriage; or

(c) the rights and privileges of the female party to such customary marriage

or of any children born of such marriage.”



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In the event that one party to a marriage was a minor and below the age of 21, the Act required the father or guardian of any such party to ensure the registration of the marriage immediately after its consummation and sign a marriage register together with a magistrate before two witnesses.⁷¹⁶ Registration was therefore a requirement but failure to do so did not affect its validity. There are different opinions whether non-registration of customary marriages rendered them invalid under the Transkei Act.

The issue arose in the 2006 case of *Womarld and Another v Kambule*⁷¹⁷. The case was an appeal against a judgment by Chetty J in the Eastern Cape Division. The court *a quo*

⁷¹⁶ Section 33 and 34 respectively.

⁷¹⁷ 2006 (3) SA 562 (SCA); the dispute arose around the question whether an unregistered customary marriage that was entered into in the former Transkei in terms of the Transkei Marriage Act in 1985 was a valid marriage. The deceased, Burton Baltimore Zitha Baduza, married Norah Khupela Baduza by civil rites in terms of the repealed Black Administration Act No. 38 of 1927 in 1956 after divorcing his first wife in the same year. It was alleged that the marriage, which was out of community of property and of profit and loss, (section 22(6) of the BAA had subsisted until the death of the deceased in June 2002. The respondent was married to the deceased in terms of custom in 1985. The deceased had provided the respondent (customary wife) with a place to stay his house situated at Ezibeleni, Queenstown, and later

had ruled in favour of a widow who was part of an unregistered customary marriage and accorded her rights to reside at a certain immovable property where the deceased had also left behind his civil law widow.⁷¹⁸ The court held that because the deceased husband and the respondent had concluded a customary marriage and complied with all its requirements, this was a valid customary marriage as envisaged in the Transkei Marriage Act.

In reaching its conclusion, the court *a quo* also referred to the Zimbabwean case of *Zimnat Insurance Co Ltd v Chawanda*⁷¹⁹, and held that regarding unregistered customary marriages as invalid because parties omitted to register them in terms of the Transkei Marriage Act, "would be inimical to one's sense of justice. In consonance with the spirit in *Chawanda's* ruling, the Transkei Marriage Act improved the equal rights of children born of customary marriages thereby doing away with the problems around illegitimacy of children thus improving the proprietary consequences upon dissolution of marriage.⁷²⁰ The court elaborated and held that the Recognition of Customary Marriages Act (120 of 1998) which expressly states 'that failure to register a customary

transferred its ownership to her. At a later stage, the respondent took occupation of another house in the same city, which was purchased by a company (Burton CC) which essentially belonged to the deceased. After the death of the deceased, the applicants began disputing the validity of the respondent's marriage to the deceased. They sought to claim rental from the respondent for her occupation of the Queenstown home. In response, the respondent refused to pay and the applicants sought an eviction order together with a declaration that her marriage with the deceased was void *ab initio* because it was not registered in terms of the Transkei Marriage Act.

⁷¹⁸ *Wormald NO and Others v Kambule* [2004] 3 All SA 392 (E), the court *a quo* dismissed an application launched by the appellants seeking, firstly, to evict the respondent from certain residential property under the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No. 19 of 1998 (PIE) and, secondly, an order declaring a customary marriage the respondent is alleged to have contracted with one Mr Burton Baltimore Zitha Baduza ("the deceased"), from which she claims her right to occupy the property derives, null and void. The court *a quo* came to the conclusion that: in terms of customary law the widow enjoys a type of personal servitude of *usus* or *habitatio* in respect of the residence which her husband allowed her to occupy during the subsistence of the union and further that the fact that the marriage was not registered in terms of the Transkei Marriages Act did not invalidate it.

⁷¹⁹ 1991 2 SA 825 (ZS), where the court held that a woman living with a man in an unregistered customary union had the right to compensation for loss of support if that man is killed unlawfully. See case in 3.3.5 Chapter 3 *supra*.

⁷²⁰ See also in this regard Dlamini "The legal status of illegitimate Black children" 1984 *Obiter* 14, who brings out the point that for a long time children born of customary marriages that existed concurrently with another civil marriage were regarded as illegitimate and their fathers had no obligation before the law for their maintenance.

marriage does not affect its validity removed the perceived impediment to validity of marriages.⁷²¹

The respondent (widow) alleged that, her customary marriage to the deceased entitled her to a personal servitude of *usus* or *habitatio* in respect of the residential property provided by her deceased spouse and that the customary marriage was not rendered invalid by the fact of its non-registration in accordance with the Transkei Marriage Act. The court *a quo* concluded that the respondent was not an unlawful occupier as envisaged in section 1 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act⁷²² (PIE). The appellants contested these findings.

The appeal was upheld and an order for the eviction of Ms Kambule (customary wife) from the residential property in Queenstown was granted.⁷²³ In reaching its decision, the court firstly reaffirmed a property owner's right to possession of his property against a person who unlawfully occupies it unless that right is limited by the Constitution, another statute, a contract, or some other legal basis. Maya AJA had the following to say:

"It must be borne in mind that the effect of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE) is not to expropriate the landowner and that it cannot be used to expropriate someone indirectly. The landowner retains the protection against arbitrary deprivation of property under s 25 of the Bill of Rights. PIE serves merely to delay or suspend the exercise of the landowner's full proprietary rights until a determination has been made whether it is just and equitable to evict the unlawful occupier and under what conditions."⁷²⁴

In light of this *dictum*, the court *a quo*'s ruling was criticised for finding that a right to occupy the property accrued because of the alleged customary marriage. Thus, the respondent's occupation of the property had no legal basis and therefore unlawful. On

⁷²¹ See *Wormald's case supra* 398 para 16.

⁷²² Act No. 19 of 1998.

⁷²³ The eviction proceedings were brought by the executor of the estate of the late Mr Baltimore Burton Zitha Baduza and his surviving spouse, Mrs Norah Khupela Baduza, a close corporation which is the registered owner of the property and Mrs Baduza. Ms Kambule opposed the application for eviction on the ground that she was entitled to occupy the property by virtue of her customary marriage to Mr Baduza who purchased it through the close corporation to provide her with accommodation as her husband. The existence of the alleged customary marriage was disputed.

⁷²⁴ *Wormald's case* para 15.

the other hand, the PIE intended for the courts to be cautious by stating that a person may not be evicted from their home without an order of court made after a consideration of all the relevant circumstances establishing that eviction order just and equitable. Unfortunately, for the customary law widow, the eviction order was held to be just and equitable owing to the customary wife's standard of life.⁷²⁵

Although the widow was evicted in terms of the PIE, her predicament was worsened because her customary marriage was held to be invalid. In a minority judgement, Combrinck AJA backed the Appeal court's findings by interpreting provisions of section 37 of the Transkei Marriage Act dealing with the consequences of marriage. In terms of the Act:

"Notwithstanding anything to the contrary contained in any law, a woman married in terms of the provisions of this Act shall –

(a) in the case of a civil marriage, upon the solemnization thereof, and

(b) in the case of a customary marriage, upon the registration thereof in terms of the provisions of Part 2 of Chapter 3, be under the guardianship of her husband, for the duration of such marriage."

From the learned Judge's point of view, the legal consequences of a customary marriage only flowed subsequent to registration and consequently, the respondent's marriage to the deceased was invalid in that it was not registered in accordance with the provisions of the Transkei Marriage Act making her occupation of the immovable property illegal.⁷²⁶

As such, without deciding whether there was a customary marriage, the Supreme Court of Appeal held that the right of a customary wife or widow to maintenance from her

⁷²⁵ *Ibid* para 20 where Maya AJA said, "It is clear that she is not in dire need of accommodation and does not belong to the poor and vulnerable class of persons whose protection was obviously foremost in the Legislature's mind when it enacted the PIE. To my mind, her situation is essentially no different from that of the 'affluent tenant' occupying luxurious premises..."

⁷²⁶ See para 35 and 36, however, in terms of section 4(9) of the Recognition of Customary Marriages Act (Act 120 of 1998), registration of a customary marriage is not essential to its validity. Unfortunately therefore in *Kambule's* case, the Counsel agreed that the Act only applies to marriages concluded after the 15th of November 2000 (the commencement date of the Act). For more on the requirements around registration of customary marriages under the RCMA, see 4.3.2 *infra*.

husband's estate does not entitle her to occupy a specific property, which was bonded to a third party. Ms Kambule's occupation of the property was therefore unlawful but she was entitled to lodge a claim for maintenance from her deceased husband's estate in another application if she succeeded in establishing the existence of the customary marriage. She was granted a twelve-month period within which to vacate the property.

Precedent does not adopt a concrete position whether the lack of registration invalidated a customary marriage in terms of the Transkei Marriages Act. In the case of *Kwitshane v Magalela*⁷²⁷ the court concluded that registration was essential to a valid customary marriage. According to Kruger AJ:

"In my view, customary marriages could not be regarded as valid marriages after the coming into operation of the Transkei Act 21 of 1978 unless they were registered. The community might have regarded them as legal; this was not the case in terms of the law."⁷²⁸

Contrary to the decision in *Kwitshane*, in *Shwalakhe Sokhewu and Another v Minister of Police*⁷²⁹ it was held that failure to register did not invalidate the marriage.⁷³⁰ Back to the case at hand, the matter did not end there for the customary widow. Because the Supreme Court had given Ms Kambule an eviction order, the ensuing case of *Kambule v The Master*⁷³¹ was now essentially an application for maintenance against the deceased's estate in terms of section 2 of the Maintenance of Surviving Spouses Act⁷³². As with the preceding two cases, the latest application by the widow again prompted an inquiry into the validity of her unregistered marriage with the deceased.

⁷²⁷ 1999 (4) SA 610 (Tk).

⁷²⁸ *Ibid* 613.

⁷²⁹ [2005] JOL 15580 (Tk) at 8 where Jafta AJP held that:

"As a social institution marriage is as important to black people as it is to white people. The significance attached to a customary marriage in communities where such marriages are still concluded is by no means less than the one attached to a civil marriage. Nor is the dignity of parties to a customary marriage less than of the parties to a civil one."

⁷³⁰ In *Kambule's* case (*court a quo*) where Chetty J held that *Kwitshane's* case had been wrongly decided contrary to the position adopted by Combrinck AJA in the final Appeal; another decision which rendered failure to register non-essential was *Nomaza Mvunelo v Minister of Home Affairs* (unreported case No 744/02).

⁷³¹ 2007 3 SA 403 (E).

⁷³² Act No. 27 of 1990.

The Master of the High Court, as first respondent, contested the claim for maintenance on the basis that the marriage between the deceased and the applicant was non-existent. The three main issues that arose in the case were those of:

- i. Setting aside the decision of the Master of the High Court (as first respondent) not to take a decision in response to an objection lodged by applicant to the first and final liquidation and distribution account of the massed joint estate of the late husband in June 2002 and Miss Norah Khupela Baduza.
- ii. Directing Hugh Anthony Wormald NO (the second respondent) to amend the first and final liquidation and distribution account by admitting the applicant's claim for maintenance in the amount of R7 927 per month from 21 June 2002 until her death or remarriage (less R2 500 per month in the period from 21 June 2002 to the date of her vacation of 44 Longview Crescent, Queenstown).
- iii. Directing that the costs of this application be borne by the massed joint estate of the late Burton Baltimore Zitha Baduza and Norah Khupela Baduza.

Subsequent to dealing with contradictory rulings on the effect of an omission to register a customary marriage as required by the Transkei Marriage Act, Pickering J came to the following conclusion:

“In the view that I take of this matter it is not necessary to determine what the effect of the non-registration of the customary marriage was in terms of the Transkei Marriage Act because, in my view, whatever perceived impediment there may be to the validity of the marriage because of the fact of non-registration under that Act, the marriage has been validated by the Recognition of Customary Marriage Act 120 of 1998 (the Recognition Act).”

It becomes apparent that the High court sought to reverse the minority judgement by Combrinck AJA in the Supreme Court case and confirm the findings of the court a quo. Because the customary marriage was not prohibited by any provisions of the Transkei Marriage Act⁷³³ and the Recognition of Customary Marriages Act⁷³⁴, “a failure by parties

⁷³³ See section 3(1).

⁷³⁴ Section 10(1) and (4) of the RCMA which do not prescribe registration as an essential for the validity of the customary marriage.

to a customary marriage to register such marriage in terms of the Transkei Marriage Act would not affect its validity. The first issue was thus decided in favour of applicant.”⁷³⁵

The second issue, that is, whether the applicant could be regarded a “spouse” for the purposes of the Maintenance of Surviving Spouses Act, the court too, found in favour of the applicant. After deciding both issues in favour of the applicant, the application was postponed for the hearing of oral evidence to determine, *inter alia*, the existence or validity of the customary marriage, that is, “whether or not the applicant was the customary-law wife of Burton Baltimore Zitha Baduza from 1985 until his death in 2002”⁷³⁶

There are a number of decisions in the Transkei division that have preserved customary marriages, in situations where they could have easily been dismissed based on their non-registration. Among these is the case of *Feni v Mgudlwa and Others*⁷³⁷ where the court also declined to follow the decision in *Kwitshane’s* case and approved the decision of Jafta AJ in *Sokhewu’s* case as correct. In *Feni’s* case, Pakade J gave unqualified support for the *ukuthwala* custom as a basis for the formation of a valid customary marriage is given. In *casu* the judge found that there was no real *ukuthwala*, but went further to say, had there been a real *ukuthwala* at hand, he would have recognised an ensuing customary marriage. In *Nomaza Mvunelo v Minister of Home Affairs and Others*⁷³⁸, Van der Byl AJ also declined to follow the decision in *Kwitshane’s* case and held that:

“I do not intend to deal fully with my reasons for agreeing with that conclusion. Broadly, I wish to merely point out that in my view the intention of the Legislature in that Act was to recognize the values and *boni mores* of, particularly, the Xhosa people who have from time immemorial accepted customary unions as a valid marriage.”

⁷³⁵ *Kambule* (2007) at 413.

⁷³⁶ *Ibid* at 414.

⁷³⁷ Transkei High Court Case No. 24/2002 (unreported).

⁷³⁸ Transkei Division Case No. 744/2002 (unreported), dated 20 July 2005, where it was held further that: “The failure to register any such marriage cannot in my view affect the validity of any such marriage if it had taken place in accordance with the customs followed by the community in solemnizing any such marriages. Should the validity depend on registration the question arises as to what the status of the customary marriage will be until such time as it is registered.”

Therefore, in the Transkei, the requirement for registration of customary marriages was not really an essential for its validity. Precedent demonstrates the true intentions of the legislation when dealing with customary marriages. The approach of the courts was pragmatic because strict adherence to the requirement for registration would have made life difficult for the predominantly rural population to comply, thus placing spouses, especially women in an unfavourable position upon dissolution of marriage by death or divorce. According to Bekker⁷³⁹, traditionally, the fundamental element that demonstrated the existence of a valid customary marriage was an agreement between two families and an undertaking by the groom's family to pay bride wealth.

However, in line with contemporary views on equality, the Transkei Act did not significantly improve other aspects regarding women's status. It went further and followed in the footsteps of the Black Administration Act by placing women under the guardianship of their husbands.⁷⁴⁰ In 1999, the provisions in section 11(3) (b) of the BAA together with section 37 of the Transkei Marriages Act giving men marital power over their wives came under attack in the case of *Prior v Battle*⁷⁴¹. In this case, the applicant, Anne Prior, a white lady married her husband Donald Battle (first respondent) at Port St Johns in 1993 under the Transkei Marriage Act. Not long thereafter, in 1995, she moved the application in the High Court asking for the marital power granted by section 37 of the Transkei Act to husbands over their wives, in both civil and customary marriages, to be declared unconstitutional. Their marriage, being governed by the provisions of s 22(6) of the BAA was consequently out of community of property.

The court held that, the marital power of husbands over their wives was unconstitutional only in respect of civil marriages but in terms of customary marriages the attack was unsuccessful. Customary law of marriage was upheld and the court per Justice Miller stated that:

⁷³⁹ Bekker *Seymour's Customary Law in Southern Africa* (1989) 112ff.

⁷⁴⁰ See section 11(3) (b) of the BAA and section 37 of the Transkei Marriages Act.

⁷⁴¹ 1999 (2) SCA 850 (Tk), the case was the first major attack on the principles of customary law under the three year old South African Constitution at the time.

"It is not for this court to in this matter to merely equate marital power in civil marriages with the marital power in customary marriages. To do so would be to err. The marital power in customary marriages is, in many respects, a subject separate from marital power in civil marriages and an investigation, taking into account such matters as polygamy and the importance of patriarchy, would have to be conducted before a decision regarding the marital power is made."

The dictum cautions that, to attack customary law and the concept of marital power on the face of it may be an injustice to a certain extent. A proper inquest into the intricacies of the roles of men and women in the family and the household is necessary before one is hasty to dismiss the issue as discriminatory or offensive.

4.2.6 KwaZulu Act on the Code of Zulu Law (1985)

While the earlier versions of the Code placed emphasis on the village head as custodian of all property in his village, the significance of the further codification of customary law in terms of the KwaZulu Act on the Code of Zulu Law⁷⁴² shifted the patriarchal roles regulating matrimonial property to the family head in customary marriages. The KwaZulu Act held that the family head is owner of, and has control over all family property in the family home. It read as follows:

"The family head is the owner of all family property in his family home. He has charge, custody and control of the property attaching to the houses of his several wives and may in his discretion use the same for his personal wants and necessities, or for general family purposes or for the entertainment of visitors. He may use, exchange, loan or otherwise alienate or deal with such property for the benefit of or in the interests of the house to which it attaches, but should he use property attaching to one house for the benefit or on behalf of any other house in the family home an obligation rests upon such other house to return the same or its equivalent in value."⁷⁴³

⁷⁴² Act No. 16 of 1985.

⁷⁴³ Section 20 of the Kwazulu Act.

One may be compelled to argue whether the provision was an accurate depiction of the family head's role in a traditional household, bearing in mind he was only a trustee and did not own family property in his individual right *per se*.⁷⁴⁴

The 1985 Act sought to uplift women's legal status contrary to provisions of section 11(3) (b) and section 37 of the BAA and the Transkei Marriages Act respectively.⁷⁴⁵ According to the Act, every person attained majority status at the age of 21 years. It held that:

"... a citizen becomes a major in law on marriage or on attaining the age of twenty-one years and for the purposes of this subsection age may, in the absence of proof, be determined and recorded by the Commissioner or Magistrate, whose decision shall be final."⁷⁴⁶

Ironically, the Act was apparently self-contradictory as it contained a provision that still undermined women's capacity before the law by stating that a woman was under the guardianship of her husband.⁷⁴⁷ Therefore, the continual treatment of women as minors severely compromised their ability to own property on the one hand, and enter into contracts without assistance on the other. Two years later, the revised Natal Code of Zulu Law reiterated more or less the same provisions and principles contained in the KwaZulu Act of 1985.

4.2.7 Natal Code of Zulu Law (1987)

The Natal Code of Zulu Law⁷⁴⁸ essentially retained the object of the KwaZulu Act of 1985, by consolidating a family head's right to own and retain sole control of all family property. In terms of the revised code, "the inmates of a family home irrespective of sex

⁷⁴⁴ Mamashela and Xaba "The Practical Implications and Effects of The Recognition of Customary Marriages Act No. 120 of 1998" 2003 *Research Report No. 59* at: <http://sds.ukzn.ac.za/files/rr59.PD> (Accessed 15/05/2010).

The writer says: "...the husband did not own this family property in the Western sense of the word as he was only a 'caretaker' who administered it on behalf of all the family members."

⁷⁴⁵ See in 4.2.4 and 4.2.5 respectively *supra*.

⁷⁴⁶ Section 14 of the Kwazulu Act.

⁷⁴⁷ Section 27(3) of the Kwazulu Act.

⁷⁴⁸ Proclamation R151 of 1987, GG No. 10966.

or age shall in respect of all family matters be under the control of and owe obedience to the family head.”⁷⁴⁹ Accordingly:

“The family head shall be the owner of all family property in his family home. He shall have charge, custody and control of the property attaching to the houses of his several wives and may in his discretion use the same for his personal wants and necessities, or for general family purposes or for the entertainment of visitors. He may use, exchange, loan or otherwise alienate or deal with such property for the benefit of or in the interests of the house to which it attaches, but should he use property attaching to one house for the benefit or on behalf of any other house in the family home an obligation shall rest upon such other house to return the same or its equivalent in value.”

The impact of the KwaZulu Act and the Natal Code was that women in KwaZulu-Natal were subjected to the matrimonial property system as governed by customary law. The two instruments had the negative effect of making wives in customary marriages incapable or unfit to hold or manage property. They were expressly excluded from meaningful economic activity in the face of an active redefinition of gender roles in relation to income and property. In the constitutional court case of *Gumede v President of the Republic of South Africa and Others*⁷⁵⁰ Moseneke DCJ attacked the provisions of Natal Codes as unconstitutional when he held that:

“There can be no doubt that the marital property system contemplated by the KwaZulu Act and the Natal Code strikes at the very heart of the protection of equality and dignity our Constitution affords to all, and to women in particular. That marital property system renders women extremely vulnerable by not only denuding them of their dignity but also rendering them poor and dependent. This is unfair.”

Custom is perhaps misconstrued in many respects nowadays especially when it comes to how property rights and needs of the community were determined and interrelated at customary law. According to Bennett, livestock were allocated to men but the husbands had no personal rights to such property in consonance with the communal character of

⁷⁴⁹ See section 22 of the Natal Code.

⁷⁵⁰ (CCT 50/08) [2008] ZACC 23 para 36, see further discussion of case in 5.2.2.1 *infra*.

customary law.⁷⁵¹ In the likelihood of multiple families in polygamous households, the husband would establish separate houses with their separate house property. This put him in control and made him the head of all the houses regardless of the ranking of each particular family group.⁷⁵²

In addition, the family head has a duty to keep the estates of the various houses in his family home separate and settles disputes relating thereto.⁷⁵³ In the 1946 case of *Mpungose v Mpungose*⁷⁵⁴ the court held that:

"...native social system regards the family as a whole and all members of the family participate in its possessions. The head of the family is virtually a trustee or director of the possessions of the family and not, as in common law, the owner."

Thus, an individual in customary law is deemed to have acquired his/her rights via a family head and the right is in turn protected in a similar manner. The co-operation of the family members represented by the family head is of the utmost importance in the acquisition and disposal of property rights.⁷⁵⁵

Sections 44 - 50 of the KwaZulu Act and the Natal Codes on Zulu Law dealt with issues around the registration of customary marriages. Like the BAA, the Codes made provision for the appointment of official witnesses to preside over traditional weddings and ensuring their registration. Thus, witnesses were required to provide proof of the existence of a valid marriage in the event that its existence came into dispute.⁷⁵⁶ If the marriage was not registered, its validity could be proven by hearing oral submissions in the presence of the official witness who attended the ceremony.

⁷⁵¹ Bennett and Peart *Customary Law for Southern Africa* 301.

⁷⁵² Jansen M "Family Law" in Bekker, Rautenbach and Goolam *Introduction to Legal Pluralism in South Africa* (2006) 43, where the author expands and says that, the family head's rights were not absolute as he had a moral obligation to consult his wife on matters of major importance.

⁷⁵³ Mqeke 1999 *Obiter* 63, who says the head of the household is required to administer the matrimonial estate for the common good of the family.

⁷⁵⁴ 1946 BAC (N & T) 37 – 40.

⁷⁵⁵ Bekker *Seymour's Customary Law in Southern Africa* (1989) 82.

⁷⁵⁶ Maithufi 2009 *De Jure* 194, "although registration of a customary marriage was conclusive proof of its existence, failure to have it registered did not invalidate or nullify it where all the requirements were met."

In conclusion, the codification of customary law did not entirely yield positive effects for the preservation of customary marriages as a whole, largely because of some misconstructions of custom. One of the criticisms levelled against the Natal Code is that it undermined female roles in marriage by implying that native law was based on basic principles including the subjection of women. Some contemporary writers share similar sentiments that, codification in general sometimes diverted from pre-colonial tradition, by undermining the rights of women.⁷⁵⁷ The writer explains the real roles that woman assumed traditionally that did not equate to subjection as follows:

“On marriage women were given access to productive land, which they worked themselves. They were in control of the process of agricultural production and retained for their own use a substantial proportion of the product of that land and their labour. Work was heavy but it took place in a community which provided substantial security. The value attached to fertility gave the possessors of that fertility social standing and social integrity.”

4.2.8 Land Tenure Laws and Women's Rights to Property

Legislation on land tenure in South Africa during the colonial era has been criticised for distorting and substituting the communal social organisation that prevailed before, by introducing one which tended to be individualistic in nature. The shift to recognising individual rights would have drastic consequences on the dynamics regulating ownership of family property. In 1913, the Natives Land Act⁷⁵⁸ was passed with the specific aim to define new boundaries for African landholdings by creating 'native reserves' as part of the administration's drive towards segregation.⁷⁵⁹ Land designated for the resettlement of Blacks amounted to 7.3% of the total land in the country. To achieve its goals, the administration developed two main forms of land tenure, quitrent,

⁷⁵⁷ Guy J “The Destruction and Reconstruction of Zulu Society” in Marks and Rathbone *Industrialisation and social change in South Africa: African class formation, culture, and consciousness, 1870-1930* (1982) 45, who says further that, “...we have still to understand how women both participated in and resisted their exploitation.”

⁷⁵⁸ Act No. 27 of 1913, was also known as the Black Land Act, Bantu Land Act or the Union Land Act, it prohibited Blacks from owning or renting land outside designated reserves (approximately 7 per cent of land in the country).

⁷⁵⁹ Van Onselen “The Reconstruction of a Rural Life from Oral Testimony: Critical Notes on the Methodology Employed in the Study of a Black South African Sharecropper” 1993 *Journal of Peasant Studies* 503.

and trust land. Limited rights in quitrent land were ceded to African men upon payment of an annual fee.⁷⁶⁰

The initial impact of the new land tenure system was that indigenous communities who were naturally accustomed to and reliant on subsistence agriculture lost their arable land.⁷⁶¹ In addition, this had a negative impact on the protection of women's property rights as they operated under customary law. Since rights in quitrent land were in the male domain, according to custom, only an appointed male heir (usually the eldest son) in terms of the primogeniture rule could inherit such land whilst married women could not.⁷⁶² As Simons⁷⁶³ observes, even a widow could not inherit the property because it belonged to the first male son.

The new scenario resembled 19th century policy when the administration recognised village heads as the male patriarchs in order to collect taxes and implement its policy of indirect rule. This time around, husbands were the chosen titleholders of quitrent land to the demise of their wives rights in immovable property.⁷⁶⁴ The previously communal traditional land tenure became more individualised although ownership of family property was never exclusive but resided in the collective while serving familial needs.⁷⁶⁵ It therefore leaves no doubt that land tenure laws and growing emphasis on a capitalist mode of production were partly responsible for the disintegration of traditional

⁷⁶⁰ Kerr *The Customary Law of Immovable Property and of Succession* (1990) 95, since a rental fee was paid for the land annually, one could not legally transfer, mortgage, lease or sub-let such land if the Chief Commissioner did not grant prior approval.

⁷⁶¹ Simons *African women: their legal status in South Africa* (1968) 271.

⁷⁶² Mamashela "New families, new property, new laws: the practical effects of the Recognition of Customary Marriages Act" 2004 *South African Journal on Human Rights* 624, who says that, "the allotment and devolution of quitrent land dealt women's property rights yet another blow. To qualify for allotment, one had to be a family head (a man). A single or married woman did not qualify in her own right for an allotment."

⁷⁶³ Simons *African women* 263, see also brief discussion in 4.2.4 *infra* where mention is made of section 23(2) of the Black Administration Act, which provided that on the death of the father, quitrent land would devolve on one male person to be determined according to the tables of succession which are informed by the principle of primogeniture.

⁷⁶⁴ Mamashela 2004 *South African Journal on Human Rights* 622.

⁷⁶⁵ Claassens "Women, Customary law and discrimination: The impact of the Communal Land Rights Act" 2005 *Acta Juridica* 42.

family structures in colonial South Africa.⁷⁶⁶ According to Davenport⁷⁶⁷, colonial policy not only helped white landlords to remove black sharecroppers, but held out prospects for the easier requirement of labour for mines by proposing to enlarge the recruiting areas, the reserves.

As with the position in South Africa, the colonial administration in Zimbabwe also embarked on a very similar model of land tenure and redistribution that had a negative impact on the rights of African women to immovable property. In 1930 the Land Apportionment Act⁷⁶⁸ was passed and structurally transformed the rural areas by creating Tribal Trust Lands (TTLs), whose main function was to provide cheap labour for the urban areas, mines and European owned farms and to reabsorb any 'surplus population' rejected or discarded by these employment centers.⁷⁶⁹ A major difference however suffices between the two countries. While Africans in South Africa were prohibited from purchasing land outside their boundaries in terms of the Natives Land Act, in Zimbabwe provision was made for blacks to purchase freehold land as farmers.⁷⁷⁰ Given that most black women were poorly educated or uneducated altogether, they were unable to purchase freehold land and their land rights continued to be mediated through men.

⁷⁶⁶ Wolpe H "Capitalism and Cheap Labour power in South Africa: from segregation to apartheid" in Beinart and Dubow *Segregation and apartheid in twentieth-century South Africa* (1995) 71, who shares the view that, the Act was an effort by the administration to resolve the scarcity of African labour on the white farms, and to prevent Africans who cultivated on their communal lands from acquiring capital that would enable them to repurchase forcibly gotten European land. This leaves no doubt that the objective was to destroy any form of accumulation of wealth by Africans thus having an indirect impact on the livelihoods and complex dynamics of African women's rights to property as wives.

⁷⁶⁷ Davenport *South Africa: a modern history* 3ed (1987) 531.

⁷⁶⁸ Act No. 30 of 1930.

⁷⁶⁹ TTLs accounted for 25% of the total land in the country. Considering that Zimbabwe is a much smaller country than South Africa in total area and population, the 7,3 % allocation for native reserves under the Natives Land Act of 1913 must have resulted in severe pressure on arable land.

⁷⁷⁰ See discussion in 3.2.4 Chapter 3 *supra* where Black farmers thrived there was evidence of high incidence in polygamous marriages largely due to the abundance of resources by such men and the need for large families to provide labour within the family.

Another significant impact of the land tenure laws in South Africa came in 1936 with the enactment of the Native Trust and Land Act.⁷⁷¹ In terms of the Act, the quitrent system continued to exist, but the South African Development Trust⁷⁷² was formed to be owner of all state land. The new system also restricted any ownership or purchase of land by Africans outside the stipulated reserves in similar fashion to the Natives Land Act.⁷⁷³ It also did not do much to ease the pressure on native reserves created after 1913, as the land designated for expansion was increased to an insignificant 13% from the previous 7.3%.⁷⁷⁴

According to Delius⁷⁷⁵, "In the late 1930s and 1940s betterment planning was enforced and imposed strict controls over communities - particularly those on trust land. This led to the expansion of the role of both Native Commissioners and Agricultural Officers. Betterment planning [which apparently covered this and other laws] included - in varying degrees - restrictions on ploughing, prohibitions on cutting trees, the culling of cattle...the division of arable and grazing land and the reduction of field size"

Again, the predicament for African women worsened because Trust land did not belong to the family as was the case with quitrent land where the family head could rent a family homestead. Trust land was rented to village heads and Africans were prohibited from buying it with only the option to rent it.⁷⁷⁶ In addition, the land could not be inherited upon death, because it went back to the Trust meaning that individuals could only occupy the land subject to a certificate of occupation that did not amount the rights attached to a title deed. However, a widow and her children could remain in occupation

⁷⁷¹ Act No. 18 of 1936, also referred to as the Development Trust and Land Act; The Department of Bantu Administration and Development was required to do away with what were referred to as 'black spots' which were pockets of land owned by blacks but surrounded by white-owned land.

⁷⁷² The South African Development Trust (SADT) also had the power to acquire land in each of the provinces for the specific purpose of resettling black Africans.

⁷⁷³ Christopher *The atlas of apartheid* (1994) 32ff.

⁷⁷⁴ Lapping *Apartheid: a history* (1987) 204.

⁷⁷⁵ Delius P "Migrant Organisation the Communist Party the ANC and the Sekhukhuneland Revolt 1940 – 1958" in Bonner *et al Apartheid's genesis, 1935-1962* (1993) 138ff.

⁷⁷⁶ Simons *African Women* 265.

of a deceased man's allotment if they continued to reside at the homestead and did not change residence.⁷⁷⁷

It has been accepted that the warped perceptions held by many that women were minors under their husbands could be attributed to the continual denial of property rights to married women and widows by the state. With the resultant scarcity of land for cultivation came reductions in food production and fewer surpluses to sell for cash, which paid for hut, and poll taxes that comprised part of the administration's revenue base.

