THE LEGAL STATUS OF AFRICAN WOMEN IN ZIMBABWE-RHODESIA

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CONTENTS

SUMMARY

This thesis arose out of a request by the Bishop of Mashonaland to investigate and report on the legal status of African women in Zimbabwe-Rhodesia. Superficially, such a task appeared to demand no more than a statement of customary law but it soon became apparent that far more than this was required if a full statement were to be given of the private law rights and duties of African women. In Zimbabwe-Rhodesia, Africans may be subject either to the common law or customary law and, accordingly, may bear rights and duties arising out of either system. One of the principal areas of difficulty lay in determining when one or other system of law applied. Even customary law itself can no longer be regarded as a separate and discrete system. In the courts of district commissioners, the common law has had a profound influence on customary law and has succeeded in producing a new system of law which is a synthesis of customary and common law principles.

This legal plurality is matched by a triadic court structure in Zimbabwe-Rhodesia. Depending on the court in which a case is heard, a different system of law may be applied. While the tribal courts apply a system of law based on traditional rules, responsive to the needs of each, particular tribal community, the commissioners' courts will apply a system of customary law strongly influenced by the common law. Magistrates' courts and the High Court, of course, will apply only the common law.

Although the law applied in the district commissioners' courts is readily ascertainable, information regarding the law applicable in tribal courts is generally insufficient. The most comprehensive statement of Shona law was undertaken by Holleman in the 1950's. This work relates only to the Hera and Mbire tribes. Child's work, although more recent, is a more limited compilation of legislation, court reports and his own observations of tribal law. Bourdillon's ethnography of the Shona peoples is concerned only peripherally with customary law. The first task was, accordingly, to obtain further information on certain aspects of customary law which might have changed since previous writers did their research or which might not have been specifically addressed. A full statement of this project (referred

to in the text as the "Research Project"), the findings and the observations will be found in Appendix E to this thesis. What did emerge, in broad terms, was that while the tribal courts are aware of the problems presented by changes in the social position of women, their response was, by and large, conservative and hesitant. The district commissioners' courts have shown a far more lively interest in the challenge posed by social change. In many areas, they have attempted to modify and update the traditional rules of customary law. Yet, in this forum, there is a lack of direction in the overall development of the law. The full implications of legal change do not always appear to have been considered and the courts have not adhered to a consistent policy.

Nor should the courts bear full blame for the uncertainty which shrouds the law. District commissioners have been placed in a singular position whereby they are expected to create new law and reform customary law as the occasion warrants[1]. This task is, more properly (at least in terms of the English conception of the judge's role), left to the legislature. Even in this regard, however, one is struck by the conflicts which arise between the provisions of various statutes applying either directly or indirectly to African women. It is apparent that the legislature has never, formally, applied its mind to the question of the African woman's status.

African women (a sizeable proportion of the Zimbabwe-Rhodesian population) are subject to a traditional system of law which is ill-suited to their present way of life. Traditional customary law is a reflection of needs posed by the small-scale, peasant society which was a feature of central and southern Africa in the nineteenth and earlier part of the twentieth century. This legal system was concerned with maintaining the integrity and well-being of the family and paid scant regard to the individual. An aspect of the traditional social structure was the special position afforded men, as persons of authority within the family; women did not enjoy the same privileges. The phenomenon of urbanisation (just one of the radical social changes to have swept Africa this century) has resulted in an erosion of the extended family and the emancipation of the individual.

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1 Chapter 3

If we are to accept, as a fundamental value, the individual's right to enjoy the culture of his own choosing, we should be prepared to allow him a personal legal regime to match his life style. Yet African women, although they frequently participate in the Western European economy and live according to a similar life style, remain, in certain vital respects, subject to the traditional system of customary law. This type of thinking does not suggest that the individual may or should be permitted to determine each rule of law according to his or her own wishes. Obviously, the ultimate result of such an approach would be anarchic and, indeed, contrary to the very basis of a national legal system for, implicit in the very notion of "legal" rules, is the idea that individuals be bound to act in a certain manner regardless of their own wishes. This should not, however, obscure the rationale of this thesis. Here it is proposed that the broadly conceived cultural preference of individuals should be taken into account in deciding which system of law should govern their behaviour.

What is sought is a means of matching a system of law most suited to the individual's cultural predilections. If the present, overall legal order of Zimbabwe-Rhodesia is accepted as the framework within which changes must be effected, there are five, principal methods of achieving legal reform. Each of these methods serves to exclude customary law in favour of the common law where this appears to be appropriate in terms of the individual's cultural preference. The problem posed is to find the most efficacious method of realising this aim.

1 DEFINITION OF THE TERM "STATUS"

Legal science is concerned with the behaviour of men as social beings. Social behaviour implies that the actions of men are patterned in a certain way; yet, if we are to conceive of a pattern as something which is standardised, regular and recurrent, we must recognise that it is independent of the individual's actions as they occur in space and time. When actions are patterned, they exist in a timeless and ubiquitous sense; they are standards of action in terms of which individuals may organise their behaviour. It is apparent, therefore, that the lawyer (and the social scientist) is concerned not only with the actions of men as they occur in fact, but also with standardised action or, to use a term more familiar to the lawyer, normative action. A norm is an abstract conception, implying a standard for recurrent action[1].

Distinctive beliefs and expectations are organised in respect of normative action; in other words, the individual is expected by society to ensure that his actions conform to the standard set by the norm. In this sense, a norm suggests an obligation or duty imposed on the individual to realise the required standard in his conduct. The notion of duty further suggests the correlative notion of a right - the idea that a person, group of persons or society as a whole may demand that the individual organise his actions so as to conform to the norm in question. The concept of normative action contains, therefore, the twin and complementary notions of right and duty. The individual bears a duty to realise the norm concerned and another individual or group of individuals has a right to insist that the norm be realised by his behaviour. Our concern, as lawyers, is, chiefly, with legal rights and duties, namely, those which are willed for the regulation of external human conduct and conceived as binding and, thus, sanctioned by a socially recognised authority[2]. The wide range of rights and duties regarding

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1 Nadel The Foundations of Social Anthropology 38sq

2 In terms of Austin's definition of law, viz a command emanating from a political superior, customary law would fall outside the province of law "properly so called". The Province of Jurisprudence Determined Vol 1 101sq. In the social and political milieu of Africa, the concept of a "competent lawgiver" must be broadened to include the community as a whole: Kelsen The Pure Theory of Law 225 and 228. See also the definitions given by Hoebel The Law of Primitive Man 26-28 and Llewellyn and Hoebel The Cheyenne Way 205sq

purely etiquettal, affective and moral behaviour, falls outside the scope of this thesis. The mother, for instance, is under a duty, in nearly all societies, to show her infant children love and affection; conversely, they are usually under a duty to show her proper respect and affection. Relevant as such duties may be to the anthropologist or sociologist, they are of peripheral concern to the lawyer.

The norms which any particular individual is expected to realise by his or her conduct may be determined by a variety of factors: for example, norms may be created by contract, by commission of a delict or crime or by occupying a certain status. We find that most rights and duties in face-to-face societies are determined by status[3]. The concept of status generally denotes that the legal rights and duties which arise between individuals are predetermined by the law by virtue of the individuals belonging to certain classes of person. In other words, the legal rights and duties associated with status are imposed by the law independently of the will of the individual[4]. What distinguishes rights and duties determined by status, from contractual or delictual rights and duties, is that the former are imposed without regard to the individual's actions. In the case of contract, two or more persons agree to create rights and/or duties inter se; in the case of delict, the wrongful action of one individual, by harming another, gives rise to the duty to make compensation. Although an individual may, by his own act (as, for example, marriage) acquire a status, formal change of status may not be effected solely by the independent act of the individual. This is particularly marked amongst African peoples where each change of status is marked and accepted by the community as a whole in various rituals, such as the rites de passage announcing puberty. Whether the change in status requires the formal acceptance of the state, as in the common law marriage, or the recognition of the community, as in a customary

3 See infra, Chapter 2; Gluckman The Ideas in Barotse Jurisprudence 171sq

4 Paton Jurisprudence 398, relying on Allen Legal Duties 28; status, regarded as a series of rights and duties imposed in respect of a certain class, has also been considered as such by Goodenough in Tyler (Ed) Cognitive Anthropology 312-313

law marriage, the individual's status must be determined in accordance with extrinsic criteria for recognition.

The status held by any person implies membership of a class or category of persons. Certain rights and duties are then imposed on all members of that class. The classes are determined by a variety of criteria. Among the more obvious are age, sex and marriage[5]. An individual may, of course, be a member of more than one class at the same time: for instance, a woman may, at one and the same time, belong to the class of mother viz-à-viz her children; daughter as regards her father; wife as regards her husband and so on. From this it is apparent that a particular class is always relative to another; the class of fathers is relative to that of children etc. Nor should we find this surprising since it is clear that the rights and duties associated with a particular class find their correlatives associated with the complementary class or society at large: for example, the father's duty of support is correlative to the child's right to claim fulfilment[6].

It is necessary, as part of the process of definition, to distinguish status from other, closely related concepts. Until the 1920's, status was frequently used by social scientists to denote the relative inferiority or superiority of persons in relation to one another; in other words, it was used to show rank. This is status in a "scalar" sense. Since then, status has generally been used to denote the set of rights and duties pertaining to a category of persons, ie status in the non-scalar sense (or "Linton" sense - the latter term being derived from the author of this approach)[7]. Today, the term "rank" suffices to indicate the relative inferiority or superiority of classes in a society. More exactly, it denotes a positional scale of classes, each marked by a series of diacritical characteristics and usually sharply defined by formalities for admission and promotion. Status and rank may coincide: for instance,

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5 Paton op cit 399

6 The relativity of status is an attribute emphasised by social scientists: Beattie Other Cultures 36

7 International Encyclopaedia of the Social Sciences Vol 15 251

the relationship of grandmother and grandchild can be considered in terms of two, relative statuses or two, socially graded ranks. On the other hand, any coincidence is not essential: the relationship of brother-sister need not involve considerations of rank, although it normally does involve status. The question of rank, often associated, as it is, with authority (in particular, political authority)[8], falls outside the scope of this thesis.

Status can, similarly, be distinguished from role although this distinction would, initially, appear to be significant only in the context of the social sciences. In so far as social relationships denote the ways in which people behave with regard to other people, the term status is usually used to define the persons between whom the relationship exists, ie it indicates the identity of the social actor. Role, on the other hand, determines what the social actors are expected to do[9]. It implies, of course, all norms which are applicable in terms of the status in question, be they legal, moral, etiquettal etc. It can readily be appreciated that a certain status automatically implies a certain role (which accounts for Talcott Parsons' use of the omnibus term "status-role")[10]. The converse is not equally true. Status need not necessarily be inferred from a certain role: for instance, the role of feeding and caring for a child may be played by mother or father or, in some cultures, aunt, grandparent etc. Similarly, the role of educating a child may be played by parent, teacher, priest, leader of age set etc. It would seem, from this brief account of status and role, that the concept of role is not of any particular assistance in defining status for legal purposes. The activities which holders of certain statuses are expected to perform can be described by the more familiar term "norm", implying, as it does, the right-duty relationship

We may, at this stage, suggest a preliminary definition of the concept of status. The classic definition is that proposed by Paton who maintains

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8 Nadel op cit 171

9 Beattie op cit 36

10 Parsons Essays in Sociological Theory 42 and The Social System 25-26

that status is,

> "the fact or condition of membership of a group of which the powers are determined extrinsically by law, status affecting not merely one particular relationship, but being a condition affecting generally though in varying degree a member's claims and powers." 11

Paton continues, to stress the following attributes of status. The rights and duties attached to a particular status are determined extrinsically by the law, without regard to the volition of the individual. Entry into a class of persons may take place independently of the will of the individual or it may be voluntary. It is not necessarily based on a defect of judgment nor does it always result in restricted powers. Finally, status is a condition affecting a person's rights and duties generally, not in a particular respect; in other words, membership of a particular status implies acquisition of rights and duties en bloc thereby conditioning the individual's general ability to relate with other members of his society.

Although Paton speaks of status affecting the member's "claims, liberties, powers and immunities" many writers usually associate status with the capacity of the status holder[12]; in another definition, status is referred to as the aggregate of the individual's rights, duties and capacities[13]. Afrikaans writers have criticised the English texts for their use of the expression "legal capacity" without distinguishing two separate concepts: the capacity attached to a particular class to perform juristic acts and the capacity to have rights and duties. They maintain that inherent in the notion of status is the competence or ability of the individual to perform certain juristic acts and to exercise various rights and duties. The most obvious example is that of a minor. Because a minor is deemed to lack the requisite intelligence and judgment, he is deemed to be incapable, for instance, of incurring contractual obligations or, if below a certain age, executing a valid will[14]. Until now, we

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11 op cit 399sq - a definition derived from Allen op cit 28sq

12 Allen op cit 47, for instance, distinguishes between status which is a condition, capacity which is a power to acquire and exercise rights, and the rights themselves

13 Boberg The Law of Persons and the Family 15

14 van der Vyver "Regssubjektiwiteit" (1973) 36 Tydskrif vir Hedendaagse Romeins-Hollandse Reg 269; Boberg op cit 37sq for a summary of the Afrikaans writers' views on status; Hahlo and Kahn The South African Legal System and its Background 120

have spoken exclusively of the "rights" and "duties" associated with status. We have now to ask whether the "claims, liberties, powers and immunities" mentioned by Paton and the capacities and incapacities mentioned by other writers are to be treated as something different and separate from rights and duties.

If the concepts of "right" and "duty" are used only to mean the claiming of performance (or forbearance) of an action and the correlative obligation to perform or forbear, then the concept of capacity would have to be considered separately. It is because of lack of precision in the use of terms "right" and "duty" that more accurate terminology is necessary. Hohfeld has proposed a scheme of terms, briefly described below, which more accurately denotes the content of the obligation and claim[15]. Within Hohfeld's scheme, it is possible to redefine capacity in order to bring it into harmony with the right-duty concept. If Hohfeld's scheme is accepted, capacity need not be considered separately.

(1) A right is a legally enforceable claim by A against B for performance or forbearance of a certain act. The correlative is a duty on B to do or forbear from doing. A wife, for example, has a right to maintenance.

(2) A liberty (or privilege) means that A may do or forbear from doing, without infringing B's rights. In other words, A has no duty to B to do or forbear from doing. For instance, in customary law, a kraalhead has the liberty to cultivate the lands which he has been allocated by a wardhead. The correlative, in this case, is no right by B to demand action or forbearance.

(3) A power means that A is able, by his act or failure to act, to affect his legal relations between himself and B or between B and C. In customary law, a kraalhead may, for example, sue third parties for delictual damages. The third party suffers the correlative (a liability) to have his legal relationships so affected.

(4) An immunity is an exemption from having one's legal relations altered by a particular act or omission on the part of another person. For instance, if she becomes emancipated, a widow or divorcee, in customary

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15 Fundamental Legal Conceptions: an approach advocated by Paton op cit 401; for a useful summary see Hahlo and Kahn op cit 81-82

> law, is immune from the control of her former husband. The correlative is a disability.

Seen in terms of Hohfeld's scheme, the capacity to perform juristic acts (handelingsbevoegdheid in Afrikaans) is a power. For example, the capacity to contract or execute a will implies that the individual may perform these juristic acts thereby altering his relationships with other people. What is loosely termed "delictual capacity", namely, the capacity to be held accountable for one's delictual actions, may, similarly, be regarded as a power - the ability to affect legal relations with other individuals by wrongful action. A capacity to have rights and duties in respect of property, usually called "proprietary capacity", may be regarded as a liberty or privilege. Boberg has noted that:

> "'bevoegdheid' in the sense of what a person may do can be expressed by saying that he has a liberty or privilege to do it, while the connotation of what a person can do (ie has the legal capacity to do) can be expressed by saying that he has the power to do it." [16]

In this sense, therefore, the distinction between rights, duties, on the one hand, and capacities and incapacities, on the other, vanishes. The question now remains whether it is worthwhile doing violence to accepted legal terminology by discarding the three terms "right", "duty" and "capacity" for the terminology proposed by Hohfeld. It is considered that this is not necessary. Provided that it is understood that these three terms can be construed more precisely and that, fundamentally, the difference between right-duty and capacity is a difference between right-duty and liberty-no right (or power-liability), there would seem to be no particular merit in compelling the reader to adjust to a new terminology. The traditional English terms will, accordingly, be used unless the context compels greater precision.

In this thesis, the legal status of African women in Shona customary law will be considered. This means that we will be investigating the legal rights, duties and capacities associated with the class of African women. Africans in Zimbabwe-Rhodesia may be considered generally as a class for several reasons, some sounding in private and some sounding in public law,

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16 op cit 37 fn 10

A variety of statutes impose various legal rights and duties on Africans, primarily affecting their status in public law: for example, they are required to carry identification in terms of the Africans (Registration and Identification Act)[17]. It is, however, only the legal status of African women in private law which will be examined.

In Zimbabwe-Rhodesian private law, Africans have the power to regulate their legal affairs in accordance with African customary law[18] or, in certain circumstances, the common law[19]. They have, moreover, the right to litigate in traditional tribal courts, in the courts of district commissioners or the magistrates' courts or the High Court. It is chiefly for these reasons that we must consider them separately as a class for the purposes of this thesis.

It is the legal status of African women, not the status of African men, which will be examined. In common with many cultures, the Shona differentiate, both legally and socially, between the classes of men and women. It is not our concern to consider the legal distinction between the status of men and women under the common law; rather we are concerned with the distinction in customary law. In terms of that system, the following aspects of the woman's status will be investigated:

(1) the power to contract a valid marriage in customary law and the power to effect the dissolution of a marriage;
(2) the right to maintenance;
(3) the complex of rights and powers associated with the custody and guardianship of children;
(4) the power to acquire property and the liberty to use and enjoy property in possession;

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17 (Chapter 241)

18 The term "customary law" will be used in this thesis to denote the laws evolved by Africans, applied in tribal courts, and the law of Africans as perceived and modified in the district commissioners' courts. As will be indicated later, there may be a difference between the two conceptions of customary law

19 The "common law" denotes the law introduced into Zimbabwe-Rhodesia by the white settlers - both statutory and case law. The decision to use this term was a difficult one. It has the merit of reflecting the common usage of the courts and avoiding difficulties associated with cognate terms such as "civil law", "general law", "Roman-Dutch law" and "the laws of Rhodesia". The term "customary law" is, similarly, sanctioned by general usage

(5) the capacity to execute a valid will and the right to inherit;

(6) the power to enter into contractual relationships;

(7) the powers, rights and duties arising out of delicts;

(8) the power to sue and be sued in court;

(9) the liberties acquired on emancipation; and, finally,

(10) the effect of a civil or Christian marriage on her overall status.

2 THE POSITION OF WOMEN IN SHONA SOCIETY

Legal and social rights and duties are ascribed to status on the basis of various values and beliefs. One hesitates to suggest, in the case of women, that all these beliefs are empirically based. The inferior legal status of Roman women, for instance, was said to be imposed on them because of their levitas animi[1] but the Romans learned that the legal incapacities of women were meaningless in view of their actual abilities[2]. Whatever the truth of the woman's actual or supposed lack of ability, the status of the African woman is determined by the values and beliefs of the society in which she finds herself.

The peoples now loosely termed "the Shona" inhabit most of Zimbabwe-Rhodesia and parts of Mocambique. The term "Shona" is of uncertain origin and may well have been a term of contempt applied by the Ndebele invaders of the last century. Certainly, the people tend to classify themselves according to their chiefdoms or, on a broader basis, according to their dialect groups. The four principal Shona dialects are: Karanga in the so-called "Victoria circle" (ie centred on Fort Victoria); Zezuru in the "Salisbury circle"; Manyika in Manicaland and Ndau in the Melsetter area. To these four major dialects, Korekore in the North-eastern region of the country and Kalanga in the far West, may be added. Zezuru has received, linguistically at least, the widest official recognition, possibly because it is spoken in and around the capital. From studies undertaken amongst the various Shona peoples, it seems that there is little discrepancy in the tribal laws regulating the status of women; accordingly, it is possible to treat Shona law as a whole in this regard[3].

The importance of status in traditional African society should be emphasised. Formerly, and even today, the Shona, in common with the other Southern Bantu, are an agrarian peasant people. Communities (villages or misha) tend to be small. They consist of kinsmen, their wives and children,

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1 Gaius 1.144, who elsewhere (1.190) says that this is magis speciosa quam vera. See Buckland A Text-book of Roman Law 165, citing Ulpian 11.1 who says that women should be under the care of a tutor because of infirmitas sexus et ignorantia rerum forensium

2 Carcopino Daily Life in Ancient Rome 97 and 104-109

3 Bourdillon The Shona Peoples 31-34

possibly affinal relations and, occasionally, such unrelated males and their wives as had placed themselves under the authority of the family head[4]. A group of kinfolk, living in the same village, would regard themselves as a mhuri[5]. The head of the mhuri is usually called samhuri (family head). The mhuri is, frequently, co-extensive with a village or musha but not always since membership of the mhuri is exclusively a matter of kinship, whereas membership of a village is not necessarily so[6].

In such face-to-face societies, rights and duties tend to be determined by status rather than by contract. This phenomenon led certain writers to describe African society as "status dominated" and prompted Maine's famous dictum that "the movement of the progressive societies has hitherto been a movement from Status to Contract"[7]. Most of the rights and duties borne by the inhabitants of these small village units were determined by their status in terms of the kinship system (ie as father, mother, wife etc). The system of kinship and marriage determines the class to which the individual belongs (namely, his or her status) and it is not surprising that the relationships of any given individual viz-à-viz nearly every other person with whom he has daily contact will be determined by his status. Not all of these relationships have legal content, of course: the relationship of grandmother-grandchild, with its attendant rights and duties, is of no legal significance. It is, rather, in respect of the primary relationships of the husband-wife, parent-child type, that one finds

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4 Bourdillon op cit 75-82 for a description of the musha; Holleman in Colson and Gluckman (Eds) Seven Tribes of Central Africa 361-367. The villages are grouped into wards (dunhu) of which each chiefdom will contain two or more. The importance of the ward to the Shona can be grasped from the following Native Department minute: "A village was not a home: it stayed for only a short while on the same spot. The tribal territory was not a home: it was too wide and vague for the mind of a man to grasp. But the dunhu was home. It was big enough for a man's children and children's children to settle in; it was small enough to know everyone who lived in it." Cited by Holleman Chief, Council and Commissioner 88

5 Holleman Seven Tribes 393

6 Holleman Seven Tribes 394

7 Maine Ancient Law 100; Driberg "The African conception of law" (1934) 16 Journal of Comparative Legislation and International Law 232; see the discussion in Elias The Nature of African Customary Law 95-98; Gluckman The Ideas in Barotse Jurisprudence 171sq

that the legal rights and duties have been highly evolved[8]. The fundamental difference between Western European society and Shona society lies in the fact that, in the former, legal relationships are more likely to have been created, voluntarily, by individuals entering into contracts with one another; in traditional Shona society, legal relationships were more likely to have been predetermined by the law and conceived in terms of status[9].

The kinship system does much to refine the more obvious status determinants mentioned before - sex, age and marriage [10]. A feature of Shona society is the "extended family". The Shona are organised into various patrilineages which can more conveniently be described as clans (rudzi). Clans are groups of people who share the same name (mutupo). The clan is divided into subclans, each of which, similarly, bears a common name (chidawo). On the strength of the same mutupo and chidawo members can claim a common origin through the agnatic line. The subclan functions, moreover, as an exogamous unit[11].

Of greater practical, day-to-day importance than the rudzi or subclan is the chizwarwa - a group of agnates which comprises the first and second generation descendants, in the agnatic line, of one man, namely, his children and son's children. Traditionally, the members of a chizwarwa would live close together: the father with his unmarried sons and daughters and, possibly, a married son and his family in the same village, with other married sons and their families in neighbouring villages. This group usually came together for ritual purposes, to praise and propitiate the ancestral spirits. Although, ideally, members of the same chizwarwa should live together, for a variety of reasons this does not, in practice, always happen. Because marriage amongst the Shona is virilocal, daughters go away to live with their husbands' families; if the families happen

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8 For a scholarly and graphic representation of the rights and duties arising out of status, see Reader Zulu Tribe in Transition 124 and 132sq

9 Gluckman op cit Chapter 6 gives a full exposition of this notion

10 As to how this is worked out in Shona society, see Holleman Shona Customary Law 32sq

11 Holleman Shona Customary Law 23-24; Seven Tribes 382-382; Bourdillon op cit 37sq

to be neighbours, relationships will be retained at a high level of intensity; but distance normally results in a weakening of kinship ties. On the death of a father, his sons tend to drift away and, often, on becoming married, a son will set up an establishment away from home[12].

> "An analysis of the composition of Shona villages shows that, after the nuclear agnatic body of kinsmen, the uterine elements ... are usually numerically strongest in the village ... Apart from these relatives, almost any combination of relationship may be found in the same village or neighbourhood." 13

Persons within the chizwarwa are classified according to various statuses which are organised in a hierarchy of ranks. Relationships within the chizwarwa are always asymmetrical, implying an element of relative superiority or inferiority[14]. In relation to myself, there are all those who belong to the first and second ascending generation. According to classificatory kinship terminology, I call them "father" or "grandfather", respectively, and they are superior to me. Similarly, all members of my own generation who are of the same sex and older than me I call "elder brother" (or "elder sister" as the case may be) and they are considered superior to me. In a position of inferiority, relative to me, are all my children and grandchildren and younger brothers and sisters. By use of the appropriate kinship term, the difference of generation, age and sex is immediately reflected. A certain standard of behaviour is expected in regard to each class of person[15].

Inherent in this family organisation is the separation of sex roles and male dominance[16]. Undoubtedly, in traditional society, male dominance was the ideal. The family was always represented by the most senior male. All junior men, as well as women, came under his authority. From this

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12 For a description of the chizwarwa see Holleman Shona Customary Law 24-25; Seven Tribes 384-386; Bourdillon op cit 41

13 Holleman Seven Tribes 393

14 Holleman Shona Customary Law 30-31

15 Holleman Shona Customary Law 31; Bourdillon op cit 39-40

16 Bourdillon op cit 70-71; Gelfand The Genuine Shona 33-36; Holleman Shona Customary Law 206-211. All these writers are careful to stress that although the formal status of the woman appeared to be inferior in relation to that of the man, in practice, women exerted considerable influence and power

description, one should not assume that African women were not held in high esteem or that their social status was necessarily a servile one[17]. The situation was considerably more complex than this.

The key to understanding the Shona woman's social and legal status lies in the differentiation of sex roles; she played a certain number of roles all of which were ascribed to her because she was a woman. Within her own family, a woman's main function, as a sister, was to obtain for her family, when she married, a sufficient number of rovoro cattle from her affines to enable her brother to marry and, in this manner, to beget children for her family. Because of the importance of this transaction, there was a special relationship between brothers and sisters who had been joined for the purpose of rovoro. The woman was a chipanda sister and her linked brother owed her a duty of respect and gratitude[18]. It was because of this special position that the sister became vanuveni (custodian) of her brother's wife and was the principal arbiter in their marital disputes. It was only if she could not find a solution to their problems or if matters had become too serious, that complaints would then be taken to the head of the family[19]. The sister was also placed in a special relationship to the children of her brother's marriage to whom she was vatete and to whom they owed a duty of respect and obedience. She would instruct the daughters in their marital obligations and duties at puberty. Her advice was sought in the choice of her niece's husband and she played an important role in the marriage negotiations[20]. When her brother died, she assumed responsibilities similar to those of an executor of his estate, prior to the kurova guva ceremony. If she felt that the estate were mismanaged or not used to benefit the deceased's minor heir, she might (usually assisted by her own son) lay a complaint with a chief or headman. If the deceased's wife when widowed declined to enter into a levirate union with one of the deceased's male relatives, the

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17 Refer to the authorities cited in footnote 16; Goode World Revolution and Family Patterns 18

18 Bourdillon op cit 68-69; Holleman Shona Customary Law 65-66; Child The History and Extent of Recognition of Tribal Law in Rhodesia 30

19 Also known as vamwene: Holleman Shona Customary Law 70-71 and 219; Bourdillon op cit 53-54

20 Also known as samukadzi; Holleman Shona Customary Law 66-67

widow could place herself under the authority of the deceased's sister until other arrangements could be made[21].

When a woman married, although she never became a member of her husband's family in the full sense, she was,

> "gradually inaugurated in her husband's home by his family, not as a mere incubator of children, a piece of acquired property, but as a respected member of a highly-respected family, a person with dignity, status and rights, who has agreed to become the wife of her husband and to bear children for his family." 22

The newly wedded wife was under the tutelage of her mother-in-law whom she served by performing the menial tasks of the household in the company of her sisters-in-law. As she proved her fruitfulness by bearing children and her worth by caring for her family, the esteem in which she was held would, naturally, grow[23]. Although her husband was indisputably head of their family unit, the wife had important roles to play in caring for children and providing food, not only by cultivation of food but also preparing and distributing it at meal times. The provision of food for her husband was, for the Shona woman, not only an essential duty but a cherished privilege. In a polygamous household, the husband had to be careful to eat food prepared by each wife and with the same relish to avoid giving rise to jealousy. Divorce could result from her failure to cook his food adequately and the wife could show her displeasure by serving her husband small portions[24].

The wife always owed her husband and, indeed, all men respect. He might, and often did, speak roughly to her in public whilst she, in public, might never speak until spoken to[25]. The ideal in the Shona household, however, was co-operation between husband and wife since it was realistically appreciated that harmony was essential for the successful running of the family enterprise[26]. The husband could expect his wife to make decisions regarding the family property and stock in his absence. She was also free

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21 Holleman Shona Customary Law 235-238; Child op cit 104

22 Holleman Issues in African Law 105

23 Holleman Shona Customary Law 205-206; Gelfand op cit 32-33

24 Bourdillon op cit 67

25 Holleman Shona Customary Law 207

26 Bennett Appendix E Question 24

to pursue any natural talent as midwife, herbalist, diviner, potter or brewer. The income from these activities should, ideally, be pooled with her husband's income to assist in providing for the family[27]. (In particular, a woman might become the medium for the ancestral spirits and could, in this manner, gain considerably prestige and wield great power[28]).

As the wife's sonsgrew up and took their places in the family as adult, married men, the wife's prestige and influence grew. As ambuya (grandmother) her age, and the wisdom associated with age, made her a figure of importance within her husband's family. She always retained a measure of control over her sons and had considerable authority over her daughters-in-law. To her grandchildren, she was the figure of affection and love, the teller of tales and the teacher of folk-lore[29].

It was as a mother of married daughters, however, that the Shona woman attained her greatest prestige and influence. She was considered to be the living link between maternal spirits, which are guardians of fertility, and her matrilineal descendants. Her son-in-law had to pay her great respect and both he and his family would be careful never to offend her. Because of the spirits' power over the young wife's fertility, the son-in-law was obliged to give a special beast (ngombe youmai) to his mother-in-law to propitiate the maternal spirits[30].

On the death of her husband, a woman of child-bearing age would be offered the choice of entering into a levirate union with one of her deceased husband's male relatives(usually his younger brother) or of returning to her father's home, with a necessary adjustment in the rovoro. If, however, the widow had grown-up sons of her own, she would probably take her place in one of their households. Her husband's heir was responsible for her future maintenance[31].

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27 Bennett ibid; Holleman Shona Customary Law 212-214 and 351 regarding the matri-estate

28 Bourdillon op cit 71 and 73

29 Bourdillon op cit 45; Gelfand op cit 44

30 Holleman Shona Customary Law 182-183; Bourdillon op cit 47

31 Holleman Shona Customary Law 234-238; Bennett Appendix E Question 89

If the wife died, the Shona recognised her continued association with her family and its ancestral spirits. Accordingly, all property which was deemed to belong to her had to be returned to her family, more especially to her brothers, where it would be distributed. It was partly for this reason that the woman cannot be considered to have become a full member of her husband's lineage. The deceased woman's spirit was regarded as highly vengeful and to keep back any of her property was to take a serious risk[32].

The social status of the Shona woman, in traditional African society, changed as she grew older and her children matured. She was valued, first, for her ability to bring cattle into her own family, to provide wives for her brothers and thus enlarge her lineage. Her own reproductive capacity then became her chief source of esteem and, as her children grew up and married, her status was determined by her link between the maternal spirits and her daughters, together with such prestige as she had earned by her endeavours in her family and village community. Her influence over her sons remained strong and her daughters remained emotionally close to her; similarly, her authority over her daughters-in-law was considerable, especially if they were living in the same village with her. She played an important role in the upbringing of her grandchildren, who always held her in respect and affection. Yet throughout her life, the Shona woman was under the authority of a man: while she was a child, she was under the authority of her father until she married and went to live with her husband. Until her marriage was dissolved, she was under the authority of her husband; as a divorcee, she reverted to her father's authority and, as a widow, she might remain in her husband's family under the authority of one of his male relatives (if she chose to enter a levirate union) or his heir or she might return to her father.

Because the ideal of Shona society was male dominance, a woman was deemed to be incapable of performing juristic acts or litigating without her guardian's assistance. Similarly, she was not held personally responsible for her own wrong-doing. To assume that these incapacities were due to what the Shona considered to be an inferior intellect would be presumptious.

32 Holleman Shona Customary Law 240

Suffice it to say that her incapacities in this regard derive from the premium placed by the Shona on male authority in the family. In addition, because she was never fully integrated as a member of her husband's lineage, she could never exercise rights of guardianship over the children born of her marriage. Because all wealth was vested in the head of the family (who was always male) she could not exercise rights in respect of wealth acquired by her husband nor could she inherit the estate of her husband or a male member of her own family. To accord her such rights and capacities would be incompatible with her social status.

As has been indicated, however, the woman was not a servile creature subject to the caprice of men. She was afforded a large measure of esteem, influence and protection within the kinship group; but the security of her position was dependent on the survival, intact, of the extended family. Provided that the traditional institutions of Shona society remain more or less whole, a woman has a number of people who, on the strength of kinship obligations, will hold her in esteem and will care for her well-being. Once the kinship ties are weakened, however, the security afforded by her ascribed status is diminished[33].

The arrival of Europeans in Zimbabwe-Rhodesia, has generated far-reaching change in traditional African society. In particular, urbanisation of Africans has necessitated the breakdown of the extended family together with a weakening of kinship ties[34]. The institutions of traditional Shona culture which functioned so well in the small village communities, where kinfolk were kept in daily contact with one another, must necessarily cease to function as effectively in the urban environment, where large numbers of people, usually strangers, are compelled to live together, work together and share common recreation. Freed from the ties of the old system, many men and women have used their independence to participate in

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33 Bourdillon op cit 367-368

34 Although note the interesting findings revealed by a brief survey conducted by Gelfand op cit 185-195: "The survey revealed that the Shona townspeople who have lived an appreciable time in the urban environment of Salisbury still cling closely to their moral and spiritual culture even though they have adopted very largely the material way of the West." Cf Bourdillon op cit 364-369

the Western social and economic systems. Many women, especially urban women, have responded to the challenges presented by social change by becoming nurses, teachers, social workers, businesswomen etc. Even in the rural areas, women are entering the Western economic system by growing cash crops, such as groundnuts, and selling them on the open market; they are manufacturing various products, such as basketwork, needlework and pottery, and are selling these products[35].

While the restricted legal powers of the Shona woman formerly caused little hardship because of the restricted roles she was expected to play and the support and protection she could find in the extended family, changed social conditions have rendered customary law, in many instances, irksome. In the past, the divorced or widowed woman, for instance, could always expect to find shelter and food within one of the large, self-sustaining villages of her own or her husband's family, as the case might be. Nowadays, she may well be committed to live in a town, away from relatives, or find herself an unwelcome addition in her father's house where resources are limited. Similarly, whereas in the past the woman would never be expected to support the entire family, she may, today, find that she has no option but to run the household while her husband is away working in town. In these circumstances, if she has no contractual capacity and no power to appear in court, she will be placed in an unwarranted position of hardship. Apart from this, the aspirations of many African women have simply outgrown the traditional roles they were expected to play. The Christian widow, for example, would find the notion of a levirate union repugnant to her religious convictions; the salaried teacher, in a position to compete with men in her employment, would find wifely subservience, at home, untenable.

Although these social changes have affected the lives of all African women to some, though varying, degree, the law regarding their legal status remains basically unchanged. Admittedly, European judicial officers, namely district commissioners, have imported several principles from the

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35 One of the ways of achieving financial independence is through prostitution: Bourdillon op cit 73-74

common law and have integrated these into the body of traditional customary law[36]; but the tribal authorities have not responded as readily to the problems posed by social change. Many African women in Zimbabwe-Rhodesia now chafe under legal restrictions which are no longer an accurate reflection of their social position. This is a neglected area of the law which, unfortunately, has seldom attracted the interest or sympathy of the lawyer, judicial officer or law-giver.

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36 Bennett "The African court system in Rhodesia: an appraisal" (1975) 15 Rhodesian Law Journal 146-147; Goldin and Gelfand African Law and Custom in Rhodesia 78-79 regarding the "dual" system of customary law in Zimbabwe-Rhodesia

3 THE ZIMBABWE-RHODESIAN COURT STRUCTURE

Historical Development of the African Courts in Zimbabwe-Rhodesia

The legal status of African women can be properly understood only in the context of the system of courts in Zimbabwe-Rhodesia. Depending on the court in which an action is heard, a different system of law is likely to be applied, accordingly, it is essential to our understanding of the law regulating the status of African women to consider, fully, the various courts of Zimbabwe-Rhodesia, their jurisdictional limits and the general characteristics of the law which they are likely to apply.

The arrival of the European colonists in Africa, during the nineteenth and early twentieth centuries, brought indigenous African culture into sharp confrontation with the culture of the colonial powers. Throughout Africa, the difference in values and attitudes which characterised these cultures made integration of white and black societies seemingly impossible. For many years, the two cultures co-existed, rather than integrated. This social dualism, in turn, led to legal dualism.

Broadly speaking, the Europeans introduced their own laws, which were applicable to the colonial settlers. Disputes between Europeans were justiciable in courts staffed by Europeans, run according to the procedures used in the home country. The indigenous African courts could not be expected to understand the intricacies of European law nor could the Europeans be expected to submit their disputes to a totally alien legal system. During the colonial period, in most African countries, European law was kept as a self-contained system. While it was recognised that Europeans should retain their law, it was also recognised that Africans could not, suddenly, adapt to a foreign legal system. Accordingly, side by side with the European system of law and courts, the African legal system continued to operate, dispensing justice in the traditional manner to African litigants[1].

1 For a brief description of the court structure in other African countries, see: Robert "A comparative study of legislation and customary law courts in the French, Belgian and Portuguese territories in Africa" (1959) 11 Journal of African Administration 124; Robinson "The administration of African customary law" (1949) 1 Journal of African Administration 158

In both Francophone and Anglophone Africa, the independence of the former colonies resulted in full-scale reform of the court system. Even before independence, many countries recognised the need for one body of general law and one judicial system applicable to all persons, regardless of their race[2]. It was obviously felt that social integration had paved the way for judicial integration. Zimbabwe-Rhodesia and South Africa are the only two countries in Africa today which retain the dual court system; we may now examine the former in terms of its historical development.

Soon after occupation of the country, in 1890, Zimbabwe-Rhodesia was declared a British protectorate. The first magistrates' courts were established under a Proclamation of 10th June, 1891, by the High Commissioner in Mashonaland. These courts had jurisdiction in both civil and criminal matters and in all cases, except those in which Africans only were concerned[3]. The law to be applied was to be "the same as the law for the time being in force in the Colony of the Cape of Good Hope"[4]. After the Matabele War, the administration of the British South Africa Company was extended from Mashonaland to Matabeleland. In terms of the Matabeleland Order in Council of 18th July, 1894, magistrates' courts and a High Court were established with civil and criminal jurisdiction[5]. Appeal lay to the Cape Supreme Court. It was impliedly recognised that these courts would have jurisdiction over Africans[6].

The Matabele War had a profound effect on Company policy. The Ndebele political structure had been shattered and the people were left without their traditional leaders; both from the necessity of an effective administration and for reasons of security, it was realised that the African people of the colony had to be brought within the European framework of government.

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2 Brooke "The changing character of customary courts" (1954) 6 Journal of African Administration 67, citing the resolutions of the Judicial Advisers' Conference at Makerere College, in 1953. This was followed by a second conference, at Jos, in 1956 (for a report of which see the supplement to (1957) 9 Journal of African Administration).
It must be clearly understood that "racially" different systems of law and courts suggst something more fundamental than a simple difference of ethnic origin. The difference is a matter of culture, although this has often been obscured by political considerations

3 Sections 3, 4 and 5 of the Proclamation, 1891

4 Section 19 of the Proclamation

5 Sections 26, 36 and 37 of the Order in Council

6 Section 27 of the Order in Council, 1894

Accordingly, the Company employed the services of selected civil officers, with experience in the Cape and Natal, to keep an eye on the African population. At first, the "native commissioners'" responsibilities were little more than those of political watchdogs but these responsibilities expanded rapidly[7]. In time, the native commissioners became the major instrument in government relations with the African population. The thinking behind this move was that:

> "The successful government of natives, even under the most settled conditions, is rather a question of men than of regulations ... . The only form of government which the natives understand is personal government." 8

With the imposition of taxes on Africans, the native commissioners were tasked to deal with the administration of this legislation. The subsequent development of the department shows a steady increase of new administrative activities, often unrelated to the African population. As the business of governing the Colony increased, more use was made of the native commissioners[9]. In view of the shortage of European manpower, government was compelled to rely upon the services of available staff and, in most cases, this meant the native commissioners.

Native commissioners were granted judicial powers only in 1898, after the tumultuous events of the Shona and Ndebele Rebellions. These powers were conferred at the same time as the judicial system of Zimbabwe-Rhodesia was being reorganised and placed on a sounder basis. In terms of Sections 49 and 69 of the Southern Rhodesia Order in Council of 1898, the magistrates' courts and the High Court were given jurisdiction over all persons in the Colony. When hearing cases involving Africans, they were free to summon one or two African assessors for advice on points of law[10]. The magistrates' courts were confirmed as the lowest grade European courts. Appeals

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7 Holleman Chief, Council and Commissioner Chapter 1, especially 15

8 Letter from Milner to Chamberlain, cited by Palley The Constitutional History and Law of Southern Rhodesia, 1888-1965 141

9 Howman "The Native Affairs Department and the African" (1954) Nada 46

10 Section 50 of the Order in Council

lay to the High Court and from there to the Cape Supreme Court. Final appeal lay to the Privy Council. The application of the laws of the Cape was confirmed[11]. Section 79 (3) of the Order in Council empowered the High Commissioner to confer on native commissioners or assistant native commissioners the same jurisdiction as that exercised by magistrates. In November, 1898, the High Commissioner approved the Native Regulations which defined the native commissioners' judicial powers It was provided that if native commissioners or assistant native commissioners were appointed as special justices of the peace by the High Commissioner, they would be empowered to exercise all the powers and jurisdiction exercised by resident magistrates[12]. Although it was implicit that native commissioners were to deal with African civil litigation, provision was made for Africans to bring any case before either the native commissioner or the magistrate, as they wished[13]. Further provision was made for appeals to lie direct to the High Court in civil cases between Africans which had been heard in the native commissioners' courts[14]

The reasons for granting native commissioners judicial powers are not altogether clear. With regard to their jurisdiction over Europeans, it was felt that the number of judicial officers should be increased to prevent the country from slipping into a state of lawlessness. Again, it seems, there was a shortage of trained European manpower capable of undertaking these duties and native commissioners were the only government officials available. Similar thinking appears to have prompted the grant of judicial powers over Africans. It had long been appreciated that Africans were compelled to travel considerable distance to magistrates in order to obtain legal redress. It was felt that by empowering native commissioners to hear these disputes, African litigants could be saved time and expense[15]. In general, it would appear that these judicial powers were consonant with the native commissioners' already well developed administrative powers and with their intimate knowledge of African affairs.

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11 Section 49 (2) of the Order in Council

12 Section 6 of the Regulations, No 18 of 1898

13 Section 7 of the Regulations, No 18 of 1898

14 Section 8 of the Regulations, No 18 of 1898

15 Palley op cit 138

In 1910, the native commissioners' jurisdiction was narrowed down to embrace civil proceedings in which Africans only were concerned and criminal proceedings in which the accused was African[16]. The magistrates' courts and the High Court retained their concurrent jurisdiction over both Africans and Europeans. Presumably, it had been acknowledged that native commissioners were the people most competent to deal with African litigation. The final move, to give the Native Affairs Department exclusive civil jurisdiction over Africans, came in 1927. In terms of Section 15 of the Native Affairs Act[17], magistrates lost their civil jurisdiction in cases in which the rights of Africans only were concerned. (They retained their criminal jurisdiction, however.) The native commissioners, on the other hand, lost most of their criminal jurisdiction over Africans, retaining only their powers in respect of contraventions of the Native Affairs Act[18]. At the same time, a special court, presided over by the Chief Native Commissioner, was established to hear civil appeals from the native commissioners' courts[19]. This was called the Court of Appeal for Native Civil Cases. Further appeal lay from this tribunal to the High Court.

The reorganisation of the court structure reflects a subtle change in the role of the native commissioner. As the Attorney-General said, in the second reading of the Native Affairs Bill,

> "It was, of course, inevitable that with the progress of civilization amongst natives and their contact with European laws and sanctions there should be a weakening of the purely native sanctions which governed their lives and there should arise a situation in which individual natives should somewhat disregard tribal, communal and official control. The weakening of these purely native sanctions has left an hiatus, and it is considered that this hiatus should be filled." 20

Who better to fill the judicial hiatus than the native commissioners ?

The second branch of the African courts was established ten years later.

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16 Section 14 of the High Commissioner's Proclamation No 55 of 1910

17 No 14 of 1927

18 Section 13 of the Native Affairs Act

19 Section 21 of the Native Affairs Act

20 Hansard, 24th June, 1927, col 1934

The tribal authorities, in Zimbabwe-Rhodesia, had lost much of their political power and, along with it, their judicial power. Although resident magistrates were competent to appoint chiefs to exercise civil and criminal jurisdiction over Africans[21], this had never been done. Despite the absence of any official recognition, however, the traditional African courts had continued to function since the Occupation[22]. The incorporation of the chiefs into the governmental framework in accordance with the policy of indirect rule was a rather slow and piecemeal process in Zimbabwe-Rhodesia. This was the result of the government's ambivalent attitude toward the tribal leaders. On the one hand, the weakening of traditional tribal authority was welcomed; on the other hand, it was recognised that the tribal authorities could make a significant contribution towards the administration of the country[23]. It was only in the 1930's that the chiefs had fully emerged, again, as tribal leaders. The Native Councils Act[24] provided a forum for discussion of local affairs and the Native Law and Courts Act[25] restored to the chiefs their judicial powers. It was felt, at the time, that to recognise the tribal courts would do no more than to legalise an existing practice. The only alternative was to

> "clap these chiefs into prison every time they comply with the custom handed down to them by their ancestors and which is not repugnant to justice." 26

It was also hoped that through the guidance of the tribal and native commissioners' courts, the African population would gradually come to absorb European law and customs. An added practical advantage would be a reduction of the number of cases heard by the native commissioners' courts.

Close control was maintained over the new courts. The native commissioners were entrusted with extensive revisory powers[27]. They were given access to all records kept by chiefs' courts and could, on their own initiative,

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21 Section 11 of the High Commissioner's Proclamation of 1891

22 Bowman Report on Native Courts for Southern Rhodesia para 27

23 Rhodesia Government Native Affairs Commission of Enquiry, 1910-1911 5

24 No 38 of 1937

25 No 33 of 1937

26 Hansard, 1st November, 1937, col 2444

27 Section 10 of the Native Law and Courts Act

from perusal of the records, revise the proceedings of the court and transfer the matter to their own court or any other competent tribunal. In addition, the native commissioners' courts were constituted courts of appeal from the tribal courts[28]. It would be more accurate, however, to say that cases could be retried in the native commissioners' courts, for the judgment of the tribal court became of no force and effect and the matter was heard de novo[29].

In 1958, further changes occurred in the court system when, as a result of the report of a committee convened to investigate the inferior courts of Zimbabwe-Rhodesia, magistrates were given jurisdiction to hear civil cases between Africans, when both parties had consented thereto or where one of the parties was an African who had obtained exemption from African customary law[30]. At the same time, the Native Affairs Act was amended to bring the native commissioners' jurisdiction more closely into line with the jurisdiction of the magistrates' courts in respect of the subject matter of the claim[31]. In 1963, the last vestiges of the native commissioners' criminal jurisdiction were removed: henceforth, they were competent to hear general matters of contempt of court only[32]. As a result, the magistrates' courts and the High Court gained exclusive criminal jurisdiction over Africans.

The Present Jurisdiction of Courts Dealing with African Litigation

A major reorganisation of the African courts occurred again, in 1969, when the present African Law and Tribal Courts Act[33] was passed. The structure of the courts and their civil jurisdiction may now be considered in light of their legislation.

Apart from minor changes, the structure and jurisdiction of the European courts has remained substantially the same, since the '930's. The lowest

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28 Section 11 of the Native Law and Courts Act

29 Palley op cit 540

30 Hansard, 25th February, 1958, col 1119; Magistrate's Court Amendment Act No 4 of 1958

31 Section 3 of the Native Affairs Amendment Act No 16 of 1958

32 Native Affairs Amendment Act No 22 of 1963

33 Formerly, No 24 of 1969, now Chapter 237

grade of court is the magistrate's court, constituted in terms of the Magistrates Court Act[34]. Magistrates have jurisdiction over Africans and Europeans alike in civil matters. The common law is almost exclusively applied in these courts for, in terms of Section 13 (2) of the Act, a magistrate may, at his discretion, transfer a case to a district commissioner's court, if it appears to him that the matter falls to be decided wholly or substantially by customary law. It seems that although, under Section 3 (1) of the African Law and Tribal Courts Act, magistrates are competent to apply customary law, they prefer, in practice, to transfer cases involving customary law to the district commissioners' courts.

The next court in the hierarchy of European courts is the General Division of the High Court, established in terms of the High Court Act[35]. This court has inherent jurisdiction in respect of all matters and over all people in Zimbabwe-Rhodesia. Although the High Court is competent to hear cases involving customary law, in practice it will refuse to do so, preferring, instead, to refer the case to a district commissioner's court[36]. Accordingly, the common law is nearly always applied in this tribunal. The Appellate Division of the High Court, the third court in the hierarchy, is constituted in terms of the 1969 Constitution. It has no original jurisdiction; it may hear appeals from the General Division, the magistrates' courts and the Court of Appeal for African Civil Cases. Except in the latter case, the common law is applied in this court.

Major changes have occurred in the structure and jurisdiction of the courts designed to hear African civil cases. The first hierarchy is based on the district commissioners' courts. These courts are established in terms of Section [illegible] of the African Affairs Act[37]. The court is constituted by one district commissioner, assistant district commissioner or district officer, sitting alone, although he may summon to his assistance a chief or headman to sit in an advisory capacity as an assessor[38]. The

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34 Chapter 18

35 Chapter 14

36 Mpambwa v Mpambwa 1974 (4) SA 307 (R) and the critique of this decision in (1974) 14 Rhodesian Law Journal 100

37 Chapter 228

38 Section 5 (1) and (4) of the African Affairs Act

jurisdiction of the district commissioner is specifically defined in terms of race. It is provided that he has jurisdiction in civil suits

> "in which the rights of Africans only are concerned or which have been transferred from a magistrate's court under the Magistrates Court Act." 39

The same limitations in respect of the subject matter of the dispute are imposed upon the district commissioners' courts as are imposed on the magistrates' courts in terms of Section 13 (1) of the Magistrates Courts Act. Unlike magistrates' courts, however, district commissioners' courts have jurisdiction to adjudicate upon cases affecting the status of Africans, in particular with regard to the dissolution of customary law marriages or civil or Christian marriages, since these matters are not excluded from the jurisdiction of district commissioners by Section 13 (1) of the Magistrates Courts Act.

Appeal lies from a district commissioner's court to the Court of Appeal for African Civil Cases. This court was established in terms of Section 6 of the African Affairs Act. The court is constituted by a President (a retired judge or advocate of at least ten years' standing) and two other members who are, or have been, district commissioners. Further appeal lies from this court to the Appellate Division

The second hierarchy of African courts is based on the tribal courts, namely, the courts of chiefs and headmen. The Minister of Internal Affairs may grant judicial powers to any chief or headman he thinks fit[40]. The tribal courts have civil jurisdiction over Africans where the defendant is normally resident in the area of the court's jurisdiction or the cause of action arose within the area of the court's jurisdiction or if the defendant consented to the jurisdiction of the court. They have jurisdiction over Africans and non-Africans in the circumstances described above, provided that the non-African consents to the jurisdiction of the court[41]. The jurisdiction of the courts in respect of the nature and subject matter of the dispute is unlimited except that it has no juris-

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39 Section 5 (1) of the African Affairs Act

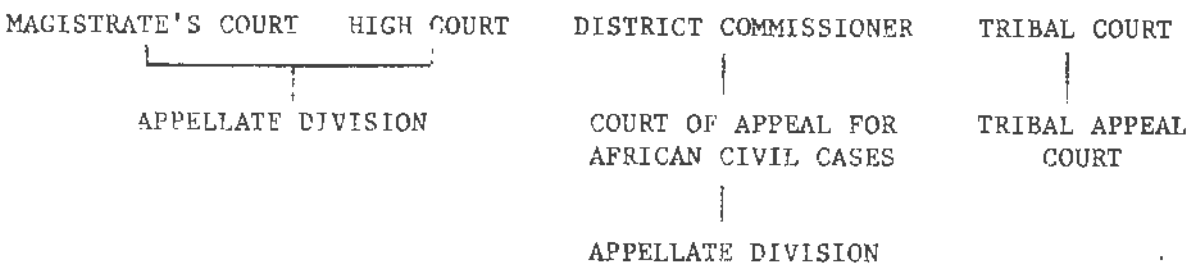
40 Section 7 (1) of the African Law and Tribal Courts Act

41 Section 9 (1) (b) of the African Law and Tribal Courts Act

diction to dissolve a civil or Christian marriage[42]. Similarly, no limitations have been imposed on the orders which a tribal court is competent to make in civil cases[43].

The African Law and Tribal Courts Act introduced an important change in the Zimbabwe-Rhodesian court structure by establishing a new court of appeal for the tribal courts[44]. The Tribal Appeal Court is composed of three chiefs who are presidents of tribal courts It is a remarkable tribunal in that it acts as the final court of appeal in civil cases, thereby severing all connection with the district commissioners' hierarchy of courts and the European courts. In this manner, a self-contained hierarchy of tribal courts has been created. The district commissioners have been left with only very limited supervisory powers over the tribal courts[45].

An African, in Zimbabwe-Rhodesia, has the option of bringing a civil case in one of four separate fora, with the possibility of appealing to one of three different courts of appeal:



Although the jurisdiction of the inferior courts is limited with regard to area (viz, the general principle of actor sequitur forum rei is applied), the areas of the courts' jurisdiction overlap. In effect, therefore, the defendant has no way of inhibiting the plaintiff's choice of forum.

It can no longer be said that Zimbabwe-Rhodesia has a dual court structure. In civil cases, it would be more accurate to describe it as a triadic court structure.

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42 Section 9 (3) of the African Law and Tribal Courts Act

43 Section 10 of the African Law and Tribal Courts Act

44 Section 21 (2) of the African Law and Tribal Courts Act

45 Section 20 of the African Law and Tribal Courts Act

Assessment of the Court Structure

It is apparent, from the historical evolution of this system, that the structure of the African courts has never been determined by a single, consistent policy. The magistrates' courts and the High Court, on the other hand, were instituted to cater for European litigation. This has been their function since they were first established and they continue to apply only the common law. It is more difficult to determine the purpose and function of the African courts. We may infer (from his position) that the district commissioner is expected to realise the interests and aspirations of a large number of Africans who are in a phase of cultural transition. While district commissioners are expected to be familiar with the traditional cultural values and attitudes of the African population, they are also educated in the common law tradition[46]. The laws applied in their courts reflect their dual role in at least four respects.

Firstly, in terms of the conflict of laws rules contained in Section 3 of the African Law and Tribal Courts Act, district commissioners may apply either the common law or customary to the solution of a dispute. In this manner, they may exclude customary law. (The conflict of laws process will be considered in detail in the next chapter).

Secondly, district commissioners' courts have not hesitated to update customary law in order to meet modern demands. For example, in traditional customary law, an African woman was not deemed to be capable of entering into transactions with people outside her own family. Her modern role in commerce and industry has made this rule anachronistic. The district commissioners' courts have, therefore, given her full contractual capacity with regard to the running of her business concerns[47].

Thirdly, and this causes considerable difficulty in understanding African customary law in Zimbabwe-Rhodesia, district commissioners have transposed (although often unconsciously) rules and principles from the received

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46 Holleman op cit Chapter 1, although he shows how the district commissioner tended to lose his originally close contact with the African people

47 Fasara v Agnes Manjaya 1958 SRN 853

system of common law into customary law[48]. They have done this in two ways. At a fundamental level, European administrators and lawyers, from their observation of African social institutions, have inferred various rules of customary law. Instead of attempting to understand and apply these rules in terms of their African social setting, they have often subsumed them under related phenomena of the common law. The training of an anthropologist sensitizes him to the subtleties of cultural difference and puts him on his guard against descriptions which are moulded by his own cultural traditions[49] Frequently, the lawyer lacks this training and, in consequence, tends to describe and evaluate rules of customary law as if they were part of the more familiar system of common law. Of course, there may well be a similarity between our own and foreign legal rules. If the rules bear close resemblance, we may be forgiven for treating them as if they were the same as ours; but we are in danger of failing to appreciate marginal differences which may exist in the rules themselves or their application in the foreign system of law. Such lack of understanding may easily promote distortion of the foreign rule[50]. The following statement provides a useful illustration of this problem:

> "Under traditional African law a woman never attained full legal status On marriage she left the guardianship (patria potestas) of her father and came under the subordination of her husband. In general she remained a minor under tutelage." 51

We find here that several technical terms, derived from the common law, have been applied to the African legal system - "guardianship", "patria potestas", "minor" and "tutelage". This does not, necessarily, mean that there is never correspondence between the institutions of customary law and those of the common law but, if there is, in fact, a difference,

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48 Bohannan Justice and Judgment among the Tiv Chapter 1; Gluckman "African jurisprudence" (1961/2) Advancement of Science 443

49 See Beattie Other Cultures 41-48

50 Regarding the European conception of customary law generally, the following comment is illuminating: "Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilised society. ... On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own When once they have been studied and understood they are no less enforceable than rights arising under English law." In Re Southern Rhodesia 1919 AC 211 at 233-234 (PC)

51 Child The History and Extent of Recognition of Tribal Law in Rhodesia 89

customary law may suffer from distortion. It may even happen that the distorted perception prejudices the attitude of the administrator of customary law. The classic example, in this regard, was the European conception of marriage consideration In South Africa, European observers noted that when Africans entered into a marriage, the husband gave his prospective wife's family a valuable consideration (usually in the form of cattle). Many observers inferred from this practice that the husband "purchased" his bride[52]. Moreover, the South African courts and several writers called marriage consideration "dowry", although it is obvious that dowry is a completely different institution[53] (The giving of dowry is foreign even to the common law. Our understanding of it is derived from Roman law where it was originally considered to be a contribution by the wife or her family to assist the husband to establish a new household[54].) In view of these misconceptions, we should not be surprised to find Seymour (a leading authority on customary law in South Africa) commenting:

> "Although this view is based on speculation after a consideration of ancient law, it seems probable that the payment of dowry (bridewealth) originated as a species of sale or exchange; in primitive patriarchal societies, the head of the family had the jus vitae necisque over his children, the power to sell them in bondage, or to give them in marriage." 55

One may be forgiven for suspecting that it is this type of distortion which prompted an early South African missionary-anthropologist to say that marriage consideration "poisoned the whole of native life"[56]. This is an understandable point of view if the wife is considered to be the object of a commercial contract. It is only since the true nature of the marriage consideration has been revealed that lawyers and others concerned with the administration of customary law have shown a less hostile attitude to the institution[57]. The example cited is, perhaps,

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52 Seymour Bantu Law in South Africa 142 and the authorities cited

53 Seymour ibid

54 Van Warmelo An Introduction to the Principles of Roman Civil Law 51; Thomas The Institutes of Justinian 34

55 op cit 142

56 Junod Life of a South African Tribe Vol 1 282

57 Seymour op cit 142

an extreme one; and it would be foolish to argue that, in all cases, the European perception of customary law is distorted and, even if distorted, has a deleterious effect on the administration of justice. Nonetheless, to obtain complete understanding of African customary law, we must beware that we do not impose our own preconceptions.

On another level, the common law explicitly impinges on customary law. Since arriving in Africa, Europeans have condemned various institutions of traditional customary law because these institutions were not in keeping with European notions of liberty and morality. Although colonial governments were prepared to recognise customary law, they were not prepared to condone such practices as the killing of twins, witchcraft and slavery[58]. Accordingly, it was provided that customary law was to be applied only in so far as it was not repugnant to natural justice and morality and, in terms of this provision, certain rules of customary law were not recognised or enforced. It is difficult to separate this process from the overt modification of customary law to meet modern social conditions. Both processes involve importation of common law rules and, implicit in these rules, are European notions of liberty and morality. For instance, the courts have insisted that a woman's consent to her marriage be regarded as a prerequisite for a valid union in customary law[59]. To hold otherwise would be incompatible with Western European notions of individual liberty[60]. For similar reasons, the courts have considered orders of custody of minor children on the basis of the child's best interests[61]. (This principle is now contained in statutory form[62]). It will be apparent, of course, that the application of these common law principles could as well have been argued on the basis of the repugnancy clause or on the basis of the conflict of laws; but this has not been the approach of the courts. Instead, they chose to modify customary law by the informal introduction of new rules and principles. This process is evident only in the courts of district commissioners and the Court of Appeal for African Civil Cases and has fostered the growth of a "second"

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58 See Chapter 4, regarding the application of the repugnancy clause

59 R v Chokumarara 1945 SR 88

60 Article 16 of the Universal Declaration of Human Rights

61 Dayimano v Kgaribaitsa 1931 SR 134: Child op cit 73sq

62 Section 3 (5) of the African Law and Tribal Courts Act

system of customary law, reflecting the cultural and educational predilections of the judicial officers staffing the courts[63]. The courts do not formally distinguish the common law rules and principles from the customary law on to which those rules and principles have been grafted. The law they apply is still termed "customary law" but it is a modified version of the traditional law. The rules relating to the conflict of laws and the provision of the repugnancy clause were designed to cater for this type of situation but, whether consciously or unconsciously, the courts have circumvented such formal processes and have evolved a new system of customary law, often bearing close resemblance to the common law. It is not proposed to upset what is now an established feature of Zimbabwe-Rhodesian customary law: it would do violence to contemporary legal thinking to distinguish from traditional African customary law rules derived from the common law and to term those rules "common law". Although we must accept the existence of a hybrid system of customary law, this does not mean that we should be unaware of the influence of the common law nor should we fail to isolate the areas affected by its importation and, if necessary, analyse the results of its application.

The third hierarchy of courts is staffed exclusively by the traditional tribal authorities. The judicial functions of chiefs and headmen are but one aspect of their general political roles as tribal leaders[64]. Although the tribal courts are now established and regulated by the government, under the African Law and Tribal Courts Act, as little as possible has been done to interfere with the traditional manner of administering justice. Just as the cultural attributes of district commissioners have a profound influence in shaping the law they apply, so, too, do the attitudes of chiefs and headmen determine the quality of the law and the manner in which it is applied in their courts[65].

When disputes arise within the Shona community, there are various levels at which people may attempt to solve them, corresponding with a hierarchy of courts and courts of appeal. Family disputes, if possible,

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63 Goldin and Gelfand African Law and Custom in Rhodesia 78-79

64 Bourdillon The Shona Peoples 132-133

65 Goldin and Gelfand op cit 78

should never come before a public court; they should be solved within the family concerned[66]. It will readily be appreciated that the husband/father of a family group will attempt to settle any disputes which arise between his wives and his children. As such, he acts in an informal judicial capacity when he presides over the family court. More important is the village court, presided over by the village headman (designated a "kraalhead" by government and called samusha/sabuku by the Shona). The village headman is competent to hold an informal court, in the nature of a family court, to settle any disputes arising within the village community under his authority. Only minor and simple cases, susceptible of ready settlement, are heard at this low level[67].

If the village headman cannot solve the dispute or if the matter is serious (such as seduction or adultery) it will be heard in a wardhead's court[68]. This court differs from the village headman's court in that it has a more formal procedure and precise structure[69]. As Holleman puts it, the function of a village headman is that of an arbitrator settling a dispute, while the function of a wardhead is that of a judge formally deciding a case[70]. At the highest level of authority, acting as a court of appeal from the wardheads' courts, is the chief's court. As a judicial officer, the chief has inherent jurisdiction over all persons in the chiefdom. Apart from his appeal jurisdiction, he acts as a court of the first instance with regard to such serious matters as assault, stocktheft, witchcraft etc. The procedure in this tribunal tends to be more formal than that of the

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66 Bourdillon op cit 147 for a brief description of the court structure; Goldin and Gelfand op cit 30-35 regarding the tribal authorities. Refer to the description of a village (musha) in Chapter 2

67 Holleman Shona Customary Law 8; Goldin and Gelfand op cit 120-121; Holleman in Gluckman and Colson (Eds) Seven Tribes of Central Africa 363

68 Goldin and Gelfand op cit 226

69 For a general description of the ward (dunhu) see Holleman Shona Customary Law 11-14; Seven Tribes 367-372

70 Seven Tribes 370-371; Shona Customary Law 8; The Shona draw a distinction between the function of a village headman arbitrating a dispute - which is termed kuenzanisa nyaya - and the formal adjudication of a wardhead - kutonga mhoswa

wardhead's court, as befits the most superior court of the tribe[71].

The manner in which the tribal courts apply customary law and, indeed, their conception of their role in settling disputes gives them a distinctive character. Law is not usually applied, as it is in European courts, as a fixed and predetermined system of rules.

