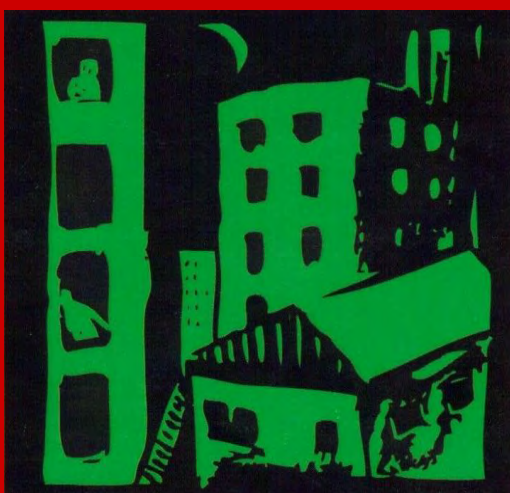
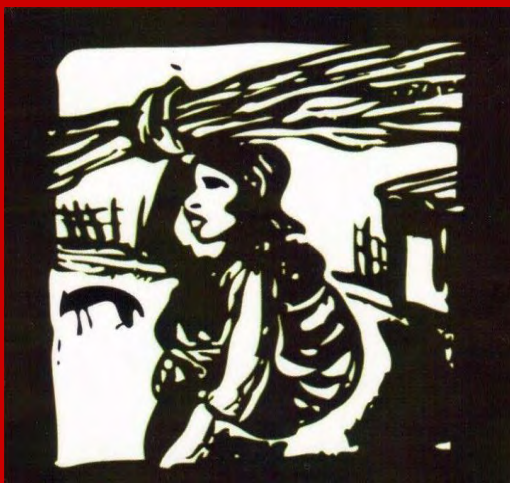


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The rights of women in unregistered customary marriages in Zimbabwe: Best practices from South Africa

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ABSTRACT

Zimbabwe's marriage regime is regulated by the Marriages Act No. 1 [Chapter 5:17] of 2022 (Marriage Act, 2022). According to the Marriage Act, 2022, the proprietary consequences of all marriages solemnised and registered following its provisions are regulated by the Matrimonial Causes Act [Chapter 5:13] of 1985 (Matrimonial Causes Act). Yet unregistered customary marriages are neither solemnised nor registered in terms of the Marriage Act, 2022. As such, a gap in law is created in which unregistered customary marriages fall beyond the regulation of the Matrimonial Causes Act at divorce. In other words, when it comes to divorce, unregistered customary marriages are not guaranteed the equitable distribution of matrimonial property contemplated by the

Matrimonial Causes Act. This position affects the property, cultural and equality rights of women who are in unregistered customary marriages. It is thus recommended that Zimbabwe follow the example of South Africa, which has recognised the validity of unregistered customary marriages even at divorce. This in turn calls for the reform of marriage laws in Zimbabwe.

Keywords: unregistered customary marriages, women, property rights, culture, equality and divorce.

1 INTRODUCTION

In Zimbabwe, there are three types of marriage: civil, customary, and unregistered customary marriages.¹ The Marriages Act No. 1 [Chapter 5:17] of 2022 (the Marriage Act, 2022) affirms the existence of these three types.² Civil and customary law marriages are fully recognised for all marital purposes, and their solemnisation and registration are regulated by the Marriage Act, 2022. Although the main difference between civil and customary law marriages is that the former are monogamous and the latter, potentially polygamous, they are, in all instances, equal.³ Unregistered customary marriages are the third type of a marriage, and come into existence when a marriage is concluded under customary law and parties do not register their marriage.

Some scholars have called this *kuchaya mapoto* (cohabiting),⁴ but such marriages go beyond mere cohabiting. Kiernan defines cohabitation as the arrangement that obtains when two parties to a sexual relationship share a residence before they are married.⁵ Cohabitation is said to have largely replaced unplanned, hurried weddings, as single women who become pregnant now prefer cohabiting with their partners while they await marriage.⁶ By contrast, in unregistered customary marriages there is no anticipation of a marriage because the parties are already in a marriage. Unregistered customary marriages, however, enjoy neither full legal recognition nor the protection of the law, unlike civil and customary law marriages, because they are excluded from the regulation of the Matrimonial Causes Act [Chapter 5:13] of 1985 (Matrimonial Causes Act). This is the position even though such marriages are widely practised in Zimbabwe.

¹ Nenjy Nyamapfene Law Practice *Types of marriages in Zimbabwe* (2017) available at <https://www.nnlawpractice.co.zw/> (accessed 10 August 2021).

² Marriages Act No. 1 [Chapter 5:17] of 2022 (Marriage Act, 2022).

³ Section 5(5) of the Marriage Act, 2022.

⁴ Nyamapfene (2017).

⁵ Kiernan K "Unmarried cohabitation and parenthood in Britain and Europe" (2004) 26(1) *Law and Policy* 33. See also Kiernan K "Redrawing the boundaries of marriage" (2004) 66(4) *Journal of Marriage and Family* 980; Heuveline P & Timberlake J "The role of cohabitation in family formation: The United States in comparative perspective" (2004) 66(5) *Journal of Marriage and the Family* 1214.

⁶ Manning W "Marriage and cohabitation following premarital conception" (1993) 55(4) *Journal of Marriage and the Family* 850.

For example, the Zimbabwean High Court, in the case of *Karimatsenga v Tsvangirai and Others*, conceded that many customary marriages in Zimbabwe are unregistered.⁷

The exclusion of unregistered customary marriages from the regulation of the Matrimonial Causes Act at divorce compromises the property rights of women who are parties to these marriages, limits their cultural rights, and raises the question of equality within the marital regime. This article, in the following section, outlines the rights of women in unregistered customary marriages prior to the Marriage Act, 2022, and then, in subsequent sections, discusses the Zimbabwean marriage regime under the Act. The penultimate section elucidates the South African position on the regulation of unregistered customary marriages at divorce and makes recommendations for law reform in Zimbabwe.

