



Centre for  
Conflict Management  
and Transformation



## Cultures in Conflict

Challenges of Marriage and Divorce under  
Zimbabwe's Dual Legal System



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## Introduction

This analysis draws from the research study and dialogue meetings that were part of CCMT's intervention in Chiwundura. The paper gives an account of the perspectives of the people of Chiwundura on Zimbabwe's current legal system which combines the application of Roman Dutch Law and Zimbabwe's Customary Law. It explains the conflicts that arise as a result of the current legal system, particularly in regards to marriage, divorce and inheritance of property. The paper also highlights the recommendations coming from the community members on how the legal system can be adapted to respond to the needs of the people.

CCMT has been working with the Chiwundura community for two years. The intervention was aimed at addressing rights violations that women were facing in the application of customary law by the customary law courts. Between 2012 and 2013 CCMT conducted a research study and facilitated several dialogue meetings in the community. Customary law was viewed by community members in Chiwundura as having a number of advantages over general law although it was inherently discriminatory to women.

## Background

The phenomenon of conflicting laws that occurs in countries that have plural legal systems is not unique to Zimbabwe but it is a challenge in many former colonies. The British colonial administration through indirect rule allowed the colonised to continue practising their traditions within matters of personal and family law. European laws on the other hand, were used to govern the public sphere of politics and economics. Despite the differences in colonial experiences most post colonial states have plural legal systems.

Plural legal systems have the potential to disadvantage women who are caught in the middle when the different legal systems collide. All countries in the Southern African Development Community (SADC) region recognise customary law. Furthermore, all countries in the region have sought to protect the rights of women in their Constitutions by incorporating a non discrimination clause. Some countries like Malawi, South Africa, Mozambique and Zimbabwe have gone a step further by stating in the Constitution that should there be a conflict between laws in regards to the equality and non-discrimination clause, general law shall take precedence. However in other countries like Botswana, Zambia and Lesotho when it comes to personal matters under customary law the non discrimination clause in the Constitution will not apply. The Constitution of Tanzania is silent about what should happen in the event of a conflict between two laws.

This paper will seek to explore how Zimbabwean women and in particular those that live in Chiwundura have experienced legal pluralism. Various aspects of family law will be analysed, first by looking at the legal provisions (both customary and general) and secondly by an examination of how the courts have interpreted the law. This will be done by looking at case law and detailing the realities of people in Chiwundura.

## Application of Customary Law in Zimbabwe

Zimbabwe has a dual legal system, comprised of general law (Roman-Dutch common law and legislation) and customary law.<sup>1</sup> African customary law is a specialised form of law in Zimbabwe. In pre-colonial times customary law was the sole legal system in existence. During the colonial era European laws were taken up so as to suit the new political order. Customary law governed issues that were regarded as personal or family matters whilst the European law governed public affairs and criminal law. In post independent Zimbabwe the dual legal system was maintained and customary law has continued to co-exist with other sources of law including domestic constitutional law, statutory law, common law and international treaties.<sup>2</sup>

Customary law refers to the recognised customs and practices of the tribes of Zimbabwe which have been in practice for centuries. For a custom to become law it must be certain, reasonable and should have attained the recognition of formal law. Customary law deals with civil matters including marriage, divorce, custody and guardianship of children, maintenance, inheritance and appointment to traditional leadership. Legislation provides that African customary law will be applied in civil matters where the parties have agreed that it should apply and where it appears just and proper to apply it.<sup>3</sup> Customary law has no jurisdiction over criminal matters.

Customary law is difficult to apply objectively because it is not homogenous; different tribal groupings have varied customs and practices. This is compounded by the fact that customary law is not written down. It is therefore the duty of Chiefs to interpret customary law, as they are the guardians of customs and values. The lack of common, standard interpretations in customary law means that it is left to the discretion of the Chief to determine the rights of women in regards to all areas of customary law including marriage, divorce and inheritance.

