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## **INTERNAL CONFLICTS BETWEEN CUSTOMARY LAW AND GENERAL LAW IN ZIMBABWE : FAMILY LAW AS A CASE STUDY**

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### **INTRODUCTION**

Under Zimbabwean law and despite the achievement in April 1980 of majority rule, with regard to family law and personal law, discriminatory treatment of Africans and women persists. Despite the passage since Independence of two Acts designed to help eradicate racism and sexism in Zimbabwe (the Customary Law and Primary Courts Act, <sup>1</sup> "the Primary Courts Act" and Legal Age of Majority Act, <sup>2</sup> "the Legal Age of Majority Act") the statute books still contain pre-Independence legislation preventing equal treatment of Africans and women.

The Primary Courts Act eliminated racially based criteria for determining which system of law should apply to a particular dispute. It introduced new guidelines for resolving conflicts between customary law and general law, a significant move towards equality under the law. It repealed an Act containing a provision that exempted disputes between Africans from many general family law statutes.<sup>3</sup>

The Legal Age of Majority Act conferred majority status on all Zimbabweans aged 18 years or above. Previously, most African women had remained minors all their lives. They suffered from the restrictions which accompanied minority status. The Legal Age of Majority Act helped women achieve equality. Despite these achievements, the present law still discriminates against women and Africans. Co-existence of customary law and general law can result in discrimination.

A dispute whether customary or general law should govern a case constitutes an internal conflict of laws. Conflict of laws means a dispute between two different systems of law. Generally each system constitutes the law of a particular area, often an entire country. The conflict issue a court must resolve involves deciding which of the two systems to apply to a particular dispute between private parties; whether, for example, Zimbabwean or French law should apply to a dispute over a contract. That constitutes an issue of international conflict of private laws. Zimbabwe has general law and various systems of customary law, all

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The writer is deeply indebted to Denis A.B. Robinson of the Law Department for his many helpful suggestions. Many of the ideas relating to family law were developed in discussion with Mr Robinson between 1981 and the present. The writer is also indebted to Prof. Robert B. Seidman of Boston University School of Law and to Welchman Ncube, Staff Development Fellow, and Julie Stewart of the Law Department for their criticism and comments.

1. Act No. 6 of 1981.

2. Act No. 15 of 1982.

3. The African Law and Tribal Courts Act, Chapter 237.

applicable throughout Zimbabwe. When a court has to decide whether to apply general law or customary law or whether to apply one system or another of customary law, it must decide an internal conflict of laws issue.

This article focuses on current internal conflict of laws problems concerning disputes between customary law and general law. It does not reach internal conflict of laws disputes involving a choice between two or more systems of customary law.<sup>4</sup> Herein, "internal conflicts" refers to conflicts between customary law and general law.

Because of the triadic system of pre-Independence courts in Zimbabwe and because of racist laws controlling the choice of a system of law, few internal conflict of laws problems came before the superior courts. Most internal conflict of laws disputes involving a choice between customary law and general law in Zimbabwe have developed since Independence. After majority rule, the Government and Parliament made efforts to eliminate discrimination based on race and sex and to restructure the courts and the legal system to make them colour-blind and capable of providing more even-handed justice. As a result, necessary and far-reaching changes have already occurred and more will probably occur in the near future.

Part I of this article will examine how, faced with a dispute as to whether customary law or general should govern a case, a Zimbabwean court should proceed to determine which system of law should be applied. It will also consider the jurisdiction of various Zimbabwean courts with respect to the application of customary law and general law.

Part II will examine some aspects of family law as it relates to internal conflict of laws problems with respect to the application of customary law and general law. It will examine the four types of Zimbabwean marriage and the internal conflict of laws problems relating to the consequences of each type of marriage.

Part III will deal with proposals for legislative reform to eliminate or lessen some problems in family law. Emphasis has been placed in the article on short term easily implemented solutions to family law problems resulting from internal conflict of laws. More far reaching and fundamental reforms which are urgently needed are beyond the scope of this article.

One of the problems resulting from conflicts between customary law and general law is that each of these two different systems provides for different rights and obligations on many matters. Non-Africans have some rights which Africans do not have. Africans have a few rights which

4. Section 4 of the Primary Courts Act contains the guidelines for determining which of two systems of customary law should be applied.

5. See discussion of Zimbabwean courts and conflicts of laws under the pre-Independence statute in "Conflict of Laws-The Application of Customary Law and the Common Law in Zimbabwe," *30 International and Comparative Law Quarterly* 59 (1981).

non-Africans do not have. Men have some right which women do not have. This disparity of rights is, in the main, due to legislative enactments.

The proposals for reform aim at achieving equal rights for all Zimbabweans, regardless of race, sex, which court hears a case, or which system of law the court applies. While customary law and general law co-exist in Zimbabwe, differences between the rules of law on the same issue under customary law and general law will continue. However, as discussed *infra*, various reforms can eliminate discrimination and can increase options available to Africans.

## **PART I — RESOLUTION OF CONFLICTS BETWEEN CUSTOMARY LAW AND GENERAL LAW**

### *A. The Current Status of Customary Law and General Law*

The Constitution of Zimbabwe, section 89, and the Primary Courts Act, sections 2 and 3, depict what constitutes the law of Zimbabwe and contain Zimbabwe's choice of law rules. Consequently, statutes law overrides Roman-Dutch common law and customary law. Subject to the existence of a relevant statute, general law and customary law have *equal status* as systems of law.

Section 89 of the Constitution provides:-

“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 or 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”

Section 89 makes a statute override common law. It also makes the application of general law subject to any statute on the application of customary law.

Section 2 of the Primary Courts Act defines the two systems of law as follows:-

“ ‘customary law’ means the customary law of the indigenous people of Zimbabwe or any section or community thereof;”

“ ‘general law of Zimbabwe’ means the common law of Zimbabwe and any enactment, and excludes customary law;”

At the time the Constitution came into effect in April 1980, the

African Law and Tribal Courts Act,<sup>6</sup> ("the Tribal Courts Act"), regulated the application of customary law. During 1981, the Primary Courts Act repealed the Tribal Courts Act. The Primary Courts Act now controls the application of customary law.

### *B. Application of Customary Law Prior to Independence*

Under the triadic court system in effect prior to the adoption of the Primary Courts Act, some courts dealt only with disputes between Africans. Tribal courts, presided over by chiefs and headmen, had jurisdiction only to apply customary law. District commissioner's courts, presided over by white district commissioners, had jurisdiction to apply both customary law and general law in accordance with the choice of law provisions of section 2 and 3 of the Tribal Courts Act. Section 3 of that Act empowered district commissioners to determine any civil case between Africans or between an African and a person who was not an African. In practice, the court dealt with cases between Africans. A dispute between an African and a non-African was litigated either in a magistrate's court or in the High Court, depending on the subject matter of the case and the amount in dispute. These courts applied general law. If an action commenced in a magistrate's court required the application of customary law, a magistrate could order the case to be commenced afresh in a district commissioner's court.<sup>7</sup> Although it had jurisdiction to apply customary law, if the then General Division of the High Court had such a case, it transferred the case to a district commissioner's court. For example, in *Mpambwa v Mpambwa*<sup>8</sup> Beadle C J, said:

"I should like to refer here to my judgement in the case of *Kusikwenyu v Parsons* G D 26 of 1972 (not yet reported) where I pointed out that where there are matters which are essentially matters of African custom with which this court is not familiar, the proper courts in which to pursue these matters are either the district commissioner's court or the tribal courts set up under the African Law and Tribal Courts Act 1969".<sup>9</sup>

Prior to the enactment of the Primary Courts Act, a case having a potential internal conflict issue usually found its way to a district commissioner's court. District commissioners had jurisdiction to apply customary law and general law. They most often applied customary law to dispute between Africans. District commissioners rendered judgements, sometimes without making clear what system of law was being applied. Cases which has been decided under Roman-Dutch law and cases decided

6. See note 3, *supra*.

7. Section 13(2) of the Magistrates Court Act, Chapter 18. This subsection was repealed by section 30 of the Primary Courts Act.

8. 1974 (2) RLR 20.

9. *Mpambwa*, *supra* at p. 23.

under customary law were cited in judgments as precedents in support of a rule of law the district commissioner or court of appeal for African civil cases wished to apply. The court rendering the judgment often did not appear to realize that precedents under general law and under customary law could not be used interchangeably. Internal conflict issues rarely reached any appeal court. If cases went to the court of appeals for African civil cases, the parties rarely appealed such cases to the then Appellate Division of the High Court, even though such appeals were possible, albeit expensive.

### *C. The Impact of the Primary Courts Act on the Jurisdiction of Various Courts*

The Primary Courts Act, in 1981, abolished the tribal courts, the district commissioner's courts and the court of appeal for African civil cases and established the primary courts. These included village courts, community courts and district courts, the last named being magistrate's courts specially designated to hear appeals from community courts. These courts have jurisdiction to apply only customary law and to hear only civil cases except that community courts are empowered to hear certain criminal cases (although none has done so to date). In 1982, community courts were empowered to make maintenance orders in accordance with the provisions of the Maintenance Act<sup>10</sup> ("the Maintenance Act"). For primary courts, internal conflict disputes involve a jurisdictional issue. Unless it is determined that customary law applies, the court loses jurisdiction to hear the case, subject to the exceptions discussed *supra*.

*All Zimbabwean courts now have jurisdiction to apply customary law.* The provision in the Magistrates Court Act which allowed a magistrate to avoid deciding a case if it required the application of customary law has been repealed.<sup>11</sup> The magistrate's courts, the High Court and the Supreme Court all have jurisdiction to apply either customary law or general law in a civil case, subject only to monetary and other restrictions upon the jurisdiction of magistrate's courts contained in the Magistrates Court Act.<sup>12</sup>

If a village court or a community court decides that a case should be determined under general law, except as explained *supra*, the primary court *must* dismiss for lack of jurisdiction. If a case otherwise within the jurisdiction of a magistrate's court is brought in that court or a case is commenced in the High Court, the court may hear and determine the case regardless of whether it decides that customary law or general law is the proper system of law to apply in the particular case.

### *D. Current Jurisdiction of Zimbabwean Courts Is Mis-Understood*

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<sup>10</sup> Chapter 35.

<sup>11</sup> See note 7 *supra*.

<sup>12</sup> See Section 13 of the Magistrates Court Act.

