TOWARDS A THEORY AND PRACTICE OF ACCESS TO CIVIL JUSTICE FOR THE POOR IN ZIMBABWE:
LAW AND DISPUTE RESOLUTION IN A PLURALISTIC SOCIETY

by

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A thesis submitted in conformity with the requirements for the degree of Doctor of Juridical Science
Faculty of Law
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DEDICATION

To my parents, to whom I owe a lot; and to the rest of my family, in appreciation of all their support; and, above all, to the One who made it all possible.
Acknowledgements

I would like to thank Professor Janet Mosher for guiding me through various phases of my work. I would also like to thank Professor Craig Scott for all the support and help that he provided.

My sincere thanks to the University of Zimbabwe for granting me a three year study leave to enable me to pursue my study for this thesis. I also thank the Faculty of Law of the University of Toronto and the University of Toronto for providing financial support for my study and living expenses.

I would also like to thank my friend Anna Maria Vela, for providing assistance in word processing and all my friends who encouraged me to pursue doctoral studies. I would like to thank all my friends in Canada who helped make my stay in Toronto comfortable. In this regard, special mention is made of Professor Shelley Gavigan.

Finally, I would like to thank the staff of the various libraries in Toronto and Harare that I used for their assistance. I also thank the staff of the National Archives of Zimbabwe for assisting me.
Abstract

This thesis examines the problem of lack of access to justice for poor people in Zimbabwe. The focus is on civil justice. This thesis departs from the predominant approach in the North American (and other Western) scholarship on access to justice which tends to focus on legal services and dispute resolution mechanisms.

An approach suitable to the Zimbabwean context, particularly by taking into account the existence of an officially pluralistic legal system, and the social context in which legal pluralism operates, is adopted.

Justice for the poor in Zimbabwe is conceptualized as more than access to legal services and dispute resolution mechanisms. Although these are important, and issues of the quality of both are pertinent to the Zimbabwean context, issues about the adequacy of substantive laws are equally important. Therefore justice is conceptualized as both substantive and procedural justice. The interaction between substantive and procedural justice is also examined.

The implications of pluralism for access to justice are specifically addressed in this thesis. The examination of pluralism includes an analysis of customary family laws from an historical perspective. Family laws and family relationships, including extended family and kinship ties, formed the basis of indigenous social organization. The area of family laws is most illustrative of the problems of pluralism in the legal system and general cultural pluralism. In particular, it illustrates the problem of divergent legal concepts. This divergence is more acute in the area of gender relations within family laws. The subordinate position of women in customary family laws presents one of the problematic features of customary laws. It also renders pluralism's acceptance of divergence of legal norms problematic. This thesis proposes some possible means of resolving these problems.

Finally, this thesis also addresses the more conventional barriers to access to justice for poor people in Zimbabwe (including poverty itself) such as lack of access
to information, linguistic problems, procedural barriers within the court system, social distance between judicial officers and poor people and geographical barriers to access to courts. Possible solutions to these problems are provided.
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INTRODUCTION

1. The Thesis

This thesis seeks to argue and demonstrate that poor people in present day Zimbabwe lack adequate access to civil justice. In particular, it is argued as follows:

(a) The problem of lack of access to justice for the poor in Zimbabwe must be analyzed within the framework of the social context in which poor people live. This includes taking into account the historical fact of colonization and the introduction of pluralism.

i) This thesis identifies and illustrates the uniqueness of the Zimbabwean context—pre-colonial, colonial, the struggle for independence, and the path of post-colonial reconstruction.

ii) Looking at the historical context facilitates an understanding of the operation of pluralism, as well as of the transformation of the socio-economic and political formation, and its impact on law.

iii) Transformations in the socio-economic context, particularly the processes of industrialization and urbanization, must also be taken into account. In relation to customary law, the historical context is crucial to a critique of its amenability to these transformations.

iv) The status of women in family law and family relationships has been chosen to illustrate the impact of pluralism and socio-economic factors on access to justice. Family law and family relationships were, and to some extent still are, central to indigenous social organization. As a result, it is in this area more than in any other, that the effects of pluralism and socio-economic changes are most evident.

(b) While North American (and other Western) legal experience and scholarly writing on access to justice offers important insights for an account of access to justice in Zimbabwe, there are important limitations to the relevance of that experience and literature which include:

i) The differences in social context which make the transplant of
institutions and ideas difficult.

ii) The fact that most North American literature on access to justice tends to ignore issues of substantive justice which are very crucial in the Zimbabwean context.

iii) There is a need to identify and analyze problems that make it difficult for poor people to access the courts in Zimbabwe. It is contended that access to the courts is necessary for the effectuation of legal entitlements, defence against unjust legal proceedings and contribution to general legal normative ordering.

iv) The debates on ADR in the North American context generally focus on issues that are different from those that would be relevant in the Zimbabwean context. The Zimbabwean context requires an analysis of traditional customary dispute resolution mechanisms which does not occur in the North American literature because of the absence of similar institutions in mainstream North American experience.

(c) Access to justice for the poor in the Zimbabwean context will turn out to have very particular features when the needs of the poor, particularly the needs of poor women, are placed at the centre of the analysis. These features include:

i) the need to critically examine the desirability of pluralism in the official legal system;

ii) the impact of socio-economic changes on the status of women, particularly on poor women;

iii) the impact of non-legal social control on the status of women, particularly on poor women; and

iv) the need to enhance the poor’s access to the courts.

This thesis concludes with specific institutional recommendations that are aimed at addressing the specific issues highlighted above with the ultimate goal being to ensure that Zimbabwe will have a legal system that meets standards of justice that are appropriate for both the social context and the least advantaged groups, including poor women. In
particular, it is proposed that substantive and procedural issues in the law reform process in contemporary Zimbabwe be addressed as follows:

i) Through a process of cultural dialogue. Such a process addresses the need for more participatory, accountable and accessible approaches to law reform as opposed to imposed solutions. It is argued that a process of cultural dialogue will have greater efficacy.

ii) Through specific procedural reforms. The proposed procedural reforms are regarded as essential prerequisites to effective access to justice by the poor in Zimbabwe, who constitute a majority of the population.

2. Limitations
Although this thesis draws on international human rights standards and issues of the impact of economic development on women, these issues are not part of the central focus. The former are used to illustrate standards which can be used to judge whether or not specific laws are just. The latter is addressed only as it relates to changes in the social context within which particular laws, especially customary laws, operate.

3. Methodological issues
The dominant method for this study was library research. However, court records from the Harare magistrates court were also analyzed by the writer. A total of more than 20,000 records from the year 1991 were perused in an attempt to find cases involving self-actors. The search turned out only seven cases which were useful for analysis. In addition, unstructured interviews with magistrates were also carried out by the writer in order to find out some of the problems encountered by self-actors in utilizing the magistrates court. A total of three magistrates were interviewed and one former magistrate was also interviewed. Documents from the National Archives of Zimbabwe was also studied. It was very difficult to search for relevant material at the National Archives of Zimbabwe because in most cases

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1 These would provide an indication of some of the problems that poor people are likely to encounter in utilizing the courts without legal representation.
the indexing is not sufficiently detailed to enable one to decide whether a specific document is relevant or not without actually perusing it. As a result a lot of time was spent (albeit necessarily) reading material which turned out to be not useful to this thesis.

Finally on methodology, a significant limitation on the library research carried out in Canada (i.e. the bulk of the research) was the absence (in Toronto) of some of the original materials cited by authors e.g. case law reports.

4. *General Outline*

Chapter one begins with an overview of the socio-legal history of Zimbabwe which is provided in order to give the reader a general understanding of the Zimbabwean context. The next part gives a more detailed account of the Zimbabwean social context from an historical perspective. It focuses on pre-colonial, colonial and post-colonial phenomena. It also focuses on the status of women in customary family law and family relationships. Women are chosen as the subject of focus because poor women are a sub-group of the poor in Zimbabwe and because of the importance of the status of women to issues of pluralism and access to justice. Customary family law is chosen as a subject of focus because of the importance of customary family law and family relationships to indigenous societies. The family, particularly in its extended form, was (and to some extent still is) the central unit of production and reproduction and social organization in indigenous societies. Because of this centrality, customary law was more developed in family law than in other areas. Customary family law is most illustrative of the changes that occurred as a result of the colonization process and capitalist penetration. It is also illustrative of the problems of pluralism and adaptability to socio-economic changes. The centrality of customary family law to indigenous social life makes it an important arena for conflict with the received law and resistance to change which is relevant to the analysis of access to justice. This conflict and resistance (highlighted in chapter 3) is most obvious when the status of women is placed at the centre of the analysis.

Chapter two is an examination of theoretical perspectives on access to civil justice. It begins with a presentation and analysis of some of the North American (and other Western) perspectives on access to justice which is then commented upon from a Zimbabwean
perspective. This is followed by the writer's own perspective on access to justice for the poor in Zimbabwe which emphasizes the need to address pluralism and both substantive and procedural justice issues. The need for access to state-recognized dispute resolution mechanisms such as courts is also emphasized.

Chapter three continues the analysis of pluralism by making the link between pluralism and access to justice in respect of substantive law and access to dispute resolution mechanisms more evident. It concludes with some tentative questions which need to be addressed in order to resolve the problems of the impact of pluralism on access to justice.

Chapter four addresses specific barriers to access to the courts for poor people in Zimbabwe. It begins by an outline of some of the legal needs of poor people in Zimbabwe highlighting the problems of poor women. Poverty is also analyzed with a focus on women. It concludes by addressing specific barriers to access to the courts by poor people in Zimbabwe including; lack of access to information, procedural barriers (adversarialism, procedural complexity etc), linguistic barriers (problems with literacy, the English language and legalese), geographical barriers and the problem of social distance between judges and poor people. The impact of pluralism on these barriers is highlighted.

Chapter five concludes this thesis. It offers a possible way of resolving the problems of the impact of pluralism on access to justice through cultural dialogue on customary family laws and practices. It also offers specific proposals for enhancing poor people's access to the High Court and the magistrates court. It ends with a general conclusion to this thesis.
CHAPTER ONE: LEGAL PLURALISM IN ITS SOCIO-ECONOMIC AND POLITICAL CONTEXT WITH SPECIFIC REFERENCE TO THE POSITION OF WOMEN IN FAMILY LAW AND FAMILY RELATIONSHIPS

A. Introduction

This chapter describes the introduction of legal pluralism in Zimbabwe and the socio-economic transformation that occurred with colonization. It begins with a description of indigenous social organization and outlines the transformations that occurred during the colonial and post-colonial periods. The transformation of political and socio-economic conditions had a significant impact on law and dispute resolution.

The first section of this chapter provides an overview of the socio-legal history of Zimbabwe focusing on colonization and socio-economic transformation. This is intended to provide a general picture of how these phenomena affected indigenous societies. The next sections provide more detailed descriptions of indigenous social organization and the transformation process.

The second section of this chapter begins with a description of pre-colonial social organization focusing on the family and the community. An outline of pre-colonial customary family laws is then provided. The section concludes with an analysis of pre-colonial political structure, socio-economic relations, and law and dispute resolution mechanisms. The third section deals with the colonial period. It begins with a description of the transformations that occurred in the political structure, in the socio-economic conditions, and in customary law and dispute resolution mechanisms as a result of the colonization process. The description of customary dispute resolution mechanisms includes three detailed case studies which are presented in order to show how these operated in practice. An analysis of these case studies follows their description. A description of dispute resolution mechanisms, including those introduced during the colonial era is then provided. The final part of the section on the colonial era is an analysis of the transformations that occurred during this period focusing on political structure, socio-economic relations, and customary family laws and dispute resolution mechanisms. The final section of this chapter examines the post-colonial era transformation of customary laws and dispute resolution mechanisms.
B. The Socio-Legal History of Zimbabwe; An Overview

The history of Zimbabwe is a very wide subject which can be the subject of several studies. A thorough study of the history of Zimbabwe is obviously beyond the scope of this thesis. What is presented is a brief overview of the major aspects of Zimbabwe’s history which, it is hoped, will provide a clearer understanding of the issues discussed herein.

1. From Colonization to Independence 1888-1980

Zimbabwe became a colonial state in the late nineteenth century and as a result of colonisation. Prior to colonisation, Zimbabwe was comprised of separate tribal societies led by traditional chiefs. Economic relations were centred around agriculture. Land was regarded as the property of the entire tribe held in trust by the chief. The chief allocated land to male heads of households. The major tribes in Zimbabwe were (and still are) the Shona and the Ndebele. The Ndebele chief at the time of the beginning of colonisation was a man called Lobengula. The Ndebeles were militarily stronger than the Shona and often raided them and forced them to pay tribute. Thus, Lobengula regarded the Shona leaders as his subordinates.

The process of colonisation began with the arrival of European missionaries, traders, miners and hunters. The first decisive step towards colonisation was the Rudd Concession of 1888. This was an agreement entered into between Lobengula and one Charles Rudd on behalf of certain concessionaries. The agreement gave the concessionaries and their assigns "the exclusive charge over all the metals and minerals situated and contained in (Lobengula’s) kingdoms". In return the concessionaries were to pay Lobengula one hundred British pounds per lunar month and give him some military equipment and military aid. Some historians have suggested that Lobengula was misled on the extent of the

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activities sanctioned by the agreement. He is said to have believed that only about ten men would prospect for, and mine, gold for a limited period. The Rudd Concession was subsequently ceded to the British South Africa company.

The British South Africa company was incorporated by Royal Charter dated 29th October, 1889. The charter granted it a twenty-five year period of administration over the areas constituting present day Zimbabwe and could not be revoked unless there was misconduct by the company. The British government chose to carry out the colonisation process through the company rather than by direct intervention in order to save itself administrative costs. The incorporation of the company by Royal Charter rather than under the Joint Stock Companies Acts ensured that the company would be under the direct control of the British government.

Having received the Royal Charter, the company proceeded to recruit people to settle in (Zimbabwe). The company was led by Cecil John Rhodes. The first group of settlers, known as the "Pioneer Column", arrived at a place they called Fort Salisbury (now Harare) on 12th September 1890. They set up the British flag, claimed the area occupied by the Shona as part of the British empire, and named it Mashonaland. Four years later, the area occupied by the Ndebele was militarily conquered and named Matabeleland. In 1895 the two areas became one settler colony called Rhodesia (named after Cecil John Rhodes).

In 1896 the Shona and Ndebele rebelled against the settlers. The rebellion was crushed and the leaders executed.

The company's administration was supervised by the British through the British High Commissioner for South Africa. These supervisory powers were conferred by various Orders - in - Council. The Order - in - Council of 1891 gave the High Commissioner supervisory powers over Mashonaland, as did the one of 1894 in respect of Matabeleland. The supervisory powers were confirmed and reinforced by another Order - in - Council in

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4 Palley, supra note 2 at 33.

1898. The colony was renamed Southern Rhodesia (to distinguish it from present day Zambia which was named Northern Rhodesia).

In 1923 company administration ended. A new administrative regime known as "responsible government" came into operation. This was a form of indirect rule by the British government in terms of which the settlers ran their own affairs under the overall supervision of the British government. This state of affairs more or less continued until 11 November 1965 when the white minority Rhodesia Front Party government unilaterally declared independence from the British. The country became Rhodesia.

The unilateral declaration of independence was followed by an escalation of the struggle for majority rule by the black population. The struggle received international support in the form of economic sanctions against Rhodesia and military aid from some countries. An attempt (in 1979) to create a new black government led by a political party which opposed the armed struggle failed. During the brief period of this government the country was called Zimbabwe-Rhodesia. Zimbabwe came into being on 18 April 1980 after the first all race, one person, one vote democratic elections.

2. Capitalist Penetration

The economic policies of the colonial regimes had a major impact on present day socio-economic conditions in Zimbabwe. The economy was organized in a racist manner with the intention of conferring most of the benefits on the white settlers and very few, if any, on the majority black population. This policy is most apparent in the area of land distribution.

At the time of the arrival of the early settlers, the black population was producing sufficient agricultural produce for its own needs through subsistence farming. The early settlers were more interested in mining than agriculture, so the black population sold them its surplus. This led to the prosperity of black farmers, which in turn alerted the settlers to the

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6 Between 1953 and 1963 Southern Rhodesia joined Northern Rhodesia [Zambia] and Nyasaland (Malawi) to form what was known as the Federation of Rhodesia and Nyasaland. For this and all the history up to this point, see Palley, supra note 2.

7 This phrase is used by Fitzpatrick, P. in Sugarman D. ed., Legality, Ideology and the State (London: Academic Press, 1983) and other scholars to describe the introduction of capitalist relations of production in pre-capitalist pre-colonial societies.
viability of farming. The settlers also needed alternative economic activities having realized that the mineral resources were not as abundant as they had thought. However, they found it hard to compete with the established black farmers. They needed labour but the black population was unwilling to work for them because it was self-sufficient through agriculture. Their response was a policy with two major goals. Firstly, they had to undermine the viability of black agriculture in order to force the black population into the labour market. Secondly, they had to force the black population into the cash economy in order to undermine dependence on subsistence farming. These goals were achieved through various discriminatory practices and legislation, the effect of which is aptly summarised by Mafico:

"The discrimination against African agriculture had the effect of reducing its viability. Among other things, this forced Africans onto the labour market. While the state provided subsidised loans to the white settlers, no such facility was available to the black farmers. In addition, African peasants were removed from lands near the railway and roads. This effectively made transportation costs and profit ratios discouraging. Taxes such as the poll, dog, head and hut taxes were imposed. These had to be paid in cash and Africans had to either increase commodity production or seek wage employment."

Settler farmers needed labour to increase productivity on their farms. They found very little voluntary labour because of the self-sufficiency of the indigenous population. The taxation measures implemented to force the indigenous population onto the labour market did not totally solve the problem because it was still possible to increase production in some areas. The settlers then resorted to directly forcing indigenous men to work for wages. This system of forced labour was sanctioned by the state. Men who failed to appear for

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10 Ibid.
conscription were prosecuted and sentenced to three months' hard labour on a settler farm.\(^\text{11}\)

This process of coercing labour was also used in the mining sector and continued into the 1940s. It increased when there was decline (due to protests from the British colonial office because of the disruptive effect of migration on families) in labour supply from the neighbouring British territories of Northern Rhodesia (Zambia) and Nyasaland (Malawi). Recruitment from Mozambique did not fully alleviate the shortage.\(^\text{12}\) The labour shortage (and the need for coerced labour) was exacerbated by the fact that the settler farmers preferred to rely on labour intensive production than to invest in technology.\(^\text{13}\) The expropriation of indigenous land and a rigorous eviction of all indigenous people from all land designated as European land was the final blow to indigenous self-sufficiency in agriculture.

The productivity of indigenous agriculture was further undermined by depriving the Africans of most of their productive land. The Land Apportionment Act of 1930 designated 50.4\% of all the land (including all the urban centres) as European land. Africans were not allowed onto European land except as employees. In addition, all the land in the best agricultural regions (good rainfall, good soils) was designated European land. The provisions of the Land Apportionment Act were reemphasized when the Act was repealed and substituted by the Land Tenure Act of 1965. The almost 50:50 division of the land was maintained despite the fact that the African (black) population outnumbered the European


\(^{12}\) Ibid at 111 Johnson disagrees with scholars like Arrighi, supra note 9 and Mosley who claim that coerced labour ended in the 1920s.

\(^{13}\) Ibid at 112-4.
settlers by 20:1\textsuperscript{14}. The Land Tenure Act further imposed tighter restrictions on Africans on European land. The land tenure regimes under the Act and its predecessor were different. Europeans could own land in their area but Africans could not. Their land was actually considered state land which was "reserved" for Africans. A small portion of the African population was allowed to own land in areas designated as African Purchase Areas in which the conditions (climatic, infrastructure) were inferior to those on European farms. The majority of the African population was confined to peasant farming on the "reserves" which were initially known as "native reserves", then "African reserves" and are now known as "communal areas". The situation regarding the distribution of land is not significantly different today. As Herbst observes:

"The appropriation of African land by European settlers guaranteed white economic domination and black poverty during the colonial period, and the inequitable distribution of land in Zimbabwe today is a dramatic symbol of the enduring structures of unequal society".\textsuperscript{15}

The overcrowding in the peasant areas has resulted in degradation of the soil (which was already poor in most areas) which, coupled with poor rainfall, has undermined productivity. The result is that most peasant families are not even subsistence farmers, but rather are in need of supplementary sources of outside income. In most families that external income is either absent or inadequate, resulting in massive poverty among Zimbabwe's peasant population. The available statistics on productivity and overcrowding are gloomy.

\textsuperscript{14} Mafico, \textit{supra} note 8 at 16.

In 1980, 74% of all peasant land was in semi-arid drought prone areas.\textsuperscript{16} In 1979 the population of the peasant areas exceeded their carrying capacity by approximately two million people.\textsuperscript{17} In 1981 the Riddel Commission noted that:

"The most fundamental constraint on raising the incomes of families in the peasant sector to a level that will meet their minimum needs is land shortage."\textsuperscript{18}

A study of a sample of 600 communal land (peasant) households (around 1986) by Jackson and Collier concluded \textit{inter alia}:

"Our analysis shows that there is a large fraction of communal land producers (approximately 40%) who even in above average seasons do not market any cereals. Even a modest drought might increase this proportion to 60%. --- this pattern is broadly replicated across agro-ecological regions."\textsuperscript{19}

The post-colonial state has attempted to address the problem of overcrowding through resettlement, but very few families have been resettled since independence due to financial and logistical constraints.