The court system in Zimbabwe is as follows in descending order of precedence: Constitutional Court, Supreme Court, High Court, Magistrates' Court and Customary Law Courts.<sup>4</sup> Customary law courts are not regarded as courts of record so on appeal to a higher court the matter is heard as a new case.

Customary law courts are broken into two, namely primary courts which are presided over by headmen and community courts which are presided over by Chiefs.<sup>5</sup> Procedure in the customary law courts is simple and can begin by the complainant stating verbally the nature of the claim. It is usually recorded by the Chief's aide. Decisions passed in the customary law courts can be appealed or reviewed by general law courts.<sup>6</sup> It should be noted that in rural Zimbabwe where 61% of the population lives<sup>7</sup>, customary law courts are an important arm of the justice system.

The major challenge that women face when they approach local courts is that the law being applied by traditional leaders is based on traditions that are no longer appropriate in a contemporary Zimbabwean society. Although culture is dynamic, customary law is proving to be less dynamic with regards to the rate at which it changes. Women in Chiwundura feel that the application of customary law exactly as it was being applied 50 years ago is unfair.

<sup>1</sup>S192 of the 2013 Constitution of Zimbabwe 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 which provides that the law applicable in Zimbabwe is Roman Dutch Law and African Customary Law, as modified by subsequent legislation.

<sup>2</sup>**Constitution** provides the framework for how different state institutions relate to each other and lays down the rights of citizens. **Statutory law** refers to Acts of Parliament. **Common law** or judicial precedent refers judge made laws that is rules established in case are binding on future cases with similar facts. **Human rights treaties** refer to agreements made by different states that are meant to protect and promote human rights.

<sup>3</sup>S3 Customary Law and Local Courts Act (Chapter 7:05)

<sup>4</sup>The existence of Customary law Courts does not preclude other courts in the judicial hierarchy from applying customary law. Customary law can be applied by all courts in Zimbabwe.

<sup>5</sup>S5 (1) Customary Law and Local Courts Act.

<sup>6</sup>Ibid s24 and s25.

<sup>7</sup>World Bank Statistics (2010) <http://www.tradingeconomics.com/zimbabwe/rural-population-percent-of-total-population-wb-data.html>



Most women who participated in the dialogue process however pointed out that although they were satisfied with the way in which Chief Gambiza was interpreting and applying customary law, they were unhappy with Headmen's treatment of women in their courts.

## Marriage and Divorce

In keeping up with the dual legal system the Zimbabwe marriage system is pluralistic. There are three types of marriage that are recognised by the law, these are, (i) Civil marriage which is monogamous, (ii) customary law marriage which is potentially polygamous and (iii) unregistered customary law union (only recognised in certain circumstances).<sup>8</sup> About 84% of Zimbabwean marriages are unregistered customary law unions.<sup>9</sup> This means that the majority of married Zimbabweans do not have marriage certificates. Customary Law does not specify when a marriage comes into existence<sup>10</sup> and in the absence of a marriage certificate, the burden falls on the woman to prove that a marriage existed. When asked about the fact that the majority of people in Zimbabwe did not have marriage certificates, dialogue participants noted that having a certificate was important as it provided security to women. One woman noted that when her husband died, in order to access his benefits she had to get four affidavits from her husband's family stating that the two were married. It was difficult for her as her mother-in-law had been opposed to the marriage. In the absence of a marriage certificate it is difficult to prove the marriage exists.

Although unregistered customary law unions are widely practiced they do not have full legal recognition unlike the other two types of marriage. The law only recognises an unregistered customary law union as a marriage with regards to maintenance of children and inheritance.

However, one village head noted that throughout the ages people have been getting married without certificates. He further stated that of those people who do not have the marriage certificate many are living happily as husband and wife. Claiming that the payment of lobola is not enough to seal a marriage is considered an affront to local customs and beliefs. Payment of lobola in the eyes of many Zimbabweans is central to the validity of a marriage whereas registration of a marriage is not viewed as essential. Furthermore, for many rural communities it is financially and logistically difficult to register a marriage as this requires travel to the nearest district centre to find a marriage officer.