2 THE RIGHTS OF WOMEN IN UNREGISTERED CUSTOMARY MARRIAGES BEFORE THE MARRIAGE ACT, 2022

2.1 Status rights of women in unregistered customary marriages

In the colonial era, women were generally accorded minority status in all aspects of life, including in marriage. Husbands were the head of the family and the ultimate decision-makers of the household. Cheater notes that, under colonialism, women were:

excluded from access to land and one of the major reasons for the exclusion of women from direct control of the means of production and the family product lay in the payment of bride wealth (*roora, lobola*), which not only transferred rights in a woman's labour and reproductive capacity from her own family to ... her husband but also indemnified her family for this loss.⁸

After independence, law reforms were effected in terms of which men and women who attained the age of 18 years were deemed to have acquired the age of majority. According to section 15 of the General Law Amendment Act [Chapter 8:07] of 2016 (General Law Amendment), the law of legal majority was to apply for the purpose of any law, including customary laws.⁹ This meant that women in unregistered customary marriages could participate in their marriages equally with their husbands. However, even though women had attained the same age of majority as men, the problem that remained concerned the status of unregistered customary marriages.

As long as unregistered customary marriages were not registered in terms of the Customary Marriages Act,¹⁰ they were not given the legal status of a marriage at divorce. This was so despite the fact that these marriages could be established through the payment of *lobola*, as was held in several court cases. For instance, in *Gwatidzo v Masukusa*, a classic High Court case, the court had to deal with the validity of an

⁷ *Karimatsenga v Tsvangirai* HH 369/12.

⁸ Cheater AP "The role and position of women in pre-colonial and colonial Zimbabwe" (1986) 13(2) *Zambezia* 65–79 at 66.

⁹ Section 15(1) and (3) of the General Law Amendment Act [Chapter 8:07] of 2016.

¹⁰ Customary Marriage Act [Chapter 5:07] of 2001.

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unregistered customary marriage and was guided by the payment of the bride price.¹¹ In brief, the facts of the case were that a man who was party to an unregistered customary marriage subsequently registered a civil marriage with another woman (the second wife). The second wife then sued the first wife for adulterous damages when the first wife had a child with the husband after the conclusion of the civil marriage. The court, in determining whether there was indeed an existing marriage between the husband and the first wife, and in view of the fact that the marriage was not registered, was guided by the payment of a bride price. It held that since the bride price had been paid for the first wife, the first wife was entitled to conjugal rights and thus, in the circumstances, could not be an adulterer.

Similarly, in another High Court case, *Hosho v Hasisi*, bride-price payment played a significant role in determining the existence of an unregistered customary marriage.¹² In this case, the court held that payment of a bride price remains the most cogent proof and indicator of a customary union or marriage, particularly when it has not been formally registered. The defendant, however, failed to prove the payment of the bride price and lost the benefits of a surviving spouse.

Despite all of this, unregistered customary marriages failed to earn legal recognition at divorce. Before the Marriage Act, 2022, the legal position on unregistered customary marriages was expressed in *Jeke v Zembe*, where the court held as follows:

Although this was about an appeal from the Magistrates Court decision, it is pertinent to note that the legal principles from that decision are that: a customary law union is not a marriage; parties to such a union cannot be divorced by the courts; the Matrimonial Causes Act cannot be used to distribute their estate; and a choice of law process has to be pleaded to establish a cause of action.¹³

2.2 Succession rights

With regard to women's succession rights, in the colonial era there was no differentiation between women in unregistered customary marriages and those in registered marriages. The succession rights of blacks were regulated by the Zimbabwean Native Marriage Act of 1952 (Native Marriage Act). Section 14 of the Native Marriage Act allowed the application of customary law when dealing with marriage issues or disputes among blacks. In terms of this section, the customary inheritance rule of male primogeniture was applied to cases of succession for black people. Male primogeniture refers to the principle that only the eldest legitimate son

¹¹ *Gwatidzo v Masukusa* 2000 (2) ZLR 410 H.

¹² *Hosho v Hasisi* 2015 ZWHHC 491 (HC).

¹³ *Jeke v Zembe* 2018 ZWHHC 237.

may inherit the deceased estate, to the exclusion of the widow and other siblings.¹⁴ In the absence of a son, the inheritance would pass to the brother of the deceased.

This customary law has been criticised for discriminating against the deceased's wife and eldest female children.¹⁵ In *Dokotera v The Master*, the application of the rule of male primogeniture to the distribution of the deceased estate saw a wife losing her matrimonial land to her deceased husband's brother because they had no male child.¹⁶ This blunt discrimination was perpetuated in the Constitution of Zimbabwe, 1980 (1980 Constitution), section 23(3)(a) which allowed the application of customary law in matters related to divorce, marriage, and inheritance among black Africans.¹⁷ The section provided that discrimination was not allowed on the basis of gender, but was allowed in regard to issues of adoption, marriage, divorce, burial, the devolution of property on death, or other matters of personal law, in all instances where the application of African customary was applicable in any case involving Africans.

As such, Africans could not be protected by the non-discrimination provision of the 1980 Constitution in the matters noted above. This left women vulnerable, especially in matters of inheritance. A case in point is *Magaya v Magaya*, where the rule of male primogeniture was upheld in a succession dispute, with the result that the eldest daughter and her mother were left with no inheritance rights as regards the estate of their father and husband, respectively.¹⁸

¹⁴ Omotola JA "Primogeniture and illegitimacy in African customary law: The battle for survival of culture" (2004) 15(1) *Indiana International & Comparative Law Review* 116 at 116.

¹⁵ Maunatlala K & Maimela C "The implementation of customary law of succession and common law of succession respectively: With a specific focus on the eradication of the rule of male primogeniture" (2020) 53 *De Jure* 36 at 36.

¹⁶ *Dokotera v The Master*, 1957 R. & N. 703-4.