Members of the legal profession and the Government continue to debate the issue of whether or not magistrate's courts have jurisdiction to apply customary law. Debate is also continuing on whether Part I of the Primary Courts Act applies in all Zimbabwean courts or only in primary courts. Part I contains four sections (section 3 - 6). With few exceptions, the statutory law of Zimbabwe as to when customary law applies and when general law applies are contained within section 3. No other statute contains guidelines for choosing between customary law and general law. None of the sections in Part I is specifically restricted to primary courts. As those sections do not contain restrictive language, they constitute statutory law which overrides conflicting provisions of Roman-Dutch common law and customary law. Every Zimbabwean court is bound to follow those provisions.

A recent undated judgment *In the matter between Nhamburo and Nhamburo* delivered by the Magistrates Court for the Province of Matabeleland demonstrates that at least some magistrate's courts do not realize that they have jurisdiction to apply customary law and they are required to follow the guidelines in section 3 of the Primary Courts Act. The *Nhamburo* case involved an application for summary judgement arising from a summons issued by the plaintiff to have the defendant ejected from property. The defendant claimed she had a customary law right to remain in the house in dispute. The magistrate's court dismissed the application for summary judgment on the ground that as community courts had been given jurisdiction to hear certain claims in connection with immovable property, a magistrate court did not have jurisdiction to hear such a claim. The magistrate probably was referring to section 12(1) (c) of the Primary Courts Act which provides:-

"12 (1) Subject to the provisions of this Act and any enactment, a primary court may in any civil case—

\* \* \*

"(c) make such order as may be necessary to enforce any right to use or occupy immovable property held in accordance with customary law."

The property in question was located in the Luveve suburb of Bulawayo. It had been inherited by plaintiff in accordance with customary law but was not "held in accordance with customary law." Plaintiff registered it in his own name and held a deed of transfer. It was, therefore, held in accordance with general law. A community court would have no jurisdiction to deal with defendant's claim of a right of occupancy based on customary law. Even if jurisdiction had been conferred on community courts, that would not have deprived magistrate's courts of existing jurisdiction which was not taken from them by any statutory provision. Section 13 (1) (b) (iii) of the Magistrates Court Act gives a magistrate's court jurisdiction "in actions of ejection against the occupier of any house, land or premises situate within the province". There is nothing in the Magistrates Court Act which restricts such courts to the application of general law in the way primary courts are restricted to the application of customary law by section 11 (1) (a) and 11 (2) (a) of the Primary Courts Act.



In his unpublished judgment in the *Nhamburo* case, the magistrate incorrectly stated the issue thus:

“As I see it, the central issue in this case put in its most simple form is this a matter which should be decided according to the general law of Zimbabwe as applied in the Magistrates Civil Court or is this a matter which should be heard before the Community Court and decided according to the Customary Law?”<sup>13</sup>

The issue the magistrate’s court should have decided was whether it should determine the matter under general law or under customary law. Part of the reason for the magistrate’s court’s confusion can be noticed from a further statement in the same judgment where the magistrate said:

“With respect in my opinion, the provisions of section 3 of Act 6/81 [Primary Courts Act] apply *only* to cases which come before a *Primary Court as defined in Act 6/81* or a District Court as defined in Act 6/81” (emphasis court’s)<sup>14</sup>

Most respectfully, as noted *supra*, neither section 3 of the Primary Courts Act, nor any other statutory provision restricts the application of this section to cases before primary courts. It applies to cases in every court in Zimbabwe. Section 3 contains the guidelines for determining whether customary law or general law should be applied in a particular case. The Constitution, section 89, made the application of general law subject to the “provision of . . . law for the time being in force in Zimbabwe relating to the application of African customary law.” Section 3 is the current provision relating to the application of customary law. Every court, including the Supreme Court, must apply that section in deciding whether customary law or general law is the proper system to apply in a particular case. It would be an intolerable situation if different choice of law rules could be applied in different Zimbabwean courts for deciding whether customary law or general law should govern a case.

#### *E. An Historical Perspective on the Extent of the Coverage of Substantive Law Statutes*

The Tribal Courts Act provided that statutes relating to certain issue should not affect the application of customary law to Africans unless specifically made applicable to Africans. In defining customary law, section 2 of the Tribal Courts Act provided:-

“‘customary law’ in relation to a particular African tribe, means the legal principles and judicial practices of such tribe except in so far as such principles or practices are repugnant

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<sup>13</sup>. *Nhamburo*, *supra* at p.2.

<sup>14</sup>. *Nhamburo*, *supra* at p.3.

to — (a) natural justice or morality; or (b) the provision of any enactment:

*Provided that nothing in any enactment relating to the age of majority, the status of women, the effect of marriage on the property of the spouse, the guardianship of children or the administration of deceased estates, shall affect the application of customary law, except in so far as such enactment has been specifically applied to Africans by that or any other enactment;*" (emphasis added).

This provision was abolished by the repeal of the Tribal Courts Act. A similar provision to the one quoted *supra* was contained in the African Law and Courts Act<sup>15</sup> ("the African Law and Courts Act") which was in effect from 1937 until it was repealed in 1969 by the Tribal Courts Act. With respect to many statutes relating to family law which will be discussed *infra*, the restrictive provision discussed *supra* was in effect at the time of their enactment. Consequently, most substantive family law statutes did not apply to Africans. The effect of the repeal of the restrictive provision on the extent of the coverage of the statutes affected will be discussed *infra*.

#### *F. Choice of Law Provisions in Section 3 of the Primary Courts Act*

We now turn to section 3 of the Primary Courts Act to see how it provides for the choice between customary law and general law to be made. Section 3 commences as follows:

"3 (1) *Subject to the provisions of this section and of any other enactment, unless the justice of the case otherwise requires . . .*" (emphasis added).

The section then goes on to state that customary law *shall* be applicable to cases where certain conditions exist and that in other cases general law shall be applicable. The application of customary law or general law is, in each case, made *subject to* a relevant statute. In other words, section 3 provides that statutes override both customary law and common law. Now all statutes apparently apply to disputes between Africans unless there is a statutory provision with respect to a particular statute specifically providing that it does not apply to such disputes.

Many statutes, which do not specifically say whether or not they apply to Africans, may now have become applicable to Africans even though when enacted the statute would not have been applicable to such disputes because of the restrictive provision in section 2 of the Tribal Courts Act quoted *supra* or because of a similar provision in the African Law and

<sup>15</sup> Chapter 104 of 1963 Revised Edition of the Statutes. When enacted entitled Native Law and Courts Act, No 33 of 1937.

Courts Act.<sup>16</sup> Although one may assume that the extent of the coverage of certain substantive law statutes has been extended by the Primary Courts Act, open questions exist as to the coverage of some statutes which can be settled only by further enactments of Parliament or by judgments of the Supreme Court. Attention will be drawn to some of those open questions in connection with the discussion *infra* of family law problems.

A court dealing with a case involving an internal conflict of laws issue must first resolve the choice of law dispute before dealing with the substantive law issue in the case. If a substantive law statute is potentially relevant to the main issue in the case, this statute must be examined in connection with the choice of law dispute as the court must determine whether or not it is applicable. If the statute is applicable, the court must decide that general law is the proper system of law to apply. If the court has jurisdiction to apply general law, it can then proceed to hear the case. If it does not have jurisdiction, it must dismiss the action.

The application of customary law is also made subject to a "justice of the case" otherwise requiring exception. It is respectfully submitted that this provision in subsection (1) of section 3 restricts when customary law can be applied and means that it should not be applied if "the justice of the case otherwise requires". This "justice of the case" clause does not empower a court to apply customary law and ignore a statute relevant to the issue being adjudicated.

The now repealed Tribal Courts Act contained the same "unless the justice of the case otherwise requires" provision. It was interpreted by the then General Division of the High Court in *Jirira v Jirira*<sup>17</sup> as allowing a court on the basis of the Europeanised life style of the litigants to apply general law to the proprietary consequences of their marriage and to ignore a statutory provision which required the application of customary law to the proprietary consequences of such a marriage. Most respectfully, it is suggested that a court may decide to apply general law instead of customary law only where there is no applicable statute *requiring* the application to customary law.

The "justice of the case" provision should be resorted to rarely to justify the application of general law and only if a grave injustice would be done by applying customary law to a case where relevant factors such as mode of life of the parties indicate that customary law should be applied.

Section 3 (1) (a) of the Primary Courts Act goes on to deal with the application of customary law. It provides that "customary law shall be applicable in any civil case where-

- (i) the parties have expressly agreed that it should apply, or
- (ii) having regard to the nature of the case and the

<sup>16.</sup> Section 2.

<sup>17.</sup> 1976 RLR 7 (GD, HC)

- surrounding circumstances, it appears that the parties have agreed it should apply, or
- (iii) having regard to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply;"

Section 3 (1) (b) provides that "the general law of Zimbabwe shall be applicable in other cases."

Section 3 (1) (a) (i) allows parties to agree on which system of law should apply only in a case where there is no relevant statute.

*G. An Individual May Not Unilaterally Choose the System of Law By Which He/She Will Be Governed*

No individual in Zimbabwe has an unqualified right to decide whether customary law or general law will govern all litigation by and against him/her. All litigation involves two or more adversaries, who, theoretically at least, seek opposite results from the litigation. Litigants are entitled to have the case between them decided in accordance with the law. The court hearing the case determines at or before the time it hears the case what the applicable system of law is. If the rules of substantive law that would be applicable under the two contending systems are the same, the conflict is known as a spurious conflict and the court can properly proceed to determine the case under the system of law chosen by plaintiff as the result should be the same whichever system is applied.

Where the substantive rules of law on the issue involved in a case differ under the potentially applicable systems of law and where consequently they may affect the outcome of the case, the determination of the conflict of laws issue may be crucial to the final outcome of the case. A litigant will always choose the system of law under which he/she would win. A court resolving a conflict of laws dispute must ignore the substantive rules of law under the competing systems of law and how they affect the parties chances of success and apply the choice of law rules. If the parties each wish the case to be determined under a different system of law, for example, one party wishes it to be determined under general law and the other party under customary law, the wishes of neither party are binding on the court.

The court before which the case is pending had the duty of deciding in accordance with the law of Zimbabwe which is the proper system of law to apply in the case before it. The court must apply section 3 of the Primary Courts Act without regard to the likely final outcome of the pending action.

*H. Evidentiary Hearing Needed If Dispute On Which System Applies*

Where, in a case there is an issue as to which system of law is to apply, it will be necessary for the court to decide that issue before hearing the

case. As noted, *supra*, if the case is before a primary court, the determination of which system of law should apply also determines whether or not the court has jurisdiction to hear the case. Even if the case is not before a primary court, it will still be necessary for the court hearing the case to determine which system of law it will apply if that is put in issue by a litigant or if the court has any doubts about the proper system of law to apply in the case.