The process of capitalist penetration involved industrialization. The new industries were centred around mining and agro-based industries. The mine owners also used coerced wage labour.\textsuperscript{20} Working conditions at the mines during the early years were so appalling that people shunned working there. The work was strenuous. The living quarters were

\begin{itemize}
  \item \textsuperscript{16} Herbst, J.I. \textit{State Politics in Zimbabwe} (Berkeley: University of California Press, 1990) at 39.
  \item \textsuperscript{17} Herbst, \textit{Ibid.} at 41.
  \item \textsuperscript{18} As quoted by Herbst, \textit{Ibid.}
  \item \textsuperscript{19} Jackson J. C. & Collier, C., \textit{Income, Poverty and Food Security in the communal lands of Zimbabwe} (RUP Occasional Paper No. 11) (Harare, University of Zimbabwe (Department of Urban and Rural Planning), 1988) at 43.
  \item \textsuperscript{20} Johnson, \textit{supra} note 11 at 125.
\end{itemize}
overcrowded and poorly ventilated with inadequate washing facilities. The result was "death rates that shocked the most hard-bitten." When the self-sufficiency of the indigenous population (through agriculture) had been weakened sufficiently to make labour migration voluntary, wages still remained at a level that was not sufficient to sustain families. There was also a reluctance by some men to bring their wives and children into the urban areas because of the overcrowding and a perception that there was moral laxity in these areas. This contributed to the phenomenon of families that are split between the rural and urban areas, which continues to this day.

3. Introduction of Legal Pluralism

The creation of a new colonial state and the imposition of a new political order meant that the new rulers had several options in relation to the indigenous law and dispute resolution mechanisms. Was there to be complete supersession? Were the indigenous systems to be supported totally or partially? The colonial regimes chose partial recognition. A detailed examination of the manner in which various aspects of indigenous law and indigenous dispute resolution were recognized and not recognized is provided in the next section. The partial recognition involved the outlawing of some customary laws and practices, indifference towards others and full recognition of others. Sometimes the approaches would change with time. At independence the post-colonial state maintained legal pluralism in both substantive

\footnote{Gann, L.H., \textit{A History of Southern Rhodesia} at 180 as quoted by Ranney, S.I., "The Labour market in a dual economy: Another look at colonial Rhodesia" (1985) 21 Journal of Development Studies 505 at 510.}

\footnote{Arrighi, \textit{supra} note 9.}

and procedural law with radical transformation of the institutions of customary dispute resolution and less radical transformation of substantive customary law.

Zimbabwe has undergone significant changes in the socio-economic, cultural, legal and political spheres from the pre-colonial era to the current post-colonial era. Under colonial rule, the country underwent the transformation from a collection of separate agrarian societies to a unified colonial state. The colonial state was further transformed into the current nation state. These changes transformed the socio-economic, political, and cultural context in which law and dispute resolution mechanisms operated. The remainder of this chapter examines the nature of these changes and the manner in which transformation occurred beginning with the pre-colonial era up to the current era.

C. Pre-Colonial Era

The examination of social organization during the pre-colonial era focuses on the family, the village, the ward and the chiefdom. These are categories used by the various scholars who have studied indigenous social organization in Zimbabwe. The examination is based on the writings of social anthropologists (such as Holleman) and other scholars who studied indigenous social organization during the colonial era. There was no writing prior to colonization and therefore no writings by the indigenous people themselves. However, the relevant information was passed on from generation to generation through oral history. It is these oral historical accounts that the scholars of the colonial era relied on. Goldin and

Gelfand\textsuperscript{25} point out some of the problems with this type of anthropological research. Firstly, there are problems with language and interpretation. Secondly, there are problems with matching concepts, particularly for non-lawyers. Non-lawyers may not sufficiently understand legal concepts. Thirdly, interviewees may give answers even though they do not understand questions or know the correct answer because they consider it rude or inhospitable to acknowledge ignorance or to give a negative reply.\textsuperscript{26} The first of these problems can be resolved if the anthropologist or other scholar understands and speaks the indigenous language. Holleman appears to have had some understanding of the indigenous language although the extent of his understanding is not clear. On mismatching of concepts, it should be pointed out that this is not just a problem of non-lawyer scholars. Lawyers can also mismatch concepts if they interpret them from their own cultural background which is different from the indigenous one.

In addition to the problems already pointed out, one must add the problem of choosing key informants. Informants necessarily present the information from their own ideological perspectives and assumptions. Choosing informants exclusively from a certain group (e.g. elderly men) is likely to produce a study skewed in their favour. Holleman reports that he conducted his research by direct observation, of individuals and communities in their daily activities, direct observation of court proceedings and questioning of male and female informants.\textsuperscript{27} Goldin and Gelfand report that they "visited" tribal courts and held

\textsuperscript{25} Ibid.

\textsuperscript{26} Ibid. at 72.

\textsuperscript{27} supra note 23 at ix. Schmidt, E. "Negotiated spaces and contested terrain: Men, women and the law in colonial Zimbabwe, 1890 - 1939" (1990) 16 Journal of Southern African History 622 at 625-6 is incorrect when she criticizes Holleman for consulting only elite males as informants.
interviews and discussions with various tribal leaders and others. The latter are not specified.\textsuperscript{28} Goldin and Gelfand's disciplines are law (Goldin) and medicine (Gelfand).

However Gelfand appears to have had a great interest in social anthropology although it is not clear whether he was actually trained in that discipline. This outline of some of the problems of research and the specific methodologies of some of the researchers should be borne in mind when examining and analyzing the indigenous laws and practices of the pre-colonial and colonial era.

1. The Family

In order to understand the family in pre-colonial Zimbabwe, it is necessary to examine the manner in which it was formed and perpetuated. The basis of the formation of the family unit was the marriage contract.

a. Marriage and Bridewealth

The marriage contract was, for both the Shona and the Ndebele, a contract between families and not between the individual spouses.\textsuperscript{29} The marital union between husband and wife was seen as the establishment of a new reproduction cell within a wider patrilineal kinship group.\textsuperscript{30} The extended family contributed towards the formation and support (material and moral) of the nuclear family. The greatest material contribution was the giving of cattle for

\textsuperscript{28} supra note 4 at vi.

\textsuperscript{29} On Shona see Holleman, J.F. \textit{Issues in African Law} (The Hague: Mouton, 1974) at 90


\textsuperscript{30} Nothing is written about the practice of the very small minority matrilineal Tonga of the Zambezi valley.
"lobolo" (marriage consideration or bridewealth). "Lobolo" is the Ndebele word and has become the commonly used word in legal writings in Zimbabwe. Sometimes the word "lobola" is used but this is inaccurate because "lobola" is the verb meaning "to marry". The Shona word for bridewealth is "roora". A man's family (particularly his father) had an obligation to provide him with cattle for "lobolo". The Shona usually practiced a linking system in terms of which all the male children in a nuclear family were "linked" with their sisters for the purposes of "lobolo" so that the brothers would use the cattle obtained from the sisters' marriages to pay their own "lobolo". This system helped young men whose fathers could not afford the "lobolo" cattle. The "link" sister had special roles in her link brother's family which included mediation in disputes and acting as general counsellor and adviser to his children.

The payment of "lobolo" was not meant to reduce the marriage contract to a purchase agreement. It was regarded as compensation for the appropriation of a woman's reproductive capacity and to enable the husband to secure for himself and his kin-group paternal rights in the children born of the marriage. Mittlebeer adds that "lobolo" created a bond between a man and the parents of his bride. He was expected to assist them when they needed his help while at the same time the wife's family "remained in the background as a protection for their daughter against the husband's mistreatment". It must be noted that the basis of "lobolo" was patriarchal. The compensation for the woman's reproductive capacity was not for the woman herself, but mostly for her father or other male guardians. The only

31 Holleman, supra note 29 at 96-7.
32 Ibid. at 116-7.
33 Mittlebeeler, supra note 23 at 42.
exception was a cow given to her mother (as representative of a woman’s maternal ancestresses) because it was believed that the mystical powers associated with reproduction were vested in a woman’s maternal ancestresses.34 "Lobolo" also produced disadvantages for women because it had to be refunded upon divorce. Deductions had to be made for children born of the marriage. Holleman points out that the computation of the amount of cattle to be refunded on divorce was not done arithmetically. A number of factors were taken into account including the matter of guilt, the lack of good faith, the previous relations between the family and the fear of retribution (including through the use of witchcraft).35

In some cases, women whose marriages were unsatisfactory committed adultery with a view to breaking the marriage and establishing a new union with the paramour. The paramour would then be responsible for refunding the husband’s "lobolo" cattle in addition to paying his own "lobolo" to the woman’s family.36

A consequence of marriage being negotiated by the family and the practice of "lobolo" was that divorce was also not unilateral. The families had to negotiate the terms of the divorce and the marriage was considered terminated when the terms of the negotiated settlement were fulfilled. There was no formal divorce through a court but a court could adjudicate on the terms of dissolution (if the parties could not agree) or the question of whether or not the termination of the marriage was reasonable in the circumstances (also if the parties could not agree).37

34 Holleman, supra note 29 at 118 - 119.
36 Ibid.
37 Ibid. at 128-9.
A further consequence of "lobolo" in marriage was that death of either spouse was not regarded as automatically terminating a marriage. In the event of the wife's death, (particularly if she was still of child bearing age), the wife's family could provide the husband with a substitute wife. The marriage would be considered terminated only if they failed to do so. In the event of the husband's death, the wife would be "inherited" by one of her deceased husband's brothers. The marriage would be terminated if she refused to be inherited or none of her deceased husband's brothers was willing to inherit her. A woman of child-bearing age was not expected to refuse inheritance. An older woman could do so and choose to remain a part of her deceased husband's family while being looked after by her adult son(s). It is not clear what would happen if she had no sons.38

The status of children was also affected by "lobolo". As indicated above, "lobolo" conferred paternal rights on a husband and his paternal kin among the Shona and Ndebele. Children were necessary for lineage continuity which was highly valued. Among the Shona, organic unity was promoted through the use of specific kinship terminology. A man's (let's call him "A") father's brothers and sisters were his fathers and "female fathers" respectively, the brothers of his (A's) father were his "older" and "younger" fathers (depending on their birth order), the children of his (A's) brothers were his children and the children of his (A's) father's brothers were his brothers and sisters. Holleman calls this the principle of

38 Holleman, supra note 24 at 330 ff.
classificatory kinship and observes that it extended as far as agnatic\textsuperscript{39} ties were recognised and that was "very far indeed"\textsuperscript{40}

b. Economic Activities and Property Relations

The family (both nuclear and extended) was also a unit of economic production in which the husbands appropriated the surplus produced by their wives and children and, to a lesser extent, fathers (or their brothers) appropriated the surplus produced by the nuclear families of their children (classificatory children in the case of fathers' brothers).\textsuperscript{41} The centering of economic activity around the family encouraged the practice of polygyny.\textsuperscript{42} Men married more wives in order to accumulate more wealth and used the wealth thus accumulated in order to marry even more wives and gain political status. Thus wealth, polygyny and political status were mutually reinforcing. Indeed most Shona chiefs had many wives.\textsuperscript{43} The chiefs manipulated polygyny for political gain by marrying wives from different areas of their chiefdoms so as to secure the loyalty of non-kin subjects by converting them into affinal relatives. The assumption was that relatives would be more loyal than strangers.

\begin{itemize}
  \item \textsuperscript{39} Gluckman, M. in his book \textit{Custom and Conflict in Africa} (Oxford: Basil Blackwell, 1965) defines "agnatic" to mean "kinship by blood through males" (p. 10) and that is the context in which the word is used in this thesis.
  \item \textsuperscript{40} Holleman, supra note 29 at 90.
  \item \textsuperscript{41} Weinrich, supra note 29 at 137.
  \item \textsuperscript{42} This word is used to describe a situation where a man marries more than one wife. Some writers use the word "polygamy" to describe the same situation. This writer’s understanding is that the two are not interchangeable. "Polygyny" refers to a man having more than one wife whereas "polygamy" refers to a situation where either one of them has another spouse or other spouses.
  \item \textsuperscript{43} Weinrich, supra note 29 at 137.
\end{itemize}
a valid assumption given the fact that marriage was regarded as binding families (in their nuclear and extended form) together.

The economic activities of the family centred around crop production and livestock keeping. The Ndebele were pastoralists more than they were crop producers. They supplemented their crop production by raids on their Shona and Tonga neighbours. They also raided them for cattle and human captives. The captives included young men who were incorporated into the army. Non-agricultural economic activity included wood, skin and iron work by men and pottery by women. Women also offered their services as midwives and both men and women could be diviners and herbalists. Diviners and herbalists received their calling from ancestral spirits and one could not become one unless specifically called.

The husband was the head of the household and, if he was the most senior of the most senior generation, the head of the extended family as well. He was responsible for the propitiation of the ancestral spirits. He was legally responsible for the actions of his children (regardless of age or marital status) unless he could prove that they had deliberately flouted his authority in a manner that was tantamount to disowning him.

44 Weinrich, supra note 29 at 1.
45 Ibid.
46 Holleman, supra note 29 at 135.
48 Ibid.
49 Ibid.
The children owed their father respect, obedience and recognition of authority.\textsuperscript{50} Adult married sons were still expected to consult their fathers before disposing of any property of value.\textsuperscript{51} The duties of respect, obedience and recognition of authority were extended to include the father’s brothers (i.e. all classificatory fathers).\textsuperscript{52} Severing relations with one’s father carried the risk of the disapproval of the ancestral spirits.\textsuperscript{53} This mystical threat, together with the privileged economic status of fathers (in comparison to children), ensured that the younger generation was duly deferential to the older.

The emphasis on the extended family and patrilineal kinship among the Shona resulted in settlements and communities that generally coincided with kinship. No writings on Ndebele settlements in pre-colonial Zimbabwe have been found so the ensuing discussion on community is based entirely on the practices of the Shona.\textsuperscript{54}

2. Community

The pre-colonial Shona were divided into several communities which also served as political units and, sometimes, coincided with kinship groupings.\textsuperscript{55}

\textsuperscript{50} Ibid.
\textsuperscript{51} Ibid.
\textsuperscript{52} Ibid.
\textsuperscript{53} Ibid., at 62-63.
\textsuperscript{54} The Ndebele came to Zimbabwe in the middle of the 19th century fleeing from the tyranny of their Zulu overlords. (See Weinrich, supra note 29 at 1). Weinrich claims that the Ndebele lost their elaborate kinship units when their military organization was abolished by the colonial state. (at p. 37-8).
a. The Village

The smallest communal unit was the village.\textsuperscript{56} The practice of shifting cultivation made it a temporary (in terms of physical location) community.\textsuperscript{57} It was usually composed of agnatic kin (usually brothers) but sometimes also included affinal relatives.\textsuperscript{58} The head of the village was the eldest of the agnatic kin.

i. Economic Activities

The Shona were an agrarian community. The village headmen received the village's first allocation of land (within a particular ward) from the ward headman or, if the village had moved to a new chiefdom, from the chief.\textsuperscript{59} The head then allocated the land allocated to him to the various subsections (i.e. the households of his brothers), if any, by simply showing them the boundaries of their allocations. They would be free to practice shifting cultivation within those boundaries.\textsuperscript{60} Heads of households (i.e. fathers) would in turn allocate the portion allocated to them to their wives. In polygynous unions, each wife would get a separate portion.\textsuperscript{61} They would also allocate portions to married sons staying with them and to sons who were of marriageable age. The latter were sometimes given portions of their mothers' allocations. They were expected to cultivate the fields and build up a stock of

\textsuperscript{56} Ibid.
\textsuperscript{57} Ibid.
\textsuperscript{58} Ibid. at 84.
\textsuperscript{59} Ibid. at 85.
\textsuperscript{60} Ibid.
\textsuperscript{61} Ibid.
grain in anticipation of their marriages. Daughters of marriageable age were given portions of their mothers' allocations for the same purpose.62

Village level economic cooperation was manifested by a practice in terms of which household heads arranged a schedule for reciprocal aid in the performance of specific agricultural tasks such as cutting bush for fresh fields, ploughing, weeding and reaping.63 In addition, the members owed each other duties of economic support in accordance with their family ties, both nuclear and extended.

ii. Role of the Leadership

The village headman had political, judicial and spiritual functions. His political functions included representing the people before the ward headman and the chief.64 His judicial functions were confined to arbitration (according to customary law) of minor disputes such as quarrels between husbands and wives, parents and children etc. and initial investigation of disputes. He had no power to adjudicate.65 "Arbitration" under customary law was not the same as is commonly understood under the English common law. Specifically, the process did not have to be agreed to in advance and the "arbitrator's" decision was not legally binding on the parties. The procedure "had the character of a family circle presided over by the head of the family and jointly ironing out any differences

62 Ibid. at 85-6.
63 Holleman, supra note 24 at 10-11
64 Ibid. at 8
65 Ibid.
between two or more of its members". He was assisted in his duties by heads of sections (if any) or heads of (nuclear) families. He usually had one or two "henchmen" to act as go-betweens and trusted counsellors, often a younger brother, son-in-law or sister's son. His spiritual duties included officiation in family rituals such as the dedication or sacrifice of cattle to the family's ancestral spirits or calling upon them for assistance in cases of illness or other misfortune.

b. The Ward

The next level of community organization among the pre-colonial Shona was the ward. Kinship was less important in the ward than in the village. Unity was based more on the sharing of common territory than on kinship but kinship was still important. The ward normally had a well defined territory marked by natural features such as rivers, streams or hilltops.

i. Leadership And Its Role

The land was allocated to the ward by the chief and the ward headman was responsible for upholding the community right to occupation and use of the land. He was

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66 Ibid.

67 Holleman, supra note 55 at 86. Holleman does not explain the meaning of "henchmen" in this context. "Adjudicate" is used in the usual sense of the word i.e. making a formal binding decision after a formal inquiry into the disputed issues.

68 Holleman, supra note 24 at 8.

69 See the discussion of chiefdoms (below).

70 Holleman, supra note 24 at 8.
the arbitrator in land disputes between villages and also responsible for taking action against unlawful use of common territory by ward members or strangers.\textsuperscript{71}

A ward headmen's judicial duties included adjudication of all disputes arising within his area apart from serious cases such as those involving witchcraft, homicide and stock theft.\textsuperscript{72} In practice he also avoided any cases in which he would have to judicially impose a judgement, regardless of the minor nature of the dispute. This was due to the fact that the parties had an automatic right of appeal to the chief and the appeal took the form of a hearing \textit{de novo} thus rendering the original decision pointless and also because he lacked enforcement powers. In such cases he referred the parties to the chief's court. The ward headman's ritual functions included initiating and presiding over special ceremonies of thanksgiving to the ancestral spirits (his and the unknown spirits of the original occupiers of the land) to celebrate the end of the agricultural season. He also presided over rituals held to ask the ancestral spirits for rain in times of drought.\textsuperscript{73}

\textbf{ii. Economic Activities}

Economic cooperation at the ward level was in the form of parties organised for the purpose of providing labour in one's fields. The organiser would invite people from his/her own village and the surrounding villages in the ward. The people would work and then drink traditional beer prepared by the host.\textsuperscript{74}

\textsuperscript{71} Ibid. at 14.

\textsuperscript{72} Ibid.

\textsuperscript{73} Ibid.

\textsuperscript{74} Ibid. at 10 - 11.
c. The Chiefdom

The next level of communal organization was the chiefdom. At the time documented by researchers (the period immediately preceding colonisation), the Shona did not have paramount chiefs or kings. However, it has been historically documented that at least one Shona kingdom had once existed prior to this time. This was a centralised kingdom under the Mwenemutapa and Changamire dynasties.\(^7\) It is generally believed that the great Zimbabwe national monument was built during this time. The Great Zimbabwe monument (after which the country is named) is an old fortress with a conical (observation) tower. It was built from stone (without mortar). By the nineteenth century this kingdom had disintegrated and the Shona were organised into several independent chiefdoms. The chiefdom was therefore the highest form of communal and political organization. Thus, the chiefdom was synonymous with the nation-state in modern day political organization.

The chiefdom was usually made up of (or divided into) several tribal wards. These formed a loose confederation and were semi-autonomous. Political cohesion and hierarchical authority were achieved through several measures. Firstly, the utilisation of kinship ties; several tribal wards (same as the wards described above) could be formed around and governed by different branches of the chief’s lineage. The relative importance and authority of such wards depended on the seniority of such a branch in the principal genealogy. The branches are the groups of agnatic descendants of the sons to the oldest known chief of the area, i.e. the founder of the chiefdom. The chieftaincy was supposed to rotate among these branches collaterally and in order of seniority. Secondly, conquered wards were sometimes allowed to retain their territory as vassal wards. Thirdly, tribal wards that sought the chief’s

\(^7\) Weinrich. supra note 29 at 1 makes a fleeting reference to this kingdom. Mwenemutapa is sometimes referred to as Munhumutapa.
protection from another chief (i.e. sought to change chiefs) were also allocated their own territory. Solidarity between the wards made of kin and those made of vassals and "protectorates" was achieved by intermarriage which created affinal ties in addition to the political ties. 76

i. Leadership And Its Role

The chief's court had full jurisdiction over all the persons under the chief's political control. It was a court of first instance in matters that were considered serious enough to affect the entire chiefdom, such as homicide, witchcraft, arson, stock theft and offenses against the chief's person. It had power to adjudicate and enforce its judgements. It was also a final court of appeal from lower tribunals. On appeal, the hearings were de novo. 77

The chief's ritual functions were mostly confined to the propitiation of his own ancestral spirits but would sometimes include presiding over great tribal rituals. The latter were very rare. 78

3. The Customary Family Laws

This section summarizes the pre-colonial customary family laws of the Shona. A few aspects of Ndebele customary law are also included.

a. Marriage

76 Holleman, supra note 55 at 89 - 91.

77 Ibid. at 92.

78 Ibid.
As described earlier, marriage was initiated through negotiation between families and the payment of bridewealth. Polygyny was practised by both the Shona and the Ndebele. Husbands were the heads of the nuclear families and the "guardians" of their wives. Both societies were patrilineal. In discussing marriage, Holleman describes some irregular marriages which took place among the Shona. These included the betrothal of young girls who were not yet of marriageable age. This was usually done by poor fathers in times of famine or other material distress such as the need to raise a mature son’s bridewealth. This practice came to be known as "child pledging" by the colonial government and was outlawed. Another form of irregular marriage was elopement. A woman (usually after becoming pregnant) ran away from her parent’s home to the home of her lover. The man’s family would then approach the woman’s family and regular bridewealth negotiations would be initiated. Poor men could offer their services (instead of bridewealth) to the parents of their future brides which was another form of irregular marriage. As already pointed out earlier, the death of either spouse could result in the perpetuation of the marriage bond through a "substitute" spouse. Goldin and Gelfand refer to another irregular marriage. This was the practice of giving a woman to be married to a member of a family whose kinsman had been killed (either intentionally or otherwise) by a member of the woman’s family. The woman would be expected to produce offspring to "replace" the deceased.

