

Chapter 4

Factors determining unregistered customary Marriages and the distribution of property on their dissolution in Zimbabwe

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Abstract

Zimbabwean courts consider the 'surrounding circumstances' of the parties as per the provisions of Section 3 of the Customary Law and Local Courts Act (Chapter 7:05) and the 2013 Constitution of the Republic of Zimbabwe in determining whether a union between two persons is an unregistered customary marriage and reallocating matrimonial property rights on the dissolution of the marriage. This chapter addresses the difficulty in determining unregistered customary marriages and the inadequacy of remedies in the distribution of property on the dissolution of such marriages which is a significant problem generated by Zimbabwe's plural legal system by turning to the common law and the right to equality in the Zimbabwe Constitution which is an attribute of citizenship.

Key Words: Customary law, choice of law, unregistered customary marriages, remedies, Zimbabwe

1. Introduction

Zimbabwean courts consider the 'surrounding circumstances' of the parties as per the provisions of Section 3 of the Customary Law and Local Courts Act (Chapter 7:05) and the 2013 Constitution of the Republic of Zimbabwe in determining whether a union between two persons is an unregistered customary marriage and reallocating matrimonial property rights on the dissolution of the marriage. This chapter addresses the difficulty in determining unregistered customary marriages and the inadequacy of remedies in the distribution of property on the dissolution of such marriages which is a significant problem generated by Zimbabwe's plural legal system¹ by turning to the

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common law and the right to equality in the Zimbabwe Constitution which is an attribute of citizenship.

Unregistered customary marriages are one of the three types of marriage that are recognised by the law. The others are the civil marriage which is monogamous, and the registered customary law marriage which is potentially polygamous. Unregistered customary law marriages are recognised in certain circumstances and are problematic because of the difficulty in determining when the union of two persons is a customary marriage² and the unfair and inequitable reallocation of matrimonial property rights at the dissolution of marriages.³

This chapter is organized as follows. The next section considers the nature of unregistered customary law unions and its proprietary consequences. Part three examines the choice of law process and the 'surrounding circumstances' consideration in the determination of unregistered customary marriages, while the fourth section considers how the proviso of 'the justice of the case' has become a dominant feature of the surrounding circumstances principle. In the fifth section, the development of effective remedies for the distribution of matrimonial property at the dissolution of unregistered customary marriages as a component of the proviso 'justice of the case' is considered. Concluding remarks follow in the sixth section of the chapter.

¹G Swenson (2018) 'Legal Pluralism in Theory and Practice' (2018) 20 *International Studies Review* 438. See s.192 of the 2013 Constitution of Zimbabwe sanctions the plural legal system of the country because it provides that the law to be administered in the country is the law in force on the effective date of the Constitution. The law in force was provided for in s 89 of the Lancaster House Constitution that provided that the law applicable in Zimbabwe is Roman-Dutch Law and African Customary Law, as modified by subsequent legislation. See also L Madhuku *An introduction to Zimbabwean Law* (2012) 26. See also L Benton *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (2002): 'legal pluralism became a defining feature of colonial administrations that sought to harness local dispute resolution mechanisms to help legitimize and institutionalize their rule.'

² AS Tsanga 'A Critical Analysis of the Women's Constitutional and Legal Rights in Zimbabwe in Relation to the Convention of the Elimination of All Forms of Discrimination Against Women' (2002) 54 *Maine Law Review* 247.

³ W Ncube 'Re-Allocation of Matrimonial Property at the Dissolution of Marriage in Zimbabwe' (1990) *Journal of African Law* 1; F Banda 'Between a Rock and a Hard Place: Courts and Customary Law in Zimbabwe' in Bainham, A (eds) *The International Survey of Family Law* (2002) 471. Tsanga (n 2 above) 249 notes that a key problem with unregistered customary marriages, which impacts on women's right to equality within marriage, relates to the proprietary consequences emanating from such unions upon its dissolution

2. Unregistered customary law marriages in Zimbabwe

As stated above, Zimbabwe has a triadic marriage regime. There is a marriage under the Marriages Act⁴ exclusively governed by general law. Then there is the customary marriage under the Customary Marriages Act⁵. The third type of marriage is the unregistered customary law union which meets all the requirements of a customary law marriage except for solemnization. Section 3(1)(a) of the Customary Marriages Act expressly specifies that no marriage entered into in terms of customary law shall be regarded as valid unless it is solemnized. However, the union is recognised as a valid marriage for limited purposes of customary law in relation to the status, guardianship, custody and succession rights of children.⁶ The courts have extended the limited recognition of unregistered customary marriages for purposes for loss of support⁷ and adultery damages.⁸ To determine that the union between two persons is an unregistered customary marriage begins from the conclusion that a union is a customary marriage. The status of unregistered customary marriages is compounded by the fact that the effects of section 3 (1) of the Customary Marriages Act on the distribution of matrimonial property on the dissolution of an unregistered customary marriage have been far-reaching in two respects. The parties to an unregistered customary law union are unable to enjoy the benefits of registered customary marriages because of the absence of the principle of equitable distribution of matrimonial property, which applies to registered marriages in terms of the Matrimonial Causes Act.⁹ Justice Makarau in the case of *Marange v Chiroodza*¹⁰ recognized this point:

In my view, the unregistered customary union is an institution that will be with us for a long time. It is an institution sustained by tradition and custom, graced by social acceptance, and favoured by the majority of the people in the country

⁴ Chapter 5:11.