Some women noted that it is even possible to gain unfair advantages by means of marriage certificates. An example given was that of a woman who had separated from her husband in the 1990s. When she heard that he had died she inherited everything with the help of her marriage certificate since she claimed to be the surviving spouse, leaving his customary law wife and his children destitute.

### Property Rights in Marriage and after Divorce

The Married Persons Act (Chapter 5:12) provides that all marriages contracted after 1929 are out of community<sup>11</sup> of property unless the parties enter into an agreement prior to the marriage.<sup>12</sup> This means that a married couple can acquire property as individuals and at divorce personal property is not shared; only matrimonial property is shared.

<sup>8</sup> Subject to this section, no marriage contracted according to customary law, including the case where a man takes to wife the widow or widows of a deceased relative, shall be regarded as a valid marriage unless - "such marriage is solemnized in terms of this Act" (s3 (1) Customary Marriages Act [Chapter 5:07]

<sup>9</sup> Herald 84pc of *Zim Marriages Unregistered* <http://www.herald.co.zw/84pc-of-zim-marriages-unregistered/>

<sup>10</sup> It is not clear when a marriage comes into existence. Is it when a woman elopes (kutizira) to the man's house? Is it after the payment of a token of acknowledging that the girl who has eloped has been accepted by the man and his family? Or is it when the man pays the bride wealth (*rusambo*) which traditionally would allow a man to live with his wife (if she hadn't eloped).

<sup>11</sup> **Out of community of property** means that whatever property each spouse brings to the marriage is not part of the matrimonial property. At divorce only matrimonial property is shared.

<sup>12</sup> s2 of the Act.

In other words a spouse gets to keep whatever they brought into the marriage when the marriage is dissolved. Under customary law property is ascribed to spouses according to their gender. For instance women's property is usually household utensils and furniture while men own the bigger and more valuable property like cattle and cars. It should be noted that under customary law the concept of individual ownership of land is absent, land is communally owned.

Divorce for both customary and civil marriages is governed by the Matrimonial Causes Act. The Act provides that at divorce matrimonial property should be shared in an equitable manner between the spouses. Since marriages in Zimbabwe are out of community of property the property to be shared is that which the spouses accumulated together as a couple. It follows that both parties start at 50/50, but an assessment of their contribution and circumstances can lead to either the increase or decrease in their share. What is notable is that the Act takes into consideration the domestic contribution that either spouse has made.

The general practice in Chiwundura is that when a couple is to be divorced, the household property is divided between them according to the circumstances of each case. The cattle forming the general herd all remain with the husband. The wife is entitled to any property she may have acquired in her own right, for example, cattle (*mombe dzehumai*) given to her as marriage portions or any cattle earned through trade or as a form of payment for work done. Usually when the woman is older and there is little possibility of her remarrying she usually remains on the homestead. Younger women are expected to leave the homestead and return to their families' home.

As one can note the provisions of the Matrimonial Causes Act are not followed in the Chiwundura community. The challenge with legislation is that individuals can only enforce their rights through courts which in the case of Zimbabwe are often not easily accessible to the rural population.

Unregistered customary law unions are not covered by the Matrimonial Causes Act. Spouses in these unions have to rely on general law principles like tacit universal partnership and unjust enrichment.<sup>13</sup> These general law principles when applied to customary law do not deliver fair justice to the spouses.

In her judgment Makarau J (as she then was) spoke clearly on the unfairness of the conflict of laws. She noted:

*“It appears that the conflict between customary law and general law will be an issue that will confront the courts in this jurisdiction for some time to come. In my opinion, that has the potential of causing palpable injustice in some cases, especially for women married under customary law, who may find general law being applied against them to erode whatever positions they may be occupying by virtue of customary law.”<sup>14</sup>*

<sup>13</sup> **Unjust enrichment** is when a person makes a profit at the expense of another person. **Tacit universal partnership** is when two parties participate in a venture without any formal agreement.

<sup>14</sup> Kusema v Shamwa HH46-2003 pg 3.