79 Goldin and Gelfand, supra note 5 at 176-182.
80 Ibid, at 176.
81 Holleman, supra note 24.
82 Goldin and Gelfand, supra note 5 at 174-5.
The major family assets (the land and the livestock) were controlled by the husband. The wives had control of the "motherhood" cow and its progeny and of any property that they earned through agricultural activities beyond those necessary for the sustainance of the family or through the exercise of special skills such as pottery, midwifery or practising as herbalists or diviners.\(^{83}\)

b. Seduction and breach of promise to marry

No writings on pre-colonial Ndebele customary law on seduction and breach of promise to marry have been found. Under Shona customary law, the claim for seduction was made by the seduced woman’s father. Virginity was highly valued and the bridewealth for a non-virgin was lower than that for a virgin. Seduction damages were intended to compensate the woman’s father for this loss of potential bridewealth.\(^{84}\) Breach of promise to marry was a claim by the woman herself (assisted by her family). It was framed as a claim for return of the love token (love tokens were exchanged by couples to signify their sincerity in their intention to get married).\(^{85}\) It was not necessary that there be seduction. The man would be ordered to pay damages in addition to returning the love token\(^{86}\). Failure to return a love token was regarded as a sign of intention to harm the woman through witchcraft particularly by causing her to become barren.\(^{87}\)

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\(^{83}\) Holleman, supra note 24 at 351-4.

\(^{84}\) Ibid. at 77 ff.

\(^{85}\) Ibid.

\(^{86}\) Ibid.

\(^{87}\) Ibid.
c. Divorce

Under both Ndebele and Shona customary law, divorce was negotiated by the families of both the husband and the wife.88 The families would negotiate the return of bridewealth as described above. As noted earlier, under Shona customary law, although a court had no jurisdiction to dissolve a marriage, it could still adjudicate on the following issues:

1) the question of whether or not a dissolution of the marriage was reasonable in the circumstances.

2) where the parties had already agreed that a dissolution was inevitable, the terms of the dissolution.89

The families always first attempted to reconcile the parties before dissolving the marriage.90

d. Custody, Guardianship and Maintenance91.

Under Shona Customary law the custody and guardianship of children born of a marriage also vested in the husband and his kin. Upon divorce, a woman would leave the children. Children who were still very young (e.g. those still being breastfed) could go with their mother temporarily until they were old enough to be handed back to their father. Children born to unmarried mothers were under the custody and guardianship of the mother’s

88 Ibid. at 292 and Goldin and Gelfand, supra note 5 at 148.

89 Holleman, supra note 24 at 128-9.

90 Goldin & Gelfand supra note 5 at 148.

91Goldin & Gelfand, supra note 5 emphasize that the terms "custody" and "guardianship" have no distinct meaning under customary law. They are used in the sense of someone having "control" over a child and being responsible for the child. However this statement appears not to be true of the Ndebele of whom Jackson, H.M.G. (1926) N.A.D. A 30 at 34 mentions that widows could, with the King’s consent, be appointed guardians of their minor children.
family head until claimed by the father (if he wished to do so). If the father claimed the child, he would be required to compensate the mother's family for looking after the child from the time of birth until the time of transfer of the child. Mothers and their families were not obliged to contribute toward the maintenance of children if they did not have the custody and guardianship of those children.92

e. Inheritance

Under Shona customary law, different laws applied to the inheritance of the matri-estate and of the patri-estate.93 In the former, a distinction was made between the "motherhood" cow and its progeny and the property acquired personally by the deceased woman.94 These categories were confined to property of significant value (usually livestock).95 The smaller personal belongings of a deceased woman were distributed among her daughters, sisters and other near relatives as consolation gifts ("misodzi" - literally "tears").96 The "motherhood" cow and its progeny and other livestock (such as goats) received by the deceased in her capacity as mother of a married daughter, had spiritual and organic significance. It was therefore inherited by her own natal family e.g. brother, rather than her children.97 With the property acquired by her own endeavours, (the "mavoko" -

92 Ibid. at 183-194.

93 Holleman, supra note 24 at 330 ff.

94 Ibid.

95 Ibid.

96 Ibid.

97 Ibid.
"hands" property), the preferred claimants were her own children with the eldest son taking precedence over the others.\(^{98}\)

The patri-estate was inherited in its entirety by the eldest son of the deceased who owed a duty to support all the dependents of the deceased.\(^{99}\)

4. Analysis of the Pre-Colonial Era

Both the pre-colonial Shona and Ndebele were agrarian societies living mainly according to lineage arrangements (to varying extents) and without industrialisation. This analysis evaluates the general political, socio-economic and legal contexts in which they lived.

a. Political Structure

The political structure was based primarily on hereditary leadership. Since both the Shona and the Ndebele were patrilineal, it was also male dominated. In this context, it is apparent that women had no voice at least in the formal political structures. The internal gender political struggles (if any) that occurred in this context cannot be deduced from the existing literature on the pre-colonial era.

b. Socio-economic Conditions

Despite their lack of modern symbols of material affluence and their being cashless societies, pre-colonial Shona and Ndebele societies still had disparities in economic and social power. Gluckman’s view is that there were "no complicating conflicts arising from clashes of

\(^{98}\) Ibid.

\(^{99}\) Ibid.
economic interests between classes" in the traditional societies of Zimbabwe (and other Southern and Central African states) because:

"Limited trade relations inhibited the introduction of luxuries and relatively inefficient tools prevented those who had control of labourers from putting them to great productive use". 100

Although it is true that there were no socio-economic classes, as defined by classical Marxist analysis, in the pre-colonial era, there is no doubt that there were hierarchical socio-economic relationships. Chiefs were able to acquire more wealth (in the form of cattle and agricultural produce) by virtue of their hereditary traditional leadership. Other male elders (ward and village headmen and heads of extended families) also had access to more resources than women and younger men.

The bridewealth system, despite its role in strengthening family ties, was also a means of exercising control over women and young men. A woman had to consider a man’s ability to pay bridewealth before consenting to marry him because this factor was of primary importance to her family. A woman contemplating divorce was equally bound to seriously consider the bridewealth implications of her choice. Young men depended on their elders for cattle for bridewealth (sometimes obtained through their sisters) and this dependency gave the elders control over the young men’s choice of spouses.

The bridewealth system was also used in conjunction with the lineage system, in particular concerns about lineage continuity and multiplication, to exploit the reproductive capacities of women. This is typified by the custom of providing a substitute spouse after the death of a husband or wife. In the case of the husband’s death, it was expected that a woman of childbearing age would continue to produce children for the lineage through the

100 Gluckman, supra note 39 at 31.
substitute. In the case of the wife's death, the wife's family had to provide another wife at reduced bridewealth to produce more children for the deceased wife’s husband and his lineage.

The extended family system had its advantages. It provided social security (material and otherwise). In the event of death of the material support provider or destitution, the other members of the extended family were available to assist.

Polygyny in the pre-colonial Shona and Ndebele societies was a way of expanding the patrilineal group (by producing more children). Expansion of the patrilineal group enhanced its status. Polygyny was also used (as noted above) as a political strategy by some Shona chiefs who ensured the loyalty of alien members of their chiefdoms by marrying wives from among them.

c. Law and Dispute Resolution

The family laws of the pre-colonial Shona and Ndebele reflect their social values and economic conditions. Emphasis was placed on bridewealth marriage. Pre-marital relationships were discouraged by claims for seduction damages. Patrilineity was encouraged by custody and guardianship laws which favoured fathers. The dominance of men in socio-economic relations was reflected by inheritance laws which favoured male heirs.

In dispute resolution, the extended family's significance was emphasized. The formation and dissolution of the marriage contract was entirely in its hands. In addition Shona village heads (who were often heads of extended families) played a significant role in
attempting to resolve disputes within the extended family without taking them to 
"outsiders"101 (the ward headmen and the chiefs).

The relationships between the people were predominantly multiplex102. Therefore it 
was important that any disputes be resolved amicably. Although Shona ward headmen and 
chiefs had formal dispute resolution functions which they exercised separately and distinctly 
from their other functions, they were still connected to the community in which the disputes 
arose and their role in attempting to resolve the disputes was not the professional concern of 
technocrats. They actively sought to prevent the disruption of social harmony. Their 
concern was, of course, not entirely altruistic. As political leaders, they had a lot to lose 
from any serious disruption in social relations because the disenchanted would emigrate to 
other wards or chiefdoms. Losing followers was equated with losing prestige and status 
which was measured inter alia by the size of one's following.

D. Colonial Zimbabwe

The most significant change brought about by the colonisation process was the 
creation of a new colonial state comprised mainly of the Shona and the Ndebele. The groups 
which did not belong to these major groupings were the Tonga, Kalanga and the Ndau. The 
Zimbabwean Tonga are a very small part103 of a group which settled on both the Zambian

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101 The degree to which they were "outsiders" obviously depended on the existence or 
non-existence of kinship ties.

Law 6 at 8 describes "multiplex" relations as a situation where "people who interact in one 
realm (e.g. the economy) also interact in others (e.g. politics, kinship, residential 
neighbourhood, or ritual)."

103 Less than 1% of the Zimbabwean African population. (Weinrich, supra note 29 at 
xii).
and Zimbabwean sides of the Zambezi River before colonisation. The colonisation process separated them. They are the only matrilineal group in Zimbabwe. The Kalanga are a group which was originally Shona but became incorporated with the Ndebele before colonisation. The Ndau are considered part of the Shona although they were originally a part of the Nguni. There is also a Venda and Shangaan population in Zimbabwe. The former spread into the country from neighbouring South Africa.\textsuperscript{104} All these groups, together with the white settlers, became one colonial state initially known as Southern Rhodesia and currently known as Zimbabwe (since 18 April, 1980).

The colonisation process also brought about industrialisation and capitalist relations of production. This capitalist penetration impacted the indigenous social organization in various ways. The impact in one area often had implications for various others.

1. Transformation of the Political Structures

As noted earlier in this chapter, there were two main separate phases of the colonial era. At first there was the period of British colonial rule, initially under the B.S.A. Co. and later (1923 onwards) through "Responsible government". This was followed by the period of Unilateral Declaration of Independence (U.D.I.) from the British government by the minority white settlers.

Both Shona and Ndebele chiefs participated in the uprisings against British colonialism (represented by the administration of the British South Africa Company (B.S.A. Co.) which occurred in 1893 (Ndebele only) and 1896-97.\textsuperscript{105} The colonial government

\textsuperscript{104} Weinrich, supra note 29 at xii.

\textsuperscript{105} Weinrich, A.K.H., Chiefs and Councils in Rhodesia: Transition from Patriarchal to Bureaucratic Power (London: Heinemann, 1971) at 10-11.
legally abolished hereditary chieftaincy through the Southern Rhodesia Native Regulations (18 of 1898). In terms of these regulations, the colonial government would appoint whoever it wished as chief and could arbitrarily subdivide or amalgamate chiefdoms. The chiefs so appointed were to hold office "contingent upon good behaviour." In practice, selection of suitable candidates generally continued to be made by the indigenous people in accordance with customary principles and the government would simply officially endorse the chosen candidates by appointment in terms of the Regulations. Ward headmen were appointed by chiefs. The government could not refuse to endorse the chief’s appointments unless there was good reason to do so.

The colonial government had earlier taken other steps which undermined indigenous traditional political authority. It set up a Native Affairs Department which was under the direct control of the imperial government i.e. not subject to the control of the B.S.A. Co’s administration. The first Native Commissioners were appointed in 1893. The Native Commissioners’ duties included the collection of taxes and keeping watch against political insurgency. They also took part in recruiting indigenous labour and in dispute resolution.

Chiefs and ward headmen were part of the Native Boards that were established by the colonial government in 1931. They worked with elected indigenous representatives.

106 Provisions as cited by Goldin and Gelfand, supra note 5 at 14.

107 Ibid.

108 Holleman, supra note 55 at 26-7.

109 They were not "native" in the sense of indigenous. Their designation (and that of their department) was connected to their duties i.e. working among the indigenous people who were referred to as "natives".

110 Weinrich, supra note 105 at 14.

111 Ibid.
Boards could make recommendations to the government but had no authority to enforce their own recommendations.\footnote{Ibid.} Native Boards were replaced by councils in 1937. Councils were chaired by Native Commissioners and had limited powers of taxation and to pass by-laws.\footnote{Ibid.} They had a very limited mandate which was confined to the maintenance of roads and bridges, water conservation and primary (elementary) education.\footnote{Ibid.}

The emergence of the nationalist movement during the 1950s resulted in an attempt to coopt chiefs by the colonial government. This was during the period of "Responsible" government when the British government had handed over most of the governing powers to the settlers subject to its overall supervision particularly in relation to their (the white settlers') treatment of indigenous people. The settler colonial government sought to gain the support of the chiefs by raising their allowances (in 1951) and by boosting their authority. The latter was accomplished by expanding their chiefdoms (through the earlier legislation which gave the government power to amalgamate chiefdoms and appoint and remove chiefs). Of the 323 government recognised chiefdoms, 89 were abolished, 11 chiefs were pensioned off (and not replaced thus losing their chiefdoms) and 37 were removed from the rank of chiefs. Thus the remaining chiefs had much larger chiefdoms than before.\footnote{Ibid. at 13 citing Garbett (1966) at 118.}

A provision of the Native Affairs Amendment Act (No.31 of 1959) further strengthened the authority of chiefs and other traditional leaders. It made it a punishable offence (by a fine of up to five hundred pounds or imprisonment for up to six months) for
any African to say or do anything likely to undermine the authority of an officer of the
government including a chief, (ward) headmen or kraalhead (village headman). Insolence
was also punishable.\footnote{Mittlebeer, supra note 23 at 24.}

In 1958 chiefs were taken on a government-funded sightseeing tour (by air) to the
newly constructed Kariba dam and industrial areas in the cities. They also attended the
official opening of Parliament. Government efforts to gain the support of chiefs appeared to
have been successful when they openly sided with the government (against the nationalists) in
1959 by petitioning (through their provincial assemblies) the government to ban nationalist
meetings in their areas.\footnote{Weinrich, supra note 105 at 16.}

The U.D.I. era brought in a more racist government. There was more political
manipulation of chiefs and other indigenous leaders for the purpose of suppressing the
nationalist movement and its call for majority rule. Although the unilateral declaration of
independence was made in November 1965, the racist government under the leadership of
Ian Douglas Smith took over in 1964.

In October, 1964, the U.D.I. government gathered about six hundred tribal chiefs and
headmen for a meeting. The meeting was held at a place called Domboshawa (a few
kilometres from the capital city, Harare, which was known as Salisbury at that time.) The
meeting was referred to as an "indaba"- an analogy with a Ndebele traditional practice of
holding public meetings at which all the adult males were free to speak on pressing matters.
The meeting was shrouded in secrecy and closed to the press. The government announced at
the end of the meeting that it had been unanimously agreed that the majority of the
indigenous population desired independence from British rule, but under a white
government. The government later used this alleged unanimous decision to justify its
unilateral declaration of independence (from Britain) in November 1965.\textsuperscript{118}

It should be pointed out that most of the chiefs and headmen were indeed opposed to
the nationalist movement. They saw the nationalist leaders as "young ones" who threatened
respect for genealogical seniority and traditional sanctions. They sought the return of their
"old powers" in the belief that their communities could be restored to their pre-colonial status
in terms of social order.\textsuperscript{119} It was this attitude which cost them the support of many young
people\textsuperscript{120} and made them vulnerable to guerilla attacks when the nationalists resorted to
armed struggle.

The chiefs were rewarded for their support of the U.D.I. (Unilateral Declaration of
Independence) government by a series of legislative measures embodied in the African
Affairs Amendment Act\textsuperscript{121} of 1966. This was an amendment to the Native Affairs Act of
1927 which had been retitled the African Affairs Act by a general legislative amendment of
1962. This general amendment i.e. the 1962 amendment, substituted all references to
"native" with "African."\textsuperscript{122} However, "native commissioners" were renamed "district

\textsuperscript{118} Holleman, supra note 55 at 348 - 350.

\textsuperscript{119} Ibid. at 352 - 353.


\textsuperscript{121} No. 44 of 1966.

\textsuperscript{122} Holleman, supra note 55 at 87 - The amendment was apparently meant to accommodate African dislike of the use of the word "native".
commissioners." The legislative measures introduced by the U.D.I. government included a concession to "give consideration to customary principles of succession" when appointing chiefs, a formal recognition of a practice that had generally been previously observed. The designation of chiefs as constables (the lowest rank of the colonial police force - the British South Africa Police (B.S.A.P.) was removed and substituted by a designation as "peace officers." The chiefs were offended by the former designation because they felt that as hereditary traditional leaders they should not be ranked with "the (lowest of the) recruited common ranks of the government's African constabulary." The new designation was shared with magistrates and judges, but also with the same constables that the chiefs despised and even their own messengers and headmen's messengers. Holleman brought this fact to the attention of some chiefs who responded that they were not bothered by it.123

Other measures included a relaxation of the restrictions on chiefs' movements. Previously they were prohibited from leaving their areas without notifying the district commissioner. The amendment required them to notify the district commissioner if leaving their areas for more than seven days. Another measure was the provision of salaries and allowances (from the government) for headmen for the first time. They were not remunerated for their services until this time but they could collect and retain hearing fees in relation to their judicial duties. Finally, the chiefs were to be "consulted" in decisions regarding the removal of "unauthorized" people from their tribal areas. "Unauthorized" people included all non-indigenous people. Village heads were given the responsibility of notifying the authorities whenever such persons "took up residence" in their villages.124 The

123 Holleman, supra note 55 at 359 - 360.

124 Ibid. at 360.
"consultation" was purportedly in recognition of the chiefs' traditional powers of banishment. In fact it was one of the colonial government's measures in coopting traditional authority in the implementation of its own policies.

In 1969 the U.D.I. government passed its own constitution which gave chiefs the right to participate in the legislative bodies. Ten chiefs were to be nominated to the senate. In addition, chiefs were given power to nominate eight members of the National Assembly.

In summary the colonization process was characterized by the political subjugation of the indigenous population. The cooption of indigenous political authorities in this process undermined their legitimacy in the eyes of the indigenous population.

2. Impact of Capitalist Penetration on Family and Kinship Ties.

Changes to the indigenous social organisation were also brought about by capitalist penetration. The introduction of industrialisation and a cash economy affected the economic relations in the family. Young men started leaving their rural homes to seek employment in the newly established urban centers. They used their earnings to support their families thus reversing the traditional role in which the father (as head of the family) had been in control of the economic livelihood of the family. Peasant agriculture was no longer profitable because it had been undermined by the policies of the colonial government. Young men also used their earnings to pay their own bridewealth. Bridewealth had originally been payable in

125 Ibid.


cattle but the cash economy was influencing some parents to demand cash. The young men's ability to pay their own bridewealth undermined their traditional reliance on their fathers (and the extended family) for bridewealth cattle. It further undermined the Shona practice of "linking" brothers to sisters for bridewealth purposes.\(^{128}\) This reduced the young men's accountability to their families for the treatment of their wives. As noted earlier, traditionally, the "link" sister had a special role in her brother's family. She was the first person the couple (particularly the wife) would turn to for assistance in resolving marital disputes. Her brother was bound to take her advice because it was "her" cattle (i.e. the bridewealth cattle paid by her own husband) that enabled him to marry his own wife. She was also a special counsellor to the children born of the marriage.\(^{129}\)

Holleman noted further changes to bridewealth in urban communities. Women were using bridewealth as a status symbol by insisting that their husbands pay high amounts of bridewealth as a sign that they cared for them. Fathers were demanding high bridewealth in order to use a portion of it to finance lavish church wedding feasts. These wedding feasts were seen as enhancing social prestige.\(^{130}\) Weinrich's study of African marriage which was carried out between 1972 and 1975 revealed some significant changes to the institution. Among the matrilineal Tonga, she found that bridewealth had become very high. This was due to the fact that the Tonga traditional settlement had changed from uxorilocal\(^{131}\) to

\(^{128}\) Holleman, supra, note 29 at 100.

\(^{129}\) Ibid.

\(^{130}\) Ibid. at 165-167.

\(^{131}\) Residence with the woman's kin.
virilocal\textsuperscript{132} as a result of their being relocated during the construction of the Kariba dam during the mid fifties. The Tonga initially lived in the alluvial plains of the Zambezi river but they were moved to higher ground. Wives (and their matrilineal kin) initially controlled the land but the relocation changed that when their husbands assumed responsibility for cutting new fields. The change became permanent although matriliny was retained. Consequently men were asked to pay very high bridewealth as compensation for appropriating the labour of their wives and children (instead of their wives' brothers doing so) during the subsistence of the marriage - a practice which was contrary to the principles of matriliny. Upon divorce or death of the husband, Tonga wives and their children would live with their matrilineal kin thus re-establishing matriliny.\textsuperscript{133}

Weinrich also noted that young people (other than the Tonga) were resorting to elopement marriages rather than negotiated marriages because they were adaptable to changes brought about by capitalist penetration and yet still traditional. Elopement marriages also enabled young people to force their elders to cooperate in negotiating bridewealth and other marriage formalities.\textsuperscript{134} However, among the educated urbanites, men were using bridewealth as a justification to exploit their wives' labour power. They were claiming that the payment of bridewealth gave them the right to expropriate all that their wives earned. Husbands were collecting the salaries of professional wives. Weinrich commented on this situation:

\textsuperscript{132} Residence with the man's kin.

\textsuperscript{133} Weinrich, supra note 29 at 25 - 26, 40.