According to Mamashela⁷⁷⁸, the flow of labour migrants surged as many men went to work on white farms and in the urban industries making their families more dependent on insufficient monthly wages. Due to the mobility of African men, for deserted wives life was even more difficult for they found themselves having to fulfil all these responsibilities on their own. The upset to family life is also blamed for the flight of women to urban areas in search of deserting husbands, employment, or both.⁷⁷⁹ The Natives Trust and Land Act has since been repealed and the South African Development Trust abolished by the Abolition of Racially Based Land Measures Act.⁷⁸⁰

In similar fashion, in Zimbabwe, the Native Land Husbandry Act⁷⁸¹ was enacted in 1951 to resolve the scarcity of land in the overpopulated Tribal Trust Lands (TTLs) because of the initial Land Apportionment Act. Like its predecessor and the Native Trust and Land Act of South, the Native Land Husbandry Act equally contributed to the individualization of land tenure among Africans. It required land to be registered and clearly defined a farmer as a man despite the fact that women were working and living on the land while the majority of the men between the ages of 16 and 60 migrated into wage labour in urban areas.⁷⁸² In order to access land, women had to show evidence of

⁷⁷⁷ *Ibid.*

⁷⁷⁸ Mamashela 2004 *South African Journal on Human Rights* 625.

⁷⁷⁹ *Ibid.*

⁷⁸⁰ Act No. 108 of 1991 see also in terms of Proclamation R 28 of 1992 (31 March 1992).

⁷⁸¹ Act No. 52 of 1951 see also in 3.2.5 Chapter 3 *supra*.

⁷⁸² Gaidzanwa "Women's Land Rights in Zimbabwe" 1994 *Journal of Opinion* 12.

abandonment or extra-territorial residence of their husbands or that they held custody of their children.

The state in post-colonial South Africa is behind a drive to redress past inequalities especially around land tenure. In 2004, the Communal Land Rights Act⁷⁸³ (CLRA) was enacted to make provision for legal security of tenure by transferring communal land, including the KwaZulu-Natal Ingonyama Trust land to communities and to provide for the democratic administration of communal land by communities. The Act's focal point is the restitution of communal land to communities previously disadvantaged by colonial land tenure by doing away with individual rights to property especially those only identifying men.

The position now is that if land was already allocated to one spouse prior to the Act, the other spouse has rights to co-ownership of the property because they are married.⁷⁸⁴ At the same time, the Act substantially raises the status of rural women by recognising their personal rights to immovable property.⁷⁸⁵ In terms of section 18(4) (b) of the Act, the government's commitment becomes even more clearer as it entitles the Minister of Land Affairs to bestow a new right order on a woman in her own right. Although the Act is not yet in force, it does away with past injustices of the old regime. However because it has taken so long for the Act to come into operation, sceptics are wary of celebrating a victory for women's rights just yet. Some say there is a general lack of cohesion between the Constitutional obligation on land reform and commitments towards gender equality and practice.⁷⁸⁶ The fear is that the Act still emphasises the role of male traditional leaders in identification of people eligible for land allocation.⁷⁸⁷

⁷⁸³ Act No. 11 of 2004.

⁷⁸⁴ Section 4(2) of the CLRA.

⁷⁸⁵ Thus a woman can have land allocated to her personally and have it registered in her own name, see section 4(3) and 5(1) respectively.

⁷⁸⁶ South Africa has a constitutional obligation to realise the land rights of previously disadvantaged communities. In terms of section 25(6): "A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress."

⁷⁸⁷ Walker "Piety in the Sky? Gender Policy and Land Reform in South Africa" 2003 *Journal of Agrarian Change* 113, this camp also believes that the shortcomings in the implementation of gender policy

According to Walker⁷⁸⁸, “the CLRA has been criticised by a wide range of civil society organisations but welcomed by representatives of traditional leaders, who are accorded considerable power to continue exercising control over the allocation and administration of communal land, ownership of which will now vest nominally in ill-defined communities.” Women’s rights groups have therefore been at the forefront of advocating for the repulsion of the Act.⁷⁸⁹

Recently in the Constitutional Court case of *Tongoane and Others v Minister of Agriculture and Land Affairs and Others*⁷⁹⁰ the CLRA was declared unconstitutional on the basis of both substantive and procedural irregularities. The case was an application by four communities who challenged the CLRA on basis that it undermines security of tenure, gender equity, and grants authority to traditional leaders who have not been elected and whose interests do not reflect those of the communities. The communities also appealed against the refusal by the High Court to declare the CLRA invalid for failure to enact it in accordance with the correct procedure, because Parliament failed to comply with its obligations to facilitate public involvement in the legislative process.

In May 2010, Ngcobo CJ handed down judgement and held that, various provisions of the CLRA affect indigenous law and traditional leadership and that the Act replaces the living indigenous law regime, which regulates the occupation, use and administration of communal land. It further replaces both the institutions that regulated these matters and

emanates from a general lack of understanding of the principles and management of women’s land rights issues within the Department of Land Affairs.

⁷⁸⁸ Walker C “Redistributive Land reform: for what and for whom” in Ntsebenza and Hall *The land question in South Africa: the challenge of transformation and redistribution* (2007) 139.

⁷⁸⁹ Claassens A “Women, Customary Law and Discrimination: the impact of the Communal Land Rights Act” in Murray and O’Sullivan *Advancing women’s rights: the first decade of democracy* (2005) 42, the writer notes that, “the most vehement opposition came from rural women and women’s organisations, who argued that the Bill undermined the principle of equality in favour of an alliance with traditional leaders. However traditional leaders on the other hand welcomed the Act as a triumph of tradition and African custom.” On the shortcomings of the Act see also, Smith H “An Overview of the Communal Land Rights Act 11 of 2004” in Claassens and Cousins *Land, power and custom* (2008) 35ff.

⁷⁹⁰ *Others* 2010 (8) BCLR 741 (CC), 2010 (6) SA 214 (CC), earlier on in October 2009, the four communities assisted by the Legal Resources Centre, won a victory in the North Gauteng High Court. The judgment declared invalid and unconstitutional key provisions of the CLRA that provide for the transfer and registration of communal land, the determination of rights by the Minister and the establishment and composition of land administration committees. The matter was then taken to the Constitutional Court for a confirmation order on the invalidity of the Act.

their corresponding rules. In conclusion, the learned Judge attacked Parliament for not following the correct procedure in the Act enactment and that where the Constitution prescribes a legislative procedure, that procedure must be followed. Apart from the failure to conduct public hearings, the process was supposed to establish committees with at least a one-third composition of women.⁷⁹¹

Similar criticism has been made against the Communal Land Act⁷⁹² of Zimbabwe that was enacted in 1982 to govern the access to communal land in Zimbabwe. In terms of the Act, when allocating land in communal areas of Zimbabwe Rural District Councils (the responsible local authorities) are required to consult and cooperate with the local chiefs. They ought to have regard to the customary law governing land allocation among those people who were customarily entitled to real rights in the land.⁷⁹³ However, the Act does not do much for women's property rights because only men are still identified as custodians of communal land in the rural areas. The impact of the Act is that peasant women were allocated land use rights within the households as wives and daughters in patrilineages and have to work and earn a living from the same land thus reinforcing patriarchal holds on women.

4.3 CONCLUSION

The official customary law that became a product of state intervention had the broader impact of giving administrators the discretion to strike down practices such as *lobola* (bride wealth), polygamy, and *ukungena* levirate marriages.⁷⁹⁴ The 'repugnancy clause' became one of the hallmarks of colonisation by imposing a general limitation on the application of customary law and allowing courts to ignore or strike it down if any rule

⁷⁹¹ See at para 126 where the Chief Justice further emphasised that the Parliament should urgently and diligently enact the constitutionally envisaged legislation that will ensure that there is restitution of land to the people and communities that were dispossessed of their land during the apartheid era.

⁷⁹² Act No. 20 of 1982.

⁷⁹³ See section 8 of the Communal Land Rights Act in 3.3.3 Chapter 3 *supra*.

⁷⁹⁴ According to the Royal Instructions of 1848 on the colonization of Natal, it was held that:

"in assuming the sovereignty [of Natal] we have not interfered with or abrogated any law, custom or usage prevailing among the inhabitants ... Except so far as the same may be repugnant to the general principles of humanity, recognised throughout the whole civilised world...."

happened to conflict with Western standards.⁷⁹⁵ In other cases, apart from outright repudiation, cultural practices that used to be in the realm of private family such as divorce became legal events placed before the public eye.⁷⁹⁶ The Black Administration Act only gave partial recognition side by side with partial recognition of customary law. On the other hand, the Transkei Marriages Act confirmed the customary law of marriage and making a strong impact in the case law of the new South Africa.⁷⁹⁷

Access of women to family property was compromised to a large extent by misconstructions of custom. Their rights suffered further with the introduction of new land tenure systems that disrupted traditional family life as a whole. With introduction of a money economy also the need for women participate in wage labour. This resulted in out cries by African men who thought they were losing their holds on their women. Debate around the access of women to property and land in the rural areas is still taking centre stage as it also encompasses South Africa agenda on land reform. Only when the scales recognising both men's and women's property are balanced can real transformation take place in a family context.

In both South Africa and Zimbabwe, we see the effects of indirect rule, which saw participation of traditional African authorities in legislative and administrative processes resulting women's sexuality being placed under the firm control of African and European male patriarchies.⁷⁹⁸ The irony was that during the infancy of colonial rule in both

⁷⁹⁵ Bennett T W "Conflict of Laws" in Bekker, Rautenbach and Goolam *Introduction to legal Pluralism in South Africa* 2ed (2006) 24.

⁷⁹⁶ Koyana and Bekker "The Indomitable *Ukuthwala* Custom" 2007 *De Jure* 139, the writers begin by saying that the state denied recognition of the customary marriages for many reasons. Among these was the custom of *lobola*, which they misunderstood as the sale of a woman together with the polygamous nature of traditional marriages, which was in direct conflict with the understanding of marriage as the union of one man, and one woman.

⁷⁹⁷ The Act gave full recognition to the customary marriage, equal in status to the common law marriage, and for the first time, wife and children of customary marriages were now able to inherit equally with the wife and children of the civil marriage.

⁷⁹⁸ Welsh *Roots of Segregation* 161, the major role players in the codification process were the secretary of native affairs, administrators of native courts and traditional African authority such as chiefs though white influence was more substantial. There was no place for input from African women hence their interests were shadowed by interests of African men.

countries, as Ranger⁷⁹⁹ observes, the early colonial era brought new opportunities particularly for African women, while at the same time colonial courts accepted their claims for emancipation. However, the position changed and as colonial rule became more embedded officials and African chiefs sought to re-establish their control over women, which resulted in the reinvention, institutionalisation and hardening of customary. So pertinent was the issue of control that in 1932, South Africa enacted the Native Service Contract Act⁸⁰⁰ to restrict the migration of African women into urban areas.⁸⁰¹

On another level, women's ability to deal with matrimonial property especially land suffered a big blow. With the combination of the Natal Codes, the Natives Land Act, and the Black Administration Act, the administration sacrificed women's property rights substituting them with those for African men as titleholders. Events in Zimbabwe took a similar trajectory with the Land Apportionment Act and the Native Land Husbandry Act, right up to the Communal Lands Act of post-colonial Zimbabwe, all that gave precedence to men's right to immovable property.

Now, sixteen years after independence, the South African government has committed itself to abolishing remnants of colonial legislation, which in contemporary thinking continues to cling to an oppressive and discriminatory past contrary to the principles enshrined in the Constitution's Bill of Rights. With the enactment of the Repeal of the Black Administration and Certain Laws Amendment Act⁸⁰², there is now no doubt that colonial law including the Codes on Zulu law are now outdated.

⁷⁹⁹ Ranger T O "The Invention of Tradition in Colonial Africa" in Hobsbawm and Ranger *The invention of tradition* (1983) 211ff.

⁸⁰⁰ Act No. 24 of 1932, section 2.

⁸⁰¹ Walker *Women and Gender in Southern Africa to 1945* (1990) 1ff, in addition, in the period after the Act, women could not easily leave their families and seek employment before presenting written permission from their husbands and fathers. Later on in 1936, the Native Affairs Department required railway personnel to restrict women from travelling into the cities without such permission.

⁸⁰² Act No. 28 of 2005, in its preamble it declares that: "since the Black Administration Act, 1927 (the Act), is regarded as a law that is repugnant to the values set out in the Constitution...and is reminiscent of past divisions and discrimination...it ought to be repealed as a matter of the utmost urgency."

4.4 POST – INDEPENDENCE LEGISLATION

4.4.1 Introduction

Upon attaining its independence in 1994, South Africa embarked on a major constitution making exercise that sought to emphasise the fundamental rights of its citizens. Apart from emphasising individual rights, the rights of cultural communities also came to the fore. The time was right to see where customary law and customary marriages found themselves in the new South Africa. In this atmosphere of socio-legal engineering, in 1996, the South African Law Reform Commission convened to make proposals towards a framework that would recognise customary marriages. The main objective was to attempt to harmonise traditional values and common law principles regulating marriages in a single piece of legislation.⁸⁰³

Bearing in mind that previous legislation made some commendable attempts to recognise traditional marital values, it tended to be territorial thereby scattered in its application. Largely the Transkei Marriages Act achieved this goal and to a lesser extent the codification of customary law in the province of Natal. Similarities in government policy become apparent in post independence Zimbabwe and South Africa. While Zimbabwe embarked on a drive to pass legislation to improve the status of women after 1980 with the Legal Age of Majority Act and the Matrimonial Causes Act, the South African government embarked on a more radical approach that sought to both recognise customary marriages and polygamy while drastically changing the nature of these marriages.

Today, the Recognition of Customary Marriages Act seeks to uphold customary marriages, while simultaneously giving precedence to values entrenched in the Bill of Rights.⁸⁰⁴ The argument is that, sometimes these constitutional values calling for

⁸⁰³ The Act would rely on section 112 of the Constitution that entitled customary law to be applied where applicable, subject to the Constitution, read together with section 15(3) which stated that, nothing prevents legislation from recognising, *inter alia*, marriages concluded 'under any tradition, or a system of religious, personal or family law.'

⁸⁰⁴ the recognition of customary marriages as well as the exercise of cultural rights may not be in conflict with any other provision in the Bill of Rights.

equality, strike at the heart of custom as gender roles take new definitions and implications. Others have gone to the extent of criticising the Bill of Rights as another repugnancy clause in a different guise.⁸⁰⁵ Given the apparent controversies, we are compelled to ask if the new RCMA has accomplished its goals at harmonisation of customary with common law with desirable consequences or if to the contrary, it has given leeway for another legal system to state the substance of the African marriage.

4.4.2 Recognition of Customary Marriages Act 1998

The Recognition of Customary Marriages Act to a large extent followed in the footsteps of the Transkei Marriages Act by recognising polygamy as a valid traditional institution of a marriage and elevating the status of women by recognising their equality in marriage as their civil law counterparts. Having been hailed for finally recognising the customary marriage in South Africa, the RCMA has been criticised for introducing new concepts of the received common law into the traditional arena thus departing from custom and modifying it in a way that may be viewed as a contemporary approach towards recognition of customary law.

There is a perception that by requiring the formal regulation of various aspects of the customary marriage by calling for *inter alia* registration and High Court applications to obtain decrees upon divorce, its objectives may not be realised considering its material application on rural communities. We shall therefore look at the impact of those aspects of the Act that appear to depart from true custom and back some findings with empirical evidence from research in specific areas where possible.

⁸⁰⁵ Herbst and Du Plessis "Customary Law v Common Law Marriages: A Hybrid Approach in South Africa" 2008 *Electronic Journal of Comparative Law* at <http://www.ejcl.org/121/art121-28.pdf> (Accessed 18/08/2010), who say that, "...although far removed from colonial rule, a new limitation, namely the Bill of Rights, was placed on the recognition of customary laws by the new rulers."

4.4.2.1 Equality of Spouses

Previous legislation made wives in customary marriages subject to the marital power of their husbands hence they were regarded as perpetual minors in marriage.⁸⁰⁶ The RCMA now gives both spouses equal status and capacity to acquire and dispose assets together with the capacity to enter into contracts and litigate without assistance. According to the Act, "on the basis of the equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any powers that she might have at customary law."⁸⁰⁷

This is in accordance with the equality clause enshrined in the country's constitution.⁸⁰⁸ In addition, the position taken by the Act also reinforces the Age of Majority Act⁸⁰⁹, which states that everyone attains the age of majority at age 21.⁸¹⁰ In this regard, the RCMA finds similarity with the Legal Age of Majority Act⁸¹¹ of Zimbabwe that confers equality and legal capacity to both men and women at the age of 18 years.

However, in reality, when customary law is the dominant force in a community, the husband often remains the family head and controls all family property, severely restricting the wife's contractual capacity and ability to acquire property.⁸¹² According to Mqeke⁸¹³, one may argue if the real implications of the provision on equality were considered fully. By elevating the status of women in this way, the Act goes against previous legislation such as the Black Administration Act and the Transkei Marriages

⁸⁰⁶ In this regard see previous legislation in section 11(3) of the Black Administration Act, section 27 of the Natal Code of Zulu Law Proc R195 of 1967 and section 37 of the Transkei Marriages Act, see also the case of *Prior v Battle supra*.

⁸⁰⁷ See section 6 of the RCMA.

⁸⁰⁸ See section 9 of the Constitution.

⁸⁰⁹ Act No. 57 of 1972.

⁸¹⁰ However, the position is set to change in terms of the proposed Recognition of Customary Marriages Amendment Bill that will lower the age of majority to 18 years like the Legal Age of Majority Act in Zimbabwe. In terms of the Bill, "Despite the rules of customary law, the age of majority of any person is determined in accordance with the Children's Act No. 38 of 2005."

⁸¹¹ Act No. 15 of 1982, see also in 3.3.2 Chapter 3 *supra*.

⁸¹² Cronje and Heaton *South African family law* (2004) 194, see also in this regard Pienaar "African customary wives in South Africa: is there spousal equality after the commencement of the Recognition of Customary marriages Act?" 2003 *Stellenbosch Law Review* 262ff.

⁸¹³ Mqeke 1999 *Obiter* 61ff.

Act that derogated women's status in marriage.⁸¹⁴ In addition, the Act also overturns the ruling in *Prior's* case where a husband's marital power over his wife in a customary marriage was upheld and therefore not unconstitutional.⁸¹⁵

As Mamashela⁸¹⁶ points out, as long as rural communities continue to be more conservative in lifestyle than their urban counterparts are, the RCMA may fail to achieve its goals on the equality of spouses. According to him, equality is still not a reality for women in the rural areas and that despite the Recognition Act their lives continue in a traditional setting that is predominantly patriarchal. As a result vast and comprehensive educational initiatives have to go hand in hand with legislative reform of this scale in order for the government's objectives to be met.

4.4.2.2 Grounds for Divorce

Apart from the equality of spouses, the RCMA also departs from custom by establishing the common law concept of irretrievable breakdown of marriage as the main ground for divorce. In addition, the Act also lists other common law grounds such as insanity and presumptions in terms of the Marriages Act⁸¹⁷ and further undermines traditional dispute resolution mechanisms and roles of family members by making it requirement that a marriage is dissolved only by court order. In similar fashion, in terms of the Matrimonial Causes Act of Zimbabwe, a court is entitled to make an order for dissolution of marriage if satisfied that the marriage has disintegrated so much that there is no reasonable prospect of a normal marriage relationship between the parties.⁸¹⁸

According to custom, particularly among the Xhosa of South Africa, a woman could return to her father or guardian if neglected by her husband by means of the *theleka* (to

⁸¹⁴ See section 11(3) (b) and section 38 respectively. However in terms of section 11A of the Black Administration Act in the 1980s, women were allowed to obtain immovable property either in ownership or leasehold and position that somewhat differed to that in Zimbabwe with its Deeds Registries Act that only entitled men to have title to immovable property with women only doing so if duly assisted.

⁸¹⁵ *Prior v Battle* in 4.2.4 *supra*.

⁸¹⁶ Mamashela 2004 *South African Journal on Human Rights* 616ff.

⁸¹⁷ Act No. 25 of 1961, however if the Recognition of Customary Marriages Amendment Bill becomes law, the Civil Union Act. 2006 Act No. 17 of 2006 will substitute the 1961 Act in this regard.

⁸¹⁸ Section 8(1) and (2).

be taken) custom. In turn, the husband was entitled to invoke a remedy known as *phuthuma* (to fetch) in order to seek the return of his wife from her father or guardian. The procedure was symbolised by the payment of a token determined in terms of customary law. The marriage would only be deemed dissolved if the husband failed to invoke the remedy within a reasonable timeframe. In the event that the wife refused to return to her husband after being *thelekaed* (taken) by her guardian, the husband was at liberty to claim the return of some *lobola* cattle minus a specified number of beasts for each child born of the marriage. Nowadays with introduction of a money economy, deductions may take the form of cash because for decades, money has also become an accepted form of bride wealth.⁸¹⁹ In the case that the dissolution of marriage was due to the husband's fault, he forfeited his rights to claim return of any *lobola*.⁸²⁰

Concerning the acceptable grounds for divorce, the RCMA, further entrenches the common law position where a single act of adultery by either spouse is a sufficient cause for irretrievable breakdown of marriage.⁸²¹ One may argue that 'irretrievable breakdown' being a western concept of law has a direct negative impact and compromises the *phuthuma* and *theleka* remedies among the Xhosa where their primary role was to prolong marriage. In addition, the role of a woman's father or guardian is alienated further as he could order the return of his daughter in the event of maltreatment.

Not all share the opinion that the introduction of irretrievable breakdown is an imposition of a western concept of law.⁸²² According to Bekker⁸²³, the concept of irretrievable breakdown has always resembled the ground for divorce in customary law where a

⁸¹⁹ Schapera *A Handbook of Tswana Law and Custom* (1994) 62.

⁸²⁰ However although a husband could be at fault, customary law does not always afford the wife cause for complaint or justification for ending the marriage on account of her husband committing adultery.

⁸²¹ See also in this regard *Gomani v Baqwa* 3 NAC 71(1917) and *Fuzile v Ntloko* 1944 NAC (C & O) 2.

⁸²² Jansen in Bekker, Rautenbach and Goolam *Legal Pluralism in South Africa* 45, where the writer cautions and says, "while some might regard the use of irretrievable breakdown as simply being an imposition of a civil ground of divorce on a customary marriage, this is not necessarily so."

⁸²³ Bekker "Grounds for divorce in African customary law marriages in Natal" 1976 *Comparative and International Law Journal of Southern Africa*, 346.

marriage was dissolved if it had totally broken down. Contrary to this view, Jansen⁸²⁴ is of the opinion that codification of custom in the Code of Zulu Law listed grounds for divorce that conflicted with the true spirit of customary law and for that reason, the use of irretrievable breakdown is unfounded. According to him, the circumstances that were traditionally perceived as justifiable grounds for divorce in customary marriages still warrant consideration in the determination of whether a marriage has in fact irretrievably broken down.⁸²⁵

In addition to the various grounds for divorce, the RCMA provides that a divorce can only be effected by obtaining a court order from a high court, family court or divorce court.⁸²⁶ The Act has gone all the way in terms of section 8(3) by stating that the Mediation in Certain Divorce Matters Act⁸²⁷ and section 6 of the Divorce Act⁸²⁸ governing civil marriages, apply to the dissolution of customary marriages. The Act also makes provision for the interests and welfare of children born of customary marriages subsequent to divorce by equating their position to that of children born of civil marriages.⁸²⁹ Some are of the opinion that in this way, the court as the upper guardian of all minors has however modified customary law by emphasising that the best interests of the children are decisive.⁸³⁰

The impact of the provisions on divorce in terms of the Act poses a degree of uncertainty because of the apparent contradictory nature of the section 8. Ironically, on

⁸²⁴ Jansen *op cit* 45.

⁸²⁵ *Ibid.*

⁸²⁶ Section 8(1).

⁸²⁷ Act No. 24 of 1987, the mediation in Certain Divorce Matters Act deals with the appointment of family advocates as well as family counsellors who assist family advocates in providing advice with regard to custody and control of minor children.

⁸²⁸ Act No. 70 of 1979.

⁸²⁹ This is a positive outcome and finds great similarity to the position in the Transkei when the Transkei Marriages Act was passed and did away with the scourge of illegitimacy of children born of customary marriages during subsistence of a civil marriage, making them eligible to inherit just as children from civil marriages.

⁸³⁰ Vorster, Dlamini-Ndandwe and Molapo "Consequences of the dissolution of customary marriages" 2001 *South African Journal of Ethnology* 62ff, the legislation authorises the court to make an order regarding guardianship, custody, access and maintenance of any minor child of the marriage. However, in terms of customary law, the father had absolute right to the custody and guardianship of children born in the marriage and they could not be taken away from him.

the one hand, the Act states that the provisions of section 8 may not be construed as limiting the role recognised in customary law of any person, including any traditional leader, in the mediation of any dispute or matter arising prior to the dissolution of a customary marriage by a court.⁸³¹ On the other hand, only the courts can determine what entails 'irretrievable breakdown of the marriage' and make orders they deem fit in that regard.⁸³² The reality is that fundamental familial roles have been undermined by putting emphasis on divorce as a legal event in the public arena determined by strangers.

In the past, with the exception of KwaZulu Natal, divorce in customary law was an extra-judicial matter with non-involvement by the State. The marriage was dissolved only by agreement between the spouses and other parties involved in the marriage negotiations such as the wife's father or guardian as *lobola* holder.⁸³³ In the event of a polygamous marriage, interested parties could be the man's other wives. To a small extent, the RCMA seeks to recognise the role that these interested parties may have in the divorce although largely at the court's discretion.⁸³⁴

Further research has to be done in order to conclusively determine whether 'interested' parties participate in divorce proceedings before the law. The irony here would be that, whilst the RCMA recognises the celebration of customary marriages by payment of *lobola*, thus recognising family obligations at marriage, it does not place equal emphasis on their roles in the eventuality of divorce.

The RCMA is also silent on the regulation of repayments of *lobola* subsequent to divorce. Referring to Bennett the court in *Thembisile's* case held that: "in customary law the central issue in divorce proceedings is refund of bride wealth, an obligation taken so literally that the husband could demand return of the same cattle he had originally given.

⁸³¹ Section 8(5).

⁸³² Maithufi and Bekker "The Recognition of Customary Marriages Act of 1998 and its impact on family law in South Africa" 2002 *Comparative and International Law Journal of Southern Africa*, 261ff.

⁸³³ Bekker *Seymour's Customary Law* 198, see also in this regard *Thembisile v Thembisile* 2002 (2) SA 209 TPD

⁸³⁴ Section 8(4) (c) of the RCMA which empowers the court to order that anyone who has sufficient interest in the matter be joined in the divorce proceedings.

If they died in the interim, the defendant could settle the claim with a cash equivalent.⁸³⁵ According to Olivier, the return of *lobola* cattle was essential to facilitate the final dissolution of marriage, failure of which meant that there was room to reconcile the spouses.⁸³⁶ In the final analysis, one may wonder if the RCMA by not requiring the return of *lobola*, is a true reflection of the "living" law among those negotiating marriage by payment of bride wealth.⁸³⁷

Evidence from empirical research has shown that the Recognition Act could have negative implications that may render its objectives unrealistic and difficult to attain.⁸³⁸ The majority of rural men do not bother to approach the formal system to obtain court decrees upon divorce and rather opt to desert their wives.⁸³⁹ One magistrate was quoted saying that, "...there are very few customary cases that I hear in this court, sometimes not even one the whole year. There are three reasons for this, one, it is socially unacceptable for a woman to return to her natal home from a marriage. Secondly, women are taught to persevere and thirdly marital problems are resolved through family discussion."⁸⁴⁰

⁸³⁵ Bennett and Peart *customary law for Southern Africa* 269, see also *Thembisile's* case para 28 discussed in 4.2.4 *supra*.

⁸³⁶ Olivier and Joubert *Indigenous law* 59.

⁸³⁷ Jansen "Multiple marriages, burial rights and the role of *lobolo* at the dissolution of the marriage" 2003 *Journal for Juridical Science* 131.

⁸³⁸ Mamashela and Xaba "The Practical Implications and Effects of The Recognition of Customary Marriages Act No. 120 of 1998" 2003 *Research Report No. 59* see at: <http://sds.ukzn.ac.za/files/rr59.PDF> (Accessed 21/08/2010) The writers undertook research on sample populations chosen from rural areas in the Natal midlands on the fringes of Pietermaritzburg. Chosen districts were Mpendle, Talyor's Halt, Plessislaer, Bulwer, Hamsville, Donneybrook, Newcastle, Glencoe, Escort in kwazulu Natal. Their methods included interviewing magistrates and clients who approached the Criminal Justice Centre CCJ for paralegal advice. The main objective of their study was to establish whether the legal empowerment by the RCMA has managed to improve the daily lives of rural women in customary marriages and whether they were able to achieve their material aspirations as provided for by the Act. Some of the questions asked entailed investigating if women owned property during marriage and upon its dissolution by death or divorce.

⁸³⁹ *Ibid* 23, among the conclusions of the research was the prevalence of two phenomena linked to divorce, that is, actual or constructive desertion. 'Actual desertion' means that the husband actually leaves the house and does not return whilst 'constructive desertion' implies that the husband continuously abuses his wife both physically and emotionally to such an extent that she may voluntarily leave the marital home.

⁸⁴⁰ *Ibid*.

By making dissolution of marriage a matter of the High Court, divorce has become a costly endeavour because of the need for legal representation. In addition, the proximity of these courts is far from many rural communities, factors that continue to make the formal system an unattractive option for many rural folk.

To this extent, the RCMA finds similarity to the Matrimonial Causes Act and the Customary Marriages Act of Zimbabwe, which make provision for dissolution of marriage on the above ground.⁸⁴¹ Thus the legislation has the common characteristic of opening the gates to divorce at the first provocation, while the customary law generally closes the gates to divorce and insists that spouses and their families 'think it over' or 'talk it over' in an effort to reconcile. While writing on marriage systems and principles among the Zulu, Gluckman⁸⁴² avers that the most significant aspect of transferring bride wealth was that all children subsequently born to the woman became members of the husband's lineage and that this feature was the basis of the stability and rarity of divorce of Zulu marriage.

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4.4.2.3 Registration of Customary Marriages

Another problem with the recognition Act is with regards to the requirement that customary marriages must be registered within specified timeframes. Both spouses may register their marriage but an omission to do so does not affect its validity.⁸⁴³ Previous legislation was not uniform on this requirement for customary marriages. For instance, in the former Transkei, failure to register a marriage did not render the marriage invalid,

⁸⁴¹ See section 16 of the Customary Marriages Act on dissolution of marriage that:

"No marriage solemnized in terms of this Act or the Marriage Act or registered under the Native Marriages Act [Chapter 79 of 1939] or contracted under customary law before the 1st April, 1918, shall be dissolved except by order of a court of competent jurisdiction in terms of the Matrimonial Causes Act."

Section 5(1) of the Matrimonial Causes Act states that:

"An appropriate court may grant a decree of divorce on the grounds of irretrievable breakdown of the marriage if it is satisfied that the marriage relationship between the parties has broken down to such an extent that there is no reasonable prospect of the restoration of a normal marriage relationship between them."

⁸⁴² Gluckman M "Kinship and marriage among the Lozi of Northern Rhodesia and the Zulu of Natal" in Radcliffe-Brown and Forde *African Systems of Kinship and Marriage* (1950) 182.

⁸⁴³ Section 4 of the RCMA.

whereas in Natal, the position was different.⁸⁴⁴ Problems with registration usually arise where a customary marriage subsists alongside another civil marriage and disputes around matrimonial property arise.⁸⁴⁵

Concerning timeframes, a customary marriage entered into before the commencement of the Act had to be registered at the Department of Home Affairs before 15 November 2002.⁸⁴⁶ On the other hand, customary marriage concluded after commencement of the Act, has to be registered within three months of such conclusion or within such longer period as determined by the Minister from time to time in the gazette.⁸⁴⁷

Although the Act provides for registration, this is not a requirement for a valid customary marriage.⁸⁴⁸ Any spouse may apply for the registration by completing the prescribed form and supplying the prescribed information as well as any additional information that the registration official may require. During the registration of the customary marriage, the husband has to make a declaration stating the traditional community's rules and customs in accordance with which the marriage has been concluded. In the case of *Baadjies v Matubela*⁸⁴⁹ it was noted that in the absence of registration certificate the existence of the marriage can be proven in other ways, however this is not always easy.

The impact of the provision on registration is that it poses a potential burden on particularly rural families who are not well acquainted with the technicalities and demands of the formal law. In addition to their ignorance of the law, they often find themselves unfavourably situated and cannot easily reach the cities to register their marriages owing to financial and geographic considerations. For them, the observance and fulfilment of traditional rites to marriage is sufficient and binding on the respective

⁸⁴⁴ Bekker "Requirements for validity of customary marriages" 2001 *South African Journal of Ethnology* 43.

⁸⁴⁵ See the relationship between customary and civil law marriages discussed in the cases of *Thembisile* and *Womarld* in 4.2.4 and 4.2.5 respectively *supra*.

⁸⁴⁶ The registration period was originally limited in section 4(3)(a), to one year after commencement of the Act but the period was extended by Government Notice 1228 Government Gazette 22839 of 23 November 2001.

