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# DEFENDING AND PROTECTING GENDER EQUALITY AND THE FAMILY UNDER A DECIDEDLY UNDECIDED CONSTITUTION IN ZIMBABWE\*

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## INTRODUCTION

Zimbabwe is party to virtually all international human rights instruments which oblige countries to *inter alia*, protect and promote the family and family life for the benefit of its members; guarantee women equality with men during marriage and at its dissolution; guarantee women equal rights and responsibilities with men in marriage and family relations; and guarantee equal rights and responsibilities between men and women regarding the entry into marriage, ownership, management and disposition of property within and without marriage. Since independence the state has sought to reform family laws with a view to granting women and children rights and protection, particularly against those traditional and customary practices which are perceived as unjustifiable. However, the approach to these issues has been uneven and sometimes inconsistent and muddled. On the other hand, social reaction, particularly from elders and traditionalists has often been sharp, aggressive and resistant.

The objectives of this paper are to review, analyse and evaluate, within the framework of the country's obligations under international human rights treaties, Zimbabwe's legislative reforms which have been directed at achieving gender equality and the general protection of women and children within the family. Also evaluated are the social reactions to some of these changes which have struck at the core of traditional rights, norms and values. This paper tells the story of how Zimbabwe has grappled, even though sometimes inconsistently and incoherently, with the complex issues relating to the co-existence of not only a formal plural system of laws but also a plural and highly contested system of norms and values. Modern and Western inspired values on equality between men and women, on the rights of children have clashed with "traditional" and "customary" values on the same matters. The legislative reforms in the field of family law have thus resembled a Western dance to the sounds of traditional drums and music in what may be described as a dance trapped between the slippery slopes of modernity and quicksands of tradition and customary law.

Depending on which side of the debate commentators have found themselves in there have been two broad and opposed views on many of the family law reforms. One view, encapsulated in the resistance of chiefs, traditional leaders and elders, has seen some of the reforms as a dangerous game sweeping Africans down the uncontrollable torrents of Western values which have poisoned African culture and torn asunder African traditional values which acted as a glue holding together not only the African family but also the African cultural way of life. The other view has seen some of the changes as half-hearted, weak and too little often too late by a state muddled and trapped in the quicksands of tradition. None of these extremes represent reality. They are, however, important ideological

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\* A shorter version of this paper was written for and presented at the International Society of Family Law, Ninth World Conference, on Changing Family Forms: World Themes and African Issues, held in Durban, South Africa, 27-31 July, 1997.

posturings by the activists on either side of the debate, one seeing the reforms as inadequate and too little and the other seeing them as simply too much too quickly. This paper attempts to look at the reality from a less polarised perspective while capturing the essence of the social reactions to the reforms as represented by the disputants in the debate. The reality is essentially that the constitution of Zimbabwe, although amended recently to incorporate a prohibition of gender discrimination, remains decidedly undecided on whether or not the principle of gender equality should extend to all aspects of social life.

## THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK

Before discussing the constitutionalisation of gender equality and family law reform within the context of the protection of women and children's rights in family law it is instructive to give a general overview of those provisions of the various international human rights instruments which are relevant to gender equality and the reform of family laws in Zimbabwe. Firstly, there is Article 23 of the International Covenant on Civil and Political Rights which declares the family to be the "natural and fundamental group unit of society" which is entitled to protection by society and the state and also obliges States Parties to take all appropriate steps to ensure "equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution".<sup>1</sup>

Secondly, the African Charter on Human and People's Rights ("the African Human Rights Charter") is more robust and emphatic about the importance of the family in its Article 18 which states that:

- (1) The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical and moral health.
- (2) The State shall have the duty to assist the family which is the custodian of morals and traditional values recognised by the community.
- (3) The State shall ensure the elimination of every discrimination against women and child as stipulated in international declarations and conventions.

Article 29 places a duty on all individuals to preserve the harmonious development of the family and to work for its cohesion.<sup>2</sup>

Thirdly, there is Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women ("the Women's Convention") which mandates States Parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular to ensure, on the basis of equality the equality of men and women, *inter alia*:

- (i) the same rights and responsibilities during marriage and at its dissolution;
- (ii) the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children;
- (iii) the same rights and responsibilities with regard to guardianship, wardship trusteeship and adoption of children,<sup>3</sup>

1 See also the Preamble to the Convention on the Rights of the Child and Article 18 of the Charter on the Rights and Welfare of the African Child.

2 See also Article 31 of the Charter on the Rights and Welfare of the African Child.

3 See also Articles 2 and 8(1) of the Convention on The Rights of The Child which when read together are to the same effect, namely that children should have the same rights vis-a-vis their parents regardless of their status. The equivalent provisions in the Charter on The Rights and Welfare of the African Child are Articles 3 and 20.

- (iv) the same rights as husband and wife, including the right to choose a family name;
- (v) the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property; and
- (vi) 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.

Thirdly, under Article 15 States Parties are required not only to ensure that women and men are equal before the law but also to accord to women the same legal status or capacity as that applicable to men. Fourthly and finally Article 5 requires States Parties to take all appropriate measures to "modify the social and cultural patterns 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".

When read together, all these provisions of international human rights instruments which have a bearing on the family and family law, mean no more than that the body of family laws must recognise and implement the equality of men and women in family and matrimonial matters from the formation of marriage, through their personal and property rights during marriage and their rights and obligations in relation to their children to their rights and obligations upon dissolution of marriage by divorce or death. The question that then arises and which is discussed and assessed throughout this paper is the extent to which the body of Zimbabwe's family laws, both at customary law and general law, have been reformed to be in line with the country's obligations under the various international human rights treaties referred to above and to all of which Zimbabwe is a party.

## THE CONSTITUTIONAL FRAMEWORK, THE FAMILY AND WOMEN'S RIGHTS

That national constitutions represent a powerful value framework which is used to link international human rights standards to national law is today well accepted,<sup>4</sup> even in Africa with its historical legacy of one party state constitutions which were described as constitutions without constitutionalism<sup>5</sup> and which at that time often bore a pale resemblance to the reality of political practice. Today, the importance of Constitutions in protecting fundamental rights in the new democratising Africa, particularly in East and Southern Africa, cannot be over-emphasized. Thus in presenting issues of gender equality, family rights and children's rights one has to begin by charting the Constitutional framework within which such rights are protected and are to be understood.