¹⁷ Section 23(2) of the Constitution of Zimbabwe Act No. 1 of 1980 provides as follows: "For the purposes of subsection (1), a law shall be regarded as making a provision that is discriminatory and a person shall be regarded as having been treated in a discriminatory manner if as a result of that law or treatment, persons of a particular description by race, tribe, place of origin, political opinions, colour, creed or gender are prejudiced –

(a) by being subjected to a condition, restriction, or disability to which other persons of another such description are not made subject; or

(b) by the according to persons of another such description of a privilege or advantage which is not accorded to persons of the first-mentioned description. and the imposition of that condition, restriction or disability or the according of that privilege or advantage is wholly or mainly attributable to the description by race, tribe, place of origin, political opinions, colour, creed or gender of the persons concerned.

(3) Nothing contained in any law shall be held to be in contravention of subsection (1) (a) to the extent that the law in question relates to any of the following matters-

(a) adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;

(b) the application of African customary law in any case involving Africans or an African and one or more persons who are not Africans where such persons have consented to the application of African customary law in that case."

¹⁸ *Magaya v Magaya* 1999 (1) ZLR 100 (SC).

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Section 23(3)(a) of the 1980 Constitution was, fortunately, amended through the Constitution of Zimbabwe Amendment Act of 2005.¹⁹ The amendment introduced a new position in that it proscribed discrimination on the grounds of, inter alia, sex, gender and marital status in matters of divorce, family, and inheritance among blacks. The gains of this amendment are that female children and widows can inherit, on equal terms with male children from the deceased estate of the father and husband, respectively. In section 68C, the Administration of Estate Act acknowledges traditional and cultural customs of inheritance, but the heir is no longer entitled to walk away with everything and leave the surviving spouse and other children with nothing. The heir may inherit only the walking stick (*tsvimbo*) and the title as the head of the family; all other properties are distributed, with the surviving spouse getting a one-third share and all other children sharing the remaining two-thirds equally. Unregistered customary marriages are regarded as valid marriages for succession, as provided by section 68(3).²⁰

Parties to an unregistered customary marriage have a right to dispose of their estate through a will, a right which still stands under section 7 of the Administration of Estate Act.²¹ However, a will cannot be used to render the surviving spouse homeless. In the case of *Kusema v Shamwa*, the High Court protected a woman who had been in an unregistered customary marriage and whose matrimonial home was bequeathed to the deceased's son in the will of her late husband.²² The court was hesitant to uphold the dictates of the will in view of the injustice it could cause to the deceased's widow, who was married to the late husband under customary law.

2.3 Custody rights and maintenance

In the colonial era, custody of children born to parties in an unregistered customary marriage was governed by tradition and custom.²³ Upon divorce, a father who had paid the full bride price was entitled to custody of all children who were above seven years of

¹⁹ Section 3 of the Constitution of Zimbabwe Amendment (Amendment No. 17) Act of 2005.

²⁰ Administration of Estates Act [Chapter 6:01] of 1907.

²¹ Section 7 of the Administration of Estate Act Chapter 6:01 of 1907 provides as follows: "Deposit of wills with Master. 1) Any person may deposit with the Master or Assistant Master, either open or enclosed under a sealed cover, any will, codicil or testamentary instrument executed by him. (2) The Master and the Assistant Master shall each keep, or cause to be kept, a register of the names and descriptions of the persons depositing with him every such deed, and the date on which it was so deposited. (3) Every such deed shall be accompanied by a duplicate or fair and true copy thereof, which, together with the original, shall be kept under the charge and custody of the Master or Assistant Master, as the case may be, until the death of the maker thereof, unless re-delivery of the same is demanded by the said maker, or in his lifetime by his lawful agent specially authorised for that purpose, and when any such deed is re-delivered in manner aforesaid, the maker or his agent, as the case may be, shall sign a receipt for the same."

²² *Kusema v Shamwa* 2003 ZWHHC 46.

²³ Ncube *W Family law in Zimbabwe* 1st ed Harare: Law Resource Foundation (1989) 126.

age;²⁴ the wife had to relinquish custody and return to her parents. The common law regarded the father's right to custody and guardianship of a child born out of wedlock was analogous to that of any other third party.²⁵

The Constitution of Zimbabwe Amendment Act 2013 (the Zimbabwean Constitution) ushered in a new era in which both parents have equal rights to the custody of their children if the children are below 18 years. Section 80(2) of the Constitution recognises equal parental responsibility for all children and makes no distinction as to the type of marriage the parties are in, indeed, it applies even if there is no marriage at all. Furthermore, women in unregistered customary marriages derive their maintenance rights from the Maintenance Act [Chapter 5:09] of 1971 (Maintenance Act). In terms of section 4 of the Act, anyone, including women in unregistered customary marriages, may institute summons for support against anyone who has neglected their legal responsibilities. Such a summons may be for support either for the child or for the spouse. As Ncube notes, the duty of spouses to maintain each other is reciprocal, a husband or a wife can claim spousal maintenance.²⁶

Furthermore, parties in an unregistered customary marriage are allowed to claim the loss of support from third parties. In *Zimnat Insurance v Chawanda*, the Zimbabwean Supreme Court ruled that a woman who has been in an unregistered customary marriage can claim for loss of support arising from the death of her husband.²⁷ This case involved a wife suing an insurance company that insured the driver responsible for her husband's death in a traffic accident. Equally, a husband can sue a third party for loss of support in the event of his wife's death caused by that third party.

3 THE MARRIAGE REGIME UNDER THE MARRIAGE ACT, 2022

The Marriage Act, 2022 reaffirmed the existence of three types of marriages: civil, customary, and unregistered customary marriage. Another intimate relationship recognised by the Marriage Act, 2022 is civil partnership. The Marriage Act, 2022 enumerates the requirements for each type of marriage. What should be highlighted is that these types of marriage are required by law to comply with general requirements (minimum age of 18 years and the right to consent) set out in sections 3 and 4 of the Marriage Act, 2022.²⁸

3.1 Civil marriages

²⁴ Ncube (1989) 127. See also *Chiwaka v Machinga* 1979 CAACC 16; *Jokonia v Simanga* 1967AAC 34.

²⁵ *Sadiqi v Muteiswa* 2021 ZWSC 132.

