

# RWANDA

## FAMILY LAW IN RWANDA

*Charles Ntampaka`*

### I INTRODUCTION

The Rwanda Family Code was adopted in 1988. By it, the Legislature sought to put an end to the legal dualism which had characterised the period of Belgian control, and to apply a unified system. In it, the roles of the various sources of law are defined, as is their status in the hierarchy of norms. So under article 98 of the Constitution:

"customary law remains in force only to the extent that it has not been superseded by legislation and that it contains nothing that is contrary to the Constitution, to legislation, to regulations, to public order or to public decency."

Nonetheless, people continue to follow some of the now abrogated customary rules, so creating a division between codified law and what happens in practice. Written law does not cover the whole field. Legislation governs the law of persons and of the family, whereas custom still applies to matrimonial property and succession. The Civil Code, article 3, determines the rule the courts must apply:

"In the absence of an applicable legislative provision, the judge decides on the basis of customary law and in the absence of a custom, on the basis of the rules he would make if called on to legislate. He takes inspiration from the solutions set out in doctrinal writing and the decisions of the courts."

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Researcher at Instelling University, Antwerp, visiting lecturer at the Université Catholique de Louvain and the Katholieke Universiteit Leuven. Translated by Peter Schofield.

A. Bainham (ed.), *The International Survey of Family Law 1995*, 415-433.

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So family law in Rwanda is drawn from both legislative and customary sources. After an overview of the traditional law, we shall turn to the essential elements taken from western systems into the establishment of family relationships, and the way customary law has resisted these. The paper will then review the gaps and the unconstitutional provisions which make it difficult to apply the Code.

## II THE FAMILY IN TRADITIONAL LAW

### A Concepts

Traditional law regards the family as the subject of law. The individual has rights only in terms of the responsibility he exercises in the interest of the group. The family is a group linked by blood relationship, consisting of people who share a more or less distant eponymous common ancestor, though there is no precise degree at which one stops. Traditionally the family is exclusively patrilineal, with the exception of outsiders integrated into it; it does not include wives of the male members,<sup>1</sup> nor descendants of female ones. A group of households related by blood and possessing a common patrimony (land, cattle and grazing rights) constitutes an "*inzu*" or minor lineage. This is a group extending across from three to six generations, related through males; several such groups form a major lineage, called "*umuryango*", having a chief, common property, and an agreed procedure to deal with conflicts between the members. Traditional law also recognises an approximation to the nuclear family, the household, or "*urugo*", consisting of a man and his wives and children, along with all others for whom he is responsible. Legal recognition of polygamy enables a man to belong to several households at the same time.

The Civil Code introduces and establishes the nuclear family of a man, a woman and their children. It is the only form of family protected by law. The Constitution, Article 24, provides that "*the family, the natural foundation of the Rwandan family, is protected by the State. It is the right and duty of parents to bring up their children.*" By placing this article alongside the other laws, one can understand that the family referred to is exclusively the domestic

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1 A. Kagame, *Les organisations socio familiales dans le Rwanda ancien*, Musée royal d'Afrique centrale, Tervuren, (1954), at 72; T. Maquet, *Les relations socio familiales de l'ancien Rwanda*, Musée royal d'Afrique centrale, Tervuren, (1954), at 62.

2 D. Nothomb, *Un humanisme africain*, ed. Lumen vitae, (1969) at 151.

household. In practice, the people maintain the relationships of the lineage family, and these are often as powerful as those of the domestic household family. Thus marriages are still arranged by the lineage, and in its name; reciprocal duties of members of the lineage to each other are still strong.

### III THE ORGANIZATION OF THE FAMILY

#### **A** *Interpersonal relationships*

There are two types of relations between family members, vertical ones and horizontal ones. Vertical relations are ones of subordination and reverential fear. Each generation is subject to those above it by seniority. This enables the older generations to take responsibility for the activities of the younger ones which might impose liability on the family group, disturb its cohesion or damage its interests. Horizontal relations bind members of the same generation. They are generally those of equals. The oldest male takes on the responsibility of the elder in the group. He is seen as the closest to the ancestors, and holds paternal authority.<sup>3</sup>

#### **B** *Functions within the family*

The lineage was self-sufficient and its activities were organized so as to ensure its proper functioning. Functions essential to group survival were carried out within the group.