## Inheritance and Marginalisation of Women

Property inheritance in Zimbabwe is governed by several pieces of legislation including the Administration of Estates Act (Chapter 6:01) and the Deceased Estates Succession Act (Chapter 6:02). Both pieces of legislation take into consideration the pluralistic nature of the country's legal system. The law provides for succession under customary and general law as well as for people married under different marriage regimes.

Traditionally and under customary law, male children's rights to inheritance took precedence over female children's rights, the latter sometimes being disinherited. However the Administration of Estates Act does away with this anomaly and provides that the "heir" will not receive all of the property but only the customary items.<sup>15</sup>

Inheritance usually becomes an issue when a person dies intestate (without a will), as many people do, or when a will is contested. There is a general notion that leaving a will is not part of the local culture. One participant in the dialogue process disputed this saying that people do leave wills, only that they are oral. He recalled an incident where a man called his relatives, friends and neighbours for a party where he spoke about what would happen to his property when he died. The participant highlighted that the man distributed his property to his sons, while the daughters got nothing. During the dialogue process, few women challenged the idea that daughters are excluded from inheriting. Many people noted that it is common for daughters to be left out of the will because they are viewed as transitional i.e. they get married and leave the family. Heirs are expected to take up the role of the head of the household and take care of the family.

A woman married under customary law can inherit from her deceased husband. A cohabiting partner cannot inherit under customary law unless she has children with the deceased. Inheritance is additionally complicated in an unregistered customary union as a widow would need legal confirmation of the union in the form of affidavits of two relatives of her deceased husband before she can inherit the estate. For many years women in unregistered customary law unions were greatly disadvantaged as they were not viewed as surviving spouses.<sup>16</sup> Women who manage to inherit any property are unable to pass it on to their own heirs or to keep it once they remarry. Where daughters inherit property, when they get married they usually have to leave behind their inheritance as they cannot take it to their husband's family. Wives usually inherit their husband's property, however when they remarry they are usually asked to leave the property for the benefit of their children.

Wife inheritance is another cultural practice that was discussed during the dialogue process. There were mixed feelings about the practice with most of the women opposed to it while men and some older women supported it. The dialogue participants noted that when a woman is widowed young there is need for her to move on with her life. However, they said it was preferable for her to do so within the family as this would mean her children are well taken care of as well as the property her husband left behind.

<sup>15</sup> S68C of the Administration of Estates Act(Chapter 6:01).

<sup>16</sup> In the case of *Katiyo v Standard Chartered Zimbabwe Pension Fund* 1994(1) ZLR 225(H) it was held that the plaintiff was not regarded as a spouse in terms of the defendants Pension Fund Rules as she had failed to prove so by submitting a copy of a marriage certificate as proof that she was legally married to the deceased. ... an unregistered customary law union was held to be an invalid marriage and as such the plaintiff was not entitled to the annuity. The court however, stated obiter that it was the responsibility of the law maker to amend the law so as to protect widows in unregistered customary law unions.

If she was to remarry outside her husband's family, she would have to leave her children and the property she inherited behind. They further argued that wife inheritance was not such a bad practice as a woman is given the opportunity to choose a husband from among family members of her deceased husband and that there would be several dialogues before she would officially choose her husband. It was argued that the process is not carried out arbitrarily.

Those opposed to wife inheritance argued that women are being treated as part of the husband's property rather than an independent adult. They also noted that in this era of people dying as a result of HIV related illnesses it is not a good practice. Further it violates the woman's right to choose her spouse. It was argued that although the protagonists stated the woman had a choice, in practice the woman would be told that if she is opposed to the idea of remarrying within the family she would then lose her inheritance. Those opposed to the practice further argued that in cases where the woman has managed to keep her inheritance, relatives have scrutinized her every action and once it is evident that she is in a relationship with another man they throw her out.

It appears that wealth is tied to men and women can only have access and control to wealth through their relationship with men, be it as daughters or as wives. Once that relationship changes, through death, divorce or marriage women risk losing all property they would have inherited.