> "You will find no tribal African, however intelligent or experienced, who can even venture to give you a systematic and critical exposition of a particular legal subject, let alone a review of the salient principles or classifications of the law of his people. He may quote a number of legal maxims and present these as if they were strict legal definitions, rigid rules of law. But when it comes to actual practice it becomes evident that these maxims are too generalised or too vague to permit strict interpretation. ... They are important because they represent certain broad guiding principles or approximations or isolated beacons or landmarks by which a general direction can be found. But they are certainly not strict, charted roads from which one cannot deviate. And so the course of Shona Law is a flexible one and, to our mind, often unpredictable." 72

To the African mind, the provision of various rules and their interpretation is less important than the task of solving social disputes. In other words, it is more important that the disputing parties discover a new modus vivendi, that their dispute and its harmful effects be erased and that the community return to harmonious co-existence[73]. To achieve this aim, it is often more important to reconcile the disputing parties than to apply, impartially, rules of law for the solution of a conflict. The Shona judicial officer would "settle rather than decide.. appease and reconcile rather than enforce."[74]

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71 For a general description of the chiefdom (nyika) see Holleman Shona Customary Law 15-21; Seven Tribes 376-377

72 Holleman Issues in African Law 13

73 Bohannan op cit 61-65, 96-101 and 210-214

74 Holleman Issues in African Law 4. For a useful description of the judicial process in the tribal courts see Bourdillon op cit 147-160. The importance of reconciliation (and, in consequence, the relevance of rules of law) should not, however, be overstressed. In many cases, such as delictual actions and claims for return of rovoro, tribal courts function in much the same manner as European courts. See Gluckman The Judicial Process among the Barotse of Northern Rhodesia 55sq and van Velsen "Procedural informality, reconciliation, and false comparisons" in Gluckman (Ed) Ideas and Procedures in African Customary Law 137sq

In this regard, it is pertinent to question the extent to which tribal courts will act upon government legislation. Apart from the fact that the educational qualifications of African judicial officers seldom equip them to apply complex legislative provisions, it must be appreciated that the strict application of such rules is not in keeping with the African conception of a judicial role. The best documented example illustrating this proposition relates to the enactment depriving tribal leaders of their judicial powers during the period 1898 to 1937[75]. Despite this legislation, it was quite apparent that chiefs and headmen continued to dispense justice with the consent and to the satisfaction of their people. This did not, necessarily, indicate that the tribal leaders deliberately violated statutory law; rather, it indicated that the administration of justice was a far more flexible and informal process than in the European community, dependent not on the wording of a statutory instrument[76]. For these reasons, one should not assume that legislative provisions will automatically be applied in tribal courts. Much will, obviously, depend on the education and attitude of the individual chief or headman but, as a general rule, it would be safer to assume that only district commissioners regularly take account of statutory law.

Finally, we should note that the tribal courts and the district commissioners' courts have quite different attitudes to the doctrine of stare decisis. Courts staffed by Europeans, not surprisingly, follow the common law tradition of stare decisis. The decisions of the Court of Appeal for African Civil Cases provide binding precedents for the district commissioners' courts. They are recorded and reported, in this manner supplying a readily ascertainable source of law. (It is uncertain, however, whether the Court of Appeal is bound by its own decisions in view of some startling

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75 Rhodesia Government Commission appointed to inquire into and report on administrative and judicial functions in the Native Affairs and District Courts Departments para 183, regarding the widespread disregard of legislation.

76 Holleman Chief, Council and Commissioner 92 describes a similar situation concerning the criminal jurisdiction of tribal courts. Although, officially, the courts lacked criminal jurisdiction, they continued to hear criminal cases simply because they were unaware, in most instance, of the common law distinctions between crimes and delicts. See also the case of S v Khumalo 1973 (1) SA 567 (R) regarding the statutory distinction between judicial and arbitral functions in tribal courts

reversals of previous decisions[77]). It would seem most unlikely, on the other hand, that the decisions of either the district commissioners' courts or the Court of Appeal provide precedent for the tribal courts since the chiefs and headmen do not have the requisite facilities or educational requirements necessary to apply a doctrine of precedent consistently[78].

An individual tribal court may well abide by a decision it gave earlier or it may even follow a decision given by a neighbouring court; but there is certainly no formal doctrine of stare decisis in the sense that it is applied in European courts[79] Such a principle is, of course, inconsonant with the general design of a tribal court which is "to solve conflicts rather than rationally and impartially to apply abstract rules of law."[80] In the absence of a system of case reporting and formal legal training for the staff of tribal courts, of course, the doctrine of precedent is impracticable. For these reasons, it is unlikely that the tribal courts will follow the decisions of the tribal appeal courts. The latter courts might have provided a link between the district commissioners' courts and the tribal courts but, again, it is uncertain whether the decisions of the tribal appeal courts will bind district commissioners or whether the decisions of the Court of Appeal will bind the tribal appeal courts. The latter have sat on only a few occasions, to date, and no provision has been made for reporting their judgments.

From the above, it is apparent that two separate and distinct systems of customary law have been promoted in Zimbabwe-Rhodesia. The hierarchy of courts based on the district commissioners' courts and each individual tribal court is applying its own particular system of law. While there may be, and, undoubtedly, there often is a degree of overlap, the two systems of customary law in the country are in a state of divergence. The

77 For instance Kakoma v Chikono 1946 SRN 377; cf Imbwadzawo v Manondo 1948 SRN 431; Palley op cit 506-510

78 And statutory provisions: the tribal courts, for instance, simply ignore the provisions of Section 3 (5) of the African Law and Tribal Courts Act regarding the interests of the child in custody orders. Instead they regularly apply the rules of customary law: Bennett Appendix E Question 96

79 Gluckman The Judicial Process 253sq

80 Bourdillon op cit 158

differences between the two systems seem to be destined to grow ever greater. One significant influence, which could foster uniformity, is the source from which the courts derive their knowledge of the law; but the sources are widely disparate. The Court of Appeal for African Civil Cases derives its law from authoritative texts, previous decisions and, occasionally, from the opinions of experts[81]. District commissioners rely partly on their personal knowledge of customary law but, mostly, on precedents, texts and expert opinions. (The magistrates' courts and the High Court, it should be noted, derive the law they apply from the same sources, ensuring that a consistent body of rules is applied, regardless of the court in which a suit is brought.) The tribal courts, however, rely solely on their intimate knowledge of the people and the laws of their areas of jurisdiction. As Goldin and Gelfand have put it:

> "tribal courts enunciate African law uninfluenced and unimpeded by Roman-Dutch law or the study of books or written precedents. ... The African knows his laws, not as a result of study, but by virtue of being and living as an African." 82

Without a viable system of precedent linking the two hierarchies of courts, and now that the appeal courts have been separated, it seem that, apart from the slow process of education, little can be done to integrate the two systems of customary law[83].

Account is taken, in this thesis, of the difference between the laws applied in the district commissioners' courts and the Court of Appeal for African Civil Cases, on the one hand, and the tribal courts, on the other. For obvious reasons, it is impossible to take account of the law applied in each, individual tribal court in the country. Accordingly, the system of Shona customary law is considered as a single system. While the potential exists for divergence amongst the various tribal courts, there is, in fact, a remarkable degree of uniformity in the Shona law relating to women. Consequently, in each chapter, where appropriate, the customary law, as it is expounded in the tribal courts will be presented first[84];

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81 Section 5 of the African Law and Tribal Courts Act

82 op cit 78

83 For a general treatment of the Zimbabwe-Rhodesian court system, see Bennett "The African court system in Rhodesia: an appraisal" (1975) 15 Rhodesian Law Journal 133

84 Authority for this body of law will be derived, principally, from anthropologists and the author's research project: Appendix E

this will be followed by the law applied in the district commissioners' courts and the Court of Appeal for African Civil Cases[85].

85 Authority, in this instance, is derived from the reported cases and authors such as Child and Goldin and Gelfand

4 THE APPLICATION OF THE COMMON LAW AND CUSTOMARY LAW

Colonial Solutions to Conflict Problems

Since a legal system is the reflection of a culturally unique unit, the co-existence of two cultural communities in Africa - Western European and indigenous African - inevitably gave rise to legal duality. Initially, this dualism posed no particular problems: the received systems of Western European law were applied to the white settlers and customary law was applied to Africans[1]. This presupposed no cultural contact between the two communities. Once Africans began to participate in the Western European economy and social intercourse between the two communities increased, however, problems of conflict of laws began to occur[2].

The type of conflict which occurred in Africa could best be designated an "interpersonal conflict" for the legal dualism inherent in the colonial state assumes that an individual, because of his culture, is bound by a particular system of law[3]. The conflict is conceived in terms of the person of the individual rather than the territory of a foreign state (which is the basis of Private International law). The question which faced the colonial courts was when to apply a particular system of personal law.

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1 Seidman "The reception of English law in colonial Africa revisited" (1969) 2 East Africa Law Review 52: "English law was perceived as immanent in society, and hence innate in Englishmen. The notion that Englishmen carry their law with them in their portmanteaus was a reflection of the same understanding. Its implication was that it was just and proper that their disputes be settled pursuant to the law which was perceived as their birthright." This represents a revival of the personality principle which had formerly flourished in the early Middle Ages. Each person was to be judged by his lex originis, viz the tribal law of his birth. In the Lex Ribuaria 31.3, for instance, it is provided: Hoc autem constituemus, ut infra pago Ribuario, tam Franci, Burgundionis, Alamanni seu de quacumque natione commoratus fuerit, in iudicio interpellatus, sicut lex loci continet, ubi natus fuit, sic respondeat. Quod si damnatus fuerit, secundum legem propriam, non secundum Ribuariam, damnum susteneat.

2 The conflict of laws is a formal reflection of a more profound social conflict: for example, see Akolawin "Personal law in the Sudan - trends and developments" (1973) 12 Journal of African Law 149

3 Allott New Essays in African Law 113. This is not applicable, of course in every field of law: public and commercial law matters are governed exclusively by the received system of European law: see infra

The general answer was to apply customary law to Africans in cases which involved family law, succession, rights to land and a few specific contracts. Since the conflict was viewed in terms of person, it was appropriate that the personal legal regime regulated rights and duties arising in the private law sphere In other areas, where the interests of state were concerned (viz constitutional, administrative and criminal law), however, the received system of Western European law was invariably applied. Similarly, the wide variety of transactions and institutions, such as corporations, introduced from Europe, necessitated application of the legal system from which they were derived. Transactions, such as the purchase of shares in a company or hire-purchase agreements, were all regulated by the common law. This simplistic approach could not, indefinitely, provide a full and satisfactory answer and, in the course of time, various refinements were evolved.

In the Portuguese and Francophone countries, an attempt was made to forestall conflict problems by predetermining the personal law of the individual. Initially, all the African inhabitants of the French colonies were typed as having a customary law status (statut coutumier) and the whites had a French civil law status (statut civil français). All civil and commercial disputes arising between persons who had a customary status were to be judged according to customary law. If an African, through contact with European society, changed his life style so as to become assimilated into French culture, he could make application to a court to change his status to statut civil français[4]. A similar procedure was adopted in the Belgian Congo and the Portuguese territories[5]. Apart from these provisions, more detailed choice of law rules were not laid down by legislation and the implications of conflict problems were left to be solved by the courts and academic writers.

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4 Salacuse An Introduction to Law in French-speaking Africa 49-54. The French approach was to concentrate on status and ignore any other rules for resolving conflict problems. Apart from providing that all civil and commercial matters between Africans were to be judged according to local custom, no other choice of law rules were provided

5 Robert "A comparative study of legislation and customary law courts in the French, Belgian and Portuguese territories in Africa" (1959) 11 Journal of African Administration 124

In the Anglophone countries, a slightly different approach was taken. Here the subject matter of the case, together with the race of the litigants, determined choice of law. In terms of this broad principle, two different approaches to choice of law were evolved. The pattern for West Africa was established by the Gold Coast Supreme Court Ordinance of 1876[6], which provided:

> "Such laws and customs shall be deemed applicable in causes and matters where the parties thereto are natives of the Colony, and particularly, but without derogating from their application in other cases, in causes and matters relating to marriage and to the tenure and transfer of real and personal property, and to inheritance and testamentary dispositions, and also in causes and matters between natives and Europeans where it may appear to the Court that substantial injustice would be done to either party by a strict adherence to the rules of English law. No party shall be entitled to claim the benefit of any local law or custom, if it shall appear either from express contract or from the nature of the transactions out of which any suit or question may have arisen, that such party agreed that his obligations in connection with such transactions should be regulated exclusively by English law: and in cases where no express rule is applicable to any matter in controversy, the Court shall be governed by the principles of justice, equity, and good conscience "

A contrast to these fairly detailed choice of law rules is provided by the East and Central African model, of which the Native Court Regulations of 1897 for the East African Protectorate are an example[7]:

> "3. The Native Courts ... shall, as far as practicable, ... be guided by, and have regard to any native laws and customs not opposed to natural morality and humanity."

In both cases, the fact that the race of the litigant was not necessarily decisive in respect of the choice of legal system left room for a more flexible approach to choice of law than in Francophone Africa.

The East African approach allows the court a broad discretion to apply the law which appears most appropriate in the circumstances[8] Customary

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6 Section 19 of Act No 4 of 1876. This model was later adopted in Nigeria, Sierra Leone and Northern Rhodesia: Allott op cit 123-130

7 Subsequently adopted in Uganda, Tanganyika, Nyasaland, Somaliland and Bechuanaland: Allott op cit 130-133

8 Reminiscent of Section 3 (1) of the former Native Law and Courts Act No 33 of 1937: see footnote 52. Section 11 (1) of the Black Administration Act No 38 of 1927 (as amended), in South Africa, allows the court a similarly wide discretion

law might, accordingly, be applied in the more conservative areas of the law - the family, tenure of land and succession - but if an African litigant were fully assimilated into the English way of life, it would be open to the court to apply the common law instead. This is a commendably flexible approach but, because of the absence of any specific choice of law rules, it degenerated into a case-by-case assessment, leading to uncertainty[9]. The Gold Coast Ordinance is more rigid and, in consequence, more productive of certainty. Customary law was applicable in those areas least likely to be affected, initially at least, by contact with English culture but, on the basis of an implicit agreement, these choice of law rules could be varied[10]. It is this type of thinking which appears to have inspired the current Zimbabwe-Rhodesian choice of law provisions.

In comparing, briefly, the Anglophonic and Francophonic systems, we may note that they both tend to reflect the distinctive policies of the colonial governments. France and Portugal had a policy of direct rule and these nations had embarked on a programme of assimilating the African inhabitants of their overseas territories into what they considered to be their culturally superior standards[11]. The British did not, in general, advocate assimilation and, in terms of their policy of indirect rule, allowed Africans to remain subject to their traditional tribal leaders and legal regimes[12].

Since independence, an attempt has been made, in all the former colonies, to abandon, as far as possible, the distinction between customary law and the received system of European law. It was widely felt that there should be a national body of law administered by a single system of courts[13].

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9 Which is Pallev's criticism of Section 3 (1) of the former Native Law and Courts Act in Zimbabwe-Rhodesia: see footnote 54; and, in South Africa, see Hahlo and Kahn South Africa: the Development of its Laws and Constitution 336; Allott op cit 132

10 Allott op cit 129

11 Salacuse op cit 43-44; David and Brierly The Major Legal Systems in the World Today 512-513

12 See, generally, Robinson "The administration of African customary law" (1949) 1 Journal of African Administration 158

13 See, for example, the report on the Judicial Advisers' Conference at Makerere: Brooke "The changing character of customary courts" (1954) 6 Journal of African Administration 67. In no country, however, has legal dualism been completely eradicated

In some of the former French colonies, a comprehensive code has been drawn up, embodying the principles of both customary and civil law[14]. This has had the effect of eradicating any conflict problem as all litigants are subject to a single, national system of law. Other countries have seen the solution in a partial codification of particularly contentious areas of law, such as marriage[15]. The certainty which these changes lend to litigation has its attraction but they inevitably suppress the individual's freedom to choose the legal regime of his or her preference (which is one of the potential values implicit in legal dualism).

The Zimbabwe-Rhodesian Approach to Conflict Problems

Since the country was first occupied by the British South Africa Company, in 1890, Zimbabwe-Rhodesia has had a dual legal system to complement its dual court structure. African laws and customs were expressly recognised in the Charter which Rhodes obtained from the Crown, on 29th October, 1889. Article 40 of the Charter provided the Company with the powers necessary to govern the new territory and, in Article 14, it was provided:

> "In the administration of justice to the said people or inhabitants, careful regard shall always be had to the custom and laws of the class or tribe or nation to which the parties respectively belong, especially with regard to the holding, possession, transfer and disposition of lands and goods, and testate or intestate succession thereto, and marriages, divorce, legitimacy, and other rights of property and personal rights, but subject to any British laws which may be in force in any of the territories aforesaid and applicable to the peoples or inhabitants thereof."

The same regard was paid to customary law in the various Orders in Council passed between 1891 and 1898, after the country had been made a Protectorate. Finally, in 1937, Section 3 (1) of the Native Law and Courts Act[16] provided that:

> "Notwithstanding the provisions of Article 49 of the Southern Rhodesia Order in Council 1898, in the determination

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14 Madagascar and Ivory Coast, for example

15 Such as the Tanzanian Law of Marriage Act No 5 of 1971 and Mali's Code of Marriage and Guardianship No 62-17 of 1962

16 No 33 of 1937

> of any civil case between natives by any court of law, the decisions shall be in accordance with native law and custom, but if native law and custom is inapplicable to the cause or matter before the court -
>
> (a) any court of law other than a native court shall determine the case in accordance with the law of the Colony;
>
> (b) a native court shall state all proceedings in the case to the Native Commissioner of the district for decision or transfer to a court of competent jurisdiction."

This enactment remained in force until the promulgation of the current African Law and Tribal Courts Act, in 1969, which substantially modified the rules determining the application of customary law and the common law.

Despite Zimbabwe-Rhodesia's long history of legal dualism[17], the problem when to apply customary law or the common law has received very little attention. The reason may be found, as Agbede suspects[18], in the court system of the country. The provision of a dual court system or, as is the case in Zimbabwe-Rhodesia, a triadic system, frequently forestalls any conflict problem. In practice, if the litigant wishes to seek his remedy under the common law, he may sue in a magistrate's court; if he wishes to seek his remedy under customary law he may sue in a tribal or district commissioner's court. In this manner, the selection of a particular forum operates to avoid the conflict problem. Forum shopping has, however, been disapproved. The court in In re Robert[19] said that:

> "It would be a novel and an intolerable situation in which the substantive law governing the relationships between the same parties varied in accordance with the court in which it fell to be decided." 20

Although there is nothing to prevent the magistrates' courts or the General Division of the High Court from applying customary law, they are reluctant to do so. The judicial officers staffing these courts are not specially qualified in customary law and problems relating to the

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17 Although Zimbabwe-Rhodesia may be said to have a "plural" legal system in that it embraces the common law and at least three different systems of customary law (Shona, Ndebele and Tonga), the term "dual" is more apposite to denote the conflict between customary and common law

18 "Conflict between customary and non-customary systems of law" (1972) 5 Verfassung und Recht in Ubersee 415

19 1953 SR 47 at 48

20 The plaintiff, being the one to select the forum, places the defendant in an unfavourable position; cf Hansard 28th January, 1969, col 626sq

proof of customary law make it more expedient to hear such cases in the district commissioners' courts[21]. In theory, conflict problems should not arise in the tribal courts for, in terms of Section 9 (1) of the African Law and Tribal Courts Act, they are competent to apply only customary law. Presumably, the same restriction applies to the tribal appeal courts, although there is no provision in the Act in this regard. Accordingly, conflict problems are likely to be encountered either in a district commissioner's court or in the Court of Appeal for African Civil Cases as these courts are competent to apply both the common law and customary law.

The application of common law and customary law is currently governed by Section 3 (1) of the African Law and Tribal Courts Act which provides as follows:

> "Subject to the provisions of this section and of any other enactment, in the determination by any court of law of any civil case between Africans or between an African and a person who is not an African, the decision may be given in accordance with customary law.
>
> (1a) Save as otherwise provided in this section, unless the justice of the case otherwise requires -
>
> (a) customary law shall be applicable in any case which is between Africans and which relates to -
>
> (i) seduction or adultery; or
> (ii) the custody or guardianship of children; or
> (iii) the devolution otherwise than by will of movable property on the death of an African:
> Provided that where the deceased was an African mentioned in section 70 of the Administration of Estates Act (Chapter 301) the provisions of that section shall apply; or
> (iv) rights in land which is not held under individual registered title; or
> (v) marriage consideration; or
> (vi) a marriage between Africans contracted under customary law, whether or not it has been solemnised under the African Marriages Act (Chapter 238);
>
> and
>
> (b) the law of Rhodesia shall be applicable in any other case."

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21 Bennett "The African court system in Rhodesia: an appraisal" (1975) 14 Rhodesian Law Journal 135

In the absence of detailed judicial analysis or academic guidance, we are still at large as to the interpretation of this section. In the circumstances, the following interpretation of this section is suggested, as being the most logical and one in keeping with the spirit of the legislation.

Fundamentally, the recognition and application of a system of law, perceived to be "foreign" by the forum, is no more than an attempt to meet the litigants' reasonable expectations[22]. This may be regarded as part of the process of doing justice to the parties for if the court were to apply a system of law which appeared to them foreign and incomprehensible, it could not be said to have achieved its aim of dispensing justice[23]. If, then, we accept that choice of law rules are designed to select the legal system which will gratify the parties' reasonable expectations, Section 3 (1) appears to offer a simple and sensible scheme. The judicial officers charged with the discretion to apply customary law have a great responsibility, in fact "greater than that generally borne by the courts."[24] Section 3 (1) provides that customary law is applicable to all the issues contained in subsection (1) (a). These issues are, substantially, the same as those set out in Article 14 of the BSA Charter - family law, succession and land tenure - those core areas in which a settled community is likely to be most resistant to change[25]. These are prima facie rules for the selection of the appropriate legal system; they are variable if the "justice of the case otherwise requires". The latter clause introduces a welcome degree of flexibility into Section 3 (1).

There is a temptation to assume that Private International Law, because it deals with the solution of conflict problems, can be used for the solution of conflicts between customary law and the common law. Although

22 American Restatement of the Law of Conflict of Laws, Second Vol 3 6; Castel Canadian Conflict of Laws 9-10; Anton Private International Law 5; cf Kahn-Freund General Problems of Private International Law 319-320

23 This theory as the basis of conflict of laws was introduced by Cheaveson Conflict of Laws 7-10 and 40-41

24 Minister of Native Affairs: ex parte in re Yako v Beyi 1948 (1) SA 388 (AD) at 396 per Schreiner JA

25 These are the very areas in which Roman law had the least influence in the development of Roman-Dutch law

it has a useful role to play, Private International law must be treated with caution[26]. There are two reasons for this. The basis of Private International law differs from that of interpersonal conflicts in that it is founded on an assumption that laws are territorially defined and, for that reason, are confined to particular nations. The conflicts with which we are concerned are founded on the assumption that laws are culturally defined, without regard to a particular locality. There can, of course, be no precise territorial division of law in a nation, such as Zimbabwe-Rhodesia, which has a dual legal system. Private International law assumes, moreover, that systems of law are discrete entities and are, in consequence, mutually exclusive. This is not true of customary law, which has been substantially modified by common law concepts[27] Because of these two fundamental differences, the choice of law rules offered by Private International law must find no place in the solution of interpersonal conflicts[28].

Even if these warnings are heeded, there is no reason why certain techniques of Private International law should not be used to advantage. The classification of the cause of action, for instance, is a familiar preliminary issue in Private International law[29]. Until now, this question has been ignored in Zimbabwe-Rhodesia; one assumes that the courts have classified intuitively rather than rationally. The failure to appreciate that there may be a classification problem, however, may lead to injustice. For example, intercourse with a girl, against her will, is usually treated as rape in the common law. In Shona customary law, it is more likely to be regarded as the delict of seduction[30]. If it is classified as rape, the common law of crime applies; if classified as seduction, prima facie, the customary law of delict applies. The question which system of law to use for classification is not answered in the African Law and Tribal Courts Act. We may be forgiven, therefore, for searching further afield and considering the principles of Private International law for a solution to this problem.

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26 Allott op cit 115-116

27 Elias The Nature of African Customary Law 273

28 Allott op cit 116

29 Allott op cit 117

30 Child The History and Extent of Recognition of Tribal Law in Rhodesia 4

Another technique is the separation of various aspects of a case. Each aspect of the case may be governed by a different legal system. This technique is regularly used in Private International law but, to date, it has not been consciously used in conflicts between customary and common law. As Allott says, we adhere to the "all or nothing" rule: if one aspect of a case is governed by the common law, then the whole case is governed by the common law[31]. There is no good reason for doing this. In Teacher Tevera v Julius Chiveza[32], however, the Court of Appeal rejected the decision of the court a quo to assess damages according to customary law and to determine delictual responsibility according to the common law:

> "Section 3 of the African Law and Tribal Courts Act, 1969, does not allow a case to be dealt with partly under customary law, and partly under the law of Rhodesia. One or other of the two systems, 'shall be deemed to be applicable'."

It would be unfortunate if this decision were read to exclude all possibility of separation of aspects of a claim. For instance, the formal validity of a marriage may well be separated from the essential validity; similarly, the formal validity of a will may be distinguished from the interpretation of the will and there may be good reason to apply different legal systems to each issue.

Possibly the most fundamentally important technique of Private International law is the use of various "connecting factors" which serve to indicate which legal system should be applied to the solution of the case before the court. This technique will be examined in detail below.

In order to solve interpersonal conflict problems, the following approach is suggested. Initially, the cause of action must be classified as contract, delict, marriage etc. Section 3 (1) provides that the general choice of law rules contained therein are "subject to ... any other enactment". Accordingly, once the nature of the action has been determined, one should seek a specific statutory choice of law rule and, if one exists, this must be applied to the solution of the conflict problem.

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31 Allott op cit 118

32 1975 CAACC 1 at 3

Section 13 of the African Marriages Act, for instance, provides that, notwithstanding the fact that a marriage has been solemnised according to civil or Christian rites, the spouses' property is to be governed by customary law. If no specific choice of law rule, such as this, exists, reference may be made to the general choice of law rules provided in Section 3 (1)[33].

In terms of this section, prima facie, customary law is applicable to any of the matters provided for in Section 3 (1) (a); all other matters are governed by the common law under Section 3 (1) (b). It is to be noted that these are prima facie choice of law rules, no doubt applied intuitively in many of the cases coming before the courts[34].

The prima facie choice of law rules may be varied in the following circumstances:

(1) both parties express their desire to the court that the matter in question be governed by a particular legal system[35].

(2) The parties may expressly agree, prior to any action, that a particular legal system be applied to the transaction in question[36].

(3) Failing express agreement, it may appear from the nature of the case or the circumstances surrounding the matter that the parties had a particular legal system in mind[37].

(4) The justice of the case may require variation of the prima facie choice of law rules[38].

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33 Allott op cit 119 suggests this "hierarchy" of conflict norms

34 In a line of cases, heard before the passing of the African Law and Tribal Courts Act, for example, the common law was applied to mercantile transactions: Chitiyo v Hlupani 1940 SRN 155; Bangure v Muwirimi 1946 SRN 328; Kakoma v Chikono 1946 SRN 377; Tangwara v Thiti 1960 SRN 939. Moreover, in Fanwell Chamboko v Jonasi Nyamayovo 1972 CAACC 1, the court applied the common law, this time expressly adverting to the provisions of the Act

35 Section 3 (3) (b)

36 Section 3 (3) (a) (i) of the Act. To permit the proposita choice of law autonomy is one area in which the [illegible] persona conflict of law differs from Private International Law. In the latter system, it has often been questioned, especially in the case of contracts, whether the parties are free to deviate from the proper law: see W de Vos "Freedom of choice of law for contracts in Private International law" (1961) Acta Juridica 1 especially at 13

Section 3 (3) (a) (ii) of the African Law and Tribal Courts Act

38 Section 3 (1a) of the African Law and Tribal Courts Act

Where the parties have expressly agreed to the application of one or other legal system (the situations envisaged in (1) and (2) above), the court is doing no more than gratifying their legitimate expectations in applying the agreed legal system. One can readily anticipate such agreements being entered into in association with contractual matters and, in this manner, a simple, precise solution to a potential conflict problem is supplied in advance.

Whether the parties have entered into an express agreement or not, the prima facie choice of law rules will be applied unless it can be proved to the court that variation is necessary in the circumstances[39]. It will be up to the party alleging variation to prove to the court, on a balance of probabilities, that the prima facie rules should be varied. If he satisfies the court on this score, the legal system alleged must be applied.

If a party alleges variation, he will have to prove express agreement, alternatively, an implied agreement ((3) above) or that the justice of the case demands variation ((4) above). Whether reliance is placed on the justice of the case or implied agreement, the basis for seeking variation of the prima facie rules will often be the same, in that the court will be required to look to the facts of the case in order to determine whether there is sufficient proof, on a balance of probabilities, showing that the prima facie rules ought to be varied[40].

It is suggested that, at this stage of the case, various connecting factors should be alleged which will tend to indicate which legal system is most appropriate. A connecting factor is a factual element signposting the legal system proper to the solution of the case. Private International law is quite familiar with the use of certain connecting factors which "connect" the action with a legal system: for instance, if the case is concerned with intestate succession to movable property, the factual element which is deemed to point to the appropriate legal system is the

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39 Although it appears from Fanwell Chamboko v Tonasi Nyamayovo 1972 CAACC 1, that the court may be prepared to raise these matters mero motu

40 In Teacher Tevera v Julius Chiveza 1975 CAACC 1, the court observed that the "qualification 'unless the justice of the case otherwise requires' must be invoked with caution. Obviously each case must be decided upon its own facts."

domicile of the deceased[41]. The connecting factors commonly used in Private International law pertain to territorially defined legal systems: the domicile of the propositus, the place where the delict was committed or the marriage was celebrated etc. It is for this reason that the unqualified use of Private International law must be eschewed. It is not the manner in which Private International uses connecting factors which is advocated here: rather it is the idea of employing certain key facts from a case to signpost the applicability of a particular legal system. Private International law proposes, for example, the use of single connecting factors which are predetermined as being applicable to the type of action before the forum. Domicile, for instance, is the connecting factor used to indicate the system of law which will be applied to solve questions relating to intestate succession to movable property. It is suggested that this way of using connecting factors should be discarded in favour of a "proper law" approach, whereby the appropriate legal system may be inferred from a number of factors[42].

This is a radical departure from the rules of Private International law but it is a departure which is justified by the nature of the conflict problem in Africa. We are not concerned with a territorially distinct system of law but with a "personal" law conceived in terms of the cultural attributes of the litigants. Reliance on any one connecting factor, to the exclusion of all others, would yield a certain but, potentially, inappropriate result - one not reflecting the subtleties of the litigants' cultural preferences. Several connecting factors are considered below. They should be treated cumulatively, in the sense that if the majority of factors suggest the applicability of customary law or the common law, as the case may be, the person alleging variation of the prima facie choice of law rules may be regarded as having discharged his onus.

(1) Ethnic Origin or Race

A person's race, in Africa, is usually indicative of his culture.

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41 Anton op cit 52-53; Schmitthoff A Textbook of the English Conflict of Laws 6-7; Baxter Essays on Private Law, Foreign Law and Foreign Judgments 27

42 Cheshire and North Cheshire's Private International Law 31

Although race is a convenient label which may designate a certain type of culture, it is by no means, today, always accurate. Nevertheless, race will still be used as a primary test and often it may prove conclusive.

The first question is what is meant by the term "African" ? A general definition is provided in the Interpretation Act[43] which states that an African is:

> "Any member of the aboriginal tribes or races of Africa and the islands adjacent thereto, including Madagascar and Zanzibar; or any person who has the blood of such tribes or races and who lives as a member of an aboriginal community."

Although this definition may not be strictly accurate in ethnic terms (a member of the Merina tribe of the Malagassy Republic, for example, is not Bantu or Negro), it is, no doubt, intended to mean all the indigenous inhabitants of Africa. In terms of this definition, the race of peoples of mixed blood may be ascertained by reference to their mode of living (a factor which will be considered shortly)[44].

The test of race provides no reliable guide if one of the litigants is a non-African. Section 3 (1) leaves the matter open: "the decision may be in accordance with customary law." Nor will this be a suitable connecting factor if one or both of the parties has adopted a Western way of life.

(2) Life Style

The term "life style" is used here to indicate the culture in terms of which an individual lives; his cultural preference may be inferred from the manner in which he lives. Life style, as a connecting factor, is especially appropriate in cases concerned with marriage and family law. Africans who have chosen a "Western" way of life may be presumed to intend the common law to be applied to their legal disputes. In Chikosi

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43 Chapter I

44 Allott op cit 182-196 regarding the problems associated with the factor of ethnic origin

v Chikosi (2)[45], the litigants had adopted a completely Western European life style, prompting the judge to say:

> "having regard to the circumstances of the parties, their standards of education, their business and social status, their mode of living and the tenets and moral principles which attach to their marriage by Christian rites, I consider that the justice of the case, insofar as custody pendente lite is concerned, requires the application of common law principles."

As Chikosi's case shows, if a person has adopted a Western culture, we may assume that by applying the common law to the solution of a case, we are gratifying his reasonable expectations.

A cultural preference must be inferred from a wide variety of facts, such as education, religious convictions, type of employment, place of residence, customs, manners and so on[46]. It would be facile to pretend that this is a simple process, especially when considered in relation to a people in a phase of cultural transition, for it would be difficult (if not impossible) to find an African who had abandoned all the tenets of his traditional way of life. Similar problems are experienced with regard to the determination of domicile in Private International law. Yet, if we are to accept the propositions that law is a manifestation of culture and that certain Africans may now be governed by the common law because their culture (to a greater or lesser extent) has changed, we must also accept the use of a connecting factor such as life style. From this, it need not be inferred that culture (or rather cultural preference) is an absolute concept; the life style of a litigant is notional in that it will reflect only the preponderance of attributes which go to make up an individual's cultural predilection. People seldom, if ever, overtly express a total commitment to a particular culture and, if no solution may be found in that quarter, we are compelled to infer a preference from whatever facts are available. Merely because this is a difficult process which cannot be treated as an unequivocal issue, does not mean that we must avoid it.

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45 1973 (3) SA 145 (R)

46 Ramothata v Makhothe 1934 NAC (T&N) 74 and Sibanda v Sitole 1 NAC (NED) 347 (1951) are two South African cases where the choice of law was determined by the parties' life styles, in terms of choice of law rules which give the court a wide discretion to apply whichever system seems most appropriate: footnote 50

Use of life style is of greatest assistance only if both parties to the action have the same life style - as in Chikosi's case. If only the plaintiff, for example, as a Western life style, it would unfairly prejudice the defendant, who had not abandoned his traditional manner of living, to apply the common law to the case. When using connecting factors we seek a preponderance of facts which will indicate the application of one legal system or the other. In order for the plaintiff to prove, to the satisfaction of the court, that the justice of the case requires variation of the prima facie choice of law rules, he will have to show that life style, together with other connecting factors, indicate the application of one or other legal system. It is in this sense that connecting factors must be considered cumulatively.

(3) The Nature of the Property in Dispute

The nature of the property which is the object of the dispute may tend to indicate the application of one or other legal system. Property, such as cattle - the basis of the traditional African conception of wealth[47] - would tend to suggest the application of customary law. Property which is entirely unknown to traditional African society, such as copyright, shares, motor cars, etc, will tend to indicate that the common law should be applied. Again, we may assume that the parties, in their dealings with certain types of property, expected one or other legal system to apply. This connecting factor must always be used in combination with others, such as the life style of the parties and the place where the property is situated. While we can readily appreciate that Africans, in their dealings with cattle, for instance, are likely to expect customary law to be applied, this is not a necessary inference. Cattle have acquired a monetary value and it may be quite clear from the circumstances of the case that application of customary law would be inappropriate[48].

(4) The Place where the Cause of Action Arose

Although this connecting factor assumes a system of territorially defined laws it may, nonetheless, remain a viable connecting factor in the case of interpersonal conflicts in Zimbabwe-Rhodesia. In this country, land

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47 Holleman Shona Customary Law 318-319

48 Such as the sale of cattle to an abbatoir

is apportioned on a racial basis, into black and white areas; particularly in the Tribal Trust Lands, where only Africans are permitted to live and work on the land, customary law is the predominant system. In urban areas, on the other hand, the common law is the predominant system.

This connecting factor may, therefore, be of use in contractual and delictual matters. In a South African case, Sawintshi v Magidela[49], for example, the fact that the parties to a transaction lived in an African reserve and that the object of the transaction was home grown mealies, persuaded the court to apply customary law. This case was decided in terms of a statutory choice of law rule[50], giving the judicial officer discretion to decide the case either in terms of the common law or customary law.

The place where the cause of action arose may be of use but it can seldom be used in isolation, chiefly because the place might well be fortuitous. It is because of this type of problem that it is advisable to consider connecting factors in combination.

(5) The Nature and Form of a Transaction

Use of a particular transaction, known to only one system of law, automatically suggests the application of that system of law. If two Africans have entered into a rovoro transaction, for instance, we may safely assume that we will be fulfilling their wishes if we apply customary law. Conversely, if they have entered into a hire-purchase agreement, the common law would be applicable. Where the transaction is known to both legal systems, however, its nature or character will give no guide as to which is the more appropriate system. In such circumstances, the use of a particular form, peculiar to one or other legal system, may tend to suggest the application of that system. Where two Africans have entered into a civil or Christian marriage, for example, we may infer, from their use of this form, that they would expect the common law

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49 1944 NAC (C&O) 47; but in Pasco Nyamariwa Gunda v Margaret Faina and Boniface Monyani 1976 CAACC 31, the court refused to countenance separate systems of urban and rural law

50 Section 11 (3) of the Black Administration Act No 38 of 192 as amended

to be applied to any matrimonial issue which arose during the marriage[51].

The connecting factors presented above do not constitute a closed list; rather, the more significant have been selected for consideration. The South African commissioners' courts are familiar with the technique of considering all the facts of the case before deciding which system of law to apply and, it is submitted, that this technique can be used to advantage in Zimbabwe-Rhodesia As Schreiner JA said in Minister of Native Affairs: ex parte in re Yako v Beyi[52]:

> "In each case (the native commissioner) has at some stage to determine which system of law it would be fairest to apply in deciding the case between the parties. I think that he should only finally decide which system of law he is going to apply after considering all the evidence and argument as part of his eventual decision on the case."

Nor should it be assumed that any one connecting factor will necessarily be more decisive than another. The weight to be accorded a connecting factor may vary according to the circumstances of each case.

The cases decided in terms of the former Native Law and Courts Act[53] do not provide a reliable guide to determining which system of law to apply. The old Act (which was based on the East and Central African model) gave the judicial officer a wide discretion to apply the system he considered to be the most appropriate. This may account for the vagueness and inconsistency of the earlier decisions. As Palley says:

> "It is difficult to rationalize and extract principles from the decisions of Southern Rhodesian courts given in terms of this provision, since they have not always been consistent in deciding when customary law is inapplicable or even what inapplicability means." 54

Although flexibility is desirable in deciding what system of law to apply, these cases appear to have gone to the opposite extreme. They give the impression of a case-by-case evaluation without reference to rule or principle.

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51 Chapter 14

52 Minister of Native Affairs: ex parte in re Yako v Beyi 1948 (1) SA 388 (AD) at 397, considering Section 11 (1) of the Black Administration Act

53 Section 3 (1) of Act No 33 of 1937

Palley The Constitutional History and Law of Southern Rhodesia 1888-1965 506-510 and the cases she cites therein

Section 3 (4) of the African Law and Tribal Courts Act provides:

> "In cases where no express rule is applicable to any matter in controversy, the court shall apply the principles of justice, equity and good conscience."

This provision is ambiguous since it can be construed to mean that if the court can find no choice of law rule to determine which system of law to apply, it is to use basic considerations of right and wrong in order to determine the applicable legal system. Used in this sense, it would comply with Allott's suggestion that, in the absence of any statutory choice of law rule, the judge must rely on his "basic sense of right and wrong"[55]. On the other hand, Section 3 (4) could mean that where there is no applicable law to the facts in issue, the court may simply judge the issue fairly, using basic principles of right and wrong. Unfortunately, the section is so broadly worded that either of these interpretations is possible.

Once the court has decided to apply customary law, further considerations are raised by the "repugnancy clause". The application of customary law, in all parts of colonial Africa, was subject to the over-riding qualification that it was not "repugnant". This provision has been framed in a variety of terms: usually, it is stated that customary law is applicable only in so far as it is "not repugnant to justice or morality"[56] or "not repugnant to natural justice, equity and good conscience"[57] or "not repugnant to natural justice or morality"[58]. Whatever the exact terms used, the colonial legislators felt that various practices condoned by customary law (such as child betrothal, compulsory levirate unions etc) could not be tolerated in terms of the blanket recognition given to that system. The terminology has had no effect in fixing the exact meaning of the clause[59] for whatever abstract criterion was used for determining repugnancy, the result appears to have been much the same. This is not altogether surprising, of course, since the various criteria expressed bear close resemblance.

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55 Allott op cit 119

56 Section 12 of the Local Courts Ordinance, 1962, Malawi

57 Ghana, until 1960; Nigeria and Sierra Leone, prior to independence

58 Art 36 of the Northern Rhodesia Order in Council; Section 2 of the Native Law and Courts Act, Southern Rhodesia

59 Allott op cit 158-159

A similar type of repugnancy proviso, regarding legislation, is usually added to the general repugnancy clause. This provides that customary law shall not be applied if it is "incompatible with any enactment" or "inconsistent with any written law". The thinking which prompted this clause was that although customary law might be recognised, it should not be permitted to over-ride the terms of colonial legislation which was intended to provide a new basis for regulating the behaviour of all inhabitants of the colony - black or white.

In Section 2 (1) of the African Law and Tribal Courts Act "customary law" is defined as:

> "the legal principles and judicial practices of such tribe except in so far as such principles or practices are repugnant to -
>
> (a) natural justice or morality; or
>
> (b) the provisions of any enactment:
> Provided that nothing in any enactment relating to the age of majority, the status of women, the effect of marriage on the property of the spouses, the guardianship of children or the administration of deceased estates, shall affect the application of customary law, except in so far as such enactment has been specifically applied to Africans by that or any other enactment."

The application of subsection (a) - repugnancy to natural justice and morality - has not been without its problems. Which standard of morality is the court to invoke ? Faced with this problem, the court in a Tanganyikan case commented:

> "Morality and justice are abstract conceptions and every community probably has an absolute standard of its own by which to decide what is justice and what is morality. But unfortunately, the standards of different communities are by no means the same. To what standard then, does the Order in Council refer - the African standard of justice and morality or the British standard ? I have no doubt whatever that the only standard of justice and morality which a British Court in Africa can apply is its own British standard. Otherwise we should find ourselves in certain circumstances having to condone such things, for example, as the institution of slavery." 60

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60 Cited by Allott op cit 163

An unrestricted application of this criterion, based on Western notions of morality, could set at nought many institutions of customary law: polygamy, the levirate and sororate unions, the absence of any notion of individual ownership of land and freedom of testation, to name a few. These institutions are generally opposed to Western moral values. This danger has, fortunately, been appreciated by the courts and, accordingly, the repugnancy clause has been invoked only very rarely. The judicial attitude has been markedly liberal[61]. In an attempt to define the sphere of operation of this clause, Tredgold CJ said, in Tabitha Chiduku v Chidano[62], that:

> "(it) should only apply to such customs as inherently impress us with some abhorrence or are obviously immoral in their incidence."

A further test was propounded in Matiyenga and Mamire v Chinamura and Others[63]: customary law should not be applied if it "so outrages accepted standards of ethics as to create a sense of revulsion."

This clause has been invoked very infrequently by the Zimbabwe-Rhodesian courts. With regard to the consent of a spouse to marry, it has been held that:

> "It is not in accordance with natural justice and morality that a man should be deemed to have entered into a conjugal union with a woman when he has at no time accepted her in the character of wife, as distinguished from wife-to-be." 64

Similarly, it has been held that a woman cannot be compelled to enter into a kupindira union against her will[65]. There are a couple of decisions regarding the parent-child relationship[66] but this area is now controlled by legislation[67]. The institution of slavery was disapproved in Mabigwa v Matibini[68] where the court held that the payment of a redemption fee to release a captive from servitude in Ndebele law

61 Elias British Colonial Law 106

62 1922 SR 55

63 1958 SRN 829 at 832

64 Abigail Kurangwa a/b Kurangwa v Elijah Chanakira 196 CAACC 29

65 Chawa v Bvuta 1928 SR 98

66 Vela v Madinika and Magutsa 1936 SR 171; Francisca and Simon v Matope 1953 SRN 650; Kafahakurotwe v Ajida 1966 CAACC 10

67 Section 3 (5) of the African Law and Tribal Courts Act

68 1946 SRN 360

was unenforceable as being immoral. One case has concerned delict; in Chakawa v Goro[69], the court found that the absence of a claim for damages in Manyika law in a situation where a woman had been injured by a cow could not be considered repugnant to natural justice or morality.

In these cases, the courts referred either to natural justice or morality, or both,as the criteria for striking down the relevant rule of customary law. So it seems that, in Zimbabwe-Rhodesia, these concepts are interchangeable. It should be appreciated, however, that although in Matiyenga's case, reference was made to the common law to suggest that a rule of customary law was not repugnant, this approach is to be deprecated. Child has cautioned that customary law should not be struck down merely because it is not the same as the common law[70].

The second clause of the repugnancy proviso provides that customary law must not be applied if it is repugnant to the provisions of any enactment. It would be absurd to suggest that this means that a rule of customary law should not be applied because it was "abhorrent" to an enactment or because "it created a sense of revulsion". Presumably, what is meant is that the rule is "incompatible" or "inconsistent" with an enactment[71].

There are very few cases in Zimbabwe-Rhodesia dealing directly with this clause[72]. Mutandwa v Minister of Native Affairs[73], was concerned with Section 3 of the Native Affairs Act, 1927, which provided that the Governor-in-Council should appoint chiefs to preside over tribes. The plaintiff in this case contended that because customary law had not been expressly abolished, the appointment must be of someone selected in accordance with customary law. It was held that Section 3 could not be read subject to customary law, especially since the court could not apply

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69 1959 SRN 908

70 op cit 20

71 Allott op cit 175-180; the term "enactment is defined in Section 3 (1) of the Interpretation Act (Chapter 1) to mean any act, statute included in the revised edition of the Statute Law of Southern Rhodesia prepared under an act, statutory instrument or any provision contained in any enactment mentioned in these three classes. Section 2 (1) of the African Law and Tribal Courts Act includes any Imperial or Federal act

72 see Child op cit 21 regarding application of this clause

73 1937 SR 134; and Joshua v Martha 1976 CAACC 20

customary law if it were repugnant to an express enactment, which it was in this case. In Komo and Leboho v Holmes NO[74], the court went even further. Ordinance 6 of 1907 recognised the right of all persons, including Africans, to make wills; there was no specific provision to the effect but the implication was clear. The court held that in so far as customary law prohibited the making of wills it would be in conflict with the Ordinance and should, therefore, be disregarded[75]. This raises one of the problems at the heart of the repugnancy clause. To what extent must customary law be in conflict with the provisions of an enactment before it is overruled ? In Mutandwa's case there was conflict with an express provision; in Komo's case, there was a conflict with an implied provision. Gower goes part of the way to answering this question:

> "a statute should be construed as not affecting a transaction governed by customary law unless it expressly or by necessary implication provides to the contrary. The main argument in favour of this conclusion is the manifest absurdity which would otherwise result." 76

The successful use of the repugnancy clause to prohibit application of customary law raises a further question. If the court is directed to apply customary law by the choice of law rules and if it finds that this law is repugnant, should the common law be applied instead ? This question has not arisen for decision under the new Act. It might be argued that the common law should be applied on the ground that it is the general legal system of the country and will provide rules wherever customary law is not applicable. Section 3 states that customary law is to be applicable in certain cases and the common law in all others; on this basis, if customary law may not be applied because it is repugnant, then the common law, as the general law, must be applied. Certainly, under the previous Native Law and Courts Act, it was provided that customary law was to be applied unless it was repugnant; accordingly, if it were found to be repugnant, the common law was applied in its place. There seems to be no ground for this approach under the new Act unless

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74 1935 SR 86

75 See Chapter 9 regarding testamentary capacity in Zimbabwe-Rhodesia

76 Cited by Allott op cit 179, italics supplied

it is accepted that the common law is the general law of the land and customary law applicable only by way of special exception. Alternatively, the court might invoke the provisions of Section 3 (4) of the Act, which state that:

> "In cases where no express rule is applicable to any matter in controversy, the court shall apply the principles of justice, equity and good conscience."

5 THE CAPACITY TO CONTRACT A VALID CUSTOMARY LAW MARRIAGE AND TO EFFECT A DISSOLUTION

The marital union, in customary law, differs fundamentally from the common law marriage. In customary law, marriage reflects an alliance of two families rather than a simple union of two individuals[1]. Although the spouses themselves acquire certain rights and obligations inter se, their respective families become responsible for the fulfilment of these rights and obligations[2]. The family concern in the marriage is reflected by the payment of rovoro and, indeed, the Shona term for marriage is kurovorana - the giving of marriage consideration (rovoro)[3]. The bride's family (known, collectively, as vatezwara) gives the groom's family (vakuwasha) a woman to facilitate reproduction of the groom's lineage; in return, the bride's family receives a certain number of rovoro cattle with which to obtain a woman to replace the bride they have given. Should the marriage end early, either by death or dissolution, if the groom's family has not fully benefitted from the bride's child-bearing potential, rovoro will normally have to be returned[4]. Generally speaking, the bride's family group, as represented by her guardian (usually her father), implicitly holds itself responsible to the groom's lineage for the fulfilment of the woman's wifely duties[5]. On the other hand, the husband's family group, as represented, in the first instance, by the groom's father (if he is alive) or his heir, undertakes to look after the wife so as to enable her to keep house and rear children[6].

It is the concern of the two families, represented by the most senior males (normally the spouses' fathers) to contract marriages in customary law. In particular, the bride is not considered to be a contracting

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1 Holleman Shona Customary Law 153-154; Bourdillon The Shona Peoples 52-53. The relationship between the two families is established as wife-providers and wife-receivers

2 Seymour Bantu Law in South Africa 92

3 Hannan Standard Shona Dictionary 566; Bourdillon op cit 58-59

4 Holleman op cit 150-151

5 Holleman op cit 186-188

6 Holleman op cit 219-220

- or, more precisely, agree as to the amount and delivery of rovoro

party[8]. Indeed, throughout the duration of her marriage, the woman is not the person who may hold the husband to account for performance of his marital duties nor is she normally regarded as being responsible for the performance of her own marital obligations. The husband never brings an action against his wife (although he may chastise her); he looks, instead, to her guardian. Similarly, the wife looks, ultimately, to her father to protect her against her husband[9]. The tezwara is, at all times, an interested party in the marriage of his daughter and he can be called upon to intervene, either to discipline his daughter or to take her side against her husband.

In traditional customary law, the marriage was normally preceded by various customary formalities[10]. Ideally, if a boy and girl fell in love, they would exchange love tokens as symbols of their commitment to one another[11]. The boy would then inform his father that he wished to marry the girl. The boy's father would engage the services of a disinterested third party (the munyai) to negotiate with the girl's family. The proper thing to do, would be for the munyai to approach the girl's

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8 It is the bride's father who will state the amount of rovoro payable, who will give his daughter in marriage and will enforce payment of rovoro: see Child The History and Extent of Recognition of Tribal Law in Rhodesia 23; Holleman op cit 172-176. The role of the groom's father is not as precise. Although the groom's family has an obligation to provide rovoro (an obligation most usually carried out by the groom's father) - Holleman op cit 169 - many people feel that this is no more than a moral obligation: Bennett Appendix E Question 21. Moreover, the groom often pays his own rovoro nowadays: Bourdillon op cit 365

9 Holleman op cit 219-221

10 The normal proposal marriage is known as kuvunzira: Holleman op cit 99-109. Bennett Appendix E Question 22: this appears to be the most common method of negotiating a marriage

11 Holleman op cit 76 terms this informal agreement an "engagement", to be distinguished from an "definition" agreement which is a formal agreement between the two families ie consensus to establish a relationship of marriage: op cit 98. Shona law takes no cognisance of the engagement agreement unless it is terminated by the boy, in which event the girl, with the assistance of her father, may sue for return of her love token. Mystical reasons underlie this action, viz if the boy keeps the love token, the girl may later prove to be barren: Holleman op cit 77; Bourdillon op cit 56

family bearing a certain sum of cash. This would be placed before the girls of the family and the chosen fiancée would take a portion of the money as a sign that she wished to marry her suitor[12]. This formality is known as the rubvunzo. The rest of the money will be returned to the munyai with instructions from the girl's father to bring a further sum known as zarura muromo ("opening of the mouth")[13]. This gift of cash is used to persuade the tezwara to state his demands for rovoro and rutsambo[14]. Once these requirements are made known and have been accepted by the mukuwasha, the families might begin to communicate more freely with one another, with a view to establishing amicable relations before the wedding. The girl will probably be visited by the female relatives of the mukuwasha to ascertain whether she seriously wishes to marry her prospective spouse[15]. When the rovoro cattle have been collected, they are driven across to the tezwara's village and, amidst appropriate festivities, the wedding takes place[16].

The elements essential to the conclusion of a valid marriage, which can be elicited from these formalities, are the agreement as to the amount of rovoro to be paid (actual delivery is often postponed) and the handing over of the bride to the groom's family[17]. In the eyes of the tribal courts, the consent of the woman is not essential. Indeed, her consent to a marriage is deemed so insignificant that she may be formally betrothed even before she has attained the age of puberty[18]. Prior to the

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12 Bourdillon op cit 57; Holleman op cit 100. From this time onwards the reciprocal kinship terms mukuwasha (son-in-law) and tezwara (father-in-law) are used, indicating that an affinal relationship has been established

13 Holleman op cit 100

14 Rutsambo was, traditionally, a token payment, such as a hoe, symbolic of sexual rights in the woman. Today, it is nearly always a substantial payment of cash: Holleman op cit 159; Bourdillon op cit 57; Goldin and Gelfand African Law and Custom in Rhodesia 134-135

15 Holleman op cit 106

16 Holleman op cit 104-105

17 In terms of Sections 3,4,7 and 8 of the African Marriages Act there are now additional requirements: the marriage must be solemnised before a marriage officer and registered: Child op cit 40-43

18 This type of marriage, known as kuzwarira, is usually encountered where the bride's father is in serious economic difficulties: Holleman op cit 115-120. Although officially prohibited under the African Marriages Act, it is still practised: Bennett Appendix E Question 22

age of puberty, she was not handed over to her groom but, nonetheless, in traditional customary law, the "arranged marriage" was not exceptional[19].

In Shona law, there was no fixed age at which a person was deemed to be competent to marry. When a girl was physically capable of bearing children, she would usually be considered to be of marriageable age[20], in the sense that she could realise her principal marital duty of procreation.

Although the woman has little say in the negotiation of a customary marriage, this does not mean that, in practice, her wishes are totally disregarded. The Shona realistically appreciate that an unhappy marriage may result in divroce which will necessitate return of rovoro. Any father would be unwise to compel his daughter to marry a man she patently disliked[21]. Moreover, if a girl had set her heart on marrying a particular man, there were various ways in which she could persuade her father to give his consent to the union. A popular method is still the "elopement" marriage (kutizisa). The girl and her lover elope one night to the boy's village. Hopefully, the boy's father will then send a munyai to her father, bearing a token which will function as rubvunzo. Especially if the girl is pregnant, this procedure may force her father to give his consent to the union[22]. A variant form of the elopement marriage is the "flight" marriage (kutizira) whereby the girl flees to the village of her chosen man. She acts on her own initiative, without anyone else's knowledge. If her prospective spouse accepts her, he may then persuade his father to open negotiations with the girl's guardian[23]

In the district commissioners' courts, the consent of the spouses is regarded as being of the essence of a valid marriage in customary law[24]. In Abigail Kurangwa a/b Kurangwa v Elijah Chanakira[25], the court held that:

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19 or, according to Holleman op cit 118-119, necessarily that unhappy for the bride

20 Holleman op cit 72

21 Holleman op cit 129-131

22 Holleman op cit 109-115; Bourdillon op cit 60

23 Holleman op cit 123-124

24 Jack v Tsuro and Mia v Khodia 1933 SRN 46; R v Chokumarara 1945 SR 88

25 1966 CAACC 29

> "In Shona law the consent of the groom was not required ... but it is not in accordance with natural justice and morality that a man should be deemed to have entered into a conjugal union with a woman when he has at no time accepted her in the character of wife, as distinguished from wife-to-be."

The consent of the bride is now required by legislation. Section 7 (1) of the African Marriages Act provides that a marriage may not be solemnised (as is required for all marriages in customary law if they are to be considered valid unions) unless "the intended husband and wife freely and voluntarily consent to the marriage." The pledging of child brides is specifically prohibited. Section 11 of the African Marriages Act provides:

> "(1) Any agreement whereby an African girl under the age of twelve years is, whether for any consideration or not, promised in marriage to any man shall be of no force or effect.
>
> (2) Any African who enters into an agreement referred to in subsection (1) shall be guilty of an offence and liable to a fine not exceeding one hundred dollars or, in default of payment, to imprisonment for a period not exceeding one year."

Although an African girl may not be compelled to enter into a marriage against her will, in terms of this legislation, we should not infer that she has the power to contract a valid marriage on her own account[26]. Under Section 7 (1) (c) of the African Marriages Act, the woman's guardian is also required to give his consent to the marriage, before it may be duly solemnised. Moreover, in terms of Section 4 (2) (a) of the same Act, the woman's guardian is required to be present at the solemnisation of the union. These requirements are applicable whatever the age of the woman[27].

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26 Seymour op cit 106 is probably right when he says of South African customary law (basically the same on this point, as in Zimbabwe-Rhodesia) that insistence on the bride's consent "does not make her a contracting party (to the marriage), but is merely another right added to her previous rights under the law of status." Cf Child op cit 89

27 The Act includes levirate unions - Section 3 (1). The Act makes no reference to the age of the woman or her status, viz widow, spinster or divorcée. In Katsandi v Chuma 1937 SRN 86 and R v Gutayi 1915 SR 49 (and various other cases cited in Chapter 13) the courts held that once a woman had been married, she was freed from her father's guardianship and, accordingly, was to be considered

If the woman's guardian refuses to give his consent to the marriage, however, Section 5 of the African Marriages Act provides that the intending spouses may appeal, through the district commissioner of the district in which the woman resides, to the appropriate provincial commissioner. The latter may authorise the solemnisation of the marriage if, after inquiry, he is satisfied that consent has been unreasonably or improperly withheld. After consultation with the woman's guardian, the provincial commissioner may fix the amount of rovoro to be paid.

No provision is made, either under the African Marriages Act or in the case law regarding the age at which women are deemed to be capable of contracting a valid marriage. In the common law, marriageable age and consent are treated as quite separate issues. Neither of these issues, as we have seen, is regarded as being of any great moment by the tribal courts; and the marriageable age of the woman does not appear to have attracted the attention of European judicial officers. It might be argued that, in terms of Section 3 (1) (a) (iv) of the African Law and Tribal Courts Act, customary law is to be applied to all aspects of a marriage in customary law. This would include the marriageable age of the girl; and, in consequence, the district commissioners' courts must accept the approach of the tribal courts to the question of marriageable age. Alternatively, a solution to this problem may be found in Section 11 of the African Marriages Act, which prohibits the pledging of girls under the age of 12 years in marriage. We may infer that the woman is deemed to be capable of giving her consent to the union once she is over the age of 12: a contrario, it may be inferred that African girls are incapable of contracting marriages if they are under the age of 12. Finally, a solution may be sought in Section 7 (1) (b) of the same Act,

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to be emancipated. Child op cit 43 feels that she is free to marry without her guardian's consent, citing these cases as authority. It is submitted that he is wrong. Under customary law, agreement as to rovoro is essential and a woman cannot receive her own rovoro; nor may she dispense with rovoro as it is on rovoro that the validity of the union is based. For these reasons it is felt that the woman's guardian's consent is always necessary. The cases concerned with emancipation have all dealt with locus standi and proprietary capacity; they cannot be used as authority for granting the woman capacity to contract her own marriage. In practice, however, widows and divorcées are given as much freedom as they like to find another spouse. Their marriages are seldom inhibited: Bennett Appendix E Question 58

which provides that the marriage officer may not solemnise the union unless the girl freely and voluntarily gives her consent. It may be argued that if the girl is too young (under the age of twelve, for instance) she is incapable of forming a proper consent and, on that ground, should not be considered capable of contracting a valid marriage. In this manner, the issues of consent and marriageable age may be joined[28].

Just as the woman's consent is not traditionally considered to be essential to the creation of a valid marriage in customary law, so, too, does she lack the capacity to dissolve the marriage[29]. Because the marriage is a transaction between two families (concluded without the intervention of the state or any outside authority), it is properly the task of the families concerned to terminate the union if they think it fit to do so. Accordingly, it is the bride's father and usually, in practice, the husband who negotiate to end the marriage. While the wife may initiate proceedings for dissolution, as will be discussed later, it is her guardian who must return rovoro which signifies dissolution; she is not deemed competent to perform this act on her own account because she, at no time, is the holder of the rovoro[30].

The customary law dissolution is not without its formalities but it lacks the rigidity of the common law divorce. There are no specific grounds upon which dissolution of the marriage may be claimed nor are there any procedures which must, invariably, be followed. Provided that the wife's guardian and her husband have reached agreement as to the return of rovoro (and not even the full amount need be returned), the marriage will be effectively terminated[31]. It should not be inferred that either

28 This was the approach of the court in R v Majoni 1963 R & N 143 (SR) where Young J argued (in respect of a charge of unlawful intercourse with a girl under the age of 16) that if the girl is not of marriageable age, ie 12 years, she cannot legally consent to a customary law marriage

29 Many contemporary writers (Holleman, for instance) avoid using the term "divorce" in the context of customary law to prevent confusion with the common law notion of divorce. They prefer, instead, the term "dissolution" which will be used in this thesis. At times, of course, use of "divorce" is unavoidable; for instance, to distinguish dissolution by death or designate the divorced woman

30 Holleman op cit 265

31 Holleman op cit 267sq "A Shona marriage may be dissolved when the two families agree that continuation of marriage relations between them has become impracticable"; Goldin and Gelfand op cit 148

party has a licence to end the marriage when he wishes; both the husband and the tezwara must take care that they can show good reason for dissolving the marriage, otherwise the offending party will be penalised in return of rovoro. Despite the informality of the procedure, the Shona are probably at their most "legalistic" when entertaining an action for dissolution. The reasons motivating the action must be one commonly accepted as being good grounds for ending the marriage[32]. Sexual infidelity by either of the spouses is not a good reason, provided that it is not persistent; on the other hand, if a spouse were deliberately to withhold his or her sexual favours, this would indicate that he or she wished to end the marriage[33]. It is evident that any behaviour which shows a settled intention to terminate the marriage union will normally be sufficient. Such an intention may be inferred from refusal to perform domestic duties, persistent neglect, desertion or deliberate acts of cruelty. Outrageous acts, such as incest, witchcraft or homicide, may make the union untenable and, accordingly, may result in a divorce. The Shona realistically acknowledge that a marriage which has broken down in fact must be formally terminated.

This pragmatic approach does not obscure a very real concern with the property implications of dissolution. It is essential to both parties that they appear innocent in order that the other side will be penalised in return of rovoro[34]. Innocence is established, partly, by observing certain procedures. If the wife's behaviour has warranted termination of the union, her husband should escort her back to her father, bearing a gupuro (token of rejection). He should announce, publicly, his intention to send her home and he should declare his reasons, preferably producing proof[35]. The tezwara will then bear the guilt. He may tender return of a portion of the rovoro (or the husband may claim a portion). The

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32 Holleman op cit 281 points out that two factors - guilt (mhoswa) and repudiation (kuramba) - are combined to determine the outcome of the divorce. The central interest of both parties is, of course, kugura rovoro (to divide rovoro) and these factors will influence the amount to be returned

33 Holleman op cit 273-277; Bourdillon op cit 66

34 Holleman op cit 280: "The principal question facing a European court in a divorce suit is whether sufficient legal cause exists to dissolve the marriage. In Shona practice the question is rather on which terms the marriage can be dissolved."

35 Holleman op cit 282-283

amount will be determined by several factors: a rough guide of one beast per child the woman has borne and a portion for the number of years the marriage has lasted will be retained by the tezwara[36]. A certain amount will be retained or returned, depending on the guilt of the spouses. If the husband refuses to accept the amount tendered, the matter may be taken to court for settlement[37]. The position of the husband who has not formally escorted his wife back to her kraal, is somewhat weaker since it is assumed that he is the guilty party. Because the tezwara is now in the better position, he may delay in handing back the rovoro, usually, until his daughter has remarried[38].

If it is the wife who wishes to end the marriage, she normally returns to her own family. Desertion on her part raises a presumption of guilt against her and, for this reason, she must be able to justify her action by showing some proof of maltreatment by her husband[39]. If the wife has found another man, she may, of course, desert him. Although this places the tezwara in an unfavourable position, her action will probably win some public sympathy To avoid any suspicion of connivance, the tezwara should give his whole-hearted support to the mukuwasha in finding the woman. If the husband wishes to continue with the marriage, despite his spouse's behaviour, he may sue the gomba for damages for adultery and bring his wife home: otherwise, he should claim return of rovoro[40].

The district commissioners' courts have recognised and accepted the general approach of customary law to dissolution of a marriage. Formally, only one change has been introduced and that is the intervention of the court in granting divorce decrees. In terms of Section 16 of the African Marriages Act, a customary marriage may be validly terminated only at the instance of a court of competent jurisdiction[41], viz a

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36 Child op cit 27

37 Holleman op cit 292

Holleman op cit 284

39 Holleman op cit 287; Bennett Appendix E Question 41: although tribal courts maintained that the wife may dissolve her marriage, it was clear that this power was severely circumscribed: Question 44

40 Holleman op cit 288-290

41 Farayi v Hodza 1945 SRN 319; if the dissolution occurred prior to the passing of the African Marriages Act, however, the court's order is merely declaratory: Chidombgwe v Nyakudjga 1949 SRN 462; Sekanyi and Siyiwa v Chirasa 1955 SRN 770: Hama v Matsutso 1963 CT CC 21

tribal court[42] or district commissioner's court[43]. There appears, furthermore, to have been a rather more rigid attitude adopted to the reasons for dissolution. No doubt influenced by the common law, district commissioners will dissolve a marriage union only if they find that there is a good and sufficient reason[44], such as desertion, cruelty, practice of witchcraft, impotence of the husband, barrenness of the wife and adultery committed by the wife[45]. In this regard, any party approaching a district commissioner's court will have to prove the existence of a proper ground for dissolution of the marriage[46].

The district commissioners' courts have not considered the African woman's capacity to dissolve her marriage. This is surprising in view of their decisions on the necessity of consent to create a valid marriage in customary law. Nonetheless, in light of these decisions, it would seem that the woman must have the requisite capacity. If customary law contains a rule to the contrary, it should be excluded on the grounds of natural justice and morality[47] Apart from policy considerations, if it is accepted that a woman is emancipated from her guardian's control when she marries[48], it must follow that she is free to act without his assistance to terminate her marriage.