##### **1** *The function of education*

The child belongs to the family. This last collectively provides for the child's education to ensure his harmonious integration into the activities of the group. Although the genetic parents have primary responsibility for his education, paternal uncles, referred to as "the other fathers" also have a responsibility for his acts. They all have the duty to discipline the child until majority is reached, and they are jointly responsible for his acts.

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3 For details see G. Kouassigan, *Famille, droit et changement social en Afrique noire francophone*. Travaux des VIIIe journées d'études juridiques Jean Dabia, Bruylant, Brussels, (1978) at 171 ff.

## **2     *The judicial function***

The head of the family exercises within it the functions of its judge and advocate. He is to settle internal disputes and to represent the family in disputes between its members and outsiders. He is assisted by a council of elders, which helps him to act. In general, all decisions are aimed at conciliation and not at the humiliation of any party. No distinction is drawn between penal and civil matters. Any conflict puts group unity in issue and so must be resolved if cohesion is to be restored. The legal rule must sometimes bend to the exigencies of conciliation. Decisions can be severe, in particular that of exclusion from the group and being disinherited for repeated, serious misbehaviour. This penalty resembles that of civil death found in ancient western systems. The person loses his rights and can take no responsibility within the family.

## **3     *The administrative function***

Within the family are activities, assets and persons that need to be organised. The head of the family sees to it that assets are fairly shared and properly used. He determines the disposal of assets and integration of outsiders into the group. He arranges marriages and gets together the assets required to meet the marriage payment or the trousseau for the marriage. In general, even in the case of a civil marriage, the family is involved in giving its consent.

## **4     *The economic function***

Property is collectively owned and its exploitation is a matter for the family. Each household has to produce enough for its own needs and to contribute to group expenditure. Each household must have land to farm in every season, land on which to build a dwelling house, and access to common land, in particular woodland and grazing land. Access to the right of enjoyment of a particular family asset is gained by way of inheritance. Division is made within the family according to the wishes of the deceased, not necessarily with a view to equality as between heirs. Daughters acquire no rights to immovable property.

## **5     *The religious function***

Although not organised publicly, the cult of ancestral spirits subsists in some families. It is arranged, to ward off possible misfortune, by the family elder. The patriarch is the only one capable of passing on the desires of the other members, because he is closest to the ancestors, and gets the most favourable hearing. He is the representative of the chain of holders of paternal authority passed on from father to son across the generations. Occasionally things are

done outside this system, but this is generally frowned upon and is thought likely to bring on untoward consequences for other group members.

### III IMPORTATIONS FROM WESTERN-TYPE SYSTEMS

It is now realised that one does not change individual behaviour completely by legislation, and that individuals will continue to live as if the law did not exist. Thus there is a sort of passive resistance to the intended changes. The family exists in everyday life and goes on imposing its rules, particularly in matters of property, but the effects of legislation are still significant. Among the most important of these are recognition of the individual as a subject of the law, viewing marriage primarily as a conjugal union, rather than as an interfamily alliance, and the recognition of bilateral kinship - in the maternal as well as the paternal line.

#### **A     *The individual as a subject of law***

The Rwandan Constitution regards the individual human being as a possessor of rights and duties. First, article 12 provides that human life is sacred and that the law guarantees the inviolability of the individual. Thus none may infringe individual freedom except in cases provided by law. Every citizen enjoys equal protection of the law, except that minors and persons who are of full age, but under legal incapacity, while they do have rights, are restricted as to their ability to enforce them. As well as protecting the physical integrity of a person, the law also protects his identity. The registers of civil status enable one to discover the name, the domicile and the nationality of every person registered.