⁸⁴⁷ Section 4(3) (b).

⁸⁴⁸ Registration serves as *prima facie* proof of the existence of a customary marriage.

⁸⁴⁹ 2002 (3) SA 427 (W) see also *Wormald's case supra* para 27 – 37.

families to proceed and fulfil their respective obligations in terms of the new contract between two families.

The requirement for registration becomes stricter when it comes to polygamous marriages, which are supposed to be concluded in terms of a High Court application. Many men fail to apply for court orders when taking subsequent wives as required by the Act thus making those new marriages unregistrable. The South African Law Reform Commission was of the opinion that registration would be necessary to provide proof of the marriage to third parties as well as to determine the matrimonial property system.⁸⁵⁰

The impact of the Act however does not only arise out of the requirements of the legislation but also out of limitations within administrative arms of the state. There is evidence that some officials from the Department of Home Affairs (which is responsible for the registration of marriages) are not well conversant with the provisions of the Act. It has been observed that people requiring registration of their marriages have been turned away because they did not bring bridesmaids and other family members.⁸⁵¹ In terms of the Act, one or both spouses alone may register their marriage.

4.4.2.4 Polygamy

Another source of conflict in the RCMA concerns the requirement that a man apply to the High court before entering into a marriage with a second or more wives. The purpose of applying to a court is to have a contract regulating the matrimonial property regime approved by the court. In terms of section 7(6):

“A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages.”

⁸⁵⁰ See the South African Law Reform Commission *supra*.

⁸⁵¹ Mamashela and Xaba 2003 *Research Report No. 59 supra* at 30.

Where the writers, with the backing of their research findings to notice of the fact that: “...another person who wanted to register a marriage was asked bring the wife and her bride's maids, his best man, and immediate members of both families. Such an entourage would have necessitated the hiring of a minibus – an expense the groom could not afford.”

Read with subsection 6, section 7(7) further holds that when considering the application in terms of subsection 6 the court must:

“...in the case of a marriage which is in community of property or which is subject to the accrual system, terminate the matrimonial property system which is applicable to the marriage and effect a division of the matrimonial property and ensure an equitable distribution of the property; and take into account all the relevant circumstances of the family groups which would be affected if the application is granted.”

The court has the discretion to vary the terms of the initial antenuptial contract and grant an order as determined by the court, or decline the application by the husband if the order would negatively affect the life of another spouse or interested party.⁸⁵² This could be an endeavour by the courts and legislation to discourage men from taking more wives and compromise sustenance of their existing families. The provision by the RCMA is potentially problematic to implement because the majority of rural folk where polygamy is more apparent, will not bother to seek a court order when they wish to contract further marriages in terms of customary law.

According to Jansen⁸⁵³, there could be a problem with this provision because the Act is silent about the consequences if there is no approved contract. The writer also is of the view that, a few marriages if any would be changed in this way, as doing so would be expensive. It will also be difficult for wives to convince their spouses to relinquish sole control of the matrimonial assets.⁸⁵⁴ The requirement for a High Court order is also a characteristic of Zimbabwean law. In term of the Matrimonial Causes Act, failure to obtain a court order when taking a subsequent wife is a ground for nullifying such customary marriage.⁸⁵⁵

⁸⁵² Section 7(7) of the RCMA.

⁸⁵³ Jansen in Bekker, Rautenbach and Goolam *Introduction to Legal Pluralism* 44, from his point of view, the husband's competence to enter into a further marriage must be seen as dependent on the court's approval of his intended marital contract, otherwise section 7(6) – (9) have no meaning and the interests of the wives and their family groups are unprotected.

⁸⁵⁴ Jansen “The Recognition of Customary Marriages Act: many women still left out in the cold” 2002 *Journal for Juridical Science* 121.

⁸⁵⁵ See section 13 of the Matrimonial Causes Act.

The limitation of this provision is that it is difficult to enforce because the majority of rural folk may not bother to approach the courts in order to sign a contract before an official as this also proves to be a bit costly. Research has demonstrated that, "in practice...many men simply desert the first wife and cohabit or marry a second wife. It is likely that Section 7 will only be paper tiger."⁸⁵⁶ From another angle, officials from the Department of Home Affairs have been known to refuse the registration of potentially polygamous customary marriages.⁸⁵⁷ There might be the potential danger of maladministration by officials who refuse to register polygamous marriages based on their personal reservations of the practice.

Customary law went as far as recognising that deceased men's brothers could become successors to their widows thus entering into polygamous marriages. This was in terms of the custom of *ukungena* among the Zulu of South Africa and *kugara nhaka* among the Shona of Zimbabwe. Polygamous marriages therefore arose in two scenarios, firstly, where a man paid *lobola* for a second wife, and secondly, where an heir entered into a levirate marriage with his deceased brother's wife by means of widow inheritance. There is potential that the RCMA does not recognise polygamous marriages that arise out of levirate marriages.

Traditionally, with the exception of KwaZulu Natal⁸⁵⁸, a marriage agreement between two family groups could be perpetuated even upon the death of one of the spouses. The widow was expected to remain with her late husband's family and continue with the procreation of children for the deceased by means of the *ukugena* custom.⁸⁵⁹ The position before the proposed amendment to the Act meant that the RCMA was silent as

⁸⁵⁶ Mamashela and Xaba *Research Report* No. 56 *supra*.

⁸⁵⁷ *Ibid* at 30, where the writers confirm this position from their interviews with women. According to their findings, some Home Affairs staff did not know the new law and one respondent mentioned that he was turned away upon attempting to have his second customary marriage registered because he was in another subsisting marriage. The reasons cited for their refusal were that he was already married.

⁸⁵⁸ Section 36(1) of the Codes of Zulu Law provides that the death of anyone of the spouses terminates the customary marriage.

⁸⁵⁹ Jansen 2002 *Journal for Juridical Science* 124, the death of a woman did not necessarily mark the end of marital life for a man. Her house continued to exist if her family provided a seedraiser to give birth to children for the man's lineage as per purpose of *lobola*. Any child born after the death of a spouse is regarded for all practical purposes, offspring of the deceased spouse.

to the dissolution of customary marriages by death thereby giving rise to presumptions regarding the recognition of levirate marriages.⁸⁶⁰

The Act is now clearly steered towards doing away with the chance of misinterpreting its provisions on dissolution of marriage. While the principal Act only provides for dissolution of marriage by court decree on account of irretrievable breakdown, if the new Recognition of Customary Marriages Amendment Bill becomes law, a marriage will also be deemed dissolved upon death of one spouse. It amends the RCMA by stating that, "a customary marriage may be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage; or death of one of the spouses."

By proposing the termination of customary marriages on death of one the spouses, the Act fails in its purpose to recognise polygamy that could arise out of levirate marriages (*ukungena*). However while we maintain that there is no dispute regarding the recognition of polygamy, concern is with the imposition of legal technicalities that poses a threat to the preservation of traditional family law within the dictates of legislation.

The intricacies and potential problems of the requirement for registration and polygamous marriages were dealt with in the recent case of *Mayelane v Ngwenyama and another*⁸⁶¹. The case was an application by one Mdjadji Florah Mayelane, a widow from the Limpopo province, against the first respondent, Mphephu Ngwenyama and the Minister of Home Affairs in her capacity as the political head of the Department of Home Affairs, which was responsible for registration of all marriages. In 1984, before her husband's death in 2009, the applicant had entered into an unregistered customary marriage with the deceased, Hlengani Moyana, in accordance with customary law and tradition.

⁸⁶⁰ Cronje and Heaton *family law* 198.

⁸⁶¹ [2010] 4 All SA 211 (GNP), on the 8th of February 2010, the North Gauteng High Court in Pretoria granted an order declaring a purported customary marriage entered into between the late Hlengani Dyson Moyana and the first respondent as null and void *ab initio*.

The deceased had also married another woman, the first respondent, according to customary law in 2008. The applicant was unaware of the fact that her husband had entered into another marriage until after his passing. It was common cause that the second marriage was not preceded by an application to the High Court for an order of approval thereby regulating the future matrimonial property regime as determined by section 7 of the RCMA. The applicant contended that the second marriage was invalid because of the failure to obtain such order. The first respondent advanced the argument that the fact that her marriage to the deceased was properly and publicly celebrated in accordance with custom was sufficient to establish an unassailable second marriage entered into by the deceased. In consideration of the competing claims by the applicant and the first respondent, the second respondent's offices (Department of Home Affairs) refused to register the applicant's marriage to the deceased.

The court made a ruling in favour of the applicant and held that because the first respondent's purported marriage to the deceased, entered into after the Act was promulgated, was not preceded by the conclusion of a contract as envisaged in section 7(6) of the RCMA, the purported marriage of the first respondent was void. The applicant was therefore entitled to a declaratory order to that effect and entitled to have her marriage to the deceased registered.

However the position is set to change as legislation is geared to refuse registration of marriages where one spouse is deceased and will require both spouses to be present before a registering officer.⁸⁶² The Recognition of Customary Marriages Amendment Bill seeks to redress the position adopted in *Mayelane's* case where the court ordered the Department of Home Affairs to register a marriage where the husband was deceased in order to recognise the rights of a widow in a polygamous marriage. The Bill amends section 4 of the 1998 Act by substituting certain words and states that:

"Both spouses must together apply to the registering officer in the prescribed form for the registration of their customary marriage and must furnish the registering officer with the

⁸⁶² See section 6(B) of the Amendment Bill, "No registering officer may register a customary marriage of which one spouse is deceased."

prescribed information and any additional information which the registering officer may require in order to satisfy himself or herself as to the existence of the marriage.”

The observation thus far is that, more than ten years after the Act came into force, there is evidence that the requirements around obtaining High Court orders for leave to take another wife and subsequent registration are difficult to implement and fulfil in the real world. In this regard, South African law tends to differ with its Zimbabwean counterpart. The *Mayelane* judgement illustrates that when the South African courts are faced with the dilemma of having to deal with unregistered customary marriages, especially where more than one wife is involved, there is potential that one spouse may lose all rights to claim a share in matrimonial property upon dissolution of marriage by death or divorce.

Similar matters dealing with unregistered customary marriages have come before the Zimbabwean courts and the judiciary has often applied provisions of the Customary Law and Local Courts Act that give the court discretion to apply the common law of equity. This is because the sharing provisions in the Matrimonial Causes Act only recognise registered customary marriages as valid. The problem was that, where a man died leaving more than one wife, the spouse whose marriage was celebrated customarily but unregistered was often left in an unfavourable and vulnerable position.

4.4.2.5 Matrimonial Property Regimes

Finally, the fundamental source of controversy that the RCMA has brought into the legal arena and the customary marriage emanates from the distinction between the matrimonial property regimes of marriages contracted before and after commencement of the Act.⁸⁶³ Firstly, the Act states that marriages that were already in existence at the commencement of the Act shall remain as marriages out of community of property in accordance to the true customary law position.⁸⁶⁴ Secondly, the Act recognises customary marriages entered into after commencement of the Act as marriages in

⁸⁶³ However if the Recognition of Customary Marriages Amendment Bill put before parliament in 2009 becomes law, section 7(1) will make all customary marriages, marriages in community of property.

⁸⁶⁴ Section 7(1) RCMA.

community of property with profit and loss unless the parties enter into an antenuptial contract that provides otherwise.⁸⁶⁵

The impact of this distinction has been a source of criticism for being unconstitutional because women in marriages out of community of property were placed in an unfavourable position by allowing men to retain family property subsequent to divorce. Previous legislation such as the Transkei Marriages Act and the KwaZulu Natal Codes confirmed the position that customary were marriages out of community of property.⁸⁶⁶ The distinction also brings to the fore, contradictions within the Act itself if read with section 6 which guarantees women's equality in marriage including rights to control matrimonial property. According to Pienaar, the provision of equality by the Act is in effect useless when the patrimonial consequences of marriage are subject to customary law.⁸⁶⁷

The apparent shortcoming in section 7(1) and (2) of the RCMA came under attack in the case of *Gumede v President of the Republic of South Africa and Others*.⁸⁶⁸ The parties were married in 1968 in terms of customary law implying that up to 1998, when the RCMA was passed, and subsequently became enforceable in 2000, the proprietary consequences of their marriage were to be governed by customary law. Customary marriages are marriages out of community of property and therefore only recognise men's rights to retain matrimonial property upon dissolution of marriage. For this reason, the applicant (wife) contended that the distinction by the Act between the two categories of marriages was unconstitutional and that therefore even marriages contracted before the year 2000 should be declared marriages in community of property.

⁸⁶⁵ Section 7(2) RCMA.

⁸⁶⁶ The Transkei Marriages Act held that customary were out of community of property and according to the KwaZulu-Natal Codes of Zulu Law, house property belongs to the specific house but is still under the control of the family head. The house property must, however, be utilised for the benefit of the members of the specific household in a polygamous marriage. The family head also shouldered the responsibility to maintain the daily needs of his wife/wives and children.

⁸⁶⁷ Pienaar 2003 *Stellenbosch Law Review* 269, see also in this regard, Akinnusi "The consequences of customary marriages in South Africa: would the recognition of customary marriages Act, 1998 make any difference?" *Journal for Judicial Science* 147ff.

⁸⁶⁸ 2009 (3) SA 152 (CC).

In the first instance, the Durban Coast Local Division allowed the application to the effect that the marriage of the *Gumede*'s and all customary marriages contracted before 2000 were declared to be automatically in community of property and on the death of one spouse, the property was to be divided in terms the rules of community of property. Theron J held that: "...it is not the Recognition of Customary Marriages Act that creates discrimination, it is customary law in its various manifestations that does so."⁸⁶⁹ As such, provisions of section 7(1), together with section 20 of the KwaZulu Act on the Code of Zulu Law⁸⁷⁰ and the Natal Code of Zulu Law⁸⁷¹, were held to be invalid because they were an affront to section 9 of the Constitution.⁸⁷² The judgement was referred to the Constitutional Court where it was confirmed as required by law.⁸⁷³

The *Gumede* ruling implies a drastic departure from customary law regarding the patrimonial consequences of customary marriages. Some writers have reservations whether placing customary marriages in community of property is wise.⁸⁷⁴ In terms of custom, there is no distinction as to whether marriages are either in or out of community of property.⁸⁷⁵ The common perception is that the effect of marriages out of community of property means that women cannot claim a share in matrimonial property upon divorce except if the property in question is personal in nature, often leaving them either destitute or severely disadvantaged.⁸⁷⁶ Traditionally, upon divorce, a woman returned to her father's family and in turn, the woman's father as guardian and *lobola* holder, he had the obligation to maintain his daughter who became part of the house again.

⁸⁶⁹ *Ibid* para 12.

⁸⁷⁰ Which held that the family head is the owner of and has control over all family property in the family home.

⁸⁷¹ *Ibid*.

⁸⁷² Section 9(3) provides that: "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."

⁸⁷³ (CCT 50/08) [2008] ZACC 23, see also Section 167(5) of the Constitution which states that:

"The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force."

⁸⁷⁴ Mqoke 1999 *Obiter* 64.

⁸⁷⁵ Bekker *Seymour's Customary Law* 71.

⁸⁷⁶ Bennett and Peart *op cit* 232ff.

This obviously meant that divorced women did not always find themselves destitute or without care. In addition to the personal property retained by a woman upon dissolution of marriage, custom entitled her to the care of her family thus providing a safety net. By so doing, the concept of house property found application. Such property was used for the benefit of the house to which it belonged and also applied to polygamous households. Bekker elucidates on the position and says:

"In original customary law, both in theory and in practice, a family head was in control of the family home and its property. An emancipated individual could not own anything individually, and whatever he might have acquired vested in the family head. Yet, this has been shown, the property of the family home was not owned outright by the family head, but was held in communal ownership by the family as a unit, under his administration and control."⁸⁷⁷

Unfortunately, because of the impact of modernisation and urbanisation, new types of property have evolved, such as vehicles and urban houses to which individuals have personal rights to ownership of property under the protection legislation. According to Bekker and De Kock, women actually had special interests in house property. They contend that, the youngest son who ordinarily left the family home last, used such property to maintain and take care of his sisters and their children if they were unmarried, or divorced and returned home.⁸⁷⁸

The impact therefore is that the Recognition Act abolishes the customary law governing the matrimonial property system of marriages by attaching the principles of community of property to it and making provision for variations by antenuptial contract. In the event of polygamous marriages, the matrimonial property regime must be regulated anew if a man wants to marry another wife and a court application made in this regard. In effect,

⁸⁷⁷ Van der Walt and Pienaar *Introduction to the law of property* 2ed (1997) 388.

⁸⁷⁸ Bekker and De Kock "Adaptation of the customary law of succession to changing needs" 1992 *Comparative and International Law Journal of Southern Africa* 366.

aspects of the Marriage Act⁸⁷⁹ and the Matrimonial Property Act⁸⁸⁰ that regulate civil marriages substitute the customary matrimonial property regime.⁸⁸¹

Research has shed some light on the dynamics in marriages regarding ownership of property and one of the conclusions is that, the provision for variations of matrimonial property regimes by antenuptial contract may not be utilised by many. This is because men continue to be predominantly the owners of house property whilst women have very limited rights to immovable property.⁸⁸² It is common cause especially among the rural folk that traditionally speaking, the purpose of property such as the matrimonial home is multifaceted. On the one hand it provides for the aged and takes care of those from failed marriages whilst on the other hand, it provides a religious base for ritual performance. Therefore owing to the different roles that an African home plays, the notion of its joint ownership by spouses with the possibility of selling it at the end of the marriage and sharing the earnings, might be difficult to realise.⁸⁸³

From a comparative point of view, it becomes apparent that the South African legislation has adopted a more radical approach by totally altering the matrimonial property regime of customary marriages. On the other hand, the Matrimonial Causes Act of Zimbabwe calls for the sharing provisions to guide the courts discretion in the reallocation of matrimonial property in equal shares.⁸⁸⁴ The hallmark in Zimbabwean matrimonial law is the recognition of the indirect contributions that women make in the household where women find themselves disadvantaged because they are housewives in customary marriages. The result is that Zimbabwean courts have a leeway to alter the percentages in reallocating matrimonial property on a case-by-case basis thus striking a balance

⁸⁷⁹ Act No. 25 of 1961.

⁸⁸⁰ Act No. 88 of 1984.

⁸⁸¹ In terms of the Recognition of Customary Marriages Amendment Bill, the Civil Union Act No. 17 of 2006 will substitute the Marriage Act in application to customary marriages.

⁸⁸² Mamashela and Xaba *op cit* 22.

⁸⁸³ Mamashela 2004 *South African Journal on Human Rights* 633.

⁸⁸⁴ See the cases of *Murerwa v Murwera* (28/01) [2004] ZWSC 13 (unreported) and *Usayi v Usayi* (49/01) [2003] ZWSC 11 (unreported) in 3.3.4 Chapter 3 *supra*, where the Zimbabwean courts through progressive interpretation of provisions of section 7(4) of the Matrimonial Causes Act passed rulings that recognised the right of women to fifty percent of the value of matrimonial property.

between the needs of recognising traditional expectations and progressive legislation promoting realisation of women's rights.

One may argue that the *Gumede* decision in the constitutional court was a contributory factor towards revision of some provisions of the RCMA. Barely a year after the judgement on the 8th of December 2008, in 2009, the Department of Home Affairs invited for public comment, the draft Recognition of Customary Marriages Amendment Bill.⁸⁸⁵ Perhaps this shows a commitment by government to bring some legal certainty and place customary marriages in community of property beyond doubt thereby putting the final nail on the coffin. Fundamentally, the Bill seeks to do away with the distinction between customary marriages before and after the Act. Section 7 of the principal Act is amended by the deletion of subsection (1) and substitution for subsection (2) by stating that:

"A customary marriage in which a spouse is not a partner in any existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage."

The Amendment Bill goes ahead and repeals provisions of the 1985 KwaZulu Act on the Code of Zulu Law and the 1987 Natal Code further abolishing the customary law regulating matrimonial property. In the final analysis, the RCMA which for the first time in South African legal history, gave official recognition to customary marriages, evidences a movement towards the common law. The dominance of western values is apparent in the imposition of the antenuptial contract, western concepts of divorce and division of property.⁸⁸⁶

⁸⁸⁵ Government Gazette 32198, General Notice 416 of 2009.

⁸⁸⁶ Church "The convergence of the western legal system and the indigenous African legal system in South Africa with reference to legal development in the last five years" 1999 *Fundamina: A Journal of Legal History* 13.

According to Bennett⁸⁸⁷, the RCMA gives full recognition to all existing customary marriages and it ensures that the consequences of all marriages, whether civil, Christian or customary, are more or less the same. From his point of view this will do away with the problem of conflict of law situations because no matter what form of marriage a couple may contract under, the consequences will be the same. Perhaps these attempts to create single rules and values aimed at equality of persons before the law are in part, a response to South Africa's history of dual and discriminatory systems of law.⁸⁸⁸

4.4.3 The Divorce Act 1979

Although the Divorce Act⁸⁸⁹ was enacted during the colonial era, its provisions are discussed under this section for their interrelatedness with key sections in the RCMA. The position up to 2000 (when the Recognition of Customary Marriages Act came into force) was that the Divorce Act only applied to civil marriages. The application of the Act to customary marriages is now activated by section 8(4) (a) of the RCMA which states that, a court dissolving a customary marriage has the powers contemplated in sections 7, 8, 9 and 10 of the Divorce Act.⁸⁹⁰

On the one hand, the new position can be criticised for being an outright adoption of the common law of equity by the customary marriage while at the same time, it may be hailed for bringing a considerable degree of equity in divorce cases. The Divorce Act thus permits a divorce court to order the transfer of property to another spouse if it is just and equitable to do so.⁸⁹¹ To this extent, South African law finds similarity with the

⁸⁸⁷ Bennett in Bekker, Rautenbach and Goolam *legal pluralism in South Africa* 27, the writer goes ahead and explains that, "certain differences may nonetheless persist, the most notable being the potentially polygamous nature of customary marriages."

⁸⁸⁸ *Ibid.*

⁸⁸⁹ Act No. 70 of 1979.

⁸⁹⁰ Section 7 of the Act provides for the division of assets and maintenance of the parties; section 8 makes provision for the rescission, suspension and variation of orders; section 9 deals with the forfeiture of patrimonial benefits and section 10 provides a court with a discretion as to whom to award costs against.

⁸⁹¹ See sections 7(3) and (4) of the Divorce Act. Section 7(3) of the Divorce Act provides that:
"A court granting a decree of divorce in respect of a marriage out of community of

discretion that the Zimbabwean courts have in terms of the Matrimonial Causes Act to distribute matrimonial property in a just and equitable manner subsequent to granting a decree of divorce in customary marriages. In terms of section 7 of the Matrimonial Causes Act:

(1) Subject to the provisions of this section, in granting a decree of divorce, judicial separation or nullity of marriage, or at any time thereafter, an appropriate court may make an order with regard to:

- (c) the division, apportionment or distribution of the assets of the spouses including an order that any asset be transferred from one spouse to the other,
- (d) the payment of maintenance whether by way of a lump sum or by way of periodical payments, in favour of one or other of the spouses or of any child of the marriage.”

There is no doubt that the two pieces of legislation speak the same language. The Divorce Act lists the factors that a court needs to take into account when considering which assets are to be transferred and redistributed according to its discretion.⁸⁹² In addition, a court may require that satisfaction of a court order to distribute property be deferred on certain conditions, upon application by the party against whom the order is granted.⁸⁹³ Also, the Act makes a divorcing party's pension interests part of his or her assets for purposes of determination of patrimonial benefits.⁸⁹⁴

In general, the new position of policy is that the dissolution of a customary marriage is dealt with in similar fashion as a civil marriage. There has been debate as to whether the provisions in the Divorce Act only apply to people married out of community of

Property—

(a) entered into before the commencement of the Matrimonial Property Act, 1984, in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded; or

(b) entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, in terms of section 22(6) of the Black Administration Act, 1927 (Act No. 38 of 1927), as it existed immediately prior to its repeal by the said Marriage and Matrimonial Property Law Amendment Act, 1988, may, subject to the provisions of subsections (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the court may deem just be transferred to the first-mentioned party.”

⁸⁹² section 7(5).

⁸⁹³ section 7(6).

⁸⁹⁴ section 7(7).

property because the RCMA already caters for marriages in community of property. According to the Act, where parties are married out of community of property, in the absence of an agreement between them and on application of a party, a court may, if it is just and equitable, order that the assets of the other party be transferred to the applicant party.⁸⁹⁵ Bennett explains the position saying that, sections 7(3), (4), (5) and (6) of the Divorce Act which give the court the power to transfer property of the husband to the wife apply only to marriages out of community of property.⁸⁹⁶

This brings into question the proper meaning to be ascribed to the provisions of section 8(4)(a) of the Recognition Act. According to Cronjé and Heaton, a divorce court does have the power to exercise the equitable jurisdiction given to a divorce court by section 7(3) of the Divorce Act to customary marriages even if they are not out of community of property by reason of the provisions of section 8(4)(a) of the Recognition Act.⁸⁹⁷ On the other hand, Bennett argues that to reach that conclusion requires an “adventurous interpretation” of section 8(4)(a).⁸⁹⁸ In the Constitutional Court’s confirmation of the High Court judgement in the *Gumede* case, Moseneke DCJ said that:

“This means that every divorce court granting a divorce decree relating to a customary marriage has the power to order how the assets of the customary marriage should be divided between the parties, regard being had to what is just and equitable in relation to the facts of each particular case. This would require that a court should carefully examine all the circumstances relevant to the customary marriage and in particular the manner in which the property of the marriage has been acquired, controlled and used by the parties concerned, in order to determine, in the final instance, what would be a just and equitable order on the proprietary consequences of the divorce.”⁸⁹⁹

⁸⁹⁵ However if the Recognition of Customary Marriages Amendment Bill comes into force, by the deletion of section 7(1) and its substitution with section 7(2), all customary marriages will automatically be in community unless there is express agreement between the spouses to the contrary.

⁸⁹⁶ Bennett *Customary law in South Africa* (2004) 182.

⁸⁹⁷ Cronjé and Heaton *Family Law* 195.

⁸⁹⁸ Bennett *Customary law* 282.

⁸⁹⁹ (CCT 50/08) [2008] ZACC 23 para 44, the learned Judge said further that: “In my view, there is no cogent reason for limiting the scope of the equitable jurisdiction conferred on a divorce court by section 8(4)(a) of the Recognition Act in relation to matrimonial property of a customary marriage which is out of

It becomes apparent the courts are entitled and will most probably enforce the provisions of the Divorce whenever the underlying object is to achieve equity regardless of whether the customary marriage is in or out of community of property. This seems to be the approach adopted in Zimbabwe in terms of the Matrimonial Causes Act together with the Customary Law and Local Courts Act which gives the courts a discretion to invoke the common law of equity to unrecognised and unregistered customary marriages. The emphasis here is attaining an order favourable to both parties but especially vulnerable women.

Women can also now claim and apply for maintenance orders in the case of dissolution of the marriage a position that did not exist at customary law.⁹⁰⁰ Traditionally, the reason behind the dissolution of the marriage was to sever all ties between the spouses and there was no maintenance system between the former spouses. According to the RCMA section 7(1) and (2) of the Divorce Act applies to customary marriages, empowering the court to grant a maintenance order against a spouse for the benefit of the other spouse. In granting an order for the payment of maintenance, the court has to take into account any provision or arrangement made in terms of customary law.⁹⁰¹

When issuing a maintenance order, especially regarding the children's interests, the fact that the father had paid *isondlo* to the person maintaining the child has to be taken into consideration.⁹⁰² It may be argued that the right to claim maintenance from the other spouse is a radical change to the true customary law position and accounts for the many problems encountered before Divorce courts. The viewpoint that customary law in South Africa did not recognise the maintenance of spouses conforms to observations by some academics. Armstrong, who whilst writing on the Shona of Zimbabwe, held that, if

community of property. It is clear that at both a textual and purposive level, section 8(4)(a) does not restrict the equitable jurisdiction of a court to a marriage out of community of property."

⁹⁰⁰ See section 7(4) (e), "A court granting a decree for the dissolution of a customary marriage – may, when making an order for the payment of maintenance, take into account any provision or arrangement made in accordance with customary law."

⁹⁰¹ section 8(4)(e) of the RCMA, see also in this regard, Pienaar 2003 *Stellenbosch Law Review* 267, the delivery of *lobola* to the woman's father is probably a factor that could be considered, which could undermine the woman's position.

⁹⁰² Maithufi "The recognition of Customary Marriages Act of 1998: a commentary" 2000 *Journal of Contemporary Roman-Dutch Law* 515 for additional factors that the court may take into account.

the father wanted to claim custody of an illegitimate child, he paid a cow (*mombe yechiredzwa*) as an appreciation token to the mother's parents for bringing up and caring for his child. This was the closest thing to maintenance under the customary legal systems of Southern Africa.⁹⁰³

South African law finds strong resemblance to the position in Zimbabwe with the Matrimonial Causes Act that makes provision for a court to grant a maintenance order in the interests of a spouse and minor children. Another distinction between the treatment of maintenance orders in both countries is that, in South Africa spouses in customary marriages can claim maintenance *pendente lite* (while litigation is pending) as confirmed in the case of *Baadjies v Matubela*⁹⁰⁴. On the other hand, in Zimbabwe, the law recognises the right of a spouse to be granted an order for payment of arrear maintenance.⁹⁰⁵

The persisting difficulty confronting government is that the provisions of section 8(4)(a) of the Recognition Act read together with sections 7(3), (4), (5), (6) and (7) of the Divorce Act, apply only upon dissolution of the customary marriage. In other words, a divorce court may make the equitable order in relation to family property only when the marriage is dissolved. Unfortunately, this does not cure the discrimination which a spouse in a customary marriage has to endure during the course of the marriage.

4.4 CONCLUSION

In the final analysis, during the development of legislation in South Africa, there was a tendency to emphasise the distinctions between civil and customary marriages, and the later was inferior in most respects. These disparities have decreased considerably however, owing to legislative intervention but judicial creativity was also a factor

⁹⁰³ Armstrong "Maintenance Payments for Child Support in Southern Africa: Using Law to Promote Family Planning" 1992 *Studies in Family Planning* 224, therefore the concept of an *isondlo* beast finds similarity to the Shona concept of *mombe yechiredzwa*.

⁹⁰⁴ 2002 (3) SA 427 (W), however in this case the existence of a customary marriage could not be proved and the application was refused.

⁹⁰⁵ See section 7(1)(b), section 11(1) of the Matrimonial Causes Act.

especially in rulings on marriages concluded in terms of the Transkei Marriages Act. Apart from the fact that the customary marriage as recognised by legislation now resembles western values more than ever, the only fundamental difference remaining is that the civil marriage is inherently monogamous while a customary marriage is potentially polygamous.⁹⁰⁶

However, the critical question is whether all these changes to customary marriages will be as effective as intended or whether they will only be paper law.⁹⁰⁷ In order to meet its the desired objectives, the state should initiate comprehensive educational drives via various stakeholders particularly among the rural population in order to move towards a greater degree of socio-legal certainty.⁹⁰⁸ According to Allott⁹⁰⁹, one of the reasons reason for this uncertainty is that family law is generally considered to be intertwined with the emotions of people and is therefore more opposed to change.

On the issue of whether polygamy still has a place in today's society there are divergent views on this point. On the one hand, polygamy is criticised for enhancing male domination, while those in favour of it see the benefits that ensue for the wives, such as the division of labour and an increased opportunity for women to be economically active in their respective households.⁹¹⁰ There could be greater deal of autonomy for women in polygamous marriages as long as they run their own family units although the husband retains his role as head of the families.

Regarding the redistribution of matrimonial property upon dissolution of marriage between men and women, there have been unjust attacks on customary law in this regard. This is largely to due to disintegration of the communal subsistence economy

⁹⁰⁶ Dlamini "The Christian v customary marriage syndrome" 1985 *South African Law Journal* 701ff, see also the case of *Guma v Guma* 4 NAC 220 (1919).

⁹⁰⁷ Jansen in Bekker, Rautenbach and Goolam *Legal Pluralism* 49.

⁹⁰⁸ Mqoke 1999 *Obiter* 64.

⁹⁰⁹ Allott A N "Reforming the law in Africa – aims, difficulties and techniques" in Sanders *Southern Africa in need of law reform: proceedings of the Southern African Law Reform Conference, Sun City Bophuthatswana, 11-14 August 1980* (1981) 228 – 229.

⁹¹⁰ Van Schalkwyk "Law reform and the recognition of human rights within South African family law with specific reference to the Recognition of Customary Marriages Act 120 of 1998 and Islamic marriages" 2003 *De Jure* 293.

where traditional property rights found their efficacy. Customarily, property rights belong to family or agnatic groups with the members sharing in the group's rights to property.⁹¹¹ With new forms of property comprising most of the litigation nowadays, it is inevitable that harmonisation between traditional values and western principles might never be achieved.



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⁹¹¹ Myburgh *Papers in indigenous law in Southern Africa* (1985) 15.