⁵ Chapter 5:07.

⁶ Section 3(5) of the Act provides that 'A marriage contracted according to customary law which is not a valid marriage in terms of this section shall, for the purposes of customary law and custom relating to the status, guardianship, custody, and rights of succession of the children of such marriage, be regarded as a valid marriage'.

⁷ *Chawanda v Zinnat* 1989 (2) ZLR 352.

⁸ *Carmichael v Moyo* 1994 (2) ZLR 176.

⁹ Chapter 5:13.

¹⁰ 2002 ZLR 171 (H).

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... Thus, the law becomes incomprehensible in the eyes of society by failing to provide the same remedy to the same people, married under the same traditions but differentiated simply by the registration of their unions. In my view, in such an instance when it fails to provide the remedy to correct an obvious injustice, the law then removes itself from the people and fails to be a reflection of the mores and values of the society it seeks to serve. It risks being ignored as alien.¹¹

A fundamental challenge of unregistered customary marriages is the potential for the discrimination of female partners of these marriages. According to Ncube, unregistered customary law unions, being invalid marriages by virtue of their non-registration, have no proprietary regime.¹² In the eyes of the general law, the parties are unmarried and hence their property is treated as the property of unmarried individuals. At separation, each party takes with him or her the property, which he or she acquired during the marriage. This position perpetuates discrimination against a majority of women who are not able to acquire much during the marriage.¹³ It is even worse in terms of customary law, because 'property acquired during the marriage becomes the husband's property whether acquired by him or his wife'.¹⁴ At the dissolution of the marriage, the husband is entitled to all the property except *inkomo yohlanga*¹⁵ and *impahla zezandla*¹⁶ which are regarded as exclusively belonging to the wife. Ncube observes that in practice, this property often comes to little more than a handful of kitchen utensils, one or two goats and one or two cows.¹⁷ As a result, if a union is recognized as an unregistered customary marriage, it is obvious that customary law works 'untold hardships on countless wives who had to leave their marriages without any meaningful property'.¹⁸ While it is generally, agreed that the discrimination suffered by wives of unregistered customary marriages is inconsistent with the right to equal protection before the

¹¹ Page 174F-G.

¹² W Ncube *Family Law in Zimbabwe* (1989) 167.

¹³ According to ZIMSTATS around 60% of marriages in Zimbabwe are unregistered customary law unions.

¹⁴ See for example *Jenah v Nyemba* SC4/86.

¹⁵ This property is made up of a cow and its offspring given to the wife as her share from the *lobolo*/brideprice when her daughter is being married.

¹⁶ Property acquired by the woman through the use of specialized skills such as midwifery, knitting, and pottery.

¹⁷ Ncube (n 12 above) 2.

¹⁸ Ncube (n 12 above) 2.

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law and non-discrimination¹⁹, the solution to the problem has dogged both the legislature and the judiciary for a long time.²⁰

It is, therefore, a determination that a union is an unregistered customary marriage that is crucial in the issue of fair and equitable remedies in the distribution of matrimonial property on the dissolution of such marriages. This chapter focuses on the factors, which the courts take into account in determining that the union of two persons is an unregistered customary marriage before it considers the effectiveness of remedies.

3. The choice of law process and the ‘surrounding circumstances’ consideration in the determination of unregistered customary marriages: A constitutional inquiry

In this section, we inquire deeper into the factors that would assist the determination that the union of two persons is an unregistered customary marriage. Since solemnization is the difference between an unregistered and a customary marriage, our primary concern is a consideration of choice of law rules²¹ that assist a determination of when a customary marriage is in existence. In Zimbabwe, the choice of law process is governed by the 2013 Constitution²² and section 3 of the Customary Law and Local Courts Act. Section 3 is the principal provision that governs the choice of law process between customary law and general law.²³ It is suggested that the wording of section 3 provides two

¹⁹ Section 56 of the Constitution.

²⁰ The dilemma facing the judiciary at the dissolution of unregistered customary law unions was aptly expressed by Justice Chitakunye J in *Mautsa* HH 106/2017 thus, '...the distribution of property at the dissolution of an unregistered customary law union has dogged these courts for many years. Despite the call for legislative intervention to protect the interests of women who stand to be left destitute after having given a portion of their life to a man who has advanced financially as a direct result of the union, no legislative intervention has been effected. I wish to add my voice to the call for legislative intervention, just as happened with the situation of surviving spouses at the demise of their husbands in terms of the Administration of Estates Act, [Chapter 6:01].'