#### **1 Nationality'**

The basic principles of Rwandan nationality law' can be summed up as follows: the law distinguishes nationality of origin from acquired nationality, the *jus sanguinis* takes precedence over the *jus soli*, the fundamental law allows dual

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4     For detail see Charles Ntampaka, "La nationalité rwandaise", *Répertoire notarial du droit français*, 11.1983, v° Rwanda.

5     Law of September 28, 1963 codifying Rwandan nationality law, J.O. 1963, at 427. Arusha peace agreement.

nationality', however the prohibition against dual nationality set out in the nationality code is still unamended (article 19). The code also permits acquisition of Rwandan nationality by someone not born Rwandan. This can be by marriage, by adoption, by naturalisation, by choice, by apparent status or as a result of a territorial change. Naturalisation is practically impossible as a result of the steps to be taken, notably the obligation to perform some exceptional service to Rwanda and to speak the national language, *Kinyarwanda*. To date, only one person has taken Rwandan citizenship by naturalisation.' As regards nationality by apparent status, a collective measure was adopted in favour of all foreigners established in Rwanda since 1948. Such persons are Rwandan provided they renounce their nationality of origin.<sup>A</sup>

## **2 Name**

The system adopted in the civil code is not one that uses a family name. Traditional law is maintained, giving the father the right to choose a name for each of his children. Such a name is often evocative. It has a sense and meaning: gratitude to the Almighty; a profession of faith; strength; satisfaction; a project to achieve; confidence; submission... The civil code forbids the giving of a name which infringes public decency, but stops short of determining any sanctions or identifying the persons entitled to prohibit the given name. Persons may bear the same name without being related, which must give rise to problems in relation to the registration of civil status. Persons bearing the same name, may have a different forename, but this too may be the same.

## **3 Domicile and residence**

Whereas the colonial Civil Code defined domicile as the place where a person had his main establishment, the Civil Code now in force treats domicile as being the place where a person has his permanent links, where he can be found at any time, directly or through an intermediary, where he registered in the population registers. In Rwanda, domicile tends to mean the administrative territorial

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- 6 Fundamental Law of the Republic of Rwanda of May 26, 1995. Peace Accord of Arusha between the Republic of Rwanda and the Rwanda Patriotic Front. Protocol of accord on repatriation of Rwandan refugees and the return of displaced persons of June 9, 1993, article 7 "*The principle of dual nationality is accepted. The Rwandan, nationality law will be revised to that effect.* "
- 7 This concerns a Belgian religious person naturalised under the law of January 30, 1975.
- 8 D.-L. n° 28/81 of November 13, 1981, *J.O.*, 1981, at 1167.

unit in which one is listed in the census. One can have only one domicile in this sense, but, for the purpose of certain acts, anyone may choose his domicile. The Code provides for neither domicile of function nor domicile of attachment. Under the Civil Code the married woman takes her husband's legal domicile, unless they have been judicially separated, or the husband is declared absent or is put under judicial guardianship (*conseil judiciaire*). This infringes the principle of equality between spouses.

A person's residence is the place in which he habitually lives. When the domicile is not known, residence takes its place.

## **B Marriage as a conjugal union**

While traditional law marriage is an alliance between two families to found a new productive and reproductive unit, the view taken of it in the written law is that a man and a woman undertake to live in partnership and assume reciprocal duties. Although the traditional law alliance did not preclude the possibility for the husband of other unions, in written law monogamous marriage is the rule.

### **1 The recognition of civil marriage**

Under article 169 of the Civil Code, monogamous, civil marriage is the only form legally recognised. All others are excluded, in particular religious and customary marriage, although these were for a time valid.<sup>9</sup> The wedding ceremony raises a number of problems; first the people regard civil marriage as a simple administrative formality and the customary ceremony that preceded it as being the real marriage; next the lack of an organised register of births makes it impossible to determine the precise ages of the parties; finally, for want of an administrative service adequately and competently staffed, the records drawn up are often defective or badly filled in.