The Declaration of Rights in Zimbabwe's Lancaster House Constitution largely belongs to the old fashioned Westminster given post-colonial type of declaration of rights and hence, like its Botswana counterpart, did not until last year (1996) specifically provide for gender

4 See, for example S. Goonesekere, "The Best Interests of the Child: A South Asian Perspective" in P. Alston (ed), *The Best Interests of The Child: Reconciling Culture and Human Rights*, Clarendon, Oxford 1994, 117-149, at p145; B. Rwezaura, "Domestic Application of International Human Rights Norms To Protect The Rights of The Girl Child in East and Southern Africa, in W. Ncube (ed), *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa*, Dartmouth, London, 1997; and W. Ncube, "Recognition and Monitoring of Children's Rights in Africa: Challenges and Prospects", unpublished paper presented at the International Interdisciplinary Course on Children's Rights, Children Rights Centre, Universiteit Gent, Belgium, 28 June-5 July, 1997.

5 Okoth-Ogendo, "Constitutions without Constitutionalism: Reflections on an African Political Paradox" in I. Shivji (ed), *The State and Constitutionalism: An African Debate*, Sapes, Harare, 1991, p3.

equality. It did not even provide for the equality of all Zimbabweans before the law<sup>6</sup> and hence the clause dealing with the protection of the law did not and still does not embody the important value/principle of non-discrimination or put positively the notion of equality of all citizens before the law.<sup>7</sup> It is also old fashioned in that, unlike the new democratic constitutions in the region such as those of South Africa and Namibia, it makes no provision for family and children's rights.<sup>8</sup>

In its original version the non-discrimination clause of the Zimbabwean Declaration of Rights namely, section 23, simply outlawed discrimination based on race, tribe, place of origin, political opinions, colour and creed but conspicuously absent was any reference to sex or gender as a prohibited basis of discrimination.<sup>9</sup> This meant that it was possible to enact laws which discriminated, for example against women, without offending the Constitution. However, in other jurisdictions it has been held that the failure of a constitutional provision to specifically mention sex as a prohibited basis of discrimination was not to be read to mean that that form of discrimination was permissible. For example, in the case of *Dow v Attorney-General of Botswana*,<sup>10</sup> it was held that even though the anti-discrimination provision did not specifically mention sex or gender, the Constitution of Botswana nonetheless prohibited sex based discrimination since it had to be read and interpreted to be in line with the country's obligations under international human rights treaties such as the Women's Convention and the African Charter on Human Rights, both of which Botswana is a party to. Since these treaties prohibited all forms of discrimination including those based on sex or gender, the court reasoned that, while such treaties did not confer direct enforceable rights on individuals until national law has been enacted to localise them, nonetheless the courts were at liberty to use them as aids to the interpretation of ambiguous constitutional provisions. Whatever interpretation the courts chose had to be in compliance with the international obligations of the state.<sup>11</sup> Virtually the same

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- 6 The relevant provision, departing from international trends, only provided that "Every person is entitled to the protection of the law" whereas equivalent provisions in international human rights treaties and comparative constitutions normally provide for the equal protection of all by the law or simply for the equality of all before the law.
  - 7 More modern Constitutions in the region unequivocally provide for equality of all before the law. For example, section 9(1) of the South African Constitution states that "Everyone is equal before the law and has the right to equal protection and benefit of the law". See also Article 10 of the Namibian Constitution which is to similar effect.
  - 8 For example, Sections 28 and 23 and Article 15 of the South African, Malawian and Namibian Constitutions respectively incorporate most of the essentials of children's rights found in the Convention on The Rights of the Child. Section 22 and Article 14 of the Malawian and Namibian Constitutions respectively, and in line with international human rights treaties, recognise the family as the natural and fundamental group unit of society which is entitled to protection by society and the state. The Namibia provision goes even further to recognise the equal rights between men and women as to marriage, during marriage and at the dissolution of marriage.
  - 9 Similarly worded constitutions include those of Kenya and Botswana. As a result of this constitutional loophole it became necessary to enact various provisions in different statutes outlawing sex based discrimination. Such clauses were/are found in such statutes as, *inter alia*, the Labour Relations Act, the Education Act, the University of Zimbabwe Act and the Immovable Property (Prevention of Discrimination) Act. See also generally J. Stewart, W. Ncube, M. Maboreke and A. Armstrong, "The Legal Situation of Women in Zimbabwe" in J. Stewart (ed) *The Legal Situation of Women in Southern Africa*, University of Zimbabwe, Harare, 1990, 167, at pp169-170.
  - 10 [1992] LRC (Const.) 623 (CA).
  - 11 This approach to Constitutional construction was in line with the Bangalore principles and the Harare Declaration adopted by Commonwealth judges and Commonwealth African judges respectively as aids to the interpretation of human rights legislation. The Bangalore principles are to the effect that;



approach was adopted by the Zambia High Court in the case of *Sara Longwe v International Hotels*.<sup>12</sup>

The Zimbabwean Supreme Court had a golden opportunity to adopt and develop this technique in *Rattigan and Others v Chief Immigration Officer and Others*<sup>13</sup> but the opportunity was lost because the court chose to decide the matter on other grounds. It had been argued in that case that, even though section 23 of the Constitution did not specifically mention sex as a prohibited basis of discrimination, section 11 of the Constitution did mention that all persons were entitled to the fundamental rights set out in the Constitution without regard to *inter alia* sex and therefore, section 23, being ambiguous, had to be interpreted so as to be consistent with the country's obligations under the Women's Convention which prohibited sex based discrimination. The case of *Dow* was cited in support of this approach since Zimbabwe had not specifically incorporated the Women's Convention into domestic law as is required by section 111B(i)b of the Constitution before it could be applied directly in domestic courts. Unfortunately, in its judgement the Supreme Court did not even make reference to these arguments and made no pronouncements at all, even in *obiter dicta*, relating to these issues. It chose to decide the case solely on the ground that the exclusion of the foreign husbands of the applicant Zimbabwean women were unconstitutional on the basis that they offended the protection of freedom of movement in section 22 of the Constitution. Thus regrettably a golden opportunity to broaden our jurisprudence on the incorporation of international human rights standards on issues of gender equality was lost.<sup>14</sup>

In 1996 following several years of lobbying and activism by women's organisations, particularly during the run up to the Beijing Women's Conference and thereafter, the government of Zimbabwe, through section 9 of the Constitution of Zimbabwe Amendment (No.14) Act, finally amended section 23 of the Constitution to specifically include gender discrimination as a form of constitutionally prohibited discrimination. However, for reasons which will become apparent below, the prohibition is not as comprehensive as it could have been and does not go as far as do other constitutions in the region. All that the amendment did was to add the word "gender" in the provisions which list the prohibited forms of discrimination so that section 23(1) and (2) now reads:

- (1) Subject to the provisions of this section —
  - (a) No law<sup>15</sup> shall make any provision that is discriminatory either of itself or in its effect; and
  - (b) no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of any public office or any public authority.