CHAPTER FIVE

THE AFRICAN MARRIAGE IN THE CONTEXT OF CONSTITUTIONALISM AND INTERNATIONAL HUMAN RIGHTS LAW IN POST INDEPENDENCE ZIMBABWE AND SOUTH AFRICA

5.1 INTRODUCTION

With the emergence of contemporary human rights activism⁹¹² around the world, it has become imperative to examine how post-independence Zimbabwe and South Africa have made gains in striking a balance between preserving cultural rights on the one hand, and the eradication of perceived discriminatory laws/customs relating to marriage on other. This Chapter will comment on the attempts in both countries that seek to resolve this conflict between the dictates of customary law, which may be discriminatory towards women, and the move towards embracing human rights by removal of sex and gender-based discrimination. Some of the measures adopted already include constitutional and legislative reform as well as signing of key international human rights instruments that seek to elevate women's position in society thereby influencing their status as partners in marriage.

The Chapter will begin by defining the constitutional models found in Zimbabwe and South Africa, that is, 'cultural relativism' and 'universalism' respectively, and thereafter, comment on which model best presents favourable resolutions to the conflict between customary law and constitutionalism in a contemporary African setting.⁹¹³

⁹¹² An-Na'im "Problems of Dependency: Human Rights Organisations in the Arab World" Critiquing ngos: Assessing the last Decade 2000 *Middle-East Report* No. 214 20, the scholar defines human rights activism as, "the current manifestation of historic struggles for human dignity."
[Http://www.jstor.org/stable/1520190](http://www.jstor.org/stable/1520190) (Accessed 16/02/2010).

⁹¹³ On the one hand, 'cultural relativism' allows customary law to exist unfettered by considerations of non-discrimination or equality before the law provisions, such as in the Zimbabwean Constitution, whilst on the other 'universalism' recognises customary law and the right to culture, but makes both subject to the test of non-discrimination and equality before the law such as in the Constitution of South Africa.

The table below serves as an illustration of the two constitutional models:

	ZIMBABWE (cultural relativism)	SOUTH AFRICA (universalism)
Recognise customary law	✓	✓
Recognise sex/gender non-discrimination	✓	✓
Customary law subject to non-discrimination provision		✓
Customary law not subject to non-discrimination provision	✓	
Equality before the law provision		✓

The South African Constitution⁹¹⁴ tends to limit the application of customary law by placing some aspects of custom and traditional practice, before scrutiny of the non-discrimination provisions contained within the Bill of Rights.⁹¹⁵ To the contrary, the Zimbabwean Constitution⁹¹⁶ by way of exception makes special provision whereby some practices governing traditional social life including customary law are granted immunity from non-discrimination provisions.⁹¹⁷

In addition, the Chapter refers to both countries engagement and participation in key international and continental human rights instruments, observing how jurisprudence has emerged to embrace contemporary values of non-discrimination and equality before the law. On an international level is the Universal Declaration of Human Rights

⁹¹⁴ South African Constitution Act No. 108 of 1996.

⁹¹⁵ *Ibid* section 39.

⁹¹⁶ Constitution of Zimbabwe 1979/1600 also referred to as the Lancaster House Agreement.

⁹¹⁷ *Ibid* section 23(3).

(UDHR)⁹¹⁸ of 1948, the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁹¹⁹ and the International Covenant on Civil and Political Rights both of 1966.⁹²⁰ From a more gendered perspective, we examine the extent to which both countries have fulfilled their state obligations by ratification and adoption of treaties such as the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)⁹²¹ and the Beijing Declaration and Platform for Action (BPA)⁹²² of 1995, both key instruments towards elevating women's rights. On the African continent, we refer to the African Protocol on Women's Rights and the SADC Declaration on Gender and Development of 1997. All instruments seek to prohibit discrimination based on sex and provide for equality of men and women before the law.⁹²³

In addition, we shall refer to the reporting procedures adopted by Zimbabwe and South Africa to the CEDAW committee, together with the institutional mechanisms created in both countries thereby putting into perspective current progress made in bridging the gap between cultural rights and the dictates of human rights law.⁹²⁴ Finally, the chapter will briefly examine the problems of human rights law in a contemporary African traditional context where the rights of the community are more important than those of the individual.

⁹¹⁸ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III); see Articles 2, 7; <http://www.unhcr.org/refworld/docid/3ae6b3712c.html> (Accessed 16/01/2012).

⁹¹⁹ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, pg 3; see Articles 2(2), 3. <http://www.unhcr.org/refworld/docid/3ae6b36c0.html> (Accessed 16/01/2012).

⁹²⁰ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, pg 171; see Articles 2(1), 3, 26; <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html> (Accessed 16/01/2012).

⁹²¹ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, pg 13; Article 2(a) of the Convention requires States to embody the principle of equality of men and women in their national constitutions; <http://www.unhcr.org/refworld/docid/3ae6b3970.html> (Accessed 16/01/2012).

⁹²² Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995; <http://www.unhcr.org/refworld/docid/3dde04324.html> (Accessed 13/02/2012).

⁹²³ Banda "Women, Law and Human Rights in Southern Africa" 2006 *Journal of Southern African Studies* 20, who refers to the major international instruments as the 'international bill of rights.'

⁹²⁴ *Ibid* 16, where the author says, "in most states customary law is seen as part of the national legal system receiving constitutional recognition and protection. The difficulty that arises is in determining what to do when laws within a state are in conflict and in particular what should happen when personal laws violate principles of equality."

5.2 CONSTITUTIONAL MODELS

5.2.1 Cultural Relativism: Constitution of Zimbabwe 1980

The first resemblance of a somewhat constitution in Zimbabwe came with the advent of British policy at the period of occupation of then Rhodesia in 1889. The motive was to leave as intact as possible the laws of the conquered peoples, particularly in the realms of land law and family law.⁹²⁵ When the Royal Charter was granted in 1889, the British South African Company (BSAC) made provision for the recognition of African custom and law, in the administration of justice to the indigenous community.⁹²⁶

As a precondition to the recognition of African custom was the 'repugnancy clause', which became the fundamental tool used to test whether aspects of customary law were 'repugnant to natural law, justice or morality'.⁹²⁷ This meant that if a case regarding an aspect of marriage or family law was deemed to be against the western notions of morality, it was struck down as immoral thus elevating Western law as a yardstick for the application of customary law. Nevertheless, according to Chanock, regarding the status of women as wives or their existence in a society based on patriarchy there were not many gains in the way of women's rights and liberties.⁹²⁸ Banda contends that, there was also the selective understanding of legal norms by male colonial officers who themselves discriminated against their women by according them fewer rights than those enjoyed by men in their societies.⁹²⁹

⁹²⁵ Kazembe and Mol "Women and Development, Beyond the Decade" Conference 26 - 29 September 1985 Guelph, Ontario, Canada; www.library.yorku.ca (Accessed 12/12/2011).

⁹²⁶ Section 14 of the British Royal Charter 1889, states that careful regard was to be given to the "...customs and laws of the class or tribe or nation to which the parties respectively belong, especially with regard to the holding, possession, transfer and disposition of land and goods, testate and intestate succession, marriages, divorce, legitimacy and other rights of property and personal rights, but subject to any British laws which may be in force in any of the territories aforesaid and applicable to the people and inhabitants thereof."

⁹²⁷ May *Zimbabwean Women in Colonial and Customary law* (1983) 42.

⁹²⁸ Chanock "Neither Customary nor Legal: African Customary Law in an Era of Family Law Reform" 1989 *International Journal of Law and Family* 72, who observes that, the perceived gap in knowledge of native law was filled by a combination of selective presentation of norms by African males who, fearful of losing control over women, presented masculinist constructions thereof; see also Bhebe and Ranger *The Historical Dimensions of Democracy and Human Rights in Zimbabwe* (2001) 32.

⁹²⁹ Banda 2006 *Journal of Southern African Studies* 14.

Today, the Zimbabwean Constitution is described as a strongly relativist one.⁹³⁰ According to the relativist theory, each society, law and culture is a distinct and incomparable unit which should be understood in its own right.⁹³¹ It recognises customary law as equal to the general law. According to Renteln⁹³², cultural relativism began as a theory that questioned Eurocentric ideas of civilisation and progress, which elevated the Western socio-economic and legal systems as superior.

The initial Constitution covered race, tribe and religion but not sex as grounds for non-discrimination.⁹³³ The problem for the recognition of women's rights was therefore profound because of the absence of gender. Although the Constitution was amended in 1996 to include gender as a ground on which discrimination is forbidden, it makes an exception and shields customary law from the non-discrimination provision.⁹³⁴ Discrimination against women is now prohibited by section 23(2) of the Constitution of Zimbabwe under the Declaration of Rights.⁹³⁵

In terms of Chapter III, which contains the Declaration of Rights, every person in Zimbabwe, whatever his race, tribe, place of origin, political opinions, colour, creed or sex, gender, marital status or physical disability, is entitled to the fundamental rights of the individual, subject to respect for the rights and freedoms of others and for the public interest.⁹³⁶ The section confers substantial rights and freedoms in general terms, which are expanded in the ensuing section 23. Some of the fundamental rights of the

⁹³⁰ Hellebrunn "Women's human rights and African customary laws: Between universalism and relativism - individualism and communitarianism" 1998 *European Journal of Development Research* 94 where the writer says, "unlike the universalist position, the culture-relativist approach regards different value systems as unique and incomparable units. Unlike universalists, culture relativists deny that conflicts between values from different traditions can be settled in any reasonable way. What is reasonable is itself a product of particular cultures and societies. Overriding standards for the resolution of value conflicts do not exist. It is a position which emphasises the uniqueness of all human beings, groups and social situations."

⁹³¹ *Ibid.*

⁹³² Renteln *International Human Rights: universalism versus relativism* (1990) 63, who says, "cultural relativism was introduced in part to combat... racist, Eurocentric notions of progress."

⁹³³ Section 23(2) Zimbabwean Constitution 1979.

⁹³⁴ Constitution Amendment Act No. 14 of 1996.

⁹³⁵ See also Constitution Amendment Act No. 5 of 2005.

⁹³⁶ *Ibid* Chapter III sections 11 – 23.

individual are set out as those relating to life⁹³⁷, liberty⁹³⁸, security of the person and protection of the law⁹³⁹, protection from inhuman treatment⁹⁴⁰ and protection from deprivation of property.⁹⁴¹

Section 23(1)(a) forbids any provision that is “discriminatory either of itself or in its effect”, while section 23(1)(b) provides that no person shall be treated in a discriminatory manner. Unlike the first Constitution, the Amendment in terms of section 23, outlaws discrimination on the basis of gender, and yet in the same section allows it in matters governed by customary law.

It reads as follows, “Subject to the provisions of this section;

(a) no law shall make any provision that is discriminatory either of itself or in its effect and;

(2) for the purposes of subsection (1), a law shall be regarded as making a provision that is discriminatory and a person shall be regarded as having been treated in a discriminatory manner if, as a result of that law or treatment, persons of a particular description by race, tribe, place of origin, political opinions, colour, creed or gender are prejudiced

(a) by being subjected to a condition, restriction or disability to which other persons of another such description are not made subject; or

(b) by the according to persons of another such description of a privilege or advantage which is not accorded to persons of the first-mentioned description; and the imposition of that condition, restriction or disability or the according of that privilege or advantage is wholly or mainly attributable to the description by race, tribe, place of origin, political opinions, colour, creed or gender of the persons concerned.”

However in terms of subsection (3); “...nothing contained in any law shall be held to be in contravention of subsection (1)(a) to the extent that the law in question relates to any of the following matters;

⁹³⁷ *Ibid* section 12.

⁹³⁸ *Ibid* section 13.

⁹³⁹ *Ibid* section 18.

⁹⁴⁰ *Ibid* section 15.

⁹⁴¹ *Ibid* section 16.

(a) adoption, **marriage**, divorce, burial, devolution of property on death or other matters of personal law;

(b) the application of African customary law in any case involving Africans or an African and one or more persons who are not Africans where such persons have consented to the application of African customary law in that case."⁹⁴²

The inclusion of sex, gender, marital status, and physical disability to the prohibited grounds for discrimination broadens the protection of women against discrimination. This is enhanced by the introduction of affirmative action under section 23(3)(g), which is designed to advance the rights of any class of persons who have been previously disadvantaged by unfair discrimination including women.

Section 23 has been a source of conflict and controversy and women have called for its removal from the Constitution as it compromises their roles as partners in marriage. The tentative conclusion is that currently the Constitution permits the elevation of customary law over constitutional rights. These are the very areas that are the source of women's suffering and oppression in Zimbabwe.

Sedler⁹⁴³, writing on the United States of America submits that, "there is no justification for sex based discrimination in law except to serve the notions of male supremacy. Sex based distinctions, like racial ones which are designed to maintain white supremacy, should be declared inherently invidious and insupportable except upon a showing of a compelling governmental justification which, as a practical matter, means no at all."

The Zimbabwean government has however shown commitment to facilitate the implementation of a human rights dialogue in the country by making provision for the establishment of the Zimbabwe Human Rights Commission (ZHRC). The recent Constitutional amendment in 2009⁹⁴⁴, gives the Commission a mandate to investigate the conduct of any authority or person implicated in the violation of any of the rights

⁹⁴² *Ibid* section 23(1) and (2).

⁹⁴³ Sedler "The legal dimensions of women's liberation: an overview" 1972 *Indiana Law Journal* 420.

⁹⁴⁴ Constitution of Zimbabwe Amendment Act No. 1 of 2009.

enshrined in the Declaration of Rights under the Constitution.⁹⁴⁵ The Commission will have the advantage of giving anyone including prejudiced women a channel to find recourse in terms of the law. In addition, it provides a tool to investigate cases of discrimination against women at all levels of society.

However, at this point the Zimbabwe Human Rights Commission Bill of 2011, which makes way for the establishment of the Commission, is still before parliament.⁹⁴⁶ In furtherance of the human rights dialogue, the Constitution in terms of section 108 establishes the office of the Public Protector. In terms of the section, “....the Public Protector may investigate action taken by any officer, person or authority....in the exercise of the administrative functions of that officer, person or authority in any case where it is alleged that a person has suffered injustice in consequence of that action and it does not appear that there is any remedy reasonably available by way of proceedings in a court or on appeal from a court.”

The Constitution also enshrines the right for women to be treated equally to men in the distribution of communal land. In terms of section 23(3)(a);^{ee}

“Notwithstanding subsection (3)(b), in implementing any programme of land reform the Government shall treat men and women on an equal basis with respect to the allocation or distribution of land, any rights or interests therein under that programme.”

As subsection (3)(b) of section 23 protects the application of customary law, section 23(3)(a) abolishes the distinction of women on the basis of the laws to which they

⁹⁴⁵ Section 100R(5)(e) (5) The Zimbabwe Human Rights Commission shall have the following Functions;

- (a) to promote awareness of and respect for human rights and freedoms at all Levels of society;
- (b) to promote the development of human rights and freedoms;
- (c) to monitor and assess the observance of human rights in Zimbabwe;
- (d) to recommend to Parliament effective measures to promote human rights And freedoms;
- (e) to investigate the conduct of any authority or person, where it is alleged That any of the rights in the Declaration of Rights has been violated by That authority or person;

⁹⁴⁶ The Bill was gazetted Friday 10th of June 2011 to make provision for the powers and operation of the ZHRC.

subscribe. All women are therefore entitled to land on an equal basis with men. This provision will also ensure access to land regardless of marital status when read together with section 23(2), which prohibits discrimination on the ground of marital status.

There continues to be controversy around section 23(3) of the Zimbabwean Constitution, which allows for discrimination based on customary laws regarding issues of adoption, marriage, divorce, burial, and distribution of property on death or matters of personal law. The continued existence of customary law alongside common law has perpetuated women's disadvantaged position in Zimbabwe.⁹⁴⁷ The retention of section 23(3) raises the concern that discrimination on matters of personal law and customary law poses an obstacle to the unequivocal enjoyment of human rights by women.

Another obstacle arises from the fact that 111B of the Constitution of Zimbabwe determines that international instruments do not have the force of law until they have been domesticated by an Act of Parliament. As such, they do not have authoritative force in judicial decisions, only persuasive force. The recognition and upliftment of fundamental women's rights is therefore largely left to the discretion of the judges and the practice of judicial creativity. The government in its report to the United Nations Committee on the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), committed itself to repeal all legal provisions that perpetuate discrimination against women and in the process, take a gradual approach on the matter to avoid societal resistance.⁹⁴⁸

5.2.1.1 Women's Rights under the Constitution: An Overview of Jurisprudence in Zimbabwe

The Zimbabwean Courts have handed down decisions where the determination of cultural rights has been viewed in the context of the right to equality between men and

⁹⁴⁷ Zimbabwe Progress Report On The Implementation Of The Platform For Action 1995-2003 pg25, <http://www.un.org/womenwatch/daw/Review/responses/ZIMBABWE-English.pdf> (Accessed 12/01/2012).

⁹⁴⁸ Combined Report of the Republic of Zimbabwe in terms of the Convention on the Elimination of all forms of Discrimination Against Women 2009 pg 5; <http://www2.ohchr.org/english/bodies/cedaw/docs/Zimbabwe.pdf> (Accessed 12/01/2012).

women. Some decisions have negatively impacted on the rights of girl children and widows to inherit property. In the case of *Magaya v Magaya*⁹⁴⁹ when a certain Shonhiwa Magaya died intestate, a local court in Zimbabwe designated his eldest female child, Venia Magaya, heir to his estate. On appeal, Miss Magaya's younger half-brother claimed heirship on the ground that according to African customary law, a female cannot be appointed as an heir to her father's estate when there is an eligible male in the line of succession. An appellate Judge overruled the decision of the court a quo and Miss Magaya's heirship was reversed.

The newly appointed heir took his position as head of household, removed Miss Magaya from her family home, and placed her in a shack in the neighbor's backyard. Upon further appeal, the Supreme Court of Zimbabwe upheld the appellate decision, stating that, despite constitutional protections against discrimination, the fact that this case arose under customary law exempted its discriminatory aspects from court scrutiny. The court explained that the Constitution permits this type of discrimination against women as within "the nature of African society."⁹⁵⁰

The judiciary backed up its decision by referring to section 23 of the Constitution of Zimbabwe. The court held that the Constitution prohibits discrimination in subsection (1) but in subsection (3) recognizes exceptions to this general prohibition against discrimination in issues relating to among others: (a) adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; (b) the application of African customary law. Essentially, by passing this judgement, the Supreme Court elevated customary law beyond constitutional scrutiny.⁹⁵¹

⁹⁴⁹ 1999 (1) ZLR 100 (S), another issue was raised that denying women inheritance rights was contrary to the Legal Age of Majority Act which in terms of section 3, gave all women majority status and legal capacity upon attaining 18 years of age. In terms of section 3(3), sub-section (1) the Act should "apply for the purpose of any law, including customary law."

⁹⁵⁰ *Ibid.*

⁹⁵¹ Valerie "Zimbabwe's Magaya Decision Revisited: Women's Rights And Land Succession In The International Context" 2006 *Columbia Journal of Gender and Law* 1ff.

http://jurisafrika.org/docs/articles/Valerie_on_Issues_of_Gender.pdf (Accessed 21/11/2011), the *Columbia Journal of Gender and Law* is a journal for scholarship on the interaction between gender and law. The Journal fosters dialogue, debate, and awareness about gender-related issues and feminist

Under the Zimbabwean Constitution and international human rights treaties, the female child had a right to the land. However, the court ruled unanimously that women should not be able to inherit land because of the consideration in the African society which, amongst other factors, was to the effect that women were not able to look after their original family (of birth) because of their commitment to the new family through marriage. In the *Magaya* decision the five judges of the Supreme Court undeniably weakened the status of African women in Zimbabwe.⁹⁵²

The *Magaya* decision was a reflection of the position adopted in the case of *Seva and Others v Dzuda*.⁹⁵³ The inheritor-son then sold the property with the home, and the buyer evicted the deceased's family. The family then sued to try to retain possession of the home by stating that, under customary law, the eldest son is to inherit the property for the purpose of caring for the rest of the family as the patriarch.

The court ruled that under Zimbabwean law, the customary heir had the right to inherit the property personally, and not as any sort of trust. Therefore, the son could dispose of the property any way he chose, and the buyer had every right to evict the family. This decision was counter to former decisions regarding the heir's responsibility to his family and indicated a reliance on the general law of personal property, not formerly applied to customary inheritance.

The issue of women's right to inherit also arose in another Supreme Court decision in *Chihowa v Mangwende*.⁹⁵⁴ In this case the deceased was survived by his wife, two

scholarship. The journal quotes Justice Ruth Bader Ginsburg's introduction from their first issue, that, the Columbia Journal of Gender and Law seeks to "portray today's feminist movement, not as unitary, rigid or doctrinaire, but as a spacious home, with rooms enough to accommodate all who have the imagination and determination to work for the full realization of human potential."; <http://www.columbia.edu/cu/jgl/about.html> (Accessed 20/11/2011).

⁹⁵² Quansah "The Status of Women in Zimbabwe: *Veneria Magaya v Nakayi Shonhiwa Magaya* (SC 210/98)" 1999 *Journal of African Law* 248, where it is mentioned that, "...Zimbabwe has chosen to regress into the dark ages as far as women's rights are concerned."

⁹⁵³ 1991 (2) ZLR 34 (S), the Court ruled that the eldest son, the heir under customary law, had an absolute right to personal inheritance of property even if the rest of the family was left with little or no familial property.

⁹⁵⁴ 1987 (1) ZLR 228, Dumbutshena CJ, isquoted saying, "the indications are that Parliament's intention was to create equal status between men and women, and, more importantly, to remove the legal

daughters, his father and four brothers. The Community Court had appointed the elder daughter (the respondent) to the heirship. The father (the appellant) appealed to the Supreme Court and the appeal was dismissed. The court relied on the Legal Age of Majority Act⁹⁵⁵ (LAMA), pointing out that, there was nothing in section 3, which remotely suggests that for purposes of inheritance a woman can still be regarded as a minor. Dumbutshena CJ said, "there is no indication of a contrary intention other than that enshrined in the Act and it is my opinion that there is nothing now in any enactment or at customary law which prohibits a woman from being appointed an intestate heiress."

Unsurprisingly, the appellant in *Magaya* relied heavily on *Chihowa* and on the former Chief Justice's interpretation of the LAMA. However, the Court unanimously rejected that interpretation and held the *Chihowa* case was wrongly decided. From a human rights point of view, the reasoning that women cannot be considered equal to men before the law, because of the nature of African cultural societal norms, violates several international human rights treaties to which Zimbabwe is a party. Whilst the landmark cases such as the *Chihowa* case upheld women's rights at customary law, *Magaya* went against these gains.⁹⁵⁶ This is not to say certain aspects of customary do not work for women. It has been observed that the doctrine of legal pluralism provides a leeway

disabilities suffered by African women because of the application of customary law. This view is not only common sense; it is supported by the clear and unambiguous language used in section 3." See also the case of *Lopez v Nxumalo* SC 115/85 (1985) (unreported), the Supreme Court allowed a married African woman to sue for damages in respect of her minor daughter. It seems clear that this decision is implicitly overruled by *Magaya*.

⁹⁵⁵ Act No. 15 of 1982.

⁹⁵⁶ Muchechetere JA in *Magaya's* case held that, the interpretation of the Legal Age of Majority Act adopted in cases such as *Chihowa* stemmed from a serious misunderstanding of the position of women in African society and further that, "...any 'disability' or 'discrimination' that women were subjected to under customary law stemmed not from their status of 'perpetual minority' (itself a Western concept): but from the nature of African society in which individual interests were subordinated to the common weal and in which a patriarch or senior man controlled the lives and property of all family members, both male and female. The reason why men were preferred as heirs was not because women were 'perpetual minors': but because on marriage women would leave the family of their birth and join their husband's family. The Legal Age of Majority Act was designed 'to remove disabilities rather than to confer rights' and it was therefore irrelevant in the present context."

for situational adjustment and therefore can be manipulated in favour of women's rights in Africa.⁹⁵⁷

5.2.2 Universalism: Constitution of the Republic of South African Constitution⁹⁵⁸

This section will put into context the existence of customary law including customary marriages within the broader undertaking towards democracy and constitutional transformation in South Africa since independence in 1994. According to Bronstein, this definitive shift incorporated a rather mild commitment of recognising the laws and institutions of indigenous communities within the national legal framework, while embarking on a purposive and modernist project of constitutionalism and human rights.⁹⁵⁹ The European legal tradition, embodied in British and Roman-Dutch legal principles, processes, and institutions, has long been the basis of the South African legal system, with customary African law serving as the 'stepchild' of the national legal framework.⁹⁶⁰ Nevertheless, the Constitution adopted in 1996, reflects a compromise that brings indigenous law into the national legal framework.

The South African Constitution is described as a 'universalist' type of constitution. It recognises customary law⁹⁶¹ but makes it subject to the non-discriminatory provisions in the Bill of Rights, which prohibit any discrimination on grounds of age or gender among others.⁹⁶² The universalist theory gives precedence to similarities between human beings, groups and situations regardless of their different social and cultural contexts.

⁹⁵⁷ Hellum and Stewart *Women's human rights and legal pluralism in Africa: mixed norms and identities in infertility management in Zimbabwe* (1999) 331.

⁹⁵⁸ Act No. 108 of 1996.

⁹⁵⁹ Bronstein "Reconceptualising the Customary Law Debate in South Africa" 1998 *South African Journal on Human Rights* 388, discussing the balance of cultural rights and equality within the South African Constitution.

⁹⁶⁰ Visser "Cultural Forces in the Making of Mixed Legal Systems" 2003 *Tulane Law Review* 74, where the writer is quoted saying, customary law has always been treated as a stepchild in the South African legal order and this has obviously disadvantaged the many people who substantively live in accordance with autochthonous law for certain or all purposes; see also Rautenbach "South African Common and Customary Law of Intestate Succession: A Question of Harmonisation, Integration or Abolition" 2008 *Electronic Journal of Comparative Law* 2, who says, "there has never been parity between the transplanted laws and the indigenous laws";

[Http://www.ejcl.org/121/art121-20.pdf](http://www.ejcl.org/121/art121-20.pdf) (Accessed 14/01/2012).

⁹⁶¹ South African Constitution section 211(3).

⁹⁶² *Ibid* section 8.

Those behind the theory are of the view that international human rights like gender equality, self-determination and freedom apply universally.

The South African Constitution embodies a clear commitment to gender equality. The founding provisions emphasise the values that underpin South Africa's democracy, including the principles of non-racialism and non-sexism.⁹⁶³ Equality is therefore the primary value. In similar fashion to the Declaration of Rights under Chapter III of the Zimbabwean Constitution, the Bill of Rights in South Africa contains a general commitment to equality before the law.⁹⁶⁴ It provides for equal protection of the law⁹⁶⁵, declaring that, "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."⁹⁶⁶ Moreover, in consonance with its values, the Constitution outlaws discrimination based on sexual orientation, making it the only constitution in the world to award such explicit recognition by upholding the rights of same-sex couples to marry.⁹⁶⁷

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In addition to the gender equality provisions in the Bill of Rights, the Constitution also provides for the recognition and protection of customary laws and institutions for example, Chapter 12 making provision for the recognition of, and role of traditional leaders.⁹⁶⁸ Provision is made that, "the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with

⁹⁶³ *Ibid* section 3(2), which states that, "All citizens are equally entitled to the rights, privileges and benefits of citizenship; and equally subject to the duties and responsibilities of citizenship."

⁹⁶⁴ *Ibid* section 8(1) "The Bill of Rights applies to all law and binds the legislature, the executive, and the judiciary, and all organs of state."

⁹⁶⁵ *Ibid* section 9(1), "Everyone is equal before the law and has the right to equal protection and benefit of the law."

⁹⁶⁶ *Ibid* section 9(3).

⁹⁶⁷ One may argue that the recognition of same-sex marriages epitomizes the liberal nature of the South African Constitution, in this regard, also see further in the case of *Fourie and Another v Minister of Home Affairs and Another* 2005 3 (BCLR) 241 SCA, for a discussion of the potential difficulties that could arise if a same-sex couple tried to live together as spouses.

⁹⁶⁸ In the case of *Mabuza v Mbatha* (2003) 1 All SA 706 (C) para 32, the court held that the test for the validity of indigenous law is no longer consistency with public policy and natural justice, but consistency with the Constitution. It is not necessary to express any opinion on the correctness of that decision.

customary law.”⁹⁶⁹ This section suggests that the principle of equality will supersede any aspect of traditional law that violates that principle.⁹⁷⁰

It is already apparent that the application of customary law does not go without limitation. Section 30 of the Bill of Rights states that “everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.”⁹⁷¹ Furthermore, section 31 holds that all persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of the community to enjoy their culture, practice their religion and use their language, and form, join, maintain cultural, religious and linguistic associations and other organs of civil society.⁹⁷² In addition, the Bill of Rights provides for legislation that recognises marriages concluded under any tradition, or a system of religious, personal, or family law; or systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.⁹⁷³ No rights however, may be exercised in a manner inconsistent with the principle of equality.

⁹⁶⁹ South African Constitution section 211(3); see also the case of *Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC) para 51, where it was held that, “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 courts are obliged by section 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law. In doing so, the courts must have regard to the spirit, purport and objects of the Bill of Rights. Our Constitution, “...does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill of Rights.”

⁹⁷⁰ Bennett “The Equality Clause and Customary Law” 1994 *South African Journal on Human Rights* 122 - 123, where the scholar makes an analysis of the state of affairs by saying, “...customary law falls under the shadow of a bill of rights which was given pride of place in the Constitution in particular under the shadow of a gender equality clause” and also that “..by implicitly recognising customary law, and at the same time prohibiting gender discrimination, the Constitution has brought about a head-on confrontation between two opposing cultures admittedly a confrontation that has long been gathering force. Because African culture is pervaded by the principle of patriarchy the gender equality clause now threatens a thoroughgoing purge of customary law.”

⁹⁷¹ South African Constitution section 30.

⁹⁷² *Ibid* section 31.

⁹⁷³ *Ibid* section 15(3)(a).

This delicately tuned constitutional compromise occurred against a history of several decades of global human rights debates on women's right to equality, on the one hand, and the respect for cultural values and traditions on the other. According to Howard, this scenario is loosely termed the 'universalism versus cultural relativism' debate, which is primarily characterised by an apparent inconsistency between two liberatory discourses, namely feminism and national liberation, the latter incorporating the principle of self-determination for indigenous peoples.⁹⁷⁴

The South African Constitution has made significant headway in establishing key institutional arrangements that entrench its values and vision. This is evident with the creation of what are termed Chapter 9 institutions which are strategic arrangements promoting gender parity, equity, and empowerment of women.⁹⁷⁵ At the top of the hierarchy is the South African Human Rights Commission, a body mandated to promote and protect human rights in general.⁹⁷⁶ The Constitution also establishes the Commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Communities⁹⁷⁷ and encourages its composition be gender balanced.

From a more gendered perspective, and in an effort to elevate the rights of women, the State has created an enabling environment, and adopted a National Policy Framework for Women's Empowerment and Gender Equality.⁹⁷⁸ The most prominent is the

⁹⁷⁴ Howard *Human Rights and the Search for Community* (1995) 51, who criticises cultural relativism for the reason that it places men in a position of privilege at the expense of the rights of women.

⁹⁷⁵ See in this regard a report by the Commission for Gender Equality on South Africa's Compliance with the Beijing Declaration and Platform for Action March 2010;

[Http://www.pmg.org.za/files/docs/100721bpfa.pdf](http://www.pmg.org.za/files/docs/100721bpfa.pdf) (Accessed 10/01/2012).

⁹⁷⁶ South African Constitution section 184, in terms of section 184(1), The South African Human Rights Commission must, (a) promote respect for human rights and a culture of human rights; (b) promote the protection, development and attainment of human rights; and (c) monitor and assess the observance of human rights in the Republic.

⁹⁷⁷ *Ibid* section 185.

⁹⁷⁸ South Africa's National Policy Framework for Women's Empowerment and Gender Equality; this Gender Policy Framework outlines South Africa's vision for gender equality and for how it intends to realise this ideal. It also outlines among its other principles and guidelines, that women's rights be seen as human rights and that customary, cultural and religious practices be subject to the right to equality; [Http://www.info.gov.za/otherdocs/2000/gender.pdf](http://www.info.gov.za/otherdocs/2000/gender.pdf) (Accessed 20/01/2012).

establishment of a Commission for Gender Equality (CGE)⁹⁷⁹ in terms of section 181 of the Constitution, a body empowered to promote, educate, monitor, and lobby for gender equality. There is also a Joint Monitoring Committee (JMC) on the Improvement of the Quality of Life and Status of Women, which is essentially a national parliamentary committee, within the country's gender machinery. The Committee must monitor and evaluate progress with regard to the improvement of the quality of life and status of women in South Africa.