The case of *Magaya v Magaya*<sup>17</sup> raised the important question of whether a fundamental tension exists between anti-discrimination rights, particularly on the basis of gender and the right to cultural self-determination, including the application of customary law. In this case the Supreme Court unanimously upheld the customary law of primogeniture<sup>18</sup> and stated that women should not be able to inherit land "because of the consideration in the African society which, amongst other factors, was to the effect that women were not able to look after their original family (of birth) because of their commitment to the new family (through marriage)".

## Women and Leadership

The institution of traditional leadership is hereditary; leaders are selected using the customary laws of succession. Traditional leaders are selected by their families but have to be confirmed by the President through the Minister of Local Government. The patriarchal nature of customary law generally results in the exclusion of women from key traditional leadership positions. Zimbabwe has only five substantive female chiefs, three of them from Matabeleland and two from Mashonaland. These are Chief Sinqobile Mabhena of Umzingwane, Chief Ketso Mathe of Gwanda and Chief Nonhlanhla Sibanda of Insiza, all from Matabeleland South province. In Mashonaland region, there are two female chiefs, Charehwa and Chimukoko, of Mutoko and Mudzi respectively.<sup>19</sup> Although there are female chiefs, there is strong resistance from traditionalists who hold that women are not allowed by custom to preside over men in any circumstance. The dialogue was attended by several female village heads. The women however were not interviewed to get a clearer picture of how they came to be village heads. During discussions with the group, some of the male village heads were opposed to women taking up traditional leadership roles from their fathers or husbands. One village head called women (particularly wives of village heads) "ghost workers" because they either do not share the same clan bloodline or, in the case of daughters, they will get married and that means moving the leadership to another household that has no royal ties. A married woman cannot take up her father's chieftaincy because she is regarded as a member of another family (her husband's).

<sup>17</sup> 1999 (1) ZLR 100.

<sup>18</sup> This is a rule of inheritance which provides that the oldest male child has a right of succession to the estate of his parents at the exclusion of his siblings, male or female.

<sup>19</sup> <http://www.africangn.net/fs-38.htm>



## Challenges Encountered in Implementing Customary Law

There is a general lack of awareness of the differences between customary and general law amongst community members in Chiwundura. Ignorance concerning general law is also high amongst traditional leaders, who are supposed to be interpreting customary law. For instance, one village head mentioned that he felt undermined when his subjects appealed to a “judge” in the Magistrates’ Court. Another claimed that he granted a peace order (although he has no jurisdiction to grant such).

In implementing customary law, both traditional leaders and community members face various challenges. Village heads should act only as mediators. In practice however they are often actually presiding over cases and giving judgments. In some cases community members ignore judgments passed by village heads because they have no legal force. There are also people who do not take customary law seriously because traditional leaders do not have effective enforcement mechanisms and also because their decisions can be challenged in Magistrates’ court. Chiefs are not happy with the fact that they have less power than Magistrates.

Under traditional customary law in Zimbabwe, a woman's legal status is that of a perpetual minor -they remain under the guardianship of male members of their families until they marry, upon which time this duty falls upon her husband. This renders women invisible in the legal system and severely limits their rights as citizens.

### Conflicts between General Law and Customary Law

Tensions between the application of customary law and general law continue to exist and tend to have serious impacts on a wide range of social institutions:

**Marriage:** There are conflicts that arise as a result of having a pluralistic marriage regime. Customary law marriages are potentially polygamous whilst civil marriages are strictly monogamous. Another notable conflict is the fact that marriage arrangements under customary law involve third parties who can sue or be sued whilst civil marriages only involve the two parties.

**Custody and guardianship of children:** General law usually awards custody of minor children to the mother and also looks to the best interests of the child. On the other hand customary law views children as belonging to the father unless they are being breastfed in which case they should then remain in the custody of the mother.

**Domestic Violence Act:** The issue of marital rape is proving to be contentious with traditional leaders as the concept is absent from customary law. When a woman agrees to marry a man under customary law it is implied that she has consented to sexual intercourse for the duration of the marriage.