\textsuperscript{134} Ibid. at 57 - 58.
"Today bridewealth has indeed become the main contributor to male dominance in the home."\textsuperscript{135}

Weinrich also found that there was exploitation of the practice of polygyny to meet new economic interests. Farmers in one of the commercial farming areas set aside for Africans (known as African Purchase Areas) were marrying several wives from the surrounding peasant areas in order to improve labour supply. They even called upon their wives' families to assist, thus reversing the customary position where the son-in-law is supposed to assist the father-in-law and not vice versa.\textsuperscript{136} Businessmen with multiple stores were also exploiting polygyny by marrying several wives and placing each wife in charge of one store. They believed that wives were more trustworthy than kin (brothers) or non-relatives and were less likely to embezzle money from the businesses.\textsuperscript{137} The management of the privately owned tea estates in Zimbabwe's eastern districts were also found to be encouraging polygyny. They did this in order to exploit (at lower wages) the labour of women and children during the labour intensive tea-picking season. The further exploitation of these women and children by their husbands/fathers was facilitated by a policy in terms of which their wages were collected through these household heads.\textsuperscript{138}

Weinrich further observed that there was increasing family instability among the people living on (white owned) commercial farms and mining settlements. This was due to their extreme poverty (wages were very low) and lack of extended family support. The latter

\textsuperscript{135} Ibid. at 75.
\textsuperscript{136} Ibid. at 27.
\textsuperscript{137} Ibid. at 138 - 9.
\textsuperscript{138} Ibid. at 148.
was in some cases due to the fact that most of the people were foreigners (from Malawi, Mozambique and Zambia). Weinrich called these super-exploited communities.\textsuperscript{139}

Labour migration affected the role of women in the economy. Some women left the rural areas to seek employment in the urban centres. During the earlier period of industrialisation (1900 - 1939) most of the women who went to urban areas were from the rural areas closest to the urban areas. Some of them were engaged in selling foodstuffs. Others resorted to prostitution.\textsuperscript{140}

Those women who remained in the rural areas became dependent on their migrant husbands (or other male relatives) for cash. The men used some of the cash to purchase more modern agricultural implements such as ploughs.\textsuperscript{141} The women began to do the bulk of the agricultural work (because of the absence of men) and yet received less credit for their role in production because the monetary contribution of men was valued more (because of the multi-purpose function of money).\textsuperscript{142}

Initially female participation in the labour market was very limited. This was due to a combination of factors. Patriachial control in traditional indigenous societies resulted in the reluctance of men to allow women to migrate to the industrial and mining centres to seek employment. The colonial state also pursued a policy of restricting the movement of women.

\textsuperscript{139} \textit{Ibid.} at 189.

\textsuperscript{140} Barnes, T.A., "The fight for control of African women's mobility in colonial Zimbabwe, 1900 - 1939" (1992) 17 Signs 586 at 595-6.

\textsuperscript{141} Summers, \textit{supra} note 127 at 233.

Employers also preferred male labour to female, sometimes even in the sphere of domestic services.\textsuperscript{143}

Eventually more African women joined the labour market and became employed as professional and unskilled workers. The former included teachers and nurses. The latter included domestic workers, shop assistants and factory workers. Both professional and unskilled African women were paid less than African men for the same work. (African men were paid less than white women and white women were paid less than white men).\textsuperscript{144}

3. Transformation of Customary Family Laws

In the area of law, the guiding principle was set out in the Royal Charter which was granted to the British South Africa Company. The principle required that, in the administration of justice, the company should always have "careful regard" to the "customs and laws" of the indigenous people unless they were "repugnant to natural justice and morality". This principle was used to evaluate substantive customary civil law. Customary criminal law was never recognised.\textsuperscript{145}

The colonisers could be divided into three categories. Firstly, there were the missionaries who sought to influence government to change those aspects of customary law which they found objectionable (on moral/Christian grounds) such as consentless marriages and polygyny. Then there were the settlers (most of them part of the original "Pioneer Column") which had been largely recruited from South Africa. These tended to hold the

\textsuperscript{143} see Barnes, supra. note 140 and Schmidt, Elizabeth, "Patriarchy, capitalism and the colonial state in Zimbabwe" (1991) 16 Signs 732-756.

\textsuperscript{144} Ibid. at 35.

\textsuperscript{145} Goldin and Gelfand, supra note 5 at 8.
belief that indigenous people and their laws were primitive and would take a very long time to become "civilised".

Finally, there was the Native Affairs Department (before U.D.I.) which tended to represent the British government ideology of "indirect rule". This was the department which was most tolerant of customary law and indigenous social organization generally. These categories were not always distinguishable and sometimes the views of the three groups converged. The post-U.D.I. period was dominated by the settler views which had become overtly racist and prejudiced.

The changes to customary family laws that were made through legislation and through interpretation by the courts (sometimes invoking the "repugnancy clause") were influenced in one way or other by the views held by these diverse groups of people. The affirmation of certain customary family laws was also influenced by the same views.

a. Marriage

Bridewealth or marriage consideration came under attack from colonial officials. They passed the Native Marriage Ordinance of 1901 which attempted to regulate bridewealth by fixing it at a maximum of five head of cattle for a chief's daughter and four head of cattle for a commoner's daughter. Cash and other property equivalents were not to exceed five pounds in value. The differentiation between a chief's and a commoner's daughter was repealed in 1912. The maximum brideswealth limit was increased to twenty pounds in value in 1950.

146 The colonisers' categories are from Summers, supra note 127.

147 The "repugnancy clause" refers to the provision in the Royal Charter of 1889 which provided that customary law was not to be applied if it was "repugnant to the principles of natural justice or morality". This provision was incorporated into subsequent colonial legislation.
In addition chiefs and headmen were prohibited from taking cognisance of any suit in relation to payment or recovery of marriage consideration. According to Holleman, the government added this provision because of the possibility that chiefs and headmen would not cooperate in enforcing the limit.\textsuperscript{148} The twenty pound limit was abolished in 1962. There is nothing to suggest that these limitations were observed while they were in force. Indeed the abolition of the limits appears to have been an acknowledgement that they had not worked. The colonial government lacked both the means and the officials for enforcing the limits.

The High Court ruled that bridewealth was incompatible with a marriage contracted according to Christian rites. It was held to be repugnant to natural justice and morality to insist on bridewealth for this type of marriage. The judge stated:

"The lobolo, a relic of barbarism recognized by our ordinances for marriages according to native custom, has no place or influence over a Christian marriage."\textsuperscript{149}

In 1974, the Appellate Division of the High Court (the predecessor to the Supreme Court) held that a claim for bridewealth was not enforceable if the customary marriage was not registered or solemnised.\textsuperscript{150}

The Native Marriages Ordinance of 1901 also provided for the registration of the marriages of the indigenous population. Prior to colonisation, there had been no writing and hence no registration of indigenous marriages. The registration process involved the parties to be married, the bride's father or other guardian and the chief (or a headman deputed by

\textsuperscript{148} Mittlebeeler, \textit{supra} note 23 at 92.

\textsuperscript{149} \textit{R v Ngono et Uxor} 1915 S.R. 1 at 4 as cited by Goldin and Gelfand \textit{supra} note 5. The judge who made these comments appears to have endorsed bridewealth in another case decided the same year. See \textit{R v Gutayi and Others} 1915 S.R. 49 at 52-53.

\textsuperscript{150} \textit{Peter Choto v J.M. Mapiye} AD 97/74 as cited by Goldin and Gelfand, \textit{supra} note 5 at 60.
him). All these had to appear before a native commissioner who was responsible for registering the marriage. The native commissioner was to ascertain whether the bride freely consented to the marriage and also the arrangements for the payment of bridewealth. The latter was intended to ensure that the limits were complied with. Very few marriages were registered in terms of the Ordinance.¹⁵¹

Mittlebeeler speculates on why it was so. Firstly, the consent requirement would have exposed consentless marriages i.e. arranged marriages. Secondly, the travelling expenses involved in appearing at the native commissioner's office might have been prohibitive for some people. Finally, most people did not see the need for registration having lived in a preliterate society and knowing that they would suffer no disabilities in their own communities for having failed to register.¹⁵²

In terms of the Ordinance, all "native" marriages not registered according to its provisions were legally invalid. The non-feasibility of this provision was realised later (in 1929) when the provision was repealed because non-registration had rendered most African children illegitimate under the received law.¹⁵³

The Native Marriages Ordinance of 1901 was repealed and substituted in 1917 but the emphasis on registration remained. The 1917 legislation was in turn repealed by the Native Marriages Act of 1950.¹⁵⁴ The Act changed the registration requirement into a solemnisation requirement. This meant that the customary requirements for a marriage were superseded by

¹⁵¹ Mittlebeeler, supra note 23 at 46-49.
¹⁵² Ibid.
¹⁵³ This does not seem to have had any practical implications.
¹⁵⁴ Act No. 23 of 1950.
statutory requirements. In theory, this meant that bridewealth was no longer a prerequisite to a valid marriage but in practice the native commissioners continued to enquire into arrangements for the payment of bridewealth and to record the relevant details on the marriage certificate. Marriages not solemnised in terms of the Act were invalid except in regard to the status, guardianship, custody, and rights of succession of the children born of them. The Native Marriages Act was renamed the African Marriages Act and is still in force today including this particular provision although some minor amendments have been made.

The colonial policy on marriage was dual. The above relates one aspect of it. The other aspect involved marriages solemnised in church. It was felt that these were superior to marriages according to custom and should not be treated the same way as customary marriages. In R v Machingura\textsuperscript{155} this superiority was emphasized. The facts involved an African man who "married" (i.e. registered his marriage) one woman before a native commissioner in 1917 and subsequently converted his union into a Christian marriage by having it solemnised in church in 1926. This was permissible as long as the man had no other wife at the time (which was the situation in this case). However, the man purported to marry another woman according to customary law during the subsistence of this marriage. He was charged with bigamy. He appeared before an assistant magistrate (magistrates are discussed below) who acquitted him on the basis that the Christian marriage that he entered into was not a legally valid marriage. He equated the first customary marriage with a Christian marriage and decided that since the man was already married at the time that he purported to marry according to Christian rites, this second marriage to the same woman was

\textsuperscript{155} 1932 S.R. 67.
of no legal effect. Consequently, the marriage to the second woman was valid according to customary law (which allowed polygyny) and therefore no bigamy had been committed. The Attorney-General brought the matter before a judge of the High Court for review. The judge reversed the decision of the assistant magistrate and commented as follows:

"...I can find no justification for the implication in the Assistant Magistrate’s judgement that a marriage by native custom is of the same standing as one by civilised rites. Although the word "marriage" is used to describe both institutions, the incidents are vastly different. The former is somewhat one sided, allows polygamy and is easily dissolved; the later contemplates an exclusive union terminable only on death (or) by decree of the courts. I am definitely of the opinion that a marriage according to civilised rites is on a higher level than one according to native usage and to hold that the latter cannot be replaced by the former would have a tendency to retard rather than advance civilisation."  

The cultural prejudice of the judge is evident.

The perceived superiority of the marriage according to "civilised" rites or "Christian" rites was maintained by insisting on monogamy. Furthermore, Africans intending to enter into this kind of marriage had to receive "enabling certificates" from the native commissioners. The native commissioners would explain to them the implications of such a marriage and ensure that all the requisite consents had been given. Sometimes native commissioners used this power for ulterior purposes, such as demanding that a young man should first pay all his outstanding taxes before obtaining the enabling certificate. This led some Catholic priests to start issuing marriage certificates which only "blessed" the union and enabled the parties to take the sacraments. These certificates were not legally valid and

\[\text{\textsuperscript{156}} \textit{Ibid. at 70} \text{ The reference to "polygamy" was intended to mean "polygyny". There was a general tendency to use the former instead of the latter among the colonial officials and writers despite the fact that the latter is a more accurate depiction of the practice that existed in Zimbabwe (and still exists, though less prevalent).}\]
added to the confusion on the different forms of marriage and their consequences. This confusion is evidenced by the instances of bigamy as in the case referred to above.

Prosecutions for bigamy did not seem to resolve the issue, as one native commissioner observed:

"We must bear in mind that under the present conditions, when a native is convicted and sentenced for bigamy, in most cases after serving his sentence, he continues his marital relations with his "bigamous" wife. What advantage has been gained by making him a criminal in the first instance? We have achieved nothing but only exposed the impotence of our legal and religious measures. Religion cannot be upheld or enforced by penal measures; its basis is personal conviction." 

Despite the existence of all these measures for solemnisation of marriage, many Africans continued to marry in the traditional way. However, some colonial policies forced some Africans to comply with the official requirement. One such policy, was the policy of allocating different types of housing in urban areas for single and married male workers with the better quality housing going to the married ones. Marriage could only be proved by the production of a marriage certificate therefore most working men were forced to obtain marriage certificates. In a survey of African marriages conducted between 1972 and 1975, it was found that only 1.5% of the urban couples did not officially solemnise their marriage as opposed to more than 50% of their rural counterparts.

An issue that is connected to marriage law during the colonial era was the passing of the Native Adultery Punishment Ordinance (3 of 1916). It was passed as a response to the

157 Weinrich, supra note 29 at 82-83.


159 Weinrich, supra note 29 at 84.
concerns expressed by traditional African leaders that some foreign migrant workers (most of them single or living in the country without their wives) were committing adultery with the wives of local men.\(^{160}\) This law was passed despite the fact that adultery was not a crime for non-Africans at that time. A court had decided in *Green v Fitzgerald*\(^{161}\) that the Roman-Dutch common law crime of adultery was obsolete.\(^{162}\)

The obsession with "native" adultery was carried over to the civil law. In *Iden v Philemon*\(^{163}\) the customary law that allowed a husband to claim adultery damages from his wife's paramour without seeking a divorce was held to be "repugnant to natural justice and morality" if applied to a marriage contracted according to Christian rites.

b. Divorce

The colonial officials also attempted to change the customary divorce process. Traditionally, divorce was a matter of negotiation between the extended families of the parties. No court could grant a formal decree of divorce. Some colonial officials (e.g. the judge in *R v Machingura* (above)) thought that this made divorce easy, thus weakening the institution of marriage. They overlooked the contribution of the extended family and the bridewealth custom in enhancing marital continuity. In *Takuleni v Pedzisayi*,\(^{164}\) an appeal court judge criticised a lower court that had followed customary law by adjudicating on a

\(^{160}\) Mittlebeeler, *supra* note 23 at 72.

\(^{161}\) 1914 A.D. 113 as cited by Goldin & Gelfand, *supra* note 5 at 12.

\(^{162}\) Ibid.

\(^{163}\) 1918 S.R. 140.

\(^{164}\) 1942 S.R.N.A.C. 184.
matter concerning the return of lobolo (bridewealth) without actually granting a decree of
divorce. The judge declared, "it is most irregular (for the court) to grant the return of lobolo
without the annulment of the marriage." The Native Marriages Act of 1950 (now African
Marriages Act) made it mandatory for parties whose marriages were solemnised in terms of
its provisions to obtain a formal order of divorce from a competent court upon dissolution of
their marriage. Parties to "Christian" marriages were already required to do so. This
introduced a new formality which was unknown to customary law.

The fault principle was introduced to customary law by the courts. Customary
marriages could be dissolved if both sides agreed that the marriage had irretrievably broken
down. In Naomi and Chirumi v Majara165 it was held that such an agreement was "repugnant
to natural justice and morality". The court stated that there must be "just" reason for the
divorce "as between the spouses."166

When the colonial courts started granting divorces for customary marriages, they
formulated "grounds for divorce" based on the factors that would be taken into account
(under customary law) in deciding a claim for the return of bridewealth167 and on their own
sense of justice.

1) Husband's impotence. This was not taken into account under customary law but the court
decided it would be repugnant to natural justice and morality to disallow it as a ground for
divorce.168

165 1953 S.R.N. 351 as cited by Goldin & Gelfand, supra note 5 at 250.
166 Ibid. at 150-151.
167 Ibid at 149
168 Chawa v Bvuta 1928 S.R. 98 as cited by Goldin & Gelfand, Ibid at 68
2) Sterility
3) Desertion by the wife
4) False accusations of witchcraft (by either spouse)
5) Cruelty including assaults and the wife’s refusal to perform domestic duties.
6) Barrenness of the wife (only among the Shona because the Ndebele did not take this into account).
7) Adultery by wife but not by the husband (because of polygyny).169

In Katsande v Chuma it was held that a divorced woman did not revert back to the guardianship of her father or other male member of her natal family.170

c. Custody, guardianship and maintenance

In matters of custody and guardianship the colonial state maintained (until 1969) the customary position which made the fathers of children the custodians and guardians of those children upon divorce or separation.171 This position was even maintained for "Christian" marriages. The "best interests of the child" principle was subsequently introduced for all types of marriage through section 3 (5) of the African Law and Tribal Courts Act (24 of 1969). The minority status of African women was also reinforced. In R. v Machangara172 a

169 Ibid at 150ff.


172 1930 S.R.N.A.C. as cited by Mittlebeeler, Ibid.
man was fined by a native commissioner for failing to appear in court as guardian to his deceased brother's married daughter who was being sued by her husband.¹⁷³

In maintenance matters, the customary law that the father of an illegitimate child was not obliged to support the illegitimate child unless he claimed custody of the child was upheld in the case of In re Roberts ¹⁷⁴

Husbands were obliged to support their wives upon divorce regardless of fault.¹⁷⁵

d. Seduction/Breach of Promise to Marry

Customary claims for seduction damages were generally upheld except that it was held in the case of Simon v Manukisa that seduction damages could not be claimed where the man was engaged or betrothed to the woman involved. The requirement under Ndebele customary law that the woman must have been a virgin was held to be no longer valid.¹⁷⁶

The Shona customary law of awarding damages to "accompany" the return of the love token upon a breach of promise to marry was not enforced by the colonial courts. Instead, it was held that a claim for breach of promise to marry was unknown to customary law.¹⁷⁷ The

¹⁷³ Subsequent exceptions to the principle of perpetual minority of African women made by the courts included divorced women (Chawa v Bvuta (above); "emancipated" women (Elizabeth Makola v Godongiwe 1954 SRN 409); and spinsters (Katsandi v Chumba 1937 S.R.N. 86 and licensed traders (capacity restricted to matters concerning their businesses - Tasara v Agnes Manjaya 1958 S.R.N. 581. All the citations as per Goldin and Gelfand supra note 4 at 192-3

¹⁷⁴ 1953 S.R. 98 as cited by Armstrong, supra. note 170 at 343

¹⁷⁵ George Mazorodze v Jeneth 1970 AAC 38 as cited by Goldin & Gelfand, supra. note 5 at 173

¹⁷⁶ Goldin & Gelfand, Ibid.

¹⁷⁷ Five v Mbambo as cited by Goldin & Gelfand, Ibid. at 139
Shona customary law of awarding damages to "accompany" the return of the love token could have been interpreted as a form of customary breach of promise to marry claim.

e. Family Property Relations

Women not subject to the guardianship of their husbands could own property in their own right (see the discussion of guardianship above). In addition, the traditional categories of property which was not subject to the husband's control were recognised.\textsuperscript{178} In \textit{Jirira v Jirira}\textsuperscript{179} it was held that it would be contrary to the "justice of the case" to apply customary law to the property relations of the parties where their "way of living and the nature of the transactions between them are removed from the incidents of customary law."\textsuperscript{180} In this case a wife was suing her husband for a share of property on the basis of an alleged universal partnership.\textsuperscript{181}

f. Inheritance

Customary inheritance laws were upheld in relation to movable property. Immovable property was to be inherited by the heir "at customary law" in his "individual capacity."\textsuperscript{182}

\begin{itemize}
\item \textsuperscript{178} \textit{Rebecca and Musiyiwa v Vurayayi} 1958 SRN 26 as cited by Goldin and Gelfand, \textit{Ibid.} at 192.
\item \textsuperscript{179} Unreported judgement dated 3 April, 1975 as cited by Goldin & Gelfand, \textit{Ibid.} at 193.
\item \textsuperscript{180} \textit{Ibid.}
\item \textsuperscript{181} \textit{Ibid.} "Universal partnership" is a Roman-Dutch common law property concept which allows someone to claim a sharing of assets (and liabilities) in the absence of an express partnership agreement.
\item \textsuperscript{182} Section 7 of the African Wills Act, Chapter 306.
\end{itemize}
Africans could now dispose of their property by written will (a concept unknown to traditional customary law). It was held that Ndebele widows could inherit in trust (from their deceased husbands) on behalf of their sons. This was said to be in accordance with Ndebele traditional customary law. All other African women were held to have had no right to inherit property.

In relation to movable property, no distinction was made between Africans married according to customary law and those married according to Christian (or civil) rites (from 1917 onwards). Section 12 of the Native Marriages Act of 1917 provided that the solemnization of the marriage by Christian or civil rites:

"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 customary law."

The above has outlined the transformation of customary substantive laws. The next section outlines the transformation of customary dispute resolution mechanisms.

4. Customary Dispute Resolution Mechanisms During the Colonial Era

Customary courts were not recognised as part of the formal legal system until 1937. This is the period designated the period of non-recognition (below). The period after 1937 is the

183 Ibid.

184 Mabigwa v Matibini 1937 SRN 360 as cited by Goldin & Gelfand, supra note 5 at 194.

185 Juniah v Nawa 1949 SRN 210 as cited by Goldin and Gelfand, Ibid. at 192.

186 This section was reproduced as Section 13 of the African Marriages Act, Chapter 238 and is still in force today but the Supreme Court of Zimbabwe decided that it had been repealed by implication (Mujawo v Chogugudza SC 142/92). Therefore its current legal position is not clear. For a full discussion of the Supreme Court’s decision see infra.
period of recognition. The jurisdiction of the customary courts was substantially increased during the U.D.I. era.

a. The period of non-recognition.