To give an example of the problems that result from ignorance of the law on the part of those charged with its application: a marriage had been celebrated on August 20, 1992, before the officer of the Mushubati Commune. The spouses

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9 Down to independence in 1962 traditional law applied to the natives in all private relationships' and the celebration of marriage took place within the family. Registering only had to do with the matrimonial title (see section III.C4.1 below). The Constitution of November 24, 1962 recognised religious marriages on the same terms as civil marriages. That of November 20, 1978 only allowed civil marriage.

identity documents did not disclose the relationship between them. On April 13, 1993, on the application of the family of the bride, the registration officer of that Commune decided to annul the marriage." The law is clear on this point: it is only the courts that have competence to annul marriages.

The Civil Code adopts the basic conditions found in other civil codes: the minimum age fixed at 21 years for both of the spouses (article 171), the consent of both spouses (article 184), the difference in sex, the impediments of relationship, the waiting period on widowhood. Article 279 deserves a mention, as it forbids marriage between an adulterous spouse and the adulterer where divorce was granted on that ground. These facts are practically impossible to verify, given that the officer of the register has, at the most, the stated grounds of the divorce judgment. This impediment is a mere prohibition and does not entail invalidity of the marriage. Finally we should note that the Civil Code is silent as to the marriage of certain categories of people. A person subject to interdict is in theory incapable of understanding, so cannot give a valid consent. The Civil Code says nothing about this. Others, such as deaf-mutes, cannot express their consent in the form provided in the law. The law does not provide for any other form.

## **2     *The prohibition of polygamy***

Unlike most African codes, the Legislature bans polygamy both in the Constitution and in the Civil Code. Article 25 of the Constitution provides that only monogamous marriage is legally recognised. Marriage is solemnised by being recorded in the civil status register. The Penal Code provides sanctions against bigamy (article 357, Penal Code). Article 175 forbids celebration of a marriage until a prior existing marriage has been annulled or dissolved. Dissolution can occur either on divorce or on death being judicially declared. In practice, polygyny continues, even if it is treated in law as concubinage. A customary marriage is simply added to an existing civil monogamous marriage and is invalid under the Code, but recognised in customary law. What is involved is, in civil law, an adulterous relationship, only punishable on a complaint by the wronged party, not bigamy."

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10     Decision n° 01/93 of April 13, 1993 cancelling civil marriage registration n° 212/92 of August 20, 1992, issued by the Burgomaster of the Mushubati Commune, communicated by letter n° 368/04.05/1 of June 23, 1993.

11     The general population census of 1978 showed that, of every 100 married persons, 15 were involved in a polygamous union. The situation has changed little, since 40% of Rwandan couples do not marry by civil law.

### **3     *The married woman's legal capacity***

Whereas under the colonial Civil Code a married woman had no legal capacity unless authorised by her husband (article 124), she has full legal capacity under the new Civil Code (article 212). She can open a bank account, appear in court in relation to the matrimonial property regime, witness a legal act (article 184) and use her own name in any administrative act in which she is involved (article 63).

### **4 *Divorce***

Traditional law marriage is indissoluble. Its function as a union between spouses is subordinated to its role as an alliance between lineages. The family proceeds first to try conciliation, only later considering a second union. It is the family that decides on permanent separation, on terms that are agreed so as not to jeopardise family relations.

The Civil Code lays down the grounds for divorce: fault on the part of either spouse, mutual consent, three years *de facto* separation, or desertion for twelve months. These are the only grounds on which the court can pronounce a divorce. In a case of *de facto* separation, the court weighs up the grounds put forward and confirms that the parties' life in common has ended. Spouses apply and produce proof to back up their application. Divorce has thus become their private concern, to be evaluated by the court without reference to the effects on interfamily alliances.

One interesting and original feature in the Code is that, on divorce by mutual consent, the parties must hand over half of their assets to their children. The reasons for this rule are not explained in the reports of the preparatory stages of the enactment of the law.

### **5     *The arrangements for children***

By custom, children belong to the family which provided the matrimonial title<sup>12</sup> - that is to the husband's family. On divorce, the wife could only retain very young children, and had to deliver them to their father once weaned. Under the Code, custody is supposed to go to the innocent spouse, or, in the interests of the children, to the spouse who can best ensure their education (article 283, Civil Code). However, the provision is rarely applied in Rwanda. The question of child custody is not always argued in court; it goes automatically to the

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<sup>12</sup> (Translator's note) See section III.C4.1 below.

father. Children are still not accepted in their maternal family. They can claim no rights in that family.