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42 Implied by the expressio unius rule of interpretation in Section 9 (3) of the African Law and Tribal Courts Act which expressly excludes the jurisdiction of a tribal court in respect of civil or Christian marriages. This is recognised by the Tribal Courts Rules (GN 1189 of 1970) where provision is made for service of summons in a case "concerning the dissolution of marriage" - Sections 12 (2) and 18 (2)

43 Also by implication, since the limitations imposed on magistrates' courts in this regard, have not been included in Section 5 (2) of the African Affairs Act

44 Goldin and Gelfand op cit 148; Child op cit 50sq. Etrudi and Mutadzi v Chimondo 1960 SRN 931, where it was held that dissolution on the basis of consent was not permissible; the parties must lead evidence to establish the recognised grounds

45 Goldin and Gelfand op cit 150-152; Child op cit 50-53 and the cases they cite

46 Mchemwa v Chandaengerwa 1954 SRN 723; Etrudi and Mutadzi v Chimondo 1960 SRN 931

47 In South Africa, the wife is permitted to dissolve her marriage unassisted. Her father must be joined with her husband as co-defendant because the court's order will be directed against the former for return of lobolo and the latter for dissolution: Nqambi v Nqambi 1939 NAC (C&O) 57; Mokgatle v Mokgatle 1946 NAC (T&N) 82; Nhlabati v Lushaba 1958 NAC (N-E) 18

48 Chapter 13

6 THE RIGHT TO MAINTENANCE

One of the more important rights forming part of the complex of rights associated with status, is the right to maintenance. This is more usually expressed in the common law as a guardian's duty to support his children and a husband's duty to support his wife. The term "right" in this context, properly refers to the legally enforceable claim which the child or woman has for the provision of food, clothing, shelter, medical attention etc. The guardian or husband bears the correlative duty[1]. In this section, we shall cast our net a little wider than the right to maintenance and shall consider, in addition, two other rights which are part of the marital relationship: the right of a husband to chastise his wife and his wife's right to her husband's sexual favours.

The customary law regarding maintenance is poorly developed. The duty of support is regulated by social and moral controls, rather than by the law[2]. The authorities accept, without question, that a father has a duty to feed, clothe and protect his children while they are living with him[3] but this duty need not, necessarily, be construed as a legal duty. It is conceded that a duty to support those relatives who are unable to care for themselves is implicit, especially, in the parent-child and husband-wife relationship[4]. If a child is to reach maturity, it has to be looked after by its parents; similarly, if a mother is effectively to raise her children, she requires a minimum of material security to do so. Something as fundamental to the perpetuation of the human species may well be regarded as immanent in the natural order of things. The Romans, for example, considered that the duty of support

1 Hahlo and Kahn The South African Legal System 82

2 As was the case in Roman law. Modestinus, for example, defines the effects of marriage: nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et humani iuris communicatio: D 23.2.1. See Buckland A Text-book of Roman Law 106 fn 13; Schulz Principles of Roman Law 147sq

3 Holleman Shona Customary Law 61; Bourdillon The Shona Peoples 45; see Reader Zulu Tribe in Transition 132sq for a full discussion of the father's obligations, both legal and social, towards his children

4 Resting on two criteria: the actual (or notional) inability of the right-bearer to fend for itself and a blood relationship: Boberg The Law of Persons and the Family 249, regarding children

was part of the ius naturale[5]. In most legal systems, however, it was realised that caring for children was not involuntary and automatic behaviour and, accordingly, what was considered "natural" was soon transposed into the legal code[6].

Our own conceptions may easily mislead us into thinking that customary law is similar to the common law. Since we consider that the natural duty is a legal duty, we might assume that it exists as such in all legal systems; but this is not necessarily so. There are several reasons for suggesting that customary law knew of no individual right to maintenance. The traditional African legal system reflected the dominant position of the family, the interests of which tended to be preferred to those of the individual[7]. This is clearly illustrated in the case of marriage: it was the families of the spouses which held themselves responsible, implicitly at least, for the performance of the various rights and duties flowing from the marriage union. If the woman failed to perform her obligations as a wife and a mother, it would be her guardian who would, ultimately, be required to return rovoro, signifying dissolution of the marriage[8]. Conversely, misbehaviour by the husband would be dealt with in his family court, where the wife could lay her complaints.

The emphasis of customary law, regarding the parent-child relationship, lay on parental power and the rights of guardianship over children. Customary law was seldom concerned with the rights of children against their parents. Pre-classical Roman law was similar: stress was laid on the pater's powers over his family, not his duties to his wife or children[9]. Whatever duties there were, had only religious and moral

5 D 25.3.5.16

6 As happened during the Classical period of Roman law: D 25.3.5.2; see Beinart "Liability of a deceased estate for maintenance" (1958) Acta Juridica 98sq. But, presumably, legal sanctions were employed only as a last resort

7 Phillips and Morris Marriage Laws in Africa 7-8

8 Holleman op cit 150-151

9 Jolowicz Roman Foundations of Modern Law 204; Kaser Das Romische Privatrecht 351; Schulz op cit 164-168

sanction[10]. Indeed, the law relating to children shows a clear trend whereby the interests of the paterfamilias and the family were gradually suppressed in favour of the interests of the individual child[11]. Moreover, in customary law, there was no clearly defined procedure for protecting or enforcing the child's natural right. Since the child is in no position to take action to protect its own interests, some institutionalised means must be established whereby a disinterested party can take action on the child's behalf. Without such a procedure, any right which a child might have would be rendered nugatory.

Customary law evolved in other directions. Maintenance was legally relevant only in so far as it concerned the guardian's right to claim compensation (chiredzwa) in respect of expenses incurred in maintaining a child. Especially in the case of illegitimate children, the law is clear: if the natural father of a child has acquired rights to it[12], but the child has remained with its mother until old enough to live with the father, the father is obliged to pay one beast as chiredzwa to the mother's guardian. This payment is made to offset any expenses which the mother's guardian incurred in looking after the child[13]. The right to claim chiredzwa may be enforced in court[14].

It does not necessarily follow from this hypothesis that child-neglect was the norm in African (or early Roman) society. Quite the contrary is probably true. Family relationships, especially those of parent-child, are cherished and respected in small-scale societies[15]. The absence of any rules and institutions suggests that there were no specific social problems requiring legal controls. The problem of child-neglect would be rare in the village communities which were a

10 Watson Rome of the XII Tables 42-46, regarding the part played by the family council in tempering the exercise of the pater's powers; Jolowicz op cit Chapter XVI

11 Nicholas An Introduction to Roman Law 90; Buckland op cit 142-143

12 regarding parental rights to illegitimate children, refer to Chapter 7

13 Holleman op cit 245 and 296

14 Holleman op cit 29

15 See, for example, Hunter Introduction to Conquest 24-25, regarding the Pondo and Reader op cit 13 regarding the Zulu

feature of the traditional Shona social structure. If an individual child suffered neglect by its own parents, it would still be able to find food and shelter with a paternal kinsman. Furthermore, there were always unattached women in the kraal who would be available to look after stray children. In this respect, the duty of support was spread through the family[16].

It should, moreover, be appreciated that the duty to maintain children is never regarded separately from the duty to maintain a wife. The husband is expected to provide his wife with land to grow vegetables and crops to feed her family; he should provide her with a house and clothing for the same purpose. The rearing of children falls, largely, within the wife's sphere of activities and it would only be by neglecting his wife that a father could neglect his children. If a father persistently refused to provide food or clothing for his wife, she might raise the matter in the family court[17]. Failing any solution in this forum, the wife would be justified in deserting to her own family and she would probably take her children with her. Unless the husband were prepared to mend his ways, this could precipitate the dissolution of the marriage[18].

While the child's right to maintenance is an obscure issue in customary law, the right of a mature daughter (such as a spinster, widow or divorcee) is even less clear. Although the principle is not stated by any of the authorities, we may assume that the woman is entitled to claim maintenance from her guardian, whatever her age[19]. If a woman is deemed to fall under the parental control of her father, it must be inferred that he has a duty to look after her.

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16 Holleman op cit 62, noting the pattern of kinship behaviour is extended to the father's collaterals

17 Bourdillon op cit 43; Schapera A Textbook of Tswana Law and Custom 183-184 - this is the type of dispute which should be heard, initially, in the family court, away from the public eye

18 Holleman op cit 276. In a sense, the wife is precipitating a formal action for reasons which are not immediately apparent, viz her desertion provides immediate grounds for dissolution but, underlying the desertion are other reasons which will have to be investigated and will throw blame on the husband. For a similar case, see Holleman "The case of the troublesome father" Issues in African Law 22-47

19 Bennett Appendix E Questions 59, 66 and 89 regarding the possibility of renouncing such obligations in respect of a son

A father has the liberty (in the Hohfeldian sense) to chastise his children if they are disobedient[20]. Nowhere is it proposed that a father has the ius vitae necisque of the Roman paterfamilias but the limits of this liberty are ill-defined. It would seem that moral and social, rather than legal, sanctions circumscribe abuse of this liberty. These issues have never arisen for consideration in a district commissioner's court.

The right of a child to maintenance has been clearly stated in the district commissioners' courts. In terms of Section 3 of the Maintenance Act[21], the courts of district commissioners are constituted maintenance courts. Section 4 goes on to provide that complaints may be lodged with a maintenance court to the effect that a "responsible person fails or neglects to provide reasonable maintenance for any dependant of his". The maintenance officer is empowered to issue a summons requiring the respondent to appear before the court to show cause why an order of maintenance should not be made against him. Section 6 states that, after due enquiry, the maintenance officer may make an order for periodic payment of money for the reasonable maintenance of the dependant.

The leading case concerned with the interpretation of this Act is Ruka Gondo v Elinah[22]. The court noted that the Maintenance Act does not create substantive rights to maintenance - "it merely creates procedural rights, whereby substantive rights to maintenance already in existence can be enforced." The first question, then, is, essentially, a question of conflict of laws - under which legal system do rights to maintenance arise? The court, in Ruka Gondo's case, held that the claim for maintenance is a matter which relates to the custody of children; accordingly, customary law is applicable by virtue of Section 4 (1) (a) (ii) of the African Law and Tribal Courts Act[23].

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20 Holleman op cit 62

21 Chapter 35

22 1975 CAACC 5

23 In turn, the custody of the children may be determined by the form of the marriage - in this case, marriage under customary law. If the marriage were according to civil or Christian rites, customary law is usually also applied: Duma v Madidi 1918 SR 59; Esnad Ndebele and Josiah v Togo Ndebele 1965 CAACC 23; cf Chikosi v Chikosi (2) 1970 (2) SA 145 (R) where the common law was applied

The second question is concerned with the district commissioners' understanding of the customary law relating to maintenance of minor children. Never have the courts doubted that a child might not have a right to maintenance in customary law; but all the reported decisions have been related to maintenance claims in respect of children who were in the custody of a person other than their natural father. In terms of customary law, this usually indicates either that the child was illegitimate or that the father had not paid sufficient rovoro and, on those grounds, was denied parental rights to his children. District commissioners consider that the parent who has custody of a child, has a duty to maintain the child[24]. The custodian parent may, however, claim compensation for sums expended in maintenance. Traditionally, this was the chiredzwa beast which was payable in respect of each child, regardless of the length of time that the child remained in the custody of the claimant. It is recognised that one beast does not adequately reflect the expenses incurred in maintaining a child in the modern world and, accordingly, this amount has been increased by the courts[25]. Furthermore, if the guardian parent delays in taking custody of the child, when he is entitled to it, the amount of chiredzwa payable may be increased[26]. Normally, it is the mother's guardian who has both the custody and guardianship of the children born to her, viz her father in the case of a pre-marital, illegitimate child and her husband in the case of legitimate and adulterine children[27]. (Custody may, however, be separated from the guardianship of the child, when the interests of the child dictate[28].)

The majority of cases have been concerned with a claim for chiredzwa lodged by the child's mother's father against the child's natural father. This, possibly, marks the fundamental difference between customary law and the common law attitude to maintenance. In customary law, the right

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24 Ginza v Johannes 1936 SRN 75; Joel Susondo v Wille Rutsito 1965 CAACC 8; Fordson Manduwa v Clara Busie Khanye 1977 CAACC 9; Patrick Musa v Karutswa Andurani 1977 CAACC 24

25 Lydia v Masumbu 1939 SRN 145; Sam Msonko v Mutuswu 1963 CAACC 7

26 Mkamange v Tamange 1949 SRN 447; Muchineripi v Komponi 1951 SRN 588

27 Chapter 7

28 Child The History and Extent of Recognition of Tribal Law in Rhodesia 75-76

to maintenance is seen as inhering in the child's custodian, not in the child itself. In none of the cases, has the child's custodian claimed on behalf of the child; rather, he has claimed for his expenses which, it was argued, should have been borne by the natural father[29]. In addition, no case regarding the rights of a mature daughter to claim maintenance from her father have been reported. All the cases have been concerned with young children. In view of the district commissioners' attitude to the general status of women in customary law, it would seem that, in principle, they would support her right to claim maintenance even if she were, for example, twenty-five years old, and unmarried. On the other hand, because they consider a widow or divorcee to be emancipated, it is debatable whether they would adopt the same approach in those cases.

In only three decisions, has the child's right to maintenance been in issue. In Joel Susondo v Willie Rutsito[30], the court held that the natural father of an illegitimate child was not liable to maintain the child unless he had custody. If he were not granted custody, it was held that the child should be considered to belong to its mother's family and that family bore responsibility for maintenance. In In re Robert[31], counsel argued that it was contrary to natural justice and morality to absolve the natural father from responsibility for the support of his child. Tredgold CJ held:

> "I do not think that this argument can be supported. It would be an entirely different matter if the custom under consideration involved the fact that the child would be left destitute and without means of support But, although

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29 In Roman law, for instance, the duty of support arose ex aequitate ... caritateque sanguinis: D 25.3.5.2 and the right was seen to vest in the child. This duty is clearly articulated in the common law: Boberg op cit 254. In the following cases, it can be seen that the right to maintenance was deemed to vest in the custodian rather than the child itself: Mado v Skudamedzi 1942 SRN 249, where a married woman and children were maintained by the mother's father in the absence of her husband; similar cases were: Zira v Pompey 1946 SRN 379 and David Milase v Witness 1955 SRN 773. Nendaya and Tigere v Zidenga 1955 SRN 788 and Chimwisa v Tawirai 1955 SRN 662 deal with the maintenance of step-children. Maintenance on divorce is dealt with in: Bachi Vela v M'Bayiwa Jack 1953 SRN 660: Malipiti and Julia v Kandiro 1946 SRN 337; Margaret v Amon 1946 SRN 334; Moses v Nobula and Charlton 1944 SRN 284; Mabika v Nyowa and Barangwe 1940 SRN 17[illegible] ayi v Lomcala and Mhlahla 1930 SRN 28

30 1965 CAACC 8, following In re Robert 1953 SR 47

31 1953 SR 47

> the urbanization of the native may in the future introduce complications, there is nothing objectionable in an arrangement by which one family assumes full responsibility for the care of a child, in consideration of the fact that the child becomes a member of that family with all the consequent benefit to the family, material and otherwise." 32

Ruka Gondo's case was concerned with the maintenance of children during the subsistence of a marriage. The respondent wife had heen compelled to leave her husband, taking her children with her, because of the husband's cruel behaviour. The court found that the husband had paid only a small portion of his rovoro and, accordingly, the wife and her family were entitled to custody of the children; but it was felt that the husband was liable for maintenance. It was recognised that a father's duty of support continues during the subsistence of the marriage, provided that his wife and children remain with him. If she deserts to her own family, through no fault of his, the husband's duty ceases[33].

There are no reported cases regarding the amount or standard of maintenance required by law. Although we do not know the child's rights in this regard, we can infer from decisions concerned with chiredzwa that the amount of maintenance must be determined by modern standards of living[34]. In Lydia v Masumbu[35], for example, the court held that:

> "Owing to the changing conditions of native subsistence, the archaic token payment of a rearing beast (chiredzwa) may well be quite disproportionate to the actual expenses incurred by the party who has clothed and fed the child or children for a number of years, and in such cases the Court will be justified in augmenting the customary award by an additional amount, varying according to the circumstances in each particular case." 36

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32 The learned judge seems to have had in mind the fact that the guardian of a girl will be entitled to benefit from her rovoro when she marries

33 Cf Mkamange v Tamange 1949 SRN 447, where equity determined the duty to pay maintenance; Zira v Pompey 1946 SRN 379; David Milase v Witness SRN 773

34 Child op cit 83-84

35 1939 SRN 145

36 Cf also Muchinenpi v Komponi 1951 SRN 588: £3 pa, plus £5 school fees awarded in respect of a period of 7 years for a child aged 14; Mhepo v Gidion 1959 SRN 928: £10 was awarded to cover the period from the birth of a child until the age of 7; Sam Msonko v Mutuswa 1963 CAACC 7: £15 was awarded for a period of 9 years

Lydia v Masumbu is a noteworthy decision in so far as it purports to amend a rule of customary law to bring it into line with modern social conditions. It may be questioned whether this was desireable or justifiable. Certainly, in view of the district commissioners' understanding of customary law, there is a child's right to claim support from the person who has its custody. In these circumstances, is there any necessity to increase the amount of chiredzwa payable when custody is claimed by another person ? If a person has a duty to maintain a child, there seems to be no good reason, in law, why he should be entitled to claim recompense simply because he performed his duty. Chiredzwa is a relevant obligation only in the context of traditional customary law, where there was no legal duty on a child's family to maintain it. To increase the amount owed in terms of the chiredzwa obligation would now simply have the effect of alleviating a custodian's legal duty to support the child under his care.

Section 4 (2) of the Maintenance Act provides that the complaint may be laid by the dependant concerned or by any other person who has the care or custody of the dependant. In Ruka Gondo's case, the court considered, obiter, the locus standi of the mother to lay a complaint. Although it recognised that the claim for maintenance was governed by customary law and, therefore, in terms of Section 3 (2) of the African Law and Tribal Courts Act, the mother's locus standi should also be determined by customary law, it felt that Section 4 (2) gives the woman a power which she would not otherwise have had.

So much for the rights of a child; we turn, now, to consider the wife. According to the tribal courts, when she marries, an African woman becomes the responsibility of her husband. He is expected to provide her with a house, a kitchen and kitchen utensils[37]. He must allocate her land to grow food for the family. Although the nursing of children and preparation of food are spheres of activity reserved to the wife, both spouses are expected to participate in the cultivation of crops and animal husbandry[38]. The breaking of new ground, sowing seed, weeding and harvesting are shared by husband and wife. Very often, women

37 Holleman op cit 203

38 Holleman op cit 211

will be more concerned with small stock, that is, chickens and goats, but, as Holleman says, there is no mystical reason which prohibits a woman from handling cattle as there is amongst the South African Nguni[39]. The husband's obligation to maintain his wife is never restricted or limited by special circumstances, such as his disablement[40]. If he fails in the fulfilment of his duty, the wife is entitled to complain to his family or, if the situation is serious, leave him[41].

The duty of support normally shifts to the husband's heir when the husband dies. His widow may look to the samukadzi and muzukuru for maintenance prior to the kurova guva ceremony[42]. If the widow chooses kugara nhaka, she becomes the reponsibility of the man concerned; otherwise, she may return home to her own family. There is no principle in customary law requiring the husband to pay his divorced wife maintenance. On dissolution of the marriage, the woman returns home, where her family resumes its obligation to support her.

The husband, as head of a family unit, exercises considerable authority over his wife. He is entitled to chastise her for any matrimonial misdemeanour, such as neglect of her household duties or disobedience.

> "Such disciplinary measures are regarded as obvious manifestations of his marital authority and are therefore not seriously objected to by a woman. But on no account should it be imagined that a woman is expected to subject herself to the arbitrary whims and wishes of her husband." 43

If a husband were seriously to mistreat his wife, she could complain to his family and raise the matter before the family court. If no solution were found in that quarter, she might return to her own family[44].

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39 Holleman op cit 211-212

40 Bennett Appendix E Question 36

41 Holleman op cit 213; Bennett Appendix E Question 37: the wife does not have a corresponding obligation to assume the husband's responsibilities if he were disabled, for instance

42 Holleman op cit 230

43 Holleman op cit 208; Bennett Appendix E Question 34

44 Bennett Appendix E Question 30

A further aspect of the husband's domestic authority is his right to control his wife's freedom of movement, in the sense that she requires his permission to leave his house[45]. Disobedience to his instructions would be indicative of a serious rift in the marriage, requiring intervention by either the wife or the husband's family.

Finally, it should be noted that the husband has an exclusive right to his wife's sexual favours. In one sense, this means that a husband is entitled to have sexual intercourse with his wife when he chooses, subject to the customary periods of abstinence[46]. No sexual intercourse should take place if the woman is menstruating or from the seventh month of pregnancy until six months after the birth of the child[47]. In another sense, this means that the husband has a right to take legal action if his wife has sexual intercourse with another man. Although, ideally, wives are expected to be faithful to their husbands, an occasional act of adultery is condoned in customary law. Provided the wife repents of her action, she will escape with no more than a thrashing. The husband is, of course, entitledto claim damages from his wife's lover[48]. Conversely, a woman has a right to her husband's sexual favours but, generally speaking, as long as a husband keeps his wife sexually satisfied, she has no cause to complain if he indulges in occasional adulterous relationships[49]. The Shona consider sexual gratification to be one of the most fundamental rights of marriage and if a husband were to neglect his wife - kuramba patukukwe (reject her on the sleeping mat) - she might complain in the family court or, if no solution were found, desert to her own family. Holleman has even recorded cases where a wife went so far as to approach a tribal court, unassisted, claiming

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45 Bennett Appendix E Question 33; Holleman op cit 208

46 Holleman op cit 214-217; Bennett Appendix E Question 32

47 The customary periods of abstinence are determined by African beliefs regarding the health of the child and its mother and father

48 Holleman op cit 216. Note that he cannot, at the same time, claim damages for adultery and return of rovoro to mark dissolution of the marriage: Holleman op cit 227

49 Holleman op cit 217

compensation from her errant husband[50].

The husband's right to his wife's sexual favours passes to his family when he dies. Any sexual intercourse with a widow (apart from her future levirate partner) prior to the kurova guva ceremony is considered to be a serious breach of taboo - kupisa guva (to burn the grave) - and gives the deceased's heir a right to claim damages for adultery from the widow's lover[51].

Apart from the constitution of maintenance courts and the provision of a right to claim maintenance in these courts, the district commissioners have done no more to change the legal status of African women in any of the respects mentioned above. The most important change concerns maintenance. During the subsistence of a customary marriage, the wife is entitled to apply to a district commissioner's court for an order against her husband to maintain her. Section 6 (2) (a) of the Maintenance Act provides that the court may not make a maintenance order unless it is satisfied that the person against whom the order is sought is legally liable to maintain the dependant concerned. The question arises, again, as to which system of law should be applied in order to determine whether there is liability to maintain. In Taoneswi Maposa v Ngwenya[52], the court applied customary law regarding an application for maintenance during the subsistence of a marriage on the ground that the parties had married in terms of customary law and must have intended their relationship to be governed by that system. Indeed, in terms of Section 3 (1) (a) (vi) of the African Law and Tribal Courts Act, it would appear that customary law is prima facie applicable to the marriage and all incidents of the marriage, including maintenance. Similarly, in Ruka Gondo v Elinah[53], the court noted that the Maintenance Act did not create sub-

50 Holleman op cit 275-276. The wife does not, of course, have the right to sue her husband's mistress for damages for adultery. The right to sue for adultery vests in the husband only; he paid valuable consideration (rovoro) for his wife's child-bearing potential which is obviously inclusive of her sexual favours. Any adulterous liason would be an infringement of the husband's acquired rights

51 Holleman op cit 238-240; Bourdillon op cit 210 and 242

52 (unreported) CAACC 18/1972, cited by Child op cit 98-99

53 1975 CAACC 5

stantive rights to claim maintenance; instead, it provided a new procedure for making claims. The point made in Taoneswi Maposa's case was reiterated, namely, that where the parties were married according to customary law, that system determined liability to maintain during the subsistence of the marriage.

The district commissioners' understanding of customary law in this regard is that a husband is responsible for the maintenance of his wife only while she is living with him. If she deserts him, his responsibility ceases[54]. In Taoneswi Maposa's case, for instance, the husband showed that he could provide adequately for his wife and children at his home in Buhera but she refused to stay there because she was not on good terms with his first wife. The court refused to grant an order for maintenance against the husband in these circumstances[55]. In Ruka Gondo's case, on the other hand, the court granted an order against the husband where it was shown that his wife had been compelled to leave him because of his cruel treatment of her.

In the case of dissolution of a customary marriage, the law has been substantially amended by the Matrimonial Causes Act[56]. Section 9 (1) of the Act provides:

> "If in an action for divorce the plaintiff claims against the defendant an order for the maintenance of herself after divorce and the court is satisfied that in all the circumstances of the case it is just and equitable that the defendant should be compelled to contribute to the support of the plaintiff after divorce, the court may make such order for maintenance as to the court may seem just." 57

In George Mazorodze v Jeneth[58], the court held that the provisions of the Matrimonial Causes Act were wide enough to include both customary marriages and marriages according to civil or Christian rites. Pittman P

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54 In Mado v Skudamedzi 1942 SRN 249, where the woman went to live with her father, the court held that the father had no claim against her husband unless he had first sent the woman back to the husband's village and the husband had refused to provide for her; followed in Petros Sithole v Moses Rukunda 1976 CAACC 6

55 Followed in Moses Mvenge v Emma Mafura (unreported) CAAC 58/1973 cited by Child op cit 99

56 Chapter 39

57 Section 9 (3) makes similar provision in favour of the defendant in a divorce action

58 1970 CAACC 38

held:

> "We are satisfied that Section 9 (3) of the Matrimonial Causes Act does entitle a District Officer to give maintenance to a guilty wife upon divorce, since any law or custom to the contrary would be repugnant to the provisions of that Statute, in terms of the definition of 'African Law and Custom' in ... the African Law and Courts Act." 59

Since there is no provision in traditional customary law for the maintenance of a divorcee by her former husband, this Act marks a considerable change in the law.

The district commissioners' courts have brought no change to the widow's right to claim maintenance. In Ganda v Chinamo[60], the court held that, prior to the kurova guva ceremony, the widow is entitled to maintenance, at a reasonable rate, proportionate to the value of her deceased husband's estate.

Consonant with the sentiments expressed by the tribal courts, the district commissioners' courts have held that if a man were to beat his wife immoderately, she would be justified in deserting to her father. In such circumstances, the marriage might well be dissolved[61].

Similarly, the district commissioners' courts recognise that a husband has a right to his wife's sexual favours[62]. If she persists in committing adultery, the husband may be justified in terminating the marriage[63]. Alternatively, of course, the husband may bring an action for damages for adultery against his wife's lover, while condoning her conduct[64].

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59 This decision was followed in Simon Machongwe v Christine Farusa 1972 CAACC 21. Note that the district commissioners' courts will not entertain a claim for maintenance by the wife of a customary union, unless that union has been duly solemnised and registered under the African Marriages Act: Ex Parte Seti and Others 1963 R & N 681 (SR)

60 1946 SRN 352

61 Munemo v Mandivenga and Sengeza 1943 SRN 261; Shorifwa v Risi and Mubayiwa 1944 SRN 275; Jokonya v Daina and Muchingura 1944 SRN 290

62 Kamenya v Jessie and Mbida 1943 SRN 255

63 Child op cit 51 maintains that "Under traditional law he (the husband) could not pursue both actions at the same time, and a successful claim for damages was a bar to an action for divorce. Nowadays, a husband will sue for damages and will follow this later with an action for divorce". Cf footnote 48

64 Mega Kenani v Phillemon Chifamba 1963 CAACC 44

In this chapter, we must consider the liability, if any, which arises out of the wrongful killing of a breadwinner. This question is dealt with separately because it raises the problem of the recognition accorded family relationships in African customary law.

It seems that, traditionally, customary law allowed the family of a deceased person to claim compensation for his death. Goldin and Gelfand state[65] that ten head of cattle had to be given to the victim's family and, in addition, the defendant was obliged to provide a daughter to compensate for the loss of a member of the family. The purpose behind this payment was restore the social equilibrium which had been upset by the killing[66]. Apart from the purely compensatory damages to be paid, there were penal damages which went to the chief. According to Goldin and Gelfand, one head of cattle was usually given to the chief to appease the spirit of the tribe and a further head was given to the tribal court[67].

In theory at least, the position was completely changed by the arrival of the Europeans. Because the chiefs were deprived of their criminal jurisdiction, they were no longer entitled to receive fines payable in respect of assaults and homicides[68]. It followed from this rule that where only criminal penalties had formerly been payable to the chief for wrongful behaviour, any remedy the individual might have to claim compensation in the same circumstances, would have to come from the common law. In consequence, it has been held that damages for assaults might now be claimed and quantified under the common law[69]. In the case of the death of a breadwinner, of course, there were both civil and criminal penalties in customary law; the latter have fallen away but now it is possible to claim delictual damages under either African

65 African Law and Custom in Rhodesia 197

66 Howell A Manual of Nuer Law 41sq

67 Bullock The Mashona 298

68 See Mtandwa v Shiota 1929 SRN 4 and Wiri v Masha ngombe 1939 SRN 198 with regard to incest and Keresiah and Jack v Martha and Mugweni Masimba 1958 SR 827

69 Mbawina v Chanayiwa 1946 SRN 347; George v Gabaza 1948 SRN 428; Amon Nyamupfukudza v Dorothy a/b Chirekeni 1968 CAACC 1

customary law or the common law. Presumably, the plaintiff will choose the common law whenever possible for the amount of damages he may be awarded under that system will certainly be higher than under customary law. He is assisted here by the conflict of laws rules for, under Section 3 (1) (b) of the African Law and Tribal Courts Act, this type of claim is governed, prima facie, by the common law.

Under this system of law, delictual damages may be claimed by a person who has been deprived of the support of a breadwinner. Liability is based on the actio legis Aquiliae (in terms of which it would have to be proved that the death was caused negligently or intentionally). Apart from establishing the defendant's responsibility in delict, the plaintiff must also satisfy the court that, but for his death, the deceased would have been obliged ex lege to contribute to his support[70]. It is in connection with the last requirement that difficulties may arise if the plaintiff and deceased were Africans. Since the action arises out of the common law, it follows that only relationships entailing a duty of support, recognised by the same system, will be protected.

The leading case, in Zimbabwe-Rhodesia, is Ex Parte Seti and Others[71]. The deceased's wife (according to customary law), his minor child and his mother all claimed damages arising out of his wrongful death and their consequent loss of support. The court had no hesitation in supporting the claim of the deceased's mother and child. One suspects that the court was influenced in this regard by the fact that their relationship with the deceased was one recognised both under customary law and the common law. The wife's claim, however, was dismissed. The evidence before the court showed that royoro had been paid but that their marriage had never been solemnised under the Native Marriages Act. In terms of Section 3 (1) of that Act, the union was "not a valid marriage and her status is not that of a wife for the purposes of the general law of the country."

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70 Boberg op cit 303-305

71 1963 (4) SA 962 (SR)

The court referred, in its decision, to the South African case of Santam v Fondo[72], where it had been held that a Bantu customary union (although it gives rise to certain rights and duties, including the duty of support, which are enforceable between the spouses and as against a third party who is also black) cannot found a dependant's action for loss of support against a non-black[73], because, not being a civil marriage, it creates no duty of support according to the general law of the land. This decision had the effect of depriving African women, in South Africa, of any legal remedy for loss of support if their customary law husbands were wrongfully killed. The situation was soon rectified by legislation granting a dependant's action to the surviving partner of a Bantu customary union[74].

Zimbabwe-Rhodesia is not, of course, bound by the decisions of the South African Appellate Division nor is it bound by the attitude of the South African courts and legislature to marriage under customary law. While, formerly at least, the Zimbabwe-Rhodesian courts had no hesitation in according customary marriages the same degree of recognition as common law unions (at least for the purposes of the crime of bigamy[75]), this approach has now been thrown into doubt. Dicta in several cases suggest that customary marriages will be recognised for the purposes of customary law only, ie they will not be regarded as "marriages" for all purposes, principally because of their polygamous character[76] The hesitation expressed by the courts was echoed by the legislature which specially amended the Workmen's Compensation Act and the Public Services Act to ensure that all surviving widows, irrespective of race, would be entitled to claim compensation on the death of a breadwinner[77]

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72 1960 (2) SA 467 (AD)

73 Formerly, commissioners' courts in delictual actions between blacks always granted damages to the deceased partner in a customary union: Kanyile v Mbeje (1939) 11 NAC (T&N) 45; Zitulele v Mangquza (1950) 1 NAC (S) 249

74 Section 31 of the Bantu Laws Amendment Act No 76 of 1963

75 R v Nkabi 1918 SR 160; R v Sigiwe 1918 SR 68; R v Moyo 1946 SR 12 ; R v Tshipa 1957 R & N 751 (SR); R v Ncube 1959 (2) R & N 466 (SR); Chikosi Chikosi (3) 1975 (2) SA 644 (R)

77 Section 4 (3) of Act No 52 of 1959, now Section 4 (3) of the Workmen's Compensation Act (Chapter 248); and Section 24A of Act No 42 of 1960, now Section 68 of the Public Services Act (Chapter 90)

The position cannot be regarded as settled. Seti's decision may be distinguished on the basis that the customary union in that case was not solemnised under the Native Marriages Act and, for that reason alone, did not qualify to establish a legal duty of support between the spouses. Moreover, the dicta suggesting only limited recognition of customary marriages must be read in the light of earlier rationes which accorded full recognition[78] Apart from this, it would be anomalous if the courts refused to recognise the husband's duty to support his customary law wife for the purposes of delictual claims, while they accepted this duty for the purposes of the Matrimonial Causes Act and, during the subsistence of a customary marriage, for maintenance claims inter vivos

This is an area of the law which requires clarification. For the purpose of bringing a dependant's action and for reasons to be discussed in the context of a civil or Christian marriage, it is essential that a customary marriage be treated on an equal footing with the common law marriage. Only if this is done, will family relationships created in terms of customary law receive due protection in law.

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78 See Chapter for a fuller discussion

7 CAPACITY TO ACT AS CUSTODIAN OR GUARDIAN PARENT OF CHILDREN

The concept of guardianship will be considered again, later, as it is used in respect of women[1]. We consider here guardianship in its usual meaning, namely, the complex of parental rights and duties in respect of minor children. Our concern is not so much with the duties flowing from guardianship, such as the duty to provide maintenance, but with various rights arising out of the parent-child relationship. These rights may, more accurately, be referred to as "parental rights". They include the natural right to the companionship of a child[2]; the right to benefit from its labours in the home[3] and, in the case of a daughter, the right to her rovoro when she marries[4]. In addition, there are certain powers, such as the power to consent to a child's marriage and to determine the nature of its education and upbringing[5].

There is no idea of an individual parental right to a child in customary law; rather there are lineage or family rights[6]. Customary law provides that a father and his family are entitled to exercise parental rights in respect of children born of a lawful marriage, provided that rovoro

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1 Chapter 13

2 So fundamental an aspect of guardianship has not, as yet, been articulated fully in legal terms; but it would, in the common law, for instance, be an implicit part of the right of custody: see Boberg The Law of Persons and the Family 427. Usually, companionship is in issue only when the question of the non-custodian parent's right of access is questioned. The relationship between custody and access was explained in Myers v Leviton 1949 (1) SA 203 (T) at 210-211; Goldin and Gelfand African Law and Custom in Rhodesia 187

3 Holleman Shona Customary Law 62

4 Holleman op cit 242 - this is the most vital aspect of parental rights

5 Goldin and Gelfand op cit 183

6 This proposition flows from the fact that marriage itself is not a matter of individual concern in customary law; rather it is a relationship whereby the husband's lineage can reproduce itself by acquiring a woman: Holleman op cit 148 and 153-154. Obviously, the father himself is the person to exercise the day-to-day incidents of parental rights and responsibilities but if he were to die or become incapable, these responsibilities would be inherited by his family: Holleman op cit 330sq

has been paid to the mother"s family[7]. If rovoro has not been paid, the right to the children vests in the mother's father[8]. Although, in theory, delivery of rovoro determines the vesting of parental rights, Africans are extremely tolerant of dilatory payment[9]. Provided that the children's father shows a serious intention to pay, he will not be unduly pressed, particularly, if it is apparent that he does not have means of payment In consequence, there is unlikely to be any question of the father being deprived of parental rights during the subsistence of the marriage[10]. On dissolution of the marriage either by death or divorce, the question of payment of the full amount of rovoro agreed upon becomes more urgent Even in these circumstances, the father or his family (if he is dead) is unlikely to lose parental rights unless no rovoro at all had been paid or such a small portion as not to warrant guardianship of the children[11] The point is that whether or not the father's family loses its parental rights, the mother never has a legal right to her children[12]

For practical purposes, the children are usually permitted to remain with their mother until they have been weaned, if there is any question of their separation from her[13] Parental rights to children who were not born of a lawful customary marriage, automatically vest in the mother's

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7 Child The History and Extent of Recognition of Tribal Law in Rhodesia 76; more accurately, the rule should be stated as follows: "parental rights to a child born of a lawfully married or betrothed woman are vested in its mother's husband or affianced groom by virtue of the affinition agreement between the two families", ie agreement as to payment of rovoro: Holleman op cit 242

8 Child op cit 26 and 76 - amongst the Ndebele, for instance, the threat of loss of parental rights is the only sanction compelling payment of the marriage consideration

9 Holleman op cit 172sq

10 Although if the woman's father is becoming impatient with regard to late payment of rovoro, he may impound his daughter and/or her children (kubata mukadzi). This action is resorted to usually in an effort to force the husband either to pay or dissolve the marriage. It is not commonly used: Holleman op cit 173sq

11 Holleman op cit 298 and 305

12 Bennett Appendix E Question 94

13 Bennett Appendix E Question 93

guardian - her husband in the case of an adulterine child and her father in the case of a pre- or post-marital child. In the case of an unmarried mother, should her lover wish to obtain rights to the child, he may do so by payment of damages for seduction[14]. Among certain tribes, he may be required to pay a further sum known as maputiro, together with rearing fees (chiredzwa) if the child had been brought up in the maternal grandparents' family[15] The mother is not regarded as having any right to the child, since this is a matter of family rights, although she is permitted, as a matter of convenience, to keep the child until it has been weaned

The tribal courts always determine the question of parental rights to children in terms of customary law (that is, without regard to the interests of the child concerned but according to payment of rovoro)[16].

The custody and guardianship of children is, moreover, a matter governed by customary law in terms of Section 3 (1) (a) (ii) of the African Law and Tribal Courts Act It is not surprising to find that the district commissioners' courts have adopted more or less the same approach as the tribal courts with regard to parental rights over both legitimate and

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14 Holleman op cit 144sq; Child op cit 79. In the case of an adulterine child, the woman's lover has no rights to the child. This is expressed in the maxim gomba harino mwana, ie "a lover has no child": Holleman op cit 250. Even if the woman were seduced by a man other than her husband (prior to marriage), the husband would acquire rights to the child. This is expressed in the maxim ngombe yauya nomswa pamuromo, ie "the cow comes with grass in its mouth": Holleman ibid. It may happen, however, that the husband and his family reject an adulterine child, in which event, there would be no objection to allowing the lover to claim parental rights against payment of damages: Holleman ibid.
Goldin and Gelfand op cit 207 define seduction amongst the Shona as "sexual intercourse with any woman, with or without her consent, but without the consent of her guardian ... If she is single, widowed or divorced, damages or compensation is paid to her guardian."

15 Child op cit 79-80; cf Bennett Appendix E Questions 69 and 95: in some cases, payment of chiredzwa alone sufficed

16 Bennett Appendix E Questions 92 and 94; in contravention of Section 3 (5) of the African Law and Tribal Courts Act which purports to bind all the courts in the country. Refer to Chapter 3

illegitimate children[17]. Customary law has, however, been modified in one important regard. The district commissioners have introduced a rule from the common law whereby any order affecting the custody of a child must be in the best material and moral interests of the child concerned. In other words, they consider that the welfare of the child is of greater importance than the rules of customary law. The "welfare rule" as it has been termed, has been incorporated into the African Law and Tribal Courts Act. Section 3 (5) provides that:

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

The courts are inclined, however, to interpret the "best interests of the child" to mean that the father should have custody. The reasoning is that the child will tend to identify with the father and the paternal family in accordance with African traditions and it is, therefore, advisable to confirm this tendency in the custody order[18].

Because this rule concerns only the custody of children, the courts have been compelled to separate the concepts of custody and guardianship[19]. The best interests of the child will determine who is entitled to custody but the courts are prepared to allow the father guardianship of the children, in accordance with customary law (namely, where he has paid

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17 Child op cit 73-81 and 84-85; Goldin and Gelfand op cit 183-187; Ida and Ben v Chombe 1947 SRN 393; Jeri v Saniso and Mutambiranwa 1958 SRN 851, regarding payment of rovoro

18 Jirira v Jirira and Dube (unreported) G-S-44-75; Rhodia v Mandala 1942 SRN 236, where it was held that guardianship and custody must be determined according to the Zimbabwe-Rhodesian system of patrilineal law, ie the father should be given custody so that he could keep a watchful eye on their interests. In Mildred Mungofa v Julius Mungofa 1971 CAACC 24, on the other hand, where the father was violent and an habitual drunkard and the mother religious and a competent social worker, custody was awarded to her. In the recent decision in Mbonisi Moyo v Tendayi Moyo 1976 CAACC 1, the court made it clear that the father has no overriding right to custody merely because he had paid rovoro. It was stressed in this case and Joshua v Martha 1976 CAACC 20 that a thorough investigation of the parents' circumstances is necessary before an order as to custody may be made

19 Ally Musaka v Elizabeth Matope 1959 SRN 889; Mabande v Masiya 1959 SRN 896; Annie and Chimtswipo v Batiya 1959 SRN 912

rovoro)even if itappears that he is not the most suitable parent. In this manner, the mother may well be awarded the right to custody of her children if this will best serve their material and moral interests. The welfare rule permeates all aspects of the law regulating the custody of children[20] and it includes the custody of illegitimate children[21].

The courts have not attempted to define the terms "custody" and "guardianship" and, indeed, it has been said that the two concepts are not amenable to crisp definition[22]. Nevertheless, it seems that custody denotes the physical control and education of the child[23], while guardianship includes all the remaining rights, duties and powers[24]. Important though it is, definition cannot be taken further than this.

While it has been held that it is irregular to grant custody of a child to either party of a marriage in customary law, without first dissolving the union[25], this ruling has not been followed[26]. It seems that either parent may apply for a custody order at any time after dissolution of the marriage[27] but the woman, if she wishes to make such an application, should be assisted by her guardian[28].

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20 Spiro Law of Parent and Child 80

21 Calitz v Calitz 1939 AD 56 at 63

22 Spiro op cit 302: that is guardianship in the narrow sense, when looked at in distinction to custody. Otherwise, guardianship may be used in a broad sense to denote the totality of parental rights. See also Boberg op cit 427-428 and 459-464

23 Child op cit 76

24 Kamangira v Jengera and Murapi 1940 SRN 161; Makonyo v Marini and Freddy 1940 SRN 153, both cases concerning illegitimate children

25 Annie and Kachenjeri v Tenda 1946 SRN 367

26 Ally Musaka v Elizabeth Matope 1959 SRN 889; Mumba v Antonio 1964 CAACC 60

27 And, after the action for dissolution of the marriage has been brought, a separate application may be made regarding the custody of the children: Marubini v Gumbira 1934 SRN 57

28 Chidombgwe v Nyakudjga 1949 SRN 462; Julia v Matapulaye 1952 SRN 605. If the woman was party to a civil or Christian marriage, of course, she will have locus standi to bring the application herself: see Chapter 14

The courts will consider the moral and material welfare of the child only where one party alleges the lack of suitability of the other parent[29]; but the court will not go so far as to accept a private arrangement concerning custody made by the parents themselves. It has been held that the court must hear evidence so that it can decide for itself what is in the child's best interests[30]. If it appears to the court that neither party is fit to be custodian of the child, custody might be awarded to a non-relative[31]. On the other hand, if the test of suitability of the parents proves inconclusive, the principles of customary law are applied[32].

The district commissioners' courts, in keeping with the views of the tribal courts, do not consider that a woman has an inherent parental right to her children (apart, of course, from situations where she is granted custody in terms of Section 3 (5)). It may well be that she is permitted to retain custody of her children until they are old enough to go to their father. In this regard, the district commissioners' courts usually order that a child is to remain with its mother until it is seven years old. Prior to that age, it is deemed to be in the best interests of the child to be cared for by its mother[33]. This is a rule of convenience, however, and does not acknowledge the woman's parental rights.

A civil or Christian marriage appears to have little effect on an African woman's lack of parental rights. In a series of decisions, it has been held that the guardianship of children is to be regulated by customary law[34]. (Custody, of course, is still determined by Section 3 (5)). The operation of customary law may be excluded if either of the spouses chooses to make a will in which he or she provides for the

29 Muzerengi and Wenzira v Mirizhonga Eriya 1953 SRN 657; Jeri v Saniso and Mutambiranwa 1958 SRN 851

30 Kafahakurotwe v Ajida 1966 CAACC 10; Tobias v Mandizwidza 1968 CAACC 7

31 Bope v MD Scotch 1961 SRN 958

32 Esnad Ndebele and Josiah v Togo Ndebele 1965 CAACC 23

33 Pemha v Joshua Patrick Zuichemo 1972 CAACC 9

34 See Chapter 14

guardianship of the children of the marriage[35].

35 Section 2 of the African Wills Act; Chapter 9

8 PROPRIETARY CAPACITY

The concept of proprietary capacity denotes two separate ideas: firstly, the power to acquire and dispose of property and, secondly, the liberty to use the property in one's possession, without reference to the rights of any other person. In the common law, for instance, a minor has the power to acquire property but has no power to dispose of it[1]; similarly, a landowner has the liberty to walk on his land and cultivate it free from the intereference of any other person[2].

In contemporary African customary law, the woman's proprietary capacity poses particular problems The reason appears to be that there is a wide discrepancy between traditional customary law regulating her capacity and the current social realities. Many educated, urban African women are now wage earners and, even in the rural areas, African women participate in a wide variety of money-earning activities, such as the manufacture and sale of needlework, baskets, pots etc and the cultivation and sale of crops and livestock. The traditional law which regulated the woman's proprietary capacity was conditioned by a simple peasant economy and by the peculiar conceptions of property and the rights to property. This law has become inappropriate to the modern social setting.

The traditional African conception of wealth differed fundamentally from the European idea of wealth. Holleman has observed that:

> "Material wants in pre-European times were very limited, and confined to the necessities of life: food, shelter, clothing and the tools to help produce these. Little was needed to satisfy personal vanity or sense of beauty. It was a peasant population, and agriculture was the principal economic activity ... Production was limited by the personal needs of the producers ... In short, the traditional economic pattern was on the whole aimed at self-maintenance and not at profit making.
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> If we then find that, in spite of their very limited material needs, the people had a well-defined idea of 'wealth' and strove to acquire wealth, it is clear that their conception of wealth must be interpreted in terms other than economic.

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1 Boberg The Law of Persons and the Family 642

2 Hahlo and Kahn The South African Legal System and its Background 82

> It is no coincidence that the general term for livestock, pfuma, has the same root as the words for 'wealth' (upfumi) and 'to become rich' (kupfuma) ... Wealth meant the capacity to maintain and reproduce one's kin-group as an organic unit
>
> This particular conception of wealth established a very close correlation between livestock (especially cattle) and women. Cattle were thought of in terms of wives; wives meant children for one's kingroup." 3

Because the family as a whole was concerned with its own reproduction, rights in property, which had the potential of assisting in reproduction, have sometimes been described as "communal"[4]. It follows that whatever was done with the cattle or women of the family would affect the interests of all members of the family. Similarly, the production of food was a matter affecting the whole family. As Holleman says:

> "When property was of such a nature that it served the common interests of the family, these interests had to be considered. Individual claims on the ground of personal production or acquisition would still be recognized, but these claims could be overruled when the wider interests of the family prevailed." 5

The type of property in which the family would have had an interest was administered and controlled by the head of the family concerned. The power of control did not imply that the head of the family had the liberty to use the property in his possession as he chose. He was obliged always to pay heed to the interests of the family. This arrangement guaranteed that an individual's right to property was curbed in favour of the family group[6].

It was recognised in customary law, however, that a person might have an unrestricted right to use and enjoy "personal" property. By this is meant property which had a personal, rather than a reproductive value.

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3 Shona Customary Law 318-319

4 If the common law notion of "communal ownership" is implied, this is inaccurate. Grotius Introduction to Dutch Jurisprudence 2.28.2 describes communal ownership as "a real right belonging to two or more persons over the same thing". Elias The Nature of African Customary Law 83-84 and 163-166

5 op cit 320

6 See Holleman op cit 324sq for a discussion of unity and division in the family estate

Such articles as clothing, personal adornments and weapons would be included in this category[7].

If we consider these rights in terms of Hohfeld's scheme of rights and duties, it is evident that while individuals had the power to acquire rights in property, their power to dispose of property was limited when the nature of the property concerned would (in the African view) serve the interests of the family as a whole. The individual's liberty to use and enjoy property might, similarly, be restricted in the interests of the family. It was only when the property itself had no significance, in the broader context of the family, that the individual was deemed to have full power and liberty. It will readily be appreciated that the very nature of the traditional African economy precluded the manufacture or acquisition of the many types of property familiar to the Western world. There were a few, simple categories of property, such as cattle, small livestock, crops, clothes, weapons and tools; the nature of the property within each category determined the individual's rights in respect of it.

The individual's right to property is, however, of little concern in customary law. Rather,

> "the law is interested in property as an incident of a social relationship, in addition to the property's material value." 8

In other words, customary law is concerned, not so much with an individual's rights in property, as with his rights and obligations regarding other people in respect of property[9]. To some extent, this is true of the common law as well. In order to describe family relationships, we must consider the provision of food, clothing and shelter by parents for their children. Practical requirements render the parents' rights of ownership in these categories of property far less significant than their duty to support their children. In a society where family relationships were

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7 Holleman op cit 320

8 Gluckman The Ideas in Barotse Jurisprudence 151

9 Gluckman op cit Chapter 5 for a full discussion of this principle; Gluckman in Ideas and Procedures in African Customary Law 252-264

were considered to be of prime importance, it was not surprising that these rights and obligations became highly evolved at the expense of proprietary rights[10].

Although rights in land differ, in some respects, from rights in other forms of property[11], the principles discussed above are still applicable. All rights in land vest, ultimately, in the ancestral spirits of the tribe. The chief, as a living connection between the realm of the departed spirits and the world of the living, is the physical and present bearer of the rights to the land[12].

> "The Shona do not see their land simply as property, simply as an economic asset; the land is intimately associated with the history of a chiefdom, with the ruling chief and with ancestral spirits who lived on it." 13

The chief's dominion finds practical expression in his power to permit foreigners to settle in the chiefdom. Apart from this, he has the power to allocate land to the wardheads under his authority[14]. Even these rights are restricted, however; once the chief has allotted land, he cannot, later, reclaim it or dictate the manner in which it is used. The transferee is secure in his right to undisturbed use and possession. Land which has been allocated to a wardhead may, later, be allocated to a village headman within the ward. The transferee, again, has a right to undisturbed use and possession. The land cannot be reclaimed by the

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10 Hammond-Tooke Bhaca Society 55 gives an interesting account of the "obligations imposed by ownership"

11 in that there is a "reversionary interest" in land - see infra

12 Elias op cit 162 quotes a Nigerian chief as stating to the West African Lands Committee in 1912: "I conceive that land belongs to a vast family of which many are dead, few are living, and countless members are unborn."

13 Bourdillon The Shona Peoples 85; Bullock The Mashona 71: "It may be gathered that the real owner of the land is on the supernatural plane. In the one instance, he is the tutelary spirit. In the other, a tribal spirit has not yet emerged, and Mwari, represented by his son or emanation is directly the spiritual owner."

14 Bullock op cit 71-72. Bourdillon op cit 86. From this, it is apparent that what Gluckman would describe as an "estate of administration" is closely associated with the hierarchy of political authorities: Gluckman The Ideas in Barotse Jurisprudence 86. The chief has duties corresponding to his rights in land, inter alia, to protect occupiers against trespass; to provide members of the tribe with sufficient land to support themselves and to propitiate the spirits to ensure good rains and fertility: Gluckman op cit 80; Bourdillon op cit 86

wardhead nor may he interfere with the transferee's use of the land[15]. The village headman may then allocate fields and gardens to individual members of the village community. Each individual retains the undisturbed use of his land, as long as he remains a member of the village. Should he leave the area, the land reverts to the village headman. Similarly, if the whole village moves for some reason or ceases to exist, the land reverts to the wardhead[16]. In this sense, it may be said that the person who allotted land has a "reversionary interest" in that land, ie if the person to whom the land was allotted, vacates the property, it will, automatically, revert back to the control of the person who allocated it[17].

Whereas the power to acquire rights in land is unrestricted[18], the power to alienate rights in land is limited. Once a person has been allotted a piece of land, although his heir may inherit those rights, he may not dispose of his rights to another person inter vivos[19]. On the other hand, he may dispose of his right to a coeval within his community. Only a chief has the power to grant land rights to foreigners but only then if they have submitted to his political authority. The liberty to use land is restricted only in that certain natural features of the terrain (such as springs, rivers, fruit trees and deposits of clay) must be used with due regard to the interests of other members

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15 Child The History and Extent of Recognition of Tribal Law in Rhodesia 109; Holleman in Colson and Gluckman (Eds) Seven Tribes of Central Africa 362 and 369

16 Holleman Shona Customary Law 6-8; Seven Tribes 362

17 Gluckman Ideas and Procedures 55-59. Developing an idea first put forward by Sheddick, Gluckman speaks of "primary, secondary and tertiary estates of administration" to emphasise that superior rights were rights to allocate land and to restrict its disposal. For a full discussion see: The Ideas in Barotse Jurisprudence Chapter 3; Holleman Shona Customary Law 12 speaks of "suspension" of rights in land, ie the rights of the transferor (be it wardhead, chief or village headman) are "suspended" while the land is being occupied by an individual; also Seven Tribes 369

18 except, of course, that it is only as an eligible member of a political unit, viz village, ward or tribe, that a person will be given rights

19 Bourdillon op cit 86; Gluckman Ideas and Procedures 55-56 - rights cannot be transferred to a stranger unless that stranger has joined the political community which has superior rights over the land, be it tribe or village

of the community[20].

The African conception of rights in land is framed in terms of the political structure of the chiefdom. The power to allot land and the reversionary interest vests only in those who have a position of political authority. As with cattle and other property, however, these land rights are not deemed to be as significant as the obligations owed to persons under the right-bearer's authority. Just as the head of a family is obliged to ensure that his wives and sons have sufficient land for cultivation to feed the family[21] so, too, must the chief maintain peace and security in his realm and, by propitiating the spirit, ensure fruitful harvests.

Women, of course, do not, traditionally, hold positions of political authority in the tribal community. (Examples of chieftainnesses and female ward or village heads are exceptional). For this reason, women do not have the power to allocate land. As individual members of a family, however, they may acquire the right to cultivate plots of land[22]. As soon as a man marries, for instance, he will be allocated land to cultivate by his village headman. He is then expected to give his wife a garden plot on which she may grow vegetables in order to feed her family[23]. If the marriage were dissolved her garden would revert back to her husband for re-allocation[24].

Women do not have the power to control or administer property of a reproductive significance nor do they have the power to allocate land. These powers are reserved to men, as is consonant with the principle of male authority in Shona law. Apart from this, the woman's opportunities

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20 Holleman Shona Customary Law 13; Seven Tribes 370

21 Gluckman Ideas in Barotse Jurisprudence 151sq

22 Gluckman Ideas in Barotse Jurisprudence 145: "A man is compelled to give each of his wives at least one garden or reasonable size or she can claim a divorce." The husband remains "owner" of the garden even when he has allotted it to his wife. If he takes it away from her, the remedy lies in dissolution of the marriage (ie the law of Persons); she cannot claim back her garden (ie the remedy does not lie in a vindicatory action which is part of the law of Things)

23 Holleman Shona Customary Law 6-7 and 10

24 this may be inferred from Holleman and Bourdillon

for acquiring property in the traditional, subsistence economy were very limited. Most of her activities were devoted to rearing children and feeding her family; she was precluded from succession to the estates of her husband or male kinsmen. Most of the property which she did acquire was not hers to use and dispose of as she chose[25]. Insignificant items of personal property, such as clothing and cooking utensils, were clearly recognised to be hers but, apart from this, her property was usually committed to feeding and raising her family.

The arrival of the Europeans in Zimbabwe-Rhodesia resulted in the introduction of a cash economy. The old forms of wealth, such as cattle and foodstuffs, frequently acquired a monetary value as they became commodities on the cash market Money was a necessary medium of exchange for the acquisition of a wide range of new products, such as blankets, farming implements, clothes, bicycles etc. Money was also needed to pay taxes and rovoro. In order to acquire money, new activities were undertaken: the sale of agricultural produce and livestock, employment in the towns and mines on a regular, wage-earning basis and so on. These money-making activities were,

> "an individual excursion away from the traditional sphere, and these efforts inevitably accentuate the individual character of the property so acquired." 26

It is in the light of these considerations that we must now examine the attitude of the tribal courts to the proprietary capacity of African women. With regard to the unmarried woman, Holleman has observed that,

> "In principle a father could claim the earnings of his unmarried children and exercise control over any property acquired by them." 27

In other words, while the daughter has the power to acquire property, her power to dispose of it and her liberty to use it are restricted in favour of her family, as represented by her father. Holleman reflects the traditional point of view but this attitude is being relaxed to

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25 Apart from umai and mavoko property - see infra

26 Holleman Shona Customary Law 323

27 Holleman Shona Customary Law 320

some extent. Today, it is recognised that unmarried women may use and dispose of property which they have acquired by their own efforts. It would not be considered proper for a father to claim the earnings of a daughter who was economically independent of her family, although her obligations to her family still compel her to make contributions towards their support[28]. On the other hand, the woman's rights in respect of land remain much the same as they always have been; a father may well allot his daughter ploughing land but the tribal courts feels that this should remain his property[29].

When a woman marries, she moves from the guardianship of her father to that of her husband[30]. In general terms, her proprietary capacity is not enhanced. Many Africans maintain that the woman should arrive at her new house empty-handed. Her husband is expected to provide her with food, clothing and the utensils necessary to run her new establishment. Most acquisitions during the subsistence of the marriage fall under the control and administration of the husband, regardless who acquired them[31].

A distinction must be drawn, however, between those assets in respect of which the wife has full powers and liberties and the assets in respect of which her powers and liberties are limited in favour of her husband. The "matri-estate", as it has been termed[32], may be divided into two categories. Holleman calls the first category of property "umai". It comprises the livestock and its increase which accrue to a woman by virtue of her daughter's marriage and pregnancy. This would include the ngombe youmai which is given to a woman by her daughter's husband on marriage, and smaller stock, such as the masungiro, which is paid to a woman when her daughter has her first pregnancy. Both these payments are made for mystical reasons. The ngombe youmai is given in order to

28 Bennett Appendix E Question 49; it is apparent that, in the tribal courts, the unmarried woman is deemed to have full proprietary capacity

29 Bennett Appendix E Question 50

30 Chapter 5

31 Bennett Appendix E Questions 24 and 25; excepting the woman's personal property and umai and mavoko property - see infra

32 The estate comprising the former assets: Holleman Shona Customary Law 350sq; Child op cit 90-91; Goldin and Gelfand African Law and Custom in Rhodesia 190-191 for a full discussion of this topic

propitiate the wife's ancestral spirits and ensure a fruitful union[33]; the masungiro is given by the bridegroom to avert the danger of ill-health to the parents caused by their daughter's pregnancy[34]. Holleman has called the second category of property "mavoko". It includes all the things acquired by a woman through her personal labours. Traditionally, it comprised the small livestock which a woman could acquire by her activities as a midwife, herbalist, brewer of beer or the maker of pots and baskets. It was reasoned that a woman should, if it were surplus to the family needs, be permitted to keep this property because she had worked for it. The woman's control of her umai and mavoko property is free from any interference by her husband. Particularly in the case of umai property, it is widely believed that spiritual retribution would befall any person who interfered with this property without the woman's permission. Holleman indicates, however, that the woman's opportunities for increasing her own property were limited by the demands of her children and her own family, whose requirements might compel her to dispose of it[35]. It would seem that any obligation on the woman to use this property in favour of her family would be no more than a moral obligation[36].

Other property, of minor importance, over which the wife has absolute control, includes her clothing, cooking utensils and, sometimes, the food in the granaries[37]. She has, moreover, full proprietary capacity in respect of any property which she might inherit[38] but this sort of property is of little significance: it normally comprises minor articles

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33 Holleman Shona Customary Law 182

34 Holleman Shona Customary Law 177; Bennett Appendix E Question 53 - a wife's husband may never use her umai property without her consent

35 Holleman Shona Customary Law 352

36 Bennett Appendix E Question 24 and 53; informants felt that mavoko property, in particular, should be used for the benefit of the family. But no one is entitled to deprive her of her property; rather, if she neglected her children and her husband, the remedy would lie in dissolution of the marriage, ie the remedy lies in the law of Persons

37 Bennett Appendix E Question 24; opinion was divided regarding food-stuffs

38 This must be inferred: Bennett Appendix E Question 46; Chapter 9

which have sentimental value; hence their appellation - misodzi (tears)[39].

There is no difference between the principles governing the proprietary capacity of the wife of a monogamous union and the wife of a polygamous union. All property (apart from that property which is owned individually by the wives) comes under the control and administration of the husband[40]. The only difference between monogamous and polygamous unions is that the property in thehouses established by each of the wives of a polygamist is kept strictly separate[41]. Although the relationship of each wife, in the polygamous family, viz-à-viz her husband does not differ, certain simple rules have been evolved to prevent confusion of the property which belongs to each house. A husband may not transfer property from one house to another without the consent of the wife concerned. Even if the required consent is given, the transfer is no more than a loan which will, at some time, have to be repaid[42]. Unauthorised transfer of property from one house to another is considered to be a serious matter and could provide the aggrieved wife with a good reason to return home to her father. If suitable apology and restitution were not forthcoming, this could provoke dissolution of the marriage[43]. Moreover, if the husband has acquired new property he should, having due regard to the nature of the property and the economic requirements of each house[44], attempt

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39 Holleman Shona Customary Law 337

40 Bennett Appendix E Question 26

41 Holleman Shona Customary Law 212-213; Bennett Appendix E Question 26

42 Bennett Appendix E Question 27. Loans of cattle to pay rovoro for sons in other houses are often repaid when the son receives rovoro from the marriage of his own daughter or when the wife's husband dies: Holleman Shona Customary Law 336. See also the chipanda system: Holleman Shona Customary Law 170, whereby a formal arrangement is made, linking a daughter of one house to a son of another house. Holleman notes that, contrary to the practice of the South African Nguni, this is often done to reinforce the notion of unity in a plural family. Indeed, the concept of "house" property and "kraal" property has never been fully evolved in Shona law, in the sense that it has become a formal institution of Xhosa or Zulu law: Seymour Bantu Law in South Africa 68-77

43 Bennett Appendix E Question 27

44 ie the number of children in the house and its economic resources: Bennett Appendix E Question 28

to apportion the property on the basis of equal shares. Undue favouritism of a particular house could, again, provoke desertion by the wife[45]. On the other hand, any property acquired by a wife remains in her house and is kept separate from the property in other houses[46].

The law regarding property acquired by a married woman in the course of various activities, such as market gardener, nurse, school teacher etc, is in an unsatisfactory state. (Initially, the tribal courts express some doubt as to whether the wife is required to obtain her husband's permission before she may start working in order to acquire mavoko property. It is clear that if the woman intends entering full-time employment with a third person, she will, first, require her husband's consent[47]. Opinion is divided as to whether the husband's consent is necessary if she is self-employed[48].) Assuming that the woman has permission to work, it might be assumed that any property she acquires as the result of her labours, would fall into the mavoko category because the woman worked for it herself. This is not the attitude of the tribal courts. During the subsistence of the marriage, they feel that all such property should be pooled with the husband's earnings, for the common good of the family, under the overall administration of the husband[49]. If the woman is self-employed, it is usually conceded that she should have full power and liberty to use and dispose of her earnings. If she is employed by a third

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45 Holleman Shona Customary Law 212-213 with regard to the sharing of food; Bennett Appendix E Question 29

46 Bennett Appendix E Questions 26 and 27

47 Bennett Appendix E Question 54. In the Chiwundura Tribal Trust Land, informants said that it would be improper for another person to enter into a legal relationship of long duration with a married woman, without her husband's consent. If the woman's contractual capacity is restricted in this manner, of course, her ability to acquire property is also restricted. In any event, all property acquired by the woman from this type of employment goes to her husband

48 Bennett Appendix E Question 54. It is interesting to note that in Ndebele Tribal Trust Lands, informants argued that whenever a woman sought to make a business out of any activity, she required her husband's consent

49 Bennett Appendix E Question 24; an instance where the individual's rights to property are overshadowed by obligations arising out of the Law of Persons

person, informants stated that the husband was entitled to her earnings[50]. The reasons for this attitude were varied. Some informants maintained that women went out to work only on their husbands' sufferance; their proper place was in the home and outside activities were undertaken to the detriment of the home. (This view, of course, overlooks the fact that women may be compelled to work in order to support their families.) The most common reason was that the husband paid rovoro for his wife and, accordingly, was entitled to anything she might acquire. African men feel strongly about this because they now pay considerable sums of rovoro for educated girls who are capable of earning livings[51].

It need hardly be said that the wife's proprietary capacity manifests itself as a problem only when the marriage is dissolved. In principle, the wife is entitled to keep all her own property and it is generally conceded that she is entitled to her umai property and personal property[52]. Opinion is divided as to whether she may claim her mavoko property as well. A considerable number of informants inclined to the view that a woman was entitled to her mavoko property if her husband had been at fault in terminating the marriage; conversely, the husband could keep his wife's mavoko property if she were the guilty spouse[53]. It was generally felt, moreover, that a wife could take with her any property which she had brought into the marriage at its inception[54].

After dissolution of the marriage, the widowed or divorced woman may return to her own family unless, in the case of the widow, she enters into a levirate union with one of her deceased husband's male relatives.

50 Bennett Appendix E Question 24. One cannot help but suspect that self-interest biased the informants' views, since they were all male

51 Bourdillon "Is customary law customary ?" (1975) Nada 140-149

52 Bennett Appendix E Questions 24 and 46. A wife is entitled to her home-made pots etc but it is doubtful whether this rule applies to utensils purchased for her by her husband: cf Mutizgwa v Helida and Tafira 1958 SRN 839

53 A rough and ready policy, based on the courts' perception of the equities of the situation, reminiscent, in some ways, of the common law rules regarding division of matrimonial property on divorce

54 Bennett Appendix E Question 46. For the position of the widow see Chapter 9

Alternatively, the woman may seek to lead an independent life[55]. Whether she returns to her own family or not, however, the tribal courts are beginning to recognise the independence of the widow and divorcee. Most informants stated that she is free to acquire, use and dispose of property without interference from her guardian[56]. Many reasoned that she was mvana (a woman who has born a child) and should be permitted as much freedom as possible to find a new husband. She is usually encouraged to marry again because she is considered to be a burden in her father's house. Normally, practical considerations determine the widow or divorcee's independence. If the widow chooses kugara nhaka, she falls under the guardianship of her levirate partner. If she has had several children by her deceased husband and she refuses such a union, she is allowed to remain on his lands until she finds a new husband[57].