In some cases coming before the courts, it will not be clear which system of law applies. In those cases in which the court must determine which system of law to apply, the court must hold an *evidentiary hearing* on the matter. Every court has jurisdiction to determine whether or not it has jurisdiction to hear a case and so, even a community court may hold a hearing on jurisdiction where it is contended that general law, and not customary law, should apply to the case. That issue can be determined only after the court has considered the relevant factors as defined in section 3.

A court should only hold a hearing on the choice of law issue if the defendant claims a different system of law should govern the case than the system contended for by the plaintiff or if a presiding officer, magistrate or judge feels doubt about which system should apply. A plaintiff may, with regard to any counterclaim made by the defendant, contend that the counterclaim should be determined under a system of law different from that contended for by the defendant. The procedure for determining which system of law should apply to the counterclaim is the same as that for determining which system of law should apply to the hearing of the plaintiff's claim.

It is, of course, necessary to place the burden of proof in every dispute on one party or the other. It is suggested that, with reference to internal conflict claims, the burden should be on the party alleging that the plaintiff (or the defendant, in the case of a counterclaim) has selected the improper system or the improper forum. With regard to an action in the primary courts, this would have the effect of creating a presumption in favour of the court having jurisdiction. As it would only have jurisdiction if customary law was applicable, the result would be a presumption in favour of customary law being applicable, and the burden of proof being placed on the party challenging that presumption. Obviously, if the evidence proves that customary law does not apply, a primary court must dismiss the case. However, the burden would lie on the party contending that general law applies to prove that it applies and that the court lacks jurisdiction. Usually, therefore, in a primary court the defendant would have the burden of proving that customary law does not apply.

Where the choice of law issue is not a jurisdictional issue, that is in courts which are not primary courts, the usual rules as to burden of proof could apply. This would mean that the burden of proving that plaintiff (defendant) had selected the improper system of law under which to make the claim would be placed on the defendant (or plaintiff with respect to a counterclaim) who is making the assertion. Most cases will not have an

internal conflict of law issue. The parties will be able to agree as to which system of law should apply. A court need concern itself with the question of which party has the burden of proof on the choice of law issue only where the parties disagree as to whether general law or customary law should be applied or where the court itself raises the issue. Where a court does this, the burden of proof should be on the party whose choice of law is being questioned by a court.

### *I. Court Dealing With Internal Conflict Dispute Must Consider Surrounding Circumstances*

If the defendant challenges the system contended for by the plaintiff, the court must decide whether general law or customary law applies before it can proceed to hear and decide the case or conclude that it must dismiss the case for lack of jurisdiction. Section 3 (1) (a) governs that determination and allows the court to examine the nature of the case and the surrounding circumstances and then decide if "it appears just and proper" that customary law should apply.

Section 3 (2) of the Primary Courts Act spells out the meaning of "surrounding circumstances", as used in section 3 (1) (a) (iii), which "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 customary law or the general law of Zimbabwe, as the case may be."

### *J. Court in Considering Surrounding Circumstances Must Balance Factors*

The court may consider all the factors *supra* in making its determination but, it is submitted, these do not exclude other factors which may constitute "surrounding circumstances". The court may consider any factors which it considers relevant. No single factor is decisive. The court must consider each factor to see which of the systems of law each factor indicates should control and then weigh all the factors against each other.

We shall now consider each factor in turn. As to the mode of life of the parties, if the dispute is between an African and a white, the mode of life of the African may or may not indicate that customary law should apply. The mode of life of the white will most probably indicate that general law should apply. If the dispute is between two Africans, the mode of life of both of them may indicate that either customary law or general law should apply or the mode of life of one may indicate that customary law should apply while the mode of life of the other indicates that general law should apply. Where the mode of life of each of the parties indicates

that a different system should apply, this factor is eliminated from consideration. Where the mode of life of each of the parties indicates the same system should apply, that is that either customary law or general law should apply, this is a factor which will weigh heavily in favour of the application of the system to which the mode of life of the parties points.

As to the subject-matter of the case, obviously that will sometimes point decisively in one direction or the other. A dispute over a negotiable instrument is not likely to fall under customary law. A dispute over lobolo is likely to do so. The subject-matter of most delict cases, however, does not point decisively to one system or the other. For example, a cyclist collides with a cow. The subject-matter appears to be neutral and will not assist *per se* a court in deciding which system of law should be applied.

A court must also consider "the understanding by the parties of the provisions of customary law or the general law of Zimbabwe . . . which apply to the case". This criterion will rarely have relevance to the case of a delict. Before I collide with a cow on my bicycle, I do not think about what law will apply. However, if both parties to a contract have a clear understanding about how customary law would deal with a dispute over it and no understanding about how general law would deal with it, plainly this constitutes a strong indication that customary law should apply. In cases involving a white and an African in which this factor becomes relevant, the white will usually have little knowledge of customary law and the African may or may not have knowledge of general law. This factor may have to be eliminated in certain cases. In a case between two Africans, this factor may or may not be eliminated depending on the backgrounds of the particular parties.

#### K. Section 3 (2) (d) Will Generally Control Choice of Law

In many, perhaps most cases, section 3 (2) (d) which focuses attention upon "the relative closeness of the case and the parties to customary law or the general law of Zimbabwe . . ." will influence which system of law should apply. Law constitutes part of culture. Zimbabwe has, of course many cultures. A case will have a relative closeness to that body of law and to the related culture to which the case and the parties have the closest connection. Many cases, and many individuals, will live in one culture or the other. Many cases (for example, black-white cases) and even some individuals (for example, an African graduate teaching at a secondary school in a rural area) will have one foot in each of two cultures. In the final analysis, in many of these cases the court will have to rely on the "relative closeness" test. What factors bear on this? A few are suggested:

1. *The place where the cause of action arose.* If a white cyclist in a communal area collides with an African's cow, most probably customary law would control. If a white cyclist collides with an African pedestrian in Harare, whether customary law should apply seems more problematical.

2. *The nature of the case.* If a white farmer commits adultery with the wife of one of his African workers who is married under the African Marriages Act,<sup>18</sup> customary law would be likely to apply. If a white lecturer at the University commits adultery with the wife of an African lecturer, whether customary law should apply could well depend on whether the African lecturer was married under the African Marriages Act or under the Marriage Act.<sup>19</sup> If the marriage was a customary law marriage, it would appear that customary law should apply. If it was a marriage under the Marriage Act, it would appear that general law should apply.
3. *The place where the parties reside.* If both parties live in Mount Pleasant in Harare, this constitutes a pull toward a finding that general law has the closest connection with the case. If both parties live in a communal area, this constitutes a strong pull towards a finding that customary law has the closest connection with the case. Where one party's place of residence indicates customary law and the other party's place on residence indicates general law, the factor would cancel out. If each party's place of residence indicated the same system of law should be applied, this would be an indication that whichever system was indicated should be applied.
4. *The language of the transaction.* That a contract or negotiation took place in Shona or Ndebele suggests a close connection to customary culture and therefore customary law. The use of English, however, seems neutral, for Africans practically always use English when dealing with whites, since most whites cannot speak any African language, or when dealing with another African where both parties do not speak the same African language.

Thus, as to surrounding circumstances, the court must consider a number of factors. None by itself is conclusive. Some will pull both ways. In considering them, the court must remember that in Zimbabwe neither customary law nor general law has preference over the other. They constitute *equally* acceptable systems of law. In deciding which applies, the court must examine in turn each of the factors identified in the statute and any others which qualify as "surrounding circumstances". Section 3 (1) (a) (iii) provides that customary law shall be applicable in any civil case where "having regard to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply".

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18. Chapter 238.

19. Chapter 37.



### L. *If Factors Balance Out, Plaintiff's Choice of Law Should Prevail*

In cases where the factors weight equally between choice of customary law and of general law, selection of one system or the other will unavoidably deal unjustly with one of the parties. To force an African who wishes to be governed by customary law to appear before a court where Roman-Dutch law applies or to apply customary law to a party who wishes to be governed by general law works an injustice. It is an equal injustice to bring a white before a court where customary law applies or to apply customary law to a case in which he is involved when he wishes the case decided under general law. In such a case, unfortunately, one or the other of the parties will feel aggrieved. The day has passed, however, when the African, and not the white, will always receive the unjust treatment. The legal system of Zimbabwe has become colour-blind. A court does not lose its jurisdiction to apply customary law simply because one of the parties is white or is an African who wishes to be governed by general law.

If statute law or Roman-Dutch law applies, a community court or a village court will lose jurisdiction. However, a primary court should not deliberately avoid jurisdiction which it rightfully has by giving undue weight to general law. In most places, the court will hold that a plaintiff has the choice of forum. He may choose a court which has jurisdiction over the subject-matter and which can exercise jurisdiction over the defendant. A court should not disturb the plaintiff's choice unless it finds that it does not have jurisdiction to proceed.

### M. *A Claim of Prescription Does Not Require the Application of General Law*

An additional factor to be considered in some cases may be that customary law does not bar claims by reason of prescription.<sup>20</sup> General law does. Courts always look with disfavour on claims of prescription. To decide in favour of general law in such a case may bar the plaintiff from a remedy. In such cases, unless the absence of jurisdiction appears clear, a community court should hold that it has jurisdiction.

### N. *Summary*

1. A community court has jurisdiction only to try civil cases to which customary law applies (except where specifically authorized by Parliament, e.g., maintenance orders).
2. A magistrate's court, subject to jurisdictional limitations upon it, has jurisdiction to try civil cases to which general law or customary law applies.

<sup>20</sup> Prescription Act, No. 31 of 1975. Section 2 (3) of this Act provides:

"2 (3) In so far as any right or obligation of any person in relation to any other person is governed by customary law referred to in the Customary Law and Primary Courts Act, 1981 (No. 6 of 1981) the provisions of this Act shall not apply". (emphasis added).