²¹ See CMV Clarkson & J Hill *The Conflict of Laws* (2011) 23. See also TW Bennett 'Conflict of Laws- The Application of Customary Law and the common law in Zimbabwe' (1981) 30 *International and Comparative Law Quarterly* 60; *Feremba v Matika* HH 33/07.

²² Section 192 provides that 'The law to be administered by the courts of Zimbabwe is the law that was in force on the effective date, as subsequently modified'. As of 2013, the law that was in force in Zimbabwe was general law and customary law'.

²³ 3 Application of customary law

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broad considerations that regulate the application of customary law. Firstly, customary law applies where the provisions of a relevant statute say so. Secondly, in the absence of a relevant statute, customary law applies by applying the choice of law formula in section 3 of the Customary Law and Local Courts Act. According to this section, a union of two persons is a customary marriage where the parties have expressly or impliedly agreed that it shall apply. The express or implied agreement by the parties is manifested by the fulfillment of the customs and usages of different Zimbabwean ethnic communities.

Whereas Galen has adopted the view that where there is an express agreement, the court has no discretion but to apply the legal system expressly chosen by the parties to the dispute,²⁴ Madhuku's view is that even when there is an express agreement, the general law will apply if customary law would attain an unjust resolution of the matter.²⁵ It is doubtful if Madhuku's view can withstand a constitutional challenge based on the right to participate in the cultural life of one's choice as enshrined in section 63 of the Constitution. Commenting on section 31 of the Constitution of South Africa [a provision similar with section 63 of Constitution of Zimbabwe], Nwauche rightly argues that the use of the word 'participate' connotes a legal consequence as opposed to a sense of non-obligatory and everyday engagement in popular culture, such

(1) Subject to this Act and any other enactment, unless the justice of the case otherwise requires—

- (a) customary law shall apply in any civil case where—
 - (i) the parties have expressly agreed that it should apply; or
 - (ii) regard being had to the nature of the case and the surrounding circumstances, it appears that the parties have agreed it should apply; or
 - (iii) regard being had to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply;
- (b) the general law of Zimbabwe shall apply in all other cases.

(2) For the purposes of paragraph (a) of subsection (1)—“surrounding circumstances”, in relation to a case, shall, without limiting the expression, include—

- (a) the mode of life of the parties;
- (b) the subject matter of the case;
- (c) the understanding by the parties of the provisions of customary law or the general law of Zimbabwe, as the case may be, which apply to the case;
- (d) the relative closeness of the case and the parties to the customary law or the general law of Zimbabwe, as the case may be.

²⁴ DP Galen 'Internal Conflicts Between Customary Law and general Law in Zimbabwe: Family Law as Case Study' (1983-1984) *Zimbabwe Law Review* 11.

²⁵ L Madhuku *An introduction to Zimbabwean Law* (2012) 28.

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as listening to music, reading a book or watching a film.²⁶ A choice to be bound by a certain set of normative order should thus be respected by the courts. The implied agreement is inferred where it is reasonable to assume that the parties agreed considering the nature of the case and the surrounding circumstances. Where there is no express or implied agreement, section 3 of the Customary Law and Local Courts Act provides that the courts may impose the application of customary law on the basis that it is 'just and proper'. In deciding this, the court considers the 'surrounding circumstances' which are defined as including (i) the mode of life of the parties, (ii) the subject matter of the case, (iii) the parties' knowledge of customary law and/or general law, and (iv) the closeness of the case to general law or customary law. After weighing up the four factors, the court makes an overall judgment of whether it is 'just and proper' to apply customary law.

The following discussion examines the four factors that the courts take into consideration when determining the surrounding circumstances to reach the conclusion that the union of two persons is governed by customary law.

Mode of life of the parties

As Bennett notes, initially when the colonial powers imposed legal dualism, there was no problem in determining when customary law should apply.²⁷ The mode of life of the Africans and Europeans was distinct. Africans lived according to the traditional culture, customs and values whereas the Europeans had a distinct European mode of life. Race was thus the defining factor. Customary law applied to Africans and general law to Europeans. However, such a simple, racial distinction could not be indefinitely maintained. As Europeans had more and more dealings with the local population, as Africans elected to regulate their legal relationships according to the common law, and as Africans came to change their style and adapt to the Western European cultural pattern, this distinction became blurred.²⁸ However, in cases involving status, for instance, marriage, the mode of life may be a reliable indicator of the system of law applicable. For example, in *Mautsa v Kurebgaseka*²⁹, the mode of life was the

²⁶ES Nwauche 'Affiliation to a new customary law in post-apartheid South Africa' (2015) 3 *Potchefstroom Electronic Law Journal* 580.