The administration of justice was in the hands of officials of the colonial government. Indigenous institutions for the administration of justice (the headmen’s and chiefs’ courts) were not recognised until 1937. Justice among the indigenous population was administered by specially appointed Native Commissioners. The first Native Commissioners were appointed in 1893. These officials had administrative duties apart from their judicial ones. They were not trained as lawyers but were required from 1895 onwards to pass the civil service law examinations of the colony of Cape of Good Hope (South Africa). From 1921 onwards they were additionally required to pass a test in one of two indigenous languages (Shona or Ndebele). Prior to 1927, the Native Commissioners shared their jurisdiction with magistrates (see below for a description of magistrates). In 1927 they were given exclusive jurisdiction over all matters dealing with African customary law. The justification for the change was given by the Attorney-General as follows:

"Under the present law, magistrates had jurisdiction not only to try criminal cases of contravention of the provisions of the regulations, but also to try civil cases where only the rights of natives were concerned. Now it was felt that it would be better for purposes of native administration that that (sic) jurisdiction should be taken away from the court of the magistrate. Cases in which the rights of natives only are concerned are very largely on matters of native law and custom. There are no recognised text books for dealing with that law and

\[\text{Goldin & Gelfand supra note 5 at 25.}\]

\[\text{The Colonisation of Zimbabwe was arranged from the British controlled Cape of Good Hope Colony in South Africa.}\]

\[\text{Holleman, supra note 55 at 34.}\]
custom, and it is impossible to expect that a magistrate in the ordinary way would have very much knowledge of it. On the other hand it is part of the duties of the native commissioner to know that native law and custom and it is better that these civil cases which depend on native law and custom should be tried by native commissioners and by native commissioners only.\textsuperscript{190}

In the ensuing debate one member of the Legislative Assembly expressed reservations about the extent to which native commissioners were conversant with native law and custom calling it a "speciality" which "would take a man about six to ten years of close study".\textsuperscript{191}

Another member opined:

"I do not know if the native gets substantially better justice or better protection under his own law than under our law but I certainly think it would be better for the quicker civilising of the natives if they were under our laws than under their own customs.\textsuperscript{192}

The issue of the competence of native commissioners to administer indigenous law was a very relevant one. Not only were they not adequately trained but they were all white settlers coming from a different socio-cultural background. The decisions of Native Commissioners’ courts were not officially reported but it is safe to assume that their own cultural values impinged upon their ability to make decisions that were in accordance with customary law.

\textsuperscript{190} Legislative Assembly Debates at Col. 1936 - 7.

\textsuperscript{191} Ibid. at Col. 1952.

\textsuperscript{192} Ibid. at Col. 1963 - 4.
Magistrates courts also had jurisdiction to adjudicate on customary civil matters but after 1937 they could refer customary matters to native commissioners (later known as district commissioners).\footnote{193}

Appellates from the native commissioners courts were to the high court during this period.

b. The period of recognition

The Native Law and Courts Act of 1937 provided the first official recognition of the indigenous customary courts. The act provided for recognition of "native courts". Not all chiefs and headmen's courts were thus recognised. Each court had to be specially recognised. The headmen's courts that were officially recognised were placed on an equal footing with chiefs' courts - contrary to the traditional structure where headmen's courts were subordinate to chiefs' courts.\footnote{194} Howman comments as follows on the official recognition of indigenous tribunals:

"This was no innovation. The knowledge of early native commissioners was such that most of them appreciated how little they did know, how clumsy was their intervention, and from the earliest times most of them encouraged chiefs to take civil cases as they had always done. Thus the indigenous process continued and, because no legal or formal recognition was accorded them and they were regarded as informal arbitral tribunals, unwittingly the very essence of Native Law was preserved - "to settle rather than decide, appease and reconcile rather than enforce" and to issue judgment by consent or agreement as distinct from European ideas of judgment by decree."\footnote{195}

\footnote{193}{See note 190 above and Bennett, T.W., \textit{The application of customary law in Southern Africa: The conflict of interpersonal laws} (Cape Town: Juta, 1985).}

\footnote{194}{Holleman, \textit{supra} note 55 at 13.}

\footnote{195}{Howman, R.G. \textit{Report on Native Courts for Southern Rhodesia} at 5.}
i. Case studies from traditional customary courts

The following narrative gives detailed descriptions of cases decided at different times and in different areas during the colonial period. All three case studies were observed and recorded by Holleman. These cases illustrate the procedure which indigenous tribunals followed. One case involved a headman’s court among a Shona kin group known as the Hera which Holleman observed in 1946.\(^{196}\) He noted that the headman sat on an elevated stone while the rest sat on flat ground. He also sat apart from the rest of the crowd. The crowd was divided into two sections. On one side was the headman’s deputy and fellow clansmen, the complainant and other general spectators. On the other side sat the defendant, his headman and other kinsmen. The proceedings started with the participants' exchanging greetings in the traditional way (clapping of hands). The complainant then paid sixpence (a small coin that was worth about five Zimbabwean cents in those days), as court fees. He did this by handing it to the deputy headman. The complainant then stated his case without interruptions. He stated that the defendant (who, was his father) had destroyed his own huts which were adjacent to the complainant’s property thus endangering the complainants’ property. The two had a turbulent relationship because the father was quarrelsome. They had initially lived together in the father’s current ward. The son then emigrated because of the father’s quarrelsome conduct. The father followed his son and continued to quarrel. The father moved back to his former ward and then destroyed his huts and some wild fruit trees. The case was then referred (through the deputy) to the defendant’s headman to "pass on" to the defendant. The headman was also an elder brother of the defendant. "Pass on" meant repeat the allegations to him and ask for his response. The defendant’s headman refused to

\(^{196}\) Holleman, "Hera Court Procedure" (1952) N.A.D.A. 26 See also Holleman, supra note 29 at 44 - 47.
"pass on" the case and this caused a furore (with the audience joining in) until the headman relented. The defendant then refused to respond to the claim justifying his refusal by citing the absence of his sons who were to be witnesses in the case. The case was then postponed for 3 days.

On the resumption of the trial, the complainant paid court fees (a different type of court fees from the sixpence paid at the previous hearing). He paid it in kind (tobacco). The defendant also paid court fees - a half-crown. The complainant then narrated his case uninterrupted as before. He finished by clapping hands respectfully and then sitting down. Defendant admitted the complaint. The matter was then referred to the general public to debate a possible resolution. It was finally agreed that the parties should reconcile publicly which they did. The headman also forgave the defendant for the criminal aspect of his conduct. The destruction of the huts and fruit trees was a crime according to custom to which he would have been liable to pay a fine to the headman as custodian of the land.197 Holleman also observed that the proceedings took place in a "free and easy, every-day life quality."198 People kept themselves busy with trifling work (e.g. cutting and chiselling axe handles), sometimes smoked or chatted in undertones, or even lay down comfortably.199

Another case which Holleman observed occurred in Chief Mutoko's area in North Eastern Zimbabwe. The case was observed in 1951. It involved a ward headman called Mudzengerere and a young man who was a teacher at a mission school in ward headman Nyamakope's area. The two headmen belonged to the Chareva lineage which had five

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197 For all the above see Ibid. at 28-37.
198 Ibid. at 42.
199 Ibid.
headmships. Each headman had his own court. Four of the headmen used the court at Chareva as an appeal court with subsequent appeals to Chief Mutoko’s court. Mudzengerere was the exception. His appeals had to go direct to Chief Mutoko because he was not allowed to physically enter the area where the spirit of Chareva was deemed to reside (and the court sat at this area). He was excluded because one of his forefathers had quarrelled with Chareva.

The court at Chareva was run by the right hand man of the spirit medium of Chareva. The spirit medium was a woman. The right hand man was referred to as the supreme judge ("Vutonga"). The use of "Vu" and the verb stem ("tonga" means "to judge") instead of the usual "mutongi" (judge) denoted his enhanced status. The right hand man during the relevant period was a man named Kaukonde. He was assisted by a panel of assessors who had to be approved by the spirit medium.

The facts of the case giving rise to the dispute between headman Mudzengerere and the young teacher (Katiyu) are set out by Holleman. There had been a public meeting at the "dare" (courtyard) of headman Mudzengerere in which government employees known as agricultural demonstrators were present to teach the people better agricultural methods. Attendance at the meeting was poor and one of the agricultural demonstrators asked Mudzengerere to explain the absence of most people. He remarked, "Don't they obey you any longer?" Katiyu then responded that it was "like that nowadays in our country. We ---- no longer obey our "mambos" (chiefs). We even respect our "masabhuku" more than our "mambos". Mudzengerere was offended by Katiyu’s remarks and later severely

\[200\] Ward Headmen are regarded as sub-chiefs and therefore sometimes referred to as chiefs.

\[201\] Village headmen
reprimanded him for making them. Katiyu explained that he had not meant to be disrespectful but was merely commenting on a state of affairs which he found to be deplorable. Mudzengerere accepted his explanation and did not fine him (for disrespect) as he had intended to do. Katiyu then proceeded to report the matter to ward headman Nyamakope (his own headman) because he was dissatisfied with the manner in which Mudzengerere had handled the matter. He felt he had been unduly "shamed" by the severe reprimand. Mudzengerere got angry when he heard about Katiyu's complaint and wrote him a letter (in red ink) in which he banished him from visiting his area or passing through it except "by the big road which the Europeans....have made". Katiyu took the letter to the district commissioner and requested that the district commissioner summon Mudzengerere and make him explain his conduct. The district commissioner refused to entertain the complaint and referred him to the court at Chareva.

The hearing of the matter by the Chareva court had to be transferred to another area because of the prohibition against Mudzengerere. It was decided that the matter should be heard in ward headman Chindenga's area (Chindenga was head of one of the five lineage branches). The hearing was held on a threshing floor and was presided over by both the spirit medium's right hand man (Kaukonde) and ward headman Chindenga together with a couple of assessors (from the Chareva court). The plaintiff (Katiyu) and the defendant (Mudzengerere) and their supporters sat separate from each other and closest to the presiding officers. Members of the public sat on the fringe of the gathering and were free to come and go as they pleased. Their numbers varied from twenty to forty. Mudzengerere's supporters were his sons. Katiyu was supported by ward headman Nyamakope and two others.

The proceedings began with an explanation of the change of venue. The parties paid five shillings each as hearing fees and the plaintiff paid another five shillings as messenger's
fees. It was announced that the winning party would receive back his hearing fees after the verdict.

The plaintiff was first asked to present his case. He did so without interruptions. He began by clapping his hands (as a sign of deference) and narrated his case while in a squatting posture (another sign of deference). He explained his disapproval of Mudzengerere's summoning him and the subsequent reprimand by arguing that it was improper for Mudzengerere to do what he did in the absence of anyone (e.g. a village or ward headman) who would be "like a father" to him (Katiyu) given the fact that he was an unmarried young man working outside his own district and with no family in the area. The go-between then repeated the plaintiff's statement.

The defendant proceeded to present his own case in a similar manner. He pointed out that he felt that he had acted properly towards the plaintiff in reprimanding him. He claimed he had "spoken to him like a father." He also took offence at the plaintiff's action in reporting him to the "varungu" (white people i.e. the district commissioner). However, he testified that he himself had thought of going to the district commissioner to complain about the plaintiff and other (disrespectful) "young ones like him." The go-between repeated the defendant's statement.

The court then called upon the parties to present their principal witnesses. (These are not witnesses in the conventional sense. There are secondeants and character witnesses who express opinions on the merits of the case). Ward headman Nyamakope was the plaintiff's principal witnesses. He stated that being the plaintiff's ward headman made him a "father" to the plaintiff. He emphasized that the plaintiff was a "mutorwa" (alien) and therefore it

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202 Clapping of hands is used by the Shona as, inter alia, a method of greeting (respectfully) and also as a sign of general deference.
was improper for Mudzengerere to summon him unaccompanied by supporters. He also supported the plaintiff's action in taking the matter to the district commissioner on the basis that Mudzengerere could not appear at Chareva (for reasons stated above).

The defendant's son was his principal witness. He dwelt upon the fact that the defendant was an elder who had been insulted by an alien young man. He stated that the defendant had been lenient in not fining the plaintiff yet the plaintiff had gone on to report him to the district commissioner. He took exception to the fact that the plaintiff had asked the district commissioner to summon the defendant. He stated that this would have involved the sending of a policeman to arrest the defendant like a criminal.

The matter was then referred to the public for debating. The people in this area had a special debating technique whereby the audience assumed the identity of one of the parties and expressed opinions which supported that party's case. One person could assume the identity of both parties (at different times) and the most skilful debaters often did so. The parties were prohibited from participating in this role-debating but they could be asked to answer questions and clarify factual points during the debating. The presiding officials could participate or simply ask questions without role-debating. Witnesses, other than principal witnesses, were introduced during role-debating e.g.

"I am (name of party) and I ask that (name of witness) should tell me whether or not it is true that (alleged fact(s) to which witness is supposed to testify)".

Or

"I am (name of party) and I say that this cannot be true because I heard (name of witness) telling (name of witness) that he saw (alleged circumstances to which witness is supposed to testify)".

Anyone who could shed light on the facts or incidents referred to would then respond accordingly. During the role-debating in the present case, the audience initially focused on the alleged disrespect shown by the young and alien plaintiff to an elder. Others focused on
the impropriety of Mudzengerere's summons especially since the plaintiff did not work or live in his area. They were skirting around the issue of the letter in red ink. The hearing was also becoming disorderly. One of the assessors then went to the public area and first addressed the audience reminding them that they had been skirting around the issue of the letter. He said, among other things, "We have not been speaking clearly". He then role-debated as follows:

"I am Katiyu, and I want to ask Mudzengerere why he wrote to me in red ink while it is customary to write with black?"

and went back to his place.

The ensuing debate revolved around the issue of the red ink. It was revealed that black ink was available and that the letter had actually been written by Mudzengerere's eldest son apparently on the instructions of his father. Holleman was then drawn into the debate by direct queries (i.e. no role-debating). He was asked to explain the significance of red ink in writing since:

"It is said that "varungu" (white people) invented the custom of writing, for it was unknown to us (i.e. the local people) before they came." (statement by go-between).

Holleman explained the use of red ink in marking by school teachers, by his bank manager (to show that his account was overdrawn) and by himself in his own writing (to emphasize important points). He was also asked if he had ever written a whole letter in red ink. He responded that he could not remember doing so. He was also asked if it was unusual for "varungu" to write in red ink. He replied that it was uncommon. He was then asked to explain the significance of the red on traffic lights and of the red cloths tied to the back of long poles carried at the back of trucks. He responded that they were warnings of danger but not threats. In the case of the trucks, he admitted that people could and had been
killed for disregarding the warning. The teachers' red ink and the bank manager's red ink were interpreted (by members of the audience) as warnings. The teachers were warning him of mistakes. The bank manager was warning him that he would not give him any more money and he could starve. The bank manager was equated to an unjust father refusing his child food. Holleman tried to explain the concept of banking and how it differed from the father/son relationship.

The questioning on red ink produced a preponderance of opinion that the red ink had been meant as a threat to the plaintiff. Public opinion was against the defendant. Kaukonde then delivered the judgement of the court. He began by stating that the plaintiff had been wrong in making the comments he made at the public meeting. This remark drew a loud protest from the younger section of the audience. Kaukonde proceeded to state that Mudzengerere was wrong in writing the letter and, for that reason, Katiyu would receive his hearing fees back but Mudzengerere's would remain with the court i.e. that the court was finding in favour of the plaintiff.

Katiyu was then asked whether he "agreed" with the court's decision and whether there were other matters which he wanted the court to address (an allusion to the matter of compensation). Katiyu responded that he was satisfied and did not want compensation. He had merely wanted it to be confirmed that he had done no wrong so that he could visit his friends again (i.e. the banishment in the letter would be of no consequence.)

Mudzengerere, when addressed, protested against the judgment and kept muttering furiously about young people's evident disrespect of their elders. He rejected a suggestion that Katiyu should offer him a chicken "which they could eat together as a sign that all (was) well again." Katiyu had accepted the suggestion but offered one shilling in place of the
chicken because he had no chickens. Kaukonde concluded the matter without addressing Mudzengerere’s protests.

On the way back to his own village, Kaukonde was asked (by Holleman) if Mudzengerere would let Katiyu visit his friends. He expressed surprise that it could be possible for Mudzengerere to defy the court’s judgement:

"How could he refuse Katiyu? You have heard what the people said. No harm will come to him, for if he was to die all people will know it is because of Mudzengerere".

Apart from this remark, Kaukonde refused to discuss the matter (by keeping silent). However, he did make another remark (with a sigh). He said, "Ah, these young ones!".

The red ink became such a big issue because it was equated with a threat to kill either by natural or unnatural means (witchcraft). This was due to the association of the red colour with blood and "chishava" (ominous misfortune).203

Holleman also observed another case in the Southern Wedza area of Zimbabwe. It was before a chief’s court. The case was observed some time between 1945 and 1948.204 The case involved a claim for seduction damages by the father of an unmarried woman.

D, a young, single teacher seduced the daughter of N. She fled from home and was temporarily living with friends because D’s home (the place where she was expected to flee to customarily) was too far away. She appealed to the chief because she had no place to go. D and his family (his father and two paternal uncles) were duly summoned and came to court. At the hearing, the woman stated her case first. D responded by admitting impregnation but refusing to marry her. The court insisted that he should give her a token to

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203 This entire case is from Holleman, supra note 29 at 48-66.

204 Holleman, supra note 24 at ix and 94 - 95.
signify this rejection. He gave her a shilling coin stating, "With this shilling I refuse to marry this girl." The shilling was first handed to the go-between, (messenger) who in turn handed it to the woman. She handed it back to him asking him to give it to her father (who was present with his elder brother). N's elder brother objected (on behalf of N) indicating that they (N and his family) could not formally talk with their "daughter" before the customary payments for the impregnation ("masungiro" or "matyorwa") had been made. The chief appealed to them to reconsider their position arguing, "How can we 'talk' this case if there is no-one (to speak on behalf of your party)?" They relented after being given one pound by the defendant's father as a token of opening communication. N then spoke as complainant reviewing every possible aspect of the case and suggesting that D's father should force him to marry. He finally demanded seven head of cattle as compensation for the seduction. The court persuaded him to lower his demand, pointing out that D's "fathers" had "shown themselves (to be) honourable people anxious to repair the damage caused by their son's wrong". The chief finally pronounced judgement of two head of cattle and one pound. The woman's family renewed their claim that they could not accept her back in the family without the customary payments for impregnation. The defendants promised to deliver a male and a female goat the following morning.

ii. Analysis of the case studies

The cases described above give some illustration of the social context in which disputing took place during the colonial era. Although they were all decided at a time when

205 This payment was meant for the propitiation of the woman's ancestresses who were believed to control her reproductive capacity.

206 This entire case is discussed in Holleman, supra note 24 at 94-95.
some headmen's and chiefs' courts were officially recognised, it is not clear whether or not the particular courts that heard these matters were officially recognised. It can be assumed that the ward headman's court in the Hera area was not officially recognised because the hearing fees paid by the parties were not in accordance with those fixed by statute (five shillings). In the case before the Chareva Court, the fees were in accordance with the statutory provision, therefore it can be presumed that this was an officially recognised court. The fact that the district commissioner referred the plaintiff to this court also adds to the presumption of recognition. Nothing is said about fees in the final case so it is difficult to tell whether it was a recognised court or not. The proceedings in all the courts illustrate the simplicity of customary procedure. There were no formal pleadings and the proceedings were decided in open court with public participation (the seduction case is an exception on the latter point). The presiding officers tried to be conciliatory but they also made authoritative decisions.

The decisions in two of the cases discussed were not by consensus. The Hera court case's consensual decision could be due to the fact that the parties were father and son. Indeed, in a later writing, Holleman emphasizes that the public reconciliation that occurred at the conclusion of this particular case was not common.207

All of the cases illustrate the importance of the family in traditional dispute resolution. The only litigant who appeared before the court without the support of family (Katiyu) had to have the support of a substitute father (ward headman Nyamakope).

The case from Chareva court was unique in various ways. Firstly it shows that in this particular area there was an additional level to the hierarchy of traditional dispute

207 Holleman supra note 29 at 46 - 47.
resolution - a kind of sub-ward headman's court (i.e. all the courts of the four headman who used the Chareva court as a court of appeal). Secondly, the link between the court of Chareva with the spirit medium was unique. In most communities the spiritual functions and the judicial functions were separate.

The case from Chareva also indicates some of the tensions between the pre-colonial social organization and the colonial one. The colonisation process introduced a parallel political authority to that of the traditional leaders. Thus a government civil servant would challenge the authority of a ward headman (by suggesting that his people no longer obeyed him hence the poor attendance at a public meeting). In addition, the young teacher could rely on the authority of the district commissioner (a colonial official) to challenge the authority of a headman. Paradoxically, the headman himself also contemplated (as stated in his testimony before the Chareva court) using this colonial official to challenge the rebellion of young people against traditional authority. Ward headman Mudzengerere also seemed to tacitly accept the undermining of his authority by the new colonial order. He excluded the road constructed by the colonial authority from his "banishment order". The parties in this case were involved in the utilization of the norms of the traditional society and the new society to their advantage. Katiyu was challenging the authority of an elder and at the same time criticizing the elder for summoning him without the support of his own elders. Thus he was also affirming traditional authority. Mudzengerere manipulated the mystical threat associated with the red colour by using a colonial invention (writing and red ink) to convey a subtle threat to Katiyu. Similarly, the members of the audience and the court were able to deduce the threatening message despite the use of a new medium to convey it. In this deduction, they received the assistance of a white researcher (Holleman) who happened to be present. They also drew from their own experiences with the use of the red colour in the
new society (traffic signals and danger warning signs on trucks carrying logs). The intergenerational conflict seemed to have been highlighted by this case. The younger section of the audience protested when Kaukonde stated that Katiyu’s comments were inappropriate. Kaukonde’s remark (and sigh) about “young ones” also illustrates this conflict.

The existence of intergenerational conflict and the challenge to traditional authority is also illustrated by the seduction case. The defendant’s father was quite willing to have his son marry the woman he had impregnated but he could not force him to do so. The woman’s father’s comment that he should do so was probably a sign of exasperation at the rebelliousness of the younger generation. The chief was very understanding of this situation commending the defendant’s “fathers” for their conduct. The rebellion of the young man in the seduction case could be explained by his status. He was an educated person working as a teacher and did not need his father’s material support. His economic independence enabled him to make his own decision against his father’s wishes.