3. The High Court has jurisdiction to try civil cases to which customary law applies as well as civil cases to which general law applies, without any limitations.
4. Our law is colour-blind. Whether customary law applies does *not* depend upon the race of the parties.
5. Where the plaintiff contends that customary law or general law applies, the court should assume that it applies, and where the court has jurisdiction to apply the system contended for, that it has jurisdiction unless either:
  - (a) a party questions whether customary law or general law should apply, or
  - (b) the court itself has doubt about whether customary law or general law applies.
6. If a party or the court itself raises the question of whether general law or customary law should apply to the case or whether the court has jurisdiction, the court must hold an evidentiary hearing to discover whether customary law ought to apply.
7. At the hearing, the party (usually the defendant) if he is asserting that the court does not have jurisdiction because it is a primary court and that general law and not customary law applies or that the other party has chosen the wrong system of law, has the burden of proof on his assertion. Unless the defendant discharges this burden, the plaintiff's choice of system of law must be allowed to stand.
8. Where the court itself raises the issue of which system of law applies, the party whose choice is being questioned by the court has the burden of proving he has selected the proper system and if the jurisdiction of the court is an issue that the court has jurisdiction.
9. In determining whether or not to apply customary law, the key test usually becomes whether "having regard to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply."
10. The statute identifies four factors which may bear on the "nature of the case and the surrounding circumstances". A court may, however, take other factors into account.
11. In some cases the "mode of life" factor will balance out and have to be disregarded.
12. If the subject-matter of the case concerns a matter mainly foreign to customary society, ordinarily general law will apply. However, if it concerns a matter mainly foreign to

the more developed sector, then ordinarily customary law will apply. If it concerns a matter which occurs in both societies, either law could apply and therefore this factor would have to be disregarded.

13. In determining "the relative closeness of the case and the parties to the customary law or the general law of Zimbabwe", among other factors, a court might turn its attention to:
- (a) the place where the cause of action arose;
  - (b) the nature of the case;
  - (c) the place where the parties reside; and
  - (d) the language of the transaction.

## **PART II: A CONSIDERATION OF FAMILY LAW INTERNAL CONFLICT OF LAWS PROBLEMS**

Part II of this article is designed to demonstrate, using Family Law as a case study, the type of problem that can develop as a result of the continued co-existence of general law and customary law in Zimbabwe. Internal conflict problems have also arisen in other fields such as succession, contracts and delict but are beyond the scope of this article.

### *A. An Historical Perspective on the Extent of the Coverage of Family Law Statutes*

There are over twenty pre-Independence statutes relevant to family law and succession still in existence which were enacted while the rule about non-application to Africans, discussed *supra*, was still in effect. Most of them are silent on the extent of their coverage and whether or not they apply to Africans and to marriages between Africans. At the time of their enactment, many were not intended to be applied to Africans or marriages between Africans. Before considering the extent of their present coverage, we shall briefly consider monogamous marriages of Africans from an historical perspective. Early in the history of this country, and probably because of the influence of missionaries, some Africans chose to contract a monogamous or what is often called a Christian marriage. Apart from the requirements for marriage and divorce, all of the other consequences of such marriages for Africans were then governed by customary law. In 1917 a statute was passed which provided that when two Africans married under the then general law Marriage Act, the proprietary consequences of their marriage were to be governed by customary law<sup>21</sup> This statutory provision is still on our statute book as section 13 of the African Marriages Act.<sup>22</sup>

21. Native Marriages Act No. 15 of 1917. Section 13 of this Act provided: "13. Notwithstanding the fact that any natives have contracted marriage in accordance with the terms and provisions of the Marriage Order in Council, 1938, as from time to time amended, such form of marriage 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 native law and custom."

22. Chapter 238.

Prior to Independence and the enactment of the Primary Courts Act, the law provided that in disputes between Africans, customary law was to apply to custody, guardianship, status, devolution of property, marriage consideration, seduction, adultery and all marriages under the African Marriages Act.<sup>23</sup> The all white district commissioners who adjudicated on a large proportion of disputes between Africans were allowed to apply both customary law and general law. Africans went to the district commissioner's courts to obtain divorces no matter what the form of their marriage. About the only real distinction between the different forms of marriage then available to Africans was that there were different requirements for contracting a marriage, different grounds on which a divorce could be obtained and differences on the issue of whether or not the husband could lawfully take other wives while he had an existing marriage. The requirements as to lobolo and the necessary consent of the woman's guardian and the proprietary consequences of the marriage and the law governing control over any children of the marriage were the same regardless of the form of the marriage chosen.

It should be noted that, pre-Independence, there was no procedure by which Africans could chose to have general law apply to the proprietary consequences of their marriage. The *Jirira* case discussed *supra*, which applied general law proprietary consequences to the marriage of two Africans in order to award some property which she had earned to the wife at the time of the divorce, was an aberration. Otherwise, pre-Independence, customary law governed the most vital aspects of marriage between Africans, namely, property rights, inheritance rights and rights to children. It is not possible to find a solution to the problem of discriminatory treatment under pre-Independence law because the effect of the law as then applied was blatant discrimination against women and against Africans. African women rarely owned property and did not normally inherit from any male under customary law.

#### *B. What Family Law Statutes Now Apply to Marriages Between Africans*

Persons choosing between one form of marriage and another most often do not know what rights they are selecting when they decide on the form of their marriage. Furthermore, there are some rights which are not available to Africans in connection with marriage. For example, *Africans cannot choose* to have the proprietary consequences of their marriage governed by general law. Africans are not presently permitted to select either of the two different types of proprietary consequences for their marriage which are available under general law.

Usually Africans choosing a form of marriage do not realize all the consequences of their choice as between the different forms of marriage available to them which is hardly surprising when the law is unclear at the present time as to whether or not certain statutes will apply to them. Will it make a difference, for example, as to what law will govern a dispute as to custody and guardianship whether two Africans marry under the

23.

Section 3 of the Tribal Courts Act

Marriage Act or under the African Marriage Act? If the marriage is between two Africans, are custody and guardianship issues under either or both of those two forms of marriage governed by the Guardianship of Minors Act"?<sup>24</sup>

When the Guardianship of Minors Act was enacted, it was not intended to govern disputes between Africans with respect to guardianship or custody. The provision about statutes not applying to Africans unless the statutes specifically said it applied to Africans, which was discussed *supra*, was contained in the African Law and Courts Act which was still in effect in 1961 when the Guardianship of Minors Act was enacted. Nothing was said in the Guardianship of Minors Act itself about whether or not it applied to disputes between Africans. It was clearly not intended so to apply at that time because such disputes were governed by customary law. When the Primary Courts Act provided that statute law was to override customary law and Roman-Dutch common law *without regard to race*, what effect did that have on the extent of the coverage of the Guardianship of Minors Act which was still in existence and which until that time had not applied to custody or guardianship disputes between Africans? Nothing in the Primary Courts Act provided that a statute was not to apply to Africans unless the statute provided specifically that it was to so apply. That provision had been repealed in 1981 when the Act containing it was repealed. Thus, from the time the Primary Courts Act came into effect, our law no longer provided that disputes between Africans about guardianship and custody *must* be decided under customary law. Does this mean that the extent of coverage of the Guardianship of Minors Act was extended by implication, and if so, how far? Does it now cover disputes about guardianship or custody of the children of Africans married under the Marriage Act? It would seem clear that it does. This was confirmed by McNally J in the High Court in *Chitiyo v Chitiyo*.<sup>25</sup>

However, this is not as clear as it would seem. Recently, in *Musakwa v. Musakwa*<sup>26</sup> the Supreme Court said, *obiter*, that Africans who were parties to a marriage under the Marriage Act could agree that customary law would control a dispute as to custody. Most respectfully, I do not think that under our present law parties can agree that where there is a relevant statute, such as the Guardianship of Minors Act dealing with the subject matter of a dispute, that customary law rather than the statute should apply to a dispute between them. Unfortunately, the Supreme Court did not refer to the Guardianship of Minors Act when it made its *obiter* statement. See further discussion of the *Musakwa* case in the case note published in this issue of the *Zimbabwe Law Review*.

The extent of the coverage of the Guardianship of Minors Act is even more unclear when considering a guardianship or custody dispute involving a child whose parents were married under the African Marriages Act. Does the Guardianship of Minors Act apply to custody disputes involving children of such a marriage? Probably not but the law on this is unclear.

24. Chapter 34.

25. HC-H-20-83 (unreported judgment).

26. S-11-84 (unreported judgment).

The Guardianship of Minors Act clearly does not apply to custody disputes involving children born of a customary law union which has not been registered. Such customary law unions are not regarded by general law as valid marriages except for limited purposes such as maintenance.<sup>27</sup> Such unions are regarded as a valid marriages for *inter alia* the purpose of guardianship and custody only under customary law.<sup>28</sup>

### C. *Types of Marriages in Zimbabwe*

As to the requirements for and consequences of marriage and whether general or customary law applies to each of these, we shall, for convenience, consider that there are four different types of marriage in Zimbabwe, namely marriages-

- (1) under the Marriage Act<sup>29</sup> ("the Marriage Act") where at least one of the spouses is not an African;
- (2) under the Marriage Act, where both spouses are African;
- (3) under the African Marriages Act,<sup>30</sup> ("the African Marriages Act")
- (4) under customary law, where the customary law union has not been registered.

I shall discuss briefly the law governing some of the requirements for and some of the consequences of the marriage in the case of each of these four types of marriage.

- (1) *Marriages under the Marriage Act where at least one of the parties is not an African* do not generally generate any conflict problems. The requirements of the marriage are set forth in the Marriage Act and the consequences of the marriage would be governed by general law. Where one of the parties is an African and there is an agreement as to lobolo, the lobolo agreement would be enforceable but such an agreement in this type of marriage is so rare as not to warrant further discussion here.
- (2) *Marriage under the Marriage Act where both parties are African* is the type of marriage that has in the past and continues to generate many conflict problem.

#### (a) "Enabling certificates"

Where *both* parties marrying under the Marriage Act are African, they must present an "enabling certificate" to the marriage officer at the time of their marriage. Failure to do so renders the marriage void.<sup>31</sup> *A void marriage is one which never comes into existence.* Since the new Legal Age of Majority Act, it appears that many Africans have been marrying

27. See section 12 (4) (a) of the Primary Courts Act.

28. See section 3 (3) of the African Marriages Act.

29. Chapter 37.

30. Chapter 238.

31. Section 12 (2) of the African Marriages Act.

under the Marriage Act without an "enabling certificate". This is because of the belief on the part of some Government officials that the Legal Age of Majority Act has impliedly repealed the "enabling certificate" requirement with respect to marriage under the Marriage Act where the parties intending to marry are 18 years of age or above. Such an interpretation is open to debate and does not provide the parties to such a marriage the assurance that the marriage is a valid marriage. I would therefore suggest that, while the statutory provision making such marriages void in the absence of an "enabling certificate" remains that "enabling certificates" be issued routinely to any African woman aged 18 years or above who desires to marry under the Marriage Act. *However, the provision requiring "enabling certificates" should be repealed as it discriminates against Africans.* Additionally, legislation should be immediately enacted validating retrospectively any marriage which might otherwise be held void on account of the absence of an "enabling certificate". This would prevent any husband to such a marriage, when he tires of the woman with whom he went through the marriage ceremony, from deserting her and refusing to maintain her on the ground that she was not his wife because the alleged marriage was void for lack of an "enabling certificate".