²⁷ TW Bennett 'Conflict of Laws- The Application of Customary Law and the common law in Zimbabwe' (1981) 30 *International and Comparative Law Quarterly* 59.

²⁸ Bennett (n 27 above) 60.

²⁹ HH 106/2017.

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determining factor. In reaching a conclusion that the parties maintained a western lifestyle, the court considered five factors which are the fact that the parties live in the low-density suburb of Mandara; the plaintiff's business of farming; the defendant's work at the family farm; the private educational establishment of the children. The fifth factor is the holidays and shopping trips during the weekends and holidays.³⁰ Accordingly, Zimbabweans who are regarded as having maintained a western lifestyle may be regarded as having elected not to be bound by customary law.

The mode of life factor poses little problems where both parties have either adopted a western lifestyle or retained a traditional African lifestyle. General law will apply in the former and customary law in the latter scenario. The problem becomes complex where one of the parties follows a western mode of living while the other party has retained the traditional African lifestyle. In such circumstances, the mode of life factor may be of little assistance to the court in determining the applicable legal system. Another complication arises where one or both parties have adopted a western lifestyle while also retaining a traditional African mode of life. As noted, residence is one of the significant indicators of the party's general mode of life. *Prima facie*, residence in urban areas denotes a western lifestyle and residence in rural areas denotes a traditional lifestyle. However, such a distinction is too simplistic. One of the effects of urbanization is rural-urban migration in search of employment. As people migrate to urban areas, they retain their traditional customs and beliefs while also adopting a western lifestyle. Urbanization, education and the attendant cross-pollination of culture has made the application of these factors in resolving the choice of law disputes difficult. In this regard, it is worthy to quote verbatim the articulation by Justice Cheda JA and Ndou JA in the case of *Ntini v Masuku*³¹ chronicling the effects of urbanization on the choice of law process and the inadequacy of residence as a determining factor in the surrounding circumstances of the parties. The court said:

It is a fact that the majority of marriages in Zimbabwe are unregistered and are therefore governed by customary law. For a number of decades, there has been a significant inflow of the African population from the rural areas to the urban centres. As a result of this migration, a sizeable number of people find themselves caught between a web of customary practices on one hand and urban demands on the other which require them to lead western lifestyles. This

³⁰ *Mautsa v Kurebgaseka* 4.

³¹ HB 69/2004.

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has ushered in confused and confusing matrimonial scenarios in people's daily lives. It is in this confusion that African married women by virtue of their customary and religious background still find themselves being shifted to backward and meaningless positions in society, even where they now commercially contribute to their households. Gauging by the number of claims coming before these courts, brought by the impoverished and desperate women against their husbands, the time has come, in my view, for the courts to take a positive and progressive approach in addressing the inequities in our legal system in order to where practically possible assist women in their endeavour to find justice. The increased number of cases coming before these courts is a clarion call by these members of our society for judicial intervention.

The subject matter of the case

The nature of the property in dispute may also assist the court to determine which system of law to apply. Galen gives an example of a dispute involving a negotiable instrument and one involving *lobolo*.³² General law will likely apply to the former while customary law to the later. However, due to urbanization, this factor should apply with great circumspection. For instance, although *lobolo* is a traditional customary principle which lies at the foundation of a customary marriage, its applicability has raised two major challenges. Firstly, the payment of *lobola* is a contentious issue especially since the Supreme Court declared in the case of *Katekwe v Muchabaiwa*³³ that *lobola* is not a legal requirement. Thirty-one years after the *Katekwe* decision, the High Court in the *Hosho v Hasisi*³⁴ noted that despite concerns about payment of *lobola* and its inherent contradiction with the right to equality, payment of *roora /lobola* remains the most cogent and valued proof and indicator of a customary union/marriage particularly when it has not been formally registered.³⁵ Secondly, the principle of *lobola* has been infused into general law through the law of contract. Where parties enter into a written agreement for payment of *lobola* and the terms are expressly provided for, a breach of the agreement entitles an innocent party to contractual remedies.³⁶ Thus, although the payment of *lobola* is not a

³² Galen (n 23 above) 16.

³³ SC 87/1984.

³⁴ HH 491/2015.

³⁵ *Hosho v Hasisi*.(n. 34 above).

³⁶ See the case of *Orient Jani v Noel Mucheche* where the Plaintiff successfully sued his father in law for the return of the *lobola* after his unregistered customary law wife cheated on him and

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requirement for the recognition of a marriage, it may well be that payment of lobolo is an indication that the union is a customary marriage.