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(i) where a treaty has been ratified but not as yet incorporated into national/domestic law, its principles would nonetheless be used by the courts as aids to constitutional, statutory, and/or common law interpretation in the event of ambiguity; and (ii) when interpreting statutes, including Constitutions, judges should interpret them in such a way that they are consistent with the country's obligations under human rights treaties and Conventions.

12 [1993] 4 LRC 221. For a fuller discussion of this technique in Constitutional interpretation see B. Rwezaura, *op cit* note 4 and W. Ncube, *op cit*, note 4.

13 1994 (2) ZLR 54 (SC).

14 For a brutal and trenchant criticism of the *Rattigan* judgement see L. Madhuku, "Magic and Constitutional Interpretation: A Case Note on *Rattigan and Others v Chief Immigration Officer and Others*" *Legal Forum*, 1994 Vol.6, No.3, 9.

15 Law is defined in section 113 as including statutory enactments, the Roman Dutch common law and customary law. However, as will be seen below, the potential of this provision being used to challenge discriminatory principles of law is greatly diminished by a later provision which places virtually the whole of family law outside the reach of the provision.



- (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 the law or treatment, persons of a particular description by race, tribe, place or 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.

Even though this formulation is relatively wide on the question of non-discrimination as a principle it is not as comprehensive and broad in its recognition of women's rights as comparable provisions of other constitutions in the region. The Constitution of Malawi for example has a two pronged approach to the issues of gender equality which two approaches, when taken together, comprehensively lay down the principle of equality and non-discrimination. In the first place, section 20 provides that:

- (1) Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth and other status.

Even though this provision can be said to comprehensively outlaw sex or gender based discrimination, section 24 goes further to provide specifically for women's rights and gender equality by providing that:

- (1) Women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender or marital status which includes the right:
  - (a) to be accorded the same rights as men in civil law, including equal capacity —
    - (i) to enter into contracts
    - (ii) to acquire and maintain rights in property, independently or in association with others regardless of their marital status;
    - (iii) to acquire and retain custody, guardianship and care of children and to have an equal right in the making of decisions that affect their upbringing; and
    - (iv) to acquire and retain citizenship and nationality.
  - (b) on the dissolution of marriage —
    - (i) to a fair disposition of property that is held jointly with a husband; and
    - (ii) to fair maintenance, taking into consideration all the circumstances and, in particular, the means of the former husband and the needs of any children.
- (2) Any law that discriminates against women on the basis of gender or marital status shall be invalid and legislation shall be passed to eliminate customs and practices that discriminate against women, particularly practices such as:
  - (a) sexual abuse, harassment and violence;
  - (b) discrimination in work, business and public affairs; and
  - (c) deprivation of property, including property obtained by inheritance.

This Constitutional formulation of women's rights and gender equality is so comprehensive that it would subject to the constitutionality test virtually the entire body of family law whether under the common law or customary law or statutory law. In Zimbabwe it would bring, for example, the marital power, customary inheritance laws, polygyny, custody,

guardianship and matrimonial property rights laws, be they customary, common law or statutory law, under the constitutionality test. Unfortunately, Zimbabwe's Constitution does not have any constitutional provision that approximates section 24 of the Malawi Constitution.

As if the failure of Zimbabwe's Constitution to comprehensively make provision for gender equality and women's rights in marriage and within the family was not enough, section 23 specifically provides for a host of exceptions which effectively place the whole area of family law and customary law outside the scope of the constitutionalisation of gender equality. Firstly, subsection 5 states that a law may discriminate against women to the extent that it "takes due account of physiological differences between persons of different gender except as far as that law . . . is shown not to be reasonably justifiable in a democratic society". It remains to be seen how the courts will interpret this exception to the principle of gender equality. All that may be said at this stage is that historically many of the discriminatory practices against women have been justified and defended on the basis of women's physiological differences with men. Clearly, in the hands of a sexist government and a sexist judiciary, this provision opens wide the possibilities of discriminating against women, particularly within the field of family law.

Secondly, and more ominously, are the exceptions to gender equality provided for in subsection (3) which reads in part:

- (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:
  - (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 . . .<sup>16</sup>

This provision effectively excludes the principle of gender equality from the whole area of family law and customary law and hence the various provisions of the Roman-Dutch common law, customary law and statutory law which discriminate against women in marriage and outside marriage within the whole area of family law are not constitutionally challengeable. Clearly, the Zimbabwean constitutional provisions on gender equality fall far short of the country's obligations under international human rights treaties, particularly Article 16 of the Women's Convention which, as we have seen above, obliges States Parties to ensure that men and women have the same rights during marriage and at its dissolution and indeed outside marriage in matters such as guardianship, custody and adoption of children. Also under Article 15 States Parties are obliged to ensure that women and men are equal before the law in all respects. Remember too that Article 23 of the Civil and Political Rights Covenant mandates States Parties to ensure equality of rights and responsibilities of spouses.

Notwithstanding the Constitution's failure to comprehensively protect women's rights, the Supreme Court of Zimbabwe has, seemingly half-heartedly, attempted to read broadly some of the fundamental rights recognised and protected in the Constitution to advance

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16 See also Articles 17 and 23 and sections 82 and 15 of the Constitutions of Ghana, Zambia, Kenya and Botswana respectively which contain similar exceptions on adoption, marriage and other aspects of personal law as well as the application of customary law. See also *Mwazozo v Mwazozo* SC 121/94 where, *inter alia*, it was held that the application of customary law with all its iniquities and in particular, discrimination against women in the laws of inheritance was saved by paragraph (b) of subsection 3 of section 23 as quoted here (at pp 6-7).

women's rights, gender equality and to protect the integrity of the family. The leading cases in this regard are *Rattigan and Others v Chief Immigration Officer and Others* (*supra*) and *Salem v Chief Immigration Officer and Another*.<sup>17</sup> However, there have also been lost opportunities and failures to protect the integrity of the family and women's rights such as in the case of *Ruwodo N O v Minister of Home Affairs and Others*<sup>18</sup> and *In re Wood and Another*.<sup>19</sup>