5.2.2.1 Women's Rights under the Constitution: An Overview of Jurisprudence in South Africa

In addition to the substantive rights promised in the Bill of Rights, the interpretation of these rights by courts, tribunals, and forums must conform to the Constitution's underlying ideals. The South African Constitution provides that, "when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport, and objects of the Bill of Rights."⁹⁸⁰ Courts must consider international law and may consider foreign law.⁹⁸¹

Proponents of feminist ideology together with legal scholars have also influenced landmark decisions around equality, calling for a more substantive, as opposed to formal equality.⁹⁸² South Africa was therefore also in a unique position, as the last decolonised African country to benefit not just from fifty years of global human rights activism, but also from the lessons learned from other independent African countries.⁹⁸³

⁹⁷⁹ South African Constitution section 187, which outlines the function of the Commission; 187(1), the Commission "must promote respect for gender equality and the protection, development and attainment of gender equality"; 187(2) gives the Commission power "monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality."

⁹⁸⁰ South African Constitution section 39(2).

⁹⁸¹ *Ibid* section 39(1)(b) - (c).

⁹⁸² See in this regard Kaganas F and Murray C "Law and Women's Rights in South Africa: An Overview" in Murray *Gender and the New South African Legal Order* (1994) 14 – 15.

⁹⁸³ Klug *Constituting democracy: law, globalism and South Africa's political reconstruction* (2000) 70, where the writer mentions the role of major players including the international community in South Africa's political transformation.

As the constitutional dialogue took place in South Africa, with the Constitutional Court developing landmark decisions by defining the concept of equality in the context of women's rights, it became more apparent that women on the continent remained under a generally subordinated legal status. Since 1995, the Constitutional Court has had occasion to decide a considerable number of equality cases, several involving gender equality claims.⁹⁸⁴ These cases are a testimony of how the Court has sought to define principles of equality by contextualising disadvantages and incidences of discrimination within the realities of contemporary South African society.

On the issue of minority and the ability of young girls to marry, in the case of *R v Sita*⁹⁸⁵, it was held that *ukuthwala*⁹⁸⁶ is no defence to a charge of abduction. The Commission for Gender Equality (CGE) reiterates the position that, abduction and rape of women and girls coerced into *ukuthwala* should be dealt with in terms of criminal law by the South African Police Service and the courts.⁹⁸⁷ The practice has been labelled as both unconstitutional and unlawful in that it violates the right to dignity, the right to education, the right to freedom and security of the person as well as not being in the best interests of the child.⁹⁸⁸ It is unlawful in that it violates the Children's Act, the Sexual Offences

⁹⁸⁴ In the case of *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC) 745 - 746, it was found that a statutory provision allowing the president to commute sentences of mothers with small children, but not fathers in similar predicaments, constituted gender discrimination; see also *Brink v Kitshoff* 1996 (6) BCLR 752 (CC) 772 - 73, striking down a statute which deprived some married women of the right to insurance benefits ceded to them by their husbands; in similar regard is the Zimbabwean case of *Chawanda v Zimnat Insurance* 1991 (2) SA 825.

⁹⁸⁵ 1954 4 SA 20 (E).

⁹⁸⁶ *Ukuthwala* is an Nguni cultural practice whereby an intending bridegroom, together with one or two friends, would waylay a desired bride in the neighbourhood of her own home, and forcibly take her to the young man's home, thereby pre-empting marriage negotiations.

⁹⁸⁷ South Africa's Report by the Commission for Gender Equality on South Africa's Compliance with the Beijing Declaration and Platform for Action March 2010 *op cit* 28; the Report mentions that the This unlawful practise disguised as a custom should be stamped out and perpetrators must be prosecuted accordingly. The CGE does not support the abuse and exploitation of women and girls and is therefore against such "customary" practises; <http://www.pmg.org.za/files/docs/100721bpfa.pdf> (Accessed 10/01/2012).

⁹⁸⁸ Ntlokwana N "Constitutional obligation to have cultural tolerance."

[Http://www.polity.org.za/article/constitutional-obligation-to-have-cultural-tolerance-2010-01-18](http://www.polity.org.za/article/constitutional-obligation-to-have-cultural-tolerance-2010-01-18) (Accessed 21/01/2012).

Amendment Act, and the Recognition of Customary Marriages Act⁹⁸⁹ (RCMA), all of which require consent before a child's bodily integrity can be violated.⁹⁹⁰

The CGE reports that there has been a resurgence of a phenomenon in South Africa where young girls are abducted and married off to older men under the pretext of a traditional practice called 'ukuthwala'. The practice is prevalent in the Eastern Cape and KwaZulu Natal Provinces of South Africa. The Commission contends that efforts are being undertaken to deal with the problem, which deprives girls of their rights and freedoms to lead progressive lives.⁹⁹¹

Controversy has emerged pertaining to the question whether *ukuthwala* as a way of contracting a valid customary law marriage amounts to a violation of the rights of young girls. In terms of the custom, the prospective bridegroom, with the aid of his friends, intercept the prospective bride in the not so far vicinity of her own homestead towards sunset and "forcibly" take her to the young man's home. At times, the girl is caught unawares, but in many instances, she is "caught" according to plan and agreement.⁹⁹²

On the other hand, at common law, the crime of abduction has been defined as the unlawful removal of a minor out of the control of her guardian with the intention of

⁹⁸⁹ Section 3(1)(a) of the RCMA sets out the requirements for the validity of a customary marriage, including a requirement that the parties to a customary marriage may not be minors and that the parties consent to the customary marriage.

⁹⁹⁰ See also the case of *Justice Alliance South Africa and Other v Yamani and Others* Case No. 1/2008, where a settlement was reached by the Congress of Traditional Leaders of South Africa (CONTRALESA) in the Equality Court (Eastern Cape) regarding initiation ceremonies for young Xhosa men, and how the custom violates provisions of the Bill of Rights. The background to the challenge in the Equality Court was that a young man believed that his conscience and Christian beliefs did not allow him to undergo the traditional Xhosa rite. Notwithstanding these beliefs, he was abducted from his home, taken to the bush and subjected to traditional circumcision by his father and some community leaders. As a result, he laid a charge of unfair discrimination on the grounds of his religious beliefs. In his application, he argued that he suffered harassment and had his human dignity seriously undermined.

⁹⁹¹ South Africa's Report on Compliance with the Beijing Declaration and Platform for Action March 2010 pg 28, the report correctly states that the Equality Act of 2000 was promulgated to ensure the protection against practices that infringe on the rights of women and girls, such as the right to life, health, dignity, education, and physical integrity. In reality, the situation is far more severe and the provisions of the Equality Act fail to render protection to women and girls when faced with forced marriages to much older men, abduction, and rape, as is the case in the cultural practice of *ukuthwala*; <http://www.pmg.org.za/files/docs/100721bpfa.pdf> (Accessed 10/01/2012).

⁹⁹² Koyana and Bekker "The Indomitable *Ukuthwala* Custom" 2007 *De Jure* 139.

violating the guardian's *potestas* and of enabling somebody to marry her or have sexual intercourse with her.⁹⁹³ It becomes apparent that the customary law practice of *ukuthwala* does not resemble the common law crime of abduction.⁹⁹⁴ Olivier⁹⁹⁵ contends that *ukuthwala* does not constitute abduction.

The Constitutional Court has however handed down some judgments that have been criticised for compromising the rights of women in the sphere of succession. Before 2004, in South Africa's legal scenario, under customary law, only males in the deceased's family were able to inherit. This can be exemplified by an analysis of the case of *Mthembu v Letsela and Another*⁹⁹⁶ where the application of the Bill of Rights was considered by the Pretoria high court. In this 1997 case, the rule of male primogeniture⁹⁹⁷ was upheld and the court found that females suffer no discrimination, that is, no prejudice, because although they do not inherit property, they are entitled to maintenance out of the deceased's estate.

The case involved the succession to the whole of the estate of a deceased who died intestate. The respondent, who was father of the deceased, opposed an application by the widow to succeed to the estate. The applicant sought to have the provisions of section 23(2) of the Black Administration Act⁹⁹⁸ regulating succession nullified on the basis that they were inconsistent with the provisions of section 8 of the Bill of Rights because the system of primogeniture discriminated on the grounds of sex or gender. The respondent based his claim to succeed to the estate on the primogeniture rule as

⁹⁹³ See the case of *S v Killian* 1977 (2) SA 31 (C), see further in *S v L* 1981 1 SA 499 (BSC) 502, where the abduction of a 15 year old girl was followed by intercourse. In this case the court noted that "convictions" for abduction are becoming increasingly rare due to more permissive standards in society."

⁹⁹⁴ Koyana and Bekker *op cit* 142, where the writers expand and say, "(a) *ukuthwala* is perceived as lawful in the society that designed it; there is no *ukuthwala* of males yet abduction relates to males and females; and whilst one of the purposes of abduction is to have intercourse, the contrary is the position with *ukuthwala* – here the aim is to negotiate a marriage."

⁹⁹⁵ Olivier and Joubert *Indigenous Law* (1995) 123.

⁹⁹⁶ 1997 (2) SA 936 (T), the court gave judgment in favour of the respondent, the deceased's father, on the basis that everyone has the right to participate in the cultural life of his choice in terms of section 30 of the Constitution. Therefore, the customary law rule of male primogeniture system was upheld. See also the Zimbabwean cases of *Magaya v Magaya* and *Seva and Others v Dzuda supra*.

⁹⁹⁷ The primogeniture system provides that only male relatives of the deceased in the direct line, that is son, father, grandfather, may succeed as heirs to the estate.

⁹⁹⁸ Black Administration Act No. 38 of 1927.

well as on section 30 of the Bill of Rights, which provides that everyone has the right to participate in the cultural life of his choice.

The court held that, "...in view of the manifest acknowledgement of customary law as a legal system existing parallel to the common law by the Constitution in terms of section 33(3) and section 181(1), together with the freedom granted to persons to choose this system as governing their relationships as implied by section 31, it cannot be accepted that the succession rule is necessarily in conflict with section 8."⁹⁹⁹ The judge went to say that, "there are instances where a rule differentiates between men and women, but which no right-minded person considers being unfairly discriminatory, for example the provision of separate toilet facilities."

More convincingly it was mentioned that, "A widow in particular may remain at the deceased's homestead and continue to use the estate property and the heir may not eject her at whim. Le Roux J was of the view that, if it is accepted that the duty to provide sustenance, maintenance and shelter is a necessary corollary of the system of primogeniture, it is difficult to equate this form of differentiation between men and women with the concept of 'unfair discrimination' as used in section 8 of the constitution."¹⁰⁰⁰ It follows that in terms of this system of succession, whether or not the female is the deceased's legitimate child, being female, she does not qualify as heir to the deceased's estate. Women generally do not inherit in customary law.¹⁰⁰¹

In terms of the male primogeniture rule, according to writers such as Bennett¹⁰⁰², Bekker¹⁰⁰³ and Kerr¹⁰⁰⁴, in monogamous families, provides that the eldest son of the

⁹⁹⁹ Section 8 South African Constitution.

¹⁰⁰⁰ This is consonance with the *dicta* in the Zimbabwean case of *Magaya* where the court ruled unanimously that women should not be able to inherit land because of the consideration in the African society which, amongst other factors, was to the effect that women were not able to look after their original family (of birth) because of their commitment to the new family through marriage. Muchechetere J went on to say, "Any 'disability' or 'discrimination' that women were subjected to under customary law stemmed not from their status of 'perpetual minority' (itself a Western concept): but from the nature of African society in which individual interests were subordinated to the common weal and in which a patriarch or senior man controlled the lives and property of all family members, both male and female."

¹⁰⁰¹ Bennett and Peart *A sourcebook of African customary law for Southern Africa* (1991) 400.

¹⁰⁰² *Ibid.*

¹⁰⁰³ Bekker *Seymour's Customary Law in Southern Africa* 5ed (1989) 274.

family head is his heir, failing him the eldest son's eldest male descendant. Where the eldest son has predeceased the family head without leaving male issue the second son becomes heir; if he be dead leaving no male issue the third son succeeds and so on through the sons of the family head. Where the family head dies leaving no male issue his father succeeds.

In an ensuing similar case in 1998, the case of *Mthembu v Letsela and Another*¹⁰⁰⁵, the rule of male primogeniture was also upheld. The applicant in this case had entered into an invalid customary union with the deceased because the full amount of *lobola* had not been paid to the woman's family. This is an essential feature of a valid customary union. A girl child had been born out of the incomplete marriage and therefore the child apart from being female was illegitimate. The deceased's father was the sole heir in this regard and appeared as the respondent.

The court held that the disqualification of the applicant's daughter to inherit from her deceased father flowed from her status as an illegitimate child and not from the fact that she was a girl and that the system of primogeniture was applied in customary law. Therefore, there could have been no talk of unfair discrimination on the grounds of gender in present case and it followed that the value of equality had not been infringed. Moreover, the applicant's daughter was not deprived of her right to support from her guardian.

The court was also reluctant in declaring the customary law rule of succession invalid. The reasoning was that, if the court declared the rule invalid because it offended public policy, it would be applying western norms to a rule of customary law which was still adhered to and applied by many African people. Since such a declaration would also

¹⁰⁰⁴ Kerr *The Customary Law of Immovable Property and of Succession* (1990) 99.

¹⁰⁰⁵ 1998 (2) SA 675.

have affected the customary family law rules, neither public policy nor the interim Constitution required the Court to have done that.¹⁰⁰⁶

Come the year 2004, jurisprudence began to declare that the position in the *Mthembu* cases went against the Constitution and must change. At the forefront were the cases of *Bhe and Others v The Magistrate, Khayelitsha and Others*, *Shibi v Sithole and Others* and *South African Human Rights Commission and Another v President of The Republic of South Africa*.¹⁰⁰⁷ The *Bhe* case concerned two girls, aged nine and two who challenged the rule that in the absence of a will stipulating that the girls inherit their deceased father's estate, they could not inherit the property on the grounds that they were female. The estate in question was the girls' home in Cape Town's township of Khayelitsha where the girls had been living with their parents until their father died. Since their parents were never married, even though they had been cohabiting for twelve years, the mother had no legal claims to the house. Under African customary law, the house was therefore deemed the property of the heir or the eldest male relative of the deceased's children. The house thus fell to the deceased's father, who planned to sell it.

The constitutionality of two Acts was put into question, namely the section 23 of the Black Administration Act¹⁰⁰⁸ and section 1(4) (b) of the Intestate Succession Act¹⁰⁰⁹. The latter Act excludes Black persons living under customary law from succession. Therefore, in the *Bhe* case female children are excluded as the parents were living under customary law. This will also apply to males other than the first born in other

¹⁰⁰⁶ See also *Mthembu v Letsela* 2000 (3) SA 861 (SCA), where it was confirmed that female children cannot inherit, in this case the illegitimate daughter was excluded from inheriting on the basis of her illegitimacy and not gender.

¹⁰⁰⁷ 2005 (1) BCLR 1 (CC), 2005 (1) SA 580 (CC), The third case was brought jointly by the South African Human Rights Commission and the Women's Legal Centre Trust in the public interest and as a class action on behalf of all women and children prevented from inheriting by reason of the impugned provisions and the rule of male primogeniture.

¹⁰⁰⁸ Section 23 of the Black Administration Act of 1927, provides that estates of blacks in customary law devolve on eldest male son failing him, his own eldest son (grandson of deceased) to the exclusion of all other children. In the *Bhe* case as the deceased did not have any male children the estate devolved upon his father.

¹⁰⁰⁹ Intestate Succession Act No. 81 of 1987 section 1(4)(b) prescribes how the estate of a person who, after the commencement of the said Act, dies intestate, either wholly or in part, shall devolve, "intestate estate" includes any part of an estate which does not devolve by virtue of a will or in respect of which section 23 of the Black Administration Act does not apply.

circumstances. The Court stated that section 23 was correctly described as a racist provision that is fundamentally incompatible with the Constitution. It was submitted that the section is inconsistent with sections 9 and 10 of the Constitution because of its blatant discrimination on grounds of race, colour and ethnic origin and its harmful effects on the dignity of persons affected by it.

Counsel for the appellant argued that, the exclusion of women from heirship and consequently from being able to inherit property was in keeping with a system dominated by a deeply embedded patriarchy. Counsel argued further that this system reserved for women a position of subservience and subordination, in which they were regarded as perpetual minors under the tutelage of the fathers, husbands, or the head of the extended family.

The court accepted the argument for the appellant, and declared the customary law rule of male primogeniture inconsistent with the Constitution and invalid to the extent that it excludes or hinders women and extra-marital children from inheriting property, and section 1(4) (b) of the Intestate Succession Act is declared to be inconsistent with the Constitution and invalid.

The order was that a child's share 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 the children of the deceased who have either survived or predeceased such deceased person but are survived by their descendants, plus the number of spouses who have survived such deceased; and each surviving spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister for Justice and Constitutional Development by notice in the Gazette, whichever is the greater.¹⁰¹⁰

¹⁰¹⁰ See also *Brink v Kitshoff* 1996 (6) BCLR 752 (CC) para 44 where O'Regan J said that, "the gender discrimination in our society has resulted in deep patterns of disadvantage which are particularly acute in the case of black women, as race and gender discrimination overlap and added that it was a key message of the Constitution that all such discrimination needs to be eradicated from our society." Further said that, "...many women rear children single-handedly with no help, financial or otherwise, from the

In the *Shibi* case, a magistrate had appointed a certain Sithole, an uncle of the applicant, as representative of deceased's estate. The deceased had passed on living no children, spouse or parents. The estate turned out to be of an insubstantial value and the court order did not require the uncle to provide security for the applicant who was the deceased's sister. The sister made an application to the court alleging the misappropriation of the estate by the uncle.

As in the *Mthembu* cases, the magistrate in giving his order had relied upon provisions of section 23 of the Black Administration Act, that precluded Ms Shibi from being an intestate heiress of her deceased brother's estate.¹⁰¹¹ However in the High Court on appeal, she challenged the manner in which the estate was administered and sought an order declaring her the sole heir to the estate as well as a claim for damages from her relatives and the Minister of Justice. Miss Shibi succeeded in her claim to be appointed heiress together with the claim for damages. In reaching its decision the Cape High Court relied upon the declarations previously set out in the *Bhe* case.¹⁰¹²

The last case in the trilogy of cases that declared the provisions of section 23 of the Black Administration Act and the rule of male primogeniture unconstitutional was the case of *The South African Human Rights Commission and Another v President of The Republic of South Africa*. The South African Human Rights Commission and the Women's Legal Centre were permitted direct access to the Court in the third case which was brought in the public interest, as a class action on behalf of all women and children

fathers of the children. The need to support children financially is one of the reasons for women seeking work outside the home. However, the responsibility for child rearing is also one of the factors that render women less competitive and less successful in the labour market. The unequal division of labour between fathers and mothers is therefore a primary source of women's disadvantage in our society." In addition, Justice Mokgoro expressed the same sentiments in her concurring judgment, that, "Society should no longer be bound by the notions that a woman's place is in the home (and, conversely, not in the public sphere) and that fathers do not have a significant role to play in the rearing of their young children." The constitutional prohibition of gender discrimination also came into sharp focus in the case of *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC) where Goldstone J identified young people and mothers of young children as groups who are particularly vulnerable in our society.

¹⁰¹¹ See provisions of section 23 of the Black Administration Act discussed in the *Bhe* case *supra*.

¹⁰¹² See case *Bhe* case *op cit*.

prevented from inheriting by reason of the impugned provisions and the rule of male primogeniture.

Langa DCJ, writing for the majority of the Court, held that, construed in the light of its history and context, section 23 of the Black Administration Act is an anachronistic (out of date) piece of legislation which ossified “official” customary law and caused egregious violations of the rights of black African persons. The section created a parallel system of succession for black Africans, without sensitivity to their wishes and circumstances. Section 23 and its regulations are manifestly discriminatory and in breach of the rights to equality in section 9(3) and dignity in section 10 of our Constitution, and therefore must be struck down. The effect of this order is that not only are the substantive rules governing inheritance provided in the section held to be inconsistent with the Constitution, but also the procedures whereby the estates of black people are treated differently from the estates of white people are held to be inconsistent with the Constitution.

Langa DCJ went on and considered the African customary law rule of male primogeniture, in the form that it has come to be applied in relation to the inheritance of property. He holds that it discriminates unfairly against women and illegitimate children. He accordingly declares it to be unconstitutional and invalid. He holds that while it would ordinarily be desirable for courts to develop new rules of African customary law to reflect the living customary law and bring customary law in line with the Constitution, that remedy is not feasible in this matter, given the fact that the rule of male primogeniture is fundamental to customary law and not replaceable on a case-by-case basis.

In another inheritance case, in *Moseneke and Others vs Master of the High Court*¹⁰¹³, the court contended that in the case of intestate estates of deceased Africans, race,

¹⁰¹³ 2001 (2) BCLR 103; 2001 (2) SA 18, this case concerns discrimination between black and white in the administration of deceased estates. When Mr Moseneke senior died in 1999 without leaving a will, his estate was reported to the Master of the High Court in terms of the Administration of Estates Act No. 66 of 1965. The Master referred the estate to the magistrate in Pretoria to be dealt with in terms of the Black Administration Act and later explained that the Master's office did not have the power to administer intestate estates of black persons. The family applied to the Transvaal High Court for an order declaring

gender and culture interacted in a way which discriminated indirectly against African widows. According to Sachs J, the foundational value of creating a non-sexist society was to be respected, and proper consideration had to be given to the effect of the measures on the dignity of widows and their ability to enjoy a rightful share of the family's worldly goods.

Again in *Daniel v Campbell NO and others*¹⁰¹⁴ it was held that a surviving spouse to a monogamous Muslim marriage is entitled to inherit from the deceased estate of her late husband. The word "spouse" as used in the Intestate Succession Act 81 of 1987 includes parties to a Muslim marriage.¹⁰¹⁵ In a KwaZulu Natal High Court decision in *Govender v Ragavayah NO and Others*¹⁰¹⁶, the court also extended the right to inherit to a surviving spouse in a Hindu marriage.

Furthermore, in the case of *Shilubana v Namwitwa*¹⁰¹⁷, the constitutional court held that a female child could succeed to the Chieftainship of a traditional ethnic group contrary

the Master's refusal to register and administer the estate unconstitutional and ordering him to do so. The family's legal representatives asked for and were granted an order of court declaring invalid a regulation made under the Black Administration Act which authorised magistrates to deal with intestate black estates.

¹⁰¹⁴ 2004 (5) SA 331 CC.

¹⁰¹⁵ Most Muslim marriages are by muslim customary law and were not recognised and in most cases are polygamous. In the case of *Hassam v Jacobs NO and Others* 2009 (11) BCLR 1148 (CC); 2009 (5) SA 572 (CC), the decision of the Cape High Court which has been confirmed in the Constitutional Court, dealt with the issue of gender discrimination in the right to inherit as well as addressing the common law position and the Reform of Customary Law of Succession and Related Matters Act in recognising spouses in polygamous marriages for succession purposes. The case of *Hassam* further afforded polygamous spouses to be recognised in terms of the Maintenance of Surviving Spouses Act as well as the Intestate Succession Act.

¹⁰¹⁶ 2009 (3) SA 178 (D).

¹⁰¹⁷ 2009 (2) SA (CC) 66, in this case related to a dispute regarding the right to succeed as Hosi (Chief) of the Valoyi traditional community in Limpopo. The dispute is between Ms Shilubana, the first Applicant, the daughter of Hosi (Chief) Fofeza Nwamitwa, and Mr Nwamitwa, the Respondent, son of Hosi (Chief) Malathini Richard Nwamitwa. On 24 February 1968, Hosi Fofeza Nwamitwa died without male heir. At that time, succession to Hosi was governed by the principle of male primogeniture. Hosi Fofeza succeeded his father only because his elder sister was ineligible to be Hosi. Therefore, Ms Shilubana, Hosi Fofeza's elder daughter was not considered, for the position, despite being of age in 1968. Instead, Hosi Fofeza's younger brother, Richard, succeeded him as Hosi of the Valoyi. The dispute between the parties arose following the death of Hosi Richard Nwamitwa on 1 October 2001 when the Royal Council recommended the name of Ms Shilubana for appointment as Chief of the Valoyi and Mr Nwamitwa on the other hand challenged this appointment successfully in the High Court and on appeal at the Supreme Court as well. Sections 1(C) and establish the supremacy of the Constitution over all law. Section 30 recognises the right to participate in the cultural life of one's choice, but only in a manner consistent with

to the primogeniture rule at customary law. The case also brought to the fore the interplay between section 31 recognising the right of cultural and religious communities to enjoy their culture and practice their religion and the test within the Bill of Rights. In trying to balance the respective rights, in cognisance of section 211(3) that demands the Courts to apply customary law where it is applicable, subject to the Constitution, Ngcobo J had the following to say on the importance of equality in South African society:

"South Africa is a country in transition from a society based on inequality to one of equality. This transition was introduced by the Interim Constitution, which was designed to 'create a new order . . . in which there is equality between men and women and people of all races so that all citizens should be able to enjoy and exercise their fundamental rights and freedoms'. This commitment to the transformation of our society was affirmed and reinforced in 1997, when the Constitution came into force. The Preamble to the Constitution 'recognises the injustices of our past' and makes a commitment to establishing 'a society based on democratic values, social justice and fundamental human rights'. This society is to be built on the foundation of the values entrenched in the very first provision of the Constitution. These values include human dignity, the achievement of equality and the advancement of human rights and freedoms. The achievement of equality is one of the fundamental goals that we have fashioned for ourselves in the Constitution. Our constitutional order is committed to the transformation of our society from a grossly unequal society to one 'in which there is equality between men and women and people of all races.'"¹⁰¹⁸

In the case of *Mahala v Nkombombini*¹⁰¹⁹ the court had to determine a widow's right to make funeral arrangements for the burial of her husband where the deceased's mother claimed the right. The deceased had left no indication as to whom he wished to make the arrangements. The widow (Applicant) filed an application for the right to dispose of

the Bill of Rights. Similarly, Section 31 recognises the right of cultural and religious communities to enjoy their culture and practice their religion in a manner consistent with the Bill of Rights. Section 39(2) has been mentioned above. Last, but certainly not least, in this context the abovementioned section 211(3) demands that Courts apply customary law where it is applicable, subject to the Constitution. It must also be emphasised that Hosi Richard Nwamitwa agreed and approved of this decision. The Valoyi authorities intended to bring an important aspect of their customs and traditions into line with the values and rights of the Constitution.

¹⁰¹⁸ *Ibid* para 69.

¹⁰¹⁹ 2006 (5) SA 524 (SE).

the body of her alleged late husband. The deceased's mother (Respondent), had already made arrangements for the funeral and argued that the customary marriage between the deceased and the Applicant was invalid. The issue before the court was, who had the right to make funeral arrangements for the deceased? The court gave the Applicant the right to make the funeral arrangements and held that, because the respondent could not directly and persuasively refute the validity of Applicant's customary marriage to the deceased, the marriage was deemed valid for the purpose of the application.

According to customary law, the deceased's heir should be the one to decide on the funeral arrangements in accordance with the rules of succession. Where the deceased leaves no clear instruction regarding who makes such funeral arrangements, it is deemed the inherent intention that arrangements are made by those who receive his earthly goods. At the time this case was decided, prior to the *Bhe* decision, there was normally only one heir of a deceased's estate due to the principle of primogeniture. The Constitutional Court has since ruled that the primogeniture rule violates the right of women to human dignity, which is guaranteed by the Constitution. By recognising the elevated status of women in South African society today, the wishes of the widow must carry great weight. In addition, because there can now be multiple heirs each case must be decided based on its own particular circumstances. Some of the factors to consider include family relationships, common sense, and other relevant circumstances.

Concerning the devolution of property upon divorce in a customary marriage, the Constitutional Court handed down judgment in the case of *Gumede v President of the Republic of South Africa and Others*.¹⁰²⁰ The Court was confirming an order of constitutional invalidity made by the Durban High Court in respect of certain provisions

¹⁰²⁰ 2009 (3) SA 152 (CC), Moseneke DCJ found that the respondents had failed to provide adequate justification for this unfair discrimination. He held that section 8(4) (a) of the RMCA, which gives a court granting a decree of divorce of a customary marriage the power to order how the assets of the customary marriage should be divided between the parties, is no answer to or justification for the unfair discrimination based on the listed ground of gender. This is because section 8(4) (a) of the Recognition Act does not cure the discrimination which a spouse in a customary marriage has to endure during the course of the marriage.

of the Recognition of Customary Marriages Act (RCMA), the KwaZulu Act on the Code of Zulu Law¹⁰²¹, and the Natal Code of Zulu Law regarding the proprietary consequences of customary marriages.¹⁰²²

The facts were that, a certain Elizabeth Gumede entered into a customary marriage in 1968, which was the only marriage to which the applicant's husband was party. The marriage had since irretrievably broken down, and in January 2003 her husband instituted divorce proceedings. Mrs Gumede did not work during the marriage, but maintained the family household as well as the four children. The family acquired two pieces of immovable property during the course of the marriage together with some movable goods. The main issue before the court was whether the couple's marriage was in community of property or not.

In terms of the RCMA, customary marriages concluded after the commencement of the Act, being 15 November 2000, are automatically in community of property. To the contrary, customary law governs customary marriages concluded before commencement of the Act. At the time of the decision, the KwaZulu Act and the Natal Code, both of which provided in section 20, that the husband is the family head and owner of all family property, codified the customary law in KwaZulu Natal.

The implication was that a spouse who was party to a customary marriage concluded before the commencement of the Act was entitled to nothing upon dissolution of the marriage. Moseneke DCJ found the provisions in the KwaZulu instruments to be self-evidently discriminatory on at least the one listed ground of gender and that only women in a customary marriage were subject to these unequal proprietary consequences. He held further that, because this discrimination was on a listed ground it was presumed to be unfair, and the burden fell on the respondents to justify the limitation on the equality right of women party to 'old' marriages concluded under customary law.

¹⁰²¹ Act No. 16 of 1985.

¹⁰²² Proclamation R151 of 1987.

The court held that the matrimonial proprietary system of customary law during the subsistence of a marriage, as codified in the Natal Code and the KwaZulu Act, deliberately limited the equality dictates of the Constitution and of the RCMA. In light of these findings, Moseneke DCJ confirmed the order of constitutional invalidity issued by the Durban High Court and made an order that the wife was entitled to a share in the matrimonial property as if the marriage had been one in community of property.

However, the RCMA has since been amended to provide one proprietary regime for all customary marriages, that is all marriages are deemed to be automatically in community of property. According to Andrews, the RCMA is an important milestone on the road to gender equality in South Africa, by according equal recognition of all marital regimes thereby providing broad protection to women in customary marriages.¹⁰²³ Andrews contends that this recognition reflects legal and political trends in liberal democracies where the principle of equality is centred in constitutional and legislative arrangements. As such, the inclusion of both sex and gender as grounds for proscribing discrimination protects women from undesirable discrimination based not only on biological or physical attributes, but also on social or cultural stereotypes about the perceived role and status of women.¹⁰²⁴

In the final analysis, despite some extra-legal obstacles to women's equality, the Constitution provides a framework for challenging such obstacles. The constitutional protection of women's rights, as well as the constitutional recognition of the institutions and structures of traditional law, involves a series of balancing tests that raise perennial questions about the role of law in pursuing equality, as well as respect for the many ways that citizens enjoy and practice their cultural norms and values. In South Africa

¹⁰²³ Andrews "Big Love"? The Recognition of Customary Marriages in South Africa" 2007 *Washington and Lee Law Review* 1493.

¹⁰²⁴ Andrews and Ellmann *The post-apartheid constitutions: perspectives on South Africa's basic law* (2001) 326, 335.

however, there remains a distance between the elevated ideals of the Constitution and the reality of people's lives.¹⁰²⁵

5.2.3 CONCLUSION

Santos¹⁰²⁶ questions the whole universal/relativist dichotomy, and argues that universalism is no more than a western hegemonic worldview that constructs different cultures as somehow deviant from the norm. Nzegwu criticises western feminism and the liberal model of equality saying that, "in a dual-sex context where individuals are valued for the skills they bring to community building and cultural development, gender identity is differently constructed. Identity is not abstractly constructed in terms of sameness, but concretely defined in terms of the worth of social duties and responsibilities. Because gender equality implies comparable worth, women and men are complements, whose duties, though different, are socially comparable."¹⁰²⁷ For those reasons, cultural feminists have been described as out of touch with reality and as reinforcing gender stereotypes grounded in biological determinism.

On the other hand, however, the decisions of the Zimbabwean courts on the primogeniture system in the *Chihowa* case could be regarded as a victory for Zimbabwean women, however, setback by decisions such as those in *Magaya* and the South African *Mthembu* cases. Their recognition of the right of women and widows to equal succession to deceased estates as shown in the South African *Bhe* trilogy of cases, may be seen as a good example of the positive development of African customary law.

To my mind being glued to one school of thought, that is, cultural relativism or universalism is problematic. Each case has to be viewed in the light of its peculiar circumstances considering factors such as the background of the parties and their

¹⁰²⁵ Andrews 2007 *Washington and Lee Law Review* 1497.

¹⁰²⁶ Santos "Towards a Multicultural Conception of Human Rights" 1997 *Sociologia del Dirrito* 27.