The district commissioners' courts take much the same view as the tribal courts to the proprietary capacity of African women. The primary point of difference, however, has been the formal introduction of the concept of emancipation. The Court of Appeal for African Civil Cases has reasoned that where a woman is emancipated, she has full proprietary capacity in respect of cattle purchased with her own earnings. This view was first put forward in 1927[58] and has, subsequently, been followed in a number of cases[59]. Unfortunately, the woman's power and liberty to dispose of and use her property have not, as yet, been disentangled from her obligation to render support to her family. In Rabecca and Musiyima v Vurayayi[60], the appellant (Rabecca) acquired three head of cattle, prior to her marriage, from the proceeds of the sale of produce from a plot of land which she cultivated. When she married, she left the cattle with

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55 For the options open to the widow see Chapter 9

56 Bennett Appendix E Question 59

57 On the sufferance of his heir, of course: Bennett Appendix E Question 89

58 Bullock op cit 349

59 Hlambase v Wana 1937 SRN 84; Katsandi v Chuma 1937 SRN 86; Chamurwa v Elizabeth and Chakava 1947 SRN 394; Nyongwana v Mapiye, 1947 SRN 433; Rabecca and Musiyima v Vurayayi 1958 SRN 844

60 1958 SRN 844

her brother Ndige and, in the course of time, the cattle increased to 17 head. When Ndige died, the question arose whether Rabecca's cattle fell into his estate for distribution according to the customary law of succession or whether, as owner of the cattle, Rabecca could retain them separately from the estate The President of the court recognised that an African woman could own cattle outright in her own name but, citing Holleman as authority, he went on to say:

> "The individual acquisition gives appellant a claim to the property in preference to all others. But if the common interests of the family demanded it, these individual rights could be overruled because the very nature of the property precluded a strictly individual conception of ownership." 61

Accordingly, although the court ruled that Rabecca was to be given her 17 head of cattle, it did so on the clear understanding that these cattle would be distributed amongst her deceased brother's kinfolk, as was consonant with the "interests of the family". In practice, of course, the interests of the family would normally be decided by the woman's guardian. It would be unfortunate if this approach were pursued too far for it would permit the father to claim his daughter's earnings whenever he thought fit This would render nugatory any newly won proprietary capacity.

To date there have been two reported cases in the Court of Appeal regarding the proprietary capacity of the married woman. In Angeline Chiutsu v Dennies Garisa, the court followed the opinion of Child, to the effect that:

> "Should a woman go out to work with the approval of her husband, while under his marital control, any money she earns belongs to him under both Shona and Ndebele law. ... If an Ndebele or Shona wife were allowed to keep her earnings, property acquired with her own money would be hers and would fall into the 'mavoko' category, and during her lifetime she would have control of it." 62

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61 at 849-850

62 1969 CAACC 70 at 74, citing Child op cit 91: "Unfortunately for the plaintiff, although in fact some African women may have achieved economic emancipation to a considerable degree after marrying by Christian Rites, the law of the land is still that, despite the solemnization of such a marriage, the property of the spouses shall be held according to African law and custom. Child ... states the African law correctly." In Pasco Nyamariwa Gunda v Margaret Reina and Boniface Monyani 1976 CAACC 31, it was held that if a husband allows his wife to use her wages to maintain her separate household, he must be deemed to have consented to such use of her property

This approach does little to guarantee the African wife's rights to her wages for there are few husbands who would be prepared to allow their wives to keep their earnings as mavoko property[63] In Pasco Nyamariwa Gunda v Margaret Faina and Boniface Monyani[64], the court confirmed the rule laid down in Angeline Chiutsu's case The husband, in a divorce action, claimed certain property from his wife and her earnings which she had acquired in employment as a nurse. Hamilton P held that while he was satisfied that, in Shona customary law, a wife could own certain property, such as umai and mavoko, her wages were the property of her husband.

> "It may be that customary law is not always followed by sophisticated people, especially those living in the larger towns. That, however, does not alter the established customary rule and it would be invidious and impolitic to have one rule applying in rural areas and another in towns."

Although, in the court a quo, the wife's earnings had been deemed to be mavoko property, this was dismissed in the Appeal Court. It was a pity that the learned judge refused, in this instance, to recognise that changes of social attitudes should be reflected in the law.

With regard to the widowed or divorced woman, the district commissioners' courts have, again, given effect to the concept of emancipation. They consider that a woman who does not return to her home after dissolution of the marriage, is emancipated from her father's guardianship[65]. As an emancipated woman she has, of course, full proprietary capacity[66].

The law regarding the African woman's proprietary capacity cannot be considered satisfactory, since the woman is frequently prevented from benefiting from the fruits of her labours. The widow and the divorcee

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63 The Matron of Harare Hospital, in Salisbury, for instance, ruled that her nurses' pay packets be given to the women themselves and not to their husbands so that the women might avail themselves of the opportunity of extracting at least part of their earnings

64 1976 CAACC 31 at 33. See also the dictum in Time Guru Chichetu v Mrs A Chichetu 1977 CAACC 27 at 28

65 R v Gutayi 1915 SR 49; Katsandi v Chuma 1937 SRN 86; Mzondiwa v Maguta 1947 SRN 388; Elizabeth Makola v Gondongwe 1953 SRN 705

66 As in Katsandi v Chuma 1937 SRN 86, where a divorced woman bought cattle with her earnings as a midwife

are placed in a particularly unfavourable position if they have become resident in a town and have lost contact with their kinfolk. The weakening of the communal ethic of the family has involved a weakening of the social controls which used to operate amongst the Shona. The heir of the deceased husband accepts his rights to the estate but he is often unable or unwilling to take on responsibility for the widow. This places her in an unfair position if she can neither inherit from her husband's estate nor claim property she might have acquired during the marriage. The divorcee, similarly, finds that while she is expected to forge a new life for herself, without the support and protection of her own family, she will have lost any property which she may have worked for during the subsistence of the marriage[67].

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67 Church of the Province of Central Africa Commission to Inquire into the Legal Status of African women para 96

9 TESTAMENTARY CAPACITY AND THE RIGHT TO INHERIT

The phrase "testamentary capacity" means the power to dispose of property by will[1]. With testamentary capacity, we normally associate the idea of freedom of testation for, in essence, this means the liberty to dispose of one's property mortis causa to whomever one chooses. The capacity to inherit, on the other hand, is the power to inherit property by virtue of succession to a deceased estate[2]. The power to accept an inheritance or bequest should be distinguished from the right to succeed itself. A right of succession may arise on intestacy or in terms of a will. Obviously, if there is no right to succeed to an estate, there can be no question of the power to accept the inheritance. It is proposed to consider the African woman's rights and capacities in this sense - a wider context than the title to this chapter would, immediately, suggest. Firstly, we shall deal with her power to dispose of property by will and, in conjunction with this power, the liberty to dispose of property to whomever she chooses; secondly, the right of a woman to inherit will be discussed and, finally, her capacity to inherit.

It has been noted, in the chapter dealing with proprietary capacity, that any property which has the potential of assisting the reproduction of the family, is regarded as family property or, at least, property in which the family has an interest[3]. One of the fundamental principles of customary law is the need to preserve these assets intact, within the control of the family. The corollary of this principle is the general rule that the person in control of the family property should use it to the advantage of the family as a whole and should not dispose of it outside the family group[4]. The family interest in such property restricts the present possessor's

1 Hahlo and Kahn The South African Legal System and its Background 82

2 The capacity to make a will is usually termed active testamentary capacity; the capacity to receive a benefit is passive testamentary capacity. This terminology derives from Roman law: I 2.12 and D 28.1.18.1

3 Holleman Shona Customary Law 320 - he describes such property as "organic"

4 Holleman op cit 325-330 regarding the principle of unity in a deceased estate; cf Bourdillon The Shona Peoples 43-44, who notes that, in practice, today most property is regarded as persona property

freedom to deal with the property as he chooses[5]. In theory, then, the family estate should be passed intact from one generation to the next.

The second major principle of the customary law of succession is the need to maintain an unbroken bloodline according to the rules of patrilineal succession[6]. Accordingly, when a man dies, his status, as head of a family group, is inherited by a male descendant, failing which a male ascendant. In each generation, therefore, administration of the family property falls to the senior male representative of the family. In this manner, the agnatic bloodline is preserved together with the unity of the family property.

From these principles, it becomes apparent that the head of the family, for the time being, is not free to select a person from outside the family group to succeed to him; nor is he free to bequeath property to anyone outside the family. To do so would be in contravention of the most basic principles of the Shona law of succession.

In terms of the customary law of succession, a man's oldest surviving son (by his chief wife if he was a polygamist) succeeds to his name and estate[7]; if the deceased had no surviving sons, he is succeeded by his oldest surviving grandson, i.e his first son's oldest child[8]. If the deceased had no sons or grandsons, he is succeeded by his oldest surviving brother and, failing any brothers, by their male descendants. Failing the latter class, the estate passes to the deceased's father and his male collaterals and their descendants.

Women have no right to succeed to a man's name or property. The Shona are a patrilineal people and the concept of a woman inheriting a man's status is inconceivable[9].

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5 An aspect of the obligations imposed by the law of Persons: Chapter 8

6 Holleman op cit 324-325

7 Holleman op cit 330; Child the History and Extent of Recognition of Tribal Law in Rhodesia 102

8 Child op cit 106-108; cf Jamu v Jim and Takaziweyi 1939 SRN 123; Mhango v France 1940 SRN 168; Bezai v Tamisayi 1969 CAACC 58

9 Juniah and Juniasi v Nawa 1949 SRN 449

The heir assumes control of the property formerly possessed by the deceased and used for the benefit of the deceased's family. In metaphorical terms, he "steps into the shoes of the deceased" in that he becomes head of the family, with all the concommitant rights and duties in respect of women and children. Should the heir be too young to fulfill his duties, the deceased's oldest brother will take over his obligations until the heir is of an age to accept his responsibilities[10]. In such a case, the collateral heir is liable to maintain the deceased's widow and minor children until the minor heir comes of age.

There is normally a period of approximately nine months between the death of a man and the succession of the heir at the kurova guva ceremony. During this time, any property falls under the control of the samukadzi (the deceased's paternal aunt, if she is still alive, or his eldest sister), assisted by her son, the muzukuru[11]. Before the kurova guva ceremony, the deceased's widow and children are entitled to be maintained from the deceased's property[12].

At the kurova guva ceremony, the heir accepts his appointment and certain assets may be distributed according to the rules of Shona law. Outstanding debts owed by the deceased should, at this stage, be lodged with the family meeting. All such debts will be paid out of the estate assets. Certain members of the deceased's family are entitled to claim specified portions of the estate. namely, each of his sons is entitled to sufficient cattle to provide him with rovoro (if his father has not already made provision for this); the muzukuru is also entitled to at least one beast[13]. Apart from this, the deceased's personal belongings are usually given to various members of the family as momento mori. They are articles of little material value, their chief significance being sentimental - hence their name - misodzi (tears)[14].

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10 Holleman op cit 332; Child op cit 104

11 Holleman op cit 235; Rabecca and Musi-ima v Vurayayi 1958 SRN 844; cf Munzara v Nerera 1944 SRN 272 which seems to have been wrongly decided

12 Ganda v Chinamo 1946 SRN 352; Child op cit 111

13 Holleman op cit 333sc

14 Holleman op cit 327

Although the death of a man obviously terminates the union between the individual spouses, it need not terminate the marriage agreement between their respective families The husband's family has a right to provide the widow with another marriage partner - usually one of the deceased's younger brothers or nephews[15] Within this range of men, the choice of spouse is left to the widow. The purpose of this institution is to facilitate the yakuwasha's continued enjoyment of the widow's child-bearing capacity Accordingly, if the widow were to refuse to enter into such a union while she was still young and capable of having more children, her family would be obliged to return at least a portion of the rovoro which had been paid for her[16]. This can create a difficult situation because the rovoro cattle will, in many cases, have been used to obtain wives for the widow's brothers. In any event, claims for the return of rovoro in these circumstances are very rare. If the young widow does not wish to enter into a levirate union but, instead of returning to her own family, prefers to remain with her husband's family, she may place herself under the protection of the samukadzi. In this manner, the question of her levirate union may be postponed. Where the widow is past child-bearing age, there is no question of returning rovoro. She is considered free to return to her own family. Should she elect to stay with her husband's family, however, she would fall under the care of the head of the family (namely, the deceased's heir), whose duty it would be to provide her with the means to maintain herself. If she has sons, she may, alternatively, choose to live with them[17].

This system of succession bears little comparison with the common law. According to the common law, the owner of property has the power to acquire and dispose of it at will and the liberty to use and enjoy it in any manner he sees fit[18]. Complementing this "absolute" concept

15 Holleman op cit 234sq and 334sq: Child op cit 110

16 Holleman op cit 234

17 Bourdillon op cit 250-251

18 Silberberg Law of Property 4, although as the author points out, "The law of property thus becomes a means for defining the limits within which an owner shall be free to deal with his property, how and to whom he may transfer it and whether or not a person shall have the right to acquire any particular kind of property.' What is often called the 'absolute" concept of ownership derives from Roman law: Buckland A Text-book of Roman Law 187. According to the commentators, dominium embraced the iura utendi, fruendi, abutendi

of ownership is the complete freedom which a testator has to dispose of his property, after his death, by choosing the beneficiaries who are to inherit his estate and by providing the terms and conditions subject to which his estate is to devolve[19]. The individual's freedom of testation must, of course, find its expression in a testamentary document. Under the common law, all persons over the age of puberty are considered to be competent to execute valid wills[20].

It will be appreciated that far-reaching implications stem from introducing the common law principles of testamentary succession and freedom of testation into an African environment. From the day that an African son is born, he may, if he is the first son, anticipate succeeding to his father - a legitimate expectation in terms of customary law. If his father decides to execute a will, however, his son's expectations may be effectively nullified. Furthermore, the testator's family may reasonably expect the family property to be administered in their favour; their interests, too, may be defeated if the testator decides to bequeath the cattle to a person outside the family. It was for these reasons that the European colonial powers were reluctant to accord Africans testamentary capacity in East and Central Africa[21]. Although the decision to allow African testamentary capacity, in these parts of Africa, was carefully weighed in terms of policy[22], it has never been considered in that manner in Zimbabwe-Rhodesia. Here it has simply been assumed that Africans

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19 Steyn The Law of Wills in South Africa 95; Hahlo and Kahn South Africa, the Development of its Laws and Constitution 625-626

20 Voet Commentary on the Pandects 28.1.31; this rule was received into the Netherlands from Roman law, where the relevant ages were 12 for girls and 14 for boys

21 Allott New Essays in African Law 240-241

22 This has often provoked considerable debate: Colson "Possible repercussions of the right to make wills upon the Plateau Tongo of Northern Rhodesia" (1950) 2 Journal of African Administration 24; Roberts "The Malawi law of succession: another attempt at reform" (1968) 12 Journal of African Law 81; Ollennu "Comments with special reference to customary law" (1969) 2 East African Law Journal 97, dealing with Kenya

have testamentary capacity and freedom of testation on a par with Europeans[23].

We may now turn to consider the African woman's testamentary capacity and freedom of testation. In customary law, when an African woman died, her property devolved according to predetermined rules[24]. Among the Shona, a deceased woman's umai property devolved upon her full brothers. (Implicit in this rule was recognition of the woman' blood ties with her own family.) Her mavoko property, lacking as it does the spiritual qualities of the umai property, devolved upon the deceased woman's oldest surviving son[25].

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23 The district commissioners' courts would apply customary law, in the absence of a will, in terms of Section 3 (1) (a) (iii) of the African Law and Tribal Courts Act. Prima facie, the common law should be applicable to immovable property in terms of Section 3 (1) (b). Previous case law is not entirely clear and, unfortunately, was not decided in terms of the present African Law and Tribal Courts Act. In Dokotera v The Master of the High Court and Others 1957 R & N 697 (SR), the court found that under Section 7 of the African Wills Act, provision was made for immovable property to devolve according to African customary law in the absence of a will. In Gwebu v Gwebu 1961 R & N 694 (SR), the court considered the capacity of an African to dispose of immovable property by will and in passing referred to the decision in Dokotera's case. It noted that because the concept of ownership of immovables was unknown to customary law, it was impossible to apply the customary law of succession. Rather, the law had been modified and, now, succession was governed by Section 7 of the African Wills Act. This decision was supported but not referred to in Masowa and Masowa v Masowa 1966 CAACC 46, where customary law was applied to the intestate succession to immovable property in terms of the African Wills Act.

An interpretation of Section 3 (1) of the African Law and Tribal Courts Act which is compatible with the decisions in these cases is quite possible. Section 3 (1) must be read subject to the provisions of any other enactment and it is clear that customary law is contemplated as the applicable system in regard to intestate succession to immovables under the African Wills Act. (This is implicit in the wording of that section although it is not expressly stated as a choice of law rule.) The problems which have beset the courts relate to the concept of ownership in immovables in customary law: while we must concede that there is no such concept, in the sense of ownership in the common law, various rights in land are recognised (viz rights to cultivate land, the "reversionary" interest etc). These rights may be inherited.

24 For a full treatment of this topic see: Holleman op cit 351-354; Child op cit 92; Goldin and Gelfand African Law and Custom in Rhodesia 294-296, regarding the kurova guva ceremony for a deceased woman

25 Holleman op cit 355

According to Holleman, the woman's husband would take great care to hand over every item of his wife's property to the proper heir. The deceased woman's spirit is considered to be particularly dangerous and would take immediate vengeance if the property were not properly distributed[26]. Little importance is attached to the death and succession of a woman without children; as a matter of practice, her property devolves upon the members of her own family[27].

Although the concepts of testamentary succession and freedom of testation were alien to customary law in Zimbabwe-Rhodesia, it is possible for a man to vary, in some small measure, the rigid rules of the law of intestate succession. Prior to his death, a man might indicate that he wanted certain items of property to be given to members of his family[28]. A meeting of the family must be called, at which the "testator" announces his intentions. This form of disposition bears no relation to the common law concept of testamentary capacity and, especially, not to the idea of freedom of testation. In customary law, such dispositions had to take account of the economic needs of the family and they would not be upheld if they purported to upset the usual order of succession. In particular, property might not be left to a stranger outside the family[29]. Apart from this, it is possible, in customary law, to disinherit an heir. If a man's heir were manifestly unworthy of becoming his successor because of some sufficiently serious reason (such as insanity or the commission of a grave crime), the deceased might, at a family meeting, formally disinherit his heir, stating his reasons for doing so[30]. A person from outside the family, however, may not be chosen to replace the disinherited heir; the

26 Holleman op cit 357

27 Holleman op cit 368; Bourcillon op cit 251

28 Bennett Appendix E Question 86; Bullock "Can a native make a will ?" (1929) Nada 104, although the latter indicates that an African has testamentary capacity in respect of personal property only

29 Holleman op cit 340-342 deals with the allocation of cattle during a man's lifetime: Bennett Appendix E Questions 86 and 88. The position is similar, in many ways, to the law of the South African Nguni: Kerr The Customary Law of Immovable Property and of Succession 143-151

30 Cockcroft "Is the right of disinheritance recognised in native law ?" (1934) Nada 36; Child op cit 103-104; Bullock op cit; Goldin and Gelfand op cit 284-285; Bennett Appendix E Question 87

usual order of succession may never be disregarded. This institution, again, cannot be compared with the common law idea of testamentary capacity and freedom of testation.

It is notable that the power to disinherit an heir has never been attributed to African women. The reason probably lies in the motivation for disinheritance. A man will normally disinherit his heir if it is apparent that the heir will not be able to fulfill his duties viz-à-viz the family. Since a woman's heirs have no such duties to fulfill, there would be no need to disinherit them. Although no mention has ever been made of a woman's power to dispose of her property in the manner indicated above, there would seem to be no good reason why she should not have this power. Men dispose of their property in order to make special provision for certain members of their family and, if a woman wished to do the same, there should be no good reason why she should not do so[31].

Whereas the power to dispose of property mortis causa, in whatever manner one chooses, is part of the common law, it has been accepted, in Zimbabwe-Rhodesia, that Africans have this power and no distinction has ever been drawn between them and Europeans for this purpose. The authority for this proposition is, unfortunately, not as clear as might be expected. Section 6 of the African Wills Act explicitlyaccorded all Africans testamentary capacity and freedom of testation to dispose of immovable property and any rights attaching to immovables. This section does not confer teatamentary capacity on Africans with regard to movable property. There is authority, derived from other legislation, however, in support of such capacity. Section 3 (1) (a) (iii) of the African Law and Tribal Courts Act provides that movable property is to devolve according to African customary law, unless a will has been made, whereupon it is to devolve in terms of the will. This provision obviously contemplates testamentary capacity in respect of movables, although it is not explicit. Similarly, Section 13 of the African Marriages Act contemplates the capacity of any African, who has contracted a marriage in terms of civil or Christian rites, to make a will in respect of both movable and immovable property.

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31 Bearing in mind, of course, that it is the deceased's spirit which provides the sanction necessary to ensure that oral dispositions are carried out by the family, after death

Even prior to the passing of these Acts, Africans were presumed to have testamentary capacity. In the leading case, Komo and Leboho v Holmes NO[32], the court noted that, in terms of the Administration of Estates Ordinance[33], the right of all persons, including Africans, to make wills was recognised.

> "There is no specific provision to that effect, but the implication is clear." 34

The learned judge went on to argue that in so far as there was any rule in African customary law which prohibited the making of wills, such rule would be repugnant to the legislation in question and, therefore, could not be applied. The argument in Komo's case is still applicable. The present Administration of Estates Act[35] is substantially the same as the 1907 Ordinance, in that it is implicit in the Act that all persons, of whatever race, have the capacity to execute a will. Furthermore, one can still reason that in so far as there is a rule prohibiting wills in customary law, such prohibition would be repugnant to the necessary implications of the legislation mentioned and, hence, could not be applied in terms of the definition of "customary law" in Section 2 (1) of the African Law and Tribal Courts Act[36].

Testamentary capacity and freedom of testation are separate questions but the latter has not been the subject of separate consideration by the courts of the legislature, except with regard to immovable property in terms of Section 6 of the African Wills Act. This section specifically accords Africans the liberty freely to "dispose of the ownership of immovable property or of any rights attaching thereto". The concept of individual ownership of land (at least in the common law understanding of ownership) is unknown in customary law[37]. As Holleman says,

> "land, whether cultivated or uncultivated, was never regarded

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32 1935 SR 86

33 No 6 of 1907

34 at 92

35 Chapter 301

36 Similar reasoning was used in Fraenkel and Makwati v Sechele 1964 Bas Bech P and Sw C/ (reported in (1967) 11 Journal of African Law 51), discussed in Allott op cit 241

37 Chapter 8

> as 'wealth' or even 'property' in the ordinary sense, and therefore did not form part of a person's estate. The kind of shifting cultivation practised by the Shona was not conducive to permanent land rights." 38

In order to accommodate African conceptions of land tenure, one could interpret Section 6 to mean that Africans have freedom to dispose of rights in land which have been created in terms of statute only. Under Section 47 of the Land Tenure Act[39], for example, the President may convert tribesmen's rights to land to freehold tenure; various other provisions in this Act recognise an African's right to own land in certain circumstances[40]. It would do violence to African conceptions if an individual were permitted to dispose of land which was not, otherwise, considered to be his.

There are no statutory provisions regarding an African's freedom to dispose of movable property. One can have no objection to allowing an African to dispose of his personal property to whomever he chooses but what of property in which his family has an interest ? In the common law, a person has the power to dispose of property of which he is not the sole owner[41]; and (what would appear to be in point with regard to a family estate) he may bequeath property which he owns in common with others. It is simply presumed that he intended to bequeath his share only[42]. In terms of this rule, one could avoid violating the family interest in property. Similarly, where the property in question is owned by the testator and his heir or legatee, the property passes to the beneficiary, the testator being presumed to have bequeathed only his personal share[43].

The problems raised above are applicable mainly in the case of male testators. It has already been noted that women do not, normally, in customary law, acquire anything more than rights to cultivate land for limited periods - the duration of their marriages, for instance. The likelihood of a woman

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38 op cit 322; Holleman is not entirely correct - the rights in land (although not amounting to full ownership) may be inherited

39 Chapter 148

40 Sections 24 and 48, for example

41 Where the property belongs to another person, the testator must be aware that the other was owner of the bequest if it is to be valid: Estate Brink v Estate Brink 1927 CPD 612

42 McMunn and Others v Powell's Executors 13 SC 27

43 McMunn and Others v Powell's Executors 13 SC 27

'empting to dispose of land held according to the customary law of tenure is remote. If a woman has been given a statutory right to land, then, in terms of Section 6 of the African Wills Act, she could freely dispose of this right by will. With regard to movable property, it has also been noted that women are not placed in a position whereby they are required to administer family property. For this reason, it is most unlikely that a woman would attempt to bequeath any property by will, other than that which is considered to be her own (namely, personal property, umai and mavoko property).

There has been no decision in which the African woman's testamentary capacity and freedom of testation have been clearly recognised, which is surprising in view of the considerations raised above. Yet, in the absence of any authority to the contrary, we may assume that she has the power to make a will and dispose of property as she wishes, on a par with an African man

The African woman's right to claim an inheritance on the intestate death of her husband or a male relative is strictly limited in customary law. As was indicated above, succession in customary law implies succession to a status and, since it is inconceivable that a woman play the roles associated with male status, it is similarly inconceivable that a woman succeed to the status of a man. Moreover, customary law makes no provision for the inheritance of specific portions of the estate by the widow or daughter. The widow is entitled to inherit only a few personal possessions of sentimental value.

It is only in the case of testate succession that an African woman may have the right to succeed to a deceased estate but, in practice, she is seldom nominated as a beneficiary in terms of a will. Poor people seldom make wills because of the legal formalities involved, the cost of employing an attorney, ignorance and the small value of their estates. If an African does make a will, he is unlikely to dispose of his property contrary to the dictates of customary law; nor is he likely to institute a person, other than his heir at customary law, as his general successor[44]. To

44 Bennett Appendix E Question 88; Cockcroft op cit

ignore the dictates of customary law would be to invite the retribution of the ancestral spirits and, probably, provoke a family dispute. A will which did not abide by the rules of customary law might place the family under great stress when it came to settling the spirit at the kurova guva ceremony. On the one hand, there is the desire to give full effect to the deceased's wishes which are sanctioned by his spirit but, on the other hand, there is the strong likelihood of provoking the hostility of the disinherited heir[45].

Because the African woman is unlikely to have the right to inherit, the question of her capacity to accept an inheritance is remote. Customary law is silent as regards the question of passive testamentary capacity. If a man felt that his heir were not competent or, for some reason, were disqualified from succeeding him, he should take steps to disinherit him, prior to his death[46]. If a woman were instituted heiror legatee in terms of a will, on the other hand, her capacity to accept the benefit would, presumably, be determined by the common law. This proposition would be supported by Section 3 (1) (b) of the African Law and Tribal Courts Act which provides that the common law is to apply in these circumstances[47]

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45 Bennett: this was apparent from a research project into Ndebele law similar to the one outlined in Appendix E

46 What may arise in customary law is a different question: the right of an illegitimate child to succeed to his father's name and estate. If the child were not conceived by his father, he does not have his father's blood and, on that ground, the deceased's other sons (ie his natural sons) would have a good reason for objecting to the succession of the illegitimate child. The law is still uncertain on this point, however, as can be gathered from Holleman op cit 253-259

47 Even if, under the conflict rules, it were argued that customary law should apply, the common law would prevail. Basic ideas of expediency and justice underlie such rules of the common law as die bloedige hand erft niet. One could argue that if customary law were deficient in such rules it should be disregarded for to allow the testator's murderer to benefit by his crime would be contrary to natural justice and morality. This argument was used in Chakawa v Goro 1959 SRN 908. On the other hand, statutory rules, such as those barring the writer or witnesses of a will, must be applied, even if inconsistent with customary law. In terms of the definition of "customary law" in Section 2 (1) of the African Law and Tribal Courts Act, the legislative provisions are to prevail. This type of approach was adopted in Yobe Jere v Chadzure Gamaliel and Jairosi Lungu 1959 SRN 915 with regard to extinctive prescription

It remains to be considered whether the provisions of the Deceased Estates Succession Act[48] apply to African widows. Section 3 of the Act purports to amend the common law of intestate succession by according the widow a portion of her deceased husband's estate. If it were deemed to be applicable to African widows, it would substantially modify customary law by giving the widow a right to inherit which she would not, otherwise, have. This question arose in Dokotera v The Master of The High Court and Others[49]. Murray CJ held that Section 3 was not applicable to African widows. His first argument in support of this decision was that there is doubt as to whether the legislature could have intended the Act to apply in that the use of the phrase "a child's portion" in Section 3 is probably not appropriate to marriages between Africans in view of the inferior legal status of African women The learned judge then referred to the anomalous situation which would arise if this Act were applied to every spouse in the country, without distinction as to race, until the African Wills Act was passed, making special provision for one particular racial group - the Africans. The latter statute provided only for immovable property and so complemented the earlier African Marriages Act which provided for succession to movable property. It was held, in consequence, that while the Deceased Estates Succession Act was the general legislation in point, it must be read subject to the provisions of the African Wills Act and the African Marriages Act. Both these Acts provide a special code of testate and intestate succession to movable and immovable property and they must be looked to rather than the Deceased Estates Succession Act[50] [51].

48 Chapter 302, as amended by Section 3 of Act No 18 of 1977

49 1957 R & N 697 (SR)

50 The learned judge was referring to Sections 5 and 6 of the African Wills Act, which provide for testamentary capacity, freedom of testation and individual succession in respect of immovable property; and Section 13 of the African Marriages Act which provides that customary law is to be applied to the intestate succession to a spouse married according to civil or Christian rites

51 Many Africans take out pension and insurance policies and the question may arise whether a widow, named as beneficiary in terms of such a policy, is entitled to benefit from it on her husband's death. This question falls outside the scope of the law of succession being concerned, rather, with contractsfor the benefit of third parties. The proceeds of the policy do not fall into the deceased estate and do not, therefore, devolve according to customary law: Juniah and Juniasi v Nawa 1949 SRN 449

10 CONTRACTUAL CAPACITY

The customary law of contract is poorly developed. In Zimbabwe-Rhodesia, we have little record of the traditional tribal law of contract but, from observations elsewhere in Africa[1], we know that most rights and obligations regulating relationships were determined by status[2]. An individual, in the small, self-sufficient village community which was a feature of the Shona social structure, had little day-to-day contact with persons who were not his kinfolk[3]. Most of a person's material requirements were met by his kinfolk and the duties to provide material assistance, services etc were derived from the law of persons or status. This together with the absence of any widespread commercial activity forestalled the development of a law of contract[4]. Maine, for instance, spoke of the absence of contract in less evolved societies as due to the regulation of personal relationships by the status of individuals and inheritance of property within the family unit. On this he based his well-known proposition that "the movement of the progressive societies has hitherto been a movement from Status to Contract."[5] Apart from the loan of cattle and various contracts for the manufacture of articles, such as cloth, pots and metal implements, there were few activities regulated by the law of contract[6].

The rudimentary customary law of contract was characterised by the following

1 Primarily Gluckman The Ideas in Barotse Jurisprudence Chapter 6; Schapera and Ghai in Gluckman (Ed) Ideas and Procedures in African Customary Law 318-346; Elias The Nature of African Customary Law 144-155. For Zimbabwe-Rhodesia, refer to Child The History and Extent of Recognition of Tribal Law in Rhodesia Chapter 11; Goldin and Gelfand African Law and Custom in Rhodesia Chapter 36

2 Gluckman op cit 172

3 Chapter 2

4 Cf Bohannan African Outline 194sq for a brief description of the market in West Africa. This institution was unknown in Southern Africa

5 Maine Ancient Law 100; Gluckman op cit 171sq for an exposition of this notion

6 "... traditional crafts such as the smelting and forging of metal implements, manufacture of bark or wild cotton cloth (Posselt Fact and Fiction 103) have all but died out

features. All enduring relationships (whether of contract or status) were, ideally, relationships of the utmost good faith[7]. In addition, most transactions were marked off by the observance of special formalities. Each type of contract required its own formality which appeared to be necessary and essential for the creation of a valid legal relationship. While the requirements of form and good faith appear contradictory, this is not necessarily so. Contractual relationships were sustained over a long period of time and, indeed, were most common with neighbours or persons within the immediate community. Once the initial formalities had been completed, there was a tendency to expand the contractual relationship into a quasi-kinship relationship, viz the parties would be obliged (morally at least) to render one another assistance and protection, in the same manner that kinfolk are obliged to care for one another. In this fashion, the social distance which separated the contracting parties could be bridged and an enduring relationship established. There was, however, no general model of contract in customary law, such as there is in the common law. Finally, the creation of contractual rights and obligations was dependent upon the conveyance of property. Simple consensus was insufficient to give rise to a valid contract; either goods had to be delivered or services performed before a tribal court would enforce an obligation[8].

There is a complete dearth of authority in Zimbabwe-Rhodesia regarding the African woman's power to create contractual relationships[9]. The tribal courts consider that unmarried and married women are under the guardianship

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7 These characteristics are fully expounded by Gluckman op cit 175sq. An interesting feature of customary law is the emphasis placed on obligation at the expense of right: Gluckman op cit 199sq

8 Bennett Appendix E Questions72 and 73. Each of these characteristics was confirmed in the author's research project. Informants stressed that unless cash were paid, goods delivered or services performed, there could be no valid contract. Maine said that "conveyances and contracts were practically confounded" and "a Contract was long regarded as an incomplete conveyance" (cited in Gluckman op cit 183). Cf Schapera, regarding the Tswana law, where a bare promise does give rise to an enforceable contract: Schapera op cit 319

9 What follows is based on the author's research project, Appendix E

of their fathers and husbands respectively; they are unable, therefore, to enter into a contract with another person, without the assistance of their guardian. The reasons for this are twofold. Tribal courts argue that the guardian gives his assistance as a favour because the woman needs his knowledge and experience in worldly matters. Secondly, the guardian will always be held responsible for the woman's actions and it would be unfair to permit a woman to commit her guardian to an unfavourable bargain without his knowledge. It would, however, be difficult to extract a hard and fast rule from the information given. In practice, women frequently participate in petty commercial transactions, such as the bartering of beer, pots, baskets and needlework etc without their guardian's assistance[10]. If the woman's guardian is away from home, no one would deny her power to purchase goods to maintain her family. Much appears to depend on the implications and value of the contract and the attitude of the other contracting party. Informants said, for example, that a woman could not enter into a contract for the purchase of a motor car or bicycle without the assistance of her guardian. It seems that if the other contracting party is not a kinsman, friend or neighbour and if the value of the goods or services is considerable, the woman will require her guardian's assistance[11]. Depending on the circumstances, outlined above, informants stated that if the woman entered into a contract without her guardian's assistance, he could repudiate any obligations she had incurred[12].

With regard to widows and divorcees, however, informants felt that they had full contractual capacity. They could enter into any transaction they chose and the assistance of a guardian was considered to be unnecessary[13].

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10 In particular, women have, since early times, performed services as midwives (Holleman Shona Customary Law 243 and 351; Bullock The Mashona 196) and diviners and ngangas (witchdoctors) (Bourdillon The Shona Peoples 189) - services for which they were paid. The payments formed the mavoko property: Chapter 8

11 Bennett Appendix E Questions 51, 56 and 60. Some informants argued that if a woman entered into a contract which was "outside her female activities" (ie outside the female role), she would require her guardian's consent

12 Bennett Appendix E Question 56; the law stated here is certainly not consistent: if the guardian is to be held liable for the woman's actions, how can he, at the same time, repudiate her contracts ?

13 Bennett Appendix E Question 60

When the Europeans arrived in Zimbabwe-Rhodesia, they brought with them a variety of commercial transactions, previously unknown to traditional customary law. The indigenous legal system was unable to develop sufficiently fast to accommodate these transactions and, as a result, the district commissioners' courts, almost invariably, applied the common law to such transactions[14]. Even these courts have paid scant attention to the woman's contractual capacity. They have introduced the notion of emancipation for the purpose of certain mercantile activities[15]. In one case, for instance, a widow who continued to farm her deceased husband's land was held to be emancipated with regard to the contract she had entered into for the sale of crops[16]. We may assume, therefore, that, consonant with the district commissioners' view of the status of African women[17], if the woman has not been emancipated, she lacks contractual capacity and requires the assistance of her guardian.

The law has now been rationalised in terms of Section 3 (1) (b) and Section 3 (2) of the African Law and Tribal Courts Act. The former section implies that contracts are to be regulated according to the common law and the latter section provides that:

> "The capacity of any African to enter into any transaction ... shall, subject to any enactment affecting any such capacity, be determined in accordance with the law of Rhodesia."

This means that African women are free to contract on the same terms as European women. The proviso to this section provides that if the law to be applied to the transaction in question is customary law, then customary law will determine the contractual capacity of the parties. In ascertaining whether customary law governs the transaction, special consideration will have to be given to the nature and terms of the contract[18]. Prima facie, all contracts are governed by the common law, in terms of Section 3 (1) (b). In order to prove that customary law applies, facts will have to be alleged indicating that this choice of law rule be varied. The form and

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14 Biriyo v Hlupani 1940 SRN 155; Mangure v Muwirimi 1946 SRN 328; Chikoni v Chikoni 1946 SRN 377; Tangwara v Tlili 1960 SRN 939

15 Tasara v Agnes Manjaya 1958 SRN 853

16 Elizabeth Makola v Gondongwe 1953 SRN 705

as a minor under guardianship

18 See the suggested interpretation of this section in Chapter 12, dealing with locus standi: Chikosi v Chikosi (1) 1973 (3) SA 142 (R)

nature of the contract will be of assistance in indicating whether customary law is to apply: any special contracts known only to customary law would tend to suggest the application of that system. Other connecting factors, such as the subject matter of the transaction, the place where it was entered into and the life style of the parties, will be relevant in assisting the court to arrive at its decision[19]. Prima facie, therefore, although a written hire-purchase contract entered into in Salisbury for the purchase of a motor car would tend to indicate the application of the common law, a verbal contract in respect of the loan of cattle in the Tribal Trust Lands would indicate the application of customary law.

Even although there is clear legislation regulating the contractual capacity of African women, various European commercial and governmental institutions appear to be unaware of its provisions. Most tend to treat African women as minors who require assistance in order to enter into valid contracts, despite the fact that, for the purpose of the contracts in question, the women should be accorded the same capacity as European women[20].

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19 See Chapter 4

20 Church of the Province of Central Africa Commission to Inquire into the Legal Status of Africans paras 60-66

DELICTUAL CAPACITY

By delictual capacity is meant the capacity to become bound in delict. More specifically, this means the power to act delictually, namely, a person's power, by his wrongful act or failure to act, to affect the legal relationship between himself and another person. In Roman law, for instance, a child or infans was deemed to be culpae incapax; if the child committed a wrongful act which, in the normal course of events, would give rise to liability under the lex Aquilia, the injured party would have no claim against him because he did not have delictual capacity[1].

The term delictual capacity is used more loosely in the court to refer both to the right to claim and the duty to make compensation for delictual acts. While a person's status may affect his ability to act as a right or duty bearer, it would be wrong to include these abilities in the general notion of delictual capacity. Nonetheless, account must be taken of the effect which status may have on the ability to bear rights and duties. In Roman law, again, sons in power, although capable of committing delicts (once they became culpae capax) did not have a duty to make compensation. This duty rested on their patresfamilias[2]. The duty to make compensation and the power to alter legal relationships by delictual acts were thus separated in Roman law. Similarly, the son in power had no right to claim compensation in respect of wrongs he had suffered. This right vested in the paterfamilias[3].

Customary law is, in many respects, similar to Roman law. During the lifetime of a man, all members of his family - that is, his sons, daughters and wives - are, in principle, deemed to be under his control and he is assumed to be responsible for their actions.

> "In any action directed against a person, his father (or whoever is considered to be head of his family group) should therefore be summoned as the principal defendant and in principle be held liable for any damages that may be due." 4

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1 Kaser Roman Private Law 66

2 Kaser op cit 219

3 Buckland A Text-book of Roman Law 104; D 9.2.7

4 Holleman Shona Customary Law 259; Bourdillon The Shona Peoples 45. It would be the offender's father, rather than his samusha, who would bear responsibility for the delict, although, frequently, the two roles are joined in the same person

There is no suggestion, in Shona law, however, that a child or other member of the family is incapable of committing a delict. In this sense, all persons are deemed to be culpae capax[5]. The concept of the father's vicarious responsibility for the delictual actions of members of his family harmonises with various other principles of customary law. The power to control the family property is vested in the head of the family. In the traditional African subsistence economy, individual members of a family had little or no opportunity to acquire personal property and, whatever they did acquire was committed, in terms of their obligations to their family, to be used to serve the family as a whole. Since compensation for delictual wrongs was usually paid in the form of cattle, it was only natural that an injured party look to the person who had control of cattle for compensation. In short, if we are to accept that wrongs must be righted by the payment of compensation, it would be pointless to seek compensation from a person who had no property. Apart from this, the customary law of delictual liability reflects the principle that individual interests tend to be of less account than the interests of the family group[6]. A corollary of this principle is the notion that individual responsibilities tend to be shared by the family as a group, ie the family assumes responsibility for the actions of the individual[7].

The general rule that a father is liable for his children's delictual actions is being changed by the tribal courts to take account of modern social conditions. It is now acknowledged, for example, that a father is responsible for his son's delictual acts only while his son is actually under his control. If the son were to commit a delict while living away from home, particularly if he were living and working in town, he would be held responsible on his own account. What has prompted this change of attitude, however, is the fact that the son is, very often, economically self-supporting and, in consequence, capable of paying damages himself;

5 Unlike Xhosa law, for instance: van Tromp Xhosa Law of Persons 2

6 Holleman Issues in African Law 2-6

7 This is often termed "group responsibility": Hartland Primitive Law 48. Driberg "The African conception of law" (1934) 16 Journal of Comparative Legislation and International Law 232; cf Elias The [illegible]ure of African Customary Law 87sq

but it cannot be said that a clear exception to the general rule has yet been conceptualised[8]. The wrongdoer's status as a husband and father also influences the thinking of the tribal courts. Where a man has married and set up his own abode, away from his father, it is felt that he should be held liable for his own actions because he is now, to a large extent, independent of his father[9]. Possibly, these new attitudes may, in time, affect the delictual liability of daughters as well but, in this regard, the tribal courts will probably be more conservative. The son's liability for his own actions is influenced by his status and opportunities for becoming socially and economically independent of his father. The daughter may never, of course, become the head of a family unit (in the view of the tribal courts at least) and her opportunities for seeking an independent life are, in practice, more limited than a man's.

A father may renounce his responsibility for his son's actions[10]. Holleman indicates that "such a unilateral decision of a father can have no effect unless it is endorsed by the community"[11]. Accordingly, a public declaration should be made, at which the father must give his reasons for the decision[12]. There is no authority for supposing that a father could take the same action in respect of his daughter. The renunciation of parental responsibility for a son is rare and is likely to be challeneged by the plaintiff in an action if the son himself is unable to make full compensation[13]. Partly because a daughter is usually in a less favourable position, economically, than a son, and partly because it would set an unusual precedent of female independence, it is unlikely that a valid renunciation could be made in respect of a daughter.

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8 Holleman Shona Customary Law 260; Bennett Appendix E Question 64

9 Bennett Appendix E Question 62: informants felt that marriage was the most important factor in establishing a man's independence from his father. The fact that he was considered to be responsible for the maintenance of his own wives and children, of course, tended to indicate that he should be responsible for his own delictual actions as well

10 Bennett Appendix E Question 65; Holleman Shona Customary Law 261

11 Holleman ibid

12 For instance, persistent misbehaviour, as where a son persisted in seducing girls: Bennett Appendix E Question 65

13 Holleman ibid

No writer makes any mention of the right to claim damages for wrongs suffered. On general principles, it could be argued that although the right inheres in the individual son or daughter, they cannot claim because they lack locus standi. Their guardian will be required to assist them in court. (Merely because the individual lacks locus standi, however, should not lead to an assumption that the right to claim compensation vests in the guardian or the person appearing in court).

Once a woman marries, she becomes the responsibility of her husband and he is held liable for any delictual action she may commit. If she commits a serious offence, on the other hand, such as homicide, witchcraft or arson, her husband may renounce his responsibility by sending her back to her own family[14]. There is no suggestion that the wife is culpae incapax; her husband simply bears responsibility for her actions.

Widows and divorcees may remain under the guardianship of their deceased husband's family or return to their own family, as the case may be. It may be expected, therefore, that the appropriate male will be held responsible for their actions. The phenomenon of a widow or divorcee who is prepared to live independently of her own or her husband's family is something new. It is not surprising, therefore, that no rule has been evolved to cater for this situation. It is likely, however, for the purposes of wrongdoing, that the woman would be expected to pay damages herself, if she were financially able to do so; if she could not afford to pay damages, her family would find it difficult to escape their responsibility.

Generally speaking, the married woman has a right to sue for compensation for any wrong done to her[15]. The right accrues to her personally and, although she should be duly assisted by her husband[16] in pursuing the claim, he cannot deny her the right to bring her action. If he attempted to do so, she would be entitled to request the assistance of her village

14 Holleman Shona Customary Law 205; this action may well, of course, precede dissolution of the marriage

15 Bennett Appendix F Question 31

16 Holleman Shona Customary Law 209

headman[17]. In particular, wives have the right to sue their own husbands for wrongs committed by the husbands, such as interference with their umai property or the transfer of property from one house to another[18]. The case should, initially, be heard in the family court and, although the wife does not need to be assisted at this stage, she may call on one of her husband's male relatives or the samukadzi to help her in the presentation of her case[19]. If the matter is serious, or if no solution can be found in the family tribunal, the wife may return to her own family and initiate action in a higher court, supported, this time, by one of her own kinsmen[20].

The approach of the district commissioners' courts has varied little from that expounded in the tribal courts. They recognise, for example, that a father is liable for the delictual actions of his children. In Matiyenga and Mamire v Chinamura and Others[21], the leading case in point, where two nine year old children deliberately drove cattle over a cliff, their father was held responsible for payment of the damages[22]. It is clear, from the cases, that this rule is applicable in the case of daughters as well as sons[23].

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17 Holleman ibid notes that if the case is a petty one, for example if the action involves two women or is a matter of defamation, the court may well hear her unassisted

18 Bennett Appendix E Questions 27 and 29

19 Bennett Appendix E Question 30

20 There is no information regarding the delictual capacity of widows and divorcees. On genetal principles, we may safely assume that they fall under the guardianship of their fathers (in which event the father becomesliable for their delictual acts) or, in the case of a widow, if she chooses kugara nhaka, the deceased's heir becomes responsible for her

21 1958 SRN 829

22 Followed in Ruwo v Rabson 1965 CAACC 20, a case involving personal injuries inflicted by an eleven year old. In this case it was assumed that the child was culpae capax

23 George v Gabaza 1948 SRN 428; Andrea v Mangarayi 1966 CAACC 32; in both these cases customary law was applied, but the court felt that there could, in terms of that system, be no liability in the absence of malice (presumably they meant dolus) on the part of the child. See also Ben Mhandu Tsodzo v Simon Chideme 1977 CAACC 22; cf Richard Munetsi v Timothy (unreported) CAACC 25/1969 and Anderson v Burawo (unreported) CAACC 47/1969, cited by Child The History and Extent of Recognition of Tribal Law in Rhodesia 87

The Court of Appeal departed from the rule enunciated in Matiyenga's case, however, in its decision in Edwin Mombeshora v Kennie Chirume[24]. The court felt that the basic idea of a father's liability for his son's wrongful actions

> "is that the family as a whole is liable for any wrong done by any of its members, and the father is sued as the controller of what Dr Holleman calls 'The patri-estate'. If the wrongdoing son is no longer part of the family unit in an economic sense, there appears to be little justification for making the family liable for damage caused by him."

Because of the considerable changes brought about by the urbanisation of Africans, the court felt that it would no longer be in keeping with social reality to hold a father responsible for his children's wrongdoing, in all circumstances. Accordingly, it held that if a child were physically adult, had established an abode for himself apart from his father and were economically independent, this would suffice to show that he was emancipated and, therefore, liable for his own delictual acts[25]. There is no reason why the principle expressed in Edwin Mombeshora's case should not be extended to apply to daughters as well. In Violet and Mahlaulo v Girison[26], for instance, the court held that a father was not responsible for his daughter's delictual acts where she had been living in an irregular union with a man for a number of years and had borne a number of children by him[27].

The district commissioners' courts have, similarly, recognised that a husband is to be held liable for his wife's wrongdoing[28]. Conversely, they have accepted that a wife has a right to sue for delictual damages

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24 1971 CAACC 30

25 Presumably, the court had tacit emancipation in mind. This decision was followed in Stewart a/b Patrick v Chigumbura 1971 CAACC 35; cf Takawadiyi v Munyoku Siyawamwaya 1969 CAACC 47, where the children involved in the incident ranged in age from 33 to 15 years; the court held that their parents could not renounce their parental responsibility

26 1964 CAACC 43

27 Unfortunately, the court introduced, in passing, another principle that "she was no longer under her father's control but under the control of her 'husband'." This makes it uncertain whether the woman herself is considered to be responsible for her delictual actions or her "husband"

28 Muchechesi v Seven 1969 CAACC 43

suffered by her (ie the right accrues to her personally) but she must be assisted in court by her husband when she brings the action[29].

No doubt, the rule that a widow or divorcee is emancipated[30] would include the notion that she is responsible for her delictual acts and, likewise, is entitled to sue for delictual damages on her own account.

The conflict of laws may require variation of the basic principles enunciated above. If the delict in question is one governed by the common law (and this will be determined under Section 3 (1) of the African Law and Tribal Courts Act), the question then arises whether the woman's delictual capacity should be governed by the common law as well, regardless of her capacity under customary law. By analogy with Section 3 (2) of the Act, it can be argued that unless the claim for delictual damages (or the obligation to make compensation) arises out of customary law, the woman's delictual capacity should be determined by the common law. If, for example, liability in delict were to be governed by the common law, then the woman's delictual capacity and her locus standi would be governed by the same system. (In all the cases cited above, it should be noted, customary law was the system applicable and this point was not considered[31].)

Locus standi and the rights and duties flowing from the commission of a delict are, of course, separate issues. A woman may well have the right, in customary law, to sue for damages inflicted on her but she may lack the power to bring the action without the assistance of her guardian. In the converse situation, locus standi and delictual capacity are, as a matter of practice, linked. If a woman does not have the duty to

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29 Meri v Merita 1966 CAACC 53; Henry Bwerudza v Samuel Muzunye Mhlanga 1959 SRN 895

30 Chapter 13

31 Cf Keresiah and Jack v Martha and Mugweni Masimba 1958 SRN 827, where an action for personal injuries was heard under the common law but the women involved - both plaintiff and defendant - were assisted by their guardians. Similarly, in Meri v Merita 1966 CAACC 53, the action appeared to be governed by the common law but the court felt that both parties ought to have been assisted by their husbands. These cases were heard, of course, prior to the promulgation of the African Law and Tribal Courts Act

make compensation for her own wrongdoing, she normally lacks the power to be sued in court as well. The person who will be held responsible for payment of compensation will have to be present. If we were to accept that various aspects of the case might be separated and different systems of law applied to each aspect , we might determine delictual liability under one system of law, capacity under another and, possibly, locus standi under either system. The court in Teacher Tevera v Julius Chiveza[32], however, deprecated the separation of a case into various aspects. On the basis of this authority, one could argue that if a delict were governed by the common law, in terms of Section 3 (1) of the African Law and Tribal Courts Act, then all issues associated with the delict should be governed by the same system. This would include delictual capacity. In terms of Section 3 (2), moreover, locus standi would also be determined by the system of law governing delictual liability.

32 1975 CAACC 1

12 LOCUS STANDI IN JUDICIO

Locus standi in judicio means the power to sue or to be sued in a court without assistance[1]. The importance of the woman's capacity or lack thereof should not be underestimated. If she is not permitted to approach the court to seek protection or enforcement of a right merely because she is not duly accompanied by her guardian, any right she might have would be an empty one. The decision whether to appear in court lies, obviously, with the woman's guardian and, should he decide not to take up her case, he may, in effect, deprive her of her rights.

In the tribal courts, it is generally held that a woman may not approach the court without the assistance of her guardian. If the woman is unmarried, her father must accompany her. If the woman is married, her husband must accompany her[2]. A variety of explanations have been offered for this rule. Male informants argue that the assistance of the woman's guardian is considered to be a favour: she may rely upon the experience and wisdom of one more knowledgeable in matters of litigation. Others say that the guardian should be present in order to argue the case because he will be held responsible for the woman's actions[3].

Whatever the reasons for the rule, pragmatic considerations have dictated its relaxation, particularly in cases involving married women. Should a wife wish to sue her husband for any matrimonial offence, she clearly cannot seek his assistance in the action. The proper procedure is for her to seek the intervention of her husband's sister[4]. If the samukadzi's influence is to no avail, the matter may be raised in the family court for debate[5]. Should it prove impossible to reach a decision in that

1 Claasen Dictionary of Legal Words and Phrases Vol 2 365

2 Holleman Shona Customary Law 209; Bourdillon The Shona Peoples 70; Child The History and Extent of Recognition of Tribal Law in Rhodesia 94; Bennett Appendix E Question 52

3 Bennett Appendix E Question 57

4 Holleman op cit 209 - the samukadzi (vamweme): refer to Chapter 2

5 Holleman ibid

forum, the matter may then be referred to the wardhead's court, in which event the woman must be duly assisted by one of her husband's senior male relatives. Alternatively, the family court may refuse to listen to the wife's complaints; in this event, she may return to her family and request her father to take up the case[6]. If her father decides to do so, he must accompany her to the wardhead's court. Should the wife be denied assistance from any of these sources, she may approach her husband's village headman (samusha) and ask for his assistance. Where even this course of action had proved unsuccessful, some of the tribal courts were prepared, in extreme situations, to hear the woman without the presence of a male[7].

This broadly speaking is the type of procedure which should be followed in cases of matrimonial dispute and in cases where the wife's husband has refused to assist her in the prosecution of any wrong she has suffered. Should the woman wish to go as far as precipitating the dissolution of her marriage, however, she may take more immediate action. She may desert her husband and return to her own family She is advised to provide some proof of maltreatment by her husband, if possible, in order to convince her family that they should take up her cause. Because dissolution involves the return of rovoro, her family cannot be expected to respond to her problems enthusiastically[8]. In fact, if they suspect that the woman is at fault, they may well chastise her for her foolish behaviour and send her back to her husband. Once her father has been convinced that his daughter has justification for deserting her husband, he may proceed to dissolve the marriage.

The rule that a married woman must always be assisted by her husband may also be relaxed if her husband is not available. The most common instance is where the husband is working in town and his wife is living in a Tribal Trust Land. Strictly speaking, the woman should first approach her husband's relatives to seek assistance of a senior male.

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6 Bennett Appendix E Questions 30 and 57; in the case of dissolution Question 44

7 Bennett Appendix E Question 57

8 Bennett Appendix E Question 41; regarding the return of rovoro, see Holleman op cit 297sq and Child op cit 26-30

If they are unwilling to help her, she should approach her village headman. In the absence of any assistance from either of these sources, several courts have stated that they are prepared to allow the woman to proceed with her action unassisted, provided that the matter is trivial or fairly urgent[9]. If the matter is serious, the woman will usually have to wait until her husband returns. Alternatively, she may seek the help of one of her own male relatives if the matter is both serious and urgent[10]

The same considerations apply to both widows and divorcees. If a woman has been widowed (and she has elected to remain with her deceased husband's family), either her husband's heir (if old enough) or one of his senior male relatives should accompany her to court. In the case of a widow or divorcee who has returned to her own family, her proper assistant is her father Again, several tribal courts have indicated that if the woman has decided to live independently of either her husband's family or her own family, they will hear her unassisted. Others have said that she should obtain the help of her village headman[11]. It would be presumptions, however, to infer that the tribal courts have introduced the notion of an "emancipated" woman; rather their attitude should be considered in terms of their general desire to achieve an acceptable settlement of a dispute, without rigid adherence to rules of law.

The same rule that the woman requires assistance is applicable if she is being sued. The reason usually advanced for this is that her guardian must have an opportunity of arguing the case, since he will, ultimately, be responsible for the payment of any damages[12] This aspect of the woman's locus standi is closely associated, of course, with her guardian's liability for her actions which was considered in the previous chapter.

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9 Bennett Appendix E Question 57; Holleman op cit 209

10 Bennett Appendix E Question 57; Holleman ibid; Child op cit 94

11 Bennett Appendix E Question 61

12 Bennett Appendix E Question 57

The attitude of the tribal courts has been echoed in the district commissioners' courts and the Court of Appeal where it has been held that an African woman must be duly assisted by her guardian. The basic rule should be read subject to the provisions of Section 3 (2) of the African Law and Tribal Courts Act.

> "The capacity of any African ... to enforce or defend any rights in a court of law shall, subject to any enactment affecting such capacity, be determined in accordance with the law of Rhodesia:
>
> Provided that, if the existence or extent of any right held or alleged to be held by an African or of any obligation vesting or alleged to be vesting in any African depends upon or is governed by customary law, the capacity of the African concerned in relation to any matter affecting that right or obligation shall be governed by customary law."

This section has not, as yet, been judicially interpreted[13]. In essence, it would seem that an African woman has the same power of locus standi as her European counterpart unless the issue in question is one which relates to or arises out of customary law. As Child quite rightly points out, there is no discretion regarding the determination of capacity, once the applicable system of law has been ascertained in relation to the right or obligation in question[14] The problem, however, is to determine whether the right or obligation in question arises out of customary law and, in this regard, Section 3 (2) of the Act gives no guidance. We must, accordingly, refer back to Section 3 (1) of the Act. Prima facie, therefore, if the case in question relates to any of the matters specified in Section 3 (1) (a) of the Act, the woman's locus standi must be determined in accordance with customary law; otherwise it is determined by the common law if the matter falls within the ambit of Section 3 (1) (b). This was the approach of the court in Chikosi v Chikosi (1)[15] The wife of a civil marriage sought an order regarding the custody of children and maintenance pendente lite. She approached the court unassisted. In deciding that she had locus standi,

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13 Apart from Chikosi v Chikosi (1) 1973 (3) SA 142 (R) considered infra

14 Child op cit 94

15 supra; and this was also the approach of the court in the more recent decision Ruth Gwatidzo a/b Tendai v Chaniwa Chimufombo 1976 CAACC . at 46

the court said:

> "Since the right of an African to claim dissolution of a civil marriage is not one of the matters referred to in sec. 3 (1) (a), the common law and not customary law is clearly applicable in such an action, and the capacity of a married woman to bring such action must therefore be determined according to common law."

In passing, it should be noted that although African women do not, normally, have locus standi in the eyes of European courts, in civil cases (unless the matter arises out of the common law, as described above), she always has locus standi in criminal trials. In these circumstances, the African woman is assumed to be responsible for her own actions and she does not need to be assisted by her guardian in court. This rule has never received judicial comment and, in order to rationalise it, we would have to argue that crime is governed exclusively by the common law and, accordingly, questions of locus standi must be determined by the same system[16].

In civil cases, the district commissioners' courts have recognised the enhanced capacities of emancipated women. In a number of decisions, the Court of Appeal has stated that although an African woman may not approach the court without her guardian, this rule may be waived if it is proved that she is emancipated[17]. In effect, this means that there is a rebuttable presumption that the woman is not emancipated[18]. It has been held that a widow or divorcee who has decided to live separately from her husband's family or father[19] and a woman who is carrying on business as a licensed trader[20] have locus standi.

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16 An argument which may be related to Section 3 (2) of the Act

17 Kuyu v Maria Moyo 1953 SRN 675; Tasara v Agnes Manjaya 1958 SRN 853; Hlambelo v Dandane 1964 CAACC 45; Goldin and Gelfand African Law and Custom in Rhodesia 193-194 and Child op cit 94-95

18 In cases which have reached the Appeal Court and this presumption has not been rebutted by the woman, the matter has been dismissed and the case returned to the district commissioner's court for retrial: Maria v Nyamayaro 1950 SRN 475; Hlambelo v Dandane 1964 CAACC 45

19 Mabigwa v Matibiri 1946 SRN 360; Munzara v Nerera 1944 SRN 272 where a widow was permitted to sue for an inheritance unassisted, with no comment from the court

20 Tasara v Agnes Manjaya 1958 SRN 853

In several cases, the court has simply relaxed the rule requiring assistance of African women and has made no comment[21]. In Mushariwa v Mwera and Garwe[22], on the other hand, a woman sued for dissolution of a marriage in customary law, assisted by a male relative who was not her proper guardian under customary law. The court did not object since

> "the real guardian has suffered no prejudice because even had he opposed the divorce the granting of such divorce was in order."

This line of argument has, unfortunately, not been pursued. In an even more unusual case, a woman sued for her own seduction[23]. The court noted the error but took no action because the defendant had suffered no prejudice. In a third case, the court permitted a wife to sue unassisted, remarking that proceedings in African civil cases should not be unduly hampered by formalities, provided that the parties were not prejudiced[24]. The courts have not indicated what is meant by "prejudice" in these circumstances; presumably, in the case of the woman's true guardian, it might be prejudiced if he were held responsible for the woman's wrongdoing without having an opportunity to present a defence to the court. Whatever difficulties may be associated with defining prejudice, this approach is, in general, to be welcomed. The purpose of establishing the district commissioners' courts was to provide quick, cheap and informal tribunals for African litigation[25]. Because these tribunals serve African litigants, they should, where possible, bear in mind the African attitude to the settlement of disputes; and tribal courts, of course, will not insist on strict, unvarying application of rules of law. The urban woman frequently finds herself cut off from her own or her husband's family; she may not be able to show that she is emancipated in terms acceptable to the district commissioners' courts and it may be impracticable to obtain the assistance of a male relative owing to distance, time and expense. Moreover, the woman may wish to sue her

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21 Munzara v Nerera 1944 SRN 272; Margaret v Amon 1946 SRN 334; Mambase v Jana 1937 SRN 84; Simon Machongwe v Christine Farusa 1972 CAACC 21

22 1947 SRN 396

23 Nira v Marete and Ngando 1947 SRN 416; this was unusual in the sense that the matter was heard under customary law in terms of which it is the woman's guardian, not the woman herself, who suffers damage

24 Mzondiwa v Maguta 1947 SRN 388, citing with approval the dictum in Mapheto v Kgaribaitsa 1931 SR 134

25 Tambudzayi v Samuriwo 1976 (1) SA 407 (RAD)

guardian or her guardian may be unwilling to take up her cause. In such circumstances, the woman cannot rely on the various procedures available to her in the tribal community. It would be inequitable to insist on the formality of male assistance if she were capable of conducting her own case[26] provided that her guardian would suffer no prejudice[27].

In conclusion, it may be noted that there have been no reported cases from the district commissioners' courts where an African woman was given the benefit of assistance by a curator ad litem. Rule 8 (2) of the District Commissioners' Courts Rules[28] provides:

> "If a party dies, or, in the opinion of the court, is incompetent to continue an action, the action shall be stayed until such time as the court is satisfied that there is an heir, guardian or other competent person to take over the legal responsibilities of such party or until such incompetence shall have ceased to exist."

This provision does not justify the appointment of a curator ad litem in the sense that a curator is understood to function in a magistrate's court or the General Division; but it may be useful if an African woman has commenced proceedings, with the assistance of a guardian who, subsequently, becomes unable to act. Apart from this, there is no provision in the Rules or the case law for the appointment of a curator, prior to the commencement of proceedings. In any event, it appears to be unnecessary in the district commissioners' courts. As was indicated previously, these tribunals were established,

> "to provide a court with simple procedure, in which court Africans may have their civil cases determined with the minimum of formality." 29

In keeping with these principles, the district commissioner and his staff are under a duty to assist litigants wherever necessary:

> "district officers should not hesitate to adopt a fatherly role in their courts, by, for example, pointing out to

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26 In Munzara v Nerera 1944 SRN 272, the woman was clearly incapable and she was assisted by the court

27 In Julia v Maraye 1952 SRN 605, a woman was not permitted to sue for the custody of her children on dissolution of her marriage without the assistance of her father because this matter was intimately concerned with revoro thereby making her father an interested party

28 Rhodesia Government Notice No 1151 of 1973

29 Tambudzayi v Samuriwo 1976 (1) SA 407 (RAD) at 408

> either party weaknesses in his case, and thus actively attempting to reach the truth." 30

(The duty to assist diminishes, of course, if the party concerned has legal representation[31].) These reasons may account for the fact that curators ad litem have never become a feature of litigation in district commissioners' courts.

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30 Samuel Ntuli v Simon Mlambo 1970 CAACC xii; Mapiye v Remon Murenwa 1972 CAACC v

31 Samuel Ntuli v Simon Mlambo 1970 CAACC xii

13 EMANCIPATION

We must acknowledge that we know very little of Shona law, either before the Occupation of the country or during the early years of the colony[1]. The first writings, in the 1920's[2], indicate that women were treated as if they were subordinate to men in a variety of ways[3]. The early writers were not concerned, exclusively, with customary law and such,analysis as there was, was of a rudimentary nature. Be that as it may, it was stated that African women lacked "full legal capacity"; they were, therefore, (and one assumes that this inference was drawn from their lack of capacity) "minors" under the "guardianship" of males throughout their lives[4]. The courts later introduced the concept of emancipation into customary law. None of these common law concepts fits precisely the indigenous legal institutions[5]; in consequence, it is necessary to consider the implications of imposing foreign rules in customary law.

"Minority", in present day common law, means being less than 21 years old. This usually implies that the person concerned lacks full legal capacity although there is no precise correspondence between minority and lack of legal capacity: a person under the age of 21 years, for instance, may have attained full legal capacity by marriage or may have obtained certain legal capacities[6]. Associated with the concept of

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1 Apart from the odd notes of missionaries, such as the Rev Father Burbridge, and travalogues, such as Selous' Travel and Adventure in South East Africa (1893)

2 Bullock, a leading authority in the early years of the Colony, wrote a short pamphlet Mashona Laws and Customs in 1912. He was followed by Posselt, an official in the former Native Affairs Department, writing in 1927 and 1935. In 1928, Bullock produced what was, for some time, regarded as the locus classicus on the Shona - The Mashona. In his preface, Bullock states that the observations were his own - "the most valuable impressions of the Mashona were not noted on a palimpsest, with alien records still appearing to distort the sense of the fresh inscription"

3 Bullock The Mashona 214, regarding the wife's duties; and 245-250

4 Posselt Fact and Fiction 45; Child The History and Extent of Recognition of Tribal Law in Rhodesia 89

5 Refer to Chapter 3

The difference between attaining majority under the Legal Age of Majority Act and the conferring of majority status is apparent from Afrikaans terminology: a minor is minderjarig whereas one who has full legal capacity is mondig: DP (1937) 1 Tydskrif vir Hedendaagse Romeins-Hollandse Reg 119

minority is the concept of "guardianship". There is no uniformity in the use of this term in the common law and it is often supplanted by the term "parental power"[7]. Guardianship has been defined as "the sum total of rights and duties of parents in respect of minor children arising out of parentage."[8] In the normal course of events, both mother and father of a minor child have parental power over the child. The father's authority is superior, in that he has control of the minor's property and education, whereas the mother shares control over his person[9]. Guardianship has never been precisely defined in the common law and, in this context, it is not necessary to attempt definition. More important is the association of the concepts of guardianship and minority: a minor person (or, more accurately, one lacking full legal capacity) falls under the parental power (or guardianship) of his guardians (usually natural parents).