²⁶ Ncube (1989) at 126. See also *Woodhead v Woodhead* 1955 (3) SA 138 (RA).

²⁷ *Zimnat Insurance v Chawanda* 1990 (2) ZLR 143 (S).

²⁸ Section 4 of the Marriage Act, 2022. See section 78 of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 (the Constitution); *Mudzuru & Anor v Ministry of Justice, Legal & Parliamentary Affairs N.O. & Ors* 2016 ZWCC 12; the Convention on the Rights of the Child 7 March 1990 E/CN.4/RES/1990/74.

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As was the case with the repealed Marriages Act [Chapter 5:11] of 2001 (Civil Marriages Act),²⁹ civil marriages are monogamous under the Marriage Act, 2022. A monogamous marriage is defined in section 5(1) as a union of two persons to the exclusion of all others and one in which no person may contract any other marriage during the subsistence of a marriage.³⁰ Conversely, being a party to any other marriage is a legal impediment for one to contract a civil marriage.

3.2 Customary marriages

The Marriage Act, 2022 provides for customary marriages, with section 5(2) clearly stating that these marriages are “polygamous or potentially polygamous”. The term “polygamous” is not defined in the Marriage Act, 2022. However, the general definition of polygamy includes polygyny (where a man can marry as many wives as he wants) and polyandry (where a woman can marry as many husbands as she wants).³¹ If this definition of polygamy were upheld, it would be progressive, as it entails a human rights-based approach to the extent that it allows women to practise polygamy.

Nevertheless, what exists on the ground might be different, given that Zimbabwe adheres to patriarchal norms of male dominance and female subordination.³² Women in Zimbabwe may not utilise the broad definition of polygamy to their advantage by engaging in polyandry, as it would meet strong societal resistance. Furthermore, section 5(4) of the Marriage Act, 2022, describes polygamy, in the context of a situation where a husband has more than one spouses.³³ Also, section 16(1) allows a man to marry a widow or widows of the deceased relative, yet without according a woman the same right to marry a widower or widowers of the deceased relative.³⁴ Consequently, the meaning of “polygamy” is tilted towards a man having more than one wife.

Other legal requirements of customary law marriage include two witnesses, one for each party to the marriage and the payment of *lo bola* (bride prize). Section 16(2) of the Marriage Act, 2022 provides that:

[a] marriage officer in a customary law marriage shall put to either of the parties to a proposed marriage or the witnesses any questions relevant to the identity or marital status of the parties to the proposed marriage, to the agreement relating to marriage consideration (*lobola or roora*), if any, and to the existence of impediments to the marriage.

²⁹ Marriages Act [Chapter 5:11] of 2001 (Civil Marriages Act).

³⁰ Section 5(1) of the Marriage Act of 2022.

³¹ Zeitzen MK “Polygamy (polygyny, polyandry)” in Callan H (ed) *The international encyclopedia of anthropology* United Kingdom: Wiley-Blackwell (2018) available at <https://doi.org/10.1002/9781118924396.wbiea1377> (accessed 30 April 2021).

³² Kambarami M “Femininity, sexuality and culture: Patriarchy and female subordination in Zimbabwe” Africa Regional Sexuality Resource Centre (2006) available at <http://www.arsrc.org/downloads/uhsss/kmabarami.pdf> (accessed 30 April 2021).

³³ Marriage Act, 2022.

³⁴ Marriage Act, 2022.

3.3 Civil partnerships

Civil partnerships are a new form of relationship recognised under the Marriage Act, 2022. These are intimate relationships between two people who are not married to each other but have lived together for a reasonably long period.³⁵ Parties in customary or civil marriages can contract as many civil partnerships as they wish.³⁶ Arguably, civil marriages are not monogamous in that parties can have other intimate partners. At the divorce of the parties in a civil partnership, the Matrimonial Causes Act is applicable. The parties, resultantly, are ensured that they get an equitable distribution of their property.³⁷

3.4 Unregistered customary marriages

The Marriage Act, 2022 has made provision for unregistered customary marriages.³⁸ Section 17(1) and (3) of the Act state:

(1) A marriage contracted solely according to customary law and not solemnised in terms of this Act must be registered by the parties to such marriage within three months of the date the union was entered into or such later date as may be prescribed, and for that purpose, the parties to the union shall furnish to the Registrar such information and in such form as may be prescribed and any additional information which the Registrar may reasonably require, to enable the Registrar to register the marriage.

(3) Failure to register a marriage contracted at customary law does not affect the validity of the marriage at customary law concerning the status, guardianship, custody and the rights of succession of the children of such marriage.

³⁵ Section 41 of the Marriages Act, 2022 provides as follows:

Civil partnerships (1) A relationship between a man and a woman who—

(a) are both over the age of eighteen years; and

(b) have lived together without legally being married to each other; and

(c) are not within the degrees of affinity or consanguinity as provided in section 7; and

(d) having regard to all the circumstances of their relationship, have a relationship as a couple living together on a genuine domestic basis; shall be regarded as being in a civil partnership for the purposes of determining the rights and obligations of the parties on dissolution of the relationship and, for this purpose, sections 7 to 11 of the Matrimonial Causes Act [Chapter 5:13] shall, with necessary changes, apply on the dissolution of any such relationship.

³⁶ Section 41 of the Marriage Act, 2022.

³⁷ Section 41(5) of the Marriage Act, 2022 provides that “[w]here one of the persons in a civil partnership is legally married to someone else (hereinafter called the ‘spouse of the civil partner’), a court applying sections 7 to 11 of the Matrimonial Causes Act to the division, apportionment or distribution of the assets of the civil partnership shall pay due regard to the rights and interests of the spouse of the civil partner and ensure that its order shall not extend to any assets which are proved, to the satisfaction of the court, to be assets properly belonging to the spouse of the civil partner. (6) It is here provided that, by virtue of the partners dissolving their civil partnership, neither of them shall be deemed to be guilty of bigamy contrary to section 104 of the Criminal Law Code if either of them is legally married to someone else.”