In the *Rattigan* case the Chief Immigration Officer had refused to grant the alien husbands of the three women applicants, who were all citizens of Zimbabwe, permanent residence in Zimbabwe. Following that refusal the applicants petitioned the Supreme Court for an order declaring that their rights as citizens under *inter alia* section 22 (which protects freedom of movement) of the Constitution were being breached by the refusal. In finding in favour of the applicants on this issue the Supreme Court relied on the marriage bond and the need to protect the family and hence its conclusion that to exclude the husbands from Zimbabwe had the effect of placing the applicants in the invidious position of having to choose either to leave Zimbabwe to reside with their husbands elsewhere or to effectively bring the matrimonial relationships to an end by remaining in Zimbabwe. In the course of the judgement the court observed that:

Marriage is a juristic act *sui generis*. It gives rise to a physical, moral and spiritual community of life — a consortium *omnis vitae*. It obliges the husband and wife to live together for life (more realistically, for as long as the marriage endures) and to confer sexual privileges exclusively upon each other. Conjugal love embraces three components: (i) *eros* (passion); (ii) *philia* (companionship); and (iii) *agape* (self-giving brotherly love) . . . The duties of cohabitation, loyalty, fidelity, and mutual assistance and support, flow from the marital relationship. To live together as spouses in community of life, to afford each other marital privileges and to be ever faithful, are the inherent commands which lie at the very heart of marriage . . . Marriage, . . . is one of the basic rights of man, fundamental to our very existence and survival.<sup>20</sup>

The Court went on to make reference to Article 17 of the International Covenant on Civil and Political Rights and Article 8(1) of the European Convention on Human Rights, both of which afford protection against interference with family life and emphasise the importance of preserving and protecting established family ties. Cases decided by the UN Human Rights Committee<sup>21</sup> and the European Court of Human Rights<sup>22</sup> protecting the integrity of family life, including the preservation of and respect for the relationship of husband and wife were cited with approval. The reliance by the Supreme Court on provisions of international human rights treaties protecting the integrity of family life as aids to the interpretation of the right of freedom of movement protected in Zimbabwe's Constitution was, of course, in spite of the fact that Zimbabwe's constitution does not have any provision protecting family life, family ties and marriage. Realising this the court justified its approach as follows:

Although there is no provision in the Constitution of Zimbabwe which equates directly to Article 17 of the Covenant or Article 8(1) of the Convention, S11 guarantees every

17 1994 (2) ZLR 287 (SC).

18 1995 (1) ZLR 227 (SC).

19 1994 (2) ZLR 155 (SC).

20 At p61.

21 See for example, *Aumeeruddy-Czifre and Others v Mauritius* (1981) 66 International Law Reports 255.

22 See *Abdu Laziz Cabales and Balkandali v UK* (1985) 7 EHRR 471, *Barrehab v Netherlands* (1989) 11 EHRR 322, *Moustaquim v Belgium* (1991) 13 EHRR 802 and *Beljoudi v France* (1992) 14 EHRR 801.

person 'protection for the privacy of his home'. Taken in conjunction with S22(1) and interpreting the whole generously and purposively so as to eschew the 'austerity of tabulated legalism', I reach the conclusion that to prohibit husbands from residing in Zimbabwe and so disable them from living with their wives in the country of which they are citizens and to which they owe allegiance, is in effect to undermine and devalue the protection of freedom of movement *accorded to each of the wives as a member of a family unit*<sup>23</sup> (my emphasis).

In *Salem v Chief Immigration Officer and Another* (*supra*) the Supreme Court not only upheld its reasoning in *Rattigan* based on the protection of the family unit and marriage but went further to hold that since married parties have a reciprocal duty to support each other, an alien husband resident in Zimbabwe could not be prevented from taking up employment in Zimbabwe so as to support his family. To prevent him from working would have the effect of compelling him and his family to leave Zimbabwe and go elsewhere where both spouses could work to support each other and this would amount to a violation of the citizen wife's freedom of movement as she would effectively have been compelled to leave Zimbabwe so as to be in a country, with her husband, where he would be allowed to work. In the Court's own words:

It has long been recognised that there is a reciprocal duty of support as between husband and wife . . . The duty . . . endures *stante matrimonio*. It depends on the one spouse's need for support and the other's ability to provide it. In practice, however, the primary duty of maintaining the household rests upon the husband . . . It is he who has to provide the matrimonial home as well as food, clothing, medical and dental care, and whatever else is reasonably required . . .

It follows, in my view, that unless the protection guaranteed under section 22(1) of the Constitution embraces the entitlement of a citizen wife, residing permanently with her alien husband in Zimbabwe, to look for partial or total support, depending on her circumstances, *the exercise of her unqualified right to remain residing in this country, as a member of a family unit, is put in jeopardy*<sup>24</sup> (my emphasis).

In *In Re Wood and Another* (*supra*) the Supreme Court refused to extend the protection of the integrity of the family and family life to two alien women, one married to but separated from a Zimbabwean citizen and the other formerly married to a Zimbabwean and residing with her Zimbabwean citizen child. In this case there were two women applicants. The first woman had been married to a Zimbabwean man but had been divorced. She had a son, Martin who was a citizen of Zimbabwe by birth and whose custody she had been awarded at divorce. She sought to argue that she could not be excluded from Zimbabwe as that would force Martin, a Zimbabwean citizen, to accompany her to wherever she went or to remain alone in Zimbabwe without a home and a guardian and thereby infringing Martin's right to freedom of movement. Counsel for the first woman, Mrs Wood, had argued that " . . . in order both to avoid impairing, if not destroying, the family unit and to preserve and not circumscribe the exercise by Martin of the freedom of movement afforded him under S22(1) of the Declaration of Rights, it is essential that Mrs Wood live with her son in Zimbabwe; a situation that will persist until Martin attains majority"<sup>25</sup> The Court rejected this argument essentially holding that only citizens and permanent residents had a constitutional right to reside permanently in Zimbabwe and hence, Mrs Wood, as a non-

23 At pp64-65.

24 At pp.291-292.

25 At p.158.

citizen and non-permanent resident had no right which could be infringed. Only her son, Martin, as a citizen "might claim that his right to reside in Zimbabwe was being infringed by the expulsion of his mother as he would be forced to accompany her in order to avoid separation from his mother and this would interfere with his freedom of movement". However, the Application before the Court had not been made by Martin or on his behalf.