¹⁰²⁷ Nzegwu "Gender Equality in a Dual-sex system: The Case of Onitsha" 2001 *Jenda: A Journal of Culture and African Women Studies* 1ff; www.jendajournal.com/jenda/vol_1.1/nzegwu (Accessed 09/01/2012).

social context when deciding the application and questioning of customary law. As Le Roux J mentioned in the South African case of *Mthembu v Letsela*¹⁰²⁸ that, “if it is accepted that the duty to provide sustenance, maintenance and shelter is a necessary corollary of the system of primogeniture, it is difficult to equate this form of differentiation between men and women with the concept of ‘unfair discrimination’. Therefore customary law must be applied where all the mechanisms that provide for its efficacy are present.

Unfortunately, with the disintegration of the subsistence economy and urbanisation these mechanisms generally are no longer intact to ensure the efficacy of customary law rules, succession being one of them. Injustices arise not that the system or rule is in itself discriminatory, but because these social forces and changes expose customary law in a context that it does not fit. The general observation is made that more contemporary Constitutions that emerged post-1990 tend to be more progressive in nature by guarding jealously the fundamental principles of human rights including the rights of women and children by giving precedence to notions of non-discrimination and equality of men and women before the law.

5.3 CUSTOMARY LAW AND INTERNATIONAL HUMAN RIGHTS LAW

5.3.1 Introduction

Zimbabwe and South Africa have made significant progress towards ensuring the full development of women's status in society by guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms based on equality with men. Both countries are party to a number of International instruments providing for the protection and promotion of human rights, particularly those relating to women and children. These include:

- (i) The United Nations International Declaration of Human Rights (UNIDHR)

¹⁰²⁸ See also in 5.2.3.1 *supra*.

- (ii) The International Covenant on Civil and Political Rights (ICCPR),
- (iii) The International Covenant on Economic, Social and Cultural Rights (ICESCR),
- (iv) The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).
- (v) The Beijing Platform for Action (BPFA)

In addition, there are continental instruments such as the African Charter on the Rights of Women in Africa; the Convention on the Elimination of Racial Discrimination (CERD) and the Convention on the Rights of the Child (CRC). Zimbabwe is also a state party to the African Charter on the Rights of the Child (ACRC), and the African Charter on Human and People's Rights (ACHPR), and the New Economic Partnership for Africa's Development (NEPAD). Regionally, both countries are state parties to the SADC Declaration on Gender and Domestic Violence Against Women and Children (1997). Since the ratification of these international instruments, we have seen the passing of progressive legislation in line with constitutional and international commitments in both countries.

5.3.2 The African Charter¹⁰²⁹

The Charter thrives to combine African values with international norms by promoting internationally recognised individual rights, and by proclaiming collective rights and individual duties. These include the right to self-determination and to full sovereignty over natural resources, the right to peace, the right to a satisfactory environment favourable to a people's development, and the duty of individuals to their family, community and state. The African Charter recognises the importance of women's rights through three main provisions:

¹⁰²⁹ The African Charter On Human And People's Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) <http://www.unhcr.org/refworld/docid/3ae6b3630.html> (Accessed 30/01/2012).

(i) Article 18(3), concerning the protection of the family, promises to “ensure the elimination of every discrimination against women and also ensure protection of the rights of women and the child as stipulated in international declarations and conventions”;

(ii) Article 2, the non-discrimination clause, provides that the rights and freedoms enshrined in the Charter shall be enjoyed by all irrespective of race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status;

(iii) Article 3, the equal protection clause, states that every individual shall be equal before the laws and shall be entitled to the equal protection of the laws.

In addition, Article 29(7) has a chapter on duties, which calls on individuals to promote positive African values. The interpretation of African culture as not permitting discrimination based on sex is reinforced in the African Charter on the Rights and Welfare of the Child (1990) which in article 21(1) (b) states that the state should take steps to eliminate, “those customs and practices discriminatory to the child on the grounds of sex or status.”

The discussion above shows a strong normative commitment to human rights. The unwavering commitment with which human rights are now taken on the African continent can also be seen in the founding document of the African Union, the Constitutive Act of 2000. Its key principles include a respect for human rights and gender equality.¹⁰³⁰

Human rights critics, lawyers and activists have long regarded the provisions of the African Charter as inadequate to address the rights of women. For example, while Article 18 prohibits discrimination against women, it does so only in the context of the family. In addition, explicit provisions guaranteeing the right of consent to marriage and equality of spouses during and after marriage are completely absent. These omissions

¹⁰³⁰ The Constitutive Act of the African Union 1 July 2000, articles 3(g),(h); article 4(m).
[Http://www.unhcr.org/refworld/docid/4937e0142.html](http://www.unhcr.org/refworld/docid/4937e0142.html) (Accessed 30/01/2012).

are compounded by the fact that the Charter places great emphasis on traditional African values and traditions without explicitly addressing concerns how customary practices such as wife inheritance, can be harmful or life threatening to women. Delport¹⁰³¹ contends that by ignoring critical issues such as custom and marriage, the Charter inadequately defends women's human rights.

5.3.3 The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)¹⁰³²

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 by the UN General Assembly, is often described as the international bill of rights for women. Consisting of a preamble and 30 articles, it defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination. This includes institutional development, constitutional and legislative reform, as well as adoption of reporting procedures as a tool to monitor compliance.

The Convention defines discrimination against women as, "...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."¹⁰³³

By ratifying the Convention, state parties commit themselves to undertake a series of measures to end discrimination against women in all forms, including:

- to incorporate the principle of equality of men and women in their legal system, abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women;

¹⁰³¹ Delport "The African Regional System of Human Rights - Why A Protocol on The Rights Of Women?" 2004 Centre for Human Rights University of Pretoria; [http://www. Up.ac.za/chr](http://www.Up.ac.za/chr) (Accessed 12/01/2012).

¹⁰³² Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, A/RES/34/180; <http://www.unhcr.org/refworld/docid/3b00f2244.html> (Accessed 01/02/2012).

¹⁰³³ *Ibid* Article 1.

- to establish tribunals and other public institutions to ensure the effective protection of women against discrimination; and
- to ensure elimination of all acts of discrimination against women by persons, organizations or enterprises.

The Convention therefore provides the basis for realising equality between women and men through ensuring women's equal access and opportunity in, political and public life including the right to vote and to stand for election, as well as education, health and employment. CEDAW is the major human rights treaty that affirms the reproductive rights of women and targets culture and tradition as influential forces shaping gender roles and family relations. It confirms women's rights to acquire, change or retain their nationality and the nationality of their children. Countries that have ratified or acceded to the Convention are legally bound to put its provisions into practice. They are also committed to submit national reports, at least every four years, on measures they have taken to comply with their treaty obligations. Below we shall look at specific articles in the Convention that speak to the elevation of women's rights in the family and public spheres.

5.3.3.1 Article 1: General;

Holds that, for the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

5.3.3.2 Article 2: Discrimination;

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 realisation 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, organisation 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.

In Zimbabwe, the Government placed the legal age of majority at 18 years in order to give both women and men majority status at that age. In terms of section 15(3) of the General Laws Amendment Act¹⁰³⁴, the legal age of majority applies for the purpose of any law, including customary law. The concept of the legal age of majority, however, received wide resistance by the patriarchal society. In a research conducted on the people's reaction to the law, it emerged that much of the opposition was premised on the apparent loss of a parent's claim to seduction damages and bride price in relation to the female child. Some were quoted passing the following remarks:

"African custom does not go hand in hand with this kind of thinking. If those who make laws want to impose laws on us they should make a law stating that any man who makes a women

¹⁰³⁴ General Laws Amendment Act No. 6 of 2006 [Chapter 8:07].

pregnant should automatically be liable to pay damages. If they cannot do this then they should leave us alone to lead our lives as we used to. Government has choked us with this law.”¹⁰³⁵

One may argue that by granting majority status to all persons, irrespective of sex, on attainment of the age of 18, the General Laws Amendment Act has brought a massive departure from the old position where women were regarded as perpetual minors with no legal capacity to enter into any contracts without the consent of their husbands. In the case of unmarried or divorced women, consent of fathers or other male relatives was required.

Zimbabwe reports that the practice of payment of *lobola* has as requirement for the validity of a customary marriage has not been legislated against. However, there are conflicting views in the country whether or not it is a discriminatory traditional practice. Therefore, more research, advocacy and lobbying still needs to be done to concretely demonstrate the adverse and discriminatory effects of *lobola* on the status of women in Zimbabwe.¹⁰³⁶

The Deeds Registries Act¹⁰³⁷, allows women to own immovable property in their own names, and the subsequent decisions of the courts, amended the customary law, which previously provided that the eldest male child was the heir compromising the status of widows and girls children. With the new amendment, women can inherit from the deceased estates of their husbands and fathers.

The Administration of Estates Act¹⁰³⁸, was amended to bring in the following changes to inheritance practices:

a) The surviving spouse(s) and the children of a deceased person are his or her major beneficiaries, as opposed to the heir, who was mainly the eldest son.

¹⁰³⁵ Tsanga *Taking law to the people: gender, law reform, and community legal education in Zimbabwe* (2003).

¹⁰³⁶ Combined Report of the Republic of Zimbabwe in terms of the Convention on the Elimination of all forms of Discrimination Against Women *op cit* 6;

<http://www2.ohchr.org/english/bodies/cedaw/docs/Zimbabwe.pdf> (Accessed 12/01/2012).

¹⁰³⁷ Act No. 14 of 1999.

¹⁰³⁸ Act No. 6 of 1997 [Chapter 6:01].

b) The matrimonial home, whatever the system of tenure under which it was held and wherever it may be situated, remains with the surviving spouse. This includes household goods and effects.

Part 111A of the Act deals specifically with estates of persons subject to customary law. Section 68 (3) of the Act provides that:

“A marriage contracted according to customary law shall be regarded as a valid marriage for the purposes of this Part notwithstanding that it has not been solemnized in terms of the Customary Marriages Act [Chapter 5:07], and any reference in this Part to a spouse shall be construed accordingly.”

The amendment removed discriminatory tendencies that emerged from one's marital status. The only disadvantage however is that the 1997 Amendment only applies to estates of persons who died after 1 November 1997. Zimbabwe's Report to the CEDAW Committee acknowledges these limitations when it states that as previously reported, since the enactment of the Legal Age of Majority Act of 1982 the Supreme Court has made a decision that had the effect of negating the intention of the Act to raise the status of women. In the case of *Magaya*, in which the father died before the 1st November 1997, the Court accorded inheritance rights to a male child, as opposed to the female child. The case had the effect of maintaining the minority status of women in inheritance matters.

The Criminal Law Codification and Reform Act¹⁰³⁹, which came into operation in July 2006, recognises both girls and boys as potential victims of sexual abuse. Part V of the Act also criminalises harmful cultural practices, including the pledging of female persons as compensation for the death of relatives or for other reasons.

Other means have been used to facilitate State commitments under CEDAW. The Zimbabwe Government on the 8th of March 2004, adopted the National Gender Policy

¹⁰³⁹ Act No. 23 of 2004 [Chapter 9:23].

to domesticate the provisions of international instruments and harmonising them with the county's national initiatives. Its objectives are:

- (i) To mainstream gender into all sectors in order to eliminate all negative economic, social and cultural practices that impede equality of the sexes;
- (ii) To promote equal advancement of women and men in all sectors and;
- (iii) To establish the institutional framework to ensure implementation of the gender policy, as well as monitoring and evaluating its impact.

To date, the Government has reconstituted and trained what are called, Gender Focal Persons from Government Ministries, Departments, and Parastatals to enhance their capacity to mainstream gender in sectoral policies, programmes and activities. An Implementation Strategy developed by the Ministry of Women Affairs, Gender and Community Development articulates not only the overall national strategy but also the sectoral strategies and responsibilities for the attainment of gender equality, equity and women's empowerment.¹⁰⁴⁰ As evidence of its commitment to fulfil its obligations, Zimbabwe's combined report on the implementation of CEDAW will be considered by the Committee on the Elimination of Discrimination Against Women at its 51st session in February/March 2012.¹⁰⁴¹

The Government has also adopted a policy to promote equal access to pension benefits thereby enabling widows of unregistered customary law marriages to gain access to state pensions upon the death of a spouse. Currently, the lack of proof of marriage in the form of a certificate makes it difficult for some widows to claim the pension.

¹⁰⁴⁰ The National Gender Policy Implementation Strategy 2007-2010; in addition, District and provincial gender councils were established in 2001 to facilitate the mainstreaming of gender issues at community level. The councils are made up of traditional leaders, healer, NGO representatives, faith-based organisational representatives, government officers and other civic leaders.

¹⁰⁴¹ Chipaziwa, Permanent Mission of the Republic of Zimbabwe to the United Nations, Ambassador & Permanent Representative to the United Nations, delivered to the 66th session of the third committee of the UN general assembly on Advancement of Women, 12 October 2010 pg 2;
[Http://www.un.org/womenwatch/daw/documents/ga65/Zimbabwe.pdf](http://www.un.org/womenwatch/daw/documents/ga65/Zimbabwe.pdf) (Accessed 25/10/2011).

The Pension and Provident Fund (Amendment) Regulations 2002 (No. 8) provides among others that, “the rules of any fund shall provide that on the death of a member or pensioner the benefits payable from the fund shall be paid to the following persons in the following order...to his surviving spouse and his dependent children.” These Pension and Provident Funds Regulations protect the rights of surviving spouses to have access to and benefit from their deceased spouse’s pension contributions.¹⁰⁴²

In Zimbabwe ratification of vital treaties has also occurred. The Government has ratified the Convention on the Political Rights of Women and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages. These ratifications demonstrate the country’s commitment to the elimination of discrimination against women in employment.

There has further been creation of institutional mechanisms to bolster advancement of women and gender parity. These include the Ministry of Youth Development Gender and Employment Creation (MYDGEC) through the Gender department (national machinery) and the Parliamentary Committee on gender.¹⁰⁴³ There is a Parliamentary Committee on the MYDGEC, which plays a monitoring role over the activities of the Ministry and the various Gender Focal points in line ministries. The Women Members of Parliament have formed a Gender Caucus whose objective is to sensitise the legislators to make them aware of the need for gender quality and equity.¹⁰⁴⁴

South Africa has also made inroads in conforming to international law. It became a signatory to CEDAW in 1993 and ratified it without reservation in 1995. The Optional

¹⁰⁴² Combined Report of Zimbabwe to CEDAW *op cit* 11.

¹⁰⁴³ Zimbabwe Progress Report on the Implementation of the Platform For Action *op cit* 7 <http://www.un.org/womenwatch/daw/Review/responses/ZIMBABWE-English.pdf>

(Accessed 21/12/2011); The ministry has five operative departments namely; Gender, Youth Development, Employment Creation, Skills Development, and Human Resources. The mandate of the gender machinery is to promote gender equity and equality. Its area of focus is gender mainstreaming in all levels and all sectors. The National Gender machinery runs programs in the areas of Gender and HIV/AIDS, Gender and Law, Economic Empowerment of women, Women, Politics and decision-making, Policy and National Occasions and the Girl Child.

¹⁰⁴⁴ *Ibid* 8.

Protocol was ratified in March 2005. In terms of legislative reform, the following Acts have been promulgated;

(i) The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA),

(ii) The Employment Equity Act number 55 of 1998;

(iii) The Domestic Violence Act 116 of 1998;

(iv) The Recognition of Customary Marriages Act of 1998

Like its Zimbabwean counterpart, South Africa has established distinct governing bodies as part of its international law obligations. Firstly are the empowering provisions are contained in the Commission for Gender Equality Act.¹⁰⁴⁵ In terms of the Act, the Commission is specifically given the mandate to monitor compliance with international instruments, which relate to the mandate of the CGE and further submit reports to parliament pertaining to compliance with any such conventions, covenants, or charters.¹⁰⁴⁶ One of its key powers and functions is the responsibility to evaluate any Act of Parliament, any system of personal and family law or custom, any system of indigenous law, customs or practices; or any other law, in force at the commencement of the Act which affect or likely to affect gender equality or the status of women.

The CGE also has a mandate to monitor implementation of international and regional conventions, covenants and charters signed, or acceded to, or ratified by South Africa, that impact directly or indirectly on gender equality. These instruments include amongst others the Beijing Declaration and Platform for Action (BPA), the Convention on the

¹⁰⁴⁵ Act No. 39 of 1996.

¹⁰⁴⁶ *Ibid* section 11, the Act further empowers the Commission to:

- (i) recommend to Parliament or any other legislature the adoption of new legislation which would promote gender equality and the status of women;
- (ii) investigate any gender-related issues on its own accord or on receipt of a complaint, and shall endeavour to resolve any dispute or;
- (ii) rectify any act or omission, by mediation, conciliation or negotiation: Provided that the Commission may at any stage refer any matter to the Human Rights Commission, Public Protector or any other authority whichever appropriate.

Elimination of Violence Against Women (CEDAW), the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa and the Solemn Declaration on Gender Equality in Africa.

Secondly is establishment of the Joint Monitoring Committee (JMC) on the Improvement of the Quality of Life and Status of Women. It monitors and evaluates progress with regard to the improvement in the quality of life and status of women in South Africa, with specific reference to the Government's commitments to the Beijing Platform of Action; the implementation of the CEDAW, and to any other applicable international instruments. The JMC may make recommendations to both or either of the Houses, or any joint or House committee, on any matter arising.

Thirdly is the Office on the Status of Women (OSW) established in 1997. Among some of its functions, the OSW may advise and brief the President, the Deputy President and the Minister in the Presidency on all matters pertaining to the empowerment of women including;

- (i) to liaise between NGOs dealing with women's and gender issues And the Presidency;
- (ii) to liaise between international bodies (e.g. United Nations) and the Presidency;
- (iii) to work with Ministries and departments, provinces and all publicly funded bodies in mainstreaming gender in policies, practices and programmes;
- (iv) to develop key indicators for measuring the national progression towards Gender equality;
- (v) to arrange for training in gender analysis and gender sensitisation. The OSW is the principal co-coordinating structure for the National Gender Machinery. It develops framework and monitors their implementation.

Lastly, there is a new Ministry called the Ministry of Women, Children and Persons with Disabilities, established to improve the coordination of the gender machinery,

gender mainstreaming, and the promotion of the rights of women. It creates a Department of Women, Children and people with disabilities (DWCPD). The DWCPD is composed of the, (i) Children's rights Programme; (ii) Women's Empowerment and Gender Equality Rights of persons with Disabilities. The strategic objectives of the Women's Empowerment and Gender Equality branch of the DWCPD are:

(i) to create an enabling environment for translating Government policy mandates through the empowerment, advancement and socio-economic development of women, and the transformation of gender relations

(ii) to facilitate, coordinate, oversee and report on the national gender equality programme, and on regional, continental and international initiatives and commitments.¹⁰⁴⁷

5.3.3.3. Article 5: Sex Role Stereotyping;

In terms of 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;

(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

In South Africa Presently, women are still being discriminated against on grounds of religious and cultural beliefs and practises. A 'widowhood study' conducted by the CGE during 2007 revealed that society has not moved from a fundamentally patriarchal system and women have not been emancipated from oppression with regard to their rights, such as inheritance. This is contrary to the right to equality,

¹⁰⁴⁷ See South Africa's Report on the Implementation of the Beijing Platform for Action *op cit* <http://www.pmg.org.za/files/docs/100721bpfa.pdf> (Accessed 21/12/2011).

which is enshrined in the Constitution of South Africa. Although most women still experience discrimination in society, the Equality Act seeks to prohibit gender discrimination, and several landmark legal cases have served to outlaw the traditional practice of primogeniture, as reflected in the *Bhe*¹⁰⁴⁸ and *Shilubana* cases.

In Zimbabwe, the CEDAW Committee recommended that the Government take measures to codify family and customary laws and incorporate only those customary laws and practices that promote gender equality and the empowerment of women. It further suggested that gender sensitisation training be extended to all sectors, including healthcare workers. In response to the Committee's recommendation the Government has considered the need to codify customary law, however notes that due to the dynamic nature of customs and practices, it may not be in the interest of women to codify the law. It mentions further that codification may cause permanence to customs and practice, thereby negatively affecting their dynamic nature.

5.3.3.4 Article 7: Political and Public Life;

In terms of Article 7, States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

- (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;
- (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;
- (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

5.3.3.5 Article 13: Economic and Social Benefits;

States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of

¹⁰⁴⁸ See the equality cases *supra*.

equality of men and women, the same rights, in particular:

- (a) The right to family benefits;
- (b) The right to bank loans, mortgages and other forms of financial credit;
- (c) The right to participate in recreational activities, sports and all aspects of cultural life.

5.3.3.6 Article 14: Rural Women;

States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetised sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.

States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

- (a) To participate in the elaboration and implementation of development planning at all levels;
- (b) To have access to adequate health care facilities, including information, counselling and services in family planning;
- (c) To benefit directly from social security programmes;
- (d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase their technical proficiency;
- (e) To organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self employment;
- (f) To participate in all community activities;

(g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;

(h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

In South Africa women's right to land are not firmly entrenched in legislation.¹⁰⁴⁹ The Restitution of Land Rights Act¹⁰⁵⁰ does not recognise women's rights as it does not recognise women who held land prior to 1993. The Communal Land Rights Act (CLRA)¹⁰⁵¹ attempts to recognise gender equality, but it has been criticised for giving too much discretionary powers to the Minister and too much power to Traditional Leaders who are custodians of patriarchal values. It has been argued that the Act does not secure women's land rights.

Statistically, South Africa in its report notes that in 2005/2006, 92% of those benefiting from land reform were men, as opposed to 8% women. In 2009/2010, men comprised 90% of this figure and women 10%. These statistics clearly indicate the challenges faced by woman in gaining equal access to economic resources. However, unlike many women in Africa including Zimbabwe, South African women's economic position is alleviated by the Social Grant system as part of the countries welfare system. It is reported that the number of Social Grant beneficiaries has increased since 1995 with 2.6 million beneficiaries compared to 2007 with more than 12 million recipients. Most of the beneficiaries are women and children in rural areas.

Recently in the Constitutional Court case of *Tongoane and Others v Minister of Agriculture and Land Affairs and Others*¹⁰⁵² the CLRA was declared unconstitutional

¹⁰⁴⁹ Africa Gender & Development Index Report, South Africa (November 2006).

<http://www.wits.ac.za/files/resa72585ca555147f39122746d660ca08e.pdf> (Accessed 10 /10/11).

¹⁰⁵⁰ Act No. 22 of 1994.

¹⁰⁵¹ Act No. 11 of 2004.

¹⁰⁵² 2010 (8) BCLR 741 (CC), 2010 (6) SA 214 (CC) earlier on in October 2009, the four communities assisted by the Legal Resources Centre, won a victory in the North Gauteng High Court. The judgment declared invalid and unconstitutional key provisions of the CLRA that provide for the transfer and registration of communal land, the determination of rights by the Minister and the establishment and

on the basis of both substantive and procedural irregularities. The case was an application by four communities who challenged the CLRA on basis that it undermines security of tenure, gender equity, and grants authority to traditional leaders who have not been elected and whose interests do not reflect those of the communities. The communities also appealed against the refusal by the High Court to declare the CLRA invalid for failure to enact it in accordance with the correct procedure, because Parliament failed to comply with its obligations to facilitate public involvement in the legislative process.

Ngcobo CJ handed down judgement and held that, various provisions of the CLRA affect indigenous law and traditional leadership and that the Act replaces the living indigenous law regime, which regulates the occupation, use and administration of communal land. Further that, it replaces both the institutions that regulated these matters and their corresponding rules. In conclusion, the learned Judge attacked Parliament for not following the correct procedure in enacting the Act failing to conduct public hearings and ensuring that committees were comprised of at least one-third women.¹⁰⁵³

In Zimbabwe, the issue of women's access to land has also fallen short of awarding women explicit land ownership rights. As part of the country's land reform programme, the A1 model, where the land allocated is less than ten hectares, more women (17%) were allocated land than those allocated land in the larger A2 model, where only 12% of all land allocations were made to women.¹⁰⁵⁴ This is despite the fact that Government had set aside a 20% quota for women under the Fast Track Land Reform Programme, in addition to section 23(3) (a) of the Constitution, which provides for the equal treatment of women and men in the allocation or distribution of

composition of land administration committees. The matter was then taken to the Constitutional Court for a confirmation order on the invalidity of the Act.

¹⁰⁵³ See para 126 where the Chief Justice further emphasizes that Parliament should urgently and diligently enact the constitutionally envisaged legislation that will ensure that there is restitution of land to the people and communities that were dispossessed of their land during the apartheid era.

¹⁰⁵⁴ Combined Report of the Republic of Zimbabwe in terms of the Convention on the Elimination of all forms of Discrimination Against Women *op cit* 44.

land, as well as other rights and interests under any land reform programme.

Generally access to and security of tenure to land for women is insecure especially in communal land tenure systems in Zimbabwe. In the communal lands where the majority of women reside, women have secondary use rights through their husbands. In small-scale commercial areas, very few women own land in their own right. The farms tend to be taken over by sons when the male head of the household dies. This prevailing situation raises concern considering that women are the basis of agricultural production pertaining to food security at household level.¹⁰⁵⁵ Generally in Zimbabwe, about 65% of women live in the rural areas and are actively involved in the development of their communities through public works programmes and other community development projects, such as market gardening and subsistence farming. The Government and other development agencies initiate and support these activities.¹⁰⁵⁶

While lack of security of tenure affects millions of people across the world, women face added risks and deprivations. Reports say that in Africa and South-Asia especially, women are systematically denied their human rights to access, own, control or inherit land and property. The vast majority of women cannot afford to buy land, and usually can only access land and housing through male relatives, which makes their security of tenure dependent on good marital and family relations.¹⁰⁵⁷ The UN Special Rapporteur on Adequate Housing confirms the dire situation of millions of women across the world;

¹⁰⁵⁵ See Zimbabwe Millennium Development Goals: 2004 Progress Report, pg 17, where it is said that the poverty levels are higher among female headed households, estimated at 72%, than in male headed households, at 58%.

<http://planipolis.iiep.unesco.org/upload/Zimbabwe/MDG/Zimbabwe%202004%20MDG.pdf> (Accessed 13/05/2011).

¹⁰⁵⁶ *Ibid* 47 speaking on rural women in terms of the country's commitments under Article 14.

¹⁰⁵⁷ Benschop "Women's Rights to Land and Property" Women in Human Settlements Development - Challenges and Opportunities, Commission on Sustainable Development - Thursday 22 April 2004, pg 1; www.unhabitat.org/downloads/docs/1556_72513_csdwomen.pdf (Accessed 14/01/2012), at the time the paper was presented by the writer in her capacity as Legal Officer of the Land & Tenure Section of UN-HABITAT.

"In almost all countries, whether 'developed' or 'developing', legal security of tenure for women is almost entirely dependent on the men they are associated with. Women headed households and women in general are far less secure than men. Very few women own land. A separated or divorced woman with no land and a family to care for often ends up in an urban slum, where her security of tenure is at best questionable".¹⁰⁵⁸

Eroded customary laws and practices have been blamed for women's predicament in the current African context. Due to colonial influences, individualisation of land tenure, land market pressure and other factors, many customary laws and practices have eroded over time and the forms of solidarity that used to exist and protected women from exclusion, have now disappeared in many areas. Even where statutory national laws recognise women's rights to land, housing and property, traditional values may prevail amongst judges, police officers, local councillors, and land officials. They often interpret statutory laws in what at present are understood to be "customary ways", the result being the deprivation of women from the rights they should enjoy under statutory law.

Without legal protection, women are at risk of suddenly becoming landless, as has happened in the many cases where the husband sells the family land. In the Zimbabwean case of *Khoza v Khoza*¹⁰⁵⁹, upon divorce the woman was denied the parties' communal lands matrimonial home which had been built and maintained entirely through her efforts over 23 years of marriage. The case illustrates how upon divorce, women still have to prove their contribution to the marital home in court. In addition, many succession laws only entitle widows to a temporary use right of the marital home. Overemphasis on privatisation, individual freehold tenure and rigid planning and registration procedures that are themselves costly, lengthy and often inaccessible widen the gap between the law and the people it wishes to serve.¹⁰⁶⁰

¹⁰⁵⁸ UN Special Rapporteur on Adequate Housing, Study on Women and Adequate Housing, April 2002, E/CN.4/2003/55, pg 9, <http://www.unhchr.ch/housing> (Accessed 13/01/2012).

¹⁰⁵⁹ H-H-106 (1987) (unreported).

¹⁰⁶⁰ See Benschop "Women's Rights to Land and Property" *op cit* 3, who observes that, "...without gender aware officials on bodies dealing with land allocation, inheritance and dispute settlement, a male bias among these officials will continue to stand in the way to women's enjoyment of their rights. Moreover,

In an earlier decision of the Supreme Court of Zimbabwe in *Jenah v Nyemba*¹⁰⁶¹, a married African woman instituted a claim for property without the assistance of her husband, the Supreme Court ruled that under African law and custom, property acquired during a marriage, becomes the husband's, whether acquired by him or his wife.¹⁰⁶² This was in violation of CEDAW Article 14(1), that, 'States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetarised sectors of the economy. CEDAW's General Recommendation 21, states that financial and non-financial contributions to property 'should be accorded the same weight', and the woman should be consulted when property owned by the parties is disposed of.

Nevertheless, once women are economically independent, most of the difficulties they face will fall on the wayside and they will be better positioned to cope with and overcome their difficulties. It remains important for rural women especially to be seen as agents for enhancing agricultural and rural development including food security.

5.3.3.7 Article 16: Marriage and Family;

In terms of 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:

- (a) The same right to enter into marriage;

inclusion of women in decision-making and policy formulation processes, especially among vulnerable groups such as slum dwellers, and ethnic minorities etc is crucial."

¹⁰⁶¹ 1986 (1) ZLR 138 (SC).

¹⁰⁶² *Ibid*, it was held that 'women at customary law could not own property, see also *Chiutsi v Garisa* 1969 CAACC 70 Pittman J ruled that: 'unfortunately for the plaintiff, although in fact some African women may have achieved economic emancipation after marrying by Christian rites, the law of the land is still that, despite the solemnization of such a marriage, the property of the spouses shall be held according to African law and custom.' See discussion in 3.3.2.2 chapter 3 *supra*.

(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;

(c) The same rights and responsibilities during marriage and at its dissolution;

(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

(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.

(2) The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

In South Africa, the Recognition of Customary Marriages Act¹⁰⁶³ allows for polygamous marriages, which is in direct contravention of General Recommendation 21 by the CEDAW Committee.¹⁰⁶⁴ Polygamy is still permissible in terms of South African law despite intense lobbying by various groups who are opposed to this practise. Various commentators are of the view that Government has done very little in terms of ensuring that there is an adoption of a Family Code in conformity with the Convention in terms of

¹⁰⁶³ Act 120 of 1998.

¹⁰⁶⁴ United Nations Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations*, 1994; <http://www.unhcr.org/refworld/docid/48abd52c0.html> (Accessed 20/01/12).

which unequal inheritance rights, land rights, and polygamy are addressed, with the aim of abolishing them.

Polygamy has always been a source of controversy in feminist legal theory. Its unequal status, namely that the 'benefit' of multiple marriages accrues only to men, as well as its symbolic manifestation of patriarchy, is a cause for concern for advocates of gender equality. According Prof. Pierre De Vos¹⁰⁶⁵, speaking on the issue whether polygamy still has a place in contemporary South African society, the author highlights the status of polygamy and its position within the country's democracy. He says that:

"The equality clause trumps the right to culture in the South African Bill of Rights and polygamy discriminates against women – so the argument goes – because it allows a man to marry many wives but not a woman to marry many husbands and because the emotional and financial position of the existing wives is said to be weakened when their husband takes another wife.

The Recognition of Customary Marriages Act No. 120 of 1998 extends the state's recognition and regulation of marriage to both monogamous and polygamous customary marriages. Where someone enters into a customary marriage they have a legal duty in terms of the Act within three months of entering into the marriage to have that marriage registered. The financial position of the wife in a customary marriage is also safeguarded to some degree as section 6 of the Act states that: "A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law.

Section 7 of the Act also attempts to mitigate the negative effects of a polygamous marriage on existing wives and states that a husband in a customary marriage who wishes to enter into a further customary marriage with another woman must make an application to the court to approve a written contract which will regulate the future financial arrangements of the marriages.

When this happens the husband's existing spouse or spouses and his prospective spouse must be joined in the proceedings and must in effect give permission for the further marriage. The court can amend any agreement to ensure that the existing wives are not prejudiced financially – even where such wives purport to consent to the terms of the new marriage.

¹⁰⁶⁵ De Vos "Is Polygamy Unconstitutional?" 2010;
[Http://constitutionallyspeaking.co.za/is- polygamy-unconstitutional](http://constitutionallyspeaking.co.za/is-polygamy-unconstitutional) (Accessed 12/12/2011).

It seems to me that while one could make an argument that many women - of all races and whether they are in a polygamous marriage or not – are discriminated against when they enter into a marriage, the marriage *per se* could not be said to constitute unfair discrimination.