The minor attains full legal capacity and, at the same time, is freed of parental control when he is emancipated[10]. The term "emancipation" has been borrowed from Roman law and, although it does not mean quite the same as it did in the ancient legal system[11], it signifies the manner whereby a guardian's power over his children is formally terminated. A person is emancipated when he attains the age of 21 years, enters into a trade or business on his own account (termed "tacit emancipation") or if he is granted majority by administrative act (venia aetatis, otherwise known as "express emancipation")[12].

The district commissioners' courts hold that African women are minors under the guardianship of their fathers (if unmarried) or under the

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7 Spiro Law of Parent and Child 30

8 Spiro op cit 27

9 Spiro op cit 30-33; Boberg The Law of Persons and the Family 458

10 Boberg op cit 375-377

11 In Roman law, all those persons under patriapotestas had no legal capacity. Either as a punishment for disobedience or to enable a son to make his way in business, however, a paterfamilias might free a person from his power by the formal act of emancipation: Kaser Roman Private Law 264; I 1.12.6

12 Spiro op cit 227-232; Boberg op cit Chapter 18

guardianship of their husband if they a re married. It necessarily follows from such a proposition that, of whatever age, marital state or economic or social independence, the woman must be deemed to be in loco filiae. Conversely, in keeping with common law conceptions, the courts have recognised that because African women play an important role in the economy and because they often live apart from their families, they should be deemed to be emancipated for certain purposes. To call African women "minors" is an adequate, if somewhat misleading[13], reflection of the customary law regulating their status. Use of the common law notion of guardianship is appropriate to describe the relationship between an African father and his unmarried daughter; it is appropriate to describe the relationship between husband and wife but only in so far as it connotes the wife's lack of various capacities while she is married. There is a considerable difference between the legal status of the unmarried and the married woman in customary law viz-à-viz father and husband, respectively, which is not reflected in the term "guardianship"[14]. Provided we are aware of these difference, there is no great harm done in continuing to use the term "guardian"[15]. In the normal course of events, the guardian of an unmarried African woman, whether she be a spinster, a widow who has returned home or a divorcee, will be her natural father[16]. If her father has died, her guardian will be his heir, usually his eldest son (the woman's oldest brother)[17]. The married woman's guardian is, obviously, her husband; but if her husband has died, the marital union is not necessarily terminated in customary law[18]. The widow may choose to enter into a levirate

13 In that it implies a youthful age; a term such as the Afrikaans onmondig would be more appropriate

14 The married woman has locus standi and proprietary capacity in certain circumstances, for instance

15 The courts in using the term "guardian" do not appear to be consciously imposing an institution of the common law, ie they do not, in the case of married women, appear to intend its use as a term of art

16 Child op cit 89; with regard to the acquisition of parental rights over children born to a woman other than the man's lawfully married wife see Holleman Shona Customary Law 244-252

17 According to the customary law of succession: Holleman op cit 330; Child op cit 102

18 Holleman op cit 272: the husband's family retains the right to the widow's reproductive abilities

union with one of her deceased husband's male relatives, in which event, the latter will become her guardian[19]. Alternatively, if the deceased's heir is old enough to assume responsibility for his position, she may choose to remain living with him, in which case he becomes her guardian[20]. If the widow returns home, she reverts to the guardianship of her natural father[21].

The idea of the emancipation of women is entirely unknown to customary law and, in this regard, the courts have openly sought to change it. As far back as 1915, it was held that there could be a femme sole in customary law. As Hopley J said, in R v Gutayi[22],

> "in my opinion when a native now gives his daughter in marriage, he emancipates her from his power for good and all."

Although there was no express mention of the common law in this judgment, it appears as if this rule was derived from the common law proposition that a child may be emancipated from parental power on marriage. In terms of this new rule, a widow or divorcee who refuses to return to her father's village (or, in the case of a widow, to enter into a levirate union) will be deemed to be emancipated[23].

In a different situation - the case of Tasara v Agnes Manjaya[24] - the defendant was carrying on business as a licensed trader. The court held that she

> "must therefore be held to have been emancipated and capable of suing and being sued in mercantile transactions arising out of her business."

Again, although the point was not expressly considered by the court, it seems that the principle of tacit emancipation has been transposed from the common law.

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19 Bourdillon The Shona Peoples 70; Holleman op cit 234-238

20 Holleman op cit 234

21 If a young widow returns home, the marriage will have to be dissolved by return of rovoro. Because practical circumstances make this unattractive to her family, she is usually encouraged to find another husband to provide the necessary rovoro: Holleman op cit 273

22 1915 SR 49 at 62

23 Elizabeth Makola v Gondongwe 1953 SRN 705

24 1958 SRN 853

It may well be that women may be tacitly emancipated, in circumstances other than the management of their own businesses. A recent judgment[25] indicated that the Court of Appeal would consider young men to be emancipated if they were living away from home and were financially independent of their families. The same reasoning could be applied to young, unmarried women.

Four points should be noted in connection with emancipation in modern customary law. The first is that this concept has been applied only in the district commissioners' courts and the Court of Appeal for African Civil Cases. Although, on occasion, the tribal courts might accord African women powers which, strictly speaking, they do not normally have, there is no notion of an emancipated woman or of a woman with full legal capacity[26]. Secondly, it is necessary for the woman to prove that she is emancipated. As Kerr P said, in Elizabeth Makola v Gondongwe[27], there is a rebuttable presumption that African women are not emancipated. The third point is that it is uncertain whether emancipation confers upon a woman full or partial legal capacity. In other words, although one could say that Agnes Manjaya was emancipated for the purposes of her business, it is unlikely that she would be deemed to be emancipated for other purposes, such as contracting a marriage under customary law. In the common law, the effect of tacit emancipation is the subject of debate. Certain writers argue that tacit emancipation liberates a minor from parental power for all purposes while others maintain that it is relative to the capacity to perform juristic acts only. The latter appears to be the better view[28]

> "Our case law and the weight of modern juristic opinion regard its sphere as that of the capacity to act (contract), and deny its effecting full legal capacity." 29

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25 Edwin Mombeshora v Kennie Chirume 1971 CAACC 30

26 Bennett Appendix E Question 57

27 1953 SRN 705

28 Boberg op cit 382-384

29 D'Oliveira "Venia Aetatis, emancipation and release from tutelage revisited: the Age of Majority Act 1972" (1973) 90 South African Law Journal 60. In Ambaker v African Meat Co 1927 CPD 326 and Ahmed v Coovadia 1944 TPD 364, it was held that a minor is emancipated only with regard to contracts connected with his business: Boberg op cit 392-395. See Mkens v Daley 1956 (2) SA 11 (N) and Boberg op cit 396-401 for comment

It has not been suggested in the context of African customary law, however, that tacit emancipation of women has the effect of endowing them with full legal capacity.

Fourthly, the Legal Age of Majority Act provides that:

> "A person shall be deemed to have attained the legal age of majority when he attains the full age of twenty-one years."

Section 3 of the Act goes on to provide that nothing in the Act shall be construed to prevent

> "any person under the age of twenty-one years from attaining his majority at an earlier period by operation of law."

The common law provides that a person attains the status of majority on marriage and by venia aetatis[30] It is doubtful whether the institution of venia aetatis has ever formed part of Zimbabwe-Rhodesian common law since, as far as the writer is aware, it has never been invoked. Apart from this, the application of the Legal Age of Majority Act to African women has been expressly excluded in terms of Section 2 (1) of the African Law and Tribal Courts Act[31] which provides that customary law is applicable even if inconsistent with statutory provisions relating to the age of majority or status of women. In view of Section 2 (1), it is arguable that the earlier decisions, cited above (in which it was held that an African woman is emancipated on marriage), have been overruled. Support for this argument would derive from the view that the common law methods of emancipation have been incorporated into the Legal Age of Majority Act and, accordingly, are now statutory methods of emancipation. If one were to hold (and, on the wording of the Act, this appears to be more reasonable) that the common law has been unaffected by the Act, this argument would fall away.

In summary, therefore, in the eyes of the district commissioners' courts

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30 It is argued that the old Roman-Dutch institution of venia aetatis or express emancipation by sovereign order is no longer part of South African law: Boberg op cit 378-380. It is suggested that this was repealed by the procedures provided for express emancipation in the South African Age of Majority Act No 57 of 1972

31 Chapter 4 regarding the application of the repugnancy clause

at least, African women may attain full legal capacity after marriage (either in terms of customary law or the common law) followed by divorce or the death of the husband. She may, moreover, attain limited capacity by the operation of the principle of tacit emancipation.

A concept which bears some relationship to emancipation is the notion of exemption from customary law. Especially in the former French, Belgian and Portuguese colonies, the indigenous inhabitants were permitted, in varying circumstances, to make formal application to opt out of customary law[32]. A similar provision was introduced into Zimbabwe-Rhodesia in the former Native Law and Courts Act, which provided that:

> "on application of any individual African the Secretary of Internal Affairs may ... declare that the applicant shall for the purposes of this Act only, be deemed to be not an African." 33

This provision was eventually repealed, in 1969, with the promulgation of the current African Law and Tribal Courts Act, for a variety of reasons, primarily because most Africans were unaware of its existence and, therefore, never exercised their rights in terms of it. Other Africans, who were aware of its existence, refused to opt in favour of the common law because this implied that they had an inferior status imposed as the result of racial discrimination. In any event, the implications of a change of personal law were never studied by the courts.

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32 Robert "A comparative study of legislation and customary law courts in the French, Belgian and Portuguese territories in Africa" (1959) 11 Journal of African Administration 124; under Section 28 (1) of the Natal Code of Zulu Law, an unmarried woman may apply to be emancipated: Seymour Bantu Law in South Africa 56sq

33 Section 12 of Act No 33 of 1937. See Chapter 15 for exemption procedures. If an African, exempted from the operation of customary law, were to sue or be sued by an African who had not been so exempted, the Act made no provision for which system of law was to apply. This problem could be solved in the normal manner, today, under Section 3 (1) of the African Law and Tribal Courts Act. It would be a situation similar to that of litigation between a white and an Afric

14 THE EFFECT OF A CIVIL OR CHRISTIAN MARRIAGE ON THE STATUS OF AN AFRICAN WOMAN

In this section, it is necessary to consider the effect of a civil or Christian marriage on the status of African women. Generally speaking, this form of marriage does not modify the content of rights and duties in customary law; instead, it excludes customary law viz-à-viz an African woman's relations with her husband and children in favour of the common law. In other words, the rights and duties associated with the status of wife and mother are determined by the common law, instead of customary law. We are concerned, in consequence, with a problem of conflict of laws, namely, whether customary law or the common law is applicable.

Africans, in Zimbabwe-Rhodesia, are free to enter into any one of three different types of marriage: a marriage under customary law, in terms of the African Marriages Act, a civil or a Church marriage[1], both of the latter being regulated by the Marriage Act[2] and the common law[3].

In parts of Africa, this was regarded as a valuable method of enabling Africans to acquire the same marital status as a European since most colonial marriage ordinances simply modelled themselves on European lines, thereby excluding the operation of customary law altogether[4]. When two Africans chose to have their marriage solemnised under a European marriage ordinance, it was reasoned that their choice was considered to be

> "... sufficient to show that it was their intention that the marriage contract and all the consequences flowing therefrom should be regulated exclusively by English law." 5

It was further reasoned that if one, isolated act (ie the marriage ceremony) were governed by the common law, then all other, connected acts should be

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1 We are not concerned with the effect of various other religious forms of marriage, such as Islamic or Hindu

2 Chapter 37

3 In Zimbabwe-Rhodesia, a civil marriage and a Church marriage have the same legal effect so, for all intents and purposes, an African has the choice of only two types of marriage: Hastings Christian Marriage in Africa 92-94

4 Hastings ibid; Phillips and Morris Marriage Laws in Africa 135

5 Lewin Studies in African Native Law 49, citing the Nigerian case of Cessario v Goncallo 1 NLR 41; Allott New Essays in African Law 217, citing the Nigerian case of Cole v Cole 1 NLR 75

governed by the same system. In Nigeria, for instance, the fact that the parties had married under the local marriage act meant that on the death of one of the spouses, his or her estate, if intestate, would devolve according to the common law[6]. The form of the marriage provided a far-reaching solution to any future conflict of laws problem.

The simplicity and certainty of this approach has its attraction but it must be remembered that when the parties to a civil or Christian marriage are Africans, their cultural values and attitudes might involve reference to customary law, in certain circumstances, if we are to give effect to their expectations. Many Africans enter into a Christian form of marriage in accordance with the dictates of their religion One need not necessarily infer that, as a result, all these people intended their marital relationship to be governed exclusively by the common law. Alternatively, of course, they may have entered into a civil or Christian marriage without realising that the common law would be applied to all aspects of their marital relationship. It was for these reasons that a Nigerian judge commented:

> "It would be quite incorrect to say that all the persons who embrace the Christian faith or who are married in accordance with its tenets, have in other respects attained that stage of culture and development as to make it just or reasonable to suppose that their whole lives should be regulated in accordance with English laws and procedures." [7]

The reasonable expectations of the parties themselves may be one factor which we have to take into account in deciding whether we are to apply the common law. Another fundamental consideration is that of policy. State policy (usually determined by the attitude of the Church to marriage) dictates that, in many instances, we are to apply the common law, regardless of the cultural attributes of the parties. Policy demands, for example, that a civil or Christian marriage be monogamous and that it be terminated only on certain grounds by a court of competent jurisdiction.

One is struck by the inconsistency of the decisions in Zimbabwe-Rhodesia and their general lack of direction, when faced with conflict problems

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6 Park The Sources of Nigerian Law 133

7 Smith v Smith (1924) 5 NLR, cited by Daniels The Common Law in West Africa 382; Allott op cit 218

arising out of civil and Christian marriages. Part of the reason is that these decisions were determined by the old statutory choice of law rules[8] which were so broadly framed as to provide little guidance for this type of conflict problem.

The choice of law must now be made in terms of the present African Law and Tribal Courts Act. Initially, of course, the spouses are bound by any specific statutory choice of law rule, especially those contained in the Marriage Act and the African Marriages Act; but if no specific statutory rule exists, the residual rules are provided in Section 3 (1) of the African Law and Tribal Courts Act[9]. In terms of Section 3 (1) (b) of that Act, it would seem that the common law is, prima facie, applicable to marriages under the Marriage Act. This is a general choice of law rule only. There is no indication in the Act whether all aspects of the marriage are governed by the common law or, indeed, what is included in the concept of marriage. In particular, it is uncertain whether various related issues, such as custody and guardianship of children on divorce, engagement to marry and the reciprocal duty of support are to be governed by the common law. Difficulties in coping with the inadequacies of the Act are exacerbated by potential contradictions in matters such as adultery, custody and guardianship of children and roora, which are regulated by Section 3 (1) (a). Prima facie, these matters are governed by customary law in terms of that sub-section but it may be that the type of marriage demands the application of the common law instead. In any event, the choice of law provided in Section 3 (1) are but prima facie rules, variable if it can be shownthat the parties have agreed otherwise or, under Section 3 (1a), "the justice of the case" otherwise demands. This gives the courts a measure of discretion to apply whichever legal system the reasonable expectations of the parties or policy dictate as the most appropriate in the circumstances.

Firstly, those aspects of the marriage which are clearly governed by the common law, in terms of statute or as a matter of policy, will be examined. We may then consider aspects of the marriage which may be governed by customary law.

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8 Section 3 (1) of the Native Law and Courts Act No 38 of 1937; see Chapter 4

9 The "hierarchy" of norms suggested by Allott op cit 119

Aspects of the Marriage Governed by the Common Law

(1) Capacity to Contract a Marriage under the Marriage Act

Africans who wish to contract marriages under the Marriage Act have, initially, to comply with various statutory provisions under both the Marriage Act and the African Marriages Act. In general terms, the parties have to obtain a certificate from the district commissioner stating that there is no bar to the marriage in that the woman's guardian has consented to the union[10]. This certificate is commonly termed the "enabling certificate". It must be delivered to the appropriate marriage officer, failing which the marriage is invalid[11]. The district commissioner may, in addition, issue a certificate stating the amount of rovoro paid and its value, the amount remaining to be paid and the terms of payment[12]. In this manner, the Act recognises the key role played by the bride's guardian in customary law. No matter what the woman's age, his consent must be obtained in order to create a valid union[13].

If, however, the woman's guardian unreasonably or improperly withholds his consent, it would seem that Section 5 of the African Marriages Act is applicable, viz the parties may apply, through their local district commissioner, to the provincial commissioner, who may then authorise solemnisation of the union The latter may, also, after consultation with the bride's guardian, establish the amount of rovoro. If the woman's guardian cannot be found, similar appeal may be made to the provincial commissioner to authorise solemnisation of the marriage.

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10 Section 12 (1) of the African Marriages Act

11 Section 12 (2) of the African Marriages Act

12 Section 12 (3) of the African Marriages Act

13 In terms of Sections 10 to 19 of the Marriage Act, public notice of the parties' intention to marry may be published in the form of banns or notice posted by the district commissioner. An alternative method exists whereby the parties may obtain a special licence from the district commissioner. Once notice has been published or a special licence obtained, the marriage may be solemnised by a duly authorised marriage officer in the presence of two witnesses

The common and statute law of Zimbabwe-Rhodesia regulates the age at which the parties may contract a valid marriage[14]. In the case of a boy under the age of 18 years or a girl under the age of 16, the marriage is prohibited unless the permission of the Minister of Internal Affairs is obtained[15]. The guardian of any minor child may prevent the marriage by objecting thereto in terms of the Marriage Act[16].

(2) Divorce and Annulment of the Marriage

The spouses may obtain a divorce only in terms of the common and statute law of Zimbabwe-Rhodesia[17]. Prior to the African Law and Tribal Courts Act, it seems that the application of the common law in this regard was a matter of policy:

> "The parties were married by Christian rites, and it seems to me that the marriage must be subject to the ordinary law of the land. That being so, the parties having openly entered into the marriage, must stand or fall according to our law dealing with marriage." 18

One may now argue that the authority for applying the common law with regard to divorce is to be found in Section 3 (1) (b) of the African Law and Tribal Courts Act. No doubt, however, policy considerations still weigh heavily and a party would find it difficult to argue that the "justice

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14 Rasebolai Gorewang Kgamane v Onumetsi Emmanuel 1963 CAACC 61; Child The History and Extent of Recognition of Tribal Law in Rhodesia 59-60

15 Section 23 of the Marriage Act

16 Sections 21 to 22 of the Marriage Act; Rasebolai Gorewang Kgamane v Onumetsi Emmanuel 1963 CAACC 76. The formalities of the marriage and capacity to marry are regulated, largely, by statute. For this reason, customary law is excluded in terms of its definition in Section 2 (1) of the African Law and Tribal Courts Act. Note that the common law concepts of consanguinity apply in respect of Africans who wish to contract a marriage under the Marriage Act. Express provision is made in terms of Section 6 (2) of the African Law and Tribal Courts Act for the exclusion of customary law in this regard.

17 Hahlo South African Law of Husband and Wife 362-363: considerations of policy dictate that the common law is to be applied: "it is in the interest of the State that the marriage tie, which involves a matter of the status of the parties and the interests of the offspring, should not be lightly dissolved" Carter v Carter 1953 (1) SA 202 (AD) at 205

18 Sikwela v Sikwela 1972 SR 68 at 170

of the case" demands the application of customary law instead of the common law[19].

In addition, a spouse may petition either the General Division or a district commissioner's court for a declaration that a void marriage was null and void ab initio or for a decree terminating a voidable marriage[20]. The common law applies in this regard as well, presumably as a matter of policy although, in any event, customary law knows of no such thing as a void or voidable marriage.

The locus standi of the woman to apply for divorce, a decree of nullity or judicial separation is governed by the common law. The reason is that

> "Since the right of an African to claim dissolution of a civil marriage is not one of the matters referred to in sec. 3 (1) (a), the common law and not the customary law is clearly applicable in such an action, and the capacity of a married woman to bring such action must therefore be determined according to common law." 21

It could, alternatively, be argued that since the right does not arise out of customary law, her locus standi should be governed by the common law in terms of Section 3 (2) of the African Law and Tribal Courts Act. The woman's capacity to sue for ancillary relief, such as maintenance and custody of minor children, is also governed by the common law[22].

(3) Monogamy

Considerations of policy dictate that all marriages contracted under the Marriage Act be monogamous[23].

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19 Mahlo ibid. Note that only a district commissioner's court or the General Division is competent to grant the divorce, annulment or judicial separation: Section 5 (2) of the African Affairs Act (Chapter 228). The jurisdiction of tribal courts has been expressly excluded: Section 9 (2) of the African Law and Tribal Courts Act

20 Child op cit 69-71

21 Chikosi v Chikosi (1) 1973 (3) SA 142 (R) at 145, and the cases cited in support of this proposition

22 Chikosi v Chikosi (1) 1973 (3) SA 142 (R)

23 R v Moyo 1946 SR 12. In customary law, the various secondary unions such as sororate and levirate unions are contrary to the notion of a civil or Christian marriage and, as a matter of policy, are not recognised where the spouses are married under the Marriage Act; Phillips and Morris op cit 182-183

If two Africans, already married in terms of customary law, decide to have their marriage solemnised according to civil or Christian rites, the prior, potentially polygamous union is changed into a monogamous union[24]. It must, logically, be inferred that the second union extinguishes the first for it seems that none of the incidents of the former, customary union survive, apart from the proprietary regime[25].

If a husband has more than one wife under customary law and should he decide to marry one of his customary law wives under the Marriage Act, it is uncertain what the effect of the civil union would be in Zimbabwe-Rhodesia[26]. According to the decisions of three early cases, an African could be convicted of bigamy if he entered into a marriage under the Marriage Act with a woman other than his spouse in terms of African customary law[27]. The decisions in these cases are founded on the principle that civil or Christian marriages and marriages in customary law are accorded the same degree of legal recognition. If, however, one were to adopt the view that the civil or Christian marriage were of superior standing, one could then argue that an African might terminate his marriage in customary law simply by marrying under the Marriage Act; because the latter union is considered to be superior, it must take precedence over the customary union. Some doubt has now been cast on the decisions in the three early cases by various dicta to the effect that marriages under the Marriage Act and marriages in customary law cannot be considered to be of equal standing[28].

24 Which happened in Chikosi v Chikosi (3) 1975 (2) SA 644 (R). As was pointed out, in that case, the parties have a right to enter into the second, civil union in terms of Section 12 of the African Marriages Act

25 Chikosi v Chikosi (3) 1975 (2) SA 644 (R)

26 In most African countries, the man would be prevented from doing this until he had rendered himself capable of entering into the civil marriage by divorcing the polygamous wife or wives: Allott op cit 216, referring to Ghana; Elias Groundwork of Nigerian Law 295. In South Africa, the husband is free to marry one of his wives under the Marriage Act and this form of union suffices to terminate the existing customary union(s): Seymour Bantu Law in South Africa 247-248; Sievwright "Marriage in contemporary urban Bantu-speaking communities in the Republic of South Africa" (1965/66) Acta Juridica 161. This is possible because, in South Africa, the civil marriage is considered to be of a higher status than the customary union

27 R v Nkabi 1918 SR 160; R v Sigiwe 1918 SR 68; R v Moyo 1946 SR 12

28 R v Tshipa 1957 R & N 751 (SR); R v Ncube 1959 (2) R & N 466 (SR); Chikosi v Chikosi (3) 1975 (2) SA 644 (R); Hahlo op cit 612-613

Moreover, it was recently decided in Chikosi v Chikosi (3)[29] that the customary marriage is valid for the purposes of African customary law only.

We still have clear authority for holding that an African who marries a woman under the Marriage Act, other than his present wife in customary law, is guilty of bigamy; but we have no authority for holding him guilty of bigamy if he decides to marry one of two or more polygamous wives under the Marriage Act. If it can be argued that the civil or Christian marriage takes precedence (because it is of superior standing), an African could terminate his union with an unwanted, polygamous wife simply by marrying his other wife by civil or Christian rites. In this manner, the wife of a customary union might find that her status could be terminated against her will by the unilateral action of her husband. This would be highly inequitable and would afford the husband an easy method of obtaining dissolution of his customary marriages without the necessity of proceeding through the proper judicial channels[30].

This is not the only approach which might be adopted to the problem. Under Section 16 of the African Marriages Act, it is provided that no marriage solemnised either in terms of the African Marriages Act or the Marriage Act shall be dissolved except by a court of competent jurisdiction. On the basis of Section 16, one could insist that, in order to terminate his customary union(s), the husband obtain a divorce in the proper manner.

So far we have been considering the position of a man who enters into two marriages - what of a woman ? It has been held that if a woman were to enter into a marriage under the Marriage Act with a man other

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29 1975 (2) SA 644 (R)

30 This is the law in South Africa: Seymour op cit 247-250. In that country, however, legislative provision has been made to protect the property rights of the discarded wife: Section 22 (1) and (7) of the Black Administration Act No 38 of 1927. In several East and West African countries, the husband was required to divorce his wife (of a polygamous wife according to a customary marriage), thereby ensuring that her interest in the marriage would be judicially settled and that the husband could, so to speak, come to the civil or Christian marriage with "his hands clean"

than her spouse according to customary law, her second union would be invalid and bigamous[31].

If a civil or Christian marriage is deemed to be a mongamous union, what effect would a later, customary union have if it were contracted during the subsistence of a marriage under the Marriage Act ? It is clear, from the case law, that the second union is void ab initio and that the offending spouse would be liable to a charge of bigamy[32].

(4) Maintenance

During the subsistence of the marriage, the husband is under a common law duty to maintain his wife and, conversely, if circumstances demand, she would be under a like duty to maintain her husband[33]. On termination of the marriage, the wife may claim maintenance from her husband in terms of the Matrimonial Causes Act, as read with the Maintenance Act[34].

(5) The Right to Sue for Damages for Adultery

Although customary law is generally applicable to actions for damages for adultery, in terms of Section 3 (1) (a) (i) of the African Law and Tribal Courts Act, if the plaintiff is a party to a civil or Christian marriage, the action is governed by the common law[35]. If the common law is applied

31 R v Ncube 1959 (2) R & N 466 (SR); R v Sigiwe 1918 SR 68; McClain "Recognition of polygamous and potentially polygamous marriages and conflict of laws" (1962) 6 Journal of African Law 56-57

32 R v Kaodza 1912 SR 6; R v Mgedesa 1917 SR 37; R v Chenemata and Nzanenjamu 1932 SR 35; R v Muroyi 1942 SR 11; R v Tarasanwa 1948 (2) SA 29 (SR). It is a prerequisite of the offence, in these circumstances, that the second union be solemnised in terms of the African Marriages Act: Child op cit 61-62 and the cases he cites

33 Although there is no direct authority, this may be inferred from the decision in Ruka Gondo v Elinah 1975 CAACC 5; Allott op cit 220

34 Chapters 39 and 35 respectively. In this regard, it was held in Simon Machongwe v Christine Farusa 1972 CAACC 21 that the Matrimonial Causes Act applies to customary and common law marriages alike

35 Child op cit 66; Jirira v Jirira and Dube (unreported) G-S-44-75 where the common law was applied without question. Customary law was excluded in Iden v Philemon 1918 SR 140 and Ellen v Jim 1931 SR 118 on the ground that the customary rules permit the husband to condone his wife's adultery, while suing her lover for damages. This was deemed to be incompatible with the principle of a civil marriage

in these circumstances, the wife must have a right of action as well - a right which she does not have in customary law[36]. The change in the nature of the action also has the effect of depriving the husband's heir of his claim for damages against the lover of the deceased's widow in cases where the widow committed adultery prior to the kurova guva ceremony[37].

Aspects of the Marriage which may be Governed by Customary Law

(1) The Wife's Status

In this section, we will consider, briefly, the overall status of African women as parties to civil or Christian marriages, especially the effect of the Legal Age of Majority Act[38]. It has already been noted that various rights and duties accruing to the woman by virtue of her status as a wife in a civil or Christian marriage are determined by the common law - the capacity to marry, the right to claim maintenance etc; certain, other rights continue to be governed by customary law - for example, the right to inherit from her deceased husband's estate.

Under the Legal Age of Majority Act, it is provided that a person may obtain majority status by operation of the law or on attaining the age of twenty-one years. By operation of the common law a woman attains majority when she marries, whether she has attained twenty-one years or not. One could argue that by marrying according to civil or Christian rites, an African woman becomes a major with all the implications that has in the common law, viz the capacity to perform juristic acts (especially contractual capacity) and locus standi in judicio. On the other hand, because of the proviso to the definition of customary law, the provisions of the Legal Age of Majority Act may not be applied to African women, in any circumstances. Accordingly, on this argument, they remain "minors" under customary law.

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36 Chapter 11

37 Makarakate Chidakwa v Chitaukiri 1963 CAACC 90

38 Chapter 13

These views must be reconciled with the decision in Chikosi v Chikosi (1)[39], a case which was concerned with the wife's capacity to sue, unassisted, for divorce and certain other matrimonial relief. It was argued that because the right of an African to claim dissolution of a marriage under the Marriage Act was not one of the matters referred to in Section 3 (1) (a) of the African Law and Tribal Courts Act, the capacity of a person to bring such an action is determined by Section 3 (1) (b) of the Act, in other words, by the common law. Accordingly, it was held that the wife had locus standi. It was considered unnecessary to apply Section 3 (2) of the African Law and Tribal Courts Act, which provides that the capacity of an African to defend or enforce any rights in a court shall be determined by the common law, provided that the right itself does not arise from customary law. If the Legal Age of Majority Act were applied, of course, there would have been no difficulty in determining the wife's locus standi. Once a person becomes a major, he or she has locus standi for all purposes. It would not be necessary to argue, as it was in Chikosi's case, that the wife had locus for the specific action in issue. In any event, the Legal Age of Majority Act was neither considered nor applied in Chikosi's case[40].

The decision in Chikosi's case poses particular problems. The wife in that case was accorded a capacity which, on a reading of the definition of "customary law" in the African Law and Tribal Courts Act together with the Legal Age of Majority Act, she should not have had How are we to reconcile that decision with the inapplicability of the Legal Age of Majority Act ? We are at large to adopt one of two approaches. On the one hand, we can reason that Section 3 (2) of the African Law and Tribal Courts Act specifically (and mandatorily) accords the woman locus standi in divorce actions concerned with civil or Christian marriages. This section alters the status of Africans but it is not in conflict with Section 2 (1) of the same Act (specifically the proviso to the definition "customary law") because Section 3 (2) is made specially applicable to Africans. Alternatively, it is possible to argue that an African woman's locus standi is governed by the common law in terms of Section 3 (1) (b)

39 1973 (3) SA 142 (R)

40 And one is driven, irresistibly, to conclude that the court was not aware of the effect of that Act

of the Act - the argument used in Chikosi's case. We are not necessarily importing the provisions of the Legal Age of Majority Act. Under Section 3 (1) of the Act, one has a choice whether to apply customary law or the common law. If one chooses the common law, as was done in Chikosi's case, there is no need to look to the definition of customary law and, consequently, to its proviso; if conversely, one were to choose customary law, one would have, first, to test that system of law to discover whether it was repugnant to the provisions of any enactment (provided that the rule of customary law would not be struck down if the enactment related to the status of women and was not expressly applied to Africans). Because the court in Chikosi's case decided to apply the common law, there was no need to look further to see whether the proviso to the definition of customary law was applicable[41].

If we follow the argument in Chikosi's case, we must conclude that the woman's overall status is not changed by the civil or Christian marriage - apart from the aspects of her status considered above. Her contractual capacity and her locus standi continue to be governed by Section 3 (2) of the African Law and Tribal Courts Act. There is, unfortunately, no authority regarding her delictual capacity. Presumably, she may, unassisted, sue her husband's mistress for damages for adultery but it is difficult to predict what attitude the courts would have regarding, for example, the responsibility for her delictual actions. In view of the fact that she cannot be considered to be a major, her husband should, one may assume, continue to bear liability.

There is one decision regarding marital rights. In Mucheno v Chisamba and Chisamba[42], it was held to be inconsistent with conceptions of the common law for a man to thrash his wife for her adultery[43]. It may also

41 In Chinyeruse v Jessina 1953 SRN 631, it was held that a woman must be duly assisted by her guardian if she wished to sue her husband. This now appears to be incorrect in view of Chikosi's case and other decisions cited therein at 144; cf Mzondiwa v Maguta 1947 SRN 388

42 1940 SRN 156

43 Flora Sebetsa v Maxwell Sebetsa Rathuso 1946 SR 49 is usually quoted in support of this proposition but is is misleading: see comment to that effect in Chinyeruse v Jessina 1953 SRN 631

be assumed that the spouses' rights to sexual favours must harmonise with the common law, in so far as African conceptions are at variance with that system[44].

(2) Proprietary Capacity

Under the common law, the spouses are married out of community of property and of profit and loss and the husband's marital power is excluded, unless they enter into an antenuptial contract with the purpose of varying these rules[45]. Accordingly, anything the wife acquires falls into her separate estate over which she has sole right of control. Customary law is quite different. The husband is regarded as being in overall control of matrimonial property. The wife is deemed to have proprietary capacity in respect of her umai and mavoko property only and the latter category, according to the interpretation of the district commissioners' courts, does not include her earnings[46].

Section 13 of the African Marriages Act provides the primary choice of law rule:

> "The solemnization of a marriage between Africans in terms of the Marriage Act shall not affect the property of the spouses, which shall be held, may be disposed of and, unless disposed of by will, shall devolve according to African law and custom."

Until recently, it seemed clear that customary law could, in terms of Section 13, be the only applicable legal system. Doubt has now been cast on the rigid application of this choice of law rule by the decision in Jirira v Jirira and Dube[47], which indicates that there may still be occasion to apply the common law instead. In this case, the plaintiff husband alleged that all financial and proprietary rights between himself and his defendant wife should be dealt with in accordance with Section 13,

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44 Customary periods of abstinence, for instance. This may be inferred from the courts' attitude to the action for damages for adultery which is now governed by the common law.

45 Married Persons Property Act (Chapter 78)

46 Chapter 8

47 (unreported) G-S-44-75

by African customary law. On this basis, the plaintiff claimed return of a motor car registered in his wife's name, together with $ 1 200 - his wife's earnings. Counsel for the defendant, however, put forward some interesting arguments in support of his contention that this property should not be dealt with according to customary law. He contended that even if customary law did govern the facts, there was no express rule in customary law applicable to the facts of this case and, therefore, the principles of justice, equity and good conscience must be applied, in terms of Section 3 (4) of the African Law and Tribal Courts Act. An alternative argument highlighted a potential conflict between Section 13 of the African Marriages Act and Section 3 (1) of the African Law and Tribal Courts Act. Section 3 (1) (a) (iii) provides for the devolution of movable property (other than by will) according to the laws of Rhodesia, if the "justice of the case" so requires. This is in direct conflict with Section 13 of the African Marriages Act. Section 3 (1) (b), furthermore, provides for rights in land, held under individual registered title, to be governed by the common law, again in direct conflict with Section 13. Counsel submitted that these conflicts should be reconciled by applying the rule of interpretation of statutes that where two pieces of legislation are in conflict, the later statute must prevail. Since the African Law and Tribal Courts Act was passed after the African Marriages Act, the former should prevail. Counsel's second argument does not appear to be correct: Section 3 (1) (a) and (b) must be read subject to the provisions of any specific enactment which provides a primary choice of law rule. Section 3 (1) commences with the provision - "Subject to the provisions of this section and of any other enactment ..."[48]. It is not clear, however, to what extent the court was influenced by any of counsel's arguments, for the judgment has a different basis. Initially, the learned judge noted that the spouses, in this case, had adopted a typically Western way of life. He then went on to say that

> "The parties' way of living and the nature of the transactions between them are so removed from the incidences and the customary way of life of the African people, that in principle it would be contrary to the justice of the case to apply African law and custom."

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48 Refer to Chapter 4; this is Allott's suggested "hierarchy" of conflict rules, op cit 119

It is difficult to discern how the court could apply the common law on the basis of the "justice of the case" in the face of Section 13, which makes no provision for the variation of the choice of law rule contained therein. One is forced to conclude that the only reason for applying anything other than customary law is the argument by counsel that there is no customary law rule applicable to the facts of the case. This would not, however, result in the application of the common law; rather, it would result in the application of justice, equity and good conscience.

A subsidiary question is whether Section 13 deprives the spouses of their right to enter into an antenuptial contract prior to marriage[49]. It could be argued that Section 13 relates to the effect of solemnisation of the marriage on property rights; if the spouses entered into an antenuptial contract, which must, of course, be transacted prior to the marriage, this would have the effect of taking their property rights outside the ambit of Section 13 altogether.

(3) Capacity to Act as Custodian or Guardian Parent of Minor Children

The question which legal system is to determine who is given custody and guardianship of children on dissolution of a marriage under the Marriage Act presents one of the more intractable problems in this field. If the common law is deemed to be applicable, there is a possibility, if the marriage is dissolved, that the mother be made sole guardian of the children or, at least, joint guardian with the father[50]. If customary law is applied, there can be no question of the mother becoming guardian of her children. Provided that sufficient rovoro cattle have been paid, the father has a right to guardianship of his children. In the event that no rovoro (or only a small portion of rovoro) has been paid, the wife's father may obtain guardianship[51].

Section 3 (1) (a) (ii) of the African Law and Tribal Courts Act provides that customary law is deemed to be applicable in cases relating to the

49 Expressly permitted in some countries: Sierra Leone, under the Christian Marriage Act (Chapter 95); Stafford and Franklin Principles Native Law and the Natal Code 311-312

50 Section 3 of the Guardianship of Minors Act (Chapter 34)

51 Chapter 7

custody and guardianship of children. In a line of cases, heard prior to the passing of this Act, the guardianship of the children, on either the death or divorce of the spouses, was also decided in accordance with the rules of customary law[52].

The logic in applying customary law in these cases was somewhat faulty. Generally speaking, the approach of the courts has been derived from the decision in Tabitha Chiduku v Chidano, where Tredgold CJ stated that customary law was not to be excluded unless it was repugnant to natural justice or morality The same approach was taken in the leading Malawian case, Kamcaca v Nkhota[53], after reference to the Zimbabwe-Rhodesian cases in point. The commentator on this case submits, rightly it seems, that this is the wrong reasoning to follow. The question which system of law to apply should be determined first. Only after a decision has been reached that customary law is applicable, should the question of repugnancy become relevant[54]. One may, furthermore, question the appropriateness of an alternative approach taken in Duma v Madidi, where Russell J observed that when an African contracts a marriage under the Marriage Act, he loses certain rights, such as the right to contract a second marriage; on the other hand, he does not altogether escape the operation of customary law in that the rovoro agreement may still subsist[55]. Using this analysis, it appeared that customary law might apply to the legal consequences of the marriage provided that it was not incompatible with the marriage under the Marriage Act. Because the customary law relating to guardianship was not considered to be incompatible, it thereby became the applicable system. It is difficult to discover how a concept as vague as "compatibility" may resolve a conflict between two legal systems in these particular circumstances.

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52 Duma v Madidi 1918 SR 59; Tabitha Chiduku v Chidano 1922 SR 55; Garadi v Annah 1959 SRN 924; Nguni v Sophia and Boniface 1963 CAACC 28; Anafi Robert v Annie and Isiah 1964 CAACC 55; Esnad Ndebele and Josiah v Togo Ndebele 1965 CAACC 23

53 Report and comment: von Benda-Beckman (1968) 12 Journal of African Law 173

54 von Benda-Beckman op cit 174-175

55 Bennett "African marriages under the Marriage Act: African law or common law ?" (1977) 17 Rhodesian Law Journal 39-42

Some conflict problems may be resolved by Section 3 (5) of the African Law and Tribal Courts Act which provides that whatever order is made as to the custody of children, it must be in their best moral and material interests. This provision may often be employed to circumvent tricky questions of choice of law but it will provide no ready answer where evidence as to the suitability of either parent as custodian is inconclusive or where suitability is not in issue. According to the decision in Esnad Ndebele and Josiah v Togo Ndebele[56], when the court is faced with such a problem, it should simply apply customary law. Moreover, Section 3 (5) is of no assistance if it is guardianship, not custody, which is in question.

It must be appreciated that questions of guardianship are now generally controlled by statute - the Guardianship of Minors Act[57]. A reading of the definition of "customary law" in Section 2 (1) of the African Law and Tribal Courts Act will reveal that nothing in any enactment relating to the guardianship of children shall affect the application of customary law unless the statute in question specifically applies to Africans. On this basis, one can argue that guardianship should always be determined by customary law, despite the form of the marriage. Yet, it is submitted, the unvarying application of customary law may be a shortsighted approach. It may be asked which system of law determines the relationship between parent and child during the subsistence of the marriage. Logically, the answer must be the common law[58]. This proposition may be illustrated by an example: if the father has failed to pay the full amount of rovoro agreed upon and, in addition, refuses to pay, may his father-in-law claim return of the children as a form of pledge for the payment ? Although it is clear that this practice is quite permissible in customary law, it is not, as a matter of policy, permissible in the case of a marriage under the Marriage Act. If it is conceded that the common law applies to the parent-child relationship during the marriage, there seems to be no good reason for applying customary law on dissolution of the marriage[59].

56 1965 CAACC 23

57 Chapter 34

58 Allott op cit 221-222

59 This is the argument proposed by von Benda-Beckmann op cit 177-178; Allott ibid adds that to apply customary law will weaken the mother's natural right to her children at the very time it should be strengthened

In circumstances where it is necessary to apply the common law, the type of reasoning described in respect of the wife's locus standi may be apposite. If the "justice of the case" demands the application of the common law, that is the system which is to be applied, including the Guardianship of Minors Act. It is only if customary law is applicable that one is compelled to implement the provisions contained in the proviso to the definition of "customary law", thereby excluding the Guardianship of Minors Act.

Circumstances may exist, of course, in which it would be better to grant the father guardianship of his children in accordance with customary law[60]. Whether customary law or the common law is applied, it would seem both logical and expedient to investigate the life style of the parties. By doing so, the court will be able to ensure that the children are brought up in accordance with the precepts and customs with which their parents were most familiar, thereby preventing any disruption in the lives of the children. If the parents continue to observe a traditional African way of living, despite the form of their marriage, it may be that customary law is the appropriate system. On the other hand, the "justice of the case" may demand variation of the prima facie choice of law rule provided in Section 3 (1) (a) (ii) and, accordingly, application of the common law[61].

An important provision of the African Wills Act - Section 2 - permits a party to a civil or Christian marriage to provide for the guardianship of his or her children by will. In this manner, a widow might be appointed the guardian of her children, contrary to the rules of customary law.

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60 See the reasons given in Jirira v Jirira and Dube (unreported) G-S-44-75 Of course, it should be remembered that if customary law is applied, one is acknowledging that it is the father's family which has rights in the child, not the father alone. This is an anomalous conclusion to reach in view of the fact that the marriage is a personal relationship between husband and wife, to the exclusion of their families

61 In Chikosi v Chikosi (2) 1973 (3) SA 145 (R), it was reasoned that custody of the children pendente lite must be decided according to the common law because the parties had adopted a typically Western way of life. This demanded variation of the prima facie choice of law rule in terms of Section 3 (1)

Moreover, a woman, if she has freedom of testation,might purport to nominate the guardian of her children in the event of her and her husband's death. This is an aspect of the freedom of testation which can give rise to considerable difficulty when viewed in the context of customary law. As has already been mentioned, it is the husband's family, by virtue of the payment of rovoro, which acquires rights in respect of children. May these rights be set at nought by a unilateral act on the part of the testator ? More particularly, may a woman dispose of rightswhich she does not have in customary law ? These questions acquire additional significance when it is remebered that custody and guardianship of children is, prima facie, to be governed by customary law in terms of Section 3 (1) (a) (ii) of the African Law and Tribal Courts Act. The question remains an open one for our courts and is, ultimately, a matter of policy. If the parent- child relationship is governed by the common law during the subsistence of a civil or Christian marriage, there can be no objection to the widow acquiring the right of guardianship or purporting to dispose of it by will. Past decisions, however, indicate that customary law applies to guardianship on divorce. The courts may now feel that in view of the social changes Africans are experiencing, a person should have the freedom to chooe the guardian he or she wishes for a child. Section 3 (1) (a) (ii) does not prevail over Section 2 of the African Wills Act because the former section must be read subject to the provisions of other enactments and, for this reason, need not pose an insuperable obstacle.

The right to dispose of guardianship by will exists only in the case of a civil or Christian marriage. By the expressio unius exclusio alterius rule of interpretation, it seems that the spouse of a customary marriage does not have the same right.

Section 3 of the African Wills Act goes on to provide that, even if no provision regarding guardianship has been made in a will,

> "it shall be competent for any person lawfully interested in the child of such a marriage to make application to the district commissioner who shall make such order for their guardianship as he may deem fit."

If it is deemed that the widow has a "lawful interest" in the guardianship of her children, on the death of her husband, there would be no reason why she could not make an application to a district commissioner and, further, why the district commissioner could not appoint her guardian of her children. In view of the provisions of Section 3 (1) (a) (ii) of the African Law and Tribal Courts Act, and the cases referred to above, however, it is doubtful whether a widow will be deemed to have a "lawful interest". The answer will depend on the interpretation placed on the phrase "lawfully interested"; namely, whether it is to be construed to mean "having a legal right" or, more broadly, "having any interest in the child which is not contrary to the law".

On the other hand, if the woman had been appointed sole custodian of the child in terms of an order of court, she would, presumably, have the power to nominate custodian of the child by will. Although no provision is made for this under the African Wills Act, there can be no objection, in principle, to this type of approach. The woman acquired a right, unknown to customary law, and it would be proper for her to dispose of this right in a manner recognised by the common law.

(4) Testamentary Capacity and the Right to Inherit

A civil or Christian marriage should, in principle, have no effect on the power of a spouse to make a will or the freedom to dispose of property mortis causa. Yet the form of the marriage may affect the right of a spouse to inherit on intestacy. If the common law were applied, the widow would have a claim to her deceased husband's estate in terms of the Deceased Estates Succession Act[62]; but if customary law were to be applied, she would inherit nothing from her husband's estate apart from a few small articles as momento mori[63]. Section 13 of the African Marriages Act is again applicable, providing that a marriage under the Marriage Act shall have no effect on the devolution of property on death unless the property is disposed of by will. Accordingly, it would appear as if customary law were the only applicable legal system.

62 Section 3 (Chapter 302)

63 Chapter 9

It has been held in three cases, however, that Section 13 does not apply to immovable property. It controls choice of law rules with regard to movable property only[64]. The reason given in Komo's case was that customary law knew no form of ownership or of succession to land and, on that ground, could not be applied. In this respect, Dokotera's case followed Komo's case. It would be logical to assume, in these circumstances, that if Section 13 does not apply to immovable property, intestate succession to such property should be governed by the common law but this was not the approach taken by the courts. In Dokotera's case, for instance, the applicant and her husband were both Africans who had married by Christian rites. The applicant's husband died intestate, leaving both movable and immovable property. The executor dative made the estate over to the deceased's brother - his heir in terms of customary law. The applicant objected, alleging that she was entitled to succeed in terms of the common law of intestate succession. Her objection failed. The court held that customary law must apply. The same process of reasoning was adopted in Masowa's case, where it was considered likely that the parties were married by Christian rites. Hence the anomalous position is achieved whereby, although Section 13 does not apply to immovable property, such property is, in effect, still governed by that section because customary law applies.

One final point remains to be considered: the revocation of wills made by Africans in terms of Section 2 of the Deceased Estates Succession Act. This section provides that:

> "a will, other than a joint will of an intended husband and wife who have thereafter married each other, executed by any person prior to marriage shall become null and void on marriage, unless such person endorses on such will that it is desired that the same shall remain of full force and effect."

In effect, this section provides that the change of status from a single to a married person renders a former will of no force and effect. Firstly, is this section applicable to Africans who have made wills and then contracted marriages in terms of customary law ? A similar question was

64 Komo and Leboho v Holmes NO 1935 SR 86; Dokotera v The Master of the High Court and others 1957 R & N 697 (SR); Masowa and Masowa v Masowa 1966 CAACC 46

considered in Dokotera v The Master of the High Court and Others[65]. The court in this case was concerned not with the applicability of Section 2 of the Deceased Estates Succession Act but, rather, with Section 3 of the same Act which provides for the succession of a surviving spouse ab intestato. Murray CJ held that Section 3 was not applicable. He referred to the odd situation which would arise if this Act were applied to every spouse in the country, without differentiating race.

The question cannot be considered to be conclusively settled. There is a series of decisions from both the South African and Zimbabwe-Rhodesian courts concerned with foreign polygamous marriages, some of which were not regarded as valid "marriages" for statutory purposes. The source of the early approach to this question was the decision in Seedat's Executors v The Master (Natal)[66], where the court enunciated the general principle that, polygamy being fundamentally opposed to the principles and institutions of South African law, the South African courts would not recognise foreign polygamous marriages. In L Ferera (Private) Ltd v Vos NO and Others[67] and Patel v The Master and Others[68], both Zimbabwe-Rhodesian cases concerned with the interpretation of the Deceased Estates Succession Act, it was held that only marriages contracted under the Marriage Act could be deemed valid marriages. Accordingly, the Act was not applied in respect of potentially polygamous Muslim unions.

A new attitude to recognition of foreign polygamous marriages was heralded by the Federal Supreme Court in Estate Mehta v The Acting Master[69]. Clayden J, initially, noted that the Zimbabwe-Rhodesian courts were not absolutely bound by the decisions of the South African Appellate Division; consequently, the court was free to depart from the rule laid down in Seedat's case. It was held that for the purpose of exemption from the payment of succession duty, the survivor of a polygamous marriage was a "surviving spouse" in terms of the relevant legislation.

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65 1957 R & N 697 (SR)

66 1917 AD 302

67 1953 (3) SA 450 (AD)

68 1953 SR 160

69 1958 R & N 570 (FSC)

Tredgold CJ laid the foundation for the new approach to polygamous unions:

> "There are good and sufficient reasons for not recognising such marriages when the consequences of recognition would be to disturb the incidents of our own monogamous system. But where it is merely a question of recognising the marriage for the purpose of succession to property no such complication arises. On the contrary, there are the strongest reasons why recognition should be accorded, otherwise the consequences may be most serious for the successors ...
> I am strengthened in this conclusion by the fact that it is to my mind quite unrealistic to affirm that it is contrary to the policy of our law to recognise polygamous marriages for the purposes of succession when the majority of marriages in the Colony are under a polygamous system recognised for all civil purposes." 70

Mehta's case was later followed in In re Estate Koshen[71] and, again, in Kader v Kader[72]. Lewis AJP commented:

> "When our laws were first introduced into this country some 80 years ago, all the indigenous peoples of this country were living under a system of polygamy and today, when their numbers have increased by ten-fold since that time, the vast majority of them are still practising polygamy. Save in regard to the exercise of the High Court's matrimonial jurisdiction, which is restricted to cases involving monogamous marriages, their polygamous marriages are recognised for all civil purposes. In that situation, it seems to be entirely illogical to withhold similar recognition to polygamous marriages validly contracted by non-Africans in the countries of their domicile particularly where the marriages, though potentially polygamous, are in fact monogamous." 73

On this reasoning, it was held that the non-African wife of a potentially polygamous marriage was not excluded from the ambit of the Deserted Wives and Children's Protection Act.

This line of cases may, of course, be distinguished from the situation where an African makes a will and then enters into a marriage in customary law. In each of the cases discussed above, the marriage was between non-Africans and was contracted outside Zimbabwe-Rhodesia. One may ask whether a marriage between Africans, according to customary law, within Zimbabwe-Rhodesia, also deserves recognition as a valid marriage for the purposes of Section 2 of the Deceased Estates Succession Act in view

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70 at 588

71 1960 (2) SA 174 (SR)

72 1972 (3) SA 203 (RAD)

73 at 208

of these cases. It has already been noted that, on the authority of Dokotera's case, Section 3 of the same Act does not apply to Africans and, no doubt, on the same argument, it could be said that the Act in toto does not apply to Africans. In view of the dicta, both in Mehta and Kader's cases, however, the counter argument could be put that polygamous marriages contracted by Africans in Zimbabwe-Rhodesia are valid for all civil purposes in this country.

The effect of these dicta is somewhat diminished by a later dictum in Chikosi v Chikosi (3)[74] The question in this case was whether two Africans who had contracted a valid marriage according to customary law (which had been duly registered under the African Marriages Act), had contracted a marriage valid for all civil purposes in Zimbabwe-Rhodesia. The court found that it was not valid for all purposes but only "according to African law and custom"[75] Reference was made to Section 7 of the African Marriages Act and the decisions in R v Tshipa[76] and R v Ncube[77]. The learned judge's interpretation of Section 7 (1) of the African Marriages Act is, with respect, open to debate. Section 7 (1) provides that if an African marriage officer is satisfied as to certain formalities, he shall solemnise the marriage "and such marriage shall be a valid marriage contracted according to African law and custom". It need not necessarily be inferred that the marriage is valid only for the purpose of African law and custom. The two cases referred to in Chikosi's case are distinguishable in that they were criminal cases concerned with charges of bigamy and incest. The rationes decidendi in those cases were that, for the purposes of the crimes in question, the common law will not regard polygamous marriages as valid marriages[78]. Hence, it may still be argued that despite the decision in Chikosi's case, a marriage in terms of customary law is a valid "marriage" for the purpose of the Deceased Estates Succession Act. If this argument is accepted, it would appear that when an African, who

74 1975 (2) SA 644 (R)

75 at 646F

76 1957 R & N 751 (SR)

77 1959 (2) R & N 466 (SR)

78 Similar to the approach taken in Kader's case, when it was recognised that polygamous marriages were not regarded as valid marriages for the purpose of the matrimonial jurisdiction of the General Division

is married in terms of customary law, makes a will and, subsequently, takes a second, polygamous wife, the second union renders the will null and void. In order to protect the interests of the first wife, there is much to commend this approach.

Whether this argument is accepted or not, it is clear that a marriage contracted by Africans in terms of the Marriage Act is sufficient to render a prior will null and void. There can be no question of the validity of such a marriage for the purposes of Section 2 of the Deceased Estates Succession Act, since the marriage, although contracted by Africans, is a monogamous union. Nor would Section 13 of the African Marriages Act prevail over the provisions of Section 2, since the former does no more than provide that a marriage under the Marriage Act shall not affect the property of the spouses unless disposed of by will.

Even if we do accept that a marriage under customary law is valid for the purposes of the Deceased Estates Succession Act, difficulties may arise in situations where the parties, already married according to customary law, later solemnise their union under the Marriage Act. In Chikosi's case, the parties who had been married in Zimbabwe-Rhodesia according to customary law, entered into a subsequent Christian marriage in the United States. The court found that the second marriage had the effect of converting the potentially polygamous marriage into a monogamous union and all that remained of the customary marriage was the matter of proprietary rights, which were preserved by virtue of Section 13 of the African Marriages Act. The question in the present context is whether the second marriage under the Marriage Act is regarded as a new marriage for the purpose of rendering a prior will null and void. If the view is taken that the marriage in customary law is a valid union, then it would seem that the second, civil marriage does not alter that situation; on the reasoning in Chikosi's case, the second union does nothing other than alter the nature of the marriage, viz from polygamous to monogamous. This reasoning does not do violence to the purpose of Section 2, which is to safeguard a surviving spouse's claim to an intestate estate on the death of the other spouse.

15 PREPOSED REFORMS

That there is a need to reform the law regulating the status of African women in Zimbabwe-Rhodesia is undoubted[1]. In several respects, the woman who has rejected her traditional life style, to a greater or lesser extent, must still contend with the customary legal regime, however inappropriate that may be. In a preliminary fasion, we may isolate the following incidents of her status which require reform.

(1) The woman should have the power to act as guardian of her minor children, on dissolution of her marriage by death or divorce.

(2) The married woman's proprietary capacity is in urgent need of reform. Regardless of the form of marriage, any property she may acquire falls under the control of her husband. Account must be taken of the African woman's participation in the economy and, in line with the general economic ethic of Zimbabwe-Rhodesia, her right to use, enjoy and alienate property she has acquired[2].

(3) Similarly, the woman should have a right to inherit at least a portion of her deceased husband's estate. Under the law, at present, she may inherit only if instituted legatee or heir in terms of his will; circumstances may exist, however, where she should also inherit if he were to die intestate[3].

(4) The law relating to emancipation is poorly conceived. Provision should be made whereby the de facto independent woman may have her independence legally and formally recognised for all purposes.

(5) The scope of recognition afforded marriages in customary law must be broadened and made certain. At present, it may be that customary marriages do not have the same legal effect as civil or Christian unions. This uncertainty must be removed and both unions should be

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1 See, generally, the proposals made by the Church of the Province of Central Africa Report of the Commission to Inquire into the Legal Status of African Women paras 142-149, based on representations made by many individual African women and several women's voluntary organisations

Report of the Commission of Inquiry into Racial Discrimination 80; leaving aside, of course, antenuptial contracts. If a woman chooses to enter into an antenuptial contract providing for community of property and of profit and loss and retaining the husband's marital power, she should be free to do so

3 Report of the Commission of Inquiry into Racial Discrimination 79-80

treated on an equal basis, regardless of the potentially polygamous character of the customary marriage. If this is not done, the surviving widow of a customary marriage will have no delictual claim for loss of support if her husband is unlawfully killed. Moreover, the wives of a man who has entered into two or more polygamous unions should be protected if the husband decided, unilaterally, to enter into a civil or Christian marriage with another woman or with one of his polygamous wives.

(6) All women (apart from children) should be protected from the infliction of corporal punishment by their husbands or guardians.

As a matter of general policy, there are many other areas in which the present administration of customary law in Zimbabwe-Rhodesia, could be reformed. In other parts of Africa, for instance, the existence of a dual court structure has been regarded as antithetical to the primary requirement of national unity[4]. Indeed, the uncertainty to which dualism gives rise in litigation and the potential for discrimination which (at least formerly) existed[5] are arguments for a major reform of the Zimbabwe-Rhodesian legal system. It would be beyond the scope of this thesis, however, to recommend changes in the general legal order. Rather, reform will be more narrowly conceived in respect of specific aspects of the African woman's status in terms of the existing legal system.

It will, furthermore, be assumed that the common law, as it presently stands, is capable of meeting the aspirations of the more progressive African woman. It may be argued that, in certain areas, the common law is out of keeping with the demands posed by white society in Zimbabwe-Rhodesia (especially, for instance, in the realm of divorce law[6]) but

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4 The conclusion of the London conference, reported by Allott (Ed) Conference (on the) Future of Law in Africa, London, 1959-1960; even prior to independence, the Judicial Advisers' conferences at Jos and Makerere, in 1953 and 1956, respectively, felt that the courts should be integrated

5 In Zimbabwe-Rhodesia, for example, until the African Law and Tribal Courts Act was passed, in 1969, if a white were party to legal proceedings involving an African, the matter would have to be decided according to the common law. In no circumstances could a white ever be subject to customary law

6 Recently the subject of far-reaching reform in South Africa: Divorce Act No 70 of 1979; further reforms are proposed with regard to matrimonial property: SA Government Gazette 23rd November 1979

this thesis does not seek to consider or amend the rules of the common law[7]. For the purpose of law reform, attention will be focused exclusively on the rules of customary law and the circumstances in which it may be excluded, although account must be taken of the areas in which the common law may have impinged on customary law, either formally, via the conflict of laws or, indirectly, through the district commissioners' law-making activities.

Before considering the reforms and the manner of achieving them, it is necessary to disclose the premises upon which they are based. Customary law, in modern Africa, has equivocal significance. All too often, it represents a traditional order, now out of keeping with contemporary social and economic demands. Apart from this, for many it has political connotations. The exclusive application of customary law to Africans and the application of the received systems of Western European law to the white settlers suggested the racial inequality which was frequently implicit in the former colonial regimes. On the other hand, the wave of nationalist sentiment leading to independence in several African countries had the effect of promoting customary law as the national legal system[8]. From the interplay of these social and political factors, the position of customary law in the new African nations has been determined. The conclusions reached by many governments, however, suggested that, for a variety of reasons, customary law had little part to play in the building of a new nation[9]. Whether through legislation or codification, the sphere in which customary law had previously

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7 A similar problem was experienced in Francophone Africa, where the French Civil Code was out of keeping with modern social demands: Blanc-Jouvan "Remarques sur la codification du droit privé à Madagascar" (1967) Revue Juridique du Congo 160; David "La refonte du code civil dans les états africains" (1962) Annales Africaines 160

8 The former Ghanaian president, Kwame Nkrumah, was an enthusiastic advocate of the "africanisation" of the Ghanaian legal system: (1962) 6 Journal of African Law 103sq; so, too, was President Senghor: M'Baye "L'expérience sénégalaise de la reforme du droit" (1970) 22 Revue Internationale de Droit Comparé 38

9 Seidman "Law and economic development in independent, English-speaking, sub-Saharan Africa" in Hutchinson et al (Eds) Africa and Law, developing legal systems in African Commonwealth nations 28-32 - particularly in the economic sphere

operated has been somewhat diminished[10].

The success of such reform programmes, particularly in states such as Ivory Coast and Ethiopia[11], which have severely circumscribed the operation of customary law, has yet to be determined[12]. When speaking of the "success" of a programme of legal reform one, in effect, is asking whether the people affected by legal change have accepted and acted upon the new norms which purport to govern them. It is axiomatic that the sense of identity which a people has with the legal system is of crucial importance in determining the effectiveness of the law. Popular reaction may lead to active rejection of the law or indifference, both responses rendering the programme of reform useless and, potentially, undermining the respect and authority of the government. On the other hand, the degree of tolerance to legal innovation has, sometimes, proved to be remarkably high. The reforms of Kemal Atatürk are probably the most well known in this regard. In a daring policy of modernisation, the Islamic legal order of Turkey was usurped in favour of an imported code of European inspiration. Although full acceptanceof the foreign regime took a long time to achieve, the new code has remained unshaken in its authority[13].

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10 According to Lazer "Legal centralism in South Africa" (1970) 19 International and Comparative Law Quarterly 492, even in a country such as South Africa (where, since 1927, little has been done to disturb the traditional customary legal order) customary law has been so attenuated as to be incapable of regeneration

11 With regard to the latter, see: David "Civil code for Ethiopia: considerations on the codification of the civil law in African countries" (1963) 37 Tulane Law Review 188-189; "La refonte du code civil" op cit 161

12 And is usually based on conjecture: Harvey "The evolution of Ghana law since independence" in Baade (Ed) African Law: new law for new nations 69. See also, the doubts expressed by David "Critical observations regarding the potentialities and the limitations of legislation in the independent African states" in Integration of Customary Law and Modern Legal Systems in Africa 44-56

13 The introduction of the Swiss Civil Code into Turkey, in 1926, provided the law for only a small urban elite and the legal profession. It remained foreign and incomprehensible for the majority of the population: UNESCO International Social Science Bulletin (1957) 9 No 1 7-85; see Keuning "Some remarks on law and courts in Africa" in Integration of Customary Law and Modern Legal Systems in Africa 64

The problem of acceptance underlies all legislation, as a source of new law and it is this problem which is sought to be avoided, as far as possible, in seeking to change the status of African women.

There can be no objection to legislation, in functional terms, if the enactment is, either directly or indirectly, the expression of the will of the people as a whole, as in a completely representative democracy; but if the enactment express the view of only a small minority, its general acceptance becomes much less likely. In Africa, where law reform has usually emanated from an educated urban elite, this is an immediately apparent problem[14]. By its nature a statute is of general, national application, in that the new norms are designed to apply to all people regardless of their personal inclinations. Allowance may be made for exemption of particular groups of people and, of course, legislation is often aimed at particular groups but the manner of distinguishing the group is a difficult task for the law-giver. Classes are normally determined, in the enactment in question, by simple and easily ascertainable criteria, such as race, type of employment, income etc. The problem becomes acute if no readily ascertainable criteria are available: if the legislator wishes, for example, to apply a Western European system of law to those people who have opted for a Western European way of living, what criteria are to be used in the statute to determine who is to be affected by the new law ?

This is the problem which confronts the law reformer in Africa. In most cases, the law-givers have taken care not to suppress the interests of the more traditionally-minded in the population but the difficulty of determining how their interests are to be protected in terms of legislation has never been satisfactorily resolved. Customary law should be preserved for those whose social values and attitudes remain traditional; it should be excluded, in favour of the common law, for those who have opted for a Western European life style. An abstruse criterion such as life style or cultural preference is difficult to articulate in legal terms.

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14 Blanc-Jouvan op cit 161 and 173 noted that informed African opinion usually in favour of a radical approach to customary law, while European experts seem to favour a more sympathetic attitude; David "La refonte du code civil" op cit 161

Underlying this discussion is the assumption that the cultural predilections of individuals warrant respect not only for purely pragmatic reasons (viz acceptance of the legal order) but also for ethical reasons. In countries such as Ethiopia, for instance, a different view was adopted. It was felt that customary law was out of keeping with the modern state, was harmful to the economy and, accordingly, should be abolished regardless of the conservative attitude of the majority of the population[15]. Such an uncompromising approach may be necessary in certain circumstances (to be discussed later) on ethical grounds but, in general, it is submitted that the cultural attitudes of the individual should, as far as possible, be respected[16].

Once it is accepted that customary law and the common law both have a part to play in the modern African nation, the question is how to determine when one or other legal system is to be applied. More simply, this usually involves determining the circumstances in which customary law is to be excluded. In this chapter, it is proposed to consider five principal techniques for excluding customary law. At one time or another, each one of these methods has been employed to exclude customary law with a view to bringing the law into line with current social demands. In terms of the advantages and disadvantages of these techniques, we may then determine the most appropriate manner of effecting reform.