(b) *Proprietary Consequences*

The proprietary consequences of the marriage of two Africans under the Marriage Act are different from the proprietary consequences of a marriage under the Marriage Act if at least one of the parties is not an African. In the first type of marriage under the Marriage Act, discussed *supra*, the marrying parties can choose before the marriage whether they wish to be married in or out of community of property. However, such an option does not appear to be available to two Africans marrying under the Marriage Act. The provision relevant to the marriage of two African states:

"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 African law and custom".<sup>32</sup>

The question arises as to whether or not, while the above-quoted provision remains law, two Africans may enter into a marriage in terms of the Marriage Act and agree *before* the marriage that the proprietary consequences of their marriage will be governed by general law and not by customary law.

Under the general law, where two parties, one of whom is not an African, marry under the Marriage Act, their marriage will be out of

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<sup>32</sup> Section 13 of the African Marriages Act.

community of property unless they execute a deed prior to their marriage declaring their wish that their marriage be in community of property.<sup>33</sup>

There is a Zimbabwean case which held that the general law applies to the proprietary consequences of immovable property of Africans married under the Marriage Act.<sup>34</sup> At most this means that if a house or other immovable property belongs to the wife, and there is a divorce or the husband dies the wife will be able to retain the property. Otherwise, the only way the wife can obtain the property is if her husband wills it to her. Under customary law, a wife does not inherit anything if her husband dies without a will. There is some indication in a recent judgment of our then Appellate Division<sup>35</sup> that the wife might obtain something if she claimed to be a joint owner and could prove that she was. However, the Court noted in that judgment that Roman-Dutch law has not fully developed the notion of beneficial interests in property. The then Chief Justice, Mr Justice Fieldsend, pointed out the need for Parliamentary action to give our courts authority and guidelines to deal with the increasing number of complex cases involving property disputes between spouses which will arise in the future as a result of increasing numbers of both wives and husbands working and contributing to their joint property.

To sum up, in respect of a marriage between Africans under the Marriage Act, in the event of a divorce, the disposition of immovable property is governed by *general law*<sup>36</sup> and in the event of the death of one of the spouses, the disposition of immovable property is governed by a will or, in the absence of a will, by customary law.<sup>37</sup>

### (c) *Custody and Guardianship*

As there is now no statutory provision providing otherwise, it would seem that general law, and not customary law governs disputes as to the custody and guardianship of children born from marriages solemnized under the Marriage Act. However, as discussed *supra*, in a recent custody dispute where the African parents were married under the Marriage Act, Chief Justice Dumbutshena said that if the parents had agreed that customary law should apply to the custody dispute, it would have been proper to decide the custody dispute under customary law.<sup>38</sup> In any dispute on the merits about custody in any court, regardless of whether or not the parents of the child are married and, if they are married, regardless of the type of marriage, the "interests of the child" is the paramount consideration in determining who should be awarded custody. This is provided for in section 3 (4) of the Primary Courts Act which states:

"(4) Notwithstanding anything to the contrary in this section, in any case relating to the custody of children the interests of the children concerned shall be the paramount consideration, irrespective of which law or principle is applied."

33. Married Persons Property Act. Chapter 38.

34. *Dokotera v. The Master of the High Court & Others* 1957 R & N 697.

35. *Chiromo v Katsidzira* 1981 ZLR 418 (Z, AD).

36. Note 33 *supra*.

37. Sections 6 and 7 of the African Wills Act, Chapter 240.

38. Note 25, *supra*. See note on *Musakwa* case in this issue of the *Zimbabwe Law Review*.



This overrides the customary law rule that the prime consideration with respect to custody is whether or not the father of the child has paid lobolo. In the event of a court case over the issue of the custody of a child of a marriage, this "interests of the child" provision can be relied upon by a mother whose marriage was solemnized under the Marriage Act to support her claim that she is the person best fitted to have custody.

(3) A marriage under the African Marriages Act may be entered into only between two Africans.<sup>39</sup> Even though non-Africans may be allowed by their religion or by the law of the country of which they are a citizen to enter into polygamous marriages, in Zimbabwe non-Africans are permitted to have only one wife at a time and may contract a valid marriage only under the Marriage Act.

(a) *Requirements for Marriages under the African Marriages Act*

The present requirements for marriage under the African Marriages Act are somewhat confusing. The reason for this is that the requirements listed in the Act itself were designed to provide for what was necessary to register a customary law union. Now that an African woman aged 18 years or above may marry without the consent of her former guardian on the basis that she is a major, the requirements for marriages under this Act can be said to have been altered insofar as they are inconsistent with the new Legal Age of Majority Act. Thus, lobolo is no longer a *sine qua non* in such marriages.<sup>40</sup>

However, the solemnization of marriages under the African Marriages Act has been further complicated by internal Ministry of Justice, Legal and Parliamentary Affairs regulations prescribing requirements for such marriages, which have been circulated to African marriage officers. These regulations have *not* been promulgated as statutory instruments and therefore they do not have the effect of law. They are, however, requirements with which apparently people now have to comply in order to marry under the African Marriages Act. Some of these requirements are more stringent even than the requirements for marriages under the Marriage Act. For example, although the African Marriages Act does not require the publication of a notice of intention to marry or the procurement of a licence before a marriage may be solemnized under the Act, the Ministry regulations require that such a notice of intention to marry be displayed in respect of both parties for a period of four weeks before the marriage may take place. Under the Marriage Act parties wishing to marry can avoid the delay which would be caused by the publication of banns or a notice of intention to marry by obtaining a marriage licence, nor is there any requirement under the Marriage Act for the showing of any

<sup>39</sup> Section 2 of the African Marriages Act defines marriage to mean "a marriage between Africans".

<sup>40</sup> As a woman aged 18 years or older is a major, she no longer has a guardian. There is, therefore, no one who can withhold consent to her marriage. Formerly, lobolo was enforceable because she had a guardian who could withhold consent. Now lobolo is enforceable in connection with the marriage of majors only if an agreement is voluntarily entered into in connection with the marriage.

special circumstances in order to obtain such a licence. However, under the Ministry regulations parties wishing to marry under the African Marriages Act can avoid the delay involved in the publication of a notice of intention to marry during the prescribed period of four weeks only if they can obtain a special licence after convincing the relevant Government official that "special circumstances" exist requiring the marriage to take place earlier. A marriage officer may issue a special licence but the regulations caution that such a licence should be "very rarely issued".

Because of inconsistencies between the Ministry regulations and the requirements of the African Marriages Act, there is a likelihood that certain marriages now being performed may in the future be held to be invalid. For example, on the one hand the African Marriages Act *requires* the marriage to be solemnized in the district in which the woman or her guardian reside.<sup>41</sup> On the other hand, the Ministry regulations allow the marriage to be solemnized in a district agreed upon by the intending spouses. The problem about non-compliance with such statutory requirements is that one of the spouses may later succeed in having the marriage declared invalid on the ground that there was lack of compliance with the statutory requirements, with which neither the Ministry nor a marriage officer has the legal authority to waive compliance. This is most serious for the woman since both under general law and under customary law (unless the woman can prove a valid customary law union), the woman who was a party to an invalid marriage (a void marriage) is not entitled to maintenance from the man to whom she believed herself to be validly married.

#### (b) *Proprietary Consequences*

The proprietary consequences of marriages under the African Marriages Act are governed by customary law subject to a few exceptions. For example, the spouses may, by will, each dispose of any property which belongs to him/her. Also, ownership of immovable property, in the event of a divorce, is determined in accordance with general law, the determination being the same as if the marriage had been solemnized under the Marriage Act in which regard see the discussion *supra*.

#### (c) *Status of Wife*

Judge President Sandura of the High Court recently rejected a claim that despite the Legal Age of Majority Act, the wife in a marriage solemnized under the Marriage Act reverts to minority status as far as financial matters are concerned and that she must be assisted by her husband if, as in that case, she sues for damages for a delict committed against her.<sup>42</sup> The argument advanced was that the wife is in the same position as a woman married under the Marriage Act when the marriage is in community of property and where the husband has the marital power. In Zimbabwe, a wife who is married in community of property cannot,

<sup>41</sup>. Section 4 (1).

<sup>42</sup>. *Nyemba v. Jena*, HC-H-434-84 (unreported).

because of the marital power, enter into contracts or sue unless assisted by her husband. Prior to the Legal Age of Majority Act, most African women were minors throughout their lives. Judge President Sandura held that the woman had *locus standi in judicio* to sue unassisted by her husband.<sup>43</sup>

#### (d) *Guardianship*

At present, disputes as to the guardianship of children born to couples married under the African Marriages Act are being determined in accordance with customary law. A minor cannot be the guardian of another person under any system of law in Zimbabwe. In the past when most African women remained minors throughout their lives, such women were unable to assert claims for the guardianship of their children. However, now that African women become majors as soon as they attain the age of 18 years, there is no reason why any African woman should not succeed in a claim for guardianship, the more so in the High Court. The High Court is the upper guardian of all minors within Zimbabwe and has the power to award the guardianship of a child to the mother rather than to the father or to some other male relative if it considers it to be in the best interests of the child to do so. The mother in such a case must seek to establish why the interests of the child dictate that she should be awarded guardianship.

#### (e) *Custody*

See the discussion *supra* concerning the statutory provision that "in any case relating to the custody of children the interests of the children concerned shall be the paramount consideration, irrespective of which law or principles is applied." But for that provision in section 3 (4) of the Primary Courts Act, customary law would govern disputes as to custody in the case of a marriage solemnized under the African Marriages Act. However, "the interests of the child" provision must be applied by *all* courts in *all* custody disputes and, therefore, can be relied upon in any court to support a claim that a mother is the party best suited to have custody. Custody can be awarded to a mother who is still a minor herself if it is in the interests of the child that she have custody.

### (4) *Unregistered Customary Law Unions*

#### (a) *Requirements*

**A valid unregistered customary law union while fully recognized as a marriage by customary law is only recognised, for certain purposes such as maintenance by the general law.<sup>44</sup> Customary law controls the issue of**

<sup>43</sup> *Nyemba v Jena, supra* at p. 4.