In comparison with the young man in the seduction case, the young woman who was seduced did not have economic independence. She depended on and lived with her family and was forced to leave home when she became pregnant. The fact that improved transportation infrastructure and education had been introduced did not benefit her in her specific situation. Holleman does not provide any information on her possession of formal education but it can be inferred from the fact she did not have a professional career, that she did not have sufficient formal education to enable her to attain one. This contributed to her economic dependence on her family which made it impossible for her to elope unilaterally (although the young man’s subsequent refusal to marry her shows that this would have been futile) to the young men’s family home (because it was too far away and she had no money for travel) as was expected of her customarily. At the same time it was taboo (customarily)
for her to continue to stay with her parents after becoming pregnant while unmarried and before the required customary payments had been claimed and settled. She was put in a dilemma which led her to seek innovative solutions. She went to stay with friends and brought the matter before the chief because she had nowhere to go. However, once she brought the matter before the chief, her family ("fathers") became involved and she had to surrender the claim to them. She became a mere witness. Her own views and wishes regarding compensation were not heard and unlike the young man, she could not (assuming that she might have desired to do so) disagree with her family on the matter because of her dependence on them.

Thus the new socio-economic order and customary law were not beneficial to her as a young woman without sufficient formal education and economic independence. On the other hand, formal education, a profession and economic independence enabled the young man to defy customary authority and expectations.

iii. The Procedure and jurisdiction of officially recognized customary courts
As noted earlier, in 1937 the Native Law and Courts Act conferred recognition on chiefs' courts and some ward headmen's courts whilst those ward headmen’s courts not recognised continued to operate informally. The recognised headmen's court were placed on an equal footing with chiefs' courts until 1969 when the traditional hierarchy was restored through the African Law and Tribal Courts Act. Although chiefs’ courts were officially on an equal footing with some headmen’s courts, they probably continued to operate as appeal courts unofficially. The native commissioners' courts were made appeal courts from the chiefs’ (and recognised headmen’s courts). The appeal process was by way of trial de novo. A further appeal court from the native commissioners' court had been created earlier. It was
known initially as the Southern Rhodesia Native Appeal Court. It was renamed the Court of Appeal for African Civil Cases in 1963.

The provisions of the African Law and Tribal Courts Act of 1969 abolished the Court of Appeal for African Civil cases as well as the appeal to the native commissioners' courts (which had been renamed district commissioners' courts). A new appeal court was created. It was known as the Tribal Appeal Court and was to be presided over by a panel of chiefs. The decisions of the Tribal Appeal Court (except for removal orders) were final and not subject to further appeal. It was introduced because it was felt that trials de novo before a European Court undermined the authority of chiefs.208

Section 16 of the African Law and Tribal Courts Act (24 of 1969) provided that the procedure and evidence in chiefs' and (ward) headmen's courts (which were referred to as "tribal" courts) were to be regulated by customary law "notwithstanding anything contained in any other law" except that all cases had to be heard in open court, the court had to ensure that the defendant was informed of the nature of the proceedings and each party was to be given an opportunity to present her/his case. The rationale for section 16 was stated by the Secretary for Internal Affairs (the department responsible for initiating the legislation) as follows:

"Recognition is accorded to the fact that traditional ways and procedures do in fact operate and are highly effective in ascertaining the truth. This indigenous process must not be interfered with."209

208 Howman, R. Circular Minute No. 51/67 - National Archives of Zimbabwe.

209 Ibid.
There are no writings that sufficiently detail traditional (customary) procedure but some aspects of it can be deduced from the cases observed by Holleman (above)\textsuperscript{210}.

The colonial (post 1969) customary procedure in the officially recognized customary courts is described by Goldin and Gelfand\textsuperscript{211}. The procedure described appears to have been a mixture of the traditional and the newly introduced colonial rules. The new colonial rules included rules about written summonses, the keeping of records and execution of judgements.

As far as the presentation of evidence before a chief’s court was concerned, no oaths were administered to the parties or their witnesses. The parties and their witnesses were questioned by all or a combination of the following:

1. the opposite party
2. the chief’s assessors
3. the chief’s messenger (his role was to draw the chief’s attention to any evidence which he (the messenger) knew to be untruthful)
4. Members of the audience (only with the permission of the court)
5. the chief (seldom)

There were no constraints on the admissibility of evidence and rules concerning hearsay evidence, leading questions, questions concerning character, the right to cross-examine one’s own witness or attack his or her credibility did not apply. All arguments on the merits of the claim or defence or the credibility of evidence were presented as part of the presentation of evidence and questioning of witnesses. After this process, the matter was


\textsuperscript{211} Goldin & Gelfand, \textit{supra} note 5 at 109 - 117.
formally referred to the chief (despite his presence throughout the proceedings) by the senior assessor for his decision. The chief then commented on the credibility of the evidence and proceeded to pronounce judgement urging the parties to go and live peacefully with one another. The chief could postpone the giving of judgement (to allow himself time to consult with his assessors) to a specific date.

According to Bullock, traditionally (among the Shona) the requirement for court fees could be waived in the case of a poor plaintiff. The poor plaintiff would put ashes on his head and cry outside the chief’s home for justice. It is not clear how the principle of this custom was continued with modernization and the introduction of statutory fees.

The above description centres on Shona court procedure without reference to Ndebele procedure because no written materials on Ndebele procedure have been found by the writer. Goldin and Gelfand simply state that the procedure is the same as that of the Shona except that a Ndebele chief was not greeted with the clapping of hands.

iv. Other consequences of recognition/non-recognition

The non-recognition of customary criminal law was one colonial policy which affected the judicial authority of chiefs because they had been the ultimate enforcers of customary criminal law. The treatment by the colonial government of those chiefs who tried to enforce their old powers further undermined them. In 1929 a chief sued a man (before a native commissioner) for two head of cattle which had been imposed on him as a fine for the crime


213 Goldin & Gelfand, supra note 5 at 109.
of incest\textsuperscript{214} in accordance with customary law. Incest was regarded as a crime which incurred the wrath of the ancestral spirits who would need to be propitiated. The cattle would be used to propitiate the ancestral spirits. The Native Appeals Court (an appeal court from the Native Commissioners' court) rejected his claim. Apart from having to bring a claim before the colonial courts instead of dealing with it himself (as he had done in the past), the chief's authority was further undermined by the rejection of his claim. In 1939 another chief brought a similar claim which was accepted by the native commissioner. The native commissioner decided to reinterpret customary law by awarding seduction damages to the father of the woman although he accepted the chief's claim as well. The compensation claim was contrary to customary law. No compensation was payable under customary law in cases of incest. The Native Appeals Court reversed the native commissioner's decision in awarding the chief's claim. Thus the chief's traditional right to obtain cattle from the parties to an incestuous relationship for use as propitiation for the ancestral spirits was rejected again.\textsuperscript{215} Chiefs and traditional authorities were sometimes charged with extortion when they collected hearing fees for customary civil cases which were crimes under the received law such as indecent assault.\textsuperscript{216}

The chiefs' courts' jurisdiction to try criminal cases was restored by the African Law and Tribal Courts Act (24 of 1969). However the courts were not empowered to enforce

\textsuperscript{214} Incest is widely defined under customary law particularly in relation to agnatic relationships. In one instance a man and a woman who were fourteenth cousins were deemed to be "brother" and "sister" and consequently their relationship was found to be incestuous. Affinal ties are treated in a less serious manner e.g. a man can marry sisters. See Holleman, supra note 29 at 90.

\textsuperscript{215} These cases are discussed in Mittlebeeler, supra note 23 at 21-22.

\textsuperscript{216} Ibid. at 25 - 34 citing \textit{R v Masembura} 1937 S.R. 163 and others.
customary criminal law but that of the received law (Roman-Dutch Common Law and Statutory provisions). Their jurisdiction in respect of common law offenses was restricted to cases of theft of property valued at not more than $40 (in those days) except bicycles, firearms and mail. They also had jurisdiction to try cases dealing with the common law crime of malicious injury to property (subject to the property not exceeding $40 in value and excluding "structures" used for accommodation). Their jurisdiction over statutory offenses was restricted to specified statutory offenses. All the statutory provisions involved were aimed at Africans such as provisions under the African Affairs Act, (Chapter 92), African Beer Act (Chapter 93), African Cattle Marketing Act (Chapter 94), Natural Resources Act (Chapter 264), African Land Husbandry Act (Chapter 103) and others.217

5. Other Colonial Courts
   a. Magistrates Courts

The first magistrates were appointed in 1891.218 Most of them were not legally qualified in any way.219 As pointed out above, magistrates' courts initially had civil jurisdiction to apply customary law. They were empowered to seek the assistance of one or two "natives" to advise upon matters of customary law. The provision was repealed when they lost their jurisdiction to try customary civil cases (in 1937).220

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217 As cited by Goldin & Gelfand, supra note 5 at 88.

218 Goldin & Gelfand, Ibid. at 18.

219 Ibid.

220 Ibid.
Magistrates' courts also had jurisdiction (mainly over non-Africans) to deal with non-customary civil cases and criminal cases subject to specific limits.

b. High Court

The first high court was established by the Matebeleland Order-in-Council of 1894. The provision regarding "native" advisers applicable to magistrates courts was also applicable to the High Court. The High Court initially had both original and appellate jurisdiction with appeals and further appeals going to the Appellate Division in South Africa and finally to the Privy Council. Subsequently the High Court was split into two courts i.e. the General Division (original jurisdiction) and the Appellate Division (appellate jurisdiction). There were no further appeals from the High Court (Appellate Division).

6. Analysis of the Colonial Transformation

a. Political Structure

The major change that occurred in the political structure during the colonial period was the subjugation of indigenous political structures. Despite the British colonial government's rhetoric of "indirect rule", in colonial Zimbabwe, the "indirect rule", was more through the B.S.A. Co. than through the indigenous authorities. When indigenous authorities such as chiefs and headmen were given recognition it was more for the purpose of enhancing the colonisation process than to encourage the development of local political structures to take over from the colonial government. This was particularly evident during the U.D.I. period (and to a limited extent, the period of settler "responsible government") when the

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221 Ibid. at 17.
government openly courted the support of chiefs and headmen as a buffer against the demand for majority rule by the nationalists. Chiefs were put in a "dual" and "conflicting position". On one hand a chief had to be the "faithful servant of an essentially foreign and superimposed Administration". On the other hand, the chief had to be the "head and representative of an autonomous African tribal community whose support is equally vital to him..." This contradiction equally applied (though to a lesser extent) to ward headmen and kraal heads (village heads). An example of how much kraal heads had been absorbed into the colonial administration was the fact that their collection of taxes and keeping of the necessary records on behalf of the government resulted in the Shona changing their traditional name for kraalhead ("samusha" "keeper of the village") to "sabhuku" (keeper of the book).

The rewards offered to chiefs and headmen (in the form of government allowances and token participation in the white controlled government structure), made some of them choose to side with the colonial government against their own people. This had repercussions for indigenous political struggle for independence and the manner in which the chiefs' other roles (such as in dispute resolution) would be constructed in the post-colonial era (see below).

The contradiction of the colonial government's policy of attempting to reinforce the authority of chief after having substantially undermined it (and in some ways continuing to

223 Ibid.
224 Holleman, supra note 55 at 846
225 Ranger, supra note 127 gives an account of some of the terrible consequences (for both pro and anti government chiefs) in the Makoni area.
do so) was not completely lost on the colonial settlers. During the debate on the African Affairs Amendment Act (44 of 1966) which sought to buttress the authority of chiefs, one of the members of the legislative assembly commented that it was "impossible to recreate the original system of power and authority" and that the "government could never establish the chief again as a political power." 226

b. Socio-Economic Conditions

The socio-economic conditions prevailing during the colonial era were characterized by the transition from a traditional economy to a capitalist economy. This change had implications in the various social relationships. The concepts of property and wealth and status were transformed in some cases but not in others. 227 The direct intervention of the colonial government through its segregationist policies and legislation was also a key factor. The allocation of political control was linked to economic control in the traditional societies. The capitalist economic relations changed this direct connection. Traditionally subordinate groups sought to achieve autonomy through the economic field. At the same time, those who were in control of the traditional economy sought to use their privileged positions to attain gains in the new economy. 228 The government and the owners of capital pursued their own goals which either benefited or disadvantaged the struggles of subordinates.

226 Dr. A. Palley as cited by Holleman, supra note 55 at 364.

227 Holleman, supra note 29 at 145.

228 Rwezaura, B.A. Traditional Family Law and Change in Tanzania: A Study of the Kuria Legal System (Baden - Baden: Nomos, 1985) makes similar observations about the Kuria of Tanzania, at 168-171.
i. Women and colonial socio-economic transformation

Women constituted one group of subordinates. Some of them sought to break free from the control of men by engaging in the new economy. However their struggle in this area was hampered by restrictions on their mobility which were supported by patriarchal elderly men and by the capitalists' preference for male labour.\footnote{Barnes, \textit{supra} note 140 at 586-608.}

Women's traditional role in agriculture was also undercut by capitalist penetration. Men left agricultural production in the hands of women but needed to expropriate the produce because of the inadequacy of their wages. The low wages meant that the men could not bring their nuclear families to the urban centres. They also meant that the men could not save for old age or other incapacitating events such as sickness or accidents. Their only security in such situations would be the land in the reserves. The land had become scarce (because of the government's land law which resulted in the displacement of the indigenous people from most of their land)\footnote{The details of how this was done have already been provided (above).}, and there were no guarantees that there would be some available for them if they chose to abandon it for the urban centres. Despite the valuable contribution they made to the new capitalist economy through peasant agriculture, women were still regarded as subordinate to men by both African men and the colonial government.

A different form of exploitation of women in agricultural production occurred in the African Purchase Areas. The men in the African Purchase Areas had moved out of the traditional pattern of communal ownership of land (with individual allocations). They had purchased land in terms of the new socio-economic and legal arrangements. As noted earlier, some of them utilized tradition by practising polygyny in order to increase labour
Some of the men in the African Purchase Areas were reluctant to let their wives attend government and missionary run homecraft clubs for fear that they would learn "insubordination". They also felt that the homecraft clubs would deprive them of the valuable labour of their wives.  

ii. Young men and colonial socio-economic transformation  

Young men constituted another group of subordinates in the traditional economy. As a result, they were the group that took most advantage of new economic opportunities by working in the mines and industries. The elders initially encouraged the migration of the young men because they needed the cash earnings to pay the various taxes imposed by the colonial government.

As noted earlier, young men used their cash earnings to break away from the control of elders e.g. by paying their own bridewealth. The few who managed to earn sufficient wages to remove their nuclear families from the rural areas lost most of their ties with their kin and became part of the urbanized population and some of them may have become "detribalized".

231 Weinrich, supra note 29 at 27.  
232 Weinrich, supra note 142 at 28-29.  
233 Summers, supra note 127 at 76-77.  
234 Mitchell, J.C., in Social Implications of Industrialization and Urbanization South of the Sahara UNESCO) at 695 distinguishes urbanization and detribalization. He states that the former "implies participation in urban social relations" while the latter "implies the dropping or rejection of tribal modes of behaviour, and the lapse of social relations with people living in the tribal areas."
c. Law and Dispute Resolution

i. The colonial response to the need for customary law reform

In assessing the transformation of the law and dispute resolution mechanisms during the colonial era one must take into account the different ways in which these changes were linked to the changes in the political and socio-economic conditions analyzed above. Changes in the dispute resolution mechanisms for customary law, particularly the application of customary law by the colonial courts, resulted in changes to substantive customary law through interpretation by the courts and judicial precedent. The overriding theme in the analysis of changes to substantive customary family laws is the change in the status of women. Auret posits that a change in the formal legal rights of women was needed. She observes:

"The shift from the small village community, where the domestic sphere was all important, to a situation where a man’s legal designation as head of the family was a key factor created an imbalance in the male-female dependency relationships. A man’s access to formal and legal rights which reinforced this dominance served to stress a woman’s need for added and perhaps new formal and legal rights."\(^{235}\)

Of course, the period of the "small village community" was not characterized by full equality between men and women. It also had its problematic features. Colonial intervention improved the situation in some areas and worsened it in others. In most cases, changes were not made despite the changes in the social context.

Customary law and disputing was also remoulded through interpretation by the colonial courts and direct legislative intervention by the colonial government. In Ginger v

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Kamigariwa a customary way of proving adultery was rejected by the court. The proof involved admitting a confession made by a woman during childbirth. It was believed that the child would die if the woman did not confess. False confessions would incur the wrath of the ancestral spirits. The court rejected this method of proof and went on to state that adultery had to be proved "beyond a reasonable doubt" - a standard generally confined to criminal matters. (The case involved a civil claim for compensation and not a prosecution in terms of the Native Adultery Ordinance.)

As indicated in the earlier discussion, legislative measures to regulate customary marriage were generally ignored unless there was some other policy or circumstance compelling compliance. Adinkrah discusses a similar situation in Ghana and is of the view that the non-compliance raises doubt about the efficacy of transplanting legal institutions in an attempt to force social change.

The reduction of the rules of customary law to writing by colonial scholars and through the written opinions of superior court judges (precedent) resulted in some ossification of the customary law. This was contrary to the flexibility of traditional customary law.

The development of customary law was interrupted by the colonial legal order. Therefore it will never be known how customary law would have developed to meet the challenges of the new socio-economic order. The latter was also imposed and it is equally impossible to predict how the traditional economy would have progressed had there been no

\[236\] 1944 N.A.C. 28 as cited by Holleman, Ibid.

\[237\] Ibid. at 8.


\[239\] Holleman, J.F. "Hera Court Procedure" (1955) 32 N.A.D.A. 41 at 41 - 42.
colonial intervention. Customary law's flexibility was characterised by pragmatism and contextualisation of rules rather than abstraction. The rules were not regarded as separate from "the matrix of social relationships which alone gave them meaning". This made them understandable (to the local community) and therefore accessible. However, it also made them susceptible to misinterpretation and misconstruction by outsiders who had no knowledge of the social relationships in which they were embedded (such as most colonial officials). The flexibility of the rules of customary law made it easier for litigants to invoke them before the customary dispute resolution mechanisms. The litigants did "not have to bring their case within some specific form of action."\(^{241}\)

The failure to understand the cultural context in which customary laws applied resulted in some instances in which colonial courts failed to adapt customary law to new situations. The rejection of a claim for breach of promise to marry under customary law is an example. The claim was rejected despite the fact that Shona customary law provided for a similar claim which was tied to the claim for return of the "love token". In the new cultural context, there was a possibility that engaged couples would not exchange love tokens. A claim of breach of promise to marry (without the connection to the love token) would have met the requirements of the new cultural context.

Both the legislature and the courts failed to interpret the customary law of status in the light of a changing socio-economic cultural context. In the traditional context both women and young men had limited status. Moreover women were free to deal with their


own property (other than the motherhood cow and its property) without consulting their husbands or any other male kin. In the customary law that emerged during the colonial era, young men had full legal capacity whilst women were generally reduced to the status of children (perpetual minority). Women’s right to own and manage their own property was confined to the property in the traditional sphere and generally not extended to new forms of property such as houses. Women continued to be barred from inheriting from their husbands’ estates despite their increasing contribution to these estates (particularly to new forms of property such as farms and houses in the urban centres), the emphasis on the heir’s individual rights to immovable property and the decline of the custom of a widow remarrying a member of the deceased’s family.

The absence of a written customary law led to the creation of two different categories of customary law. There was the customary law which was practised by the people on one hand and the customary law which was applied by the courts on the other hand. There was further divergence within each category. This divergence is discussed infra (see chapter 3). The pre-colonial customary law was presumably the one on which the people’s practice was based although there is no doubt that those who applied it modified it to suit new socio-economic conditions or, in a negative sense, to suit their own interests.

Goldin and Gelfand fail to acknowledge the necessity for the transformation of customary law to meet new socio-economic conditions when they express the view that the chief:

242 Weinrich, supra. note 142 at 127-134.

243 Remarrying a member of the deceased’s family ensured women material support.

244 Ibid. 256.
They also state that the role of the chief is to uphold the people’s past and protect their customs and philosophy. It would have been unfair to women for chiefs to apply the customary law in this way because women had "out grown the status assigned to them in the traditional society."

**ii. The colonial judiciary’s application of customary law**

Seidman criticises the colonial court of Appeal for African Civil cases (formerly Southern Rhodesia Native Appeal Court) and other colonial courts for manipulating the rules of recognition to selectively enforce customary law. He alleges that the manipulation took the following forms:

1) Domination by the court of the process of deciding the contents of customary law - by consulting textbooks and witnesses (such as chiefs and court messengers) without giving the parties the opportunity to object or cross-examine.

2) Through the repugnancy provision.

3) Through improper use of precedent (by not distinguishing previous cases in terms of areas from which they came from and the time lapse since the "precedent" cases were decided).

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245 *supra* note 5 at 49-50.


4) By treating textbooks like codifications of customary law despite the different settings in time and area of the studies.

5) A lax approach to witnesses e.g. using informal conversations as witness evidence and failing to question witnesses about the source of their alleged knowledge of rules of customary law such as a witness claiming to know the law applicable when an insane man killed his own child although it wasn’t clear that this had ever happened before in the relevant area from which the case arose.

6) Abusing judicial notice. Judges simply announcing what the customary law was in a particular area. (The erroneous statements would then be reified through the doctrine of precedent).²⁴⁹

One of the consequences of the manipulation cited above was that until 1972 the courts insisted that corroboration of the woman’s evidence was required in respect of claims for seduction damages. This was contrary to customary law and "out of harmony with the modern approach to the cautionary rules of evidence".²⁵⁰ Thus customary law was transformed regressively in this particular instance.

Chanock suggests that customary law was created during the colonial era. He draws this conclusion from his study of customary law and disputing in Malawi and Zambia during the colonial era. He notes that customary law in this era developed as a result of "a process of legalisation, of a transformation in African institutions rather than a continuity".²⁵¹ He further notes that the colonisation process in these countries was preceded by a time of great social upheaval in which traditional values and institutions were in a state of constant flux.

²⁴⁹ Ibid. at 887 - 890.