The understanding by the parties of the provisions of customary law or the general law of Zimbabwe which apply to the case

A case that illustrates the application of customary law based on the parties' understanding of customary law and the general law of Zimbabwe is *Lopez v Nxumalo*.³⁷ Lopez, a white Portuguese male was sued for seduction damages by the mother of a black African woman under customary law. Lopez contended that he knew no African custom and was not acquainted with African customary law. He argued that general law should apply instead of customary law. The Supreme Court dismissed this line of reasoning on the basis that the woman and her daughter also did not understand general law and lived a life guided by customary law. In this case, the Supreme Court reasoned that customary law was applicable even though the defendant was not acquainted with it. Race was the determining factor in considering the parties' understanding of either customary law or general law. Black Africans are presumed to understand the provisions of customary law and whites are presumed to understand the provisions of general law. It would appear that racial presumptions may not stand the test of time and may not survive an equality challenge. Furthermore, this factor is challenged by urbanization because several aspects of urban life like employment and education suggest that many Africans have a fused culture. It is argued that this factor may be of little assistance to the court.³⁸

The relative closeness of the case and the parties to the customary law or the general law of Zimbabwe, as the case may be

It is argued, that this factor is sufficiently covered by the mode of life factor. Galen views this factor as referring to law as part of culture.³⁹ She is of the view that this factor provides more latitude to the courts.⁴⁰ Bennett refers to this factor as the "proper law" approach in that it allows the court to apply the law which is

got pregnant before their wedding. <https://www.herald.co.zw/man-wins-lobola-case/> (Accessed on 31 October 2019).

³⁷ SC 115/85.

³⁸ See Justice Tsanga in the *Madzara v Stanbic Bank Zimbabwe Ltd and Others* HH546/2015.

³⁹ Galen (n 24 above) 15.

⁴⁰ Galen (n 24 above) 17.

closest to the nature of the case and the parties.⁴¹ 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.⁴² Urbanization however once again has blurred this simple link between law and culture. Many people have dual cultures, that is, the African culture and the western culture. Thus the “relative closeness” test becomes problematic in its application. Galen identifies four factors bearing on the “relative closeness” test.⁴³ These are the place where the cause of action arose, the nature of the case, residence of the parties and the language of transaction. It is argued that these factors are the very same factors that are considered in the parties' mode of life factor. The effects of urbanization have once again blurred the ‘relative closeness’ test. The advent of urbanization has seen rapid rural-urban migration and rapid exchange of ideas, culture, lifestyle and a fusion of traditional and western cultures such that the ‘relative closeness’ test may be an exercise in futility.

To sum up the discussion in this part, it is clear that in determining the ‘surrounding circumstances’ of the case, the court must cumulatively consider several factors. None appears decisive and conclusive by itself. At the back of its mind, the court must always remember that both customary law and general law constitute equal systems of law in the Zimbabwean legal system. Urbanization has blurred the factors and it is obvious that the principle has not responded to the changing times and social conditions.

4. Surrounding circumstances and justice of the case

To sidestep the apparent distortions and results of the “surrounding circumstances” concept, the courts have heavily relied on the “justice of the case” proviso to hold that general law should be applied even if the weighing of the factors favour the application of customary law. As stated above the ‘justice of the case’ is a proviso to the determination of the application of customary law in section 3 of the Customary and Local Courts Act. The provision seems to suggest that where there is no statute expressly providing for the application of customary law, the court has the discretion to apply general law if the justice of the case requires. According to Madhuku, the “justice of the case” provision means that even though there is a determination that customary law is

⁴¹ Bennett (n 27 above) 80.

⁴² Galen (n 24 above) 15.

⁴³ Galen (n 24 above) 16.

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applicable, the general law is applicable if it is established that the content of customary law would result in an unjust resolution of the matter.⁴⁴ This position was articulated by Chatikobo J in *Matibiri v Kumire*⁴⁵ thus:

In my view, the only logical construction to place on the phrase “unless the justice of the case otherwise requires” is that if the application of customary law does not conduce to the attainment of justice then common law should apply The phrase, “unless the justice of the case otherwise requires”, has remained in all Acts passed by Parliament, including the current one.... What emerges is that for the one hundred years during which customary law has co-existed with Roman-Dutch law, it has always been provided through legislation that where the customary choice of law rules were found to be inapplicable to the just decision of any matter in controversy, then in that event, resort should be had to the common law principles.⁴⁶

The Supreme Court endorsed this approach in the case of *Chapeyama v Matende and Another*.⁴⁷ In this case, the parties had been in an unregistered customary law union for seven years. During the subsistence of the marriage, the parties accumulated property which included an immovable property that was jointly registered. At the termination of the unregistered customary law union, the husband sought an order to delete the wife's name from the title deeds of the house and the wife counterclaimed for a fair distribution of the property. The court was of the view that, in general, where parties are married according to customary law, their rights and duties are governed by customary law. According to customary law, the wife is not entitled to a fair distribution of property. Her only entitlement was *umai* or *mawoko* property. While acknowledging that the facts of the case pointed to the application of customary law, the court proceeded to consider the remedies available to the parties under customary law. The court refused to apply customary law holding that this was a proper case to resort to the 'justice of the case' because applying customary law would result in an injustice and effectively leave the wife without a remedy. The court's approach of what constitutes a remedy suggests that the effectiveness of the remedy and justice considerations are critical in determining whether a party has a remedy or not. The court refused to regard the wife's

⁴⁴ Madhuku (n 25 above) 28.