### **C Equality between parents and between children**

#### **1 Equality between father and mother**

Traditionally, filiation is patrilineal. Children belong to their father's family, and all their rights are there. In particular they have succession rights, rights to the father's clan and *ethnie*<sup>13</sup> name, but in return they are subject to the obligations which accompany that membership, especially joint civil and criminal responsibility, religious duties they must undertake, the risks involved where revenge is pursued against the family. The maternal family takes no responsibility for children who have been recognised by their father. The Code now in force establishes equality between the parents. Both have the same rights and duties, even if some distinctions are made to avoid a clash with tradition. The child owes respect to both father and mother (article 343, Civil Code). He is subject to the authority of both father and mother (article 345, Civil Code).

#### **2 Equality as between children**

##### **i The principle of equality**

The Code distinguishes between legitimate children and natural children; but all have the same rights and duties in relation to their parents (article 326, Civil Code).

Legitimacy is the status of a child born or conceived in wedlock and not repudiated by his father. Legal pluralism under the Belgian colonial period allowed other categories of legitimate children to exist outside civil marriage. These included children of monogamous or polygamous customary unions formed before November 24, 1962 (when legal pluralism came to an end); natural children recognised and legitimated under customary law before that date; children born in religious marriages celebrated in the period when such marriages were legally recognised (November 24, 1962 to December 20, 1978).<sup>4</sup>

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13 (Translator's note) See section III.C.4.2 below.

14 The Constitution of November 24, 1962 recognised religious marriages as valid; they only lost this status under the Constitution of December 20, 1978, under which only civil monogamous marriages are legally recognised.

Regarding filiation on the maternal side, the preamble shows the line to be followed: "every child must have a father, a person, a family to undertake his education." The Code distinguishes between maternal and paternal filiation. Each may arise by voluntary act or by a court judgment at the suit of the child or his representative. Recognition on the part of any person wishing to establish the relationship takes place before a registration officer. It is not necessary for the child or the mother to consent in order to make paternal recognition valid.

## ii The limits of equality

The Code does not specify what proof is needed of natural filiation. Thus, unlike the former Code, it does not allow the birth registration to be sufficient proof of maternal filiation. Whereas the mother's name on the register and de facto family life were enough proof of legitimate filiation, a natural child must bring an action to establish maternity and obtain a judgment declaring him to be the child of the woman claimed to be the mother." Should recognition take place while the parent is married consent by the other spouse is required, unless the matrimonial regime is separation of assets. This provision affects all natural children, regardless of when conceived, if recognition occurs during a marriage. In contrast, there is no such condition imposed on an action to decide paternity. Children who have been recognised can be legitimated by a marriage between their parents. However, in case of adulterine children, marriage between adulterers is forbidden (article 279, *Civil Code*). The law gives recognised children identical rights to those of legitimate children in relation to their parents, and there is no need for the additional process of legitimation.

The status of natural children who have been recognised is precarious, as any interested party can challenge it in an action to contest status. In addition, their assimilation to the status of legitimacy only takes effect from the day of the marriage for children then already recognised, and for those specifically recognised in the registration of the marriage itself. But if filiation is later declared judicially, or if it results from voluntary recognition, it is effective only from the date of its registration. There is no specific legislative provision for opposing a second recognition of a legitimated child. But if the author of the second recognition does not contest the first, it is the first that has all the legal effects, the second is just as valid, but has no effect.

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15 Ch.Ntampaka, *Les personnes et la famille, U.N.R.*, Collection Manuels de droit rwandais, Palloti Press, Kigali, (1993) at 161.