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15 David, the drafter of the Ethiopian Civil Code, felt that customary law varied too much from area to area, was unstable and often lacked true juridical characteristics. He argued that this impeded development and was responsible for the undeveloped nature of African society: "Civil code for Ethiopia" op cit 188-189. For this reason, he argued "ce n'est pas d'une évolution, que le pays a besoin, c'est d'une révolution": "La refonte du code civil" op cit 161. The code accordingly draws its inspiration from France, Switzerland, Italy, Greece and Egypt. The part played by customary law was one of moulding the proposed legislation, rather than inspiring its provisions: Redden The Legal System of Ethiopia 53 and 76

16 Even in Ethiopia, the individual has been allowed some freedom to express his or her cultural and legal preferences: it may be expressly indicated by the spouses, prior to marriage, that they wish customary law to apply to their marriage: see Krzeczunowicz "The nature of marriage under the Ethiopian Civil Code: an exegesis" (1967) 11 Journal of African Law 175

(1) Legislation

Undoubtedly, the most radical method of excluding customary law is by legislation. Within terms of this broad approach, two different views may be isolated. What has been termed the "revolutionary" approach to customary law has been to abolish it almost entirely[17]. While this would serve the interests of the educated, Westernised African, it would do little to gain the support and acceptance of the rural and traditionally-minded. In view of what has been said above about legislation, any such radical change should be treated with scepticism. Indeed, most African countries have adopted what is called an "evolutionary" approach, namely, one in which due regard is paid to customary law but, to some degree, it is discarded in favour of a received system of European law. The evolutionists have had to come to terms with the problem of deciding when to exclude customary law but this they have not done on the basis of exempting certain classes of person (such as those who are "urbanised" or "Westernised") from the application of the indigenous legal system. Presumably, it was realistically appreciated that such an approach was impracticable. Legislatures sought, instead, to produce hybrid codes of rules which embodied both customary and European law[18].

No legislature has sought, deliberately, to effect a programme of reform of the legal status of African women. Reform has been directed to the broader areas of marriage, divorce and succession and the status of women must be considered in so far as it has been amended by such legislation. In isolating the two general models of legislative reform - the "revolutionary" and the "evolutionary" - we may use, as examples Ivory Coast and Malagassy codes, respectively[19].

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17 In no case has customary law been completely eliminated but it plays a far less significant role than it did formerly

18 This "patchwork" approach was one used to bring the traditional system of Islamic law into accord with modern social conditions: technically, this is known as the process of talfiq: Coulson A History of Islamic Law 197-201; Schacht An Introduction to Islamic Law 106

19 Other states to have enacted comprehensive marriage laws are: Guinea Loi No 64-62 of April 14, 1962, and Mali Loi No 62-17

The Ivory Coast approach is considered to be revolutionary because the general trend has been to exclude customary law wherever possible. Article 41 of the Constitution provides that the National Assembly shall have the power to fix the rules regarding the procedure by which customary law is to be ascertained and harmonised with the principles of the Constitution. Although, by implication, customary law is still recognised in Ivory Coast, it has been supplanted by the introduction of new codes based on French civil law. The most notable of these codes are those passed in 1964, regulating family law and succession.

The Ivorien government believed that continued operation of customary law would perpetuate the divisive influence of tribalism in the nation[20]. Many institutions of customary law such as the marriage consideration and polygamy were viewed as an impediment to social and economic progress[21]; in several cases, moreover, customary laws were thought to have lost their original raison d'être because of changing social conditions[22].

February 3, 1962: see Salacuse An Introduction to Law in French-speaking Africa 108-110 and 158-162 respectively. Neither Guinea nor Mali, however, has been as radical in their attitude to customary law as Ivory Coast. Other Francophonic countries have enacted legislation vitally affecting the law of marriage but they did not purport to deal with the matter comprehensively. In the Central African Republic, polygamy and the marriage consideration were both abolished and, in Gabon, the giving and receiving of marriage consideration was made a criminal offence: Salacuse op cit 297 and 343-344, respectively

20 A problem facing any government attempting to promote customary law as the national legal system, is which system of customary law within the nation to adopt. Selection of one particular system will, naturally, suggest preference for the tribe concerned and provoke the hostility of other tribal groups: Kerr "The reception and codification of systems of law in Southern Africa" (1958) 7 Journal of African Law 96

21 The marriage consideration cattle are used, principally, to obtain wives which, in consequence, diminishes the economic potential of the cattle. Similarly, if the woman is committed exclusively to raising children and caring for the home, her contribution to the national economy is greatly reduced

22 Salacuse op cit 132-133, citing Coulibaly "Les traits principaux du nouveau droit ivoirien de la famille" (1967) 21 Revue Juridique et Politique 76-77. The reforms were effected by a series of laws of October 7, 1964

In short, the new code of family law and succession was designed not simply to follow social change but to provoke it. With this in view, the basic aim of the Ivorien government was to change the national social structure from one based on the traditional extended family (grande famille) to one based on the nuclear family[23]. Apart from this, Ivory Coast, in common with all the Francophone countries, has shown particular concern with the methods of determining change in status. The informality and private manner of creating and dissolving customary marriages has been replaced by a system of registration and transaction before state officers; accordingly, all marriages must be solemnised before a duly authorised state marriage officer and divorces may be obtained only through a court of competent jurisdiction[24].

The Ivorien code, in attempting to establish the nuclear family, formally abolishes the marriage consideration[25] and polygamy[26]. The consent of both the spouses is regarded as vital to the creation of a valid marriage; only the consent of the parent exercising parental authority over the child may authorise the marriage of a minor child[27]. In addition, civil law rules relating to the prohibited degrees of consanguinity were introduced[28].

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23 Salacuse op cit. Even so, the National Assembly recognised that such radical reforms would require time and extensive public education; accordingly, it proposed that the introduction of the new law be delayed. The government felt that delay would serve no useful purpose and the laws became effective in 1964-1965

24 Registration of marriages, in Zimbabwe-Rhodesia, is, of course, mandatory if the marriage is to be valid: Section 8 of the African Marriages Act; similarly, a marriage may be dissolved only by a court of competent jurisdiction: Section 16 of the Act. Both these events are recorded in the marriage register

25 Law No 64-381 of October 7, 1964, Articles 20-23. Persons who engage in transactions for marriage consideration are subject to criminal penalties. It was felt that this institution had taken on such commercial significance that it should no longer be protected by the general recognition given customary law

26 Article 2 of Law No 64-375 of October 7, 1964. No one may now contract a marriage before dissolving a subsisting union

27 Articles 3, 5 and 101 of Law No 64-375

28 Article 10 of Law No 64-375

Similarly, the code defines, in terms of civil law, the rights and duties of the spouses toward one another, toward their children and their relatives. Spouses, for instance, have a reciprocal duty of support; children, who are able, have a like duty to support parents and in-laws who are in need[29].

The spouses are deemed to be married in community of property and the matrimonial property is administered by the husband[30]. On the death of one of the spouses, the surviving spouse takes one half of all community property, on intestacy, and the remaining one half goes to the children, without regard to age or sex[31].

The legal status of African women, in Ivory Coast, is no longer determined by customary law. This does not suggest, however, that she has complete equality with men. While sexual equality in relation to the formation of marriage is a feature of the Ivorien legislation, it is less evident during the subsistence of the marriage. The husband is made the head of the family unit since, it was felt, that to hold otherwise would be fatal to the efficient running of the family unit[32]. The law of 1964 regulates the privileges of the père de famille. In contrast to Madagascar, the wife must take her husband's name. The effect of this, it was hoped, would be to deprive the name of its traditional sanctity and serve to make it nothing more than a means of identifying the family[33]. The husband has the power to choose the place of the family residence[34]. The wife may engage in an occupation but only as long as her husband has not expressed his opposition[35].

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29 Articles 51, 52, 55 and 56 of Law No 64-375; although it must be appreciated that this is not necessarily a departure from customary law

30 Articles 68-77 of Law No 64-375

31 Article 22 of Law No 64-379 of October 7, 1964

32 Abitbol "La famille conjugale et le droit nouveau du mariage en Côte d'Ivoire" (1966) 10 Journal of African Law 158

33 Article 57 of Law No 64-379

34 Article 60 of Law No 64-379

35 Article 67 of Law No 64-379; Abitbol op cit

This provision envisages a married woman's primary role as wife and mother. All the privileges bestowed on the husband, while establishing his position as head of a nuclear family unit, free from subservience to the extended family, are conferred in the interests of the whole family and, consequently, if they are abused, the wife may apply to the courts for redress[36]. In particular, if the husband has unjustifiably refused to permit his wife to follow the occupation of her choice, a court may override his decision. Similarly, the husband is required to furnish his wife with all household necessaries and, should he fail in this obligation, she may seek judicial enforcement of her rights[37].

In a sense, the wife plays a subsiduary role in running the family: she may replace her husband as head of the family if he suffers from an incapacity or is absent[38]; she may contract in his name to purchase household necessaries[39] and her agreement is necessary in all decisions involving the moral and material well-being of the family[40]. It should not, necessarily, be assumed that the wife's relatively inferior status is determined out of regard to customary law; rather is it determined out of more pragmatic considerations of the efficient running of a family unit.

While the Ivorien legislature accorded customary law scant respect, the Malagassy legislature felt that the nation should have a code of law "unifiée, adaptée aux usages des différentes populations de Madagascar et acceptées par elles"[41]. This policy suggests that customary law should not be ignored, if the code is to be accepted by the people.

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36 Articles 60 (2) and 67 (2); Abitbol op cit 159: "Le droit pour la femme d'attaquer judiciairement les décisions abusives du mari est d'ailleurs l'expression d'un pouvoir de contrôle plus général, qui sans porter atteinte à la prééminence du mari en tant que chef de famille, suppose un rôle actif de la femme dans la vie du ménage. La loi stipule expressément à cet égard qu'elle concourt (art. 58 at. 2) avec le mari à assurer la direction morale et materielle de la famille."

37 Article 53 of Law No 64-379

38 Article 58 (3) of Law No 64-379

39 Article 65 of Law No 64-379

40 Article 58 (2) of Law No 64-379

41 Resolution of the Legislative Assembly June 2, 1959

Accordingly, although Madagascar intended also to establish the nuclear family as the basic social unit[42], it did not ignore the functions of the grande famille. The evolutionary reformer has to combine rules from both customary law and European law to produce a hybrid code, hopefully, gaining acceptance by all sections of the population. This was the approach of the Malagassy government. The ambivalent attitude of the legislature is reflected in all aspects of the law of marriage[43]. A valid marriage may be concluded in one of two ways: by celebration before an officer of the civil registry or according to the traditional customary ceremonies[44]. The latter option is available only outside the towns (communes urbaines) and such marriages must, subsequently, be registered at the civil registry. Traditional customary rules relating to consanguinity have been preserved[45]. The marriage of a minor must be authorised by the father or mother or, in their default, by a person who, according to customary law, has authority over the child[46]. Polygamy, as in Ivory Coast, has been prohibited[47]. Like the Ivorien legislation, the Malagassy marriage law has established a community of property between the spouses but they may, at the time of their marriage, devise, by contract, other rules to govern their marital property. The community regime covers the profits and earnings of the spouses and property purchased therewith during the marriage. Property owned by either party prior to the marriage or received by gift or inheritance

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42 Pédamon "Les grandes tendances du droit de la famille à Madagascar" (1965) 2 Annales Malgaches 59

43 Salacuse op cit 413 and 418; to this end a commission was created to gather all information regarding customary law. The results of this research were compiled in the Rapport de Synthèse and placed at the disposal of the codification commission

44 Article 2 of Ordonnance No 62-089 of October 1, 1962. Blanc-Jouvan op cit 176. It was realistically acknowledged that most of the population on the island would not obey a rule enjoining marriage at the civil registry

45 Article 51 of Law No 62-089

46 Article 7 of Law No 62-089

47 Article 7 of Law No 62-089; a second marriage may not be contracted before the dissolution of the first union

falls outside the community regime. The husband administers the community property but if the wife's rights are prejudiced, she may apply to court for division of the community estate[48]. Divorce or death also brings about a division of the community estate but, unlike French law, there is no equal division. Instead, the traditional Merina principle is retained, which provides that the husband receives two-thirds and the wife one-third[49]. During the marriage, the wife has all the capacities necessary to carry out, unassisted, those acts necessary for the maintenance of the home. Spouses are liable, jointly, for debts incurred in this regard, by one or other of them[50].

On the other hand, it was felt that the household needs a head and, accordingly, the husband's role as head of the family was established[51]; but it is provided that the wife's agreement is necessary in matters relating to the moral and material interests of the family and the upbringing of the children. The choice of residence is the husband's but, for certain reasons, the wife may absent herself[52].

While Madagascar has an approach fundamentally different to that of the Ivory Coast, the overall result of the reforms, in so far as they affect women, bears striking similarity. In both cases, the woman has been accorded capacities which she would not, theoretically, enjoy in customary law. Specially worthy of note is the wife's enhanced proprietary capacity and, by inference from her civil law personal legal regime, contractual capacity and locus standi. Similarly, based on French law, the wife is entitled to inherit from her deceased husband's estate. Although the principle of male dominance may have been preserved

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48 Ordonnance No 67-030 of December 18, 1967

49 Article 40 of Law No 67-030

50 Article 59 of Ordonnance 62-089 of October 1, 1962

51 Article 53 of Law No 62-089

52 Pédamon op cit 69. In general, it is expressly provided that marriage shall not prejudice the status of women: Article 50 of Ordonnance 61-025 of October 9, 1961

in the running of the family, this bears no relation to the implications of that principle in customary law. In that system, the interests of the extended family were represented by senior males and a woman could not usurp the powers and privileges associated with men. Under the new codes, the position of the husband is determined not by adherence to tradition but, rather, by the interests of expediency; nor is the wife precluded from exercising the same privileges as her husband if circumstances so demand. It is clear that the traditional legal regime regulating the status of women has been all but abolished.

In the English-speaking territories, there have been a number of recommendations concerning legislative change in family law and succession but little action has been taken. The reforms which have been implemented have been, with a couple of exceptions, partial, piecemeal and local[53]. In general, the approach has been of the evolutionary type. The inspiration for change came from Ghana which, in 1961, published a White Paper outlining proposals on marriage, divorce and inheritance[54]. Public criticism of these proposals was invited. A bill based on the recommendations failed, however, to gain support and was, finally, withdrawn[55]. The White Paper is of interest because the ideas it contained were, later, adopted by other countries. In general terms, it provided for the registration of all types of marriage; a widow's limited right of inheritance (namely a life-interest, until remarriage, of one-sixth of the self-acquired property of the deceased) and a provision that no person would be permitted to register more than one marriage. A novel proposal, subsequently adopted in other countries, was that the breakdown principle provide the only ground for divorce. This was the only proposal which was finally accepted in Ghana. The Matrimonial Causes Act[56] simplied the procedure for obtaining a divorce and provided that divorce should be granted only if it were proved that the marriage had

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53 Phillips and Morris Marriage Laws in Africa 39 fn 7, regarding the legislative reforms effected

54 Marriage, Divorce and Inheritance 1961

55 Phillips and Morris op cit 41

56 No 367 of 1971

broken down beyond hope of reconciliation. Even parties to a non-monogamous marriage may petition the court for divorce on these grounds but Section 41 enumerates a number of "faults" to be taken into consideration in a petition for dissolution of a customary marriage[57].

In 1964, the Ugandan government appointed a commission to enquire into marriage, divorce and the status of women[58]. Its recommendations were based on the Ghanaian White Paper but no further action was taken[59].

In 1967, a commission was established in Kenya to investigate the law of marriage and divorce[60]. Its recommendations were far more comprehensive than those of the Ugandan commission. It proposed the recognition of two types of marriage - monogamous and polygamous. The type would depend on the intention of the parties and would later be convertible, provided that both spouses agreed to convert the union. All marriages would require registration if they were to be recognised as legally valid. Payment of a marriage consideration was not considered necessary for validity. The only ground of divorce would be irreparable breakdown and divorce would not be granted without a certificate from a conciliatory tribunal. At the same time as the commission on marriage was sitting, a commission on succession was established[61]. This recommended, inter alia, that the widow or widows of a man who had died intestate should be entitled to a life interest in his free property (ie property which he was entitled to dispose of during his lifetime). This interest would terminate on remarriage. The courts would also have the power to make provision for any dependent who had been left destitute[62]. None of these proposals were adopted. In 1979, the Attorney-General introduced a bill aimed at modernising the marriage laws and prohibiting the

57 Daniels "Marital family law and social policy" in Daniels and Woodman (Eds) Essays in Ghanaian Law 113-117; Morris "Matrimonial Causes Act, 1971" (1972) 16 Journal of African Law 71

58 Report of the Commission on Marriage, Divorce and the Status of Women 1965

59 Phillips and Morris op cit 41-42

60 Report of the Commission on the Law of Marriage and Divorce 1968

61 Report of the Commission on the Law of Succession 1968

62 Phillips and Morris op cit 42-45

the infliction of corporal punishment by husbands on their wives. The bill was defeated in Parliament and the comments of the members of the House are an illuminating indication of the powerful conservative attitudes in Kenya. The Assistant Minister for Lands said:

> "We are being intimidated and dictated to by the views of a small pressure group of the elite ... our customs and traditional norms are being thrown to the dogs by people who have no constituencies to represent."

Another member complained that it was time that Kenya stopped "aping the British legal system and way of life"[63].

Tanzania was the first of the Commonwealth countries in Africa to legislate comprehensively on the law of marriage and divorce[64]. The Law of Marriage Act[65] integrates both customary and common law, in a manner reminiscent of Madagascar, thereby providing a single system of law which is applicable to all marriages and all people in the country[66]. Two types of marriage are recognised: monogamous and polygamous unions. The nature of the marriage is determined by the form under which it was celebrated, or the intention of the spouses[67]. No marriage is valid unless duly registered. Conversion from one type of marriage to the other is permitted if the spouses make a joint declaration to a judge or magistrate[68]. Christian marriages, however, are in a special position. The Act prohibits any conversion of a Christian marriage to a polygamous union while the couple remain Christians. Conversely, a subsequent Church marriage will automatically convert a potentially polygamous union into a monogamous union[69]. Equal protection is given to all parties and equal recognition is accorded all marriages[70]. The

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63 Report in the Daily Telegraph, 28 July, 1979

64 Preceded by a White Paper - Government's Proposals on Uniform Law of Marriage 1969

65 No 5 of 1971: Read "A milestone in the integration of personal laws: the new law of marriage and divorce in Tanzania" (1972) 16 Journal of African Law 19

66 Para 5 of the White Paper: "TANU believes that all human beings are equal and that every individual has a right to dignity and respect. The government is therefore anxious to enact legislation to provide for the uniformity of law relating to marriages and divorce." Read op cit 24

67 Sections 9 and 10 (1)

68 Section 11 (2)

69 Section 11 (5)

70 Read op cit 26

only difference between a monogamous and a potentially polygamous union is that the husband of a monogamous marriage may not take a second wife; if he does, the second union is void although not bigamous[71]. Particular protection is afforded the wives of a polygamist: if the husband proposes taking another wife, the existing wife (or wives) may lodge an objection on the grounds of hardship to herself (or themselves) or on the grounds of the unsuitability of the new spouse[72].

The Act provides for the separation of matrimonial property. On separation or divorce, the court is given a discretionary power to distribute the assets acquired during the marriage[73]. The wife has separate and equal rights to hold and dispose of property, make contracts, sue and be sued[74]. Neither she nor her husband, however, may alienate the matrimonial home without the consent of the other spouse[75]. The husband has a duty to maintain his wife (and, in appropriate circumstances, she has a reciprocal duty of support) and she may pledge his credit for this purpose. The husband is prohibited from inflicting corporal punishment on his wife[76]. A widow is free to live where she wishes and to remarry the man of her choice[77].

The sole ground for divorce is irreparable breakdown of the marriage[78]. Before granting the divorce, the court must consider all relevant evidence. A certificate from a Marriage Conciliatory Board (or exemption from it) must be obtained before court proceedings may be started[79]. The court may order maintenance to be paid, with the proviso that maintenance will not be ordered after divorce unless there is a special reason[80].

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71 Section 145; Read op cit 26

72 Section 20 (2)

73 Read op cit 32

74 Section 56

75 Section 59

76 Section 3 and 64

77 Section 66

78 Section 68

79 Read op cit 33-34

80 Section 115

In determining the custody of children, the welfare of the child is deemed to be of primary importance but the courts must have regard to the wishes of the parent and child (if it is old enough to express an opinion) and the customs of the community[81]. Finally, the Act is not deemed to have repealed any customary law which is not expressly included[82]. It is left to the courts to decide what customary law has been repealed by implication and what may continue to co-exist with the new legislation.

The Tanzanian Act is reminiscent, in many ways, of the Malagassy and Ivorien codes. The woman is accorded many benefits which she does not have under customary law and, indeed, even in the case of a customary marriage, her status is regulated largely in accordance with common law principles. In this regard, attention should be drawn to the wife's proprietary capacity, her contractual capacity and locus standi and the reciprocal duty of support. Of special significance is the attempt to protect the wives of a polygamist and the prohibition against infliction of corporal punishment. This piece of legislation has far-reaching implications for the traditional social order of Tanzania and it remains to be seen whether it has the success it deserves in furthering the interests of African women.

In Malawi, an important act has been passed regarding succession[83]. This attempted to simplify the procedures concerning administration of estates and to remedy the position of married women and children. The most significant provisions are the mandatory provisions to be applied on intestacy. These rules now prevail over customary law. Four-fifths of the deceased's property are to go to his widow (until she remarries) and children, of which two-sevenths must go to the wife who has been married the longest. No person may receive more under a will than he or she would have received on intestacy[84].

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81 Read op cit 36

82 Subsection 3A of the Judicature and Application of Laws Ordinance (Chapter 453), inserted by the Law of Marriage Act

83 Wills and Inheritance (Kamuzu's Mbumba Protection) Ordinance No 36 of 1964; Roberts "A revolution in the law of succession in Malawi" (1966) 10 Journal of African Law 21

Section 11 (1)

In Transkei, the legislature enacted a new code of marriage laws[85], seeking, in an ambitious attempt, to abolish the inferior position of the customary marriage in relation to the civil or Christian marriage. Although, in some respects, similar to the Tanzanian Marriage Act, the Transkeian law does not go as far in ameliorating the status of women. No attempt has been made to restrict the practice of polygamy and, indeed, under the Act, it is possible for a man who is already party to a civil or Christian marriage, to take another, polygamous spouse (such is the equality of recognition afforded both unions)[86]. Similarly, no restrictions have been imposed on transactions in respect of marriage consideration. It is specially provided that an agreement to pay lobolo in anticipation of a civil marriage is permissible[87].

In order to create a valid marriage in customary law, the following requirements must be observed[88]. If the spouses are over the age of 21, their consent is necessary. If they are under the age of 21, the consent of their guardians is also required. A minor wife must be handed over to her future husband and lobolo must be paid in terms of the law applicable to the bride's father. Finally, the marriage must be duly registered.

It is provided that the wife falls under her husband's guardianship[89]. The proprietary regime is automatically out of community of property and of profit and loss unless the parties make a pre-nuptial declaration to the contrary or enter into an antenuptial contract[90]. The intestate rights of succession of wives and children is always determined by customary law[91].

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85 Marriage Act No 21 of 1978

86 Section 3 (1) (a) (iii) of the Marriage Act

87 Section 15 of the Marriage Act

88 Sections 30 to 36 of the Marriage Act

89 Whether the marriage was a civil or customary union: Section 37

90 Section 38

91 Section 39

In order to dissolve a customary union, either of the spouses may approach a magistrate's court[92]. In this regard, it is worth noting that the wife's father no longer has the power to dissolve his daughter's marriage. A declaration of nullity is also possible and one ground is that the woman is already party to a subsisting customary marriage[93].

While the evolutionary approach, as typified in the Tanzanian and Malagassy legislation, recognises that law is a reflection of culture or life style and respects the cultural preference of the individual, it, nonetheless, imposes a high degree of rigidity in the law. Once rules are formulated and embodied in legislation, an essential consequence is that they become of general application to all people in the nation, regardless of their personal inclinations. Inevitably, certain rules in the new code will fail to find approval with one or other class of person. We do not have reliable information to ascertain how successful legislative reform has been in Africa, since the 1960's, but it is quite possible that major departures from tradition, in the sphere of family law and succession, have been ignored by those people who do not comprehend the new law or do not accept it.

(2) The Courts

The considerations above suggest that a more flexible, sensitive approach to law reform is necessary. The second, principal method of reforming customary law is through the courts. The district commissioners' courts, in Zimbabwe-Rhodesia, have long recognised the need to adapt customary law to changing social conditions and have grafted several rules from the common law onto the body of traditional customary law. On occasion, the deficiencies of customary law, in its contemporary social milieu, have been corrected by introducing institutions of the common law. The customary rule that a woman has no locus standi, for instance, has, in South Africa, been complemented by a further common law rule that a woman

92 Sections 47 and 48 (as read with Section 43)

93 Section 49

may apply to court for the assistance of a curator ad litem if her guardian cannot be found[94]. This is not, of course, the only way in which the courts may operate to change customary law[95]. Change may occur within the system itself, without recourse to a foreign system of law. Two cases from Ghana relating to matrimonial property, illustrate both these processes. While the system of customary law in that country favours the notion of joint family property, it does not recognise joint ownership of property by persons who are not of the same blood. In consequence, whatever a wife assists her husband to acquire, becomes the sole property of the husband. The courts, however, have embarked on a progressive development of this branch of the law, seeking to shake off the constraints imposed by the traditional rules of customary law. In Deborah Takyiwa v Kewku Adu[96], a divorced wife of a customary marriage successfully claimed one half of the cocoa farm which she had cultivated jointly with her husband on a piece of land belonging to her. Hayfron-Benjamin J suggested that the proprietary rights of a married couple should simply be determined in accordance with their intention. Conversely, in Bulley-Neequaye v Acolatse[97], the court had recourse to English law to correct an obvious inequity of customary law. The evidence established that the money for the purchase of a house was provided by the wife of a customary marriage even although the house was conveyed in the name of her husband. While the wife was away from home, her husband sold it to the plaintiff. On her return, the wife recovered possession. The plaintiff brought an action for recovery of the house. The High Court gave judgment in his favour but this judgment was reversed on appeal. The Appeal Court held that where a wife buys property and puts it in the name of her husband, prima facie, he holds it as a trustee for her.

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94 Twila v Nzimande 1940 NAC (T&N) 57; Tofu v Mntwini 1945 NAC (C&O) 63; reminiscent, in some respects, of the part played by the ius honorarium in Roman law: "adiuvandi vel supplendi vel corrigendi iuris civilis" D 1.1.7.1

95 And, indeed, it would be impossible to distinguish, in each case, the precise manner in which the common law has impinged on customary law: Elias The Nature of African Customary Law 273

96 Unreported judgement of the High Court May 18, 1971, cited by Daniels op cit 117

97 Daniels ibid

While, in principle, such processes have a commendable degree of flexibility and attention to social change, which legislation cannot imitate, there are several objections to judicial law-making in the Zimbabwe-Rhodesian context. The primary objection is one which was touched upon earlier: the only courts in which the judicial officers have the requisite training to undertake this type of reform are the district commissioners' courts and the Court of Appeal for African Civil Cases. The tribal courts, unfamiliar as they are with the common law, respond in a different fashion to social change and are more conservative in their outlook[98]. The magistrates' courts and the High Court do not, as a matter of practice, apply customary law. This situation is an open invitation to the forum shopper[99]. The only apparent restraints on forum shopping are in the nature of restrictions on the courts' areas of jurisdiction: claims will be entertained only if they arose within the court's area of jurisdiction or provided the defendant is resident there. These restraints offer no real safeguard, since the various areas of jurisdiction overlap, leaving the choice of forum to the plaintiff[100]. Apart from this, the determination of the role of plaintiff or defendant in legal proceedings is, very often, a matter of chance and it is undesireable in principle, that the system of law to be applied in a case should depend on the vagaries of a litigant's choice[101].

Judicial law-making must, necessarily, be a piecemeal and hesitant process. One must wait until appropriate facts come before the courts before a change can be implemented, regardless of the urgency of the need for reform. On the other hand, adherence to the principle of stare decisis lends

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98 Refer to Chapter 3

99 From a survey conducted in Salisbury, there is every indication that Africans are aware of the differences between the courts and are prepared to exploit these differences to suit their own ends: Stopforth Two Aspects of Social Change, Highfield African Township Salisbury Tables XLIV-XLVIIa

100 Although the court in In re Robert 1953 SR 47 clearly deprecated the evolution of two different systems of customary law

101 See the criticisms levelled at Section 11 (2) of the Black Administration Act No 38 of 1927, in South Africa, on the same grounds: Forsyth "Ius inter gentes: Section 11 (2) of the Black Administration Act 1927" (1979) 96 South African Law Journal 421-422

rigidity to judge-made law and the result of a sustained period of judicial law-making often bears little difference to legislation. The customary law of marriage, in Zimbabwe-Rhodesia, for example, now resembles a patchwork of the common law and customary law rules.

(3) The Repugnancy Proviso

A third method of excluding customary law is via the proviso to the application of customary law, namely, that it is to be excluded if it is contrary to natural justice and morality. Courts must evaluate each rule of customary law before it is applied, to determine whether it is in accordance with these principles; if it is not, customary law may not be applied. The district commissioners' courts in Zimbabwe-Rhodesia have, for instance, used this proviso to ameliorate the position of children by insisting that orders as to custody be in the best material and moral interests of the child concerned[102]. Similarly, in South Africa, the repugnancy proviso has been used to improve the position of women. Braadvedt, judge in the Native Appeal Court (as it then was), in a dissenting opinion, held that the procedure in customary law whereby a husband sues his wife's guardian for return of the woman or lobolo in order to dissolve the marriage was contrary to the audi alteram partem rule.

> "The woman in such a case is the person most vitally concerned ... It is a fundamental principle of law that no judgment should be given against a person who is not a party to the action and I cannot conceive of any reasons why that principle should be departed from just because the parties are native ... The Courts do try to decide cases in accordance with Native Custom where such custom is not opposed to the principles of natural justice. I am of the opinion that to order dissolution of a customary union without citing the party against whom such an order is sought, is opposed to the principle of natural justice. Native Customs must be evolved in conformity with our concepts of what is right or just. We are not bound to conform with them when they are obviously narrow and unjust." 103

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102 Vela v Madinika and Magutsa 1936 SR 171; Francisca and Simon v Matope 1953 SRN 650

103 Muiri v Nkosi 19[illegible] NAC (T&N) 94 at 98; followed in Tyobeka v Madliwa 1943 NAC (T&N) 40 at 42 but overruled in Zwana v Zwana and Twala 1945 NAC (T&N) 9

Useof the repugnancy proviso has, however, been circumspect[104] and, although the courts themselves have not openly articulated the reasons following, there appears to be good ground for their caution.

Both the terms"natural justice" and "morality" are notoriously vague. Today, natural justice is used as a term of art in the common law, referring to such well-known principles as the audi alteram partem rule. As such, it is applicable to matters of procedure rather than substantive law. Procedural customary law falls outside the ambit of the district commissioners' courts, since they are called upon to consider only the application of substantive customary law. It was earlier noted that the concept of morality has ambiguous connotations[105] but, presumably, it was intended that the courts should have the power to strike down rules of customary law which were in conflict with fundamental European notions of morality. If the Western European code of morals were not deemed to be the determining criterion, the legislature would have provided that both systems of law should be subject to the repugnancy proviso. Considerations of morality (unless they are assumed to derive from a universal and unchanging code[106]) may change as social needs and values change. There can be no doubt that such a proviso to the application of customary law, if broadly conceived, could be used with considerable effect. After the British annexed the Transvaal, in 1877, for instance, customary law could be applied only in so far as it was not "inconsistent with the principles of civilization recognised in the civilized world"[107]. The Supreme Court, on these grounds, declared a customary marriage repugnant because "polygamous marriages are inconsistent with the general principles of civilization"[108]. Similarly, the custom of giving a marriage consideration was regarded as the price paid for the purchase of a wife and, therefore, uncivilised[109]. The

104 Elias British Colonial Law 106

105 Chapter 4

106 Which, it is submitted, is the construction to be placed on this provision: see infra

107 Section 2 of Law 4 of 1885

108 R v Mboko 1910 TPD 445 at 447; subsequently this approach changed

109 Kaba v Ntela 1910 TPD 964

drastic effect which these decisions had on customary law was alluded to in Meesadoosa v Links[110]. In this case, the court was asked to consider the status of a widow. Mason J pointed out that if customary marriages were not recognised, a woman would have no legal father or brother; consequently, when her husband died, she would have no relative to assume guardianship and she would become derelict. The court felt that to recognise the principle of perpetual minority,

> "would not only be contrary to the principles of civilization, but in the highest degree contrary to natural equity."

By declaring all the customs concerning the constitution of the family repugnant, the very "fountainhead" of customary law was swept overboard, rendering the recognition of customary law substantially ineffective. Policy changed, in 1927, however, when the Native Administration Act was passed. Customary marriages were recognised (albeit for limited purposes) and the institution of marriage consideration was entrenched[111].

At times, the repugnancy proviso has been used simply to articulate rules of the common law, without any regard to wider ethical principles. In a Transkeian case, for example, the court held that where "Native custom comes into conflict with the common law or statutory law the former must give way"[112].

It is the wide discretion accorded the court by this proviso, with the potential for confusion and uncertainty inherent in that discretion, which suggests that the repugnancy clause is not the best medium for reform[113]. There is not only uncertainty surrounding the content of the clause itself but also the manner in which it is used. Does the clause operate to exclude a rule in the abstract or does it operate to exclude a rule as applied to a particular set of facts ? In at least

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110 1915 TPD 357 at 360

111 In terms of the Native Administration Act No 38 of 1927, Sections 11 (1) and 35: Seymour Bantu Law in South Africa 58-60

112 Ntamo v Mbede 3 SATC 9 at 12)

113 Which is similar to the public policy proviso: Richardson v Mellish (1824) 2 Bing 229 at 252. "It is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law."

one South African case, it seemed, by implication, that when a rule of customary law appeared inappropriate it could be excluded on the grounds of being repugnant. In Mokhesi v Nkenjane[114], a man persuaded a woman to leave home and marry him according to civil rites. The woman was over the age of 21 years but her guardian sued the defendant for abducting his daughter. The court held that to apply customary law would be to condemn this conduct as abduction and, implicitly, subject conduct sanctioned by the common law to a penalty. For this reason, the plaintiff lost his case. In other cases, it has been held that customary law may not be excluded simply if it would be to avoid a harsh decision[115].

In general, the courts' application of the repugnancy clause in Africa has been conservative. No doubt, there is often a temptation to invoke it to avoid hard cases but, once used in this fashion, the application of customary law could become completely arbitrary. The reluctance of the courts to invoke the repugnancy clause, even although it could be used to reflect, in a sensitive manner, changes in social values, is understandable. Certainly, the view of the English judge is that the task of making law vests, properly, in the legislature[116]. This is, fundamentally, the objection to using a proviso of this nature. Judicial law reform is generally conceived in limited terms, ideally operating within the confines of an accepted system of rules which may be modified in detail only.

(4) Exemption Procedures

Rather than rely on the uncertain process of judicial law reform, a simple expedient has been to allow the individual African the option to select his or her personal legal regime. This method of excluding the application of customary law, in areas where it is no longer appropriate, has the merit of respecting the individual's cultural preference and allowing him to determine the application of the system of law he considers best suited to his life style. The simplicity and

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1962 NAC 70 (S)

115 Ntulizwe v Komti 1921 NHC 6; Maguga v Scotch 1931 NAC (T&N) 54; Mdutywa v Mvingwa 1940 NAC (C&O) 34

116 Dumalitshona v Mraji 5 NAC 168 (1927); Madyibi v Nguva 1944 NAC (C&O) 36; Mashapo v Sisane 1945 NAC (T&N) 57 at 58

certainty of this type of approach has much to commend it

The exemption procedure was characteristic of the former French, Portuguese and Belgian colonies. In the Francophone countries[117], for example, the application of customary law was determined by providing, in various decrees, that customary law was applicable in all civil and commercial matters arising between persons who had a customary legal status (statut coutumier). On the other hand, if the litigants had a French civil status (statut civil français), French civil law was applicable. Until 1946, a person's status depended on his citizenship, ie civil law applied to citizens and customary law applied to non-citizens. Africans were not deemed to be citizens (which was a status reserved for the European settlers) but a means was offered, similar to naturalisation proceedings, whereby an African might obtain the status of a French citizen. It was provided that if an African had attained a certain level of education or had served in the armed forces, was of good moral character, had an advanced standard of living, was not a party to a polygamous marriage and had formallyrenounced customary law, he could be declared a French citizen by judicial or administrative act. In 1946, by two enactments[118], citizenship was accorded all French subjects in overseas provinces provided that "citizens who do not have a French civil status retain their personal status insofar as they have not renounced it."[119]

It was only in 1955 that the French Council of State declared that while the pre-1946 legislation concerning acquisition of citizenship no longer governed renunciation of customary law, an African over the age of 21 who was not a party to a polygamous marriage and who had been duly warned of the irrevocable nature and consequence of his act, could permanently renounce customary law by a declaration before a court competent to apply French law. Such an act was purely individual and

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117 For a full treatment of this topic see Salacuse op cit 49-54

118 The Lamine Gueye Law No 473 of May 7, 1946 and Article 80 of the French Constitution October 27, 1946

119 Article 82 of the Constitution

did not bind the declarant's family; a father, however, could include his minor children in his declaration.

The same policy was applied in the former Belgian Congo[120]. Express recognition was accorded customary law in respect of civil matters in the Colonial Charter of 1908. Provision was made whereby Africans might renounce customary law in favour of Belgian civil law by a process of immatriculation (registration). The rules governing registration were amended several times during the colonial period and, generally speaking, permitted any Congolese, who so requested, to become registered. As the European population increased, however, there was a growing tendency to establish stricter standards. In 1952, a royal decree[121] revised the system of registration and based it on a policy of cultural assimilation. Thereafter, a person could become registered only if he were of age and had "an education and manner of life implying the aptitude to enjoy the rights and to fulfill the duties provided by written legislation."

In the former Portuguese territories, it was decreed, in 1953, that metropolitan Portuguese law should be applied to all inhabitants of its overseas territories[122]. Customary law was deemed to apply to all Africans but this was considered to be a temporary measure prior to their assimilation into a Portuguese way of life. A procedure was established whereby African could voluntarily, and in two stages, opt for a civil law regime. The first stage was a partial option in favour of civil law with regard to a limited number of matters (property, contract, family law and succession). The second was a full option which could be exercised only by those who were over the age of 18, Portuguese-speaking, in fulltime employment and had completed military service. Application had to be made to a court administering civil law.

The response to these various systems of exemption from customary law

120 Salacuse op cit 469-471

121 Decree of May 17, 1952, amending Book I of the Civil Code

122 Robert "A comparative study of legislation and customary law courts in the French, Belgian and Portuguese territories in Africa" (1959) 11 Journal of African Administration 124

was poor[123]. The high educational requirements presented a barrier to many[124], of course, but political discontent with the system may have accounted for others refusing to participate. Particularly in the Belgian Congo and Portuguese territories, the applicant had no right to renounce customary law. This was an act to be performed at the discretion of the state[125].

The former English-speaking colonies had a similar system of exemption[126] and, in Zimbabwe-Rhodesia, Section 12 of the former Native Law and Courts Act permitted an African to make application to the Secretary for Internal Affairs for exemption from customary law. Again this procedure was very seldom utilised.

The Natal Code of Zulu law has specific, although more limited provision for women[127]. Any unmarried female, widow or divorcée who is the owner of immovable property or who, by reason of good character, education, thrifty habits or other good and sufficient reason is deemed fit to be emancipated, may be freed from the control of her father or guardian by order of a commissioner's court. The effect of this order is not to exempt the woman from the application of customary law but, rather, to endow her with the same capacities as an adult African man. Accordingly, she acquires proprietary and contractual capacity and locus standi. Apart from the requirements which are laid down in the Code, on which the woman's application may be granted, she cannot be considered to have complete freedom to make application for emancipation: her guardian must be notified of her application and he may object thereto[128].

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123 Salacuse op cit 51, citing Crowder: "As late as 1936 out of a total population of fifteen million in French West Africa there were only 2,136 French citizens, with the exception of the citizens of the Four Towns or Quatre Communes of Senegal"

124 Salacuse op cit 52

125 Robert op cit

126 Allott New Essays in African Law 193-196; and in South Africa, in terms of Section 21 of the Black Administration Act No 38 of 1927, an African may apply for exemption from customary law

127 Section 28 (1); Seymour op cit 56-58

128 Section 28 (2) Thusi v Thusi 1942 NAC (T&N) 84 and Camane v Camane 1960 NAC (N-E) 5 where the girl's guardian opposed the application

It is a pity that the exemption procedures have proved so unpopular. We have little indication why they were not utilised more frequently. It might be argued that the assumption that the applicant was forsaking an interior legal system for a superior legal regime of European origin could not be expected to encourage the support of many Africans, especially those with nationalist sentiments[129]. No doubt, as well, few Africans were aware of the possibility of obtaining exemption and, therefore, never made application. Whatever the past success of this procedure, there is good reason for retaining it today. The individual, when he or she is ready, may select a legal regime to match his or her personal life style. The effect of this decision may be simply and easily ascertained by production of the necessary documentary evidence.

(5) Conflict of Laws

The fifth approach is to exclude customary law in favour of the common law on a case-by-case basis, in terms of a system of conflict of laws rules. This approach must, of course, assume that both customary law and the common law are separate and different legal systems. It does not contemplate full-scale modification of customary law by the common law because if both systems were the same, no conflict could arise[130].

It is regretable that the conflict of laws has received so little attention in Africa since it is an admirably flexible and sensitive technique for responding to social change[131]. Implicit in any system

129 Church of the Province of Central Africa Report of the Commission to Inquire into the Legal Status of African Women paras 44 and 143

130 Allott op cit 116

131 Amongst the few writers to advocate use of the conflict system were Cowen "African legal studies - a survey of the field and the role of the United States" in Baade op cit 20-22; Kollewijn "Interracial private law" in Schrieke (Ed) The Effect of Western Influence on Native Civilization in the Malay Archipelago 204-235, discusses the problem of the interpersonal conflict with regard to the former German, French, British and Dutch colonies The earlier enthusiasm of people such as Neumeyer and de la Porte (cited by Kollewijn) to transpose the principles of Private International Law into the realm of the interpersonal conflict seems to have dissipated entirely

of conflict rules is recognition of cultural difference, whether it be via the territorial state (as in Private International law) or via race (as in colonial Africa). The former colonial governments placed heavy reliance on race[132] as the criterion for determining the application of customary law which, in certain cases, suggested discrimination against Africans[133]. It is not surprising that such an attitude should not find favour with the post-independence African governments. Nearly all the new states wanted a unified, national legal system. Yet it would be a pity to allow the racial attitudes of the colonial governments to obscure the real value of the conflict of laws in meeting the challenge of solving problems of social change. Initially, after the settlement of Europeans in Africa, race was a simple, cultural determinant[134]. Race is, today, no longer a cultural determinant as more and more Africans abandon their traditional ways in favour of Western European culture. If we appreciate that the two systems of law reflect cultural difference (without any unnecessarily perjorative racial overtones), we may find the conflict of laws a useful method of determining when to exclude customary law.

The rationale of a system of conflict rules is, essentially, the desire to gratify the legitimate aspirations of the litigants by applying the law which they would expect to be applied in the circumstances of the case[135]. Although it is the task of the court to make the decision which legal system of apply[136], it is still, fundamentally, the attitude of the parties which will guide the court in its choice. Implicit in the process of

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132 Allott op cit 182-188 on the concept of race generally

133 As in South Africa where a marriage in customary law receives only very limited recognition and is strictly distinguished from the common law union. See Rubin "The adaptation of customary family law in South Africa" in Kuper and Kuper (Eds) African Law: adaptation and development 208-212 and the comments by Cowen op cit 19

134 Seidman "The reception of English law in colonial Africa revisited" (1969) 2 East African Law Review 53-54

135 American Restatement of the Law of Conflict of Laws, Second 3rd Vol 6. The decision to apply customary law rests always, of course, on basic policy considerations: Allott op cit 12-13, regarding the policy considerations in the former British territories in Africa

136 As part of its wider task to administer justice. This theory was introduced by Graveson Conflict of Laws 7-10

selecting the appropriate law is the use of certain connecting factors[137]. From these factors, the attitude of the litigants may be inferred and from that the choice of law made. Outright recognition was never given to this process but use of the connecting factors was inevitable for the solution of conflict problems[138]. The major difference between the connecting factors of Private International law and those of the inter-personal conflict of laws lies in the nature of the factors. In the former system, connecting factors are conceived in terms of territory while, in the latter system, they must be conceived in terms of person[139]. During the colonial era, stress was laid on the personal connecting factor of race but this should not conceal the real issue which is one of culture. The more obvious connecting factor, today, would be the parties' life style. If the parties have a Western European life style, this would tend to suggest the application of the common law. If they retain a traditional African life style, customary law should be applied. Certainly, the courts in South Africa have not hesitated to use life style as a factor determining choice of family law[140].

A striking parallel exists between race and life style, on the one hand, and nationality and domicile, on the other[141]. A person's nationality

137 Baxter Essays on Private Law, Foreign Law and Foreign Judgments 22; Falconbridge Essays on the Conflict of Laws 39-40

138 Allott op cit Chapter 6, although some of the factors which Allott considers relevant in the choice of law process cannot all be deemed to be "connecting factors" in the sense in which that term is used here. Some, such as the existence of a remedy do not exist in the factual complex at all

139 Cowen op cit 22 argues for a revival of the medieval concept of the personal law

140 Tumana v Smayile and Another 1 NAC 207; Mboniswa v Casa and Another 1 NAC 264; Ramothata v Makhothe 1934 NAC (T&N) 74; Lebona v Ramakone 1946 NAC (C&O) 14; Sibanda v Sitole 1 NAC (NED) 347; Ntikinca v Mzilikazi 3 NAC 250. There is always the possibility, of course, that the litigants do not have the same life style. The same problem may arise in Private International law where the propositi have different domiciles (or nationalities). The solution to this type of problem is to prefer the domicile of one party according to a predetermined conflict rule. In the interpersonal conflict of laws, in terms of the approach recommended in Chapter 4, one should look to all the connecting factors in order to ascertain the legal system with which the issue has its most real and close connection

141 Allott op cit 189

is imposed upon him at the discretion of his state. The state's law is an integral part of the individual and, metaphorically speaking, it attaches to him wherever he happens to be. The individual is not free to renounce his nationality in favour of another which might suit his purposes better (apart, of course, from naturalisation proceedings). Conversely, men are free to change their domicile at will. Implicit in the notion of domicile is the determination of a personal legal regime in accordance with individual autonomy. A man may choose his domicile and, hence, his personal law to suit his own inclinations[142]

Race is used as a choice of law criterion in much the same manner as nationality. Once an individual is typed as "African", customary law is applied to him, in the same way as French law will be applied to a French national. An African has no freedom to change his legal regime in favour of a European system of law. The former colonies did, as we have seen, permit change of personal law through an exemption procedure; but, in theory, all African inhabitants of the colonies were deemed to be bound by customary law. If an individual could prove sufficient change in his cultural attributes, ie by education, employment, language proficiency etc, he could make application to a state authority to abandon customary law in favour of the received system of European law. While both the exemption procedure and the conflict of laws operate to permit the individual to choose his or her personal legal regime, the power of permission vests, ultimately, in the state[143]. The major difference between these two processes lies in the permanent effect of the exemption procedure, as opposed to the case-by-case evaluation necessary in terms of the conflict of laws approach.

If a connecting factor, such as life style, is used in the context of the conflict of laws process, it may operate in a manner similar to

142 Raeburn "Dispensing with the personal law" (1963) 12 International and Comparative Law Quarterly 125-126; Schmidt "Nationality and domicile in Swedish Private International law" (1951) 4 International Law Quarterly 39

143 The parties may not oust the court's discretion to apply one or other legal system, except in terms of Section 3 (3) (a) (i) and (3) (b) of the African Law and Tribal Courts Act. In essence, it is the court which determines which legal system is to be applied. The same is true of domicile: it is the court which determines the domicile of the propositus

domicile to permit the individual to select his personal legal regime. If a person has chosen a European education, mode of living and form of employment, all far removed from his traditional African culture, a European life style may be inferred from these facts. This, in turn, indicates the applicability of the common law. Life style is obviously not applicable to the solution of every conflict problem (such as commercial disputes) but it is apposite in determining which legal system to apply in disputes arising within such areas as family law and succession. All these are matters closely linked with life style. Moreover, because family law and succession have such an important bearing on the individual's day-to-day existence, it would seem to be an area in which party autonomy would be most appropriate. Conversely, it would seem to be an area least susceptible to radical change by legislation or interference by the state.

Use of life style as a connecting factor has a high degree of flexibility in determining choice of law and a proper sensitivity to changing social conditions but it does not provide an easy answer to the problems facing the courts. Like domicile, life style is difficult, in practice, to determine. It must be inferred from a variety of facts and this leads to a case-by-case approach[144]. Furthermore, the individual is generally presumed to be bound by customary law. In each case, he must prove to the court that the common law should be applied - a costly and lengthy process. The courts' infrequent use of this connecting factor may well be because of their reluctance to embark on the complex and detailed investigation required by a connecting factor such as this. Race, like nationality, is not nearly so elusive a concept because it admits of a simple, certain test.

The solution to these problems may be sought in two principles. Firstly, the procedure for exemption from customary law should be re-introduced in Zimbabwe-Rhodesia enabling women, of their own accord, to obtain exemption from customary law for all purposes. This would have the advantage of dispelling the uncertainties which presently surround

144 See the discussion of the merits and demerits of domicile in Private International Law Cheshire and North Chesnire's Private International Law 190-97

emancipation, particularly tacit emancipation. A certificate of exemption would provide immediate proof before a court or administrative tribunal of a change of legal regime and would save the expensive procedure of proving life style in every case.

While this solution, superficially at least, seems to avoid the problems associated with the conflict of laws approach, it engenders problems of its own. Exemption from customary law gives the woman power to enter into contracts, the power to sue and be sued unassisted etc but how should these powers be harmonised with her previous rights and duties ? Contractual capacity and locus standi present no great difficulty but what of the woman's power to act as guardian of her children and her power to contract her own marriage and obtain dissolution of the marriage. These powers directly infringe pre-existing powers held by her guardian. From the day a daughter is born, her father may legitimately, at least in terms of customary law, expect to obtain rovoro when she marries. Is this expectation to be set at nought if his daughter decides to obtain exemption from customary law ? Similarly, are her husband and his family to lose their rights of guardianship over the children she bears ? A person's rights, duties, powers and privileges do not exist in abstract; any change in a right must, necessarily, affect the bearer of the corresponding duty. We are driven, in consequence, to make a value judgment: either the woman is to be given the freedom to determine her own life or she must remain perpetually subservient to the interests of her family or her husband.

While it has already been clearly indicated, in this thesis, that the author inclines to the former view, there is no reason why certain limitations should not be imposed to restrict the woman's freedom, both in her own interests and the interests of her family. In order to ensure that the woman exercises her power of application for exemption in a considered manner, she should be at an age when the consequences may be fully appreciated. She should, accordingly, be permitted to apply for exemption only when she has attained the age of 21 years. It should, moreover, be proved that she is de facto capable of living independently of the support and control of her family. It would be possible for her

guardian to lead evidence to rebut any assertions she might make in this regard but, apart from this, it is felt to be undesireableto follow the Natal Code and permit her guardian a formal power of objection since this would place an undue restriction on the woman's freedom. Nor will the rights of her guardian be greatly prejudiced if the woman is exempted from customary law; most importantly, he may lose his right to claim rovoro[145] (which is unlikely under the present law) but, apart from this, his daughter will have a common law duty to support her parents.

Special difficulties might be encountered if a woman, exempted from customary law, were to marry a man, according to customary law, who had not been similarly exempted. Whose personal legal regime should prevail ? The same problem is found in Private International law and the solution, in that system, is to prefer the law of the husband's domicile. It would be going too far to insist that the woman's common law personal regime prevail and, indeed, out of keeping with the basic principles of both the common law and customary law. The answer to this type of problem might be found in the form of the marriage. If the woman entered into a customary marriage, customary law should determine her relationship with her husband and children. If it is a marriage according to civil or Christian rites, the common law will continue to prevail. Following on this rule, it would seem unwise to allow the woman the freedom to apply for exemption during the subsistence of a customary law marriage. Having entered into the union of her own free choice, aware of the consequent rights and duties, she should not be permitted, later, to upset the rights previously acquired by her husband and both the spouses' families. From these propositions, it follows that the woman's power to apply for exemption from customary law obtains only when she is over the age of 21 years and not a partner to a customary law marriage.

The second solution to the choice of law problems may be sought in the form of the marriage which a woman has contracted. Simply by producing the marriage certificate, a court or administrative tribunal will have ready proof of the parties' personal legal regimes. If the woman contracts

145 A particularly contentious issue in Zimbabwe-Rhodesia: Commission of Inquiry into Racial Discrimination 77-78

a civil or Christian marriage, it may be inferred that she has opted for a Christian and European type of culture and, accordingly, intended the law which governs that union to determine her personal legal regime. Particularly in the case of a Christian marriage, the parties must be assumed to be aware of the religious principles (with which the common law is in harmony) regulating the union. This solution has the merit of involving both the spouses and doing no violence to the expectations of one. On the other hand, if we are to give efficacy to the woman's power to choose her legal regime, account cannot, at the same time be taken of the interests of the wife's family[146]. This solution is attractive, moreover, in that it does not require major amendments to the law as it presently exists. While the general effect of a civil or Christian marriage is to subject the spouses to the common law, there are certain, specific areas in which customary law still prevails. The matrimonial proprietary regime and guardianship of children are two areas which are in immediate need of reform. These problems may best be dealt with by amending legislation. The overall effect which is sought is to ensure that both spouses become subject to the common law.

The principal difficulty associated with this solution involves the inference that the spouses are aware of the legal implications of the form of their marriage[147]. Many Africans enter into a Christian marriage simply because of the dictates of their religion, without appreciating the consequences of the ceremony. One answer to this problem might be found in separating the legal effects of civil and Christian marriages. As was formerly the case in Malawi[148] (and still is the case in the Francophone countries[149]), a Christian marriage has no legal effect unless later followed by a civil ceremony. Attractive as this solution appears,

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146 Except in so far as her guardian's approval is required before the woman may obtain an "enabling certificate" to celebrate the marriage. This will be considered below

147 In the South African case of Ntikinca v Mzilikazi 3 NAC 250, for instance, the court held that although the defendant had been baptised and married in Church, he had not, necessarily, abandoned his traditional way of life and, accordingly, the claim for seduction damages was heard under customary law in preference to the common law

148 Gombera v Kumwembe 1958 R & N 849 (N)

149 Hastings Christian Marriage in Africa 92-95

it cannot be expected to receive the support of the Church in Zimbabwe-Rhodesia[150] or, indeed, the government. The answer must be sought in less radical solutions. In the long term, only education will provide a complete solution to this problem but, to some extent, the issue may be circumvented by obliging all marriage officers, prior to marrying prospective African spouses, to advise them of the nature of the union and the effect it will have on their legal regime.

The life style of the parties will thus act as a residual method of determining choice of law in terms of Section 3 (1) of the African Law and Tribal Courts Act. If a person has been exempted from the application of customary law or is the spouse of a civil or Christian marriage, the common law will regulate his or her personal status. Furthermore, the children born of a civil or Christian marriage will be governed by the common law, at least in their relations with their parents. In all other cases, the parties' life style may operate to determine choice of law in matters of family law and succession.

In certain respects, it must be appreciated that even if customary law is chosen as the prevailing legal system, it should not, on grounds of policy, be applied although it might reflect the cultural preference of the individual[151]. The bride to a customary law marriage, for example, must be given an opportunity to express her consent to the union. If customary law would permit her guardian to arrange her marriage, regardless of her wishes, it should not be applied. The reason for rejecting customary law in these circumstances, is not the cultural bias of the

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150 Hastings ibid. Early missionaries in Zimbabwe-Rhodesia, anxious that Church marriages should rest on the firm foundation of legal support, won government approval to ensure that they would have the same effect as marriages under the Marriage Act

151 Although, for the conflict of laws to function effectively, it must be assumed, initially, that both the legal systems potentially applicable to the facts of the case will yield a just result: Baxter op cit 22; Kahn-Freund General Problems of Private International Law 7-9. It is only after the applicable legal system has been chosen that the court may assess the merits of the foreign rule either via the public policy exclusionary rule in Private International law or via the repugnancy proviso in inter-personal conflicts

court[152] but, rather, appeal to a notionally universal system of human rights, such as that contained in the Universal Declaration[153] and the United Nations Covenants[154]. It is in this sense that the repugnancy proviso must be construed[155]. All legal system, whether the common law or customary law, should be read subject to this code of fundamental rights and freedoms. In terms of this argument, a reserved domain is created whereby party autonomy must be restricted. This policy is particularly apposite in cases where the individual is not in a position to articulate a choice of life style and, in consequence, choose a personal legal regime. The child, for instance, cannot be considered to have a life style separate from that of its parents; but merely because the parents live according to a traditional African way of life should not give them the power to arrange the child's marriage. The African woman is frequently, in practice, placed in a position where she is unable to choose her personal legal regime. As a child, of whatever age (although this is not as true today as it was in the past), she is committed to remain in her father's house and follow his life style; as a wife, she is committed to the life style of her husband. Social values and attitudes have not been so far eroded that a woman has the same freedom a man has to pursue the work, education and recreation she chooses.

To a great extent, of course, the rules of customary law which were in conflict with basic human rights have already been eliminated by the application of the repugnancy proviso or by legislation. Child

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152 The attraction of the conflict approach lies in its value-free stance viz-à-viz foreign legal systems: Kollewijn op cit 234-235; but it must, immediately, be conceded that Private International law does not take a completely unbiased attitude to systems of foreign law since, via the public policy exclusionary rule, the forum may refuse to apply a foreign rule which appears to be contrary to the policy of the forum. This same policy consideration is built into the interpersonal conflict systems of Africa via the repugnancy proviso. Leslie "The repugnancy rule in African law and the public policy rule in conflict of laws" (1979) Acta Juridica 117 suggests a synthesis of the two views

153 General Assembly Resolution 217 (III) of 1948, especially Articles 2, 16 and 17

154 Especially Articles 23 and 24 of the International Covenant on Civil and Political Rights

155 Paper delivered by NS Peart at a conference on the Restatement of Transkeian Law, Umtata, September 18-20, 1979

marriages etc have been prohibited. In fact, there remains but one area which the courts have not yet considered. This may now, more properly, be dealt with by legislation, as will be indicated below.

From the foregoing, it is evident that whatever reforms are proposed must, as far as possible, favour the exercise of individual choice. Freedom of choice will be facilitated only in so far as a value free attitude is adopted towards both legal systems. Such an approach will do much to gain the acceptance of the people affected by the law. Where possible the individual's freedom to adopt the legal system of his or her own preference should be brought into harmony with the interests of others. For this reason, account may be taken, on occasion, of the interests of the woman's guardian and her husband but it should be accepted that if we are to permit the woman a common law regime, the interests of the former must, to some extent suffer.

Within these terms of reference, it is recommended that provision be made for an exemption procedure, similar to that contained in the former Section 13 of the Native Law and Courts Act. Exemption should be permitted only if the application is 21 years or older and is not a party to a subsisting customary law marriage unless his or her spouse consents. The application should be made to a district commissioner's court or the General Division of the High Court and the necessary legislation should direct that the court make inquiry as to whether the applicant is de facto independent of his or her parents and economically self-supporting.

Secondly, it is recommended that various changes be made to the African Marriages Act, ensuring that the African woman, on contracting a civil or Christian marriage, attain the same status as her white counterpart would when contracting a marriage under the Marriage Act. This involves:

(a) the imposition of a duty on district commissioners to advise prospective spouses of the nature of their decision and the effect it will have on their legal status, prior to issuing an enabling certificate. In particular, mention should be made of the proprietary consequences of the marriage, guardianship of the children

and intestate succession.

(b) The present procedure for obtaining an enabling certificate should now be abolished. It may be replaced by a new form of enabling certificate which states that the district commissioner has duly advised the couple of the implications of their decision to marry according to the Marriage Act. Under the present system, the woman's father, in practice, has the power to impede the marriage until he has extracted as much rovoro as he is able to from the prospective bridegroom. It is undesirable that the mercenary intent of the guardian should be allowed to inhibit his daughter's wish to marry. Apart from this, if the girl is under the age of 21, the enabling certificate seems to be an unnecessary duplication of the common law rules regulating the capacity of a minor to contract a valid marriage. This should provide sufficient check on headstrong young couples. The present form of enabling certificate will be necessary only if the parties intend entering into a customary law marriage.

(c) Section 13 of the African Marriages Act should be repealed and substituted with a section providing that when spouses enter into a civil or Christian marriage, their property shall be governed by the common law and, on the death of one or other of the spouses, shall devolve according to the common law unless devised by will.

(d) A further section should be inserted in the African Marriages Act to provide that it shall not be necessary, both with regard to the validity of the marriage or to custody and guardianship of children born of the marriage, for there to be payment or agreement as to rovoro if the spouses intend to contract a civil or Christian marriage.

(e) A section should be inserted in the African Marriages Act to provide that, after contracting a civil or Christian marriage, the rights and duties, capacities and incapacities of the parties in private law shall be governed by the common law.

(f) A section should be inserted in the African Marriages Act to provide that custody and guardianship of minor children, both during the subsistence of the marriage and on the death of one of the spouses or divorce, is determined by the common law.

in terms of existing law, the implications of such amendments to the Act will be as follows. A girl who wishes to marry according to civil or Christian rites will, if she is under the age of 21, require the consent of her guardian. If she is over the age of 21, she may marry without his consent and, in practice, this will discourage the potential for mercenary dealing with regard to rovoro.

No doubt, her guardian may use the requirement for his consent as a useful method of obtaining rovoro but, now at least, the abuse of this power will be restricted when the woman is over the age of 21. The effect of the marriage will be to regulate the spouses' relationships with one another and their children by the common law. On marriage, the woman, in terms of existing law, is emancipated from her guardian's control for all time. Under the common law, she is automatically free of her husband's marital power, unless the contrary is provided in an antenuptial contract. She will, accordingly, have full contractual capacity and locus standi (subject to the provisions of Section 3 (2) of the African Law and Tribal Courts Act) and her capacity and rights and duties in delict will be determined by the common law. The wife may, on the death of her husband or divorce, become the guardian of minor children born of the marriage. Her new capacities carry with them greater responsibilities (especially, for instance, the obligation to provide maintenance for minor children) but these responsibilities are rendered feasible by her enhanced rights in respect of matrimonial property. If the woman is entitled to maintenance on divorce (and her share of the matrimonial estate) and to a portion of her deceased husband's estate according to the common law of intestate succession, she will be placed in a more favourable position to meet her obligations.

The status of children born of a civil or Christian marriage will be governed by the common law regime which regulates the status of their parents. This must follow from the nature of their parents' marriage if the child's rights are to be harmonised with the rights and duties of the parents. If the child, later, enters into a customary law marriage, it will become subject to a customary law regime[156]. It is felt that

156 This is the position in South Africa: Nombida v Flaman 1956 NAC (S) 108; Seymour op cit 240-241

the reforms already effected in customary law both by legislation (such as Section 3 (5) of the African Law and Tribal Courts Act) and the district commissioners' courts offer sufficient protection to children so as to warrant no further amendments.

Whatever issues are not covered by statutory amendments will be governed by the general conflict of law provisions contained in Section 3 (1) of the African Law and Tribal Courts Act. Accordingly, such questions as adultery and _rovoro_ will be determined by the law selected under these choice of law rules.

Apart from the above amendments, special provision should be made to prevent a man from terminating his marriage in customary law without due recourse to a court of competent jurisdiction. Only in this manner, may the wife's rights (especially with regard to property and the custody of children) be afforded proper protection. In particular, this amendment is designed to prohibit a man from discarding an unwanted wife (married according to customary law) simply by entering into a civil or Christian marriage. Since the decision in Chikosi's case (in spite of Section 16 of the African Marriages Act), it would be advisable to amend the African Marriages Act to provide that if a man, who has contracted a potentially polygamous marriage, goes through with a ceremony purporting to be a civil or Christian marriage with another woman, while his wife is still alive and his potentially polygamous union has not been properly terminated by divorce, the second union shall be a nullity. Similarly, if a man, who has contracted two or more polygamous marriages in terms of the African Marriages Act, goes through with a ceremony purporting to be a civil or Christian marriage with one of his wives or another woman while his polygamous wife (or wives) are still alive and his polygamous marriage(s) have not been dissolved, the later ceremony shall be a nullity. In addition, it must be provided that a marriage in customary law is to be regarded as a valid marriage for all purposes in Zimbabwe-Rhodesia.

Finally, to secure the protection of all African wives, it should be specially provided that no person has the liberty to inflict corporal punishment on his or her spouse. Although customary law may permit a

a husband to beat his wife (often in a manner which would be regarded as immoderate in white society), this liberty is all too often abused. It is out of keeping with fundamental human rights to permit chastisement of an adult and any such liberty which the husband may now possess should be abolished. Accordingly, the infliction of corporal punishment on a wife should be regarded as an assault.

It is appreciated that these reforms will be applied in the courts of district commissioners. This is inevitable. The attitude of the tribal courts to legislation is unreliable and if reform is to be effective, it must be left in the hands of the district commissioners. Tribal courts do not have jurisdiction with regard to civil or Christian marriages nor will they have jurisdiction in the case of a woman exempted from customary law (since they are competent to apply only customary law). The reform which will be of major relevance to the tribal courts is that pertaining to corporal punishment and if this is to be made effective, tribal courts must be given special criminal jurisdiction to try and punish offenders.