For substantially the same reasons, the second woman, Mrs Hansard's application also failed, because she was an alien who was estranged from her Zimbabwean citizen husband. It was, the Court reasoned, only Mr Hansard, her husband, who might argue that the expulsion of his alien wife from Zimbabwe was infringing his freedom of movement as he would be obliged to accompany her to establish a matrimonial home outside Zimbabwe in order to maintain the marital relationship. But then Mr Hansard was not before the Court and he was not complaining. In the Court's own words:

... it is not Mrs Hansard who has the requisite *locus standi* to complain of a threatened or actual contravention of S22(1) of the Declaration of Rights. This protection relates to her husband and not to her.<sup>26</sup>

In *Ruwodo v Minister of Home Affairs and Others* (*supra*) an application brought by a Zimbabwean citizen minor child represented by her alien mother, to stop the expulsion of the mother from Zimbabwe also failed, even though it had been brought by a Zimbabwean citizen child seeking to keep his family (i.e. mother) in Zimbabwe. The Court, which had implied in *In re Woods*, that if the son had been the Applicant he might have succeeded, apparently had no sympathy for the very argument it had appeared to support in *In re Woods*. It now reasoned that since the minor child, as an infant, was not *sui juris* and devoid of understanding and therefore incapable of exercising volition, any decision by the parent that the child should live with her in another country effectively overrides that child's constitutional right to remain in Zimbabwe. While Mrs Ruwodo (the applicant's mother), as guardian of the applicant, had the right to assert Michael's right to reside in Zimbabwe, she had to do so in good faith as the right attached to the child and not to her. As such it had to be shown that it was in the child's interests to remain in Zimbabwe rather than go to another country with his mother. The Court concluded that there was no evidence that it was in the child's best interests to remain in Zimbabwe. What was clear was that Mrs Ruwodo, with whom the Court had no sympathy,<sup>27</sup> was making use of the child's "rights as a tool to achieve her own ends — to avoid her being returned to the United States".<sup>28</sup>

Surprisingly, in both *In Re Wood* and *Ruwodo* the Court did not seek guidance from international human rights treaties from which it would have found provisions in favour of the applicants.<sup>29</sup>

<sup>26</sup> At p.160.

<sup>27</sup> Apparently the court took a dim view of the fact that Mrs Ruwodo had had 5 children from 4 different fathers, 4 of whom were born out of wedlock and that she was destitute and dependant on the state and hence the unkind and perhaps unjudicious remark: "... Mrs Ruwodo ... is endeavouring to make use of Michael's rights to avoid being returned, with the children, to the United States of America. Not one word is spoken about why it is in Michael's best interests to remain living in Zimbabwe. He has no formative ties here, having been cast aside by the Wong family (the child's paternal family). Moreover Mrs Ruwodo is an undesirable person in Zimbabwe. She has had five children from four different fathers, four of them born out of wedlock" (at pp 232-33). The Court went so far as to suggest that Mrs Ruwodo's marriage (which had since been dissolved) to Mr Ruwodo, a Zimbabwean citizen, may have been one of convenience.

<sup>28</sup> At p.232.

<sup>29</sup> See, for example, Articles 8, 9 and 10 of the Convention on the Rights of the Child.

The decision in *Rattigan and Others v Chief Immigration Officer and Others (supra)* in so far as it recognised the right of Zimbabwean women to reside with their alien spouses without being subject to the discretionary powers of the immigration authorities was found unacceptable by the executive which responded by causing Parliament to enact The Constitution of Zimbabwe Amendment (No.14) Act 1996 which *inter alia*, amended section 22 of the Constitution to state that the right to freedom of movement shall not exclude the power of the state to exclude from Zimbabwe any non-citizen whether or not he/she is married to a citizen or permanent resident of Zimbabwe.<sup>30</sup>

When the Constitution of Zimbabwe Amendment (No.14) Bill was published it was widely criticised by women's organisations, human rights organisations and academics. The thrust of the women's organisations' criticism was that the attempt to reverse the ruling in *Rattigan* was discriminatory in that foreign women married to Zimbabwean men would continue to have a right, not only to enter Zimbabwe as of right, but to be citizens by virtue of only the marriage. The government responded, not by withdrawing the offending provisions, but by arguing that if women wanted equal treatment with men the government would amend section 7 of the Constitution to also deprive male citizens of the right of their alien wives to automatic entry into Zimbabwe. Accordingly, by the time it was enacted the Constitution of Zimbabwe Amendment (No.14) Act had a provision amending section 7 in such a way as to prospectively take away the right of alien wives married to Zimbabwean men to be granted Zimbabwean citizenship upon application.<sup>31</sup> Somewhat surprisingly, some may say naively, some women's organisations and human rights organisations applauded this as a victory of their lobbying efforts and as one more nail in the coffin of gender discrimination. Any serious analysis and view would have disclosed that there was nothing to celebrate and every reason to mourn, for what had happened was that the government had somewhat arrogantly, and maliciously refused to retain the rights which were being defended, but instead chose to take away more rights in the name of achieving non-discrimination. Men lost their rights in the struggle for equality with women. The idea that a much broader denial of rights could be applauded as a victory is, at the least, shortsighted and at worst naive. But that is exactly what happened until much later when it dawned on some of the human rights organisations that the government's "concessions" had been nothing but a gimmick which gave women stones rather than bread and worse of all took away the bread crumbs on male plates so as to ensure equality in hunger.

What will happen in practice is that the immigration authorities will continue to allow alien wives of Zimbabwean men virtual free entry into the country while alien husbands will be closely vetted, which is exactly what the immigration authorities always wanted and had been doing in the past. It is extremely improbable that the wife of any Zimbabwean citizen will ever be denied entry and residence in the country. So much then, for the celebrations of gender neutral constitutional provisions.

As we have seen, the constitutional framework in Zimbabwe fails to comprehensively provide for gender equality particularly in the field of family law. There is also a failure to guarantee the integrity of the family, women's rights in general and children's rights.

What remains is to have an overview analysis of the ordinary legislative interventions which have been introduced in the post-independence period to address some of the gender inequalities that exist in family law. In this respect, I propose to look at legal pluralism and conflict of laws, capacity, marriage and property rights in marriage.