### **3      *Filiation by adoption***

Adoption is regulated by the Civil Code. Article 333 fixes the minimum age to adopt at 35 years. There must be at least a 15 year difference in age between the adopter and the person adopted. The adopter must, as for any legal act, have capacity - that is to say enjoy full rights. The position of persons under interdict is not provided for. A similar question could be raised in relation to persons deprived of their parental rights: in principle they are incapable of taking on such responsibilities. Only one person or a married couple may adopt. While in theory the child's personal consent is required, during his or her minority this can be given by a birth parent, or by the child's tutor if the birth parents are dead or no longer in a position to exercise parental authority. An adult to be adopted must obtain consent of his or her spouse, unless the latter is under interdict, judicially separated or absent.

Adoption takes place by execution of a formal legal document before the officer of the register of civil status, and is effective from the date of it. In the absence of the father and mother the consent of the tutor is subjected to the approval of the court, which does not have to give reasons for its decision. It is only necessary to declare the decision to have been approved or overruled (article 341, Civil Code). Although adoption establishes a new family relationship between the adopters and the adopted person, the latter does not become a full member of the adoptive family; his rights in his family of origin are preserved (article 336, Civil Code). This enables him to claim succession rights, but it places him under support obligations also, both in his family of origin and in his adoptive family.

### **4      *The effects of filiation***

The Civil Code gives filiation the same effects as it has in other civil codes: recognising the parental authority of the father and mother, creating family relationships and impediments to marriage, conferring the father's or mother's nationality and raising maintenance obligations between the child and other legally defined parties. Two references to traditional law may be relevant: the right to an establishment and the attribution of the father's ethnique.

#### **i      *The right to an establishment***

In traditional law, the right to an establishment is the culmination of the education of every child. Every child, on marriage, receives from his parents a matrimonial title: a piece of land on which to build a dwellinghouse, another for the young couple to farm. He receives cattle and food for consumption. The whole family joins in. The assets received are taken into account at the time

of succession, but may be reduced if what is received is greater than what the father could have given in his will.

**ii Belonging to an ethnic (ethnic group)**

This question is not dealt with in the Civil Code; it is part of traditional law. But the compulsory reference to the ethnies in marriage registration (article 137 para 1, Civil Code) and in birth registration (article 118, Civil Code) compels the officer of the register to have it declared according to custom (article 3, Civil Code).

According to traditional law, it is only the legal father of the child who decides the child's ethnies. Only a child born legitimate, or legitimated subsequently, takes the ethnies of his father. A child recognised by his mother takes the ethnies of his maternal grandfather. The matter is perfectly regulated by traditional law; the confusions and errors found in it now arise from the interest taken by the administration in assigning the child to an ethnies, notably from confusion of legally established filiation to a particular father with the fact that by general repute in the community a man is taken to be the father, though he has not legally recognised the child.

**IV TRADITIONAL RESISTANCE TO IMPORTED LAW**

To understand the provisions taken over from traditional law, one must take account of the differences between the two notions of law and of the reasons which cause the population to keep up customs which may even be unconstitutional.

**A Another concept of law**

Unlike western laws, traditional law is not always kept distinct from religion, morality and other forms of social control. The traditional law norm originates in popular beliefs, in the philosophy of life, in relationships between the living and the dead, and in relations between the living. Traditional law fixes the rights of each individual in terms of his responsibilities in the group. These rights are not firmly established, and they are at times obscured by the need to maintain group cohesion. The legal rule must often give way to the imperatives of social security.

Rwandans fear the law. To drag a person before a court is a grave insult towards him, for it means a refusal of the principle of conciliation. Litigation perpetuates rancour instead of promoting harmony between the individual and his group. Hence the written law is not seen as a just, an ideal form of justice, as it aims at protecting individual rights without taking account of group rights. . It is not easy to reconcile such a conception of law with laws of the western type, laws in which individual rights take precedence over family rights. The two cannot be reconciled, simply by replacing one system with another; this must be achieved by a synthesis of the two systems, which has yet to be reached.

## **B Concessions made to traditional law**

### **I The regulation of betrothal**

The husband and his family make the approach (articles 161 and 162, Civil Code). Betrothal is celebrated according to custom.<sup>16</sup> The family fixes the date of the wedding, which must be within twelve months from that of the betrothal (article 164, Civil Code). No sanction is provided should this limit be exceeded. This parental involvement is not only out-of-date in practice, but also casts doubt on the freedom to marry, most of all if the couple have attained majority.