APPENDIX A

GLOSSARY OF SHONA TERMS

ambuya	grandmother
chidawo	sub-clan name
chipanda	the sister to whom a son is linked for the provision of rovoro
chiredzwa	rearing fee
chizwarwa	segment of lineage, comprising three generations
dunhu	tribal ward
gomba	lover of a married woman
- harino mwana	"a lover has no child"
kubata mukadzi	lit "to detain a woman" in order to persuade her husband to pay rovoro
kuenzanisa nyaya	to settle a dispute
kugara nhaka	lit "to remain with an estate"; to succeed to a deceased person; to enter into a levirate union with the deceased husband's male relative
kupfuma	to become rich
kupisa guva	lit "to burn the grave"; to have sexual intercourse with a widow before her deceased husband's spirit is laid to rest
kuramba parukukwe	lit "to refuse on the sleeping mat"; to deny a spouse conjugal rights
kurambana	lit "to refuse one another"; to dissolve a marriage
kurova guva	lit "to beat the grave"; the ceremony at which a deceased's spirit is laid to rest and his heir succeeds
kuroyorana	to contract a marriage by payment of rovoro
kutizira	lit "to run away"; flight marriage procedure
kutizisa	lit "to cause to run away"; elopement marriage procedure
kurouga mhoswa	to judge a case
kuvonzira	lit "to ask on behalf of someone"; procedure for regular proposal marriage
kuzwarira	lit "to bear for someone"; credit marriage
maputiro	lit "covering payment"; especially a payment to obtain parental rights to a child

masungiro	gift by husband to his wife's parents after consummat of the marriage
mavoko	lit 'hands"; property which a wife acquires by virtue of her labours
mhuri	family; kindred
misodzi	tears
mukuwasha	son-in-law
munyai	intermediary in marriage procedure
musha	village
mutupo	clan name
muzukuru	grandchild
mvana	a woman who has borne a child
ngombe	cow
- youmai	motherhood beast
- yauya nouswa pa muromo	"the cow comes with grass in its mouth"
nyika	chiefdom
pfuma	marriage consideration
rovoro	marriage consideration; nowadays, this connotes, more particularly, the cattle component of the marriage consideration
tshivunzo	indication of agreement to a proposed marriage
rudzi	clan
rutsambo	lit "bracelet"; cash paid in consideration for a marriage
sabuku	lit "keeper of the book"; modern term for village headman
sadhuri	head of a family
samukadzi	paternal aunt; cf vatete
samusha	village headman
tezwara	father-in-law
umai	lit "pertaining to motherhood"; property acquired by a woman by virtue of her st. s as a mother
upfumi	wealth, especially livestock
vanuvevu	custodian; husband's sister
vamwene	husband's sister; cf vanuvevu
vatete	paterna aunt; cf samukadzi
zarura muromo	lit "opening the mouth"; cash payment made to persuade bride's father to state his demands for rovoro

APPENDIX B

STATUTES

SECTION 3 OF THE AFRICAN LAW AND TRIBAL COURTS ACT (CHAPTER 237)

(1) Subject to the provisions of this section and of any other enactment, in the determination by any court of law of any civil case between Africans or between an African and a person who is not an African, the decision may be given in accordance with customary law.

(1a) Save as otherwise provided in this section, unless the justice of the case otherwise requires -

(a) customary law shall be applicable in any case which is between Africans and which relates to -

(i) seduction or adultery; or
(ii) the custody or guardianship of children; or
(iii) the devolution otherwise than by will of movable property on the death of an African:

Provided that where the deceased was an African mentioned in section 70 of the Administration of Estates Act (Chapter 301) the provisions of that section shall apply; or
(iv) a marriage between Africans contracted under customary law, whether or not it has been solemnized under the African Marriages Act (Chapter 238);

and

(b) the law of Rhodesia shall be applicable in any other case.

(2) The capacity of any African to enter into any transaction or to enforce or defend any rights in a court of law shall, subject to any enactment affecting any such capacity, be determined in accordance with the law of Rhodesia:

Provided that, if the existence or extent of any right held or alleged to be held by an African or of any obligation vesting or alleged to be vesting in any African depends upon or is governed by customary law, the capacity of the African concerned in relation to any matter affecting that right or obligation shall be governed by customary law.

(3) Subject to any enactment, where -

(a) it appears -

(i) from express agreement that the parties have agreed; or

(ii) from the nature of or circumstances surrounding the matter within which any case has arisen, that the parties have agreed or can be presumed to have agreed;

that customary law or, as the case may be, the law of Rhodesia should be applicable; or

(b) the parties express to the court their consent to customary law or, as the case may be, the law of Rhodesia being applicable;

that law shall be applied accordingly, and any consent referred to in paragraph (b) shall be recorded in writing and attached to the court record of the case and shall be irrevocable.

(4) In cases where no express rule is applicable to any matter in controversy, the court shall apply the principles of justice, equity and good conscience.

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

(6) In this section -

"African" includes -

(a) any company or body of persons, corporate or unincorporate, if persons who have a controlling interest therein are Africans;

(b) a provincial authority, African council or tribal land authority.

CHAPTER 238

AFRICAN MARRIAGES

To provide for the solemnization of African marriages; to regulate certain other incidents in connexion with such marriages and to prevent the pledging of children.

Ord. 5/1917; Acts 23/1950, 29/1951 (s. 2), 11/1962, 14/1962 (s. 2), 24/1962 (s. 2), 11/1971; R.G.N. 153/1963.

[1st January, 1951.]

ARRANGEMENT OF SECTIONS

Section

Short title.

1. This Act may be cited as the African Marriages Act [*Chapter 238*].

Interpretation of terms.

2. In this Act -

"African marriage officer" means—

(a) a district commissioner or district officer; or

(b) an official or chief appointed to be an African marriage officer in terms of section *eighteen*;

"district" means a district or sub-district created under the General Administration Act [*Chapter 85*];

"marriage" means a marriage between Africans;

"Marriage Act" means the Marriage Act [*Chapter 37*] and includes, where appropriate, the Marriage Act [*Chapter 177 of 1963*];

"marriage consideration" means the consideration given or to be given by any person in respect of the marriage of an African woman, whether such marriage is contracted according to African law and custom or solemnized in terms of the Marriage Act or this Act;

"marriage register" means the marriage register referred to in section *eight*;

"Minister" means the Minister of Internal Affairs;

"solemnization", in relation to marriage, means solemnization in terms of this Act.

Marriages not to be valid unless solemnized.

3. (1) Subject to the provisions of this section, no marriage contracted according to African law and custom, 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—

(a) such marriage is solemnized in terms of this Act; or

(b) such marriage was registered under the Native Marriages Act [*Chapter 79 of 1939*] before the 1st January, 1951; or

(c) such marriage was contracted before the 1st February, 1918; or

(d) being a marriage contracted outside Rhodesia, such marriage is recognized as a valid marriage in the country in which it was contracted.

(2) (a) A marriage contracted according to African law and custom on or after the 1st February, 1918, and before the 1st January, 1951, which was not registered under the Native Marriages Act [*Chapter 79 of 1939*] shall be regarded as a valid marriage.

(b) If the male party to a marriage referred to in this subsection fails to have such marriage solemnized in terms of this Act, he shall be guilty of an offence and liable to a fine not exceeding twenty dollars or, in default of payment, to imprisonment for a period not exceeding three months.

(c) A prosecution for a contravention of paragraph (b) shall not be a bar to further prosecution or prosecutions thereunder if the accused does not thereafter have his marriage solemnized in terms of this Act.

(d) No male party to a marriage who failed to register such marriage under the Native Marriages Act [*Chapter 79 of 1939*] shall be liable to prosecution under that Act for such failure.

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

Who must be present at solemnization of marriage.

4. (1) A marriage to be solemnized in terms of this Act shall be solemnized by an African marriage officer of the district in which the woman or her guardian resides.

(2) In addition to the African marriage officer and the parties to the marriage, there shall be present at the solemnization of every marriage in terms of this Act the following other persons—

(a) the guardian of the woman or a deputy appointed by such guardian:

Provided that, if the solemnization of the marriage has been authorized by a provincial commissioner or if the African marriage officer is satisfied that the guardian of the woman has consented to the solemnization of the marriage and has agreed to the form and amount of the marriage consideration, the presence of the guardian of the woman or his deputy shall not be necessary; and

(b) a witness, who shall be the chief, headman or kraal-head of the guardian of the woman or such other person as the African marriage officer may approve.

(3) The husband shall pay a fee of one dollar to the person who, in terms of paragraph (b) of subsection (2), is the witness at the solemnization of his marriage.

Authorization of marriage by provincial commissioner.

5. (1) If the guardian of a woman who wishes her marriage to be solemnized withholds or refuses to give his assent to the marriage, the parties to the proposed marriage may appeal through the district commissioner of the district in which the woman resides to the appropriate provincial commissioner who may authorize the solemnization of the marriage if, after due inquiry, he is satisfied that such consent is unreasonably or improperly withheld or refused. The provincial commissioner may also after consultation with the guardian of the woman fix the marriage consideration.

(2) If no guardian of a woman who wishes her marriage to be solemnized can be found, the appropriate provincial commissioner may, after due inquiry, authorize the solemnization of her marriage.

African marriage officer may put relevant questions.

6. (1) The African marriage officer may put to either of the parties to a proposed marriage, to the guardian of the woman or his deputy, and to the person who, in terms of paragraph (b) of subsection (2) of section *four*, is to be the witness at the proposed marriage any question relevant to the identity or conjugal status of the parties to the proposed marriage and to the determination of the marriage consideration and to the existence of impediments to the marriage.

(2) Any person who refuses to answer, or wilfully gives a false answer to, any question put to him in terms of subsection (1) shall be guilty of an offence and liable to a fine not exceeding fifty dollars or, in default of payment, to imprisonment for a period not exceeding six months.

(3) If any person impersonates either of the parties to a marriage or the guardian of the woman or his deputy he shall be guilty of an offence and liable to a fine not exceeding fifty dollars or in default of payment, to imprisonment for a period not exceeding six months.

Solemnization of marriage.

7. (1) If the African marriage officer is satisfied—

(a) save where the provincial commissioner has fixed the marriage consideration, that the guardian of the woman and the intended husband have agreed on the marriage consideration and the form thereof; and

(b) that the intended husband and wife freely and voluntarily consent to the marriage; and

(c) that the guardian of the woman consents to the marriage or that the provincial commissioner has authorized the marriage; and

(d) that no lawful impediment exists to the proposed marriage;

the African marriage officer shall solemnize the marriage by declaring the parties to be man and wife and such marriage shall be a valid marriage contracted according to African law and custom.

(2) If a marriage officer declines to solemnize a marriage referred to in subsection (2) of section *three* because he is not

satisfied in terms of subsection (1), he shall declare such marriage null and void *ab initio*.

Marriage register.

8. (1) Immediately after the solemnization of every marriage an entry thereof shall be make in ink in a marriage register to be kept for that purpose by the African marriage officer in the form or to the effect of the specimen set forth in the Schedule. Every such entry shall be signed by the African marriage officer.

(2) At the same time, before the parties depart, there shall then and there be made on a separate piece of paper a duplicate original register of such entry in which the same matter shall be entered and signed by the African marriage officer in manner or to the effect of the specimen set forth in the Schedule. The African marriage officer shall deliver such duplicate original register to the woman.

(3) Every extract from a marriage register which purports to be certified as a true copy therefrom by the African marriage officer who for the time being has the custody of the marriage register and every duplicate original register shall respectively be good evidence of the facts therein recorded in and before all courts and in criminal and civil proceedings therein and shall be admissible upon its mere production by any person.

(4) An African marriage officer shall be deemed for the purposes of section 277 of the Criminal Procedure and Evidence Act [*Chapter 59*] to be an official registrar of marriages.

Search of marriage register.

9. Any person may at all reasonable times during office hours search the marriage register in the presence of the person for the time being having the custody thereof and may upon payment of a fee of one dollar have a true copy of any entry therein certified under the hand of the African marriage officer for the time being having the custody of such marriage register:

Provided that no fee shall be payable by either party to a marriage for a true copy of an entry relating to his marriage.

Offences in relation to marriage register.

10. (1) If any person unlawfully erases or obliterates any entry in a marriage register or duplicate original register or destroys a marriage register, he shall be guilty of an offence and liable to a fine not exceeding two hundred dollars or to imprisonment for a period not exceeding twelve months or to both such fine and such imprisonment.

(2) If any person unlawfully and wilfully forges or alters or falsely makes an entry in a marriage register or duplicate original register or any certified copy from a marriage register or knowingly and wilfully delivers, offers, alters or puts off any such forged, false or altered copy, he shall be guilty of an offence and liable to a fine not exceeding two hundred dollars or to imprisonment for a period not exceeding twelve months or to both such fine and such imprisonment.

Pledging of children in marriage prohibited.

11. (1) Any agreement whereby an African girl under the age of twelve years is, whether for any consideration or not, promised in marriage to any man shall be of no force or effect.

(2) Any African who enters into an agreement referred to in subsection (1) shall be guilty of an offence and liable to a fine not exceeding one hundred dollars or, in default of payment, to imprisonment for a period not exceeding one year.

Certificates as to consent and marriage consideration in case of marriages under Marriage Act.

12. (1) Whenever Africans desire their marriage to be solemnized in terms of the Marriage Act such Africans shall appear before a district commissioner or district officer for the purpose of obtaining a certificate stating that there is no bar to such marriage by reason of lack of consent of the parents or guardian of the woman. No district commissioner or district officer shall issue such certificate until he has satisfied himself by means of such inquiry as he may deem expedient that there is no such bar to such marriage.

(2) A marriage between Africans which is solemnized in terms of the Marriage Act shall be invalid unless there was produced to the minister of religion or other marriage officer the certificate required in terms of subsection (1).

(3) On application by the parties to a marriage between Africans which is or is to be solemnized in terms of the Marriage Act the district commissioner or district officer shall furnish to the parties a certificate stating—

(a) the marriage consideration paid and its value; and
(b) the marriage consideration remaining to be paid and its value; and
(c) the terms of payment agreed upon

Such certificate shall be evidence of the facts therein recorded in and before all courts and in criminal and civil proceedings therein and shall be admissible upon its production by any person

Marriage under Marriage Act not to affect African laws as to property.

13. The solemnization of a marriage between Africans in terms of the Marriage Act shall not affect the property of the spouses, which shall be held, may be disposed of and, unless disposed of by will, shall devolve according to African law and custom.

Evidence for prosecution by husband or wife of accused.

14. Notwithstanding anything to the contrary contained in the Criminal Procedure and Evidence Act [*Chapter 59*], no marriage contracted according to African law and custom either within or outside Rhodesia which was not registered in terms of the Native Marriages Act [*Chapter 79 of 1939*] or solemnized in terms of this Act or the Marriage Act shall render either party thereto incompetent to give evidence against the other party.

Penalty for compelling African woman to marry against her consent.

15. Any person who by force, intimidation or other improper means compels or attempts to compel any African female to enter into a marriage against her will shall be guilty of an offence and liable to a fine not exceeding one hundred dollars or, in default of payment, to imprisonment for a period not exceeding twelve months.

Dissolution of marriage.

16. No marriage solemnized in terms of this Act or the Marriage Act or registered under the Native Marriages Act [*Chapter 79 of 1939*] or contracted under African law and custom before the 1st April, 1918, shall be dissolved except by order of a court of competent jurisdiction.

Validation of certain marriages.

17. (1) Any marriage solemnized in terms of the Marriage Act [*Chapter 177 of 1963*] before the 1st April, 1930, between Africans is hereby declared to be a legal, valid and effectual marriage.

(2) All African marriages in respect of which the duties imposed on native commissioners or other authorized officials by

the "Native Marriages Ordinance, 1901" were performed prior to the [illegible] June, 1917, by an assistant native commissioner or a clerk are hereby declared to have been as legal, valid and effectual marriages to all intents and purposes as if the aforesaid duties had been performed by a native commissioner or other authorized official.

Appointment of African marriage officers.

18. The Minister may appoint any official of the Ministry of Internal Affairs or any chief to be an African marriage officer for the purposes of this Act.

Existing marriage registers.

19. Every marriage register kept under the Native Marriages Act [*Chapter 79 of 1939*] shall be transferred to the custody of an African marriage officer and every extract from such marriage register which purports to be certified as a true copy therefrom by the African marriage officer who for the time being has the custody of such marriage register shall be *prima facie* evidence of the facts therein recorded in and before all courts and in criminal and civil proceedings therein and shall be admissible upon its mere production by any person.

SCHEDULE (Section 8)

FORM

No. .....

CERTIFICATE OF AFRICAN MARRIAGE

(AFRICAN MARRIAGES ACT [*CHAPTER 238*])

This is to certify that I have this day solemnized a marriage between—

Name of Husband .....
Registration Certificate No. .....
Kraal ..... Chief .....

and

Name of Wife .....
Name and Registration Certificate Number of Wife's Guardian .....

The said Wife being the* ..... Wife and having freely consented to the marriage.

Consideration paid .....
Value .....
Consideration remaining to be paid .....
Value .....
Terms of Payment agreed upon .....
.....
In the Presence of .....

Given under my hand at .....
this ..... day of ..... 19.....

.....
African Marriage Officer

*Here state whether first, second or subsequent wife

CHAPTER 240

AFRICAN WILLS

To regulate certain testamentary dispositions by Africans.

Acts 13/1933, 25/1948, 24/1962 (s. 2), 21/1963, 19/1968; R.G.N. 216/1970.

[1st September, 1933.]

ARRANGEMENT OF SECTIONS

Section

Short title.

1. This Act may be cited as the African Wills Act [*Chapter 240*].

Interpretation of term.

2. In this Act—

"district commissioner" includes a district officer.

When African parents may make provision by will for guardianship of children.

3. Notwithstanding any African law or custom which is or may be in existence, it shall be lawful for any African who has entered into a Christian or other civilized marriage to make provision by will for the guardianship of his children.

District commissioner to make order re guardianship of orphans.

4. If no such provision has been made, it shall be competent for any person lawfully interested in the children of such a marriage to make application to the district commissioner who shall make such order for their guardianship as he may deem fit.

Right of appeal against district commissioner's order.

5. Any such order shall be subject to appeal in the same manner and subject to the same rules as an appeal from the judgment of a district commissioner in a civil case:

Provided that such appeal may be brought by the person who made the application or by any person related to and lawfully concerned in the guardianship and welfare of the said children.

African may dispose of immovable property by will.

6. Subject only to the limitations imposed by this Act, an African may by will freely dispose of the ownership of immovable property or of any rights attaching thereto.

In absence of will property to go to heir at African law.

7. The heir at African law of any deceased African shall succeed in his individual capacity to any immovable property or any rights attaching thereto forming part of the estate of such deceased African and not devised by will.

Wills to be executed and registered before the district commissioner.

8. (1) Except as hereinafter provided, no provision for the guardianship of children or disposing of the ownership of any immovable property or of any rights attaching thereto made by an African in a will executed after the 1st September, 1933, shall be valid unless such will has been executed according to law in the presence of and registered with the district commissioner of the district in which the testator resides.

(2) A district commissioner, on being satisfied that a will containing any such provision as in subsection (1) mentioned has been otherwise duly executed according to law, but that it was not reasonably possible for such will to be executed in his presence, may register such will, and thereafter it shall be valid in all respects:

Provided that any such registration shall be subject to appeal in terms of section *ten*.

(3) The original of every such will shall be retained by the district commissioner for safe keeping:

Provided that the testator shall, if he so requests, be furnished with a certified copy thereof.

Immovable property in deceased estate to be administered by district commissioner.

9. Notwithstanding the provisions of the Administration of Estates Act [*Chapter 301*] or any other law to the contrary, any immovable property or rights thereto forming part of the estate of a deceased African shall, subject to the provisions of section *seven*, be administered by the district commissioner of the district in which such property is situate:

Provided that where an executor or executors have been duly nominated or appointed by the deceased or the Master, such property shall be administered jointly by the district commissioner and such executor or executors. For the purposes of administering any property as aforesaid, a district commissioner shall, *mutatis mutandis*, exercise the same powers and be subject to the same duties as are by law vested in or imposed on an executor of a deceased estate.

District commissioner to decide disputes concerning wills, but right of appeal from district commissioner's decision.

10. Any question or dispute concerning any will aforesaid or the subject matter thereof shall be decided by the district commissioner:

Provided that any such decision or any registration of a will under subsection (2) of section *eight* shall be subject to appeal in the same manner and subject to the same rules as an appeal from the judgment of a district commissioner in a civil case.

...ving rights of general ...s.

11. Nothing in this Act contained shall be construed as instituting a testamentary successor as the general heir of the testator.

...gulations.

12. Regulations for the better carrying out of the purposes of this Act may be made by such Minister as the President may, by notice in the *Gazette*, designate.

Vali...tion of certain ...s.

13. All wills executed in the presence of, and registered with or by, a district officer in terms of section *eight*, on or after the 14th March, 1963, and before the 1st April, 1967, are hereby declared to have been and to be as legal, valid and effectual to all intents and purposes as if such execution had been in the presence of, and such registration had been with or by, a district commissioner in terms of that section.

CHAPTER 46

LEGAL AGE OF MAJORITY

To declare the age of twenty-one years to be the legal age of majority. *Ord 62/1829.*

[10th June, 1891.]

Short title.

1. This Act may be cited as the Legal Age of Majority Act [*Chapter 46*].

Twenty-one years the legal age of majority.

2. A person shall be deemed to have attained the legal age of majority when he attains the full age of twenty-one years.

Law of inheritance and attainment of majority by operation of law not affected.

3. Nothing in this Act contained shall extend or be construed to prevent –

(a) any testator from bequeathing his property in any such manner as by the laws of the Colony of the Cape of Good Hope he might have done before the twentieth day of June, 1829; or

(b) any person under the age of twenty-one years from attaining his majority at an earlier period by operation of law.

APPENDIX C

CASE INDEX

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R v Tshipa 1957 R & N 751 (SR) or 1958 (2) SA 385 (SR)

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Takawadiyi v Munyukwi Siyawamwaya 1969 CAACC 47
Tambudzayi v Samuriwo 1976 (1) SA 407 (RAD)
Tangwara v Tlili 1960 SRN 939
Taoneswi Maposa v Ngwenya (unreported) CAACC 18/1972
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APPENDIX D

BIBLIOGRAPHY

Abitbol E " La famille conjugale et le droit nouveau du mariage en Côte d'Ivoire" (1966) 10 Journal of African Law 141

Agbede IO "Conflict between customary and non-customary systems of law" (1972) 5 Verfassung und Recht in Ubersee 415

Akolawin NO "Personal law in the Sudan - trends and developments" (1973) 12 Journal of African Law 149

Allen CK Legal Duties and Other Essays in Jurisprudence London OUP 1931

Allott AN "Methods of legal research into customary law" (1953) 5 Journal of African Administration 172

——— (Ed) Conference (on the) Future of Law in Africa, London, 1959-1960. Record of Proceedings London Butterworths 1960

——— New Essays in African Law London Butterworths 1970

American Law Institute Restatement of the Law, Second St Paul American Law Institute Publishers 1971

Anton AF Private International Law Edinburgh W Green & Son 1967

Austin J The Province of Jurisprudence Determined (5th Ed) London Weidenfeld & Nicolson 1954

Bennett HW (Ed) African Law: new law for new nations Dobbs Ferry Oceana 1963

Baxter IFG Essays on Private Law: Foreign Law and Foreign Judgments Toronto UP 1966

Beattie J Other Cultures: aims, methods and achievements in social anthropology London Routledge 1966

Beinart B "Liability of a deceased estate for maintenance" (1958) Acta Juridica 98

Bennett TW "The African court system in Rhodesia: an appraisal" (1975) 15 Rhodesian Law Journal 133

——— "African marriages under the Marriage Act: African law or common law ?" (1974) 14 Rhodesian Law Journal 23

Bwesi-Enchill K "The colonial heritage of legal pluralism" (1969) 1 Zambia Law [illegible]

Black HC Black's Law Dictionary St Paul West Publishing 1968

Blanc-Jouvan X "Remarques sur la codification du droit privé à Madagascar" (1967) 43 Revue Juridique du Congo 159

Boberg PQR The Law of Persons and the Family Cape Town Juta 1977

Bohannan P Justice and Judgement among the Tiv London OUP 1957

——— African Outline London Penguin 1966

Bourdillon MFC "Is 'customary law' customary ?" (1975) Nada 140

——— The Shona Peoples Gwelo Mambo Press 1976

Brooke NJ "The changing character of customary courts" (1954) 6 Journal of African Administration 67

Buckland WW A Text-book of Roman Law, from Augustus to Justinian Cambridge UP 1960

Bullock C "Can a native make a will ?" (1929) Nada 104

——— The Mashona Westport Negro Universities Press 1970

Carcopino J (translated by Lorimer) Daily Life in Ancient Rome London Penguin 1970

Castel JG Canadian Conflict of Laws Toronto Butterworths 1975

Cheshire GC and North PM Cheshire's Private International Law (9th Ed) London Butterworths 1974

C[illegible] d H The History and Extent of Recognition of Tribal Law in Rhodesia (2nd Ed) Salisbury Government Printer 1976

Church of the Province of Central Africa Commission to Investigate the Legal Status of African Women Salisbury 1976

Claasen CJ (Comp) Dictionary of Legal Words and Phrases Durban Butterworths 1975-77

Cockcroft IC "Is the right of disinheritance recognised in native law ?" (1934) Nada 36

Colson E "Possible repercussions of the right to make wills upon the Plateau Tonga of Northern Rhodesia" (1950) 2 Journal of African Administration 24

——— and Gluckman M (Eds) Seven tribes of Central Africa London OUP 1951

Cotran E "African conference on local courts and customary law" (1965) 4 Journal of Local Administration Overseas 128

Coulson NJ A History of Islamic Law Edinburgh UP 1964

Cowen DV "African legal studies - a survey of the field and the role of the United States" in HW Baade (Ed) African Law: new law for new nations 9

DP (1937) 1 Tydskrif vir Hedendaagse Romeins-Hollandse Reg 119

Daniels WCE The Common Law in West Africa London Butterworths 1964

——— and Woodman GR (Eds) Essays in Ghanaian Law Legon Ghana UP 1976

——— "Marital family law and social policy" in WCE Daniels and GR Woodman (Eds) Essays in Ghanaian Law 92

David R "La refonte du code civil dans les états africains" (1962) Annales Africaines 160

——— "Civil code for Ethiopia: considerations on the codification of the civil law in African countries" (1963) 37 Tulane Law Review 187

——— "Critical observations regarding the potentialities and the limitations of legislation in the independent African states" in Integration of Customary Law and Modern Legal Systems in Africa 44

——— and Brierly JEC The Major Legal Systems in the World Today: an introduction to the comparative study of law (2nd Ed) London Stevens 1978

de Vos W "Freedom of choice of law for contracts in Private International law" (1961) Acta Juridica 1

D'Oliveira JAvS "Venia aetatis, emancipation and release from tutelage revisited: the Age of Majority Act 1972" (1973) 90 South African Law Journal 57

Driberg JH "The African conception of law" (1934) 16 Journal of Comparative Legislation and International Law 230

Elias TO Groundwork of Nigerian Law London Routledge 1954

——— British Colonial Law, a comparative study of the interaction between English and local law in British dependencies London Stevens 1962

——— The Nature of African Customary Law Manchester UP 1962

Falconbridge JD Essays on the Conflict of Laws (2nd Ed) Toronto Canada Law Book Co 1954

Forsyth CF "Ius inter gentes: Section 11 (2) of the Black Administration Act 1927" (1979) 96 South African Law Journal 418

Gelfand M The Genuine Shona Gwelo Mambo Press 1976

Ghana Government Commission on Marriage, Divorce and Inheritance Report Accra Government Printer 1961

Gluckman M "African jurisprudence" (1961/2) 18 Advancement of Science 439

——— The Ideas in Barotse Jurisprudence New Haven Yale UP 1965

——— The Judicial Process among the Barotse of Northern Rhodesia (2nd Ed) Manchester UP 1967

——— (Ed) Ideas and Procedures in African Customary Law London OUP 1969

——— "Limitations of the case-method in the study of tribal law" (1972/3) Law and Society Review 611

Goldin B and Gelfand M African Law and Custom in Rhodesia Cape Town Juta 1975

Goode WJ World Revolution and Family Patterns Glencoe NY Free Press 1967

Graveson RH Conflict of Laws (7th Ed) London Sweet and Maxwell 1974

Grotius H (translated by Maasdorp) The Introduction to Dutch Jurisprudence Cape Town Juta 1878

Hahlo HR The South African Law of Husband and Wife (4th Ed) Cape Town Juta 1975

——— and Kahn E South Africa: the development of its laws and constitution Cape Town Juta 1965

——— and Kahn E The South African Legal System and its Background Cape Town Juta 1968

Hammond-Tooke WD Bhaca Society Cape Town OUP 1962

Hannan H Standard Shona Dictionary (2nd Ed) Salisbury Rhodesian Literature Bureau 1974

Hartland ES Primitive Law London Methuen 1924

Harvey WB "The evolution of Ghana law since independence" in HW Baade (Ed) African Law: new law for new nations 47

Hastings A Christian Marriage in Africa: being a report commissioned by the Archbishops of Cape Town, Central Africa, Kenya, Tanzania and Uganda London SPCK 1973

Hoebel EA The Law of Primitive Man: a study of primitive legal institutions New York Atheneum 1972

Hohfeld WN Fundamental Legal Conceptions New Haven Yale UP 1964

Holleman JF Shona Customary Law, with reference to kinship, marriage, the family and the estate Cape Town OUP 1952

——— African Interlude Cape Town Nasionale Boekhandel 1958

——— Chief Council and Commissioner London OUP 1969

——— Issues in African Law The Hague Mouton 1974

Howell PP A Manual of Nuer Law London OUP 1954

Howman R Report on Native Courts for Southern Rhodesia: a comparative study based on a visit to Kenya, Uganda, Tanganyika, Northern Rhodesia and Nyasaland Salisbury Department of Native Affairs 1952

——— "The Native Affairs Department and the African" (1954) Nada 42

Hunter M Reaction to Conquest (2nd Ed) London OUP 1961

Hutchinson TW et al (Eds) Africa and Law, developing legal systems in African Commonwealth nations Madison Wisconsin UP 1968

Ife University Integration of Customary Law and Modern Legal Systems in Africa (Conference held at Ibadan, 1964) Ile-Ife and New York Ife UP and Africana Publishing 1971

International Encyclopaedia of the Social Sciences (Sills DL Ed) New York Macmillan 1968

Jolowicz HF Roman Foundation of Modern Law Oxford Claredon Press 1957

Junod HA The Life of a South African Tribe (2nd Ed) London Macmillan 1927

Kahn-Freund O General Problems of Private International Law Leiden Sijthoff 1976

Kaser M Das Römische Privatrecht München Beck 1955-59

——— (translated by Dannenbring) Roman Private Law (2nd Ed) Durban Butterworths 1968

Kelsen H (translated by Knight) The Pure Theory of Law Berkley California UP 1969

Kenya Government Commission on the Law of Succession Report Nairobi Government Printer 1968

——— Commission on the Law of Marriage and Divorce Report Nairobi Government Printer 1968

Kerr AJ "The reception and codification of systems of law in Southern Africa" (1958) 2 Journal of African Law 82

——— The Customary Law of Immovable Property and of Succession (2nd Ed) Grahamstown Rhodes University 1976

Kouning J "Some remarks on law and courts in Africa" in Integration of Customary Law and Modern Legal Systems in Africa 58

Kollewijn RD "Interracial private law" in B Schrieke (Ed) The Effect of Western Influence on Native Civilization in the Malay Archipelago 204

Krzeczunowicz G "The nature of marriage under the Ethiopian Civil Code 1960: an exegesis" (1967) 11 Journal of African Law 175

Kuper H and Kuper L (Eds) African Law: adaptation and development Berkley California UP 1965

Lazer L "Legal centralism in South Africa" (1970) 19 International and Comparative Law Quarterly 492

Leslie RD "The repugnancy rule in African law and the public policy rule in conflict of laws" (1979) Acta Juridica 117

Lewin J Studies in African Native Law Cape Town African Bookman 1947

Llewellyn K and Hoebel EA The Cheyenne Way: conflict and case law in primitive jurisprudence Norman Oklahoma UP 1941

Maine HJS Ancient Law London Everyman 1965

M'Baye K "L'éxperience sénégalaise de la reforme du droit" (1970) 22 Revue Internationale de Droit Comparé 38

McClean WT "Recognition of polygamous and potentially polygamous marriages and conflict of laws" (1962) 6 Journal of African Law 54

Morris HF "Matrimonial Causes Act, 1971" (1972) 16 Journal of African Law 71

Morris JHC (Ed) Dicey and Morris, The Conflict of Laws (9th Ed) London Stevens 1973

Nadel SF The Theory of Social Structure London Cohen and West 1957
The Foundations of Social Anthropology London Cohen and West 1958

Nicholas B An Introduction to Roman Law London OUP 1962

Nkrumah K "Law in Africa" (1962) 6 Journal of African Law 103

Ollennu NA "Comments with special reference to customary law" (1969) 2 East Africa Law Journal 97

Palley C The Constitutional History and Law of Southern Rhodesia, 1888-1965 London OUP 1966

Park AEW The Sources of Nigerian Law Lagos African UP 1963

Parsons T The Social System Glencoe Ill The Free Press 1951

——— Essays in Sociological Theory Glencoe Ill The Free Press 1954

Paton GW and Derham DP A Textbook of Jurisprudence (4th Ed) London OUP 1972

Pédamon M "Les grandes tendances du droit de la famille à Madagascar" (1965) 2 Annales Malgaches 59

Phillips A and Morris HF Marriage Laws in Africa London OUP 1971

Pospisil L "E Adamson Hoebel and the anthropology of law" (1972/3) 7 Law and Society Review 537

Posselt FWT Fact and Fiction; a short account of the natives of Southern Rhodesia Bulawayo Rhodesia Printing 1935

Poulter SM "An essay on African customary law research techniques; some experiences from Lesotho" (1975) Journal of Southern African Studies 181

Raeburn W "Dispensing with the personal law" (1963) 12 International and Comparative Law Quarterly 125

Read JS "A milestone in the integration of personal laws; the new law of marriage and divorce in Tanzania" (1972) 16 Journal of African Law 19

Reader DH Zulu Tribe in Transition, the Makhanya of Southern Natal Manchester UP 1966

Redden KR The Legal System of Ethiopia Charlottesville Michie 1965

Rhodesia Government Commission of Enquiry into Native Affairs, 1910-1911

Report Salisbury Government Printer 1911

——— Commission appointed to inquire into and report on administrative and judicial functions in the Native Affairs and District Courts Departments Report Salisbury Government Printer 1961

——— Constitutional Council Report ... (on) the Native Law and Courts Act Salisbury The Council 1963

——— Commission of Inquiry into Racial Discrimination Report Salisbury Government Printer 1976

Robert A "A comparative study of legislation and customary law courts in the French, Belgian and Portuguese territories in Africa" (1959) 11 Journal of African Administration 124

Roberts S "A revolution in the law of succession in Malawi" (1966) 10 Journal of African Law 21

——— "The Malawi law of succession: another attempt at reform" (1968) 12 Journal of African Law 81

Robinson RE "The administration of African customary law" (1949) 1 Journal of African Administration 158

Rubin L "The adaptation of customary family law in South Africa" in H Kuper and L Kuper (Eds) African Law: adaptation and development 196

Salacuse JW An Introduction to Law in French-speaking Africa Charlottesville Michie 1969

Schacht J An Introduction to Islamic Law Oxford Clarendon 1964

Schapera I A Handbook of Tswana Law and Custom London Frank Cass 1970

Schmidt F "Nationality and domicile in Swedish Private International law" (1951) 4 International Law Quarterly 39

Schmitthoff CM The English Conflict of Laws (3rd Ed) London Stevens 1954

Schrieke B (Ed) The Effect of Western Influence on Native Civilization in the Malay Archipelago Batavia G Kolff and Co 1929

Schulz F (translated by Wolff) Principles of Roman Law London OUP 1936

Seidman RB "The reception of English law in Colonial Africa revisited" (1969) 2 East African Law Journal 47

——— "Law and economic development in independent, English-speaking, sub-Saharan Africa" in TW Hutchinson et al (Eds) Africa and Law, developing legal systems in African Commonwealth nations 3

Seymour SM Bantu Law in South Africa (3rd Ed) Cape Town Juta 1970

Sievwright DW "Marriage in contemporary urban Bantu-speaking communities in the Republic of South Africa" (1965/66) Acta Juridica 149

Silberberg H The Law of Property Durban Butterworths 1975

Spiro E Law of Parent and Child (3rd Ed) Cape Town Juta 1971

Stafford WG and Franklin E Principles of Native Law and the Natal Code Pietermaritzburg Shuter and Shooter 1950

Steyn G The Law of Wills in South Africa (2nd Ed) Cape Town Juta 1948

Stopforth P Two Aspects of Social Change, Highfield African Township, Salisbury Salisbury Occasional Paper No 7 Department of Sociology University of Rhodesia 1972

Tyler SA (Ed) Cognitive Anthropology: readings New York Holt, Rinehart and Winston 1969

Thomas JAC The Institutes of Justinian Cape Town Juta 1975

Uganda Government Commission on Marriage, Divorce and the Status of Women Report Entebbe Government Printer 1965

UNESCO International Social Science Bulletin 1957

van der Vyver JD "Regssubjektiwiteit" (1973) 36 Tydskrif vir Hedendaagse Romeins-Hollandse Reg 266

Van Velsen J "Procedural informality, reconciliation, and false comparisons" in M Gluckman (Ed) Ideas and Procedures in African Customary Law 137

van Tromp J Xhosa Law of Persons Cape Town Juta 1948

van Warmelo P An Introduction to the Principles of Roman Civil Law Cape Town Juta 1976

Voet J (translated by Gane) Commentary on the Pandects Durban Butterworths 1955

von Benda-Beckmann F "Comment on Kamcaca v Nkhota" (1968) 12 Journal of African Law 173

Watson A Rome of the XII Tables; persons and property Princeton UP 1975

APPENDIX 'E'

RESEARCH PROJECT INTO CUSTOMARY LAW IN RHODESIA

RESEARCH METHOD

The purpose of this project was to gather information on certain specific aspects of customary law. In particular the following points were investigated:

(a) topics which had not been fully canvassed by previous authorities[1];

(b) controversial points of law[2];

(c) rules of law which might have changed since previous authors did their research[3];

(d) points of law which appear to have been incorrectly stated by the courts[4].

The object was not to seek a comprehensive statement of customary law as it is practised amongst the various African peoples of Zimbabwe-Rhodesia.

With this limited object in view, it was considered unnecessary to employ

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1 The principal authorities being: Holleman Shona Customary Law, Child The History and Extent of Recognition of Tribal Law In Rhodesia. Holleman does not deal with the law of delict and contract; Child and Goldin and Gelfand African Law and Custom in Rhodesia give only limited coverage

2 for instance, who owns a wife's earnings; vesting of guardianship in the natural father of an illegitimate child.

3 for instance, the status of women, the nature of rutsambo and rovoro.

4 for instance, the question whether there is an action for breach of promise to marry: in Five v Mbamba 1953 SRN 613, the court held that there is no such action.

the type of research method advocated by Llewellyn and Hoebel[5]. A full investigation of African culture was superfluous to an understanding of the application of the rules and principles of customary law since there were already sufficient works[6]. The "case study" method proposed by many legal anthropologists[7] was rejected for several reasons.

(1) Foremost was the shortage of time, personnel and ready funds to facilitate such a project. Many of the aspects of the law to be

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5 Llewellyn and Hoebel The Cheyenne Way especially 20 sq; (and see Pospisil "E Adamson Hoebel and the anthropology of law" (1972-3) 7 Law and Society Review 537) the authors noted that there was frequently divergence between the purposive and functional aspects of law, especially in a society which was in the process of change. They felt that law, in these circumstances, was any rule which would be recognised as "proper to prevail in the pinch" not an abstract rule which ought to be obeyed. If one is to discover what the law is, one has to look at what the courts actually apply to the solution of cases and how they apply it. Hoebel in The Law of Primitive Man continued forcefully to advocate the "case study" method. He attacked previous works which had contented themselves with statements of abstract rules, saying that: "(it) contents itself with an almost passive acceptance of ideal law as truly representative of the law ... it does not concern itself to any great degree with variations from the stated norm; nor does it test the presumed norms with cases to see whether they actually hold when challenged in real life situations." This study of cases was further elaborated by later legal anthropologists: Gulliver "Introduction to case studies in law in non-Western societies" in Nader (Ed) Law and Culture and Society 17-19; Gluckman "Limitations of the case-method in the study of tribal law" (1972-3) 7 Law and Society Review 611 at 615 sq.

6 See the works cited below.

7 See the works cited in footnote 5; cf also Holleman "Trouble cases and trouble-less cases in the study of customary law and legal reform" (1972-3) 7 Law and Society Review; and Poulter "An essay on African customary law research techniques; some experiences from Lesotho" (1975) Journal of Southern African Studies 181.

investigated were unlikely to come before the courts and, even if they were, the length of time involved in waiting for the material to arise made it an impractical proposition. The spread of case material would do little to advance the type of knowledge sought in this project; areas in which most disputes arise (primarily family law) have already been well documented.

(2) Leaving aside these practical considerations, it was considered unlikely that the case study method would prove as illuminating as the approach finally adopted. The case study method tends to favour the investigation of a restricted area and tends to reveal many parochial features of a small community. What was required was information of general principles of customary law, rather than a detailed study of a specific area.

Accordingly, an approach similar in some respects to that employed by Allott and his Restatement project[8], was chosen. Field workers were sent to four different Tribal Trust Lands to deliver a semi-structured questionnaire to local authorities on customary law, namely, chiefs, headmen and village headmen. The method used differed from Allott's Restatement project in certain respects. Informants were interviewed at their homes. It was felt that this was more conducive to an informal, discursive atmosphere and had the advantage of saving time and expense in transporting the informants to a selected meeting point. Secondly, the "panel discussion" was not used, primarily for the reasons advanced previously, that is, time and expense. The possibility that the individual informant might be wrong or biased in his opinion was taken into account. A sufficient number of informants were chosen in each area to obtain a spread of opinion which would help to overcome this problem. The discursive nature of the panel discussion was, to some extent, simulated by the field worker who attempted to probe the informant's opinion by putting hypothetical problems to him, testing his answers and discussing

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8 The early portion of this project presents various systems of customary law as a series of precise rules which were derived from panel discussions with experts in customary law. As such the project was criticised in that only a system of idealised rules was presented, which did not take into account the flexibility with which the rules should be applied in practice, Gluckman op cit 618.

other probabilities. In any event, it was found, in practice, that a number of people became interested, joined in the interview and debated all aspects of the question so that a fully rounded opinion was ultimately achieved. The questionnaire form was used mainly as a guide for the field worker; information was elicited from general discussion, not from pre-determined questions.

It is hoped that the disadvantages of the Restatement approach could be avoided. Poulter outlined the following three objections[9]:

(1) "As with any other type of investigation involving personal communication and interaction between researcher and his subjects, there is a grave risk of distortion." Each of the field workers was well prepared for the project. They started work in their native Tribal Trust Land, an area with which they were thoroughly familiar. They were all African law students and had been required to prepare for the project by doing background research into the nature and principles of customary law. They did, of course, possess a legal education and had been fully advised as to the best approach to be adopted towards informants in the field. With this preparation, they were able to distinguish the biased or ill-informed informant; furthermore, they had sufficient general knowledge of the subject to be able to ascertain whether the principles they were seeking had "social reality."

(2) "It is difficult to ensure that those who are selected to give their opinions (are) really qualified to speak with authority." Obviously, the field workers sought the opinion of those who appeared to be best qualified in the circumstances. The informants were all men in positions of authority who had considerable experience with the application of customary law. They presided over courts, acted as assessors or assisted members of their villages in litigation. Most of the informants tended to be middle-aged and, for this reason, field workers deliberately sought the opinion of younger people and those who lived and worked in the towns to verify the attitudes of the informants. A further check, when possible, was later made on the information given through the offices of the local district commissioner.

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9 Poulter op cit 185-198.

(3) The practical difficulty may be encountered that an interpreter is needed if the participants are speaking in the vernacular. This difficulty did not arise as the field workers were fluent in the language of the area.

General principles of anthropological research were, of course, borne in mind in instituting this project. As will become apparent, the field worker lived in the community as a participant observer; he had a fluent conversational ability in the language and he had sufficient sponsors in the community to facilitate his work. The selection of field workers ensured that there would be as few barriers as possible between the field worker and the informant.

Field Workers

The character of field workers is, undoubtedly, the key to a successful research project into customary law. Two African law students were chosen for this task. It was considered essential that the field workers be African so that there would be no feeling of reserve on the part of the informants. Care was taken that the field workers begin their projects in their native Tribal Trust Lands, where relations and friends could sponsor them[10]. In this manner, it was hoped that the familiarity of the informants with the field workers would: (a) assist in breaking down any feelings of reserve; (b) assist the field worker in developing his interview technique in a relaxed atmosphere; (c) any local knowledge of the field worker could be used to supplement and clarify obscure or controversial points which might arise; (d) there would be no language barriers to inhibit interviews; and (e) field workers would be able to select informants, with prior knowledge as to whom would be most suitable for the purposes of the project.

The first field worker, who worked in the Chiota and Marange Tribal Trust Lands, was a mature student of about thirty years of age. He had been studying law for three years. His family was resident in Chiota. The second field worker was somewhat younger, twenty years of age, a highly intelligent, second year law student. His parents were living in Gwelo but most of his relations resided in the Chiwundura Tribal Trust Land, where he started his project.

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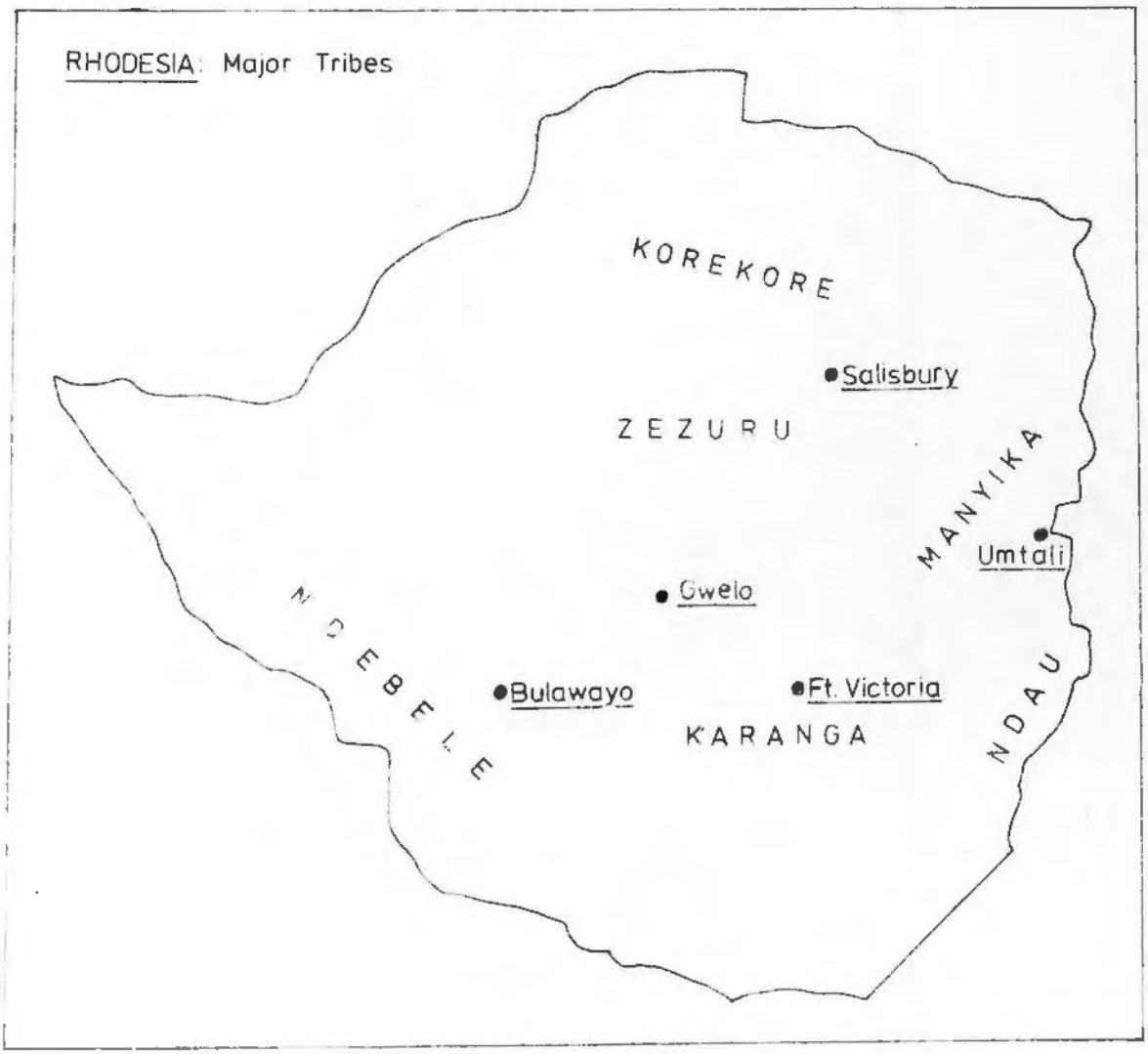
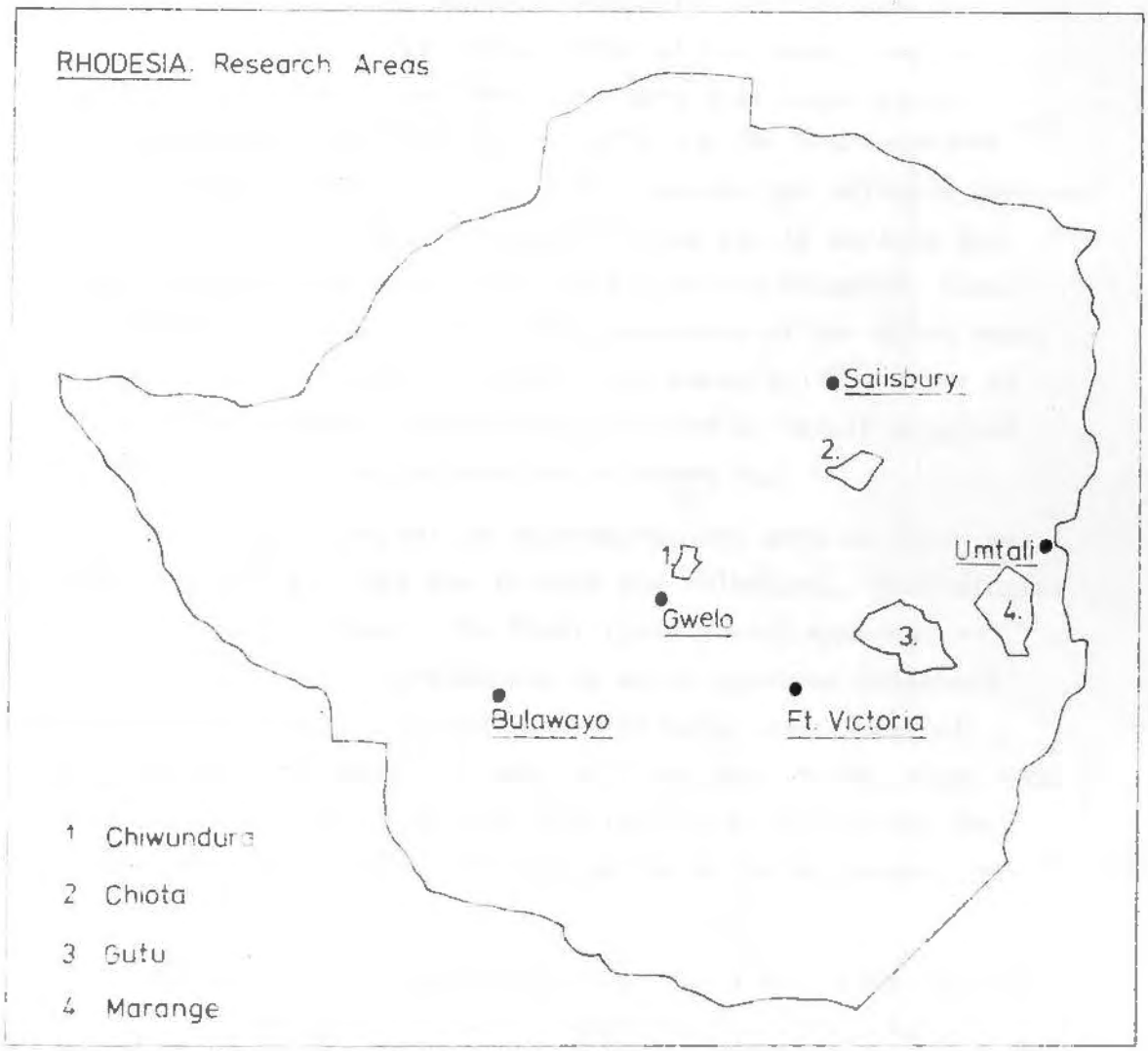
[10] Goode and Hatt Methods in Social Research 188-189.


RHODESIA: Major Tribes
KOREKORE
Salisbury
ZEZURU
MANYIKA
Umtali
Gwelo
NDEBELE
Bulawayo
Ft. Victoria
KARANGA
NDAU

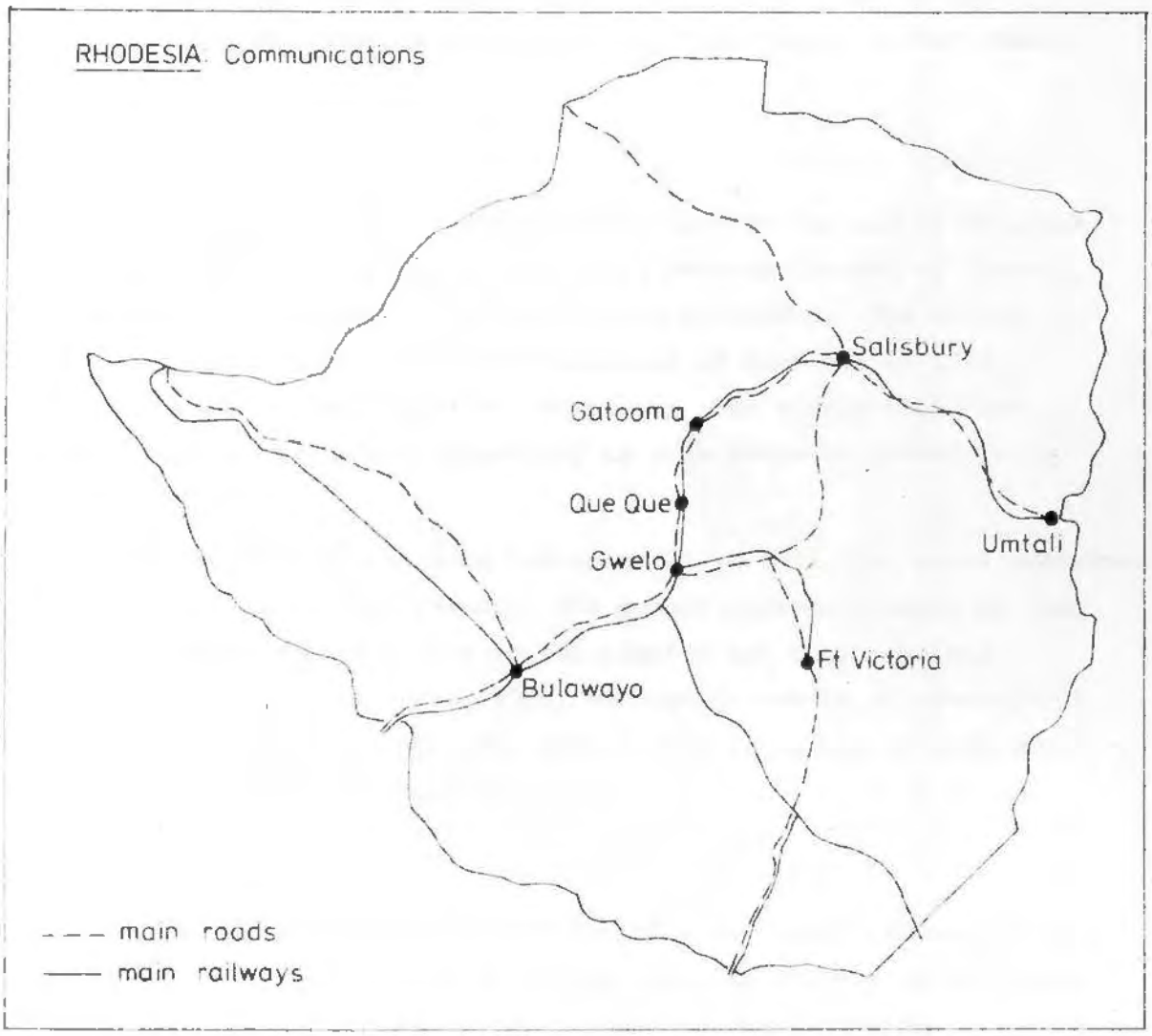

RHODESIA. Research Areas
Salisbury
2.
1.
Umtali
Gwelo
4.
3.
Bulawayo
Ft. Victoria
1 Chiwundura
2 Chiota
3 Gutu
4 Marange

The Research Areas

Zimbabwe-Rhodesia has three principal tribal groupings: the Shona peoples, the Ndebele and the Gwembe Tonga. (The legal system of the latter, although it is interesting in that it is the only matrilineal system in the country, was not investigated because the Tonga form only a small minority group.) Attention was focused on the Shona. Several factors determined which of the Shona peoples was to be studied. All the research projects were instituted after the terrorist incursions had occurred, in 1972, in the North-eastern sector of the country. Partly because of the tension and military presence in this area (which is predominantly Korekore) and partly because Bou work, The Shona Peoples, was concerned mainly with the Korekore, these people were excluded. Holleman conducted his studies of the Shona among the Hera and Mhire peoples in the centre of the country. The works of both these authors were taken into account in order to obtain a spread of knowledge regarding the various systems of Shona law.

Another factor which was important in determining the area of study was the place where the field worker had friends and relations. Accordingly, the following areas were chosen: the first field worker was sent to Chiota, a Tribal Trust Land approximately 20 miles south of Salisbury, and Marange Tribal Trust Land, approximately 16 miles south-west of Umtali. The second field worker was sent to Chiwundura Tribal Trust Land about 16 miles north-east of Gwelo and 16 miles south-east of Que Que; from there, he went to Gutu Tribal Trust Land, 40 miles north-east of Fort Victoria.

In Chiota, the informants were Zezuru-speaking. They had close contact with the capital city and most of the men were employed in Salisbury. In Marange, the informants were predominantly Manyika-speaking. The nearest city was Umtali but communications were poor and the people of this region had little contact with urban life. Chiwundura is a tribally mixed area; many of the people had been settled in this Tribal Trust Land by the Government and, accordingly, there is a mixture of Ndebele and Karanga peoples (the latter predominating). Being close both to Que Que and Gwelo and with easy access to the main roads and railway line, the people of this Tribal Trust Land have close contact with the urban centres


RHODESIA. Communications
Salisbury
Gatooma
Que Que
Gwelo
Umtali
Ft Victoria
Bulawayo
main roads
main railways

of the Midlands. Most of the men work in the towns. In contrast, Gutu is predominantly Karanga. The people say that their area is the heart of Karangaland and is the place from where the Karanga originated. They do not have as great a contact with the towns as do the people of Chiwundura.

Some balance was sought in the degree of urban contact: two of the Tribal Trust Lands had close contact with the towns while two were more remote.

Time

The first research worker started his project at the end of November in 1973. After finishing his work in Chiota, towards the end of January, 1974, he proceeded to Marange. He returned in mid-March. The second phase of the project commenced at the beginning of December in 1974, when the second field worker went to Chiwundura. He worked there for approximately six weeks before proceeding to Gutu where he worked for a further six weeks.

Although major terrorist incursions had occurred in 1972, the areas concerned were free from any military presence. The people were well aware of the events on the North-eastern border of the country but they remained relatively unaffected. Since that time, Marange is now in an operational area and, with the spread of the war, none of the areas can be considered to be totally removed from the conflict.

Method

The field workers were given the discretion to choose informants whom they considered to be most likely to be qualified as experts on customary law. Obviously, they attempted to select only the knowledgeable, intelligent and unbiased. For this reason, a considerable number of chiefs, headmen and court assessors were chosen. Having close contact with the administration of the law in their areas, they were able to speak with authority on the questions put to them. Care was taken to choose only those people who were fully accepted and integrated with the local community; strangers, and those who were socially shunned for one reason or another, were avoided. It will be apparent from the tables of informants, that most had deep roots in the area concerned.

Having selected an informant, the field worker arranged an interview with him. For this purpose, a questionnaire was used. In view of the considerable scope of law to be canvassed, it was necessary to provide some simple format, both to be used as a guide and to facilitate the taking of notes during the interview. This gave a degree of structure to the interview. Field workers were particularly instructed not to engage the informants in a "quiz" based on the questionnaire but, rather, to attempt to elicit information by means of informal conversation. The field workers found that it was advisable to start by engaging the informant on the question of _rovoro_. This proved to be a topical question, on which most informants had decided views. Once a rapport had been established, it was possible to branch out into more sensitive areas. Field workers were instructed not to challenge the statements which had been made by the informants nor to engage in a debate as to their correctness nor to express approval or disapproval. They were encouraged, instead, to put questions to the informants in order to discover further details and to test the validity of the information against hypothetical cases. Wherever possible, the field workers were asked to obtain reference to actual cases and, in order to check information and obtain a deeper insight into the social realities of the law, the field workers were asked to attend as many cases as possible.

Field workers found that, in practice, their interviews were seldom restricted to only one informant at a time. Considerable interest was excited in the community and family and friends gathered round to participate in the interview. In this manner, questions were often debated by a number of people. Most interviews took a full morning or afternoon to complete and many took place at night; this was especially so during the weekends, when people returned from work and had the leisure to talk at length.

The field workers noted a degree of test sophistication in Chiota, Chiwundura and Gutu. Both the University of Rhodesia and the Government had previously used these areas for research projects and, particularly in Gutu (where Holleman was engaged in a research project), the people were quite prepared for projects of this nature.

Once the data had been collected, the field workers were required to

write up notes regarding the area in question, the informants and any general information which might be of relevance. They then returned to Salisbury to collate and correlate the information in conjunction with the author. In this manner, any obscurities could be clarified when the data was discussed. All workers engaged in the project were lawyers by training and, while useful techniques had been culled from the social sciences for collecting the information, the purpose forwhich the information was to be used determined the analysis and presentation. A draft of the results of the project, presented in the form of question, short answer and general observations regarding the answer, was forwarded to the district commissioner of the area concerned for his comments.

Considerations of time and expense prevented the use of a pilot study. The first phase of the project proved to be valuable in that certain alterations could be made to the questionnaire, based on the experience of the field worker and the analysis of the data he had obtained. Accordingly, various minor changes were made to the second questionnaire and the field workers were briefed in the light of the experience of the first phase of the project. Amendments to the questionnaire have been noted in conjunction with the questions.

Ancilliary Information

The results of this project must be viewed against the background of the works which have already been published. The project does not purport to be anything more than supplementary to these works. Where necessary, reference has been made to these publications, which are listed below in the body of these findings.

(1) Legal Text Books - presently there are two such texts: Child The History and Extent of Recognition of Tribal Law in Rhodesia (2 Ed); Goldin and Gelfand African Law and Custom in Rhodesia. These two works cite fully the decisions of the Court of Appeal for African Civil Cases. Apart from Goldin and Gelfand, this source must be treated with caution as the decisions of the Court of Appeal may not reflect the customary law administered by all the tribal courts[11].

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11 As is the case with breach of promise, where the law is stated in accordance with the decision in Five v Mbamba 1953 SRN 613.

Various short articles in Nada (a periodical published annually by the Ministry of Internal Affairs) also deal with customary law.

(2) "Para-legal Texts" - in other words, works which, although not written as legal text books may be of use to those who have to administer or investigate customary law. Such books as Bullock The Mashona and Child The amaNdebele, contain chapters on customary law. Other sources include Government publications and articles in Nada.

(3) Anthropological Texts, principally, Holleman's works regarding the Shona: Shona Customary Law and Issues in African Law, Bourdillon The Shona Peoples, Kuper and Hughes The Shona and Ndebele of Southern Rhodesia. These and numerous other works contained in periodicals provide valuable insight into African society, its legal system and judicial process.

(4) Reportsof the General and Appellate Division of the High Court may, occasionally, be of relevance to customary law.

(5) Reported Decisions of the African Courts - unfortunately, we are limited to the reports of the Court of Appeal for African Civil Cases. Such reports should be treated with caution in that:

(a) the law applied by the Court may either be out of date[12];

(b) the law applied by the Court may not be applied with the necessary qualifications to which it should be subject;

(c) the law as stated in the report may not correctly reflect the law being practised by Africans[13]; and

(d) records of the Court proceedings are frequently imperfect.

(6) Reports of Commissions of Enquiry and Official Papers[14].

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12 As was suspected by the court regarding the requirements of an action for seduction in Ndebele law: Everest Dube v Chief Myinga 1965 CAACC 1.

13 For example, the statement in Takawadiyi v Munyukwi Siyawamwaya 1969 CAACC 51 where the simple statement was made that parents are liable in law for the delicts committed by their children; also the district commissioners' courts and the Court of Appeal for African Civil Cases apply Section 3 (5) of the African Law and Tribal Courts Act (Chapter 37) regarding the custody of children; tribal courts do not.

14 See Allott "Methods of legal research into customary law" (1953) 5 Journal of African Administration 172.

Presentation

The findings derived from this project have been presented principally with a view to quick and easy reference. From the questions posed in the questionnaire a simple tabulation of answers has been drawn up, framed in terms of a "yes", "no" and "do not know" scheme. (Where necessary the general question has been broken down into two or more questions, with the answers organised in the same manner). This will show, at a glance, whether opinion was unanimous or divided on the question concerned, and whether opinion was divided within each area or between the areas studied.

It must be appreciated, however, that legal principles in customary law cannot readily admit of a simple formulation of this kind. The answer to any of the questions posed will depend on the circumstances of the case and the attitude of the tribal courts which is "to solve problems before them in accordance with general social values rather than predetermined rules"[15]. Especially when traditional values and attitudes are changing, one cannot expect the certainty which might, once, have prevailed. For this reason, the tabulation of answers must be read in the context of the general comments which follow. Particularly if there is, as yet, no specific rule applicable to a new practice in the community, a spread of affirmative and negative answers might indicate only that informants have no experience with any cases in point or that they are doubtful as to what the law will be.

When necessary, occasional reference is made to various authorities for further information on the subject or to note points of similarity or difference.

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15 Bourdillon op cit 160.

TABLE OF INFORMANTS

TRIBE OF INFORMANTS[1]

	Indigenous	Foreign	Total
CHIOTA	18	3	21
MARANGE	30	-	30
CHIWUNDURA	18	13*	31
GUTU	22	-	22

* Meaning, in the context of this Tribal Trust Land, Ndebele as opposed to Karanga

STATUS OR RANK OF INFORMANTS

	Kraalhead	Wardhead	Chief	Total
CHIOTA	14	3	4	21
MARANGE	23	4	3	30
CHIWUNDURA	29	1	1	31
GUTU	16	4	2	22

NUMBER OF YEARS' RESIDENCE IN THE TRIBAL TRUST LANDS[2]

	20-29	30-39	40-49	50-59	60-69	70-79	80+	Total
CHIOTA	-	-	5	9	2	4	1	21
MARANGE	-	1	2	9	6	9	3	30
CHIWUNDURA	1	3	2	8	6	6	5	31
GUTU	-	3	7	8	3	1	-	22

NUMBER OF YEARS' RESIDENCE IN URBAN AREAS[3]

	0	5-9	10-19	20-29	30+	Total
CHIOTA	15	3	2	1	-	21
MARANGE	26	1	3	-	-	30
CHIWUNDURA	24	1	2	2	2	31
GUTU	14	2	3	3	-	22

1 Those who are the children of parents who belong to different tribes (only three informants fell into this category) have been classed as indigenous.