³⁸ Section 17 of the Marriage Act, 2022.

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Furthermore, section 45 provides as follows:

Subject to this Act, no marriage solemnised or registered or deemed to be solemnised or registered in terms of this Act shall be dissolved except by order of court of competent jurisdiction in terms of the Matrimonial Causes Act [Chapter 5:13].

In the two sections above, it is clear that, although unregistered customary marriages are legally recognised for other purposes (guardianship, the custody of children and children's succession) they are not recognised at divorce. According to section 5(5) of the Marriage Act, 2022, "all marriages registered in terms of this Act are equal". By implication, the only marriages that are equal in terms of this Act are those that are registered; consequently, unregistered customary marriages have a different status to those that are indeed registered. This limited validity of unregistered customary marriages has left women vulnerable to human rights violations. Such violations are unpacked hereunder.

4 THE RIGHTS OF WOMEN IN UNREGISTERED CUSTOMARY MARRIAGES UNDER THE MARRIAGE ACT, 2022

4.1 Property rights

The differentiation between unregistered customary marriage and other types of marriage has a bearing on women's property rights. According to the Married Person Property Act, marriages in Zimbabwe are out of community of property unless the parties have an antenuptial contract.³⁹ In that case, parties get what they acquired before and during the subsistence of the marriage and can therefore dispose of their property as they wish.⁴⁰

This is in line with section 71(2) of the Zimbabwean Constitution, which provides that, "every person has the right, in any part of Zimbabwe, to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of all forms of property either individually or in association with others." This section implies that property rights are given to everyone in Zimbabwe and from all walks of life, including to people in marriage arrangements. On the contrary, the Marriage Act, 2022 fails to accord parties in unregistered customary marriages the right to equitable sharing of matrimonial property.

The Matrimonial Causes Act, in sections 7 to 11, stipulates the factors to consider in achieving an equitable distribution of matrimonial property at divorce and applies only to legally recognised marriages. These include individual contributions to acquisition, the duration of the marriage, and the individual needs of the spouses as well as those of any children of the marriage. The purpose of these considerations is, as far as possible, to put the parties in the position they would have been in had there been no divorce and

³⁹ Married Person Property Act [Chapter 5:12] of 1929 (Married Persons Property Act).

⁴⁰ Gombiro TM "Zimbabwe: The ante nuptial contract as it applies in Zimbabwe" (2020) available at <https://www.mondaq.com/divorce/894718/the-ante-nuptial-contract-as-it-applies-in-zimbabwe> (accessed 3 October 2023).

to allow them to maintain their individual property after marriage.⁴¹ However, because the Matrimonial Causes Act does not apply to unregistered customary marriages, the procedure for the distribution of their property at divorce is uncertain.

The options that have been presented so far by scholars and in case law include the application of customary law or, in the alternative, the application of common law principles. Under customary law, a woman is, upon the dissolution of an unregistered customary marriage, entitled only to *mawoko* (household kitchen utensils) property that she and her spouse acquired gainfully during the subsistence of the marriage,⁴² regardless of her contribution to property purchased during the marriage.⁴³ *Feremba v Matika* confirmed this position, with the court indicating that when customary law is applied, women are left without anything from the gains of their work during the marriage.⁴⁴

Arguably, customary law is unjust towards women. If they want to evade the injustices of customary law, they have to approach the courts and plead undue enrichment⁴⁵ or tacit universal partnership⁴⁶ as a cause of action for determining a fair way of distributing matrimonial property. Poor women who cannot afford court fees and legal representation would not be able to approach the court. Furthermore, the process of applying these common law equity principles is complicated and uncertain – even for legal practitioners. For example, in *Jokonya v Pavarirega*, the High Court pointed out the significant errors that legal practitioners make in approaching it for dissolution of an unregistered customary marriage.⁴⁷ In this case, the court held that unregistered customary marriages cannot be dissolved in the High Court through the application of the Matrimonial Causes Act. Chitakunye J stated as follows:

It was apparent that *ex facie* no clear cause of action was disclosed in the summons and declaration despite this court's clarion call on legal practitioners to realise that the mere existence of an unregistered customary marriage or

⁴¹ Gonese-Manjonjo T "The recognition of customary marriages in Zimbabwe and the proposed marriage bill SALC Policy Brief No. 5" (2019) available at <https://www.southernafricalitigationcentre.org/wp-content/uploads/2019/09/The-recognition-of-customary-marriage-Policy-brief.pdf> (accessed 25 September 2023) 6 at 6.

⁴² *Chapeyama v Matende and another* 1999 (1) ZLR 534 (H).

⁴³ Gonese-Manjonjo (2019) 5 at 5.

⁴⁴ *Feremba v Matika* 2007 ZWHHC 33. See also *Matibiri v Kumire* 2000 (1) ZLR 492 (H).

⁴⁵ In *Mautsa v Kurebgaseka* [2017] ZWHHC 106, the requirements of unjust enrichment were listed as follows: (1) the defendant must be enriched; (2) the enrichment must be at the expense of another in that the plaintiff must be impoverished and there must be a causal link between the defendant's enrichment and the plaintiff's impoverishment; (3) the enrichment must be unjustified; (4) the case should not come under the scope of one of the classic enrichment actions; and (5) there should be no positive rule of law that refuses an action to the impoverished person.

⁴⁶ The principle of tacit universal partnership was clarified in the matter of *Chapeyama v Matende and Another* where it was stated that "where, a husband and wife marry under customary law, and the marriage is not registered, customary law will apply to a dispute arising out of the marriage or its dissolution. It is only possible to bring in the general law concept of a tacit universal partnership if the court lays a foundation for applying such a law. Such a foundation has not been clearly articulated."

⁴⁷ *Jokonya v Pavarivega* 2017 ZWHHC 52 at 2.