⁴⁵ 2000 (1) ZLR 492 (H).

⁴⁶ Pp 497-498.

⁴⁷ 1999(1) ZLR 534(H).

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entitlement to *amai* or *mawoko* property as a remedy rather than holding that the wife was left without a remedy.

While in the *Chapeyama* case the existence of an unregistered customary law union was not in dispute, in *Muringaniza v Munyikwa*⁴⁸ the main thrust of the dispute was whether there was in existence a customary marriage between the parties. The parties lived together from 1990, soon after the birth of their first child who died two years later in 1992. While the parties agreed that a meeting between the families held after the burial of the child, the purpose of the meeting was in dispute. The wife alleged that the meeting was to do with marriage negotiations while the husband alleged that the agenda of the meeting was to discuss damages for staying with her without the customary rites. The court had to determine whether there was a customary marriage and when it commenced. It was common cause that the husband had made some payments to the wife's family, through bank deposits. To bolster his argument that there was no customary union, and that the money was not *roora/lobola* but appeasement fee, the husband argued that the payment of money through a bank deposit was not consistent with the Shona customary way of paying *roora/lobola*. Justice Ndou (as he was then), dismissed the husband's contention by holding that if the innocent party is under the impression that the parties were conducting a customary marriage, failure to comply with one of the requirements is not necessarily fatal. While it was common cause, that depositing money into a bank account was not consistent with the Shona custom on *roora*, the court held that such deviation is not fatal because customary law is flexible and pragmatic.

The court did not, however, resolve when the customary union came into being even though there were a number of possibilities. Did it commence when the parties started living together as wife and husband in 1990? Or did the marriage come into being in 1992 at the meeting held between the families after the burial of the child? Or did it commence when a *Munyai* (go-between) subsequently was dispatched to the wife's family in their rural home in Gutu? Or rather when the husband deposited a sum of \$2 500,00, as a payment to the wife's father? The court skirted around this issue, simply making a finding that the parties were in an unregistered customary law union without addressing the question of when the marriage came into being. A reading of the judgment suggests that equality equity and justice were at the back of the court's mind. Holding that there was no customary marriage meant that the parties were

⁴⁸ 2003 (2) ZLR 342(H).

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cohabiting without proprietary advantage that it considered as unjust. The court opted to apply general law stating that in the distribution of property at the dissolution of unregistered customary law unions:

In terms of section 3, if customary law were to apply, then it would not be possible to extend any relief to a woman in the defendant's position beyond her traditional entitlements of *umai* or *mawoko* property. In the circumstances, this would have been unjust. The justice of this case requires that the matter be dealt with otherwise than in accordance with customary law

Galen has argued that the 'justice of the case' provision should be resorted to rarely to justify the application of general law to a case where relevant factors such as mode of life of the parties indicate that customary law should be applied.⁴⁹ It, however, seems that Galen's approach has not found resonance with the courts which have liberally interpreted the 'justice of the case' provision. The courts' reasoning as enunciated in *Matibiri v Kumire* was to the effect that the court considers the remedies under customary law. If it considers that the remedies under customary law lead to injustice, then it resorts to the general law on the premise that the wife is left without a remedy.

5. The justice of the case and effective remedies in the distribution of property on the dissolution of an unregistered customary marriage

The determination of whether a union between two persons is a registered customary marriage or an unregistered customary marriage has consequences. The attitude of Zimbabwean courts appears to be to use the surrounding circumstances principle in general as a basis of determining that the union is an unregistered customary marriage and the 'justice of the case' principle to sidestep applying customary law, rather resorting to the remedies of the general law. For example, in *Mautsa v Kurebgaseka*⁵⁰ the parties had been in an unregistered customary law union for 14 years. They had acquired property during the subsistence of the customary marriage. The husband argued that customary law was applicable to the parties since they intended to be governed by customary law. He contended that the wife was only entitled to that which customary law dictates *umai/mawoko* property. The court dismissed the husband's argument on the basis that although the parties were in a customary law union, the surrounding circumstances, particularly their mode of life, was

⁴⁹ Galen (n 24 above) 11.

⁵⁰ HH 106/17.

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indicative that the parties lived a modern lifestyle governed by general law. In any event the court was of the view that to award *umai/mawoko* property to the wife in terms of customary law would be unjust and an affront to a 'modern-day democratic society where both locally and internationally calls have been made for equal rights and opportunities.' It is argued that the constitutional imperative of equality before the law has been the major driving principle behind the Zimbabwean courts' resort to the justice of the case provision.