²⁵⁰ Ibid. at 901-2 citing Masembura v Yawo 1972 A.A.C. 28 which reversed the corroboration requirement. This reversal indicates that sometimes colonial courts were willing to acknowledge and remedy the errors they made in application of customary law.

This upheaval was caused by slavery and conquest particularly the conquest of matrilineal social groups by patrilineal indigenous ones. He argues that this made it impossible to have an established customary law. He elaborates on this assumption by illustrating the ways in which elders used the opportunities presented to them by the colonial government, in giving evidence of "customary law" before the colonial courts and also in presiding over their own dispute resolution institutions in which they were to apply "customary law", to create a version of customary law which suited their own interests. Colonial officials supported this created customary law whenever it coincided with their own interests. The elders' customary law was aimed at controlling women and younger men. He illustrates this with reference to the laws on marital relationships and land tenure.

In a review of Chanock's book, Snyder criticises Chanock for failing to give enough attention to pre-colonial phenomena and non-state colonial phenomena. Indeed it is improbable that the upheavals that Chanock refers to totally eradicated the pre-colonial social order. In any event, no such upheaval occurred in pre-colonial Zimbabwe. The Ndebele raids were not as disruptive because the Shona and Tonga were not assimilated into Ndebele society. They retained their own social organization. As Snyder points out, what happened during the colonial period was an interaction of the indigenous law and the colonial law in the context of changing socio-economic relations which created what he refers to as

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252 Ibid. at 9.


255 Ibid. at 256.
"combined" law. In Zimbabwe, "combined" law emerged as a result of the selective recognition of some customary laws and the substitution of others. The process of combination was further developed through the modification and reinterpretation of some of the recognized customary laws, which was sometimes accomplished by drawing from the norms of the received law.

iii. Transformation of Disputing and Dispute Resolution Mechanisms

Capitalist penetration resulted in the transformation of some disputes from "confrontation over honour to competition over property."

"...In a precapitalist society with no major differences in the ownership of capital goods, social standing is the scarce resource people seek to maximize."  

It should be emphasized that there were still differences in economic power in precapitalist Zimbabwe. However, the existence of the kinship structure and the veneration of elders and traditional political authorities overshadowed these differences. Holleman also notes the importance of status in traditional customary law. He observes that parties to a dispute "seek, not only redress for suffered loss or injury, but also vindication of their general social conduct and esteem in the community."

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256 Ibid. at 257.
257 Abel, R., "The rise of capitalism and the transformation of disputing: From confrontation over honor to competition over property" (1979) 27 UCLA Law Review 223
258 Ibid. at 241.
259 Holleman, J.F., "Trouble cases and trouble-less cases in the study of customary law and legal reform" (1979) 17 African Law Studies 1 at 6.
The procedures in traditional dispute resolution mechanisms are informal. When customary law is applied by courts with technical rules of procedure, it tends to become formalised. The disputants lose the benefit of an accessible and understandable procedure which would have been matched with an equally accessible and understandable body of norms i.e. the customary law. However, the procedures in traditional dispute resolution must also be critically examined. The informality and accessibility should not be allowed to cloud some issues that should be of great concern in access to justice. One such issue is the way in which the procedures can be manipulated by those with power in order to deny the powerless justice.

Starr and Yngvesson\(^\text{260}\) did a re-analysis of the case studies done by Gluckman and Gulliver.\(^\text{261}\) Gluckman and Gulliver had emphasized the "multiplex" nature of the relationships between the disputants and how the courts attempted to make consensual decisions. Starr and Yngvesson challenge the multiplex/simplex dichotomy and note that where the relationship is multiplex and the disputants are not of equal rank, the difference in power may be the significant factor.\(^\text{262}\) They also point out the difficulty of assessing whether or not a compromise or reconciliation was reached. Such an assessment requires knowledge of what each party intended to gain by going to court, the extent to which each party may have exaggerated his/her claim, and the quality of interaction of the litigants prior

\(^\text{260}\) Starr, J. and Yngvesson, B., "Scarcity and disputing: Zeroing in on compromise decision" (1975) 2 American Ethnologist 553. Although Gluckman's study involved the Barotse of Zambia and Gulliver's study involved the Arusha of Tanzania, both societies share some common features such as multiplex relationships and informalism in dispute resolution with Zimbabwean indigenous societies.


\(^\text{262}\) Starr and Yngvesson, supra note 260 at 557.
to and after the trial (and the difference, if any).\textsuperscript{263} They note that despite the emphasis on compromise, most of the cases studied resulted in zero sum outcomes and that this was particularly so where there was inequality of rank (and power) between the parties. Gluckman’s zero sum decision cases involved disputes over fishing rights. Gulliver’s zero sum decision cases involved disputes over land. The latter were usually between tenant farmers (mostly younger brothers or patri-kinsmen) who sought ownership rights against owners or potential inheritors of land who sought to assert ownership rights against tenant farmers. These disputes over land were occurring at a time when land was becoming scarce hence control over it was being fought over.

Starr and Yngvesson also noted the role of the judges or mediators in the disputing process. These could be potential allies of one of the disputants and may have their own "goals, strategies and stakes" in the outcome.\textsuperscript{264} These could be manifested in the promotion of the rhetoric of reconciliation and compromise.

Some of the effects of power imbalance in traditional dispute resolution mechanisms are manifested in the area of gender relations. Griffiths\textsuperscript{265} studied a dispute regarding the distribution of property upon divorce which was adjudicated upon by a chief’s court of the Bakwena of Botswana. The parties were married in 1960 and divorced in 1982. The decree

\textsuperscript{263} Ibid.

\textsuperscript{264} Ibid. at 562.

\textsuperscript{265} Griffiths, A., "The problem of informal justice: Family dispute processing among the Bakwena - a case study" (1986) 14 International Journal of the Sociology of Law 359. Although Griffith’s observations are from post-colonial Botswana, they are useful in highlighting some of the problems of dual (or plural) dispute resolution mechanisms, popular participation in dispute resolution and the multiple roles of traditional leaders (e.g. political leadership, presiding over dispute resolution mechanisms). These problems are pertinent to an analysis of customary law and customary dispute resolution in colonial and post-colonial Zimbabwe.
of divorce was granted in the High Court but the parties chose to have the property dispute heard in the chief's court instead of the High Court. The wife was apparently misled about the implications of this choice. She did not contest the divorce proceedings (which included a claim for custody of the children) on the basis that would save money and she could still recover what she was entitled to at the chief's court. The allocation of property upon divorce in the chief's court was based on the guilt principle. The wife would not be entitled to anything if she was responsible for the break-up of the marriage in any way. The husband was a well-educated senior civil servant from a very influential family. The wife was the opposite. Her claim was opposed by most of the participants in the discussion which took place (as part of the decision making process) at the chief's court. The court was presided over by a senior representative of the chief who was also a member of the royal family. He was biased against the wife. He constantly interrupted her (with critical questions) during her presentation of her evidence and hindered her in her effort to put appropriate questions to the defendant (her ex-husband). The husband was not subjected to such treatment. The husband was more articulate. He claimed that the High Court had granted him a divorce because his wife was the guilty party. The court accepted this claim and refused to award her any property except to make a "humble request" that the husband consider giving her something due to the length of their marriage.266

Griffiths observes the role played by power imbalances in this case. The husband was a powerful, educated government official from an influential family who manipulated the existence of dual dispute resolution mechanisms to his advantage. He also capitalised on the ignorance of the presiding officer and the judicial participants at the chief's court of the

266 Ibid. at 363-368.
procedure in the High Court. The presiding officer was also a powerful man by virtue of being a member of the royal family with political power presiding over a state recognised court.

Griffiths' observations, together with those of Starr and Yngvesson, illustrate the fact that traditional dispute resolution institutions and their procedures are not immune from power imbalances. The manner in which this power imbalance is utilised must be examined in order to determine the extent to which it impedes justice.267

E. The Post-Colonial Era Transformation of Customary Law and Customary Dispute Resolution Mechanisms

The overall picture of the colonial period is one of a time of immense socio-economic transformation and political subjugation to which the indigenous people responded in various ways. The ultimate response to the political subjugation was the waging of a struggle for national independence (including armed struggle) which culminated in the declaration of independence on 18th April, 1980. The country was renamed Zimbabwe. This marked the beginning of the post-colonial period which continues to the present.

1. Dispute Resolution Mechanisms

a. The Court Structure

267 The role of women in traditional formal dispute resolution (other than as disputants or witnesses) in Zimbabwe has not been articulated by any of the studies cited in this chapter. Holleman’s case studies are silent on this point. Goldin and Gelfand indicate that women attended court hearings during the period of their research (late 1960s) and sat separately from the men but do not comment on their participation in the process. Goldin & Gelfand, supra note 5 at 111.
The post-colonial government passed legislation which made substantive and procedural changes. The first major procedural change was the Customary Law and Primary Courts Act\(^{268}\) of 1981 which repealed and substituted (replaced) the African Law and Tribal Courts Act of 1969.

The Act set out, in Section 3, that, subject to the Act itself and other statutes, customary law was to be applied in all cases that fell under its purview unless the justice of the case required otherwise. This eliminated the racial bias of the previous provision which had confined customary law to disputes between Africans.

The changes in the court structure were also significant. At independence, cases involving Africans and customary law were dealt with at first instance by the headmen’s and chiefs’ courts. Appeal from the headman’s court was to the chief’s court and from the chief’s court to the Tribal Appeal Court which was composed of three chiefs who were presidents of tribal (chiefs’) courts. District commissioners’ courts had jurisdiction in civil suits "in which the rights of Africans only [were] concerned or which had been referred to them by the magistrates’ courts. Appeals from the district commissioners’ courts were to the court of Appeal for African Civil Cases (formerly Native Appeal Court). All other civil matters were dealt with at the first instance by the magistrates court (subject to specific jurisdictional limits regarding amount of claim and subject matter) and by the High Court (General Division). Appeals from both the magistrates courts and the High Court were to the Appellate Division of the High Court. The Customary Law and Primary Courts Act of 1981 abolished the chiefs’ and headmen’s courts. These were replaced by village\(^{269}\) courts.

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\(^{268}\) Act No. 6 of 1981.

\(^{269}\) The terminology is a bit confusing. One village court served a number of villages or a ward.
(headmen’s) and community courts (chiefs’). There were many reasons offered for divesting chiefs and headmen of their judicial power. One was the need for separation of administrative functions from judicial ones. (Chiefs and headmen also had administrative responsibility). The second (and probably more compelling one for the government) was the fact that most chiefs and headmen had lost the support of their followers during the final years of the war for independence. This was due to the fact that the colonial administrators were using them as informers against the guerillas thus forcing them to be collaborators against their own people. Those who resisted were arrested and imprisoned. On the other hand, collaboration was equally dangerous and some were executed by the guerillas for this practice. The loss of credibility among the chiefs and headmen resulted in the creation of popular courts (apparently based on the comrade courts in the former Soviet Union) which undermined the chiefs and headmen’s judicial authority. The government decided to coopt these courts by creating village courts presided over by elected chairmen. The community courts were presided over by state appointed judges known as presiding officers who received some legal training which was not sufficient to make them full fledged lawyers.

The village courts had jurisdiction over customary law matters up to a limit of five hundred Zimbabwean dollars. The community courts had jurisdiction over all other customary matters (no financial limit) including the granting of divorces for registered customary marriages. Appeals from the village court were to the community court (a trial de novo) and from the community court to a magistrate court sitting as an appellate court known as a district court. The former district commissioners’ courts were abolished as were the Tribal Appeal Court and the Court of Appeal for African Civil Cases. Appeals from the decisions of a district court were to the Supreme Court of Zimbabwe (i.e. the former Appellate Division of the High Court). In addition the jurisdiction of the village and
community courts over customary law matters was not exclusive. Such matters could equally be brought before a magistrates court or the High court (i.e. the former High Court, General Division). This was rare in practice although some customary law divorce cases were brought before the High Court rather than community courts. The reason for this was probably that High Court judges were considered more specialized and experienced in this area as compared to the newly appointed community court presiding officers. In any event, this was after the passing of the Matrimonial Causes Act of 1985 which made the laws governing divorce similar in all registered marriages whether contracted according to customary law or otherwise.

The Customary Law and Primary Courts Act was repealed and substituted by the Customary Law and Local Courts Act 2 of 1990. The New Act made significant changes at the lower levels of the customary law courts. The chiefs and headmen had their judicial powers reinstated. The Minister of Justice explained this change by alleging that there had been numerous complaints against village and community court presiding officers. One of the specific complaints was that;

"Some of these presiding officers were too young, while others were unsuitable in one way or the other (no details given) to discharge their duties to the satisfaction of the people...."^270

The other reason was representations (mainly by chiefs and other traditionalists) made to the government to restore the judicial powers of chiefs and headmen. This appears to have been the decisive factor.^271

^270 Legislative Assembly Debates at Col. 2749.

^271 Ibid.
The village courts were renamed primary courts but their jurisdiction remained unchanged. The community courts were renamed local courts. Their jurisdiction was restricted to claims determinable according to customary law and not exceeding one thousand Zimbabwean dollars. In addition, the powers to grant divorce, determine matters of custody and child and spousal support (maintenance) were taken away from them. The justification for taking away these matters was that they involved complicated statutory rules which the chiefs would not understand. Former community court presiding officers were reappointed as assistant magistrates and a new division of the magistrates courts, the magistrates court (customary law), was created for them. This division deals with the customary law matters that were dealt with by the former community courts and have been removed from the jurisdiction of the local courts. The appeal system remains the same except that the district court no longer exists. Appeals are to the magistrates court proper with further appeal to the Supreme Court as before.

b. Distribution of courts in Zimbabwe

The court system in Zimbabwe is pyramidal. The primary courts are more numerous than any other and most accessible geographically. The writer has not been able to locate any documentation which deals with the distribution of courts in Zimbabwe. According to personal observation, it would probably be true to say that almost every Zimbabwean lives within walking distance of a primary court (roughly five to ten kilometres) and within an estimated thirty-kilometre radius of a local court. Magistrates courts are more sparse. There

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272 Ibid. at Col. 2770.

273 It appears that they are required to acquire law degrees so that they can eventually be upgraded to full magistrates.
are eight magisterial provinces in the country. Each province has an average of three courts (places where the court sits and not actual courthouses which may be more). Thus there are about twenty-four civil magistrates courts in the entire country. The high court is one court and sits only in two places for purposes of civil trials. These are Harare (the capital city and head office) and Bulawayo (the country's second largest city).

c. The Small Claims Court

There is one other court in Zimbabwe which appears to be outside the pyramidal structure. This is the small claims court. The court started operating in January 1994 although the legislation providing for it (the Small Claims Courts Act) was passed and promulgated in 1992. A small claims court has jurisdiction to hear and determine most minor consumer complaints where the claim does not exceed two thousand Zimbabwean dollars. It is specifically precluded from exercising jurisdiction in respect of:

1. any case where the claim is made under customary law.
2. actions for divorce, custody or maintenance
3. cases involving the validity or interpretation of wills.
4. cases in which damages are sought for:
   i) defamation
   ii) malicious prosecution or wrongful imprisonment or arrest
   iii) seduction or breach of promise to marry.
5. any case in which an interdict (injunction) is sought.

\[274\] Magistrates court (Provinces) Notice 1990.
Only natural persons can bring claims before the small claims court although corporations and other associations can be sued as defendants. Legal representation is not permitted except for minors and persons under legal disability. There is no appeal from the decision of a small claims court although the proceedings can be brought on review in the High Court if there is cause for such review. As of April 1995, the small claims courts were operating only in Harare and Bulawayo and were presided over by magistrates.

d. The Judiciary and the Legal Profession

There have also been significant changes in the composition of the judiciary and the legal profession in Zimbabwe. Prior to independence, it was dominated by white males. The racial imbalance has been significantly eradicated at all levels but the entire Supreme Court bench is still male.

Prior to independence in 1980, the legal profession in Zimbabwe, including private practice, was dominated by non-Africans (mainly white persons and a few Asians and coloured (mixed race)) persons. Private practice lawyers were divided into attorneys, advocates and notaries and conveyancers. The division that was significant to court practice was the one between attorneys and advocates. Only advocates could appear in the High Court. This meant that attorneys had to instruct advocates to appear on behalf of their clients in the High Court. Attorneys were permitted to appear in the lower courts. To qualify as attorneys, law graduates had to spend a period of two years under articles. Those who wanted to become advocates had to serve a period of apprenticeship at the bar.

At independence, the government passed the Legal Practitioners Act 15 of 1981 which abolished the distinction between attorneys, advocates and notaries and conveyancers thus fusing the profession. The members of the fused profession were referred to as "legal
Despite the fusion there still remains a de facto bar in Zimbabwe. These are legal practitioners (still known as advocates in practice) who restrict their practice to taking work from other legal practitioners rather than direct from clients. A recent amendment to the Legal Practitioners Act re-introduced the distinction between notaries and conveyancers on one hand and the other legal practitioners on the other. The most common way of becoming a legal practitioner is by passing the LLB degree offered by the University of Zimbabwe. Articles were abolished in 1981. People with law degrees from other jurisdictions may be required to write local examinations (set by the Council for Legal Education) or obtain a local law degree (this happens when the degree is not recognised for purposes of practice in Zimbabwe e.g. degrees from the former Soviet Union). The number of lawyers in private practice is quite small (less than a thousand in the whole country of 10.4 million people) and all law firms are in the urban and semi-urban centres. Apart from the "advocates" and conveyancers and notaries, most legal practitioners are general practitioners. There is very little specialization either with respect to type of work done or with respect to subject matter. The racial imbalance in the profession has almost been corrected but the male-female ratio is still tilted in favour of the males. Socially, lawyers are generally respected and most of them are in the high income bracket with income from their practices and other sources such as serving as members of the boards of directors of corporations and other associations. However, there tends to be a disparity between the younger (mainly black) lawyers and their more senior (mainly white) counterparts. The latter tend to be more prosperous.

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275 The courses passed must include Conveyancing and Notarial Practice if one wants to be registered as a Conveyancer and Notary Public as well.
As already indicated, most of these lawyers are trained at the Faculty of Law of the University of Zimbabwe. The Faculty of Law of the University of Zimbabwe was established as a faculty in 1988. It is the only law school in the country. Prior to 1988, it was a department of the faculty of commerce and law. Prior to independence all the academic staff were white except for one black man who joined the department of law in 1979 and resigned that same year. There was also a black part-time lecturer who was employed to teach customary law. The current composition of the faculty is different. Most of the lecturers (they would be called professors in Canada) are black and young (under 40), post-independence graduates. The curriculum has also changed to include more teaching of law in its social context and to meet the demand for practical skills training necessitated by the abolition of articling. An attachment programme has been introduced in terms of which all students are required to do some work in both the public and private sector before completion of their degrees. They are paid by the government through a special skills training fund during the period of attachment. Employers provide working space and supervision. The faculty sends representatives (lecturers) to ensure that the programme is running smoothly. The law degree takes four years to complete and the entrance requirement is passing the "Advanced Level" exams which are written in the sixth year of high school. There are limited vacancies available so the pass level has to be very high.

2. The Substantive Law

a. Legislative Changes

The changes made to the substantive law have been through both legislation and judicial law reform. The minority status of African women under customary law was
formally abolished by the provisions of the Legal Age of Majority Act.\textsuperscript{276} The Act provided that every person acquires majority status at the age of eighteen regardless of any contrary rule of any other law (including customary law). The other changes were in the Customary Law and Primary Courts Act (above) and related to the custody of minor children upon divorce and their support. The provisions stated that the interests of children were to be paramount regardless of the system of law to be applied (i.e. the customary law or the received law) and that the fathers of children were to be regarded as primarily responsible for the maintenance of their children. These provisions are now contained in the Customary Law and Local Courts Act (the successor to the Customary Law and Primary Courts Act) with one modification. The provision which stated that "fathers" were to be primarily responsible for the maintenance of their children has been changed to impose the obligation on "parents".

The other significant change was the Matrimonial Causes Act of 1985 which set out guidelines for the distribution of property upon divorce which the courts are required to apply. The courts must take into account the contribution of the parties including non-financial contributions like looking after the home and the children. These provisions apply to all marriages (i.e. officially solemnised marriages) regardless of whether they were contracted according to customary law or otherwise. The Matrimonial Causes Act also changed the grounds for divorce from specific fault based common law and customary grounds (as constructed by the colonial courts) to irretrievable breakdown of the marriage relationship.

\textsuperscript{276} Act No. 15 of 1982.
b. Law reform through the courts

The Supreme Court of Zimbabwe made decisions that had a significant law reform effect. Most of these decisions were based on interpretations of the Legal Age of Majority Act. In *Katekwe v Muchabaiwina*\(^{277}\), the Supreme court held that a father or other customary guardian no longer had the right to claim seduction damages if the woman was a major at the time of seduction. The right was now vested in the woman herself. The judge also remarked *obiter*, that the father or male guardian had also lost his right to claim bridewealth for a daughter who had attained majority status. This decision raised a lot of controversy and opposition, some of which came from members of Parliament who called for the repeal of the Legal Age of Majority Act. These calls were ignored by the Minister of Justice. In another case the Supreme Court held that an African woman married according to customary law had full capacity to sue for damages for personal injury unassisted by her husband (as had been the case in the past).\(^ {278}\) Some of the decisions of the Supreme Court dealt with inheritance laws. In *Chihowa v Mangwende*\(^ {279}\), it was decided that the customary law which barred daughters from inheriting from their fathers' estates was incompatible with the Legal Age of Majority Act (15 of 1982) which confers majority which status on all Zimbabweans upon attaining the age of eighteen years. The rationale for the decision was an assumption that women were barred from inheriting under customary law because they were regarded as perpetual minors. The prohibition could not be sustained when women were now capable of attaining majority status.

\(^{277}\) SC 87/84.

\(^{278}\) *Jena v Nyemba* SC49/89.