### **2 The dowry, *inkwano***

In traditional law the dowry, *inkwano*, is an essential condition of validity of a marriage and of the legitimacy of children born of the union. It is referred to in the Civil Code as a condition of the celebration of the marriage and not as one of its validity. Criticism of the *inkwano* has not led to its abolition although it serves to perpetuate the power of the husband and the inequalities within the family. In fact the people still insist on *inkwano* in all marriages. The officer of the register must refer to the *inkwano* in the record of the marriage: it must not exceed fifteen thousand Rwandan francs but this limit is always exceeded, even if the declaration before the registration officer refers to it.

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16 Ministerial Order n° 098/05 of March 25, 1992, fixing the arrangements for betrothal ceremonies, J.O. 1992, at 489, article 1.

### **3 Parental consent to the marriage**

Article 184 of the Civil Code requires the parents or their representatives to be present at the marriage, even if the parties are of full age. Their consent is given in front of the registration officer on the day of the wedding, and it is written in the official record of the marriage. This consent, like that to the betrothal, raises the problem of the freedom to marry, because the Legislature does not say whether the registration officer can dispense with it and marry consenting adults without their parents' consent.

### **4 Limits to equality between spouses**

Although in theory they are equal, several provisions of the law perpetuate the inequality of the spouses.

Article 83 of the Civil Code fixes the wife's domicile as that of her husband. After the marriage the wife must be registered in her husband's commune, because domicile is defined as the place where a person is enrolled in the population registers.

The Penal Code imposes different penalties on adultery by a man and by a woman (Penal Code article 354).

Article 325 obliges the spouse who has a natural child to obtain the other spouse's consent before recognising the child. However, the law lets the natural child bring his own action to discover paternity and to argue the case without the husband or the wife being heard.

Parents exercise their authority jointly over their children, but if they disagree the father prevails (article 345, Civil Code). Greater equality could have been achieved by giving primacy to the child's interests, rather than to the father's wishes. Further, the father alone is responsible for the administration of the minor child's assets (article 352, Civil Code).

The legal effects of marriage, including the marriage of foreigners, are subject to the personal law of the husband at the time of the ceremony (article 235, Civil Code). Rather than the proper law of the marriage, or that chosen by the spouses, the Legislature has chosen that of the husband (articles 324 and 212, Civil Code).

As to nationality, the foreign woman marrying a Rwandan becomes a Rwandan national automatically, unless she renounces this, or the Rwandan Government opposes it (article 7). A man marrying a Rwandan woman only obtains national status by means of a protracted naturalisation procedure. Nationality law prefers the father to the mother (article 3). She only passes on her nationality if he is unknown or is stateless. A woman who obtains

national status can only pass it on to her children if she is widowed (article 11.1°).

## **V GAPS IN THE CIVIL CODE**

### ***A An incomplete Civil Code The legislation***

only covers the law of family relations and of persons, and does not deal with property, succession or the matrimonial regimes. Traditional law applies, containing inequalities between the sexes that lack any justification.

Opinions vary as to the legal regime. Some judges hold, without any supporting argument, that in Rwanda the legal regime is that of community of assets. Others prefer that of separation of assets; yet others community of acquests. Difficulties arise especially in a rural milieu, where the household assets are principally land belonging to the husband's lineage. All the individual has is a right to the use of this, which cannot be transferred to a third party. Sharing with the spouse is impossible, since she is a third party in relation to her husband's family in customary law. This problem ought to be resolved by evaluating each spouse's contribution in assets and in work during the marriage. In an urban setting, the law regulates the shares attributed to each, and anyone can claim. Sharing between spouses is there possible; the criteria remain to be defined.

### ***B The precarious state of some children***

The Civil Code has not caught up with science. It keeps the principle *pater est quern justae nuptiae demonstrant*. The conditions for repudiating paternity remain as they were under the former Code. Nonetheless, scientific progress has brought into existence other classes of children who, if not protected, could be easily repudiated or who would have no filiation. These are children conceived in vitro or by artificial insemination. The Code should clarify this.