Since customary law unfairly treats women parties to unregistered customary marriages, there appears to be the need to craft effective remedies by legislation and the development of customary law to protect female partners of unregistered marriages. This section considers the nature and extent of these effective remedies. The development of customary law is as Madhuku notes, a question of how the courts view customary law.⁵¹ The Constitutional Court, the Supreme Court, and the High Court have inherent powers to develop customary law, taking into account the interests of justice and the Constitution.⁵² Rather than developing remedies under customary law, the courts have resorted to applying general law where they consider that the available remedies under customary law lead to an injustice. This renders the equality of the two legal orders a myth. It also relegates customary law into a rigid body of law that cannot fashion new remedies to meet the justice of the case. It is in this regard that Bennett asks a pertinent question expressed thus: 'Should customary law be changed and developed to cater for situations unknown in traditional African society or should it be excluded in favour of the more developed system of common?'^53

It is argued that the courts have a constitutional imperative to develop customary law to keep pace with the dynamics of the society and situations which traditional African customary law does not contemplate like urbanization and equality. As noted above, the judiciary has found the solution to the choice of law problem by relegating the application of customary law in favour of general law. The judiciary's position has been to circumvent the application of customary law through the justice of the case clause and application of general law to otherwise customary law cases. In this regard, the courts have applied the general law principles of (i) tacit universal partnership, (ii) joint ownership and (iii) unjust enrichment to achieve equality, justice, and equity at the

⁵¹ Madhuku (n 25 above) 31.

⁵² Section 176 of the Constitution.

⁵³ Bennett (n 27 above) 61.

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dissolution of customary law marriages. While these principles have developed under common law, an appropriate question is whether these remedies should become part of customary law. The following section considers an argument whether such an approach should be adopted by the courts in extending and infusing the principles of joint ownership, unjust enrichment, and universal partnership into customary law. It is important to sketch an overview of these remedies.

The requirements of unjust enrichment are that (i) The defendant must be enriched (ii) The enrichment must be at the expense of the plaintiff, (iii) The enrichment must be unjustified, (iv) None of the classical enrichment actions must be applicable, and (v) No rule of law refuses an action to the impoverished party.⁵⁴ In *Mtuda v Ndudzo*⁵⁵, Garwe J summarised the requirements of a tacit universal partnership in these terms: (a) each of the partners must bring something into the partnership or must bind himself or herself to bring something into it, whether it be money or labour or skill; (b) the business to be carried out should be for the joint benefit of the parties; (c) the object of the business should be to make a profit and (d) the agreement should be a legitimate one. In addition, the intention of the parties to operate a partnership is also an important consideration. With regard to joint ownership, the Supreme Court in the case of *Kwedza v Kwedza*⁵⁶ held that registration in joint names is *prima facie* proof of equal ownership in the property. It is contended that these general law principles can be developed and shaped into customary law remedies. Even though the court's judicial activism in providing relief to women in unregistered customary law unions is commendable, it is argued that the development of customary law remedies is a more decisive and definitive solution to the problem of lack of effective remedies under customary law because this would bolster the customary law system. Unfortunately, the courts, however, have expressly shied away from their constitutional obligation to develop customary law.

It can, however, be argued that the courts have already developed customary law by recognising, [albeit without expressing it], joint and female ownership of property. The underlying reasoning for invoking the justice of the case provision has been a realisation by the courts that women in unregistered customary law unions also contribute to the acquisition of the parties' property.

⁵⁴ *Gamanje (Pvt) Ltd v City of Bulawayo* SC94/04.

⁵⁵ 2000(1) ZLR 710(H) 716 E-G.

⁵⁶ SC 73/14.

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The courts have recognised the value of the contributions, both tangible and intangible, a spouse in an unregistered customary law union would have made during the subsistence of the marriage.⁵⁷ The courts seem to simply divide the properties of parties in an unregistered customary law union at dissolution where in effect they consider the matrimonial property as joint property even though they do not express this point. As a result, one could argue that the courts have already ruled that the customary law principle that only males could own immovable property is unconstitutional on the basis of discrimination. Likewise, the customary law principle that women are entitled to *impahla yezandla/mawoko* property which only includes kitchen utensils at the dissolution of customary law unions. Without express say so, it is argued that in the guise of justice of the case provision, the courts have already developed customary law by infusing into it the concept of female ownership of immovable property and joint ownership. It is thus contended that the answer to the problem of inequalities in marriage law lies in developing customary law rather than relegating it in favour of general law. The courts must be willing and flexible enough to examine the applicability of customary law in the concrete setting of social conditions presented by each particular case.