**Criminal Law:** Certain aspects of customary law are viewed by general law as criminal activities. It is a general practice that when a woman dies and her husband has not finished paying lobola her relatives can refuse to bury her until the bride price is paid. Under general law however this is considered as extortion which is a criminal offence.<sup>20</sup>

<sup>20</sup>S134(1) Criminal Law (Codification and Reform) Act [Chapter 9:23].

## Strengths of Customary Law

### **Restorative Justice**

Customary law unlike general law is not adversarial in nature. Customary law focuses on building and/or restoring relationships and finding common ground. Customary law also focuses on reparation as opposed to punishment (restorative justice as opposed to punitive justice).

### **Relevance**

The law as applied by customary law courts takes into consideration the nature of the family set up including the extended family. It also takes into account that in some cases a matter would have already been addressed at family level which would therefore require family members to also attend court. Customary law is inclusive and focused on the whole family. In Chiwundura in divorce cases for example the Chief can summon both families to discuss the issue. General Law on the other hand is only concerned with the two parties that are divorcing.

### **Simplicity**

Customary courts do not have complicated procedures. The language used in customary tribunals tends to be that of the parties involved. This contrasts with the formal judiciary where the language of proceedings tends to be technical English which is hard to understand for the majority of the people in Zimbabwe even where translation into the indigenous language has been done. Procedures used in customary tribunals tend to be simple, clear and familiar, unlike the formal judiciary where procedures tend to be complex and require the assistance of a legal practitioner.

### **Cost and Accessibility**

Customary courts are cheap and are more accessible in terms of geography. Litigants do not have to travel a great distance to access them. Most of the structures of the formal judiciary tend to be in major district centres and the judiciary is not represented at the village level. Furthermore, customary law courts do not have the backlogs that formal courts do and matters are generally dealt with expeditiously.

## Limitations of Customary Law

### **Inconsistent Procedure**

Presiding officers have no formal legal training. Also, customary law is not written down and therefore difficult to interpret objectively/predictably. There appears to be poor recording of proceedings particularly of the justifications for the decision. As justifications for decisions are not recorded, it is difficult to monitor the basis for the decision.

### **Discrimination**

A number of limitations inherent in customary justice systems stack the system against youths, women, the poor, ethnic minorities and groups who are discriminated against in the traditional setting. In certain circumstances, for example conflict over payment of *lobola*, women are not permitted to approach traditional courts themselves, but must do so through a male relative. This has changed in some communities, particularly as some households are now headed by women.



Figure 1

## Comparison of Courts applying General Law and those applying Customary Law

Aspect	General Law	Customary Law
<b>Law applied</b>	<p>Roman Dutch common law and statutory law is applied. It is usually written.</p> <p>Law applied is inherently discriminatory towards vulnerable groups like women, youths and minorities.</p> <p>General law is governed by rules and regulations that the judiciary cannot change but can only interpret.</p>	<p>African customs and norms are applied. The law is not written however the application of customary is to some extent provided for by statutory provisions.</p> <p>Law applied is governed by the principle of the law i.e. equality before the law.</p> <p>Customary law is flexible and can be adjusted to suit the prevailing circumstances.</p>
<b>Officers of court</b>	The presiding officers have professional training and are members of the civil service.	Officers of the court do not have any formal training and are not employees of the government.
<b>Accessibility</b>	Geographically general law courts are located at major district centres. In the case of the High Court there are only two in Harare and Bulawayo that conduct circuit court for criminal cases in other cities.	Courts are located within the community and are accessible to community members.
<b>Procedure</b>	<p>The approach used in litigation is adversarial. This means that the parties are pitted against each other. Determination of the truth is dependent on the tenacity of the parties.</p> <p>The court has complex procedures; an action is usually commenced by summons. Legal representation is usually required.</p> <p>It is a court of record, reasons for judgments are recorded.</p>	<p>The procedure is inquisitorial in nature. The Chief or Headman questions the parties in the quest for the truth.</p> <p>The procedure is simple and one does not require legal representation.</p> <p>The justifications for decisions are not recorded. When appealing the decision to a higher court it is heard as a new matter.</p>
<b>Justice system</b>	The court is focused on punishing the offender so that he is deterred from committing a similar offence. In cases where a fine is paid it is remitted to the state.	Focuses on restoring the parties to the position they were before the cause of action arose. Fines paid are usually used to compensate the victim.