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marriage is not on its own a cause of action upon which to claim the distribution of assets of parties to that union. In *casu*, the plaintiff's legal practitioner was under an erroneous impression that the union was recognised as a marriage in terms of the Matrimonial Causes Act, [Chapter 5:13] when that is not so ... It would appear that the defendant's legal practitioners were also of the view that this was a valid marriage, hence in his plea the defendant conceded that the union had irretrievably broken down and so it should be dissolved.⁴⁸

In short, women in unregistered customary marriages are excluded from enjoying the same property rights under the Matrimonial Causes Act as women in other forms of marriage. This amounts to a contravention not only of the Constitution but also of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, article 6(j) of which guarantees a married woman both "the right to acquire her property and to administer and manage it freely",⁴⁹ as well as the right to receive an equitable share of the joint property acquired during the marriage upon dissolution of such a marriage.⁵⁰ Because women in unregistered customary marriages are left without legal protection, the consequences are dire, to the extent that women may be left homeless or without a means of income after their marriages end by separation.⁵¹

4.2 Right to culture

According to De Vos and Freedman, practising of cultural rights gives individuals an opportunity to participate in activities that are important to them;⁵² cultural rights are also there to promote diversity and pluralism in the community. The United Nations Report has linked the practice of cultural rights to human development because practising culture enables people to lead a full life.⁵³

Lovelace v Canada, one of the international cases on cultural rights, emphasised that cultural rights are important and deserve protection.⁵⁴ The applicant challenged the

⁴⁸ *Jokonya v Pavarivega* 2017 ZWHHC 52 at 2.

⁴⁹ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted on 11 July 2003 and entered into force on 25 November 2005 (Protocol to the African Charter).

⁵⁰ Article 7(d) of the Protocol to the African Charter (2003).

⁵¹ Nnoko-Mewanu J "Bill doesn't protect women's rights to marital property" (21 June 2019) available at <https://reliefweb.int/report/zimbabwe/zimbabwe-s-marriage-reform-should-do-more-women> (accessed 30 September 2023).

⁵² De Vos P & Freedman W *South African constitutional law in context* Oxford: Oxford University Press (2017) 504 at 504.

⁵³ United Nations Human Development Report (2004) *Cultural Liberty in Today's Diverse World* available at https://reliefweb.int/report/world/human-development-report-2004-cultural-liberty-todays-diverseworld?gad_source=1&gclid=Cj0KCQjw97SzBhDaARIsAFHXUWB85caqLbe_QnrKxpH6kkqeD7R6J1b7Uj3N1r3TM1mlVXa0LuYKAaAltmEALw_wcB. (accessed on 27 February 2024).

⁵⁴ *Sandra Lovelace v Canada*, Communication No. 24/1977: Canada 30/07/81, UN DOC. CCPR/C/13/D/24/1977 available at <https://www.escri-net.org/caselaw/2010/sandra-lovelace-v->

Indian Act of 1970 on a provision which entailed that a Canadian Indian woman who married a non-Indian could not be registered as an Indian. Because of the law, she was denied the right to return to her native home in the Toloique Reservation in Canada. This denied her the cultural benefits of living in an Indian community with her family. The United National Human Rights (UNHR) Committee upheld the complaint. It found that the exclusion of the applicant from the tribe meant that she was not able to enjoy her cultural rights as an Indian. In arriving at this conclusion, the UNHR Committee weighed the cost to the applicant of losing her cultural associations against the potential benefits that would accrue to the tribe as a result of her exclusion. It concluded that the protection afforded to the community via the sanction imposed on those who married persons outside the tribe was disproportionate and excessive. In this respect, the Indian Act was held to be violating cultural rights.

Unregistered customary marriages are entered into through cultural practice and the parties would have chosen to practise that culture. Everyone in Zimbabwe has a right to practise their culture. According to section 63(b) of the Constitution, “every person has the right to participate in the cultural life of their choice”. Section 63 appears to draw heavily on article 27 of the International Covenant on Civil and Political Rights (ICCPR), which provides that:

[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.⁵⁵

Zimbabwe is a party to the ICCPR, and so it has an obligation to accord its citizens the right to culture. According to Robinson, culture and customs are valuable parts of people’s lives, and women experience aspects of customary law as affirming.⁵⁶ The positive aspects of culture can be measured by the extent to which they affirm a woman’s personhood or are not experienced as oppressive. With this in mind, the Marriage Act’s imposition of the requirement to register all unregistered customary marriages is unreasonable to those people who wish to marry under customary law, which has no requirement of registration. Ultimately, if all unregistered customary marriages became registered, this form of marriage would be extinguished, thereby limiting people’s choice to only two types of marriages. The *choice* to marry in terms of their beliefs would remain, yet the type of the marriage they believe in would be non-existent. Following the reasoning in *Lovelace v Canada*, if the benefits of excluding the parties to unregistered customary marriages from regulation by the Matrimonial Causes Act are weighed against the disadvantages to which the parties are susceptible due to this exclusion, the exclusion is unreasonable

canada-communication-no-241977-canada-300781-un-doc-ccprc13d241977 (accessed 27 February 2024).

⁵⁵ International Covenant on Civil and Political Rights. United Nations, Treaty Series, Vol. 999, No. 14668, 19 December 1966 available at <https://www.refworld.org/legal/agreements/unga/1966/en/17703> (accessed 23 February 2024).

⁵⁶ Robinson KL “The minority and subordinate status of African women under customary law” (2017) 11(3) *South African Journal on Human Rights* 457.