The distinction between legitimate and natural children brings in the divergence between the forms of proof applicable to each class. The former Code imposed the same mode of proof for maternal filiation (article 205). The new Code does not reproduce that article. The Legislature ought to define the form of proof acceptable for establishing natural filiation.

**C     *The binding effect of judgments on status***

The former Code had provided that the rules as to the binding effect of judgments applied to decisions on status. Are we to consider that this now applies in the same manner? Or are decisions on status effective *adversus omnes*?

**D     *A total failure to coordinate legislative texts***

The reform of the Civil Code ought to have included that of other legislative texts. For example, the Banking Code, imposing on the wife the obligation to obtain her husband's consent to open an account; social legislation, which assumes that a married woman with children has no dependants; the Code of Nationality which, if it lets a woman pass her nationality to her children at all, only does so by way of exception; the social security code which makes distinctions between natural children *inter se* and between them and legitimate children and tax law, which imposes a minimal contribution on the second wife of a polygamist. This lack of coordination is calculated to produce injustice and contradictory decisions in the Rwandan courts.

**VI UNCONSTITUTIONAL PROVISIONS**

**A     *The judge as law maker***

Article 3 of the Civil Code already mentioned allows the judge to establish as applicable the rule he would have made if he had to legislate. He follows doctrinal writing and judicial precedent. Comment is called for. First, a judge is not a legislator, his job is to declare the law as it has been passed and promulgated. He is not a law maker. What he should do is to declare that neither law nor custom apply to the case, before deciding according to the merits. In his decision, he should follow first the general principles of law and of judicial precedent, and thereafter doctrinal writings.

## **B Interference with privacy**

We have noted that article 164 gives the families of the engaged couple the right to fix the date of their marriage. The spouses are free to fix the date of their marriage for themselves, especially after they have attained the age of

### **21. C Inequality between spouses**

Article 206 gives the husband control of the conjugal community. He can also decide on where they live (article 83). Rwanda is obliged internationally and constitutionally to promote the equality of parties during marriage. Neither can legally be set up as head of the community unless the two have agreed. Article 325 requires a spouse who recognises a child born out of wedlock to obtain the other spouse's consent. It is the duty of the parent of a natural child to recognise him or her, without further intervention. No one can forbid another declaring him or herself father or mother of a child, even if it is open to that person to challenge the *status ex post facto*. One might have expected the introduction of consent by the child, or by the other natural parent before the child could be recognised, since they could have a legitimate interest in denying the paternity or maternity of a particular person. Article 345 recognises the right of the father and mother to exercise parental authority, but failing agreement the will of the father must prevail. The child's interests apart, nothing can justify the preference of the opinion of one of the parents against the other. Article 352 reinforces this inequality by entrusting the administration of the child's property to the father. By article 355, both parents are entitled to the fruits of the child's personal income. However, the child has a right of property which the law should protect, just as it protects the property rights of the parents.

## **VII CONCLUSION**

We see from this analysis that family law has come under the influence in many respects of Belgian law and of canon law and particularly in the requirement of monogamy. Difficulty in applying the rules adopted comes mainly from the conflict between imported law and traditional law. As Montesquieu has said

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"when customs and practices are to be changed, it must not be by legislation: that would be tyranny; better to change them by other customs and practices".

Legislation does not always translate into collective acceptance by the population, but is sometimes merely an expression of political will contained in a code that fails to be applied. It is true that some fields cannot be regulated by custom, but it is also true that in others custom is still very much alive. In seeking to reconcile the sources of law, one could "borrow from the past the basic framework of African legal thought and adapt its contents to modern techniques of social and economic development".<sup>18</sup>

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17 Montesquieu, *l'esprit des lois*, XIX, CH. XVI.

18 E. Leroy , "Droit et developpement en Afrique noire francophonie , apres dix annees d'indpendence politique ." *Revue senegalaise de droits* , (1971)at 66-67