30 See section 8(1) of the Constitution of Zimbabwe Amendment (No.14) Act.

31 See section 4 of the Constitution of Zimbabwe Amendment (No.14) Act.

## LEGAL PLURALISM AND MARRIAGE

Zimbabwe, like most former colonies in Africa, has a legal system characterised by legal pluralism in that customary laws, the Roman-Dutch common law and statutory law<sup>32</sup> are all recognised and enforceable within the judicial system. These systems of law intersect, interact and interface resulting in a multiplicity of complications as individuals seek to maximise their rights by tracking from one system to the other in the regulation and organisation of their lives.

The post-independence state crafted a choice of law process designed to achieve the maximum degree of flexibility based on social criteria in the determination of which system of law to apply to a particular case.<sup>33</sup> The existence of customary law and general law means that the rights of Zimbabweans in family law matters will vary depending on whether the general law or customary law applies. Clearly, therefore, it is impossible in these circumstances to have equality of rights when different systems with different rules may be invoked to determine disputes in family law. The differences are well illustrated by the laws of marriage which recognise or partly recognise three different types of marriages, namely, the general law civil marriage contracted and registered under the provisions of the Marriage Act, Chapter 5:11<sup>34</sup> whose consequences are governed by the Roman-Dutch common law and statute law; the registered customary marriage contracted and solemnized under the provisions of the Customary Marriages Act, Chapter 5:07 whose consequences are governed by customary law except where customary law has been specifically ousted by statute;<sup>35</sup> and the unregistered customary union which is technically an invalid marriage and therefore without legal consequences except that for specific purposes it is recognised or treated as if it were a valid marriage.<sup>36</sup> Such purposes include the status of the children born out of such unions, their rights in respect of guardianship, custody and inheritance;<sup>37</sup> the reciprocal duty of the "spouses" to maintain each other;<sup>38</sup> the surviving spouse's claim for loss of support in the event of the unlawful killing of the other spouse;<sup>39</sup> the husband's claim for adultery damages,<sup>40</sup> and, when the Administration of Estates Amendment Act, 1997 comes into force, the inheritance rights of each of the spouses from each other's estates.<sup>41</sup> The post-independence state has, through legislative amendments, extended greater recognition to customary law unions<sup>42</sup> and the Supreme Court has, by a process of

32 The Roman-Dutch common law and statute law are collectively known as the general law.

33 See section 3 of the Customary Law (Application) Act, Chapter, 8:05, W. Ncube, *Family Law in Zimbabwe*, LRF, Harare, 1989, at pp 3-24, D. Galen, "Internal Conflicts Between Customary Law and General Law in Zimbabwe: Family Law as a Case Study", *ZL Rev*, Vols 1 and 2, 1983-84, 3 and B. Donzwa, W. Ncube and J. Stewart, "Which Law? What Law? Playing with the Rules" in W. Ncube and J. Stewart (eds) *Widowhood, Inheritance Laws, Customs and Practices in Southern Africa*, WLSA, 1995, Harare, pp 73-107.

34 Every Zimbabwean regardless of race may contract this type of marriage which is monogamous.

35 Only Africans are permitted to contract this type of marriage which is potentially polygynous.

36 An unregistered customary marriage is invalidated by section 3(1) of the Customary Marriages Act. See also W. Ncube, (1989), note 33 above; at p. 134-137; *Choto v Matiye*, 1974 RLR 302 and *Kurambakuzwa v Mabaya* SC 158/87.

37 Section 3(5), Customary Marriages Act, [Chapter 5:07].

38 Section 6(3), Maintenance Act, [Chapter 5:09].

39 *Zimnat Insurance v Chawanda*, 1990 (2) ZLR 143 (SC).

40 *Carmichael v Moyo*, 1994 (2) ZLR 176 (SC).

41 See section 2 of the Amendment Act.

42 See, for example, section 6(3), Maintenance Act, [Chapter 5:10] section 2, Income Tax Act, [Chapter 23:06] and section 2, Administration of Estates Amendment Act, No. 6 of 1997.



interpretation which I have described elsewhere as magical and mystical<sup>43</sup> also extended the recognition even further.<sup>44</sup>

However, in spite of this extended recognition, a customary union still has no proprietary consequences at "divorce".<sup>45</sup> In any event, the parties cannot divorce each other as they are in law not validly married.<sup>46</sup> The continued extended recognition of unregistered customary marriages is contrary to the country's obligations under the Women's Convention, which as seen earlier, requires States Parties to ensure that all marriages are registered in an official registry.<sup>47</sup> Also problematic and inconsistent with both notions and principles of gender equality is the continued recognition of the polygynous nature of customary marriages and unions. What is even more disturbing are the new provisions of the Administration of Estates Amendment Act, 1997 which seek to turn civil monogamous marriages into polygamous ones for the purposes of inheritance in all those circumstances where a civil marriage was preceded by a customary union with another woman. Thus where a man first "marries" one woman in a customary union and then marries another in terms of a registered civil marriage, for purposes of inheritance upon his death, the two women will both be treated as his widows and thereby effectively render the subsequent civil marriage a polygynous one. The creation of endless legal opportunities for the recognition of polygynous marriages is evidently contrary to the country's obligations under international human rights treaties already cited above.

## CAPACITY, EQUALITY AND PROPERTY RIGHTS

The Women's Convention, as already seen, mandates states parties, in Article 15, to accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity.<sup>48</sup> In colonial Zimbabwe, the capacity of Africans was always determined by reference to customary law<sup>49</sup> which was held by the colonial courts to render African women perpetual minors, always under guardianship, either of their fathers, if unmarried, or that of their husbands, if married.<sup>50</sup> Almost immediately after independence the new government rectified this by enacting the Legal Age of Majority Act,<sup>51</sup> No 10 of 1982 which came into force on 10 December, 1982. At the time of its enactment,

43 W. Ncube, "Magic and Mysticism as Aids to Statutory Interpretation: The Case of the Judicial Recognition of Customary Law Unions in Zimbabwe" *ZL Rev*, 1995, Vol.12.

44 See judgements in *Zimnat Insurance v Chawanda*, (supra) and *Carmichael v Moyo* (supra). For a fuller discussion of these cases and why they are technically indefensible see W. Ncube, note 43 above.

45 Thus the equitable redistributive powers of the courts under section 7 of the Matrimonial Causes Act, [Cap 5:13] are inapplicable.

46 *Joseph Tinga v Joshua Shekede* 1970 AAC 30.

47 See Article 16(2).

48 The Article goes further to require that women be given "equal rights to conclude contracts and to administer property" and shall be treated equally with men at all stages of procedure in courts and tribunals.