<sup>44</sup> See Section 12 (4) (a) of the Primary Courts Act. Section 3 (3) of the African Marriages Act provides that an unregistered customary law union shall be regarded as a valid marriage "for the purposes of African law and custom relating to status guardianship, custody and rights of succession of children of such marriage". This is subject to a possible interpretation that even customary law may only regard such an unregistered customary law union as a valid marriage only for the purposes listed in section 3 (3) of the African Marriages Act.

whether or not a valid customary law union exists. The requirements for a valid customary law union have generally been held to be (1) there must be consent to the marriage by the man, the woman, and the woman's guardian; (2) there must be an agreement as to the amount of lobolo; and (3) there must be a handing over of the woman by her guardian.<sup>45</sup> However, as the law now stands, these requirements are not all necessary for a valid marriage under either of the Marriage Acts, it being clear that not all marriages of Africans would be considered customary law unions.

General law is only concerned about customary law unions for the purpose of maintenance. No divorce is necessary or required to dissolve such a union and the parties can, as far as their status is concerned, simply start living separately with a declaration by the parties that the union is at an end.

Unquestionably, a large percentage of "marriages" in Zimbabwe are unregistered customary-law unions. Accordingly, it would be helpful if the law would accord such unions formal recognition. As the parties have often been living under such a union for many years, and have several children born of such a union which is recognized by everyone in their community as perfectly valid, should the "spouses" decide to end the relationship they may wish to have a court declaration that the customary law union has been terminated. Incidentally, there is nothing in the law to prevent a village or community court from giving such a declaration provided that it is not called a divorce.

(b) *Unpaid lobolo*

In 1974 our then Appellate Division held that a promise to pay lobolo related to a customary law union was not enforceable in the courts if such union has not been registered.<sup>46</sup> In 1983 at least three District Courts, although not citing the Appellate Division judgment, came to the same conclusion.<sup>47</sup> The judgments of the Appellate Division and District Courts all concluded that, as the customary law unions were not registered, the marriages were not valid and, therefore, no order could be made to enforce the payment of unpaid lobolo. These judgments are based on section 3 of the African Marriages Act which makes unregistered customary law marriages invalid except for purposes of African law and custom relating to status, guardianship, custody and rights of succession of children.<sup>48</sup>

When it ruled that a lobolo agreement in the case of an unregistered customary law union was not enforceable, the Appellate Division overlooked the then governing Tribal Courts Act, enacted in 1970. The

<sup>45</sup>. *Kurangwa a/b Kurangwa v. Chanakira*, 1966 AAC 29.

<sup>46</sup>. *Choto v Mative*, 1974 RLR 302 (R. AD).

<sup>47</sup>. *In the Matter between : Masona and Zidoro*, District Court of Mutoko, 15 March, 1983; *In the Matter between : Mukungurutse and Chadoka*, District Court of Wedza, 28 March, 1983; and *In the Matter between : Mandizha and Gutu*, District Court of Marondera, 28 March 1983. All unreported and all decided by the same magistrate sitting as a District Court.

<sup>48</sup>. See note 44 *supra*.

African Marriages Act was enacted in 1951 and so, if there was an inconsistency between the provisions of the two Acts, the provisions of the later Act, the 1970 Act, should have been followed.

The Tribal Courts Act defined "marriage consideration" in section 2 as follows:-

- “(a) Any payment or consideration in cash or kind proposed or given in respect of a marriage contracted or to be contracted-
  - (i) under customary law, whether or not it is, or is to be, solemnized under the African Marriages Act [Chapter 238]; or
  - (ii) under the Marriage Act [Chapter 37]; or
- (b) any payment or consideration in cash or kind proposed or given in respect of an affiliation agreement which is recognized in the practice of customary law;”

Section 3 (1) (a) (v) of the Tribal Courts Act provided that customary law "shall" be deemed applicable in any case which is between Africans and which relates to "marriage consideration". It is respectfully submitted that the Appellate Division was wrong in its conclusion in the case discussed *supra* that unpaid marriage consideration was not then enforceable. It is also submitted that the district court judgment cited *supra* were wrong. By the time of those judgments, the Tribal Courts Act had been repealed and replaced by the Primary Courts Act. The definition of "marriage consideration" in section 2 of the Primary Courts Act is identical to that in the Tribal Courts Act, which is quoted *supra*. However, section 3 of the Primary Courts Act does not, as did section 3 of the Tribal Courts Act, specifically provide that cases involving marriage consideration should be governed by customary law. Nonetheless, the adoption of a definition which includes marriage consideration in connection with a customary law union which is not to be registered under the African Marriages Act indicates an intention on the part of the legislature to allow the enforcement of claims relating to such agreements. Admittedly, however, the law is not totally clear on this issue and will not be until there is a decision from the Supreme Court on the issue or until clarifying legislation is passed by Parliament.

#### D. Conflicts Over Laws Re Marriage and Its Consequences

Some of the most difficult issues which the Zimbabwean courts will be called upon to resolve concern internal conflict issues in connection with disputes in family law related matters. This is so because of the several different types of marriage in Zimbabwe, as discussed *supra*. In the case of marriages involving Africans, general law governs certain aspects of each of the types of marriage identified and customary law governs other aspects.

The matter would be simple if the consequences of all marriages under

the Marriage Act were governed by general law and the consequences of all marriages under the African Marriages Act and of all customary law unions were governed by customary law. However, that is not the position nor, in any event would it be desirable as a matter of public policy or from the standpoint of the rights of women who would be deprived of rights which Parliament has and might otherwise give them. It is to be noted that a good argument can be submitted that, when two Africans decide to marry under the Marriage Act, they have thereby opted to have general and not customary law govern the consequences of their marriage, an approach which to me would seem to be the proper and correct one.

The likelihood is that most people who marry do not appreciate that they may be choosing between general law and customary law as to some or all of the consequences of their marriage. They may realize that they are choosing between a monogamous marriage and a potentially polygamous one but they do not realize that they may also be opting as to which of the spouses should have interim custody of any children should the spouses later separate, whether they should be jointly responsible for the maintenance of any children or whether the husband should be primarily responsible or whether or not the wife may claim sole custody and sole guardianship in the event of a divorce.

If two highly educated Africans who have broken with the traditional way of life marry under the African Marriages Act in order to please their parents, the wife will not be able to obtain a divorce if the husband commits adultery, nor will she be entitled to sue the other woman who committed adultery with her husband for damages, nor would she be able to prevent her husband from marrying further wives under the African Marriages Act. However, the wife would be entitled after divorce, to have recourse to her former husband for maintenance for herself which is not permissible under the general law.<sup>49</sup>

On the other hand, if two rural Africans whose lives have always been governed by customary law are persuaded by a minister of religion to marry under the Marriage Act, the wife will be able to obtain a divorce if her husband commits adultery, she will be able to sue the other woman who committed adultery with her husband for damages, the husband will not be permitted to acquire a second wife while still married to his first wife and even if the wife leaves the husband and even if she is the guilty party, she would be entitled to sole custody of any children of the marriage unless an order to the contrary is made. She will be entitled to be consulted on all guardianship decisions. However, she would be entitled to maintenance from her husband only if she obtains an order granting her maintenance, substantial or token, at the time of divorce, and she will probably not obtain maintenance unless she is the party in whose favour the divorce is granted.<sup>50</sup>

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<sup>49</sup>. Under common law, a wife ceases to be a dependent of her former husband at the time of divorce unless she is awarded maintenance at that time.

<sup>50</sup>. See section 9 of Matrimonial Causes Act, Chapter 39.

When dealing with consequences of customary law marriage, whether registered or unregistered, the problem of internal conflicts cannot be solved by a simple statutory provision that customary law shall apply to all the consequences of such marriage. To do that would deprive many women and children of maintenance rights which they have under general law.<sup>51</sup> It would also override the important provision in section 3 (4) of the Primary Courts Act that the interests of the child shall be of paramount importance in any custody dispute regardless of what law is applicable. The law with regard to the consequences of customary law marriages should therefore be that customary law should govern the consequences of such marriages except where there is an applicable statutory provision or where the parties have exercised an option available to them under any law in force in Zimbabwe.

### E. *Some Hypothetical Illustrations of the Problem*

#### *Hypothetical Case One*

The following hypothetical case may help to illustrate dramatically the type of potential problem inherent in having in Zimbabwe general law and customary law operating as equal systems of law, with the choice of the law for a particular case depending on various factors, prominent among which is the mode of life of the litigants. Take, for example, a situation where a seventeen year old female, who was a virgin at the time, is seduced by a twenty year old male. Suppose that the female has lived for most of her life with her mother and step-father, a Professor at the University, and that all of them follow a very Europeanized style of life.

However, the female's father (from whom her mother is divorced) lives in the rural area, has several wives and many other children and follows a customary style of life. Although the female's mother has custody of her, her father is still her guardian. When the father learns of the seduction, he sues the seducer in the Harare community court for damages for seduction. Although the seducer may claim that he has never had much contact with customary law and that the case should be decided under general law, the community court could quite properly find, after balancing all the relevant factors, that the father's action could be decided under customary law and not under general law. Accordingly, if the father succeeds in his action, the seducer will have to pay damages to the father of the female. Such a judgement would be binding, *res judicata*, between the seducer and the father. However, it would not bar the female from suing the seducer under general law in a magistrate's court for damages for her seduction.<sup>52</sup> If the seducer sought to plead that the female's

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<sup>51.</sup> As all statutes are part of the general law, any maintenance claims which is based on a statute is a general law claim.

<sup>52.</sup> If the young woman was still under 18 years of age at the time she started her lawsuit, she would have to be assisted by a guardian *ad litem*. She can avoid this problem by waiting until after she becomes 18 years of age before filing her lawsuit.

action against him should also be governed by customary law, the magistrate's court could quite properly decide that general law should govern the action, with the result that, if the woman proved her case,<sup>53</sup> she would be awarded damages in her own right.

When I put this problem to my law students, they are shocked at the notion that the male should have to pay twice. I do not know of any such double award of damages which has actually been made against a seducer. However, because of the fact that different plaintiffs are involved in the two actions, a judgment in either of the actions would not act as a bar to the other action.

#### *Hypothetical Case Two<sup>54</sup>*

Assume that a white commercial farmer has had sexual intercourse with the wife of one of his African labourers. The white farmer has a wife to whom he is married under the Marriage Act. The labourer and his wife are married under the African Marriage Act. The labourer sues the farmer in a community court for damages for adultery. The white farmer claims that he is not governed by customary law and asks that the action against him be dismissed as a community court has no jurisdiction to decide the case under general law. However, by following the guidelines prescribed in section 3 of the Primary Courts Act and noting that the case involved adultery with the wife of a husband whose daily life like her husband's was clearly governed by customary law and the marriage between that husband and wife being solemnized under the African Marriages Act, the court might resolve the internal conflict problem by determining that the case should be decided under customary law.