It is the cultural practices and assumptions and the view that many men (of all races and whether they are polygamous or not) have of women and their role in a marriage that is the true cause of much of the hardship of married woman. It is therefore a serious challenge to have legislation protecting women's right to equality and yet recognise a practice of polygamy which puts women at greater risk of abuse, unequal treatment and discrimination.”

The relatively recent case of *Mayelane v Ngwenyama*¹⁰⁶⁶ raised the issue of polygamous customary marriages in South Africa. The facts were that, a certain Mdjadji Florah Mayelane (Applicant) married the late Hlengani Dyson Moyana (the deceased) in accordance with customary law in 1984. The marriage was not registered. The deceased concluded a further customary marriage to Maria Mayelane (Respondent) in 2008. A headman of the village confirmed the second marriage but the Applicant was not aware of the second marriage and an application for an order approving a contract to regulate the future matrimonial property system of the two marriages, as provided for in section 7 of the Recognition of Customary marriages Act, was not made.¹⁰⁶⁷ The deceased died in 2009.

The major question before the court was whether the marriage of the deceased to Respondent was valid because of the deceased's non-compliance with the RCMA. The court held that the marriage was valid because the RCMA sought to put customary marriages on par with civil marriages and to protect the rights of individuals, including women and children, in both monogamous and polygamous marriages. The court further held that spouses in customary marriages share equal status and capacity and the purpose of court approval is to protect the existing spouse(s), the new intended spouse, and any children resulting from these marriages.

¹⁰⁶⁶ [2010] 4 All SA 211 (GNP).

¹⁰⁶⁷ In terms of section 7 of the RCMA, customary marriages entered into before the commencement of the Act should continue to be governed by customary law but a husband who is party to such a marriage and who wishes to enter into a subsequent customary marriage with another woman after the commencement of the Act must have a contract, which will regulate the future matrimonial property systems of his marriage, approved by the court.

While the Act does not explicitly state that the failure to comply with the provisions will result in the invalidity of a subsequent customary marriage, the court determines that the legislature intended the Act to have this effect. The inevitable infringement on the first or earlier spouses' fundamental rights and on the rights of any children born from the earlier marriage is of vital concern. Finally, the court emphasises the importance of women's empowerment and education in the communities where customary marriages are prevalent so that they know their rights and ways in which they can access and protect those rights. Ignorance of the law is one of the contributory factors that lead women to unknowingly enter into civil marriages without educating themselves about the risks and benefits of the respective regimes at their disposal.

In Zimbabwe, the Administration of Estates Act was amended to ensure that spouses in any type of marriage could inherit from estates of their deceased spouses. The surviving spouse inherits the matrimonial home and the goods and effects in it. In the case of polygamous marriages, the estate is shared between the surviving spouses and the children of the deceased in proportions, which are specified in the Act.¹⁰⁶⁸ In order to ensure the effective operation of the Administration of Estates Act, the Ministry of Justice, Legal and Parliamentary Affairs carried out the 'Wills and Inheritance Programme', with the financial support of the Department of International Development Central Africa in the year 2000.¹⁰⁶⁹

Regarding the effect of non-registration of marriages, women married under unregistered customary marriages are no longer so prejudiced during division of matrimonial property upon divorce. The courts have passed a number of judgments that recognise tacit universal partnerships. In the case of *Chapeyama v Matende and*

¹⁰⁶⁸ Administration of Estates Act section 68F, in terms of the Act, children of a deceased person are entitled to inherit two-thirds of the net estate, while surviving spouses share the one-third at a ratio calculated according to seniority, in favour of the senior wife.

¹⁰⁶⁹ Combined Report of the Republic of Zimbabwe in terms of the Convention on the Elimination of all forms of Discrimination Against Women *op cit* 51; the main objective of the programme was to take the inheritance laws to the people and ensure that they were effectively utilised. The programme involved several ngos, which conducted nationwide awareness campaigns. The campaigns included the publication and distribution of literature both in print and electronic form.

*Another*¹⁰⁷⁰, the spouses had been married under customary law in 1990 and two children were born of the marriage. During the subsistence of their marriage, they acquired several properties jointly, including a house registered in both their names. Upon the breakdown of the marriage, the husband made an application to court to have the wife's name removed from the deed of assignment. The wife counter claimed for a fair distribution of all asserts in the house.

The High Court decided in favour of the wife, holding that the application of the concept of a tacit universal partnership was fully justified. In dismissing the husband's appeal, the Supreme Court recommended a review of marriage laws to specifically recognise unregistered customary law marriages, as was done under the Administration of Estates Act.

5.3.3.8 Article 17: Committee on the Elimination of Discrimination Against Women;

In terms of this Article, for the purposes of considering progress made in implementing the present Convention, a Committee on the Elimination of Discrimination against Women shall be established. At the time of entry into force of the Convention will consist of eighteen and, after ratification of or accession to the Convention by the thirty-fifth State Parties, twenty-three experts of high moral standing and competence in the field covered by the Convention.¹⁰⁷¹

5.3.3.9 Article 21: Committee Reports;

The Committee shall, through the Economic and Social Council, report annually to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of reports and information received from different countries. The biggest challenge lies in the implementation of these laws and with reporting to bodies such as the UN. Already both Zimbabwe and

¹⁰⁷⁰ 2000 (2) ZLR 356.

¹⁰⁷¹ The experts shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as the principal legal systems.

South Africa have failed to adequately fulfil their obligations by failing to submit their reports within the stipulated timeframes.

One may be persuaded to argue that CEDAW reflects only Western values. Furthermore, many African countries that have ratified CEDAW have entered a number of reservations. Often these reservations strike at the heart of the Convention. In particular, most reservations are made on cultural or religious grounds, and usually exclude obligations in one of the most crucial spheres for women which is the family, very similar to the way the Zimbabwe's Constitution provides for exceptions in section 23 (3).

5.3.4 Protocol to the African Charter on Human and People's Rights on the Rights of Women (Protocol on the Rights of Women)¹⁰⁷²

The culmination of the African commitment to human rights, particularly those of women can be seen in the adoption of the Protocol on the Rights of Women in Maputo.¹⁰⁷³ Although the African Charter clearly proscribes discrimination against women, it was still felt that there needed to be an instrument focusing on women's issues. The instrument is argued to be more radical than CEDAW transforming African human rights law to one more reflective of women's experiences. The significance of this document rests in the fact that it goes beyond the African Charter by exposing the specific inequalities that plague women's lives. In doing so, the Protocol explicitly acknowledges what the African Charter does not, namely that, women's rights are seen as human rights and must be respected and observed.

Article 20 of the Protocol focuses on widows' rights by protecting them from customs and practices that constitute degrading and inhuman treatment and also ensuring that

¹⁰⁷² Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003;

<http://www.unhcr.org/refworld/docid/3f4b139d4.html> (Accessed 30/01/2012), this Protocol is in force and has been ratified by four SADC states namely Lesotho, Malawi, Namibia and South Africa excluding Zimbabwe.

¹⁰⁷³ A Protocol is an international agreement used to indicate a legally binding instrument complementary to its mother treaty, in this instance the African Charter.

women are appointed the guardians of their children, unless it is not in the best interests of said children.¹⁰⁷⁴ On the issue of women's rights to be appointed guardians to their children, there has since been an interesting development in Zimbabwean law where women may now retain their maiden names for the purposes of registering the births of their children.

In July 2010, a couple filed a Constitutional application with the Supreme Court challenging the legitimacy of the Registrar - General's policy compelling married women to revoke their maiden names as a pre-requisite for obtaining birth certificates for their children. The mother together with her identity particulars and the child's birth record, approached the Registrar – General's Office to obtain the minor's birth certificate. The officials refused to help her, ordering her to first relinquish her maiden name before obtaining the birth certificate as per directive by the RG compelling all women married under Chapter 5:11 of the Marriages Act to revoke their maiden names.

The woman's husband argued that such deprivation constituted inhuman treatment to the child and that the refusal constituted inhuman treatment in contravention of section 15(1) of the Constitution of Zimbabwe as the idea of a name is inseparable from the idea of humanity therefore the refusal to formalise the fact of the name was inconsistent with the child's humanity.¹⁰⁷⁵ The couple argued further that their son was being deprived of his right to identity in a country of his birth and thus being rendered

¹⁰⁷⁴ In terms of Article 20, "States Parties shall take appropriate legal measures to ensure that widows enjoy all human rights through the implementation of the following provisions:

(a) that widows are not subjected to inhuman, humiliating or degrading treatment;
(b) a widow shall automatically become the guardian and custodian of her children, after the death of her husband, unless this is contrary to the interests and the welfare of the children;
(c) a widow shall have the right to remarry, and in that event, to marry the person of her choice."

¹⁰⁷⁵ See the article in Zimbabwe's main newspaper where the couple argued that the change of the mother's name was not an obligation at law although it was her entitlement as a legally married woman. The husband contended that the respondents (Registrar General's office) did not have the equitable jurisdiction to withhold the minor child's identity based on a policy position that enjoys not the support of the law. He added that the denial of a birth certificate would also translate to the denial of other rights such as free movement.

http://www.herald.co.zw/index.php?View=article&catid=37%3Atop-stories&id=14961%3Acouple-challenges-mudedede&format=pdf&option=com_content&Itemid=130 (Accessed 09/07/2011).

stateless, a development that cannot be approved of in terms of municipal or international law. The child's birth certificate was however issued in the mother's name.

Given the continued existence of widow inheritance in some jurisdictions, article 20(c) makes clear that a woman has the right to remarry and that she may remarry a person of her choice. Article 21(1) on the right to inheritance provides that a widow and her children should not be evicted from their home on the death of the husband and father. States are called upon to, "include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application."¹⁰⁷⁶

The Protocol also makes clear that women have the right to live in a positive cultural context. Article 17(1) promotes women's involvement in the determination of cultural practices, presumably so that they will not be discriminatory.¹⁰⁷⁷ In addition, "States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and all other traditional practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men."¹⁰⁷⁸

Finally, the Protocol also recognises that women may need assistance when seeking to access the law and provides that member State should facilitate such access.¹⁰⁷⁹ In general, the Protocol can be lauded for being an innovative instrument that advances the goal of securing the indivisibility of human rights. It builds on CEDAW and underlines the need to back up law with effective policy and other measures. However,

¹⁰⁷⁶ Article 21(1)(a).

¹⁰⁷⁷ See also article 17(2) where the Protocol also recognizes that culture permeates all institutions from the family through to the state and so provides that the state has the obligation to take all appropriate measures to enhance the participation of women in the formulation of cultural policies at all levels. See the South African case of *Stephen Tongoane and Others v Minister of Agriculture and Land Affairs and Others supra* where women were not adequately represented in consultations preceding passing of the Communal Land Rights Act.

¹⁰⁷⁸ Article 2(2).

¹⁰⁷⁹ Article 8.

critiques are of the opinion that it has resulted in language that is somewhat vague and weak, and a number of provisions that appear noble but legally unenforceable.

5.3.5 The International Covenant on Civil and Political Rights (ICCPR)

Like CEDAW, the ICCPR is based within the text of the Universal Declaration of Human Rights (UDHR), the primary framework of modern human rights. Importantly, the ICCPR establishes that “all persons shall be equal before the courts and tribunals.”¹⁰⁸⁰ While this equality does not explicitly refer to gender, later provisions in the Covenant establish the continuance of this concept from the UDHR. The Covenant goes on to call for equality for all persons, and universal entitlement to equal protections of the law, which, “shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour and sex.”¹⁰⁸¹ Its praise comes from the call for minority groups to “enjoy their own culture” in community with other members of their group.

It is observed that the Covenant’s objectives clearly resemble the sentiments embodied in the Zimbabwean and South African constitutions in terms of the Declaration of Rights and the Bill of Rights respectively. The similarity is drawn from the fact that both documents call for non-discrimination on the ground of sex whilst at the same time recognising the right to enjoy one’s group’s cultural life and practice. In a conservative African setting, both countries not being an exception, this would mean equal entitlement to follow tradition the result being the recognition of those cultural practices that maybe perceived as oppressive to women but essential for the coercion and efficacy of the group.

¹⁰⁸⁰ ICCPR Article 14.

¹⁰⁸¹ *Ibid* Article 16.

5.3.6 The International Covenant on Economic, Social and Cultural Rights (ICESCR)

Similarly, the ICESCR calls for the elimination of discrimination against women and “the equal rights of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.”¹⁰⁸² It further includes a call for the self-determination of all peoples, and says that by virtue of that right, they should “freely determine their political status and freely pursue their economic, social and political development.”¹⁰⁸³ Self-determination and women’s equality are thus structured as close, but separate and possibly conflicting rights. As such, the question of prioritisation arises, that is, is the self-determination of a population more valid than the assertion of a global norm of human and women’s rights?

5.3.7 The Draft Declaration on the Rights of Indigenous Peoples (DDRIP)¹⁰⁸⁴

This document deals with the importance of the self-determination of groups without detailing specifically the protections against discrimination based on sex. In terms of the draft, “indigenous people have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices.”¹⁰⁸⁵ It becomes even more apparent that the whole human rights dialogue has become problematic as it reflects the imbalance inherent in the search for the establishment of and equalisation among competing human rights. The issue remains whether custom and culture must always give way to human rights norms. The answer is not a simple one, as Beyani notes, “the family is ordinarily conceived as the embodiment of culture and traditional values. Yet it is generally within the family that

¹⁰⁸² ICESCR Article 3.

¹⁰⁸³ *Ibid* Article 1.

¹⁰⁸⁴ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295; <http://www.unhcr.org/refworld/docid/471355a82.html> (Accessed 16/02/ 2012).*

¹⁰⁸⁵ DDRIP Article 33.

stereotypic attitudes and power relations have weighed heavily against women for centuries.”¹⁰⁸⁶

5.3.8 The SADC Gender and Development Declaration 1997

The preamble to the 1997 declaration makes clear that “gender equality is a fundamental human right.”¹⁰⁸⁷ The Declaration identifies areas in which women continue to experience discrimination. It notes that, “....disparities between men and women still exist in the areas of legal rights, power-sharing and decision making, access to and control over productive resources, education and health amongst others.”¹⁰⁸⁸ To tackle this multiple discrimination the Declaration makes several suggestions including giving women access to and control over productive resources including land¹⁰⁸⁹, and that women’s reproductive and sexual rights are protected and promoted.¹⁰⁹⁰ Further, States should commit themselves to ‘repealing and reforming all laws, amending constitutions and changing social practices which still subject women to discrimination and enacting empowering gender sensitive laws.’¹⁰⁹¹ The Declaration is however silent on the strategies that the state should adopt in seeking to bring about these changes.

5.4 PROBLEMS OF HUMAN RIGHTS LAW

When a country signs a convention, it means it agrees with the convention and by ratification, it undertakes to incorporate and implement its provision in terms of domestic law. Countries have their own rules about how to ratify instruments under international law. According to Banda¹⁰⁹², whilst countering the view that human rights have achieved acceptance, argues that human rights, good governance and democracy are

¹⁰⁸⁶ Beyani C “Toward a more effective guarantee of women’s rights in the African human rights system” in Cook *Human rights of women: national and international perspectives* (1994) 292.

¹⁰⁸⁷ Article B(i), H(vii);

[Http://www.uneca.org/daweca/conventions_and_resolutions/SADCDECLGENDER.pdf](http://www.uneca.org/daweca/conventions_and_resolutions/SADCDECLGENDER.pdf)(Accessed 12/02/2012).

¹⁰⁸⁸ Article C(i).

¹⁰⁸⁹ Article H(iii).

¹⁰⁹⁰ Article H(viii).

¹⁰⁹¹ Article H(iv).

¹⁰⁹² Banda 2006 *Journal of Southern African Studies* 21.

continuously being seen as preconditions for the receipt of aid, and most states now ratify human rights instruments as a means of accessing aid. Thus, their ratification of international human rights instruments is a matter of expediency rather than commitment.

Since all human rights instruments seem to draw their purpose from the UDHR, the other problem emanates from the very nature of the UDHR that is argued to be out of harmony with the nature of African culture. Apparent is the fact that, when the UDHR was drafted, debated and adopted in the aftermath of World War II, only a handful of women and no sub-Saharan African sat on the floor of the UN General Assembly. Even the broad character of the rights articulated in the UDHR framework reflects normative values, inspirations and interests of Western culture of a specific stage of historical evolution. Hence, it is clear that the 'human rights' discourse emanates from a specific historical context.

Manji¹⁰⁹³ argues that formal law is of little use to most African women whose lives are far removed from any interaction with the state or norms generated by it. She observes the 'living law' or internally generated community norms as having a greater impact on women's lives. Reiterating the point, Maboreke¹⁰⁹⁴ contends that while law grants women rights and legal capacity, it does not address the issue of women's social dependency. Some are of the opinion that it is only by way of a realisation of the fundamental values enshrined in the Millennium Development Goals that the overall condition of all in society will be improved. From a feminist perspective, this entails an enhancement of women's capabilities.¹⁰⁹⁵

Numerous scholars have critiqued the overall concept of culture and the approach of the UDHR as narrowly focusing on the individual's relationship to the state, as opposed

¹⁰⁹³ Manji "Imagining Women's Legal World: Towards a Feminist Theory of Legal Pluralism in Africa" 1994 *Social and Legal Studies* 434.

¹⁰⁹⁴ Maboreke M "Understanding Law in Zimbabwe" in Stewart *Gender, Law and Social Justice: International Perspectives* (2000) 116.

¹⁰⁹⁵ Nussbaum M C "Women and Human Development: The Capabilities Approach" in Molyneaux and Razavi (eds) *Gender, Justice, Development and Rights* (2002) 45.

to the group, a characteristic rooted in Western liberal philosophy. One of the prominent among these is An-Na'im¹⁰⁹⁶, a human rights Lawyer of Arab origin, who makes a persuasive argument for the dynamic concept of internal "cultural transformation" as the most practical guarantee of entrenching human rights in African societies. He argues that culture has a significant impact on human rights paradigms around the world and as such, culture is the best-suited vehicle for protecting rights.

He has also challenged the cultural and religious obstacles to women's rights through a reconceptualisation of the opposition of culture and rights in theory and bridging their difference in practice. He begins from the premise that state driven efforts to protect human rights need to be supported by broader strategies for social and cultural transformation. When women drummed the point home during the UN conference on Human Rights held in Vienna (1993) that "women's rights are human rights", emphasizing the indivisibility and interrelatedness of rights, they recognised the potential of culture to reinforce rights. In line with this school of thought, one may accept the decision in Zimbabwe's *Magaya* case or South Africa's *Mthembu* cases that the recognition of the primogeniture rule is relative to an African cultural setting in the private sphere of the family unit and its communal nature where rights and responsibilities are shared.

In state efforts to address the gap between customary law and human rights law, another impediment presents itself in what is known as the 'living law', an informal, flexible law reflecting the day-to-day practices of the people, which may differ from the

¹⁰⁹⁶ An Na'im "Human Rights in the Arab World: A Regional Perspective" 2001 *Human Rights Quarterly* 701-732 the writer says, the distinction between the 'public' and 'private' spheres of society can present obstacles to women's rights. The public sphere or sector of legal and political order is contrasted with the private arena of home and family where states may claim it is outside their responsibility to intervene. Abuses of women's rights often occur in the 'private' sphere where states are reluctant to act. The dominant focus on political and civil rights in the understanding of international human rights law is therefore biased to the male-dominated public sphere; see also Cook *Human rights of women: national and international perspectives* (1994) 3, who argues that international human rights law has not been applied effectively to redress the disadvantages and injustices experienced by women solely because of their gender.

customary law enshrined in statutes or found in court judgments.¹⁰⁹⁷ The living law is contrasted with state customary law, which is said to have ossified and not kept up with changes in social behaviour.

Further, as Shivji¹⁰⁹⁸ points out, the exclusion of many states from the drafting of the foundational United Nations human rights instruments has resulted in the charge that these instruments are not representative of African concerns and that they reflect the perspectives of those in the north. Mutua¹⁰⁹⁹ adds on to allege that the northern construction of human rights reflects a western value system and hypocritical, constructing African violators of rights as savages in need of northern salvation while ignoring northern violations. Not only does this highlight double standards but it also results in the privileging of the northern perspective of worldview.

African women experience a disconnection between rights' provision and rights' implementation and enjoyment on a daily basis. Despite the several protections in constitutions, legislation and international law, the goal of equality for women in these arrangements may indeed be obscure for women if certain structural obstacles to gender equality continue. For a large portion of the African female population, poverty continues to stifle the possibilities that the Constitutionalism promises through its extensive rights provisions.¹¹⁰⁰

5.5 CONCLUSION

The chapter has considered women's rights in the context of the South African and Zimbabwean constitutional models as well as under international and regional human

¹⁰⁹⁷ Himonga and Bosch "The Application of Customary Law Under the Constitution of South Africa: Problems Solved or Just beginning?" 2000 *South African Law Journal* 306ff .

¹⁰⁹⁸ Shivji *The Concept of Human Rights in Africa* (1989) 3.

¹⁰⁹⁹ Mutua "Savages, Victims and Saviours: The Metaphor of Human Rights" 2001 *Harvard International Law Journal* 201.

¹¹⁰⁰ Debbie Budlender "Women And Poverty In South Africa" 2003.

[Http://www.genderstats.org.za/documents/womenandpoverty.pdf](http://www.genderstats.org.za/documents/womenandpoverty.pdf) (Accessed 19/10/ 2009), who whilst writing on South Africa, suggests that poverty restrains the ability of women to stand up to abuse or to assert their rights because of economic dependence on men. However, in South Africa, the entrenchment of socio-economic rights for all goes a long way in improving the position of women in the country.

rights instruments. It began with an overview of the development of plural legal systems before examining constitutional provisions that address issues of discrimination. There was consideration of case law raising cultural aspects such as widow's rights of inheritance, polygamy, distribution of property on divorce, guardianship of children and the issue of minority and readiness to marry, thereby showing how different constitutional models influence women's ability to enjoy their rights. The chapter also brought to light some of the legislative reforms, institutional mechanisms, and policy positions adopted in both countries for the advancement of women's rights.

In terms of international law, the highlight was CEDAW, which was complemented by a brief examination of Continental treaties such as the African Protocol on Women's Rights. The Chapter further took into consideration regional instruments like the SADC Declaration on Gender and Development. It became more apparent that there is a multitude of human rights instruments, all of which guarantee the rights of women. However, this normative success has not necessarily resulted in women actually enjoying their rights. There are many reasons for this. For one, countries may not be fully committed to enforcing human rights; they may not have the adequate resources to do so; they may be reluctant to face down the resistance that often presents itself when people are confronted with change; or it may well be that states do not see women's rights as a priority. For their part, women may be hampered by a lack of knowledge of their rights or fear of invoking their rights in a bid to maintain long-term family relationships. Litigation is expensive and an absence of funding to bring claims is another obstacle women still face. As all these factors are important, one can only conclude that a multi-faceted approach to gender discrimination will bring about the change that sees human rights truly being women's rights.

CHAPTER SIX

THE FUTURE OF CUSTOMARY LAW: Findings and Recommendations

6.1 FINDINGS

6.1.1 Introduction

The place of customary law in the contemporary socio-legal sphere has increasingly become a point of debate. A number of traditional practices are now frowned upon with the majority being labeled as discriminatory against women owing to patriarchal nature of African traditional social organisation. This sentiment was generated in the late 19th century when the colonial administration in Zimbabwe and South Africa began to formalise customary law in an effort to bring some degree 'certainty' to it. The early Ordinances and legislation prescribed the law which the native courts administered. Thus, the understanding of customary law by Native Commissioners became the accepted authority by native courts when dealing with disputes between African litigants.

The study used various aspects of the African marriage as the departure point in understanding customary law and family social organisation in a traditional and contemporary African setting. The features of customary law of marriage in Zimbabwe and South Africa were examined, one of the highlights being the principle of communality and influence of extended family linkages. In addition, the research determined the extent to which various State interventions and factors such as legislation and constitutionalism and international human rights law have influenced the interaction between custom and the law during the pre-colonial and the post-colonial era in both countries.

In general, it was observed that legislation either ignored or distorted customary law to suit colonial needs in the emerging capitalist economy and the male bias in legislation might actually have deprived African women, the rights they may have enjoyed under

African customary law such as identity, access to land and property rights.¹¹⁰¹ One of the immediately apparent effects was the introduction of traditional private family law into a public sphere. For instance, apart from outright repudiation, some cultural practices that used to be in the realm of private family such as divorce became legal events placed before the public eye.¹¹⁰² At this point, we look at some of the key conclusions drawn by the study and thereafter attempt to make propositions for possible reform and determine the future between the customary law and western law dialogue.

6.1.2 Capacity to Marry

It has been observed that indigenous ethnic groups performed different customary rites that initiated young adolescent boys and girls into adulthood and thus determined their readiness to marry. Among the South African Nguni, circumcision for the boys and *ukuthombisa/intojane* for the girls continues to symbolise this fundamental transition. Although it is reported that initiation for girls is declining, circumcision for boys has continued to find relevance among rural and urban youth alike.¹¹⁰³

However, there have been calls to abolish the practice especially due to botched circumcisions that have left many young initiates injured or dead. Immediately one is persuaded to argue that when custom begins to deny the youth their right to life and physical integrity, measures have to be put in place to curb the risk or strike down the custom altogether as incompatible with modern thinking.¹¹⁰⁴ The South Africa government has as a matter of policy, adopted an approach of encouraging the practice

¹¹⁰¹ Knight *Statutory Recognition of Customary Land Rights in Africa: An Investigation Into Best Practices for Lawmaking and Implementation* (2010) 22, who says, "In some instances, colonial courts responsible for adjudicating "native law" distorted it by filtering its norms through European legal concepts."

¹¹⁰² Koyana and Bekker "The Indomitable *Ukuthwala* Custom" 2007 *De Jure* 139, where the writers say the state denied recognition of customary marriages for many reasons such as the description of *lobolo* as the sale of a woman and polygamy which was perceived as being incompatible with the understanding of western marriages as the union of one man, and one woman.

¹¹⁰³ Afolayan *Culture and Customs of South Africa* (2004) 202, where the author observes that, it has continuously become fashionable for boys and girls from the cities to return to the rural areas when old enough, to undergo different rituals of puberty or initiation alongside their rural age groups.

¹¹⁰⁴ Macleod C *Adolescence, Pregnancy and Abortion: Constructing a Threat of Degeneration* (2011) 29, who says, "although female initiation rites have waned recently, male circumcision continues with controversy raging concerning 'traditional' practices of circumcision versus 'modern' medical methods."

to be performed by qualified medical practitioners to save young lives as well as curb the risk of contracting HIV/AIDS. Though the government's position may be commended for addressing the issue, the major disadvantage is that, in an urban setting the rituals that symbolise the custom are compromised.

In terms of legislation, the South African Recognition of Customary Marriages Act (RCMA) by setting the marriageable age for prospective spouses at 18 years undermines customary law where specific age is not a strict consideration. It is reported that the Minister is considering lowering the marriageable age for girls to 16 years. Currently in Zimbabwe, there is differentiation in the minimum age of marriage for boys and girls, which is pegged at 18 and 16 years respectively. The anomaly has been criticised for being discriminatory to girls, who are described as being prematurely exposed to marital life. The Zimbabwean criminal law also provides that 16 years is the minimum age of sexual consent in terms of the Criminal Law (Codification and Reform) Act.¹¹⁰⁵

University of Fort Hare

In addition, there have been reports and outcries against practices such as child-pledging in certain impoverished parts of the south-east lowveld of Zimbabwe. It is reported that girls are being given to wealthy men in exchange for grain. It may be argued that the practice undermines a young girl's consent to marry and therefore retrogressive and illegal, being a mere means by poor rural families to exchange their daughter's hand in marriage for grain during desperate times. The practice is already prohibited under the Customary Marriages Act but has resurfaced due to economic and social pressures.

It was noted, whilst examining the features of customary marriages that, among the Shona, different forms of marriages evolved and were concluded in different ways without the paying of *roora* (bride wealth). An example was child-pledging and widow inheritance. Child-pledging on the one hand was aimed at stabilising domestic units of the poor whilst widow inheritance lent permanence to extended families. Marriage was

¹¹⁰⁵ Act No. 23 of 2003.

thus important to serve various social and economic roles. According to Alexander¹¹⁰⁶, the payment of *roora* in the form of grain was customary in times of hardship and notes that among the Shona, cash, gold, stock, grain, child-pledging and periods of labour were all valid ways of paying bride wealth.

In South Africa, similar concern has emerged about the resurgence of the *ukuthwala* custom which was a valid way of contracting a marriage under customary law. The practice has been wrongly equated to the common law crime of abduction where unlawfulness is an essential element of the crime. On the other hand, *ukuthwala* was unlawful in terms of custom.¹¹⁰⁷ Its disapproval has mainly hailed from the apparent involvement of young girls who in terms of legislation lack legal ability to consent to sex and marriage. There may also be arguments that because often the young girls are still of school going age, their right to education is also compromised. Although the outcries show that the practice has become unacceptable in contemporary thinking, these alternative forms of marriage provided flexibility and adaptation to change, in ethnic communities whose traditional economic base has been thoroughly disrupted. It is submitted that the dynamism of traditional institutions is illustrated by their adaptability to new social conditions.

6.1.2 The Role of Bride wealth

An examination into the relevance of *roora* and *lobola* payments among the Shona and Ndebele of Zimbabwe and the Xhosa and Zulu of South Africa, shows that bride wealth played and continues to play a fundamental symbolic role in binding the marriage contract between two families.¹¹⁰⁸ Rural and urbanised black folk alike continue to observe bride wealth payments as a means of concluding a valid customary marriage in the first instance. This is despite calls from the international community, particularly

¹¹⁰⁶ Alexander *The Unsettled Land: State-making & the Politics of Land in Zimbabwe, 1893-2003* (2006) 29.

¹¹⁰⁷ Paulston *et al The Handbook of Intercultural Discourse and Communication* (2012) 332, the authors mention that the girl's parents could even give permission for her to be *thwalaed*.

¹¹⁰⁸ Idriss and Abbas *Honour, Violence, Women and Islam* (2010) 174, who whilst writing on bride-price in Zimbabwe and Namibia, also acknowledge that *roora/lobola* is still widely practiced in sub-Saharan Africa.

human rights bodies to abolish bride wealth systems because they are 'discriminatory' to women.¹¹⁰⁹ Even today *roora/lobola* symbolises attainment and construction of cultural identity for prospective spouses and their families. However, there has been a general failure by spouses to fulfil and comply with registration requirements rendering legislation ineffective in this regard.

From another perspective, it is observed that the practice of *roora/lobola*, with all its noble intentions, may have lost its true meaning and purpose as was originally intended by custom. Factors such as colonisation, advent of capitalism and society's evolving socio-economic needs are responsible for this perversion. It may thus be argued that bride wealth in today's terms often fails to deliver its real significance, that is, the binding of two families. For instance, the acceptance and substitution of *roora/lobola* cattle for cash and the tendency of the marriage transaction to revolve around deliberations between patriarchs are some aspects resembling this change. Monetisation of bride wealth has certainly transformed its ritual significance. Notwithstanding these influences, legislation in both Zimbabwe and South Africa continues to recognise that a valid customary marriage is one concluded in accordance with custom, that is, in terms of all customary rites including payment of *roora/lobola*.

6.1.3 Property Rights of Women and Division of Matrimonial Property

There have been unjust attacks on customary law regarding the redistribution of matrimonial property upon death or divorce. It is often misconstrued that women did not own property under customary law and their rights to property were disregarded. The research observed that women were actually valued household managers and owners of property. However, owing to various factors women continue to have limited control either over resources they help accumulate personally or jointly because of power

¹¹⁰⁹ The CEDAW Committee in its response to Zimbabwe's Report of the implementation of the convention raised concern regarding the continued recognition of bride wealth payments. In terms of para 141 it was stated that; "the Committee expresses concern that discriminatory traditional practices, such as lobola, polygamy and female genital mutilation, are still accepted. Although the Constitution criminalizes any act of discrimination on the ground of sex and, furthermore, the practice of lobola has been made illegal, tradition and customary law still ensures continued discrimination."

dynamics in marriage. This is largely due to disintegration of the communal subsistence economy where traditional property rights found their efficacy. Customarily, these rights belong to family or agnatic groups with the members taking a share in group rights to property.¹¹¹⁰

Traditionally, all customary marriages were out of community of property and the husband got most of the matrimonial property upon divorce. This is not to say women had no property rights in terms of custom. Legislation in South Africa and Zimbabwe continues to raise problems when examining how the proprietary consequences of marriage are influenced by different matrimonial property regimes upon dissolution of marriage by divorce or death. In South Africa, the Recognition of Customary Marriages Act (RCMA), differentiates between marriages concluded before and after commencement of the Act. Marriages concluded before the Act are governed by customary law and therefore out of community of property whilst those concluded after commencement, are in community of property. The RCMA has thus been criticised for failing to recognise the equality of spouses and property rights of women married before November 15, 2000. The position was successfully challenged in *Gumede v The President of South Africa and Others*.¹¹¹¹ The decision declared all customary to be in community of property regardless of date of conclusion. The position of precedent now places all customary marriages as in community of property. A Recognition of Customary Marriages Amendment Bill is before Parliament to aspects of the Act.