4.3 Unfair discrimination

Unfair discrimination does not arise when people are treated differently but requires that the differentiation must be unfair.⁵⁷ As such, the test for determining unfair discrimination is to check if the differentiation is based on any prohibited ground. Article 26 of the ICCPR prohibits discrimination under the law on several grounds, including “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. In its General Comment 18, the Human Rights Committee states that discrimination implies “distinction, exclusion, restriction”.⁵⁸ Although the general comment points out that not every form of differentiation amounts to unfair discrimination, it clearly states that any legislation enacted by state parties must not be discriminatory. Article 8(3) of the Southern African Development Committee Protocol on Gender and Development (SADC Protocol) mandates Zimbabwe, as a member state since 2009, to enact legislative measures to ensure that there is an equitable share of property where spouses separate, divorce, or have their marriage annulled.⁵⁹ Section 56(3) of the Zimbabwean Constitution is clear about its intention to prohibit unfair discrimination. It provides as follows:

Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race colour tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status, or whether they were born in or out of wedlock.⁶⁰

Parties to unregistered customary marriages face discrimination on three dimensions under the Marriage Act, 2022. The first dimension of discrimination is based on the ground of marital status. Parties in an unregistered customary marriage whose marriages end through death receive better protection under the law than those whose marriages are dissolved by divorce. Section 3A of the Deceased Estate Succession Act provides that where the spouse dies intestate, the surviving spouses inherit the matrimonial home.⁶¹ Spouses from the same type of marriage but would have divorced do not have any entitlement to a matrimonial home or a fair share of it. This means that women with the marital status of divorcee are treated differently from widows, even though both have become single (unmarried).

The second dimension of unfair discrimination is the ground of class. Class is one of the prohibited grounds of discrimination in section 56(3) of the Zimbabwean Constitution. With the decline of racial discrimination in many African societies, class is

⁵⁷ Ngcukaitobi T “Equality” in Currie I & De Waal J *The bill of human rights* Claremont: Juta and Co (2017) 209–249 at 218.

⁵⁸ Convention on Civil and Political Rights General Comment No. 18: Non-discrimination. Adopted at the Thirty-seventh Session of the Human Rights Committee, on 10 November 1989.

⁵⁹ Southern African Development Committee Protocol on Gender and Development, 2008 (SADC Protocol).

⁶⁰ Constitution of Zimbabwe (2013).

⁶¹ Deceased Estates Act Chapter 6:02 1891.

an emerging category of inequality.⁶² Ngcukaitobi points to the existence of three classes in South African society, something which is also true of Zimbabwe. These classes are the upper-tier rich, the middle-tier working-class, and the bottom tier of low occupational categories and the unemployed. Class discrimination is apparent when most women affected by a law are from one class. Women in unregistered customary marriages are mostly in the bottom socio-economic tier. According to Nnoko-Mewanu, it is estimated that at least 70 per cent of women in rural areas of Zimbabwe are in unregistered customary marriages, which means that the most vulnerable rural women are the ones whose rights to own property after separation are being denied.⁶³ They remain susceptible to the inherent injustices that arise from the application of other laws or principles that do not guarantee a fair distribution of property. These women, being the most vulnerable in society, require the protection of the law.⁶⁴

The third dimension of unfair discrimination is gender, which is apparent from the absence of a clear divorce procedure to be followed by parties in unregistered customary marriages. Parties to such marriages cannot approach any general law court for divorce, as provided by section 45 of the Marriages Act, 2022.⁶⁵ The courts have been strict in observing this position. In *Mukonde v Zengeni*, the High Court set aside the Magistrate court's decision that had dissolved an unregistered customary marriages confirming that unregistered customary marriages cannot be dissolved by a court order.⁶⁶ Resultantly, there is no legal procedure under the Marriage Act, 2022 for determining when an unregistered customary marriage officially comes to an end.⁶⁷ Under customary law, a man can divorce his wife by giving her a *gupuro* (divorce token), which can be a coin, but there is no consensus on whether a woman can do the same.⁶⁸ The lack of a clear procedure thus deprives women of agency when it comes to deciding whether or not to stay in a marriage.

Women's unfair treatment at the hands of marital laws is mostly a manifestation of gender inequalities stemming from entrenched patriarchal norms.⁶⁹ It is thus of concern that the Marriage Act, 2022 perpetuates the inequalities of the past by establishing a marital system that reinforces discrimination based on marital status, class and gender.⁷⁰ The Zimbabwean Constitution states that people are equal before the law and

⁶² Ngcukaitobi (2017) at 212.

⁶³ Nnoko-Mewanu (21 June 2019).

⁶⁴ Nnoko-Mewanu (21 June 2019).

⁶⁵ Section 45 of the Marriage Act provides that, "[s]ubject to this Act, no marriage solemnized, or registered or deemed to be solemnized or registered in terms of this Act shall be dissolved except by order of court of competent jurisdiction in terms of the Matrimonial Causes Act" [Chapter 5:13].

⁶⁶ *Mukonde v Zengeni* 2011 ZWHHC 133.

⁶⁷ Gonese-Manjonjo (2019) at 7.

⁶⁸ Gonese-Manjonjo (2019) at 7.

⁶⁹ Katsande R & Tandri T "Gender equality and women's rights under the 2013 Zimbabwean Constitution" in Moyo A (ed) *Selected aspects of the 2013 Zimbabwean Constitution and Declaration of Rights* (2019) 71-79 at 71.

⁷⁰ Gonese-Manjonjo (2019) at 2.

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must enjoy the equal protection and benefits of the law. This, according to Ackerman, means that the law must protect, and be of benefit to, all people equally.⁷¹

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South Africa shares the same history with Zimbabwe as far as the rights of women in unregistered customary marriages are concerned. Women in unregistered customary marriages in South Africa were deemed to be minors during the colonial era.⁷² Civil marriages did not have equal status with customary marriages. Equality of marriages was enshrined in section 15(3) of the Constitution of the Republic of South Africa, 1996 (South African Constitution).⁷³ In keeping with this section, the Recognition of Customary Marriages Act 120 of 1998 (RCMA) was enacted.⁷⁴

Although customary marriages are required to be registered within three months of their conclusion, as provided by section 4(1) of the RCMA, their non-registration does not affect their validity, as clearly stated in section 4(9) of the RCMA. Section 2(1) provides that “a marriage which is valid marriage at customary law and existing at the commencement of this Act [RCMA] is for all purposes recognised as a marriage”. There are no exceptions to the recognition of unregistered customary marriages. Even at divorce, section 8(1) of the RCMA provides that customary marriages may be dissolved only at court by a decree of divorce. The court, in granting such a divorce decree for the dissolution of a customary marriage, would have to take into consideration the ancillary issues of that marriage, such as an equitable share of property as well as contracts and agreements relevant to the marriage.