Contrawise, the wife of the white farmer could bring an action for damages under general law in either the magistrate's court or the High Court depending on the amount of her claim against the African woman who committed adultery with her husband. If the African woman claims that customary law and not general law should be applied to the case, the court could find, following the guidelines in section 3 of the Primary Courts Act and noting that the case involved adultery with the husband of a wife, both of whom were clearly governed by general law in their daily lives and their marriage had been solemnized under the Marriage Act that general law and not customary law should apply.

Both courts, after applying the appropriate law could each decide that the defendant in the case before them was liable to pay damages. An interesting question would then arise as to whether the labourer husband of the African wife has any liability to pay damages for the delict by his wife!

53. Under Roman-Dutch common law, all a woman need prove in a seduction damages action to establish a *prima facie* case is that intercourse took place between herself and the defendant. Once she establishes intercourse, there is a presumption that she was a virgin at the time of the intercourse and that the man was the seducer. The man to avoid paying damages must then either convince the court on a balance of probabilities that (1) intercourse did not take place, or (2) that the woman was not a virgin at the time, or (3) that she and not he was the seducer (that being a very difficult thing to prove because he must show that she was the aggressor and not merely that she was a willing and eager participant).

54. The writer is grateful to Denis A.B. Robinson of the Law Department for suggesting this case.



### PART III: PROPOSALS TO REMEDY SOME IMMEDIATE PROBLEMS — SHORT TERM SOLUTIONS

Part III is designed to suggest some specific reforms which would eliminate some of the problems that have resulted in the family law field from the co-existence of general law and customary law in Zimbabwe. These limited suggestions show how complex the problem is.

A. The Customary Law and Primary Courts Act, No. 6 of 1981, should be amended as follows:

- (1) To provide that all the consequences of a marriage under the Marriage Act be governed by general law. (This should be accompanied by the repeal of section 13 of the African Marriages Act.) — *repealed*
- (2) To provide that parties intending to marry under the African Marriages Act may opt to have the proprietary consequences of their marriage governed by general law. This would mean that, prior to marriage, the parties could execute the required written document if they choose to be married in community of property. If this change were made and the parties to a proposed marriage did not wish to be married in community of property, the marriage would be out of community of property in accordance with the provisions of the Married Persons Property Act if the parties had opted to have general law govern the proprietary consequences of their marriage.
- (3) To provide that statutes should be interpreted to override both the Roman-Dutch common law and customary law where either is in conflict with any statute unless there is an *exclusion* contained in the statute itself.
- (4) Section 3 (3) provides:
 

“(3) The capacity of any person to enter into any transaction or to enforce or defend any rights in a court of law shall, subject to any enactment affecting any such capacity, be determined in accordance with the general law of Zimbabwe;  
 Provided that, if the existence or extent of any right held or alleged to be held by any person or of any obligation vesting or alleged to be vesting in any person depends upon or is governed by customary law, the capacity of the person concerned in relation to any matter affecting that right or obligation shall be governed by customary law”.

In the *Katekwe v. Muchabaiwa* case<sup>55</sup>, Chief Justice Dumbutshena said at p 13:

<sup>55</sup> S-87-84 (unreported). See note on *Katekwe* case in this issue of *Zimbabwe Law Review*.

“What has been directly affected and repealed by implication by Act 15 of 1982 is the proviso to S. 3(3) of Act 6 of 1981. Now the capacity to enforce or defend any rights in a court of law or to enter into contractual obligations is determined and governed by the general law of Zimbabwe. African women now have full legal capacity”.

If the proviso to sub-section 3 of section 3 of the Primary Courts Act has been repealed by Parliament by implication, it would perhaps be better to repeal the proviso to that sub-section to avoid future uncertainty and debate as to its meaning. If the proviso in question has been repealed by implication, as the Supreme Court stated by way of *dicta*, this would mean that general law now governs the capacity of an African plaintiff to sue even if he or she is making a claim based on customary law. Under general law, an unregistered customary law union is not a valid marriage and, except for limited purposes such as maintenance neither partner in the union may sue as husband or wife, as the case may be.

(5) Section 12 (4) of the Primary Courts Act provides:

“(4) For the purposes of an order for maintenance in terms of subsection (3) a community court shall, notwithstanding anything to the contrary contained in customary law, regard -

- (a) the person who, according to customary law, is the husband of a woman as being primarily responsible for the maintenance of that woman during the marriage and, after the dissolution of their marriage, until her remarriage;
- (b) the father of a child as being primarily responsible for the maintenance of that child until the child attains the age of majority.”

The policy reasons for adding section 12 (4) to the Primary Courts Act in 1982 were excellent. Under customary law, prior to the enactment of section 12 (4) (b), the father of an out-of wedlock child had no obligation to maintain the child unless he was given custody of the child.

Prior to the 1982 amendment<sup>56</sup> which included section 12 (4) (a) of the Primary Courts Act, there was a similar provision in the Maintenance Act providing that husbands in customary law unions were responsible for the maintenance of the wife in the union.<sup>57</sup> The provision was removed from the Maintenance Act and inserted into the Primary Courts Act. Before the 1982 amendment was enacted, community courts did not have jurisdiction to make any order under the Maintenance Act.

<sup>56</sup>. Customary Law and Primary Courts Amendment Act, No. 21 of 1982.

<sup>57</sup>. Section 6 (3) which was repealed in 1982 by the Customary Law and Primary Courts Amendment Act.

Community courts could only apply customary law and under customary law it was the woman's guardian, the person who had received or was to receive the lobolo, who was usually responsible for maintaining the woman in most circumstances where the husband or former husband failed to maintain her. The amendment quite properly gave community courts the power to order a husband to pay maintenance for his wife or former wife regardless of whether or not the marriage was registered. It also quite properly gave community courts the power to make a maintenance order against a father regardless of whether the child was born in or out of wedlock. These were changes which were helpful to women.

The difficulty, however, with the new provisions in section 12 (4) is that they are worded so that they can be applied only by a community court. They override customary law only if a community court is hearing the case. This means that if a case is brought in a maintenance court that court cannot properly make an order for maintenance on the basis of section 12 (4) (a) or (b) of the Primary Courts Act. The maintenance court would either have to dismiss the case and inform the applicant that the community court is the proper court in which to bring it or it could decide that customary law governs the application. Under customary law a court might well decide that the respondent is not liable to maintain the wife or child. The other alternative would be for the maintenance court to decide that general law is applicable. If it should apply general law, it would arrive at a decision different from that a community court would have reached as far as the woman's claim for maintenance is concerned. Under general law, because of section 3 of the African Marriages Act, an unregistered customary law union is not a valid marriage and the wife is not entitled to maintenance except that now she is if she makes her application in a community court. This is a ridiculous situation. The general law of Zimbabwe should not vary depending on the court in which a case is being litigated. The solution is simple.

Section 12 (4) of the Primary Courts Act, quoted *supra* could be amended to read:

“(4) For the purposes of an order for maintenance any court shall, notwithstanding anything to the contrary contained in customary law, regard-

(a) the person who, according to customary law, is the husband of a woman as being primarily responsible for the maintenance of that woman during the marriage and, after the dissolution of the marriage, until her remarriage;

(b) the father of a child as being primarily responsible for the maintenance of the child until the child attains the age of majority”.

If that amendment were made, it would be competent for magistrate's courts, when sitting as maintenance courts, to award maintenance in appropriate cases under the same law applied by the community courts.

This could save vital time in having maintenance paid to those entitled to maintenance and in dire need of it.

B. The African Marriages Act, Chapter 238, should be amended as follows:

- (1) By the repeal of section 13 (which deals with the proprietary consequences of the marriage of two Africans under the Marriage Act and prevents such Africans from having the same options as to the proprietary consequences of a "Marriage Act marriage" which other Zimbabweans have).
- (2) By the repeal of section 12 (which deals with "enabling certificates" and prescribes a special requirement only for Africans when they marry under the Marriage Act. Section 12 provides that if Africans marry under the Marriage Act without that certificate, the marriage is *void*). The primary courts inspectorate takes the position that the provision about "enabling certificates" has been repealed by implication as far as Africans who are majors are concerned. It is at least debatable whether or not a marriage between two major Africans where there was no "enabling certificate" would be held void. Persons marrying should not have to gamble on whether or not their marriage is valid.
- (3) If the guardian of a woman who wishes to marry withholds or refuses to give his consent to the marriage, section 5 empowers a community court presiding officer or community court inspector to authorize the solemnization of the marriage and after consultation with the guardian fix the marriage consideration. As "marriage" is defined in section 2 as a "marriage between Africans", it would appear that section 5 would apply to any marriage between Africans irrespective of which Marriage Act it is to be solemnized under. The result is that, if an African woman while still a minor wishes to marry another African under the Marriage Act and her guardian refuses consent, she would have to seek authorization for the marriage from a community court presiding officer or community court inspector. If an African woman while still a minor wishes to marry a non-African and her guardian refuses consent, she would have to seek authorization from a High Court Judge.<sup>58</sup> Section 5 should therefore be amended to restrict its application to marriages under the African Marriages Act. It is inequitable to treat an African woman who is a minor differently, because she wishes to marry another African or than a non-African woman who is a minor, would be treated if she wished to marry under the Marriage Act.

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<sup>58</sup>. Section 21 of the Marriage Act.

- (4) At the present time, the African Marriages Act does not prescribe any minimum age under which Africans may not marry. There is a minimum age prescribed in the Marriage Act which would apply to Africans if their marriage is solemnized under the Marriage Act.<sup>59</sup> Persons under the requisite age cannot enter into a valid marriage under the Marriage Act without the consent of the Minister of Justice, Legal and Parliamentary Affairs (or in certain cases of a High Court Judge). The reasons for requiring such consent for a marriage under the Marriage Act would appear to be equally valid as to a marriage under the African Marriages Act. It is recommended that a provision containing a minimum legal age for marriage, similar to that in section 23 of the Marriage Act, be included in the African Marriages Act. That provision requires the Minister's consent, discussed *supra*, where a female intending to marry is under the age of 16 years or a male intending to marry is under the age of 18 years.
- (5) As to the marriage of a minor without the consent of a guardian, it is recommended that such marriages under the African Marriage Act be made voidable at the instance of the non-consenting guardian instead of void, as presently provided. This would mean that, if the minor had since the date of the marriage become a major and wished to abide by the marriage, the marriage would remain valid. Provisions similar to those contained in section 21 and 22 of the Marriage Act could be introduced into the African Marriages Act.
- (6) If an "enabling certificate" were issued for the marriage of a minor under the Marriage Act even though the guardian of the minor had not consented, it would appear that the marriage of the minor is valid. According to the African Marriages Act, the marriage of a minor solemnized under the Marriage Act is *void* only if performed in the absence of an "enabling certificate". If section 12 were repealed, the marriage of an African minor under the Marriage Act without the consent of the guardian would be voidable by a non-consenting guardian.
- (7) Sub-section (3) of section 3 should be clarified. It provides, *inter-alia* that an unregistered customary law union is invalid except for the purposes of African law and custom relating to the status, guardianship, custody and rights of succession of the children of such marriage. Many practical problems arise from this restriction on the recognition of unregistered customary law unions which comprises a large percentage of

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<sup>59</sup> Section 23 of the Marriage Act.

the marriages in Zimbabwe. Among the debatable issues is whether or not unpaid lobolo can be recovered if the marriage is not a registered one. See discussion *supra*. During the last couple of years, some courts have allowed such recovery while others have disallowed recovery on the ground that the marriage is invalid. The Ministry of Justice, Legal and Parliamentary Affairs had advised primary court presiding officers that husbands whose marriages are not registered may not recover damages for adultery because of the provisions of section 3 of the African Marriages Act. However, an excellent argument can be put forward that such recovery is still permissible and that section 3 (3) is not relevant to such an action for recovery of damages for adultery.