In Zimbabwe, in terms of the Matrimonial Causes Act (MCA), all customary marriages are automatically out of community of property unless varied by antenuptial contract. However, the MCA¹¹¹² provides courts with a wide discretion in terms of section 7(4) to determine the distribution of marital property according to a set of factors crafted to be inclusive of wives' non-financial contributions in marriage. For example, there is provision for what are described as a wife's indirect contributions thereby recognising

¹¹¹⁰ Myburgh *Papers in indigenous law in Southern Africa* (1985) 15.

¹¹¹¹ 2009 (3) SA 152 (CC).

¹¹¹² See section 7 of the Matrimonial Causes Act providing that those with registered marriages may be allocated marital property equitably by the courts.

the value of efforts invested in looking after the household and importance of complimentary efforts by spouses. The discretionary powers of the courts however fail to guarantee equity of allocations which are largely determined by how conservative or liberal judicial officers are.

Another issue of contention remains the Act's exclusion of parties belonging to unregistered customary marriages from its sharing provisions. There are two types of customary marriages in Zimbabwe, namely the registered and unregistered marriage the latter which is not regarded as a valid marriage. It is feared that the majority of married women belong to such marriages and are often prejudiced upon divorce. An alternative has been provided for in terms of the Customary Law and Local Courts Act where grounds for bringing a matrimonial property claim may be pleaded on common law principles such as undue enrichment, equity and tacit universal partnership.¹¹¹³ In addition to the above shortcoming, it has been found that magistrates sometimes err in applying the sharing provisions of the Matrimonial Causes Act to unregistered marriages. Where the common law principles are correctly applied to unregistered marriages, litigants often do not show the requisite knowledge of what their causes of action entail leading to numerous appeals emanating of divorce litigation in the lower courts.

6.1.4 Land Rights and Rural Women

In terms of the right to land, it was observed that customary marriage laws were related and connected to land ownership laws. It became apparent that rural women fare the worst when it comes to economic standing and ownership of communal land. To the contrary, the same cannot be said about urban women who are generally more economically involved and fair better as economic companions to their husbands. Culture has also been wrongfully perceived as a disempowering tool by denying women access to, control and ownership of communal land.

¹¹¹³ Ncube "Re-Allocation of Matrimonial Property at the Dissolution of Marriage in Zimbabwe" 1990 *Journal of African Law* 1ff.

In both South Africa and Zimbabwe, colonial rule and legislation played a key role in withdrawing women from those rights they might have enjoyed under customary law. According to Joireman¹¹¹⁴, women lost control of land as household managers when legislation began dictating that land be registered in the husband's name. Traditionally, clan-based linkages and allocations assured women's access to land and therefore following this argument, women in pre-colonial times had an elevated social standing within the often criticised traditional patriarchal setup. The communal nature that was characteristic of the social organisation reinforced each individual's right to enjoy and be maintained from the groups' resources. Thus, individualisation of land tenure and principles of personal ownership disrupted the exercise of communal rights. From this premise, it may be argued that colonialism played a role in the subjugation of women by identifying black man as the only holders of title.

Labour and land legislation also had the impact of disrupting African families, particularly the efficacy of a communal mode of production. African peasantry gradually lost land to a capitalist land tenure system largely based on commercial farming. With the accompanying monetisation of the economy left women and men with no option but to rescind from family life in pursuance of wage labour. This indirectly subdued women's roles as suppliers of food and labour for their families.¹¹¹⁵

In Zimbabwe, the Land Apportionment Act, Native Land Husbandry Act and the Communal Land Act failed to guarantee the land rights of women. South Africa's Communal Land Rights Act attempts to deal with the return of land to indigenous communities whilst indirectly redressing women's ability to deal with matrimonial property. The Act does away with pieces of legislation such as the Natal Codes, Natives Land Act, and the Black Administration Act emanating from the country's colonial history. The South African government has shown commitment to abolish most

¹¹¹⁴ Joireman *Where There Is No Government: Enforcing Property Rights in Common Law Africa* (2011) 47.

¹¹¹⁵ Ramphela "Are Women Not Part of the Problem Perpetuating Sexism? – A Bird's eye view from South Africa" 1990 *Africa Today* 13.

remnants of its colonial past with enactment of legislation such as the Repeal of the Black Administration and Certain Laws Amendment Act.¹¹¹⁶

In general, the legislative and other means towards law reform that the state adopt to achieve equality between men and women fail to address the real issues owing to deeply entrenched societal norms. In both countries, legislation continues to give Chiefs powers to allocate rural and determine custom which has the effect of further leaves customary law rules being male focused by recognising men as the only rightful owners of land. It may therefore be argued that while the law may grant women's rights and legal capacity, it does not resolve the issue of women's social dependency.¹¹¹⁷

Speaking on South Africa, Goldblatt and McLean contend that, "the struggles over land rights that are underway in South Africa are inextricably bound with struggles over the content of custom. They are not so much struggles against custom, but rather, contestation over the content of customary entitlements to land in the context of the equality rights guaranteed by the Constitution."¹¹¹⁸

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6.1.5 Constitutional Perspectives

A general observation has been made that more contemporary Constitutions that emerged post-1990 such as that of South Africa, tend to be more liberal and progressive by largely recognising the notion of human rights including the rights of women and children.¹¹¹⁹ In this context, men and women are equal before the law and all laws including customary law, are made subject to this constitutional imperative. The

¹¹¹⁶ Act No. 28 of 2005, in its preamble it declares that: "since the Black Administration Act, 1927 (the Act), is regarded as a law that is repugnant to the values set out in the Constitution...and is reminiscent of past divisions and discrimination...it ought to be repealed as a matter of the utmost urgency."

¹¹¹⁷ Maboreke M "Understanding Law in Zimbabwe" in Stewart *Gender, Law and Social Justice: International Perspectives* (2000) 116.

¹¹¹⁸ Goldblatt and Mclean *Women's Social and Economic Rights: Developments in South Africa* (2011) 83, the writers further confirm the position that legislation such as the Communal Land Rights Act of South Africa brings controversy in that it awards vast statutory powers given to traditional leaders who control land and dictate custom which has the negative effect of upsetting the balance of power in rural areas.

¹¹¹⁹ Stewart A *Gender, Law and Justice in a Global Market* (2011) 107.

ensuing conflict arises between the exercise of the right to culture and religion on the one hand and the right to equality and self-determination on the other.

Zimbabwe's constitution has been described as relativist whilst South Africa's constitution is referred to as universalist. The former in terms of section 23(3), allows discrimination on the grounds of marriage, divorce, distribution of property and sex/gender when applying customary law. Section 23(3) therefore remains one of the major impediments in achievement of full women's rights in Zimbabwe. The later constitution does not make provision for any conditions when interpreting any rights and makes all laws including customary law subject to the Bill of Rights. While the argument may be raised that Zimbabwe's constitution provides a compromise between recognition of custom and internationally accepted individual rights, it is contended that elevating customary law, further relegates women's rights. On the other hand, in South African, the universal nature of human rights dominates and constitutionalism has emphasised equality as the fundamental right that can be seen as advancing western feminism and liberalism in a traditional context.

The research also examined case law dealing with cultural aspects such as widow's rights of inheritance, polygamy, distribution of property on divorce, guardianship of children and the issue of minority and readiness to marry, thereby showing the practical implications that different constitutional models had on women's ability to enjoy their rights. Although earlier decisions in such as the *Mthembu* cases on inheritance upheld aspects of customary law, recent jurisprudence emanating from South African courts in the past decade demonstrates women's liberty to challenge numerous customary law rules at a constitutional level. The *Bhe* trilogy of cases, which decisively struck down the primogeniture rule governing inheritance at customary law and the *Gumede* decision that placed customary marriages in community of property, reaffirm South Africa's commitment to attaining equal rights of women in a traditional African context.

On the other hand, jurisprudence in Zimbabwean has tended to defend cultural practices regardless of their negative effect on proprietary rights of wives and girl

children. The *Magaya* decision that upheld the customary law rule of male primogeniture serves testimony of what may be described as the downsides of the relativist model. Both countries' constitutions also make provision for government to establish institutional mechanisms by way of legislation and adoption of policies that seeks to elevate the status of women. Evidence shows that the gender debate is still alive.

6.1.6 Customary Law in the Realm of International Human Rights Law

Apart from considering women's rights in the context of Zimbabwean and South African constitutional models, customary law was examined in terms of international and regional human rights instruments. In general, African culture has been identified as being out of harmony with the principles of international human rights law. Fenrich and Others submit that,

"the bill of rights in national constitutions are now supplemented by international human rights law. The African regional human rights system, which is fast developing, presents additional challenges to customary law, particularly in the area of women's rights."¹¹²⁰

This disparity is evident in the apparent lack of compatibility between founding human instruments such as the Universal Declaration of Human Rights (UDHR) and the right to culture. It has been observed that critics contend that the UDHR was formulated at a particular stage in European history and best serves the needs of the West and not African tradition. It is further argued that instruments such as the UDHR emphasise the individual's relationship to the state, contrary to culture that focuses on the group. Falola and Salm make an assertion that,

"it would be unfair to describe indigenous law as a stumbling block on the way to full reception of a dispensation of human rights, but one cannot ignore the reality that traditional laws and institutions are founded on a worldview with origins and foundations that are completely different from those that gave rise to the doctrine of human rights."¹¹²¹

¹¹²⁰ Fenrich *et al* *The Future of African Customary Law* (2011) 68.

¹¹²¹ Falola and Salm *Urbanization and African cultures* (2005) 407.

From a gender perspective, CEDAW remains the key convention that determines and projects acquisition of women's rights globally. Continental treaties such as the African Protocol on Women's Rights compliment it. Regionally, treaties like the SADC Declaration on Gender and Development bring the notion of international women's rights closer to Southern Africa. The observation is that, although the law has been established on paper, enforcement and other ancillary structures fail to adequately take the law to the people.

There are many reasons for this observation. For one, state parties generally lack the commitment to enforce human rights law or lack the adequate resources to do so. In addition, there may be a reluctance to face societal resistance that often presents itself when people are confronted with change. Budgetary constraints may also hinder governments from categorising women's rights issues as priority areas. For their part, women may be deterred by the cost of litigation or ignorant of their rights. It has also been observed that owing to the very nature of customary marriages and their characteristic emphasis on continuity, women often fear to invoke their rights and opt to preserve long-term family relations.

Compliance by member states with the reporting procedure laid down in CEDAW has been flawed. Signatories either omit or delay in meeting deadlines stipulated for submission of requisite reports to relevant Committees within the CEDAW framework. The reporting procedure remains instrumental as it continuously persuades countries to implement international law. Insufficient consultation and lack of coordination within the national gender machinery is often cited as a shortcoming in compilation of accurate reports.

The research further identified both Zimbabwe and South Africa has generally lagging behind in incorporating key human rights instruments into their domestic laws. This is largely because of limitations in state laws, which provide that, although a country may ratify a convention or treaty, such assertion does not have the force of law until such

state exercises its discretionary obligation to incorporate the provisions in domestic legislation.

In addition, the research observed that provision of human rights did not necessarily mean that the intended parties actually enjoyed these rights. Urban women appeared more connected to their legal and constitutional rights and thus initiated litigation much more than their rural counterparts. The landmark constitutional judgments in South Africa such as the *Bhe* trilogy of cases and the *Gumede* decision did not emanate from the rural areas but from urban South African townships. Fortunately, for some, the revised policy/legislative interventions that succeed such rulings are usually meant for the benefit of all. This is evidence that a gap still exists between formal law and day-to-day realities of rural women.¹¹²² It remains imperative for the law to be legally and practically relevant to its people.

The study also identified existence of what is termed the 'living' law, which is often divorced from the dictates of state law. This 'living' law makes it more difficult for the state to address pertinent issues in society and bridge the gap between customary law and human rights law in this case the rights of the girl child. An example is the way the *ukhuthwala* marriage is apparently being abused within the rural communities of KwaZulu Natal in South Africa. What was traditionally accepted as a valid way of concluding a customary law marriage has been perverted by elements to become a practice widely frowned upon. In Zimbabwe, reports of child-pledging also demonstrate how society adopts to circumstances peculiar to it, in this case marriage of daughters to older men in return for food that ensures survival of their natal families.

6.1.7 Prevalence of Unregistered Customary Marriages

Both countries continue to be characterised by unregistered customary marriages especially among the rural population. Spouses omit to register their marriages in compliance with legislation largely because of ignorance of the consequences of non-

¹¹²² Manji "Imagining Women's Legal World: Towards a Feminist Theory of Legal Pluralism in Africa" 1994 *Social and Legal Studies* 434.

compliance. Perhaps for some, especially those who are geographically marginalised, registration also tends to be a practical inconvenience. The South African Recognition of Customary Marriages Act (RMCA) places the burden and duty to register customary marriages on both spouses however makes provision for one spouse to apply for such registration if the other refuses to comply.¹¹²³ In Zimbabwe, in terms of the Customary Marriages Act¹¹²⁴, the obligation to register a customary marriage lies with the husband and marriages are not valid unless registered whereas in South Africa the failure to register will not affect the validity of such marriage. The problem continues to be with introduction of strict timeframes and punitive sanctions where marriages are not registered within the prescribed time.¹¹²⁵ The general non-compliance is evidence that the objectives of legislation are far from being achieved.

6.1.8 CONCLUSION

In the final analysis, the development of legislation in South Africa and Zimbabwe has considerably decreased the disparities between customary law and western law in the sphere of marriage. The major objective has been towards harmonisation of the two however, customary law has had to compromise more than its common law counterpart does. From this premise, the customary marriage as recognised in legislation now resembles western values more than ever, with one of the remaining fundamental differences being the monogamous versus potentially polygamous nature of civil and customary marriages respectively.¹¹²⁶

Non-compliance and ignorance of the law remains an obstacle thereby raising the question whether these changes will be as effective as intended or whether they will

¹¹²³ section 4(8) and (9).

¹¹²⁴ section 3(1) to (5), further, recent research in Zimbabwe has concluded that about 85% of marriages are not registered by signing the country's marriage.

¹¹²⁵ See the Recognition of Customary Marriages Act section 4(1), (2), (4), (5) and (6); the result is that customary marriages entered into before November 2000 have to be registered within a period of 12 months or within such period as determined by the Minister from time to time. Those that were concluded after commencement of the Act have a requirement dictating their registration within three months after conclusion or any such time that the Minister may determine. Again, customary law is placed in a context to which it does not belong as it does not adhere to strict timeframes and prescription does not apply.

¹¹²⁶ Dlamini "The Christian v customary marriage syndrome" 1985 *South African Law Journal* 701ff.

only be paper law.¹¹²⁷ The next section attempts to propose means by which state parties may use to achieve a greater degree of favourable socio-legal certainty whilst meeting the desired objectives of legislation and international law. In these endeavours, it is also necessary for leaders to preserve what is most valuable to the African past.

6.2 RECCOMENDATIONS

6.2.1 Educational Initiatives, Advocacy and Advise Giving

In order to keep communities informed of their rights and the dictates of legislation, state parties need to continuously develop and disseminate new knowledge in a more aggressive manner particularly among rural women in customary marriages. The education drive may be comprised by continuous education of legal practitioners and judicial officers on the technicalities of adjudication in a manner that is gender sensitive and inclusive of women's rights. To bring the benefits of information dissemination closer to the people, legal education may extend to paralegals networks, councilors and chiefs at community level. Relevant state departments may also create partnerships with traditional leaders as custodians of culture and train them on women's rights and issues.

Recent reports in Zimbabwe claim that Chiefs are appealing to the Ministry of Justice and Legal Affairs to conduct training for newly installed chiefs on a quarterly basis and equip them with presiding officers' certificates. A presiding officer's certificate is a document issued to an individual chief after a training course by the Judicial Service Commission. Most substantive chiefs who were installed long back hold those certificates but a few newly elected and some acting chiefs do not.¹¹²⁸

¹¹²⁷ Jansen in Bekker, Rautenbach and Goolam *Legal Pluralism* 49.

¹¹²⁸ See Zimbabwe's main newspaper The Herald of 04/05/2012 at http://www.herald.co.zw/index.php?View=article&catid=46%3Acrime-a-courts&id=40621%3Atrain-newly-installed-chiefs&format=pdf&option=com_content&Itemid=138 (Accessed: 05/05/2012), saying that approximately 270 chiefs have the authority to preside over cases in areas under their jurisdiction in the country.

In addition, the media via vehicles like community radio may also prove an effective tool in reaching out to a wide audience where various stakeholders may host talk shows discussing pertinent socio-legal issues. For educational initiatives to benefit legislative processes, Members of Parliament and other parliamentary committee members may also receive training on relevant issues. State parties must also adhere to international law at a domestic level and popularise instruments such as CEDAW and other regional instruments.

However, it must be noted that the educational initiatives approach may be faced with resistance as the majority of parties belonging to customary marriages continue to be largely rural folk who tend to be more conservative in their outlook to life. There is evidence showing the firm commitment by rural folk to continue adhering to integral aspects of customary family law.¹¹²⁹ It is anticipated therefore that urban women or communities will more readily accept change.¹¹³⁰ According to Allott¹¹³¹, one of the reasons reason for this uncertainty is that family law is generally considered to be intertwined with the emotions of people and is therefore more opposed to change.

In addition to compliment educational drives, advocacy and advice giving at a legislative and community level respectively may go a long way in encouraging adoption of strategic policy positions, legislative reform and overall access to justice. To facilitate the advocacy approach, the study proposes formation and extension of existing alliances between Non-Governmental Organisations (NGOs) and Community Based Organisations (CBOs) to actively participate in submission of papers that foster dialogue

¹¹²⁹ Koyana *The Judicial Process in the Customary Courts of South Africa* (1991) 48 where empirical research was done in the customary courts of Chiefs and Headman in the Eastern Cape and the findings were that, cases relating to marriage and *lobola*, *phuthuma* and *theleka* remedies were still observed as they were before advent of colonial rule, see also Bennett *A Sourcebook of African Customary Law in Southern Africa* (1991) 167ff.

¹¹³⁰ Koyana *Customary Law in a Changing Society* (1980) 128 where the author says, "...change cannot be forced down the throats." Therefore if customary law is to be maintained within the dual system, while reforming it to better protect women's rights, then it is the customary communities themselves, who will have to change it.

¹¹³¹ Allott A N "Reforming the law in Africa – aims, difficulties and techniques" in Sanders *Southern Africa in need of law reform: proceedings of the Southern African Law Reform Conference, Sun City Bophuthatswana, 11-14 August 1980* (1981) 228 – 229.

within the legislature and society at large. Submissions must be reflective of people's sentiments about gender, culture and human rights in order to relevant state organs to formulate policy and law that are compatible with people's lives. Both NGOs and CBOs are also identified as effective stakeholders in popularising channels of accessing rights and giving advice to the indigent who lack knowledge on how to access their rights.¹¹³² These organizations must also be prepared to share the information and data they gather within communities with relevant state departments.

In the Zimbabwean context, the economic decline experienced in the country from 2000 – 2008 saw many NGOs diverting their attention to humanitarian interventions and various other issues such as gender did not receive priority. Since adoption of the Inclusive Government in 2009 and the general economic stability that has ensued, NGOs may again begin to fund programmes aimed at addressing neglected issues around women rights.

6.2.2 Regulation of Unregistered Customary Marriages

In Zimbabwe, there is a proposed amendment of the Customary Marriages Act to be inclusive of unregistered customary marriages. It seeks to introduce 'certified customary marriages' which will require all spouses in unregistered customary marriages to certify their marriages before relevant authorities. Such registration will also be made at the woman's instance should a man resist for selfish reasons. The amendment further proposes to put in place mechanisms to ensure authenticity of claims and a distinct register will be opened for certified marriages. Certification will have the effect of according the unregistered customary marriage the same status as the registered customary marriage thereby improving aspects such as the proprietary consequences of marriage.

¹¹³² In South Africa, some of these alliances already exist for example, The National Alliance for the Development of Community Advice Offices (NADCAO), Community Law and Rural Development Centre (CLRDC), University Legal Aid Institutions Trust (AULAI) and the Foundation for Human Rights (FHR) among others. These organizations are committed to development and long term sustainability of community advice offices.

In South Africa, the legislature must also speed up amending the Recognition of Customary Marriages Amendment Bill. Now, either spouse can apply for the registration of a customary marriage. The Bill proposes to change the position and makes provision that both spouses must register the marriage. The only criticism that has been made towards this reform is that if one spouse refuses registration such spouse leaves the other with no remedy to compel compliance. The only way to compel compliance will be by court application, which makes it expensive for women in customary marriages who normally cannot afford the costs of litigation.

South Africa must also consider registering customary marriages for those who failed to comply with deadlines for free. Couples who have failed to register their marriages within the prescribed timeframe have been denied registration by the Department of Home Affairs and must lodge a court application to register the marriage.¹¹³³ This again places a financial burden on parties in customary marriages who often do not have the resources to bring such applications.

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6.2.3 Improving Access to Justice

State parties must step up efforts towards access to justice in terms of legislation and other means. To achieve this goal, greater importance must be attached to the work of paralegals at community level who should occupy an integral place between people and the law. South Africa is in the process of establishing means of regulating the paralegal sector and attorneys profession under one piece of legislation in terms of the Legal Practice Bill.¹¹³⁴

¹¹³³ If the parties were married before the commencement of the Act they must register the marriage within 12 months. If the parties were married after the commencement of the Act they must register the marriage within 3 months. This period was extended by notice in the Government Gazette to 31 December 2010.

¹¹³⁴ Following recommendations from provincial representations at a National workshop held in Johannesburg in July 2009, the National Alliance for the Development of Community Advice Offices actively engaged the Department of Justice to hear representations by paralegals in terms of the Legal Practice Bill with the aim of seeking regulation of paralegals among other issues.

In Zimbabwe, amendment of the Matrimonial Causes Act must be expedited to extent jurisdiction over and dissolution of all types of marriages to the magistrate's courts and chief's courts in order to promote access to structures in the justice delivery system. In terms of the proposed amendment, magistrates' courts will also be empowered to hear divorce cases of marriages contracted under the Marriage Act, because of the wide distribution of these courts unlike the High Court. Presently, divorce and other matters arising out of marriage fall under the jurisdiction of the High Court, which sits in Harare and Bulawayo. The disadvantage has been that, litigants have to travel long distances and incur high legal costs.

The Zimbabwean government must also consider decentralising strategic bodies that provide legal assistance to the public. In 1996, the Legal Aid Act was enacted to establish the Legal Aid Directorate. The Directorate's main function is providing legal aid to indigent persons in both criminal and civil matters. However, the main obstacle is that the offices of the Directorate are only based in the capital, Harare, and out of reach for the majority of the population. Perhaps the state may even consider having such structures to go on circuit especially in marginalised communities and allocate more financial resources for decentralisation. To complement state efforts, participation by civil society organisations must be bolstered and popularise the provision of free legal services to women especially in specific areas of need such as family law.

6.2.4 Capacity to Marry and Eradication of Child Marriages

Zimbabwe must consider speeding up amendment of the Customary Marriages Act that proposes to equate the minimum age of marriage to the legal age of majority for both girls and boys. Regarding the prevalence of customs that see the marriage of minor girls state parties need to educate the police, social workers and other community officers on how to deal with reports the unlawful marriage of young girls. It continues to be difficult to determine whether child-pledging in Zimbabwe or the *ukhuthwala* marriage in South Africa does not carry the requisite consent and amounts to an abduction or unlawful marriage. Whilst the rights of girl children need attention in terms of

constitutionally entrenched rights, it must be acknowledged that there are cases when customary law practices are abused in the name of tradition however, there are instances that resemble genuine involvement with culture and religion. Therefore, rather than being dismissive to tradition at the first outcry, mechanisms have to be put in place to differentiate between custom and abuse of custom and criminalise those practices that deserve criminal sanction.

In South Africa, the practice of circumcision continues among the rural and urban population. Perhaps a better approach to deal with botched circumcision would be to develop a system where trained medical personnel supervise proceedings during circumcisions in the veld where the initiates erect their huts. This will enable participants to be in the surroundings that custom intended while educating and developing practices conforming to safe and modern medical standards.

Regarding the issue around age of majority and minimum age of marriage, in Zimbabwe, the government must speed up the legislative processes and equalise the marriage ages for both girls and boys as the disparity has been criticised for being discriminatory against girls. The proposals are to peg the minimum age at 18 years. In South Africa however, the reverse is under consideration and there are reports that the minimum marriageable age for girls in customary marriages will be reduced to 16 from 18 years.

6.2.5 Proprietary Consequences of Marriage

If the South African Recognition of Customary Marriages Amendment Bill is made law, all customary marriages concluded before and after commencement of the Act will be automatically in community of property. Others may argue that the change will further relegate the position of customary in contemporary South Africa whilst others see this as a victory for elevating the proprietary rights of wives in customary marriages.

Zimbabwe must in its amendment of the Matrimonial Causes Act, include all types of marriages including the unregistered customary marriages in its sharing provisions. This

will go a long way in improving the proprietary consequences of women in unregistered marriages. There is also need to continue raising awareness of the Administration of Estates Amendment Act that grants widows and girl children rights to inherit from the estates of deceased spouses and fathers. Legislative reform may positively change the law but is meaningless if it does not reach the intended beneficiaries.

6.2.6 Improve the Status of Rural Women

Rural African women being the most economically disadvantaged and geographically marginalised, are in need of the most strategic input from the state parties when it comes securing property rights. The United Nations Commission on Human Rights in conjunction with UN-Habitat has initiated a drive towards women's right to equal land tenure with men. Both Zimbabwe and South Africa may consider as a matter of government policy, to collaborate with organisations like these and participate in their broader strategies designed to improve women's right to land and property. At a domestic level, there might be need to link laws and policies related to rural land and matrimonial property.

Both countries in their land reform legislation and policies must consider consultation and allocation which is more representative of women. This comes after it has been noted that Chiefs who are empowered to allocate communal land, still recognize men as titleholders at the expense of women. Broad consultative processes and empirical research may be undertaken to compile data that may inform equitable allocation of land in each country's land reform laws. State parties must also consider consistently appointing female ministers in strategic ministries dealing with land and other issues affecting women. Broader strategies may also be employed to generally uplift the general position of rural women as wives in marriage. This entails implementing agricultural cooperatives and other income generating projects that not only boost the rural economy but also enhance the economic standing of rural women who must shift from subsistence level economics to growing their own businesses thereby improving their liquidity.

State parties must devise mechanisms to initiate a process of social transformation and support, encourage and strengthen the efforts put forward by women's and children's rights organisations by encouraging their participation in the legislative processes.¹¹³⁵ Finally, there is need by countries to dedicate more allocations of their national budgets to addressing gender-based issues. This may be achieved by gender-responsive budgeting that further asserts the idea of improving women's lives in general. In South Africa, the Women's Budget Project, a joint initiative between the country's Parliamentary Finance Committee and NGOs is a step towards achieving this goal.¹¹³⁶

6.2.7 Constitutional Reform

Perhaps Zimbabwe may consider reforming parts of its constitution to be more in line with international human rights law around issues of discrimination against women. Firstly, section 111B of the Constitution of Zimbabwe¹¹³⁷ provides that provisions of international law 'shall not form part of the law of Zimbabwe unless incorporated into the law' as Acts of Parliament. Zimbabwe having ratified most key international instruments dealing with the status of women, perhaps should now consider constitutional review and begin formulating domestic legislation to be more reflective of these commitments. The provision for establishment of the National Human Rights Commission by the Constitution will go long a long way in placing women's rights on a wider agenda.

Secondly, there is need to adequately deal with section 23 of the Zimbabwean constitution that excludes customary law from the fundamental rights under the constitution. Since constitutions must be a reflection of the people's sentiments, consultative processes must be widely employed in order to adequately reflect the views Zimbabweans have regarding the relationship between preservation of culture and

¹¹³⁵ Some of the organizations at the forefront of advocating for women and children's rights are the Women's Legal Centre in South Africa and the Zimbabwe Women Lawyers Association. These are organizations that seek to enable women and children to assert their rights by accessing the relevant legal resources and providing advocacy services in areas pertaining to children/youth; democracy/good governance; education/training; human rights; and women.

¹¹³⁶ Budlender *et al* *Gender Budgets Make Cents: Understanding Gender Responsive Budgets* (2002) 37.

¹¹³⁷ Constitution of Zimbabwe 1979/1600 also referred to as the Lancaster House Agreement, see also the Constitution Amendment Act No. 5 of 2005.

human rights. The current constitution making process in Zimbabwe that has been going on since 2011 has not been able to accommodate such issues as attention has been focused on aspects with political meaning.

6.2.8 Customary Law and International Human Rights Law

The study proposes that the state parties be wary of forcing change among traditional societies and rather facilitate an environment where internal “cultural transformation” can be used to introduce and entrench human rights among the people. As was the position in the past, culture itself may be used as a means securing and protecting rights of those who continue to adhere to customary law.¹¹³⁸

State parties may also adopt monitoring and evaluation systems whereby indicators within the judiciary are continuously monitored to compile data and keep track of jurisprudence raising issues of customary law and human rights law. Such data may become useful by enabling policy makers to make informed decisions and provide accurate data when reporting to relevant international structures such as the CEDAW Committee. On the issue of reporting, Zimbabwe and South Africa must ensure that their state machinery compiles and submit progress reports on time. Reporting procedures within the SADC must also be established and adhered to. In addition, Zimbabwe and South Africa are encouraged to move towards domestication of CEDAW and consider ratifying the Optional Protocol to the Convention as well as removing any reservations on the Protocol to the African Charter on Human Rights and people's Rights of Women in Africa.

¹¹³⁸ An Na'im "Human Rights in the Arab World: A Regional Perspective" 2001 *Human Rights Quarterly* 701-732 the writer says, the distinction between the 'public' and 'private' spheres of society can present obstacles to women's rights. The public sphere or sector of legal and political order is contrasted with the private arena of home and family where states may claim it is outside their responsibility to intervene. Abuses of women's rights often occur in the 'private' sphere where states are reluctant to act. The dominant focus on political and civil rights in the understanding of international human rights law is therefore biased to the male-dominated public sphere; see also Cook *Human rights of women: national and international perspectives* (1994) 3, who argues that international human rights law has not been applied effectively to redress the disadvantages and injustices experienced by women solely because of their gender.

African countries in general are encouraged to formulate a human rights discourse that is reflective of African culture and aspirations. The Universal Declaration of Human Rights¹¹³⁹ (UDHR) has been criticized for failing to be reflective of African values. Therefore member states must use the African Charter¹¹⁴⁰ as a point of departure and continuously debate what the notion of human rights in Africa entails. Nhlapo¹¹⁴¹ says if customary norms were properly understood for their intended purposes, they could be seen to enhance rather than diminish human rights ideals in family law.

Finally, in view of the fact that all rights are equal, more dialogue has to take centre stage on how to deal with conflicting human rights. We observe the right to culture and self-determination of indigenous communities on the one hand and right to equality including the right of women. For example, the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹¹⁴² calls for the elimination of discrimination against women and "the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."¹¹⁴³ It also calls for the self-determination of all peoples, and by virtue of that right, they should "freely determine their political status and freely pursue their economic, social and political development."¹¹⁴⁴

This is also in consonance with the objectives of the Draft Declaration on the Rights of Indigenous Peoples (DDRIP)¹¹⁴⁵ of 2007, which also emphasizes cultural rights. Self-determination and women's equality are thus structured as close, but separate and

¹¹³⁹ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III); <http://www.unhcr.org/refworld/docid/3ae6b3712c.html> (Accessed 21/03/2010).

¹¹⁴⁰ Organization of African Unity, *African Charter on Human and Peoples' Rights* ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982); <http://www.unhcr.org/refworld/docid/3ae6b3630.html> (Accessed: 21/03/2010).

¹¹⁴¹ See Nhlapo "The African Family and Women's Rights: Friends or Foes" (1991) *Acta Juridica* 141.

¹¹⁴² UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993; <http://www.unhcr.org/refworld/docid/3ae6b36c0.html> (Accessed 16/03/2011).

¹¹⁴³ see Article 3 of the ICESCR.

¹¹⁴⁴ *Ibid* Article 1.

¹¹⁴⁵ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295; <http://www.unhcr.org/refworld/docid/471355a82.html> (Accessed 17/03/2011).

possibly conflicting rights.¹¹⁴⁶ As such, discussions on the topic must resolve the issue of which rights deserve prioritization. South Africa having not yet ratified the ICSECR is encouraged to do so. At present, there are calls by South African civil society organizations for the ratification of the International Covenant on Economic, Social and Cultural Rights (ICESCR).



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¹¹⁴⁶ See Article 33 of the DDRIP, giving indigenous people the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices without detailing specifically with the protections against discrimination based on sex. Although this document is a draft, it offers important insight into international attitudes towards group rights as human rights and notions of communal self-determination.

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