## Conclusion

There is need for more data to be gathered before concrete and specific conclusions can be reached on conflicts that arise in the application of customary law and general law in Zimbabwe. However certain themes are evident from the data that came out of the CCMT intervention in Chiwundura on this topic.

Zimbabwe's dual legal system means that disputes- particularly those in the domestic sphere- may have different outcomes depending on whether general law or customary law is applied. The conflicts between customary law and general law reflect cultural differences that have not been reconciled.

Customs and traditions are important to both men and women. What women in Chiwundura want is the evolution of customary law to match the contemporary situation. However in doing this care should be taken not to sacrifice the advantages of customary law courts in an effort to reduce its limitations.

Customary Law courts are accessible and familiar to the local community. The remedies they offer are often restorative and they encourage mediation and reconciliation as opposed to the largely adversarial approach of the general law system. Customary law has several limitations that need to be addressed in order for it to provide equitable access to justice for women and other vulnerable groups.

The government of Zimbabwe has given legal recognition to registered marriages without providing the infrastructure to make registration of marriages possible for every couple. As a result legal treatment of marriage in Zimbabwe does not reflect the realities of people living in rural communities. The majority of people living in Chiwundura have not registered their marriage and laws regarding marriage do not protect them.

## Recommendations

### **Standardisation of Customary Law**

During the intervention many of the participants mentioned that there was need to codify customary law so that there are set standards and the basis for decisions becomes transparent. Whilst this is a noble idea it might lead to customary law losing one of its strongest attributes, which is its flexibility. A more realistic option could be coming up with a handbook on customary law and processes to be used by traditional leaders. A handbook would permit greater flexibility in the application of customary law whereas codification would create a set of legally binding standards through statutes. A handbook of customary laws and usages would provide a basis for increasing the pool of knowledge about these laws, and thereby provide a more informed basis from which codification of the existing customary law could begin.



### **Harmonisation of the Laws** <sup>21</sup>

There is need to come up with common standards to govern aspects of family law, particularly marriage laws. Such harmonisation of the laws would improve consistency in the operation of customary law and general law. Notable judges have supported the view that there is need to harmonise the two parallel legal systems in Zimbabwe. Makarau J (as she then was) noted that,

*“The relationship between customary law and general law is an issue that has dogged this court before, and in the absence of intervention by Parliament expressly harmonising the two legal systems, injustice may only be avoided by innovation and creativity on the part of judges...”* <sup>22</sup>

Legislators should take an active role in enacting laws to harmonise the two legal systems. There has been great progress in harmonising inheritance and succession laws whereas marriage laws are still lagging behind and this is causing serious injustice to women.

### **Capacity Building for Presiding Officers in Customary Law Courts**

There is need for capacity-building for traditional leaders enable them to cope with their roles as judicial officers. Trainings should provide support to traditional authorities to increase their understanding of human rights and women's justice issues.

### **Encourage Engagement between Customary Law Courts and Higher Courts**

There is also need to encourage engagement between the courts of the higher judicial levels (from the Magistrates upwards) and the local courts. This could include exchanges of information on substantive and procedural issues. During the dialogue process Chief Gambiza highlighted that the Magistrates' Court had provided traditional leaders with maintenance guidelines to be used when adjudicating maintenance cases.

<sup>21</sup> Unification focuses upon substituting or combining two or more legal systems and replacing them with a single system. Harmonisation on the other hand seeks to co-ordinate different legal systems by "eliminating major differences and creating minimum requirements or standards" [http://en.wikipedia.org/wiki/Harmonisation\\_of\\_law](http://en.wikipedia.org/wiki/Harmonisation_of_law)

<sup>22</sup> *Kusema v Shamwa* HH-46-03 pg 3.

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