- C. The Guardianship of Minors Act, Chapter 34, should be amended to make clear which of its provision, if any, apply to marriages under the African Marriages Act. The two lecturers at the University who have taught Family Law during the past twelve years both feel that the Act applies only to marriages under the Marriage Act. However, certain high ranking officials in the Ministry of Justice, Legal and Parliamentary Affairs consider that at least section 4 of the Guardianship of Minors Act also applies to marriages under the African Marriages Act. The extent of the application of the Guardianship of Minors Act therefore requires clarification. See discussion *supra*.
- D. The Maintenance Act, Chapter 35 should be amended as follows:
- (1) The definition of "appropriate maintenance court" in section 2 should be reworded. At present that section provides:
- "appropriate maintenance court" means-
- (a) where the claim for maintenance is *determinable according to customary law*, a community court;
  - (b) in all other cases, a magistrate's court;" (emphasis added)

However, community courts usually determine maintenance claims in accordance with section 12 (3) and (4) of the Primary Courts Act. Section 12 (4) provides:

- "(4) For the purposes of an order for maintenance in terms of sub-section (3) a community court shall, notwithstanding anything to the contrary contained in customary law. regard-
- (a) the person who, according to customary law is the husband of a woman as being primarily responsible for the maintenance of the woman during the marriage and, after the dissolution of their marriage, until her remarriage:

- (b) the father of a child as being primarily responsible for the maintenance of that child until the child attains the age of majority”.

Section 12 (4) is a statutory provision and thus part of the general law of Zimbabwe. Accordingly, when a community court makes a maintenance award in terms of section 12 (4), it is not making an award in accordance with customary law. It is therefore suggested that the definition of “appropriate maintenance court” in section 2 of the Maintenance Act be reworded to read as follows:

“appropriate maintenance court’ means-

- (a) where the claim for maintenance is determinable according to customary law or under the provisions of the Customary Law and Primary Courts Act, No. 6 of 1981, a community court;
  - (b) in all other cases, a magistrate’s court.”<sup>60</sup>
- (2) Section 6 (6) (c) provides that a maintenance court, in making a maintenance order “may include such award as to the maintenance court seems reasonable for the payment of maintenance which is in arrears”. However, without referring to section 6 (6) (c), the Supreme Court decided in the *Musakwa case*<sup>61</sup> that the maintenance court was not competent to make an award of arrear maintenance as there was no existing maintenance order. It is respectfully submitted that, for several reasons, the *Musakwa* case was wrongly decided in this regard. The Supreme Court has stated in effect that the law is that if one parent maintains the children and the other parent fails to do so, the former parent may not recover any arrear maintenance from the neglectful parent. Such a ruling favours the irresponsible parent who fails to support his children. As a matter of public policy, this intolerable situation should be remedied. See further discussion in *Musakwa* note printed in this issue of the *Zimbabwe Law Review*.

**E. The Married Persons Property Act, Chapter 38, should be amended as follows:**

- (1) This Act should apply to all marriages under the Marriage Act, including the marriages of two Africans under that Act. All parties marrying under the Marriage Act should, regardless of their race, have available to them the same options as to the proprietary consequences of their marriage. (This should be combined with the repeal of section 13 of the African Marriages Act, discussed *supra*, and the repeal of the Antenuptial Contracts Act, Cap. 29.) The Married Persons

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The wording would have to be further appropriately altered if more courts were given the right to make maintenance orders under section 12 (4) of the Primary Courts Act.

Note 25, *supra*.

Property Act should also be made applicable to the proprietary consequences of marriages under the African Marriages Act if the parties opt prior to their marriage to have the proprietary consequences of their marriage governed by general law.

- (2) A marriage in community of property under Roman-Dutch Law means that the husband has the marital power over his wife, with the result that he manages all his and her financial affairs and that the wife cannot enter into a contract or sue or be sued unless assisted by him. In other words, the wife effectively reverts to the status of a minor for many purposes. There is no reason why Zimbabwe must follow the former law of South Africa in this respect.<sup>62</sup> We could provide through a statutory provision that the marital power should be excluded or that the parties be allowed to exclude it. Many jurisdictions allow for community of property without the marital power. This means that during the marriage both spouses manage their own affairs and may freely contract and sue in their own name but that, at the time the marriage is terminated by the death of one of the spouses or by a divorce, each spouse, or his or her estate, receives one-half of the property in the community. Most women are much better off financially if they are married in community of property. It could well be that, if it were possible to exclude the marital power, many couples marrying under the law of this country would opt to marry in community of property. Many Africans might select this form of proprietary regime for their marriage if this option were available to Africans.

F. The Matrimonial Causes Act, Chapter 39 ("the Matrimonial Causes Act") should be amended as follows:

It should be made clear whether or not some or all of its provisions apply to marriages under the African Marriages Act. Former High Court Judge Pittman, when he was President of the court of appeals for African civil cases, wrote some judgments in which he maintained that some of the provisions of the Matrimonial Causes Act applied to marriages under the African Marriages Act.<sup>63</sup> If it is intended that certain of the provisions of the Matrimonial Causes Act should apply to marriages under the African Marriages Act, the wording of the Matrimonial Causes Act should be altered so as to reflect that intention clearly.

<sup>62</sup>. South Africa got rid of the marital power this year with respect to marriages in community of property by enacting a statute, The Matrimonial Property Act 88 of 1984.

<sup>63</sup>. *Mazorodze v. Jeneth*, 1970 AAC 38.



- G. The Deceased Persons Family Maintenance Act, No. 39 of 1978 ("the Deceased Persons Family Maintenance Act") should be amended as follows:

Section 2 of the Act includes in the definition of a dependent "the surviving wife or husband". This would not seem to cover multiple wives married under the African Marriages Act or wives in the case of unregistered customary law unions. It would seem desirable to amend the definition of spouse to make it refer to "surviving wife or wives, whether or not the marriage is registered". By the recent insertion of section 12 (4) (a) into the Primary Courts Act, Parliament has made clear that it wished to make a husband who is a party to a customary law union responsible for supporting his wife until her death or remarriage. By the suggested amendment, the right of such wives to maintenance in the event of their husband's death would be further secured.

#### H. *Proposals for Long Term Remedies*

There are at least 23 different statutes relevant to family law and the law of succession in Zimbabwe at the present time. These are scattered throughout the present statute books and contain interlocking provisions. Provisions on the same topic are often contained in more than one statute. For example, at least seven different Zimbabwean statutes contain provisions about maintenance<sup>64</sup> and there are also rules concerning maintenance in the various systems of customary law which are applicable in Zimbabwe. Earlier this year when the Supreme Court decided *Musakwa*<sup>65</sup> it apparently overlooked section 6 (6) (c) of the Maintenance Act which controls the issues of arrear maintenance. The oversight was understandable in view of the absence of legal practitioners to argue the case and there was no other means of bringing the relevant provision to the attention of the Court. This discussion is designed to demonstrate the need for a Code covering both family law and the law of succession.

Included in such a Code should be a single Marriage Act applying to all marriages in Zimbabwe. If there were a single Marriage Act, it would be possible to make all statutes relating to marriage, divorce and succession apply to all marriages. The complexity of existing provisions is a result of colonial laws passed by men who felt that African marriages were inferior and who were not concerned with the fate of African women.

<sup>64</sup> The Primary Courts Act, the Maintenance Act, the Guardianship of Minors Act, the Matrimonial Causes Act, the Children's Protection and Adoption Act (Chapter 33), the Maintenance Orders (Facilities for Enforcement) Act (Chapter 36) and the Deceased Persons Family Maintenance Act.

<sup>65</sup> Note 25, *supra*.

A major stumbling block to the development of a single Marriage Act, is of course, the issue of polygamy. That is an issue which will have to be resolved by the politicians. Most countries no longer allow polygamous marriages. Tanzania allows such marriages for any husband regardless of race. We cannot recommend such a solution for Zimbabwe. However, until a single Marriage Act is enacted, the problems of conflicts between customary law and general law in Zimbabwe in the fields of family law and the law of succession, are bound to increase.

## CONCLUSION

Five years have passed since Independence. The most vital changes that have been made since majority rule in the area of family law are that African women attain majority status like all other Zimbabweans when they reach the age of 18 years of age and that racial criteria have been removed from internal conflict of law guidelines for determining whether customary law or general law applies to a dispute.

Nonetheless, there are many aspects of family law which still require revision so that equal rights will be available to all Zimbabweans and so that various outmoded laws can be abolished or amended to make family law relevant to the economic, social and political development of Zimbabwe. This is especially necessary as to inheritance and property rights of women and the proprietary consequences of the various forms of marriage in Zimbabwe.

Law reform alone will not solve the problem. As long as there are different forms of marriage and different consequences, it is unjust to expect persons intending to marry to choose between the various types of marriage without knowing what rights they are opting for and what rights they are foregoing. As has been demonstrated in this article because of the colonial heritage with respect to the statutory law, at the present time it is not possible for even legal practitioners to advise with certainty as to some of the consequences of various choices. This intolerable situation adds urgency to the need for law reform with respect to family law.

Piecemeal changes in the law are necessary although they will never by themselves result in a real solution to the problem of unequal treatment by the law. Nevertheless they can at least be used to put an end to some gross injustices. While using such changes as interim measures, there is an urgent need to begin working on more basic and far reaching solutions to problems in the area of family law.



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