49 The colonial Legal Age of Majority Act Chapter 46 did not apply to Africans as it was expressly excluded from so applying. See also section 3 of the African Law and Tribal Courts Act, Cap 237 which was repealed soon after independence by the Customary Law and Primary Courts Act, No.6 of 1981.

50 For a fuller discussion see W. Ncube, "Released from Legal Minority: The Legal Age of Majority Act in Zimbabwe" in A. Armstrong and W. Ncube (eds) *Women and Law in Southern Africa*, ZPH, Harare, 1987, 193, and A. Armstrong, "Zimbabwe: Away from Customary Law" *Journal of Family Law*, (1987), Vol.II, 339.

51 Today the provisions of the Legal Age of Majority Act have been inconspicuously tucked away by the Law Revisor under the umbrella of an innocuous statute entitled the General Law Amendment Act, Cap 8:07.

few could have imagined not only the profound effects this simple five section statute<sup>52</sup> would have on numerous areas of personal laws but also the widespread national controversy it would cause. As it has turned out, few statutes in the history of Zimbabwe have caused as much controversy as the Legal Age of Majority Act and fewer still have affected so many aspects of the law and people's lives. The courts have used the Act to decide a wide range of issues ranging from ordinary capacity to inheritance issues. In *Jenah v Nyemba*<sup>53</sup> it was held that the effect of the Act was to grant African women full legal capacity embracing contractual capacity, *locus standi in judicio*, and proprietary capacity.

In *Katekwe v Muchabaiwa*<sup>54</sup> it was held that the full contractual capacity possessed by African women meant that they could, if above 18 years, enter into marriage contracts without the assistance of their parents. This has profoundly affected the very nature of customary/African marriage systems which are based on the authority of the family, particularly over women's marriage capacity.<sup>55</sup> In *Katekwe v Muchabaiwa*, it was also held that, without guardianship over a woman above 18 years, an African father could no longer sue for and recover seduction damages upon the seduction of his major daughter. This ruling meant that one of the principal legal leverages parents had over the sexuality of their daughters, was being pulled from under their feet. The unclaimability of seduction damages upon the seduction of major daughters and the capacity of "children", particularly daughters to marry without parental consent and therefore without *lobola* caused the most resistance to the Act from parents and the elders in general. The Act was then widely condemned as unAfrican and uncultural. All sorts of social problems, ranging from teenage indiscipline and pregnancy through prostitution and the high rates of divorce to baby dumping were all conveniently blamed on the Legal Age of Majority Act.<sup>56</sup> Up to today parents throughout the country passionately blame the Act for practically every perceived social evil having anything to do with the youth and sometimes having nothing to do with them, such as the perceived disintegration of the traditional African family which was, in the past, supposedly stable and protective of its members.<sup>57</sup>

Also affected by the Legal Age of Majority Act was section 13 of the Customary Marriages Act which provided that the property rights of African spouses were always to be determined by reference to customary law regardless of whether or not they had a general law marriage. In *Mujawo v Chogugudza*<sup>58</sup> the Supreme Court held that section 13 was inconsistent with the notion of the full capacity of women, particularly when read with the flexible choice of law criteria in section 3 of the Customary Law (Application) Act. This has meant that those Africans who have contracted non-customary marriages have the property consequences of their marriages governed by the general law which gives women better

52 The Act simply made provision that every person shall attain the age of majority on attaining 18 years of age and that this provision "shall apply for the purpose of any law, including customary laws". See also A. Armstrong, *op cit* note (50) at p.345.

53 1986 (1) ZLR 138 (SC).

54 1984 (2) ZLR 112 (SC).

55 See A. Armstrong *et al*, "Uncovering Reality: Excavating Women's Rights in African Family Law" *International Journal of Law and the Family*, 7 (1993) 314-369 at pp 316-317.

56 For a fuller discussion see W. Ncube, "Dealing With Iniquities in Customary Law: Action, Reaction and Social Change in Zimbabwe, *International Journal of Law and The Family*, 5, (1991) 58-79, at pp 66-70 and W. Ncube, (1987) *op cit* note 50.

57 See generally W. Ncube, *et al*, *Continuity and Change: The Family in Zimbabwe*, WLSA, 1997, Harare.

58 1992 (2) ZLR 321 (SC).

inheritance rights upon the death of their husbands as compared to customary law which completely excludes the surviving spouse from the inheritance process.<sup>59</sup>

In *Chihowa v Mangwende*<sup>60</sup> the Legal Age of Majority Act was held to have removed the disability of daughters from inheriting from their fathers and hence where the daughter is the eldest surviving child she is the heir to her deceased father's estate.<sup>61</sup> However, the widow in *Murisa v Murisa*<sup>62</sup> could find no joy in the provisions of the Legal Age of Majority Act as it was held that a widow could never inherit from her deceased husband at customary law and this disentitlement had nothing to do with whether she was or was not capable of majority status.<sup>63</sup>

It is clear that in terms of capacity Zimbabwean law recognises that women and men have the same legal capacity, except for the woman married in community of property (which marriage regime is extremely rare in Zimbabwe) who still falls under the husband's Roman-Dutch common law marital power and is thereby disabled in respect of capacity to administer the joint matrimonial estate arising out of the community of property.<sup>64</sup> Another capacity related problem is that, under section 15 of the Deeds Registries Act, Cap 20:05, a woman married in community of property is required to be assisted by her husband in dealing with the registration of any document relating to immovable property. Before this section was amended in 1989 it used to require all married women to prove their capacity before they could participate in any registration or conveyancing processes involving immovable property.

Article 16(h) of the Women's Convention requires that married women and men enjoy the same rights "in respect of ownership, acquisition, management, administration and enjoyment and disposition of property". In Zimbabwe, the bulk of women's lack of equal rights with men are to be found in the laws regulating access to and control of matrimonial property. Firstly, in respect of freehold immovable property, even though women have the same capacity as men to acquire and own freehold tenure property, because of their unequal access to education, skills training, employment and credit, they often are unable to take benefit of their proprietary capacity as they have limited financial resources to purchase

59 See generally K. Dengu-Zvobgo, *Inheritance in Zimbabwe: Law, Customs and Practices*, Sapes, Harare, 1994.

60 1987 (1) ZLR 228 (SC).