2 It must be appreciated that the number of years specified by informants is approximate only. Without the aid of calendars etc informants cannot be expected to be precise. The period indicated, shows the time during which informants were actually living in a Tribal Trust Land or were commuting on a regular basis to a Tribal Trust Land.

3 Again, the number of years specified by informants is approximate. The period indicated shows that the informant was living in an urban area for most of the time; in other words, he may have commuted on a regular basis to his Tribal Trust Land.

EXTRACTS FROM THE QUESTIONNAIRE: OBSERVATIONS AND COMMENTS

21 Can a son demand chipanda as of right ?

	Y	N	D/K
CHIOTA	11	10	-
MARANGE	30	-	-
CHIWUNDURA	1	26	4
GUTU	7	15	-

In all tribal trust lands, except Marange, a substantial number of the informants felt that a son could not demand that his father set aside a sister's rovoro for his later payment of rovoro. A moral obligation rested on the father to make some sort of chipanda arrangement, but the son did not have a legally enforceable right[1]. This question was confused with the father's general obligation to provide rovoro for his sons which could account for the division of opinion. In Chiota, however, many informants felt that sons could no longer demand rovoro from their fathers, where the latter had paid for their education.

It was only in Marange that a unanimous answer was given. Informants reasoned that because a son could not get married unless he had his father's consent he was entitled to demand that his father provide rovoro. In other words, full responsibility was placed on the father to assist his son in marriage. Marange has little contact with urban areas and so it is possible that sons are unable to obtain sufficient cash of their own accord in order to pay their rovoro. Cattle and cash are maintained in a "rovoro circle", being passed from one family to another; each family keeps such property separate for the use of sons. Informants were not asked, however, whether a son could sue in order to enforce his right. It is suspected that this could not be done - the obligation is a moral one.

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1 Gariwa v Chigwedere Musarurgwa 1958 SRN 814.

22 What is the most common form of marriage entered into today ?

CHIOTA	Kuvunzira
MARANGE	Kutizisa
CHIWUNDURA	Kuvunzira
GUTU	Kuvunzira

Holleman documents several pre-marriage procedures[1], the most common being the kuvunzira (to ask for) which he has termed the "regular proposal marriage". In terms of this procedure the man's family sends an intermediary to the girl's family to start the marriage negotiations. Informants included a Church marriage under this heading. A popular variant of the kuvunzira marriage is the kutizisa (to cause to run away) or "elopement marriage". With the boy's collusion (and usually his family's assistance) the girl elopes to the boy's village, after which an intermediary may be sent to her father to start the negotiations for rovoro. Less common is the kutizira (to run away to) or "flight marriage" whereby, without the prior knowledge or assistance of anyone, the girl elopes to the boy's village. Forms of marriage which are rare today are the "credit marriage" (kuputsira) and "service marriage" (kugarira). The former marriage takes place when the tezwara betroths his daughter (still under marriageable age) in exchange for cattle or food from her prospective husband. The latter form of marriage occurs when the husband, instead of providing rovoro, undertakes long-term service in his tezwara's village.

In all the tribal trust lands, the regular proposal form of marriage was the most common, except in Marange where the kutizisa form was more favoured by young people. In Chiota and Marange the field worker was able to produce some rough estimates as to the percentage frequency of the various forms of marriage:

CHIOTA	Kuvunzira	40%
	Kutizisa	36%
	Kutizira	24%
MARANGE	Kutizisa	45%
	Kuvunzira	40%
	Kutizira	10%
	Kuputsa	5%

1 (1950) 99 sq

In Chiwundura and Gutu kuvunzira was the most popular form of marriage, followed by kutizisa and then kutizira. In Marange informants said that the kutizisa or kuvunzira form was usual if the girl was not pregnant before the marriage. If the girl were pregnant she usually eloped to her lover's village. It is interesting to note the occurrence of kuputsa marriages in this tribal trust land. The amount of rovoro and rutsambo payable is comparatively high; this, together with the poor economic development of the area has clearly fostered a situation in which one is likely to find this form of marriage. Also worthy of note is the popularity of the "flight marriage". Presumably the time, expense and difficulty of raising the large sums of rovoro and rutsambo usually payable in this region, encourage young people to break with the established mode of negotiating marria In the other tribal trust lands, kuputsira and kugarira are regarded as obsolete.

24 Does a wife own outright her household property ?

	Y	N	D/K
CHIOTA	21	-	-
MARANGE	30	-	-
CHIWUNDURA	31	-	-
GUTU	22	-	-

Does a wife own outright her umai property ?

	Y	N	D/K
CHIOTA	21	-	-
MARANGE	30	-	-
CHIWUNDURA	31	-	-
GUTU	22	-	-

Does a wife own outright her mavoko property ?

	Y	N	D/K
CHIOTA	21	-	-
MARANGE	30	-	-
CHIWUNDURA	2	29	-
GUTU	13	9	-

The three tabulations above were derived from a more general question: "Over what property does a wife have outright ownership?" This and the following question were designed to probe the controversial matter of proprietary capacity in modern customary law. The concept of ownership is

poorly articulated in customary law; accordingly, field workers sought to discover the range of powers and rights persons could exercise with regard to property in their control. This involved questioning informants on the degree of freedom the individual had to use and dispose of property in his or her possession; who would be entitled to retain possession at certain critical times (eg dissolution of marriage) and when familial obligations might impinge on the individual's own use and enjoyment of property under his or her control. The rules of customary law designed to regulate proprietary capacity evolved in the context of a traditional subsistence economy. It is uncertain to what extent these rules are still operative, whether they have been modified and developed to meet new situations or whether they have been discarded.

Initially, it was noted that a wife has full right to use her kitchen utensils (hari) in any way she deems fit. These are regarded as personal property. The response was tested by the field workers who asked informants whether a husband could take away his wife's kitchen utensils or demand that they be left behind when the marriage was dissolved. Informants were agreed that he could not. Similarly, there was general consensus that a woman owned her umai property outright. Informants stated that the woman was entitled to use and dispose of this property as she wished, without reference to her husband, and he would not be permitted to deprive her of possession unless she consented.

Far more controversial was the question of mavoko property. The tabulation of responses above must be considered in conjunction with the following question:

Does the wife own the earnings produced from her own labours ?

	Y	N	D/K
CHIOTA	21	-	-
MARANGE	30	-	-
CHIWUNDURA	18	13	-
GUTU	17	5	-

At the outset, it should be appreciated that questions of proprietary rights arise only when the marriage breaks down. While the spouses are happy in their marriage, informants agreed that all new property coming into the family was used for the benefit of the family generally and questions of individual rights did not arise. Decisions regarding the use of this property would be taken by the husband or the couple jointly, after discussion, and neither

party would necessarily belabour his or her rights. On the other hand, it should be noted that the informants were all male and sexual bias may well have determined their responses.

The broad question: "Does the wife own outright her mavoko property?" was soon found to be too vague to obtain a clear answer. Field workers consequently split the question into two sub-questions: "does the wife own the earnings produced from her own labours?" and "does the wife own earnings from employment with a third party?" The tabulation above reflects the response to the first question. In Chiota and Marange, informants said that the wife owns anything she produces as a result of her own labour. Fear of the woman's ancestral spirits was sufficient to ensure that the husband would never tamper with this property or attempt to dictate its use. While the majority of the informants were of the same opinion in Gutu, there was a clear division in Chiwundura. The division appears to be tribal in origin. The Karange tended to say that the wife owns the fruits of her own labours; the Ndebele and those who had been influenced by them maintained that the husband owned this property. The Karanga reasoned that the woman had worked for this property during her spare time, after completing her household duties; therefore, she was entitled to keep it. The Ndebele argued that the husband was entitled to anything acquired by his wife because he had married her[1]. Since all the informants in Gutu were Karanga, it is suggested that the majority response there is the result of a Karanga approach to this question.

An alternative explanation for the division in opinion is based on the nature of the activity undertaken by the woman. The field worker asked whether a woman would own the cash she gained from the sale of agricultural produce. The informants felt that if she made a business of such an activity, the earnings should rightfully go to the husband. The opposing view was, no doubt, derived from the subsumption of such earnings into the mavoko category. This may account for the divided opinion in Chiwundura and Gutu. The response from Chiota and Marange is probably explained by the fact that the informants were not asked to consider the situation where the woman was in business for herself: they were merely asked to envisage a situation where a woman occasionally derived cash from the sale of odd surplus produce[2].

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1 This appeared from a similar project conducted amongst the Ndebele in 1973/74.

2 See Question 54.

It can be concluded that property derived from a business undertaking, an activity foreign to traditional society, has not yet been clearly conceptualised as mavoko property. In this regard, the husband's rights are still of paramount importance. On the other hand, the division of opinion in Chiwundura and Gutu may show that there is a movement in the direction of including earnings from sustained participation in a business in the mavoko category.

That this movement still has a long way to go, is revealed in the response to the second question:

Does the wife own earnings from employment with a third party ?

	Y	N	D/K
CHIOTA	4	17	-
MARANGE	3	27	-
CHIWUNDURA	1	29	-
GUTU	5	17	-

Although some informants maintained that the wife owned such property, the majority felt that it should accrue to her husband. The reasons advanced by the informants for this answer were interesting. It was argued that before a woman is entitled to seek full-time employment with a firm or organisation (such as the Ministry of Education or Health or a grocery store or factory) she will require her husband's consent, and, because the husband's consent is necessary, he has a right to demand her earnings. Another common argument was that the husband had paid valuable consideration for his wife in the form of rovoro. The amount of rovoro he paid would be greater if she were an educated woman. Accordingly, he should be entitled to the profits of her education if she subsequently relied on it to obtain employment. Many said that the wife's place was in the home; she went out to work on the sufferance of her husband and to the general detriment of her family.

The small minority who said that the wife owned her own wages, do not appear to have reached this conclusion by including the wages in the mavoko category of property. Because this is a new activity unknown in traditional society, the produce derived from it could not be fitted into traditional legal concepts. It seems that there is a gradual change in customary law on this point and it may well be that new rules will evolve to cater for new activities.

25 Does the husband have a right of administration over all property except umai and mavoko property and kitchen utensils ?

	Y	N	D/K
CHIOTA	21	-	-
MARANGE	30	-	-
CHIWUNDURA	16	5	10
GUTU	6	2	14

This question was put to informants, partly to test their response to the previous questions regarding the wife's proprietary rights, and partly to attempt to elicit a general principle concerning the matrimonial proprietary regime. The general response was that all property which is brought into the family after marriage is deemed to fall under the husband's control. Any property over which the wife has exclusive control is an exception to this rule.

It appeared from the informants in Chiota and Marange that there is a clear division between the male and female sphere of activity in the family. Property associated with male activities is deemed to belong to the husband and property associated with wifely activities is deemed to belong to the wife. Hence all farming implements, tools of trade, bicycles, livestock, rapoko and the household furniture etc are considered to be the man's property. (It appears that this property is regarded as being "personal" property.) Conversely, the woman's kitchen utensils and her clothing belong to her. (Informants were doubtful whether the granaries should be regarded as the wife's property.) Property which is in a person's day-to-day sphere of activity is deemed to belong to that person in the sense that he or she has exclusive control and, for that reason, a husband will never interfere, for example, with his wife's use of her cooking utensils.

There cannot be said to be a viable response from Chiwundura or Gutu in view of the large number of informants who could give no answer. It seems that the field worker confused the informants when asking this question. The comments made by some of the informants, however, are revealing. A similar division is drawn between the property over which a man and a woman have day-to-day control, in much the same fashion as Chiota and Marange. Informants added that all the property which a woman brought with her when she moved into her husband's village was deemed to belong to her and, on dissolution of the marriage, she might take this property home with her. When a woman is married she usually comes to her husband's house empty-handed, expecting her husband to provide her with everything necessary to

equip her new home (especially her kitchen); her husband is also expected to buy her clothing. When the marriage terminates, all the property which has been in the sphere of the wife's activities may be taken with her: this would include groundnuts, beans, pots, fowls, blankets, etc.

The classification of property, described above, appears to be the usual preliminary step to determining proprietary rights today. It relies on the nature of the property, on the one hand (informants called property falling into the wife's sphere of activity "secondary" or "less important" property) and, on the other, the person most likely to use it. This differs from the manner in which Holleman classifies umai and mavoko property which is dependent on the source from which the property is derived. These two methods of classifying marital property need not necessarily lead to any conflict, but problems might well arise with regard to cash. Cash is not something which can properly be said to pertain to the husband rather than his wife, and both, of course, may use it in the course of their daily activies. It is only by looking to the source from which the money was derived that it can be classified as the wife's or the husband's. Nonetheless, the emphasis which informants placed on the nature of the property and the person using it, shows that Holleman's classification of mavoko and umai is not as comprehensive as it might be. Cooking utensils, for instance, might have been brought by the wife when she entered her husband's house; they may have been purchased for her by her husband; in either event, they would seem to belong to the woman. Such items, however, are not necessarily mavoko property in that the woman did not make them herself.

26 Is there any difference between the matrimonial proprietary regimes in monogamous and polygamous marriages with regard to the husband's proprietary relations with his wife/wives ?

	Y	N	D/K
CHIOTA	-	21	-
MARANGE[1]	-	30	-
CHIWUNDURA	-	31	-
GUTU	-	20	-

[1] Most of the informants interviewed in Marange were polygamists.

There is no difference between a polygamous and monogamous union in so far as the husband's proprietary rights viz-à-viz his wife (or wives) is concerned. Informants said that, in practice, however, a wife will tend to have greater freedom in her use of the property which she has in her possession. The husband will not be able to take the same intimate interest in his wife's affairs which leaves her free to act as she deems fit, consulting her husband only with regard to more serious matters.

The only difference between the proprietary regimes of a monogamous and polygamous marriage is that the property of each house in a polygamnus marriage is kept strictly separate from other houses. Even so, the husband has the same general right of administration over all property in the family, regardless of which house has immediate control of the property.

27 Can a husband transfer property from one house to another ?

	Y	N	D/K
CHIOTA	-	21	-
MARANGE	-	30	-
CHIWUNDURA	-	31	-
GUTU	-	22	-

There was general consensus that a husband, once property has been allotted to a particular house, may never transfer that property to another house. Informants were asked whether the husband could not transfer property from one house to another, if the latter had no food to feed its members. The reply was that he may transfer property from one house to another only with the consent of the wife concerned and the property is then considered to have been loaned to an equivalent must be returned.

If the husband does transfer property from one house to another, without the wife's consent, she will have grounds to complain immediately to the family court. In arguing her case, the wife should be supported by one of her husband's relatives. If she receives no satisfaction in this tribunal she may take the matter to a wardhead or chief's court if necessary, with the assistance of her village headman.

28 Do the economic needs of each house govern the principles of allotment of property to the houses ?

	Y	N	D/K
CHIOTA	21	-	-
MARANGE	30	-	-
CHIWUNDURA	31	-	-
GUTU	22	-	-

If the husband has property to allot, should he allot an equal share to each house?

	Y	N	D/K
CHIOTA	21	-	-
MARANGE	30	-	-
CHIWUNDURA	31	-	-
GUTU	22	-	-

The answers to these questions are seemingly contradictory: on the one hand, informants said that the economic needs of each house govern allotment of property whereas, on the other, each house should receive an equal share. The husband, if he acquires property (particularly food, clothing and cash) is obliged to allot such property to his various wives if they need material assistance. (In practice, of course, it will be difficult to argue that they do not need such property). In general, each house is entitled to share equally with the other houses; but this rule is tempered by the principle that the size and economic needs of each house may require special consideration. For instance, if a man has two wives, one of whom has four children, and the other only one child, he should allocate a larger share of any food he has acquired to the house which has the greater number of children.

21 Can an aggrieved wife bring an action if the allotment is unreasonable?

	Y	N	D/K
CHIOTA	21	-	-
MARANGE	30	-	-
CHIWUNDURA	31	-	-
GUTU	22	-	-

Great care must be taken by the husband, when allotting property to the various houses not to show undue favouritism. If one of his wives is aggrieved by a biased allotment she may bring an action in the family court for redress in much the same manner as she may sue for property which has been taken out of her house without her consent.

If a husband persists in favouring one house at the expense of another, this may provide good reason for desertion. The aggrieved wife will feel that her husband no longer values her as a wife and will be compelled to desert.

30 Does a wife have a right to sue her husband in delict?

	Y	N	D/K
CHIOTA	21	-	-
MARANGE	30	-	-
CHIWUNDURA	31	-	-
GUTU	22	-	-

Wives have a clear right to sue their husbands for any wrongs the latter may have committed against them. Usually the matter will be instituted in the family court; the wife will call all her husband's relatives to hear the matter and will present her own case. She will not need the formal assistance of any of her husband's relatives in doing so, but may request the help of her husband's father or one of his relatives. The husband's aunt (vatete/samukadzi) should be present at the hearing. If the wife has deserted to her own family, she will still bring her action in her husband's family court but, this time, she will be assisted by her own guardian or one of her brothers or uncles. If no solution can be reached in the family court, the matter may well lead to the dissolution of the marriage.

31 Does a wife have a right to sue any third party in delict?

	Y	N	D/K
CHIOTA	21	-	-
MARANGE	30	-	-
CHIWUNDURA	26	5	-
GUTU	22	-	-

Informants replied that the wife has a right to sue any person who has committed a wrong against her. The right vests in her personally and, although she should be assisted by her husband when bringing the matter to court, he cannot prevent her from bringing the action by refusing to assist her. If he did refuse his assistance, his wife could obtain the assistance of her village headman.

The six informants in Chiwundura who alleged that the woman did not have a right to sue a third party in delict, stated that the decision to bring the action lies with the woman's husband. They were all members of foreign tribes.

It is very rare for a woman to be sued in her own name without her husband's assistance. He is liable to pay any damages which may be awarded against her and,

consequently, must be present to protect his interests.

32 Does a husband have unrestricted sexual rights over his wife ?

	Y	N	D/K
CHIOTA	21	-	-
MARANGE	30	-	-
CHIWUNDURA	31	-	-
GUTU	22	-	-

The fact that all the informants were male may be of particular significance in interpreting their answers to this question and the following two.

By "full sexual rights" was meant that the husband has the right to his wife's sexual favours to the exclusion of all other men. If another man has intercourse with his wife, the husband is entitled to sue the lover for damages for adultery. The phrase further includes the husband's right to demand sexual intercourse when he chooses, subject to the customary periods of restriction on intercourse: for example, during menstruation and after the seventh month of pregnancy until about six months after the birth of the child[1].

33 Does a husband have the right to regulate his wife's freedom of movement ?

	Y	N	D/K
CHIOTA	21	-	-
MARANGE	30	-	-
CHIWUNDURA	31	-	-
GUTU	22	-	-

A husband has the right to determine whether his wife may leave the family home, for how long she may leave and where she may go.

It would seem that if she disobeys his instructions or leaves without his prior knowledge and consent, her action may be indicative of a serious breakdown of the marriage, requiring the intervention of either the wife's or husband's family.

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1 Holleman (1950) 214 sq. The converse situation was not explored: the husband is expected to have regular and frequent intercourse with his wife. If he fails in this duty his wife has legitimate ground for complaint to his family or even a tribal court.

34 Is the husband's right to chastise his wife limited?

	Y	N	D/K
CHIOTA	3	18	-
MARANGE	-	30	-
CHIWUNDURA	-	31	-
GUTU	-	22	-

By this question, informants seem to have understood that the husband has an unfettered discretion when to chastise his wife. They all felt that he could not, with impunity, inflict serious injury on his wife. When exercising his right, moreover, the husband is expected to be moderate.

36 Does the husband have an unqualified obligation to maintain his family?

	Y	N	D/K
CHIOTA	21	-	-
MARANGE	30	-	-
CHIWUNDURA	31	-	-
GUTU	22	-	-

In this question it was sought to discover whether there is any qualification of the husband's right to maintain his wife (or wives) and family. For instance, if the husband had been injured and were unable to work, would the obligation to support the children shift to his relatives or to his wife? This was thought to be especially important, today, when many men are working in commerce and industry in the towns, and are already left to manage the family affairs in the tribal trust lands Since family responsibilities are being shared, in this manner, circumstances may arise when a wife's responsibilities are increased.

The unanimous answer was that the husband's duty to maintain his family may never be limited, regardless of the circumstances. If a husband failed in his duty, the wife would have grounds dissolution of the marriage.

In practice, in a polygamous family, this obligation may be reduced. Each wife is responsible for her own house, especially with regard to providing food, and she will not make any demands upon her husband unless matters are serious.

37 Does a wife have an obligation to maintain her husband?

	Y	N	D/K
CHIOTA	21	-	-
MARANGE	30	-	-
CHIWUNDURA	31	-	-
GUTU	22	-	-

This question follows from the previous question. Informants were asked whether the wife would be under an obligation to maintain her husband (to the extent of finding employment, if necessary) if he were disabled or unable to work. The consensus was that a woman was under no such duty. A wife is obliged to support her husband only to the extent of growing crops and food for him and the children. Obviously, she is also under a duty to perform the normal wifely duties such as cooking and cleaning but her obligations extend no further than this. It is obvious that customary law has not evolved a reciprocal duty of support.

41 Does a wife have the power to demand dissolution of the marriage?

	Y	N	D/K
CHIOTA	21	-	-
MARANGE	30	-	-
CHIWUNDURA	30	-	-
GUTU	22	-	-

The consensus was that the wife has the power to demand dissolution of her marriage. In view of Holleman's statement that:

> 'the interests of the families outweigh the private interests of husband and wife'

and the wife's status as a minor, it was deemed important to discover to whether the wife's power was in any way restricted. Informants agreed that the wife must prove that she had been subject to cruelty and neglect on the part of her husband of sufficiently serious degree before either of the families would entertain the idea of dissolving the marriage. As informants in Marange said, rovoro will have to be returned so the woman will have to prove to her family that she is in dire circumstances before she can win their support in a formal action.

In view of this, it would appear that, in practice, the wife's power is circumscribed. She will have to show positive signs of ill-treatment at her husband must will have to take care that she obtains the support of her own family, who will not be inclined to sympathise. She can, of course, request her husband's family to reprimand him for his behaviour but

this will be done in circumstances where, for one reason or another, she wishes the marriage to continue. It is possible that she may approach her village headman to gain his assistance in bringing the matter before the court, if she has been refused help by her own or her husband's family but, by doing so, she is running the almost certain risk of being rejected by her own family once the marriage has been dissolved.

44 Does the wife or her family have to send a gupuro[1] to the husband, if it is the woman who is demanding dissolution of the marriage?

	Y	N	D/K
CHIOTA	1	20	-
MARANGE	-	30	-
CHIWUNDURA	5	25	-
GUTU	-	22	-

This question was asked to investigate in more detail Question 41. Because this is a rejection token, there can be no question of it being given by a woman to her husband. As informants in Chiwundura said, a wife cannot reject her husband. If a woman wishes to divorce her husband she may do one of two things: she may either approach his family and discuss any grievances she has with them or, if they are not prepared to assist her, she must desert her husband and return to her own family. It is then up to the husband to sue his tezwara for return of rovoro. If the wife deserts in this fashion, there is an immediate assumption that she is the cause of the breakdown of the marriage[2]. This places her family in an unfavourable position in so far as return of rovoro is concerned. Because they are deemed to be at fault (in that their daughter caused the breakdown of the marriage) they may be deprived of a greater portion of the rovoro when the question of return arises during the course of the divorce action. The wife may, therefore, be severely disciplined by her family and sent back to her husband unless she can show clear proof that she was forced to desert by reason of her husband's ill-treatment.

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1 Holleman (1950) 282. The giving of a rejection token in Marange was more commonly described as duro kutura.

2 Holleman (1950) 287.

A husband is not in such an unfavourable position regarding dissolution. If he chooses to reject his wife he may do so. This raises a presumption of guilt on his part but it is not nearly so difficult for him to dispel. In particular, he does not require the assistance of another person to bring the formal action and his family will not be as concerned about return of the rovoro as the vatezwara. It is apparent from this question and Question 41, that, in practice, the wife has no power to dissolve her marriage. This is not surprising since the rights and duties created by the union concern the two families rather than the spouses. The more favourable position of the husband is an unfortunate reflection of male dominance in customary law.

46 On dissolution of the marriage what property may a wife take with her?

No tabulation of responses could be obtained in respect of this question.

The general response was that the husband and wife's estates would be separated and the woman would be entitled to take all property considered to be hers The problem arose in determining which property was deemed to be hers. Informants were agreed that the woman was entitled to all her umai property and any property which she may have inherited, during the marriage, from one of her deceased relatives. The wife's ancestral spirits ensured a sanction against any person who deprived her of such property.

A more contentious topic was the mavoko property[1]. There appeared to be no certain rules governing the disposition of this property but most informants said that if the husband were the guilty party in causing the breakdown of the marriage, the wife would be entitled to take her mavoko property with her. Conversely, if the wife were guilty of causing the breakdown of the marriage, her husband could keep this property. What property may be defined as mavoko is a controversial issue, but it would seem to include articles which the wife has personally manufactured and property which falls within her sphere of work activity. Property which cannot be apportioned to a particular sphere of activity is assumed to be

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[1] Analysed above in Question Nos 24 and 25.

the husband's and, therefore, remains with him. There appears to be a definite inclination to deal with matrimonial property on dissolution on the basis of fault: whichever spouse is at fault in terminating the marriage will be penalised regarding mavoko property.

49 Do unmarried women have outright ownership in their property?

	Y	N	D/K
CHIOTA	21	-	-
MARANGE	30	-	-
CHIWUNDURA	31	-	-
GUTU	22	-	-

In this, and in other questions concerned with ownership of property, the informants were asked whether any person had the power to determine the use and enjoyment of property under the individual's control; for instance, if the family were in need, could a father, as of right, use any property that his unmarried daughter had acquired for the benefit of the family. It is only where a negative reply was given to this question that it was considered that a person owned property "outright".

Informants stated that unmarried women, regardless of their age, had unrestricted rights to any gift which was given to them (an example of which would be a payment made during the marriage negotiations). All women who were old enough to be earning their own wages, had an unrestricted right to the fruits of their labour. Similarly, any crops which the girl had grown herself, were deemed to belong to her. The girl is considered, however, to have a responsibility to make a contribution to her parents, particularly if she were still living with them. What becomes increasingly apparent from the responses to questions on property is that while individuals might have unrestricted proprietary capacity, in practice, their obligations toward their families determined, in large measure, their use and enjoyment of the property under their control.

50 Do unmarried women have outright ownership in land[1]?

	Y	N	D/K
CHIOTA	8	-	13
MARANGE	30		-
CHIWUNDURA	4	27	-
GUTU	-	22	-

[1] This question had not been included in the original questionnaire, but in view of the response in Marange, it was inserted in the questionnaire delivered in

In stressing the unmarried girl's unrestricted proprietary capacity, under Question 49, informants in Marange said that she may even own land. They said that mature (and by this they may be assumed to mean middle-aged) women could own land in townships and business centres. Ploughing land would have to be assigned to them by their fathers (who remained the residual or "true" owners), and before a woman would be allocated farm land, she would have had to have been long unmarried.

Eight informants in Chiota said much the same as the informants in Marange; the remaining thirteen informants did not mention land rights as this question had not been put to them. The field worker in Chiwundura and Gutu specifically asked informants about the unmarried woman's land rights and received a qualified reply. Instead of saying that unmarried women can own land, informants said that they could never own ploughing land in their own name; such land vested in their fathers and, at most, they might acquire from him a right to cultivate such land. They were uncertain as to rights to plots in townships.

51 Can unmarried women enter into contracts unassisted?

	Y	N	D/K
CHIOTA	21	-	-
MARANGE	30	-	-
CHIWUNDURA	31	-	-
GUTU	22	-	-

If an unmarried woman has entered into a contract unassisted, can it be repudiated?

	Y	N	D/K
CHIOTA	-	21	-
MARANGE	-	30	-
CHIWUNDURA	-	31	-
GUTU	-	22	-

The unanimous opinion was that unmarried women can enter into contracts unassisted, and such contracts cannot later be repudiated. In Chiwundura and Gutu, informants said that a father was liable for all his daughter's dealings with other people; if she had entered into a contract in terms of which she could not perform, he was not entitled to repudiate the contract either because he had not known about it or had not assisted his daughter in making it. Informants reasoned that a father, whose daughter did hasty and imprudent things, had only himself to blame. The other contracting

party should not suffer when the father, if he had taken the trouble to discipline his daughter correctly, could have prevented such a situation from arising in the first place.

Informants in Chiota and Marange introduced an interesting qualification of this general rule, which was echoed to some extent in Chiwundura. A father is liable for all of his daughter's dealings unless her dealings are outside the sphere of her authority. This means that a father may repudiate a contract entered into by his daughter if the contract concerned a matter which was outside the usual sphere of activity of an unmarried woman. In such circumstances, the other contracting party, presumably has only himself to blame. In Chiwundura, informants said, for example, that if a girl entered into a contract in a town, not concerned with the everyday running of a home, she would be liable for the contract on her own account. Basic principles of agency seemed to govern the question of liability. If a woman purchased groceries for her father's household, he would be liable to pay for them. If, on the other hand, she were living in a town and purchased articles obviously for her own use, she would be liable. Similarly, if it is clear that she were going about her own business, for example, setting up a store which she would manage herself, her father would not be liable. This type of transaction is outside the woman's usual sphere of activities and any person contracting with her must do so on the understanding that the woman is doing it for herself and not on her father's behalf. An onus seems to fall on the other contracting party to protect himself if the woman cannot fulfil her side of the bargain; he cannot look to her father for redress.

Basic division in sex roles seems to play an important part in determining both proprietary and contractual capacity[1].

v. Can unmarried women sue or be sued in court unassisted?

	Y	N	D/K
CHIOTA	21	-	-
MARANGE	30	-	-
CHIWUNDURA	31	-	-
GUTU	22	-	-

As a general principle, all women need the assistance of their guardians when appearing before the court; but if a woman is adult and mature, she may

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[1] See also Question 56.

approach the court unassisted if she is suing her guardian or if she is suing a third person and her guardian is not available and the matter is urgent. Even if the matter is urgent, it is considered preferable that the woman obtain the assistance of one of her male relatives, failing which the assistance of her village headman, before coming to court.

53 Can a husband use his wife's umai property in time of need

	Y	N	D/K
CHIOTA	-	21	-
MARANGE	-	30	-
CHIWUNDURA	-	26	5
GUTU	-	22	-

This question was put to test the response to Question 24. Informants were agreed that a husband may never use his wife's umai property. A test situation - the wife is absent and an emergency arises in the family - was put to informants to discover whether there has been any weakening in the traditionally rigid rules governing such property. The response showed that the old rules and sanctions governing umai property remain in force. Some informants said that the woman's ancestral spirits watched over this property and the husband who interfered with it was courting disaster. Informants in Marange said that, as a matter of practice, wives sent their umai property back to their own families so that husbands never had the opportunity of using it.

A wife's consent would be needed before this property could be used by another person and, in any event, the property could be taken only on a loan basis. In fact, many women use their umai property for the benefit of their families today[1], but this practice does not detract from their absolute right of control over it.

54 Does a wife require her husband's permission to work in order to acquire mavoko property, if she is intending to be self-employed?

	Y	N	D/K
CHIOTA	-	21	-
MARANGE	-	30	-
CHIWUNDURA	30	-	-
GUTU	19	3	-

[1] Holleman (1950) 352

Does a wife require her husband's permission to work to acquire mavoko property if she is entering continuous employment with a third person?

	Y	N	D/K
CHIOTA	21	-	-
MARANGE	12	-	18
CHIWUNDURA	31	-	-
GUTU	22	-	-

Originally these two questions were not included in the questionnaire delivered in Chiota and Marange. Informants raised it of their own accord, however, and accordingly, it was included in the second questionnaire delivered in Chiwundura and Gutu.

The field worker, when discussing the first question with informants in Chiota and Marange, did not make it clear that two potential situations might arise: (a) the wife occasionally produces surplus property as the result of her personal labours, and (b) she enteres into a business enterprise on her own account, such as market gardening. This accounts for the spread of opinion between Chiota and Marange, on the one hand, and Chiwundura and Gutu on the other. Accordingly, informants in Chiota and Marange assumed a situation where the woman occasionally undertook some form of activity whereby she could earn money or acquire property. The question was only fully explained by the field worker in Chiwundura and Gutu.

The most valuable opinion may, therefore, be derived from Chiwundura and Gutu. Informants there felt that a woman is free to do what she pleases (subject to general direction from her husband) within the confines of the family, provided she does not neglect her primary duties as wife and mother. If she intends to enter into any form of contractual relationship with a person outside the family, she will require her husband's prior sanction. It is for this and other reasons explored above in relation to mavoko property (see Questions 24 and 25) that the husband's permission is required if the woman is going into business, either on her own account, or in full-time employment with another person or a firm. (In Marange a large number of informants did not raise the second question as it had not been specifically put to them).

55 Can a married woman own land?

	Y	N	D/K
CHIOTA	-	21	-
MARANGE	-	30	-
CHIWUNDURA	-	31	-
GUTU	-	22	-

Informants agreed that married women cannot own land. They may be allotted land to cultivate by their husbands but the husband remains the owner. The woman has only a temporary right to use it. Informants in Chiota said that married women could not own land in townships and business centres because of present statutory provisions which prevent them from doing so

56 Can a married woman enter into a contract unassisted?

	Y	N	D/K
CHIOTA	21	-	-
MARANGE	30	-	-
CHIWUNDURA	31	-	-
GUTU	22	-	-

If a married woman has entered into a contract unassisted, can it be repudiated?

	Y	N	D/K
CHIOTA	-	21	-
MARANGE	-	30	-
CHIWUNDURA	-	31	-
GUTU	-	22	-

All the informants felt that married women could enter into contracts unassisted and, if they could not fulfil their obligations in terms of the contract, the contract could not be set aside; their husbands would be liable for their actions. In Chiota and Marange, informants said that women had complete freedom to contract concerning matters which fell within their sphere of activity. They gave as examples the sale of mavoko property and the purchase of household necessaries. Although they were unable to give any examples, they felt that a contract outside a wife's sphere of activity would require her husband's assistance. If a third person had entered into such a contract with a married woman, informants were uncertain whether it would be valid. The field worker from his discussions, concluded that it might be voidable at the instance of the husband. The law on this point cannot be stated with any certainty, primarily because the informants have no experience of this type of situation.

Informants in Chiwundura felt that married women should not enter into relationships with third parties without their husbands' prior sanction. It was considered improper for a strange person to enter into a contract with a married woman unless her husband were there to assist her or had given her prior authority. Nonetheless, they recognised that married women were, by force of circumstances going to enter into contracts with strangers without their husbands' knowledge or consent, especially in view of the fact that most husbands, nowadays, worked in town during the week. They envisaged such contracts as the purchase of household necessaries from local grocery shops. They reasoned that these contracts were obviously quite valid and could certainly not be set aside when the husband returned home from work.

57 Can a married woman sue or be sued unassisted?

	Y	N	D/K
CHIOTA	20	1	-
MARANGE	30	-	-
CHIWUNDURA	-	31	-
GUTU	1	21	-

The conflict of opinion between Chiota and Marange, on the one hand, and Chiwundura and Gutu on the other is explained by a difference in emphasis. Informants in Chiota and Marange said that tribal courts were not unduly concerned about the assistance of a woman when she approached the court It was usual for a woman to be assisted but, if she were not, the court would not be especially concerned. In Chiwundura and Gutu, informants emphasised the normal practice: women should be assisted in court and only in exceptional circumstances would the court allow them to appear unassisted.

If a married woman were suing her husband, all informants were agreed that she should obtain the assistance of one of his senior male relatives or, if they refused their help, the assistance of one of the male members of her family If she were denied assistance from either of these sources, she might approach her samusha and quest his help. Only if he would not help her, would the court entertain her action without the presence of a male during the trial.

When suing third parties, for reasons of convenience, however, a court might entertain an action brought by a wife who was unassisted if her

husband were not present and the matter were urgent. If the matter was trivial and did not concern the husband, the court might hear the action in his absence.

In the converse situation, if a married woman were being sued, her husband would always have to be present. Informants said that he would be responsible for payment of damages and, hence, should have an opportunity of defending the matter.

Informants in Chiota and Marange seemed more inclined to regard the husband's assistance as a matter of formality and, generally, had a more lenient attitude. In Chiwundura and Gutu, informants said that it was something done as a favour; women, lacking the experience men have require male assistance when presenting a case in court. Informants felt that any woman who turned down this help would be foolish.

58 Are widows and divorcees free to remarry without the consent of their guardians?

	Y	N	D/K
CHIOTA	21	-	-
MARANGE	30	-	-
CHIWUNDURA	26	5	-
GUTU	21	1	-

Most informants said that widows and divorcees were free to enter into a marriage of their own choice and that their guardians would have no say in their selection of a new spouse. It was felt that, as a matter of expediency, the guardian would be pleased to see his daughter settled in a new home as soon as possible and would not put any obstacles in the way of her re-marriage. His consent to the new union was necessary because he would receive the necessary rovoro but, as informants in Chiwundura said, the giving of consent is a formality. It seems that because the amount of rovoro charged will be less than for the girl who has never been married, the tezwara would be less concerned with the union than usual. Informants said that widows and divorcees were mvana (those who had already borne children). Their prospects of marriage were not as good as those of maidens and, accordingly, their guardians would be pleased to see them supported by another husband as soon as possible.

Despite the freedom which the informants apparently were prepared to accord the widow or divorcee, it seems that circumstances will dictate the degree of freedom. Informants in Chiota said that if the woman had been divorced and had no children (or only one or two and was still young), her father

would have full control over her marriage. Informants in both Chiwundura and Gutu felt that a father could stop a marriage if he put his mind to it. Undoubtedly, the status of the woman and, in consequence, her rovoro value, will determine the role played by her father. The woman, disparagingly termed mvana, does not warrant much in the way of rovoro and so her father will allow her to marry whom she chooses; but a young girl, for whom a high rovoro may be charged, will warrant stricter control.

59 Do widows and divorcees have outright ownership in their property?

	Y	N	D/K
CHIOTA	21	-	-
MARANGE	30	-	-
CHIWUNDURA	31	-	-
GUTU	22	-	-

Informants agreed that widows and divorcees had unfettered control of their property[1]. Their guardians had no claim to the use of such property. In this regard, the woman appears to be totally "emancipated" from male guardianship. Very often, of course, the woman will have children to educate and support and will use any property she acquires for this purpose. In these circumstances, there is no question of her father demanding a contribution toward his own household.

This rule is modified by the institution of kugara nhaka. If a widow chooses to enter into a marital relationship with one of her deceased husband's male relatives (kugara nhaka) she falls under his guardianship and her relationship with her husband's family remains unchanged. If the widow refuses kugara nhaka, she would seem to be "emancipated" for purposes of proprietary capacity. She might, however, remain in her husband's village (when informants in Chiota and Marange said that she would be allowed to continue to occupy her husband's lands and probably his house as well). Alternatively, she might choose to return to her family (see Question 89).

If the widow remained in her husband's village, she would be allowed to continue living and working on his lands. This is a matter of expediency for if the widow had a number of children to look after, the husband's relatives would be only too pleased to share the burden of caring for them

[1] In the sense described in Question 49.

by allowing her to work the lands and produce food.

60 Can widow and divorcees enter into contracts unassisted?

	Y	N	D/K
CHIOTA	21	-	-
MARANGE	30	-	-
CHIWUNDURA	31	-	-
GUTU	22	-	-

Informants said that widows and divorcees who had become independent were completely emancipated with regard to contractual capacity. There was no limit imposed on the matters on which they could contract. Some informants in Chiota referred to a widow as "the remaining head of the family" (a remarkable departure from traditional Shona conceptions of female status), and, accordingly, free to do what she liked. Informants in Chiwundura said that, as a matter of practice, she might well rely on the greater business experience of her father to advise her when entering into a contract. In Gutu, informants were not as ready to regard the widow or divorcee as an emancipated person. They said that she continued to remain under the authority of her father and, as legitimate guardian, he would be responsible for her contractual undertakings. Even so, his assistance was not necessary for the making of a contract.

61 Can widows and divorcees sue or be sued unassisted?

	Y	N	D/K
CHIOTA	21	-	-
MARANGE	30	-	-
CHIWUNDURA	2	29	-
GUTU	3	19	-

Again a division of opinion between Chiota and Marange, on the one hand, and Chiwundura and Gutu, on the other, is encountered. In Chiota and Marange, informants said that divorced or widowed women were completely emancipated and free to approach the court without the assistance of their guardians. Some informants said that they were treated almost in the same manner as men. It was pointed out, however, that if the widow had elected to remain in her husband's village she should approach the court in the company of her deceased husband's younger brother, if he were available.

In Chiwundura and Gutu, informants said that widows and divorcees were no different from any other women with regard to locus standi. Hence, the general rule is that the woman requires the assistance of her guardian. If she were suing her guardian, she might do so unassisted, but special dispensation

would be needed from the president of the court and the matter would not pass without comment. Certain types of dispute might be brought before a family or village court, without the assistance of a man. These would be relatively petty matters, such as the straying of cattle and defamation. If the widow had entered into a union with one of her deceased husband's male relatives or if she had elected to remain in his village, she should seek the assistance of one of his brothers when approaching the court. If she had returned to her own family, she would be able to rely on the assistance of her father If, however, she had moved to a new area and had no available guardian, she should request the assistance of her local village headman.

From the above questions, and the reports of field workers, there appears to be a clear difference in attitude regarding the status of women. Informants in Chiota and Marange seemed ready to accord women a greater degree of independence than informants in Chiwundura and Gutu. While one can account for this type of approach in Chiota by arguing that nearly all the men work in nearby Salisbury, leaving women to run family affairs alone, one cannot use the same argument in respect of Marange. Nor does there appear to be a significant correlation between urban employment of men and emancipation of women, since a large number of the men in Chiwundura and Gutu are employed in towns The possibility of bias on the part of the field worker cannot be discounted[1] but the most apparent and likely explanation is that there has been uneven tribal development of the law with regard to the status of women.

62 Does marriage serve to emancipate a man from his father's guardianship?

	Y	N	D/K
CHIOTA	-	21	-
MARANGE	29	1	-
CHIWUNDURA	31	-	-
GUTU	22	-	-

The Shona realistically appreciate that full legal capacities cannot be arbitrarily determined on the happening of a certain event or on attaining a set number of years. It is a process of gradual maturing[2].

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1 Which appears from the favourable account given of women's rights in Chiota and Marange (both widely dissimilar areas). The field worker stressed, when analysing data, that women were "not discriminated against" in either of these.

2 Holleman (1950) 205.

When considering the legal status of women inter alia proprietary capacity, locus standi in judicio and contractual capacity, were investigated. Most of the powers flowing from these various capacities are withheld from women. Men present a different problem. In theory, the senior male representative of a patriline is deemed to have full legal capacities. This does not necessarily mean that other men in the patriline, once they have attained physical maturity, suffer the same incapacities as women. They appear to have the same proprietary and contractual capacity as their senior guardian. One aspect of their legal capacities requires special clarification: are they responsible for their own wrongdoing or does their guardian remain responsible[1]? As Holleman noted in the 1940s:

> "Especially nowadays, when young men are increasingly inclined to challenge paternal authority because they feel no longer economically wholly dependent upon their fathers, the problem of paternal responsibility has become acute."[2]

In a significant piece of judicial law-making, the Court of Appeal for African Civil Cases rejected the traditional notion that a father is always liable for his son's wrongdoing[3]. The court held that if a man is physically mature and economically and socially independent of his parents, he should be regarded as emancipated and, therefore, responsible for his own actions. In view of these considerations, the question is aimed at determining the present approach of chiefs and headmen to the problem of male emancipation.

The term "emancipation" is a common law conception and is not especially helpful in African law, since there is no Shona equivalent. In preference, informants were questioned about a man's "independence" from his family.

In Chiota, informants were of the opinion that a man becomes independent only when he leaves home and sets up an establishment of his own. While he remains living with his parents or living in their village, he remains under his father's authority. In Marange, a completely different answer was given. Informants thought that marriage was the most important factor in determining the independence of a man. They described the process

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1 A woman's guardian always remains responsible for her wrongdoing so it was not deemed necessary to investigate this aspect of female status.

2 Holleman (1950) 59.

3 Edwin Mombeshora v Kennie Chiruwe 1971 CAACC 30; Stewart a/b Patrick v Chigumbura 1971 CAACC 35.

whereby a young bride is brought to her husband's family; she is expected to live with her mother-in-law for approximately six to eighteen months, during which time she must prove herself capable of looking after a home of her own. When she has satisfied her husband's family on this ground, the newly married couple will be given their own house and will be deemed to be an independent unit. As the husband assumes responsibilities for his own family, so he becomes independent of his father. In both Chiwundura and Gutu the same answer was given. As informants in Gutu put it, the young man, after marriage, must "go out of the village", in other words, go out and look after himself. He will then be recognised as an independent samusha.

63 Does age have anything to do with the emancipation of men?

	Y	N	D/K
CHIOTA	-	21	-
MARANGE	-	30	-
CHIWUNDURA	-	31	-
GUTU	-	22	-

The consensus was that age, in itself, had nothing to do with the emancipation of men. In Chiota it was said that the day a man obtained his registration certificate was regarded as important in the process of maturing to adult responsibility, but whatever a man's age, he may be considered to be under the authority of his guardian. Informants in Chiwundura gave valuable insight into the practical aspects of a man's independence. They pointed out that one rarely finds adult men living with their fathers in the tribal trust lands. They are more likely to be living and working in a town. While in the town, the father will, of course, have no control over his son's actions and, for all intents and purposes, the son is fully independent of his father. But while the son continues regularly, to return home, his father will remain responsible for contractual and delictual obligations incurred in the tribal trust land. Furthermore, a son will require his father's assistance if he appears in a tribal court. While a father may not be deemed liable for a delict his son committed in town, he will be considered responsible for his delicts committed in the tribal trust land. Regardless where a son is living or working, he will be expected to make a cash contribution to the running of his father's household. The same attitude was echoed in Gutu, where informants realistically aporeciated that if a man were economically independent and living in a town, he would, while he was in the town, be considered emancipated from his father's control.

Informants in Chiwundura showed also that there was little difference between an unmarried man and a married man who continued to live with his parents. If the man were married and still fairly young (approximately under the age of 27 years) his father would be liable for his son's delictual acts. Even if the son were working in a town, but had left his wife living with his parents, his father would retain his parental authority over his son.

While marriage is an important factor in allowing a man to achieve independence, other factors are equally important. The place where the man is living, his economic self-sufficiency, his degree of contact with his family and the place where his obligations arose will serve to determine his degree of independence. The man's age is not considered to be nearly as significant.

64 Is a father always liable for his son's delictual actions?

	Y	N	D/K
CHIOTA	-	21	-
MARANGE	24	6	-
CHIWUNDURA	31	-	-
GUTU	17	5	-

The spread in opinion is more apparent than real: the response to this question in Chiota must be read subject to the qualification that a father will be liable for his son's delictual acts only while the son remains under his authority. If the son is not under his control, the father is considered to have only a moral responsibility to pay any damages awarded against his son. The response from the other areas must be read in the same terms. For example, if a son commits a delictual action in a town, he will, generally speaking, be held liable on his own account because he is not subject to his father's control while he is away from home.

That the issues are not as clear cut as this, is reflected in the response from Marange and Gutu, where a substantial minority of the informants said that a father is not always liable for his son's delicts. There is a general principle that a father should pay the damages occasioned by his son's wrongdoing. The rationale for this principle lies in the further assumption that it is the father's duty to discipline his child[1]. If he fails in this duty, he must accept responsibility for neglect of his parent duties. But the factors mentioned in questions 62 and 63 (viz when a father loses his authority over his son) are important in establishing delictual liability on the part of the fa

[1] Informants in Chiwundura spoke of mwana asine tsika - the "ill-mannered child". This type of child they associated with illegitimate children, in other words those who had no father to discipline them.

was the delict committed in a tribal area; was the son married and economically dependent on his father etc?

Clear legal principles have apparently not yet evolved to cater for modern social conditions. The traditional principle that a father is always liable for his son's delictual actions remains but it is no longer always practical to apply. The circumstances in which a father is not responsible for his son's actions have not yet been clearly conceptualised. Apart from purely physical factors such as locality and distance, the nature of the wrongdoing may well have a bearing on the issue. If a son damages a motor vehicle in a town, he will probably be compelled to bear the burden himself, provided he is physically and intellectually mature, and economically self-supporting. If, on the other hand, the delict is one of seduction or adultery, the attitude may be different. These are delicts known to traditional customary law and, accordingly, in determining liability, a more traditional approach may well be adopted.

65 May a father renounce liability for his son's delictual actions?

	Y	N	D/K
CHIOTA	21	-	-
MARANGE	30	-	-
CHIWUNDURA	29	2	-
GUTU	22	-	-

The act of renouncing liability for a son's delictual actions is considered to be extremely serious. Customary law assumes that the head of a family is responsible for the wrongs committed by persons of his own blood. Obviously, a father in taking such a drastic step, would have to ensure that the plaintiff's right to payment of damages was not prejudiced. A declaration renouncing liability should be made in court, during the hearing of the case. In order to be effective, the father would have to be able to prove that his son was old enough to realise his fault but had deliberately persisted in his wrongdoing (or was an habitual offender). The situation envisaged by informants was where a son persistently seduced girls; if, despite any disciplinary action on his father's part, he refused to change his ways, he would become liable for his own actions[1]. Chiwundura informants said that the father is, in effect, notifying the community that all future actions should be brought against his son rather than him.

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[1] Holleman (1956) 261 points out that a unilateral act on the part of the father can have no effect unless it is supported by the community; it is for this reason that the father will have to show clearly and publicly that his son is a persistent and deliberate offender.

66 May a father renounce his parental responsibilities for his son?

	Y	N	D/K
CHIOTA	-	21	-
MARANGE	-	30	-
CHIWUNDURA	23	8	-
GUTU	12	10	-

Informants in Chiota and Marange were quite adamant that a father could never sever familial relationships of his own accord. Informants were asked to consider the possibility of totally disowning a son so that no future relationship with him would ever be entertained. The previous question is, of course, part of the relationship of father and son. A father is responsible for all the actions of his blood kin and his responsibilities cannot easily be distinguished or divided. It is for this reason that the renunciation of delictual liability is regarded to seriously.

In Chiwundura and Gutu, informants were uncertain about the validity of such an action. Those informants in Chiwundura who said that this was possible, had in mind the recent case of a local headman who had renounced all knowledge of his son. The son had left for South Africa and had not returned home. Those in Gutu who felt that such action was possible, said that it was possible in theory only. They could think of no examples to support their conclusion but they cited the hypothetical case of a son who had committed incest with his father's wife. They found the idea so abhorrent that they felt certain the father would disown his son. Even in such circumstances, however, others went on to say that if the son genuinely repented and returned home, he would be accepted back into the family.

69 Is payment of damages (muripo) sufficient to give the woman's lover (gomba) a claim to paternal rights in his child?

	Y	N	D/N
CHIOTA	-	21	-
MARANGE	9	-	21
CHIWUNDURA	26	5	-
GUTU	4	16	2

Holleman has noted that if the woman's lover has paid damages (muripo) for seduction, he may tender a further payment known as maputiro to the woman's guardian. On payment of this sum, the lover is entitled to the paternal rights in the child[1]. Child seems to dispute the right of the lover to demand the child once he has paid muripo[2].

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1 (1950) 244 sq.

2 (1965) 68.

There appears to be a considerable difference in tribal law regarding rights to illegitimate children. Informants in Chiota said that payment of muripo gave the gomba a right to tender maputiro and thereby obtain parental rights to the child. Unfortunately, this does not fully disclose the legal position; it is still uncertain whether the woman's guardian has a right to refuse to accept maputiro and, therefore, retain parental rights in the child. Informants said that maputiro was usually given to forestall any disputes regarding paternity and was an inevitable payment after muripo. In Marange, most informants were unfamiliar with the practice of paying maputiro; they recorded a "don't know" answer. Some informants said that payment of muripo was sufficient to entitle the natural father to his child. Again, it is not certain whether the payment of damages merely indicates the paternity of the child or whether it gives the natural father a claim to paternal rights over the child. In Chiwundura, most informants were unfamiliar with the concept of maputiro as well. They said that if the lover concerned had had relations with a married woman and if the latter's husband did not want the child, he could demand an increased amount of muripo and then relinquish his rights to the child. (This is not the same as a woman's husband repudiating a child born to his wife; in this instance, there is not necessarily a father to whom paternal rights in the child may be relinquished.) In the case of an unmarried woman, the gomba might pay muripo and, if he wanted to claim the child as well, he could pay chiredzwa (rearing fees) after the child was born.

In Gutu, most informants were unfamiliar with the concept of maputiro[1]. They said that, in general, payment of muripo by a lover was an admission of his paternity. If he wanted the child, he could wait until it was born and then pay chiredzwa. In most cases, the court would allow the parties to negotiate the amount of chiredzwa on their own.

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[1] Informants here drew a distinction between gomba (who is an adulterer or the seducer of a betrothed woman) and chigomba (who was the seducer of an unmarried woman).

72 Does a simple promise give rise to a valid contract?

	Y	N	D/K
CHIOTA	-	21	-
MARANGE	-	30	-
CHIWUNDURA	3	28	-
GUTU	-	22	-

In line with many other systems of law, customary law does not recognise the idea of a promise giving rise to a valid legal obligation. In Roman law this was expressed by the maxim: ex nuda pacta non oritur actio[1].

Informants said that before one could sue for performance of a contract, something had to be done by one of the parties; there had to be a transfer of property (especially cash) or a performance of certain services. No distinction was drawn between contracts peculiar to customary law and those peculiar to the common law - all contracts were considered in the same light. This may indicate a tendency for transactions known to the common law to be moulded into principles of customary law.

73 Is transfer of property necessary to give rise to a valid contract?

	Y	N	D/K
CHIOTA	15	6	-
MARANGE	30	-	-
CHIWUNDURA	30	-	1
GUTU	22	-	-

Maine termed contract in primitive law "incomplete conveyance of property"; in other words, property had to change hands before contractual obligations and rights could come into existence. The bare promise itself did not suffice. This is borne out by the informants in all the research areas. The informants in Chiota who said that transfer of property is not necessary to give rise to a valid contract said, instead, that performance was sufficient. Most other informants were of the same opinion - either transfer of property (usually cash) or part performance. They referred a bare promise as chitsidzo (a serious promise); before this became actionable, something had to be given: either rubatso (a payment of earnest) or chibato something held by one of the contracting parties (usually cash).

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1 Gluckman (1965) Cap VI (1966) 72 sq; although a bare promise in Tswana law does appear to be actionable.

86 Do Africans dispose of property contrary to the usual order of succession prior to death?

	Y	N	D/K
CHIOTA	21	-	-
MARANGE	30	-	-
CHIWUNDURA	31	-	-
GUTU	22	-	-

The traditional African conception of wealth connoted assets, such as cattle, which could be used to assist the reproduction of the lineage. The rules governing the devolution of a deceased estate are concerned almost exclusively with the family cattle which Holleman calls "organic" property in that it may be used to assist reproduction of the lineage. In principle, the customary law of succession is aimed at retaining such organic property within the control of the family, together with maintaining an unbroken bloodline according to patrilineal principles. The common law conception of "freedom of testation" is completely at variance with customary law. The idea that a person may, by will, dispose of his property to whomever he may choose conflicts with the interest the family has in organic property. This question was asked in order to discover whether the rules governing the customary law of succession and property could, in any circumstances, be varied. It was designed to lead into an investigation of the African attitude to wills.

It seems that in customary law a man may make provision for the distribution of his property prior to his death. The devolution of property is not inflexibly governed by the predetermined principles of law and tradition. There are, however, several limitations on a person's freedom to make dispositions. Firstly, it must be appreciated that the person making the disposition cannot upset the usual order of succession; in other words, he may not dispose of the whole estate to a person other than the heir. He may make bequests of certain assets but these bequests must be made to members of the family (or, possibly, to close friends). Informants gave as examples a bequest of a beast to a younger son, or some cash to assist him in his education, or a plough. This power of making dispositions must never be abused, however, to the extent that most or all of the estate is wasted. In order to ensure that such a disposition will be honoured after the deceased's death, it must be spoken publicly before the family, assembled as a whole or, more commonly, before the family elders. The publicity of the declaration is necessary to supply proof of the deceased's intention when the estate is distributed at the kurovaguva ceremony.

Informant said that, the deceased's instructions will be obeyed through fear of upsetting his spirit (ngozi)[1].

87 May the heir, under customary law, be disinherited?

	Y	N	D/K
CHIOTA	8	13	-
MARANGE	1	29	-
CHIWUNDURA	-	31	-
GUTU	20	2	-

This question is related to the previous question. It seeks to discover whether the rules of succession and inheritance in customary law are completely inflexible or whether a man has, at least, partial "freedom of testation".

Most informants felt that a man might not disinherit the person who was to become his heir[2]. Disinheritance seems to be linked with the idea of disowning a son for, by disinheriting an heir, one is effectively indicating that he is no longer part of the family. But there is no correlation between the response to Question 66 and the present question.

The informants in Chiota, who thought that it was possible to disinherit an heir, said that if he had committed a serious offence (such as incest) he could not inherit the estate until he had undergone a ritual cleansing process (botsa). In Marange, informants said that if an heir had murdered his father he would be required to dress in sacks and, carrying an empty bag, go from village to village confessing his sin. People in the villages would give him grain from which he could brew beer. Once the community had partaken of the beer, he would be cleansed and be able to inherit his father's estate.

Informants in Chiwundura had nothing to add to their answer but, in Gutu, they said that an heir could be prevented from taking the deceased's property or, at least, the major portion of it. They felt that if the deceased had spent a good deal of money on educating his heir and the heir had, notwithstanding, been wilfully disobedient, he could be prevented

1 See Bullock (1929) 108. It may well be that, as in the case of the customary law of oral dispositions of property in South Africa, that the man making the disposition will have to take account of the economic needs of the family if his disposition is to be upheld: see Kerr (1961) 24-29.

2 Cockcroft (1934) 36 discusses this possibility.

from succeeding to his father's status as head of the family. Even in Gutu, it appears that total disinheritance is not possible.

88 Are wills accepted by the people of the area?

	Y	N	D/K
CHIOTA	21	-	-
MARANGE	30	-	-
CHIWUNDURA	31	-	-
GUTU	22	-	-

It is apparent that an African's right to dispose of family property is strictly limited in the interests of his family. Despite this, Africans in Zimbabwe-Rhodesia now have the capacity to make a will disposing their property to whomever they choose. The informants seemed to have accepted the idea of making wills, even although a will has the potential of upsetting the rules of traditional customary law.

Potential conflict between the provisions of a will and customary law, however, has been forestalled to some extent. Informants said that wills are no different from the oral dispositions of property which a person may make prior to death. They reasoned that if there were any difference it was superficial: wills are committed to writing and traditional dispositions are oral. As such, a will is regarded as binding on the deceased's family at the kurova guva ceremony. It will be obeyed through fear of the deceased's spirit taking vengeance. On the other hand, the will should not be completely at variance with the dictates of customary law. Informants said that if the will provided for something which was contrary to traditional notions it would simply not be upheld by the family when the estate came to be distributed at the kurova guva ceremony.

This attitude illustrates how a foreign institution may be clothed in terms of more familiar principles. There can be no doubt, however, that a will which upsets sensibilities of tradition could provoke conflict and stress in a family.

89 Is kugara nhaka still practised today?

	Y	N	D/K
CHIOTA	21	-	-
MARANGE	30	-	-
CHIWUNDURA	31	-	-
GUTU	22	-	-

If so, does the deceased's younger brother inherit his widow?

	Y	N	D/K
CHIOTA	21	-	-
MARANGE	27	3	-
CHIWUNDURA	29	-	2
GUTU	22	-	-

Although informants conceded that the institution of kugara nhaka was still in practice today, they said that it was becomingly increasingly unpopular with women. Widows had no intention of remaining under the guardianship of the man's family; they preferred their independence. Many Christians, of course, regard the institution as incompatible with their religion. Some people said that men are now loathe to accept the financial responsibility of another wife and, particularly, the responsibility of caring for and educating her children. Informants said that many women preferred to remain with the heir in order that they would be guaranteed some share in the estate (for they would be regarded as a charge on the heir). Especially if a widow were related to the heir, she would prefer to remain attached to his house where she could expect the respect and affection due to a mother.

The younger brothers of the deceased have preferent claims to the widow if she opts for kugara nhaka. At the kurova guva ceremony, informants in Marange said the widow would hand the man of her choice the deceased's knobkerries, symbolically indicating her choice of levirate partner. In Gutu, the practice was for the heir, the deceased's younger brothers, and his nephews by his eldest sister (vazukuru)to stand in a line, in order of seniority. The widow would carry a bowl of water to the man of her choice. Generally speaking, she should choose one of the younger brothers, failing whom the deceased's muzukuru; the heir could inherit the deceased's youngest wife (provided that he was not related by blood).

In theory, the choice of spouse lies with the widow. But if she chose not to be inherited, she should return to her own family, thereby dissolving the marriage. If the widow were still young and had not born many children, she would be deemed to have failed in the fulfilment of her marital obligations. This might mean that the marriage would have to be formally dissolved by return of rovoro cattle.

From what the informants said about kugara nhaka, it seems that principles are very flexible and are governed by the practicalities of the situation.

Where the widow does not wish to marry one of the deceased's relatives, she will, usually, remain attached to the heir's house; this is common if her own family live at a great distance from the heir or if she has lost contact with them. If the widow were still young and likely to remarry there would be little reason for her to remain with her deceased husband's family; she would, usually, return to her own family in the hope of finding another husband. Whatever the theory regarding return of rovoro in these circumstances, informants said that rovoro would very seldom be returned because it was considered improper to appear mercenary after a recent death. Most people were prepared to wait, in the case of a young, marriagable widow, until she remarried; the deceased husband's family could then claim the rovoro paid in respect of the second marriage. (Even then the amount of rovoro demanded would not be very high). Occasionally, if the widow were a young girl and if the marriage had not lasted long and no children had been born, portion of the rovoro would be returned by the tezwara of his own accord.

92 In the case of a civil or Christian marriage, would a father be given custody and guardianship of his children if he were not a suitable parent?

	Y	N	D/K
CHIOTA	21	-	-
MARANGE	29	-	-
CHIWUNDURA	26	-	5
GUTU	22	-	-

Field workers asked informants whether a father could still claim custody and guardianship of his children, if it were proved that he had no home, no employment and no means to support his children. They replied that, regardless of a man's circumstances, he would be entitled to the custody and guardianship of his children if he had paid rovoro. The interests of the child were not taken into account in enforcing this rule.

93 Must a child remain with its mother until it is weaned?

	Y	N	D/K
CHIOTA	14	7	-
MARANGE	30	-	-
CHIWUNDURA	26	-	5
GUTU	22	-	-

As a general practice, a child is allowed to remain with its mother until it has been weaned. Alternatively, many informants said that the child should remain with its mother until it was about seven years old[1]. They said that tribal courts will not lay down any rigid rule, which depends on the age of the child They will rather order the child to return to its father when it is capable of fending for itself - this may be when it is weaned or when it is approximately seven years old. In Marange, people realistically appreciated that a woman may not wish to look after her former husband's child for seven years. If she remarried, how could her new husband be expected to provide for a child which was not his own and which would, one day, go back to its natural father? In Chiota, some informants said that it was the older generation which favoured the rule that the child remain with its mother until weaned; the younger generation tended to favour the "seven year rule" In Chiwundura, informants said that the traditional rule of customary law was that the child remain with its mother until weaned. The "seven year rule" was something new, derived from the district commissioners' courts. A sizeable number preferred the seven year rule because it was at this age that the child started attending school, when its father could undertake the responsibility of paying for its education.

94 Must the mother retain custody of a child until it is due to return to its father, if it were proved that she were an unsuitable person?

	Y	N	D/K
CHIOTA	7	14	-
MARANGE	-	30	-
CHIWUNDURA	8	18	5
GUTU	-	22	-

The field workers put to the informants a situation where the mother was a woman of no means, slovenly, possibly a prostitute or a heavy drinker. In Chiota and Chiwundura, informants were uncertain as to what approach a tribal court would take in this situation. In Marange and Gutu, informants said that this situation would cause little difficulty: the court would simply

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[1] District commissioners' courts usually apply "the seven year rule", namely that a child should remain with its mother until seven years old. This is not a rigid rule, however: Pemha v Joshua Patrict Zuichemo 1972 CAACC 9.

find another woman in the father's family who was capable of looking after the child; alternatively, there would probably be a woman in the mother's family who could care for the child.

Arrangements concerning care of children, in customary law, are informal and are not subject to any particular rules. Guardianship is more important than custody and, until the father is entitled to take back his child, provided that it is in the care of some competent woman (even if she is not the mother), the court will not be over-concerned. This flexibility was especially evident in Chiota and Chisundura; but even in Marange and Gutu the informants who said that, ideally, the child should remain with its mother, were prepared to concede that it might have to go to another woman, if the circumstances demanded.

What emerges from these responses is that custody is not a particularly serious concern in customary law. Guardianship is considered to be much more important. Section 3 (5) of the African Law and Tribal Courts Act provides that:

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

For many years this has been the rule applied in the district commissioners' courts[1]. It is obvious that the tribal courts are either unaware of or unconcerned by this piece of legislation (see also Question 96).

95 If damages for seduction have been paid, is the father entitled to the guardianship of an illegitimate child?

	Y	N	D/K
CHIOTA	19	2	-
MARANGE	30	-	-
CHIWUNDURA	31	-	-
GUTU	22	-	-

If damages for seduction have not been paid, is the mother's guardian entitled to the guardianship of an illegitimate child?

	Y	N	D/K
CHIOTA	19	2	-
MARANGE	30	-	-
CHIWUNDURA	31	-	-
GUTU	22	-	-

[1] For example, Mildred Mungofa v Julius Mungofa 1971 CAACC 24.

these questions were put to test the response to Question 69. Provided that a seducer has paid *muripo* he is entitled to tender maintenance or rearing fees (and/or *maputiro*) in order to obtain parental rights to his child. In Chiota and Marange, informants said that the child should go to its natural father and his family; this would find favour with the ancestral spirits of that family. If the child were to remain with its mother's family it would not have the protection of the spirits of her family. In Chiwundura informants noted that the maintenance[1] payable was usually at a rate of 2 head of cattle for a girl and 1 head for a boy; more may be charged, however, if the child had remained in the mother's custody for seven years.

96 Are the interests of the child of paramount importance in determining who should have custody and guardianship of an illegitimate child?

	Y	N	D/K
CHIOTA	-	21	-
MARANGE	-	30	-
CHIWUNDURA	-	31	-
GUTU	-	22	-

It is apparent that the effect of legislation in this regard (Section 3(5) of the African Law and Tribal Courts Act, mentioned above in Question 94), has no influence over the practice of tribal courts.

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1 In Chiota, some informants said that African courts are opposed to the idea of paying maintenance. They said that it is contrary to the principles of African lifestyle whereby no one should ever be charged for the food they eat.