Because polygamous marriages in South Africa are in community of property unless they are registered, there are problems with ascertaining the validity of unregistered polygamous marriages.⁷⁵ For example, in *Baadjies v Matubela* the court dismissed an application for maintenance because the applicant was unable to provide a certificate proving the registration of their customary marriage.⁷⁶ Similarly, in *Road Accident Fund v Mongalo, Nkabinde*, the court stated that a marriage certificate would be conclusive proof of a customary marriage.⁷⁷ Some scholars, such as Himonga and Sibisi, have thus proposed the compulsory registration of customary marriages in South Africa

⁷¹ Ackerman LWH “Equality and non-discrimination: Some analytical thoughts” (2006) 22(4) *South African Journal on Human Rights* 597 at 597.

⁷² “Customary marriages in South Africa: Understanding the Recognition of Customary Marriages Act of 1998” available at <https://www.sahistory.org.za/article/customary-marriages-south-africa-understanding-recognition-customary-marriages-act-1998> (accessed 30 September 2023).

⁷³ Constitution of the Republic of South Africa, 1996.

⁷⁴ Recognition of Customary Marriages Act 120 of 1998 (RCMA).

⁷⁵ Himonga C “The advancement of African women’s rights in the first decade of democracy is South Africa: The reform of the customary law of marriage and succession” (2005) *Acta Juridica* 82 at 97; De Souza M “When non-registration becomes non-recognition: Examining the law and practice of customary marriage registration in South Africa” (2013) *Acta Juridica* 239 at 255.

⁷⁶ *Baadjies v Matubela* 2002 3 SA 427 W.

⁷⁷ *Road Accident Fund v Mongalo and Nkabinde v Road Accident Fund* 2003 (1) All SA 72 (SCA).

so as to avoid the problems of validating polygamous marriages.⁷⁸ Proponents of compulsory registration of customary marriages view registration as a way of easily verifying the spouses' marital status with a degree of certainty.⁷⁹

However, compulsory registration of customary marriages would run into its own fair share of challenges. Apart from the sociological constraints emanating from the power struggles between women and men in the context of patriarchy, people are not prepared to go through complex High Court procedures and incur the costs of the necessary legal representation for marriage registration.⁸⁰ Even if the registration of all marriages were to be made compulsory so as to make matters easier when distributing estates at divorce, the current hurdles being faced to ensure registration by parties in polygamous marriages may be absolved. For instance, as De Souza points out that, people in rural areas are "often poor and relatively isolated from the towns where Home Affairs are located."⁸¹ Compulsory registration of customary marriages has the potential to increase the burden on those who cannot meet the travel costs associated with registration.

The challenge South Africa faces with the registration of polygamous marriages emanates partly from the wording of section 7(6), which provides that:

[a] husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages.

According to section 7(6) above, the registration of polygamous marriages may be undertaken only by the husbands. His existing and prospective wives are expected to passively wait for him to take the initiative to hire lawyers and make the court application before they can be joined in the proceedings.⁸² Where the husband fails to perform this duty, the legislation does not provide his wives with the ability to initiate the court application themselves. Wives are entirely dependent on their husbands. This leaves wives in polygamous marriages with no way under the RCMA to ensure that their property is clearly identifiable and protected from other family members.⁸³ It is deeply ironic that the RCMA, which is supposed to elevate the legal status of customary marriages so as to reverse the discriminatory lack of their recognition in the past, establishes a registration framework that makes it so difficult to register these marriages in practice that they end up not being recognised at all.⁸⁴

⁷⁸ Sibisi S "Registration of customary marriages in South Africa: A case for mandatory registration" (2023) 44(3) *Obiter* 515. See also De Souza (2013) at 239; Himonga (2005) 82; Himonga C & Moore E *Reform of customary marriage, divorce, and succession in South Africa: Living customary law and social realities* Claremont: Juta Law (2015).

⁷⁹ Sibisi (2023) 515 at 529.

⁸⁰ Himonga (2005) 82 at 97.

⁸¹ De Souza (2013) 239 at 252.

⁸² De Souza (2013) 239 at 252.

⁸³ Himonga (2005) 82 at 97; De Souza (2013) 266.

⁸⁴ Himonga (2005) 82 at 97; De Souza (2013) 239 at 271.

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Registration of polygamous marriages in South Africa has not been easy, and there is not much compliance even though it is compulsory.⁸⁵ This is a lesson that Zimbabwe should heed and realise that, since unregistered customary marriages will always be among us, they require the protection of the law. However, despite the aforementioned validity challenges that South Africa has faced, its legislative framework still stands as a good example for Zimbabwe. Without registration, an unregistered customary marriage in South Africa remains valid. This is another lesson for Zimbabwe from South Africa. Once unregistered customary marriages are given validity for all purposes in Zimbabwe, it would mean that the Matrimonial Causes Act applies to their divorce and that the current challenges discussed above would be resolved. In the same manner, Zimbabwe needs to recognise unregistered customary marriages to the extent that their dissolution is effected by a court of law, with the parties having the same proprietary consequences as parties from other types of marriages.

6 CONCLUSION

This article has elucidated the injustices suffered by women in unregistered customary marriages under the Marriage Act, 2022. These include limitations to property and cultural rights, as well as unfair discrimination based on marital status, class and gender. The Marriage Act, 2022 is also a threat to women's freedom of choice, as it seeks to eradicate unregistered customary marriages by requiring all marriages to be registered. It is recommended that the South African law on the recognition of unregistered customary marriages serve as a guide to law reform in Zimbabwe aimed at determining an approach that results in equality between men and women and equality between the different types of marriages. It was noted that South Africa faces the hurdle of ensuring the registration of polygamous marriages and that this has left the courts grappling with the issue of ascertaining the validity of subsequent marriages. As such, South Africa can also learn from the Zimbabwe's property regime whereby all marriages are out of community of property.

⁸⁵ De Souza (2013) 239 at 252.

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