61 See also J. Stewart, "The Legal Age of Majority Act Strikes Again" *Zimbabwe Law Review*, 1986, Vol.4, 168; W. Ncube, *Customary Law of Succession in Zimbabwe*, paper delivered at WLSA seminar, Kadoma, 1991; and K. Dengu-Zvobgo, *et al*, note 59 above, Chapter 2. Note also that subsequent cases (*Mwozozo v Mwozozo* SC-121-94 and *Vareta v Vareta* 1992 (2) ZLR 1) have pushed back the frontiers drawn by the *Chihowa* judgement, by holding that the eldest daughter will inherit only in the absence of male issue. In fact, in *Mwozozo* the court expressed the view that minority and majority status have nothing to do with customary principles of inheritance which are determined by the patriarchal nature of Zimbabwean society and not women's legal capacity.

62 1992 (1) ZLR 167 (SC).

63 See J. Stewart "Untying the Gordian Knot: *Murisa v Murisa*; A Little More Than a Case Note", *Legal Forum* (1992) Vol.4, No.3, p.8 and L. Madhuku, "Is custom customary law? The Case of *Murisa v Murisa* and a reply to Mrs Julie Stewart" *Legal Forum*, (1993) Vol.5, No.1, 32.

64 For fuller details see W. Ncube, *The Matrimonial Property Rights of Women in Zimbabwe*, MPhil thesis, UZ, Harare, 1986, Chapter 3; W. Ncube, *Family Law in Zimbabwe*, LRF, Harare, 1989, Chapter 10; W. Ncube, *Comparative Matrimonial Property Systems*, University of Oslo, Oslo, 1989, at pp 49-71; and W. Ncube, "Underprivileged and Inequality: The Matrimonial Property Rights of Women in Zimbabwe" in A. Armstrong and W. Ncube, (eds) *Women and Law in Southern Africa*, ZPH, Harare, 1987.

freehold tenure property either in the form of urban houses or commercial farms.<sup>65</sup> Secondly, in relation to communal land (where the great majority of African families live) landed property is formally allocated by District Councils in terms of customary principles<sup>66</sup> which provide that land will be allocated to a married man and shall be held by him. Women have no independent access to this type of land and have access only derivatively as wives and hence upon divorce they have to leave the land and settle elsewhere; either in urban areas or return to their natal homes.<sup>67</sup> In respect of resettlement land, which is a new land tenure system invented after independence, the criteria for settlement favours men in that priority is given to married men in whose name the resettlement permits are issued and thus exposing wives to the same problems as faced by those in communal areas upon divorce. That is to say, they have to leave the resettlement land as the permit belongs to the husband. However, widowed women with dependents can be resettled as they also qualify. However, in practice very few women do get allocated resettlement land in their own right.<sup>68</sup> Clearly, Zimbabwean law regulating access to communal and resettlement land is discriminatory against married women both in its theory and application and therefore falls short of the country's obligations under international human rights treaties.

As to the law regulating matrimonial property in general, section 7 of the Matrimonial Causes Act, Cap 37 gives courts discretionary powers to order what they consider to be fair and equitable division of the matrimonial assets at divorce. In practice, the approach of the courts has been uneven and inconsistent in the application of these provisions mainly to the prejudice of women. In practice, rarely do the courts order equal division of matrimonial assets. More often than not the husband is given the greater proportion of the property.<sup>69</sup> What is important though, is that section 7 of the Matrimonial Causes Act has displaced both the inequitable customary law property regime which excluded women from having a share of matrimonial property at divorce and the general law out of community regime which also prejudiced women, the majority of whom either worked as housewives or if employed had their income utilised mainly for the subsistence needs of the family. However, what is still required is a more equitable matrimonial property regime which will ensure that the courts do not exercise their discretionary powers to the prejudice of women. In this respect, a presumption of equal sharing displaceable only in exceptional circumstances, needs to be established by statute.

## CONCLUSION

This paper has shown that the Constitution of Zimbabwe, unlike some of its counterparts in the region, fails to create a firm and solid base for gender equality in the field of family law and thereby fails to live up to the country's obligations under *inter alia*, Article 2 of the Women's Convention which requires national constitutions to embody the principle of equality of men and women. This failure of the Constitution has meant that the array of discriminatory and inequitable laws in family law, both at general law and customary law,

65 See generally W. Ncube *et al*, *Paradigms of Exclusion: Women's Access to Resources in Zimbabwe*, WLSA, Harare, 1997.

66 See section 8 of the Communal Lands Act, Cap. 20:04.

67 See generally W. Ncube *et al*, *op cit* note 65.

68 *Ibid*.

69 For some of the evidence in proof of this see W. Ncube, (1986) note 64 above; W. Ncube, (1987) note 64 above; W. Ncube, *Family Law in Zimbabwe*, (1989) note 64 above; W. Ncube (1991) note 56 above; and W. Ncube, "Reallocation of Matrimonial Property at the Dissolution of Marriage in Zimbabwe", *Journal of African Law*, (1990), Vol.34, No.1, 1.

cannot be challenged as falling short of the standard of the Constitution. Such laws exist in the regulation of access to communal and resettlement land which exclude women from having direct, independent and secure access to land in these tenure systems.

The courts have also not been consistent in upholding the rights of women where opportunities of creative and sensitive constitutional and statutory interpretation have presented themselves. Evidence of this is to be found in the immigration cases involving expulsion of women formerly married to Zimbabweans and in the allocation of property at divorce by the courts. However, in other instances the courts have upheld the principles of equality such as when applying the provisions of the Legal Age of Majority Act.

Social reaction to some of the legislative changes, particularly those directed at protecting women and children from excessive control by male elders, have received sharp social reaction resulting in silent resistance whereof families have often sought to opt out of state regulation of their affairs, particularly in matters of marriage and inheritance. This has tended to blunt the effectiveness of some of the laws intended to benefit women and children within the family framework and environment.<sup>70</sup> However, notwithstanding the effects, the laws have been profound for those prepared and able to assert and defend their new rights. Zimbabwe is still a long, long way from some form of gender equality within the family both in terms of the theory of law (i.e. principles of law in force) and social practice, but a few significant strides have been made in that direction and ultimately the family will be the better for it.

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70 See generally B. Rwezaura, *et al*, "Parting The Long Grass: Revealing and Reconceptualising The African Family" *Journal of Legal Pluralism and Unofficial Law*, (1995), No. 35, 25 and A. Armstrong *et al*, "Towards a Cultural Understanding of the Interplay Between Children's and Women's Rights: An Eastern and Southern African Perspective", *The International Journal of Child Rights*, 3, (1995), 333-368.



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