The courts, while acknowledging the lack of effective remedies under customary law, have opted to make calls for legislative changes in the law pertaining to the rights of parties at the termination of such unions. In *Mautsa* the court argued that it was imperative that appropriate legislative measures be taken to eliminate discrimination based on the type of marriage parties' contract. The general view of the courts has been that a proven unregistered customary union should be treated like any other marriage when it comes to dissolution and the division of assets jointly acquired by the parties during the subsistence of the marriage. Such recognition would place the unregistered customary law union within the ambit of the Matrimonial Causes Act. It is in line with the judiciary's clarion call for legislative interventions that family law scholars like W Ncube⁵⁸ and S Chirawu⁵⁹ have argued for harmonization of Zimbabwe's marriage laws. According to Chirawu, harmonization of marriage laws seeks to combat the glaring disparities among women due to the plural marital regime

⁵⁷ *Maware v Chiware* HMA 01-19.

⁵⁸ Ncube (n 12 above) 18.

⁵⁹ S Chirawu 'Challenges faced by women in unregistered customary law unions' (2014). Available at National Research Database of Zimbabwe. <http://www.researchdatabase.ac.zw> (Accessed 25 June 2018).

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with different proprietary consequences at dissolution.⁶⁰ However, Chirawu is quick to caution that in a pluralist legal system like Zimbabwe, harmonization brings more complexity since having one marriage law regime may not be practical.⁶¹ The objective of harmonization is to bring equality between marriage regimes. It is argued that rather than harmonizing marriage regimes, the recognition of unregistered customary law unions as valid marriages, and the consequent development of effective customary law remedies in the spirit of the constitutional values of equality is a more decisive and definitive solution.

The submission that the right to equality and non-discrimination should guide legislative and judicial development of effective remedies in customary law, guided by equality of marriages, finds resonance in domestic, sub-regional, regional, and international human rights systems and instruments. Domestically, section 3 of the Constitution provides a list of founding values and principles. Zimbabwe is founded on respect for the listed values and principles, which include recognition of the equality of all human beings and gender quality. Section 56 of the Constitution prohibits discrimination, among other grounds on custom, culture, gender, marital status, and social status. The rights of women are further recognised by section 80 of the Constitution. Equality is at the heart of the Constitution of Zimbabwe. Despite the constitutional provisions on equality, Zimbabwe's current marital regime is characterized by inequalities and discrimination based on the type of marriage. Sub-regionally, article 8(1) the SADC Protocol on Gender and Development recognises equality in marriage. Section 8 (2) advocates for the recognition and registration of all marriages including customary law or traditional marriages. Within the regional human rights system, the African Charter on Human and Peoples Rights recognises the right to equality and non-discrimination.⁶² The specific instrument which deals with women, the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa also recognises equality in marriage⁶³ and also promotes and protects women in customary marriages.⁶⁴ The Convention on the Elimination of Discrimination Against Women is the principal instrument in the global human rights system. Article 16 of CEDAW explicitly provides that 'States parties shall take all appropriate measures to eliminate against women in in relation to marriage...' and Article 16 (c) states that women

⁶⁰ Chirawu (n 58 above).

⁶¹ Chirawu (n 58 above).

⁶² Articles 3 & 19.

⁶³ Article 6.

⁶⁴ Article 6(c).

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and men shall have 'the same rights and responsibilities during marriage and at its dissolution'. Harmonization of marriage laws seeks to ensure that all women regardless of the type of marriage receive the equal protection of the law.

Conclusion

Our Constitution recognises customary law as part of our law. Thus section 3 of the Customary Law and Local Courts Act enjoins the courts to apply customary law in civil cases unless the justice of the case requires the application of general law. The Constitution accords it the same status that other laws enjoy under it. In addition, courts are required to develop customary law so as to bring it in line with the rights in the Bill of Rights. Customary law can no longer be viewed through the common-law lens, but must now be seen as part of our law and must be considered on its own terms and 'not through the prism of the common law'.⁶⁵ Like all laws, customary law now derives its force from the Constitution and its validity must now be determined by reference not to common law but to the Constitution. Since it is apparent that customary law will remain part of Zimbabwean law, it is argued that rather than relegating it to the doldrums, it must be developed in line with the Bill of Rights. The right to equality is the cornerstone of Zimbabwean constitutionalism. It is therefore imperative that a legal framework dealing with the problem of unregistered customary law unions be affected. The choice of law process, as provided in section 3 of the Customary Law and Local Courts Act, needs to be developed in line with the changing social contexts and human rights principles. While the choice of law criteria is inevitable in a plural legal system, it was argued that the factors must be divorced from their racial and segregationist basis. It has been argued that fairness, equity, and justice should be the basis for determining the applicable system of law to a case where there is no express agreement of the parties. The inadequacy of the current choice of law framework is brought to the fore in the distribution of property at the dissolution of unregistered customary law unions. Noting that the concept of surrounding circumstances and residence will lead to injustice against women and perpetuate inequalities, the judiciary has marginalized customary law by relegating it in favour of general law. It has been argued that the choice of law process must be flexible enough to enable the continuous development of customary law.

⁶⁵ *Bhe and Others v Magistrate, Khayelitsha and Others* 2005 (1) SA 605.

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