\(^{279}\) SC 84/87.
In *Mujawo v Chogugudza*\(^{280}\), it was held that the prohibition against widows inheriting from their deceased husbands’ estates was no longer valid for widows who had been married according to Christian or civil rites i.e. in terms of the Marriage Act (Chapter 37). The rationale for this decision was a finding to the effect that section 13 of the African Marriages Act (Chapter 238), which provided for the application of customary law to the property rights (including the right to inherit) of African spouses married in terms of the Marriage Act, had been repealed (by implication) by the Legal Age of Majority Act. The concept of repeal by implication is based on a rule of statutory interpretation used by the courts in Zimbabwe which provides that when two statutory provisions are inconsistent, the latter statutory provision is regarded as having repealed the earlier one, to the extent of the inconsistency. Another rule of interpretation is that statutory provisions override customary laws (and common law provisions) if they expressly state that they are to be regarded as overriding such laws or are irreconcilably inconsistent with them. The Legal Age of Majority Act expressly overrides the customary laws relating to status. In *Murisa v Murisa*\(^{281}\) the Supreme Court did not follow its own rationale (as indicated by the cases discussed above). A widow who was married according to customary law was held to be ineligible to inherit from her deceased husband’s estate. The court held that allowing her to inherit was contrary to customary law. Thus, in this case, the court refused to interpret the Legal Age of Majority Act as overriding customary law.

The Supreme Court’s interpretation of legislation to challenge the patriarchal aspects of customary law is laudable. The decisions were not popular with the male hierarchy (and

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\(^{280}\) SC 142/92.

\(^{281}\) SC 41/92
some elderly women). In making these decisions, the judges demonstrated more willingness to respond to the need for law reform than the legislature.

Despite the changes outlined above, legal plurality remains a feature of the Zimbabwean legal system in both substantive and procedural matters.
CHAPTER TWO: A FRAMEWORK FOR ANALYSIS

A. Introduction

This chapter begins the development of a theoretical framework within which the issue of access to civil justice for the poor in Zimbabwe is to be understood. The task is not easy due to the absence of any literature that discusses the issue from a Zimbabwean perspective. It is contended that in order to understand the need for access to civil justice by the poor in Zimbabwe, one must consider the social context in which they live from an historical perspective. Such an approach includes taking into account the impact of colonization and the transition from a pre-capitalist to a capitalist economy (see chapter one for details). Colonization resulted in the introduction of a new legal system which operated in conjunction with the indigenous customary laws. The implications for access to justice in the context of this legal pluralism are discussed in chapter three. Capitalist penetration resulted in the creation of new forms of social interaction and the transformation of existing ones and supersession of others in ways that called for changes to the legal system.

This chapter is an examination of theoretical perspectives on access to civil procedure. It begins with an examination of the predominant North American perspectives followed by a comment on their relevance to the Zimbabwean context. The next part provides the writer's own perspective on theorising access to civil justice for the poor in Zimbabwe.

B. THE CONCEPT OF ACCESS TO JUSTICE

1. North American (and other western) Perspectives

a. Access to justice as access to the courts.

Most of the North American and other Western literature on access to justice discusses access to justice as access to the courts. Kastenmeier and Remington contend that:

"[If] the poor and oppressed ...., lack access to a dispute resolving institution, the promise of equal justice under law rings hollow".¹

Hazard is of the view that the present day North American conception of justice is founded upon two basic premises. Firstly, that justice should be equal i.e. that all causes and parties should in principle receive equal treatment under the law. Secondly, that the administration of justice should be the monopoly of the state because uniformity can be achieved only if there is a single centre of control. He notes that these premises are a parallel of modern day notions of mass democracy such as universal suffrage and universal education. For Grinover, access to justice is "not exhausted by, the possibility of everyone taking their claims to the courts". However, it "does mean the opportunity to obtain effective, concrete judicial protection by means of fair process...."

The characterization of access to the courts as access to justice is problematic. Firstly, it presents justice as a commodity to be accessed, which it is not. The concept of what is just is determined by social, economic, cultural and political factors. It is also not a fixed concept. Notions of what is just change as a society moves from one historical epoch to another. The change is not automatic but a result of internal struggle within the society (at the political, economic and cultural levels). Courts are not the exclusive domain of this struggle and when justice is characterized as what one can get by demanding the enforcement of one's rights, there is a danger of creating a false impression that that is the only way to obtain justice. If such an impression is created, struggles at the other levels - political, 

2 Hazard, G.C., "Court delay : Towards new premises" (1986) 5 Civil Justice Quarterly 236 at 243

3 Ibid.

4 Ibid.

5 Ibid. at 244.


economic and cultural - may be abandoned in favour of the pursuit of legal rights. Such a development would be detrimental to those whose interests are not adequately served by the current socio-economic, political and cultural institutions. The poor in today's capitalist societies (including Zimbabwe) are one category of such people. Poor people cannot expect to gain major redistribution of economic resources through the courts:

"Poverty is not justiciable and the uneven allocation of wealth and power in the contemporary state dominated by monopoly capitalism will not respond fundamentally to court orders no matter how much we democratize and make more accessible the legal system which, after all, is rooted necessarily and irredeemably in the society and social relations with whose protection it is charged."9

The concept of access to justice as access to the courts presupposes that there is a legal system which provides "just" solutions.10 This supposition is not always valid. As already pointed out above, courts operate within a legal system which is confined by the prevailing socio-economic conditions. Furthermore, the effectuation of legal rights is not without problems. Legal procedures can hamper the ability to enforce rights. Lack of resources can also be a hindrance and the competence of judges is also relevant to the issue. All these issues have been addressed in the North American context in the access to justice literature.

Other North American and western scholars acknowledge the limitations of a focus on courts as instruments of dispute resolution only. They envisage a role for the courts that goes beyond the settlement of particular disputes. According to Fiss,11, it is the role of the courts:


11 Fiss, O., "Against Settlement" (1984) 93 Yale Law Journal 1073
"to explicate and give force to the values embodied in authoritative texts such as the constitution and statutes: to interpret those values and to bring reality into accord with them."\textsuperscript{12}

In doing so the courts may expound on the existing statutes in a manner that reforms the law. Test case litigation is deliberately aimed at seeking to reform the law through the courts. According to Cappelletti, such deliberate judicial law reform has been criticized as being, among other things, anti-majoritarian.\textsuperscript{13} Cappelletti proceeds to point out that whether this is good or bad depends on many "contingent circumstances; of time and place, of culture, of actual societal needs, of institutional settings, and, not least, the kind of judiciary which would exercise such creativity".\textsuperscript{14} He is also of the view that the problem will be lessened if the system of judicial selection allows for the participation of all strata of the population and all people have equal opportunity to get access to the courts."\textsuperscript{15} Cranston points out the conceptual problems in assessing the impact of judicial law-making".\textsuperscript{16} These include the problem of ambiguity and conflict in the decision itself and the problem of isolating the relevant causal factors in cases of compliance with the decision by parties other than those directly affected.\textsuperscript{17} On the latter point he observes that:

"Individuals or institutions might comply with the terms of a decision because of factors independent of the court such as political and community pressures.\textsuperscript{18}

Another limitation of judicial law reform is the danger of reversal through legislation. Law reform through the courts is also restricted by the fact that technical rules of statutory interpretation and the mode of judicial reasoning limit the amount of leeway that judges have

\textsuperscript{12} Ibid at 1085.


\textsuperscript{14} Ibid.

\textsuperscript{15} Ibid. at 45-6.

\textsuperscript{16} Cranston, R., "What do courts do?" (1986) 5 Civil Justice Quarterly 123

\textsuperscript{17} Ibid.

\textsuperscript{18} Ibid.
in creating new law. Decisions that are incongruous with the accepted rules and mode of judicial reasoning will lack credibility and undermine the judiciary's perceived impartiality. It would appear as if judges were bending the rules in order to reach a particular outcome. Finally, Abel is critical of court-based law reform because it channels conflict into legal fora rather than the more political and power-challenging fora like public protests.\(^{19}\)

A more recent trend in the access to justice movement in North America is the promotion of alternative dispute resolution mechanisms (ADR.)

b. ADR.

According to Macdonald,\(^ {20}\) most modern studies of access to justice adopt a conception that conceives the civil justice system "as comprising the whole panoply of public and private institutions and processes by which interpersonal and social conflicts are recognized, negotiated and resolved".\(^ {21}\) Those institutions that do not form part of the traditional process of adjudication through courts or other tribunals, are referred to as "alternative dispute resolution mechanisms". They are characterised by non-adjudicatory methods of resolving disputes such as negotiation, and mediation, and informal adjudicatory dispute resolution mechanisms such as arbitration. Negotiation refers to the disputants' attempt to settle the dispute between themselves i.e. without the intervention of a third party and with or without the assistance of lawyers or other advocates.\(^ {22}\) Mediation involves the intervention of an outsider to the dispute who lacks decision-making power.\(^ {23}\) She or he merely helps the disputants reach their own settlement.\(^ {24}\) In arbitration, the third party has decision-making power, is not bound by precedent and her or his decision is final (except that the courts can

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\(^{19}\) Abel, \textit{supra} note 8 at 536.

\(^{20}\) Macdonald, \textit{supra} note 7.

\(^{21}\) \textit{Ibid.} at 57.


\(^{23}\) \textit{Ibid.}

\(^{24}\) \textit{Ibid.}
reverse it where there is fraud or excessive zeal on issues by the arbitrator.) The disputants in arbitration may agree to have a binding or non-binding arbitration.

According to Singer, the following are the most common forms of ADR mechanisms which have been adopted in the United States of America:

1. Community dispute resolution through community mediators. This has been used to resolve multi-party disputes such as access to limited public housing by different ethnic groups, (Aboriginal) claims to land and fishing rights, conflicts between developers and environmental groups.

2. Community Dispute Resolution Centres or Neighbourhood Justice Centers which are used to resolve minor criminal cases and some civil cases. They may be established by private organizations such as Bar Associations or by ad hoc neighbourhood groups. They may be operated by lawyers and social workers or by community residents of all occupations.

3. Institutional Grievance Procedures e.g. in prisons, high schools, universities and hospitals.

4. Consumer conciliation through consumer complaint offices, media action lines, state and local government ombudsmen and private trade associations.

5. Government-sponsored mediation e.g. for civil rights and welfare cases.

6. Consumer Arbitration - Trade Associations such as Better Business Bureaux and professional groups such as Bar Associations have begun to require their members to precommit themselves to binding arbitration of disputes with consumers. Consumers have an option to opt out. However, some contracts for the purchase of goods may specify arbitration as the only means of resolving a dispute in the event of a breach.

7. Court-annexed arbitration - a requirement that certain civil cases (generally those involving claims for damages between the ceiling for small claims courts and a higher amount of up to $10,000.00) be submitted to arbitration by court sponsored panels of attorneys. The decisions of the panels are binding unless

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25 Ibid. at 27-8.

26 Singer, L.R., "Non-judicial dispute resolution mechanisms: The effects on justice for the poor" (1979) 13 Clearinghouse Review 569.
either party appeals. The appellant will be penalized in costs if she or he does not improve the arbitrator's award by a specified amount or percentage.\textsuperscript{27}

There are divergent reasons for supporting ADR mechanisms. According to Cappelletti, ADR mechanisms are a part of the third wave of the access to justice movement and motivated by a philosophy which:

"accepts alternative remedies and processes, in so far as such alternatives can help to make justice fair and more accessible."\textsuperscript{28}

According to Nader the judicial process is "one point of the continuum of the broader category of public forms of dispute settlement."\textsuperscript{29} Galanter\textsuperscript{30} supports this attempt to centre the courts and the judicial process. He points out the residual nature of the judicial process. Courts resolve only a small fraction of the disputes that are brought to them and disputes brought to court are "an even smaller fraction of the whole universe of disputes."\textsuperscript{31} He is of the view that there has been a shift from seeing access to justice as a problem of how to get disputants into court to seeing it as "a problem of how to contribute to justice in the setting where the disputants find themselves - an undertaking in which the role of the courts is indirect and perhaps minor."\textsuperscript{32} He opines:

"Just as health is not found primarily in hospitals or knowledge in schools, so justice is not primarily to be found in official justice-dispensing institutions."\textsuperscript{33}

\begin{thebibliography}{99}
\bibitem{27} 1 to 7 in Singer, \textit{Ibid.} at 570 - 571.
\bibitem{28} Cappelletti, M., "Alternative dispute resolution processes within the framework of the world-wide movement to make rights effective" (1993) 56 Modern Law Review 282 at 295.
\bibitem{29} Nader, L., "Introduction" in Nader, L., ed., \textit{Law in Culture and Society} (Chicago: Aldine Publishing Company, 1969) 1
\bibitem{31} \textit{Ibid.} at 150.
\bibitem{32} \textit{Ibid.} at 160.
\bibitem{33} \textit{Ibid.} at 161.
\end{thebibliography}
ADR mechanisms are sometimes encouraged because of their perceived advantages over court-based adjudication. According to Delgado and others, the following have been given as the perceived advantages of ADR mechanisms:

1. They are more efficient and save both time and money.

2. They reduce the states' costs because of the use of fewer and less paid decision-makers.

3. They reduce costs because they do not require much support staff such as clerks, bailiffs and court reporters.

4. They save costs for disputants because the informality obviates the need for attorneys.

5. They are more accessible to indigent litigants and those with small claims. They are also less threatening and intimidating.

6. They are more suited to resolving certain kinds of disputes than the process of adversarial, adjudication e.g. disputes involving people in long-term relationships such as family members, neighbours, tenants and landlords, small business partners.

7. They avoid "all or nothing" judgement and encourage creative solutions.

8. Community based ADR mechanisms promote empowerment.

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35 Ibid. at 1366-7.
Trubek\textsuperscript{36} notes that ADR mechanisms which are communitarian have been used as a basis to critique adjudication as alien and alienating. It is alleged that adjudication fails in the following ways:

1. It isolates individual claims, thus deterring collective struggle of a more direct and political nature.
2. It destroys valuable relationships and aggravates conflict by its "winner-take-all" approach which makes it difficult to compromise.
3. It relies on (allegedly) universal principles rather than the values and normative understandings of diverse communities in which individual lives are embedded or which are mutually constructed in dialogic situations.
4. It is insensitive to individual needs. It must force disputes into pre-selected categories and stereotypical fact situations.
5. It is backward-looking and judgemental rather than forward-looking and reparative.\textsuperscript{37}

Trubek regards ADR mechanisms outside the communitarian model such as small claims courts, summary jury trials and mandatory arbitration as a co-option of ADR by "traditional legal institutions simply as a way of subsidizing the costs of litigation".\textsuperscript{38}

Pearson\textsuperscript{39} gives more perceived shortcomings of formal adjudication that have been cited by proponents of ADR mechanisms. It is alleged that court processes do not increase the cooperative, communication and problem-solving skills of the parties.\textsuperscript{40} It is also alleged that the coercive nature of adjudication results in low commitment to, and compliance with,


\textsuperscript{37} Ibid. at 122.

\textsuperscript{38} Ibid. at 121-7.

\textsuperscript{39} Pearson, J., "An Evaluation of Alternatives to Court Adjudication" (1982) 7 Justice System Journal 420

\textsuperscript{40} Ibid. at 420.
court orders and agreements. Pearson evaluates the existing studies on the success of mediation and arbitration and concludes that mediation and arbitration do not achieve the objective of reducing court congestion and delay. She points out that this is because voluntary programmes fail to attract sizeable numbers of disputants and have negligible impact on caseloads. She further notes that voluntary arbitration and mediation is also generally more expensive per case than court-based adjudication. However, she finds mandatory mediation and arbitration is cheaper.

Merry notes that community mediation programmes have tended to emphasize caseloads in evaluations rather than the more important issue of the quality of justice. In other words, issues of quantity (and the concomitant cost/benefit analyses) have become more dominant than addressing communities’ concerns about justice.

The following sets out some of the major critiques of ADR mechanisms. These are centred around four issues: concerns about the transplant of institutions; concerns about the inability of ADR mechanisms to address normative issues; the inability of ADR mechanisms to deal with power imbalances, and finally; for compulsory mechanisms, questions about allocation and referral.

i. ADR and the transplant of institutions
The proponents of ADR mechanisms usually draw from studies by anthropologists of pre-industrial societies. Such an approach ignores the fact that dispute resolution mechanisms are a result of specific socio-economic, political and cultural factors. Felstiner has observed that:

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41 Ibid.
42 Ibid. at 426.
43 Ibid. at 437.
44 Ibid. at 437.
46 Ibid. at 181-2.
"The dispute processing practices prevailing in any particular society are a product of its values, its psychological imperatives, its history and its political and social organization."47

He proceeds to present two ideal types of societies (the technologically complex, rich society (TCRS) and the technologically simple, poor society (TSPS) and concludes that there is a link between social organization and the dispute processing mechanisms of adjudication, mediation and avoidance, thus making the transplant of institutions (from one social organization to another) not viable.48

Merry makes the same observation. She highlights the following differences between American society and the prototypes in which mediation predominates:

1. The prototypes are characterized by stable, closed and bounded social systems with restricted mobility which the American societies are not.

2. The prototypes are more homogeneous in norms and values and therefore can rely on shared expectations and customs rather than explicit, state enacted laws and formally coercive mechanisms such as adjudication.

3. The prototypes have a different prevailing legal culture. Most American urbanites believe in their right to go to court.49

Merry's critique can be criticized for its generalization of American societies. There could be segments among the American population whose social organization more closely approximates that of the prototypes, for example native Americans50 and some minority groups.

Engel and Steele also note the undesirability of transplanting procedures and structures from one setting to another. They note that the transplanted structures and

47 Felstiner, W. L. F., "Influences of social organization on dispute processing" in Tomasic and Feeley, supra note 45 at 44.

48 Ibid. at 56-9.

49 1 to 3 from Merry, supra note 45 at 175.

50 For example, the native peoples in Canada apparently reject the dominant social organization and its dispute resolution mechanisms. See Stevens, S. D., "Access to Civil Justice for Aboriginal Peoples" in Hutchinson, supra note 36 at 203. See also Leroy Little Bear, "Dispute Settlement among the Naidanac" in Devlin, R. F., ed., First Nations Issues (Toronto: Emond Montgomery, 1991) 4.
procedures are likely to be distorted and produce unintended effects in other parts of the system.\textsuperscript{51}

The connection between the prevailing socio-cultural organization and dispute resolution mechanisms is illustrated by the example of Japan. According to Kawashima (writing around 1969 or earlier), litigation is shunned in Japan because it undermines the values of social harmony. It is regarded as morally wrong, subversive and rebellious.\textsuperscript{52}

The concerns about the transplant of institutions that have been expressed in relation to ADR highlight some of the problematic features of dispute resolution mechanisms that do not take into account the socio-economic and cultural context.

ii. ADR and normative ordering

Apart from their attempt to transplant alien institutions, ADR mechanisms have been criticized for their failure to provide authoritative interpretation and/or restatement of social norms and values. Fiss criticizes the settlement of disputes outside the courts because it robs the courts of their role in explicating and giving force to norms and values embodied in the substantive law.\textsuperscript{53}

This is what Engel and Steele describe as the "generalized normative ordering" function of a legal system (including the courts).\textsuperscript{54} Mather expresses concern about ADR mechanisms and the need to address social values. She states:

"My fear about the alternatives movement is that it will avoid the legal system and then redefine issues in ways that may settle the quarrel but will not deal with social values that really are involved or should be involved in a publicly acknowledged way."\textsuperscript{55}


\textsuperscript{53}supra note 11 at 1085.

\textsuperscript{54}supra note 51 at 334.

\textsuperscript{55}Mather, L., "The importance and political implications of dispute definitions" in Vermont Law School (Dispute Resolution Project), A Study of the Barriers to the Use of ADR (South Royalton : Vermont Law School, 1984) 19 at 21.
Yamamoto expresses the same concern when he notes that:

"ADR presents problems of considerable importance. ADR removes disputes from the light of public scrutiny. Deterrence and public education values served by open proceedings are undermined by ADR." 56

Delgado and others are also against the use of ADR mechanisms in "cases that have a broad societal dimension." 57 Using ADR mechanisms in these cases would result in "atomization and (loss of) opportunities to aggregate claims and inject public values into dispute resolution." 58

All the above criticisms are valid. However, it should be noted that there are times when courts are no better than ADR in addressing the expressed concerns. Not all court proceedings end with public pronouncements of the relevant social norms and values. Some decisions are simply confined to the resolution of the particular dispute. The latter tend to constitute the majority of court decisions particularly at the lower court level. Therefore the observations made about courts are more pertinent to the decision-making of ultimate appellate courts and courts that deal with constitutional issues (Supreme Courts).

Furthermore, strictly "normless" and "value-free" decision-making does not exist in reality. All decision-making is restricted by some adherence to common, accepted values and standards (whether publicly expressed or not). For example, Gulliver observes that there is often evocation and manipulation (conscious and unconscious) of norms in negotiation 59. This observation raises concerns (for the opponents of ADR) about the (often) private nature of the negotiation process. Should not this evocation and manipulation of norms be subject


57 supra note 34 at 1403-4.

58 Ibid.

to the scrutiny of the general society? Gulliver also posits that there is a connection between norms and power.\textsuperscript{60}

\textbf{iii. ADR And Power Imbalances}

Some critiques of ADR mechanisms are based on their inability to address power imbalances. Delgado and others argue that the formality of adjudication (adversarial) provides safeguards for visible minorities against bias and prejudice among decision-makers and disputants\textsuperscript{61}. They are concerned about the informalism of ADR mechanisms. They believe it makes them more susceptible to outcomes that are coloured by prejudice and bias particularly in disputes involving parties of unequal status such as landlords and tenants and those involving issues of systemic inequalities against racial minorities and women.\textsuperscript{62} Richard Abel is also critical of the informalism of ADR particularly in relation to the poor. He is of the view that the inequality of power and resources between poor people and their opponents makes informal dispute resolution mechanisms unsuitable for the resolution of their disputes. He regards formal procedures as the only safeguard against power imbalance in dispute resolution mechanisms although he acknowledges that these cannot eliminate substantive social inequalities.\textsuperscript{63} Simon\textsuperscript{64} provides a counter-argument to Richard Abel's criticism. He argues that formal settings are more difficult for unrepresented litigants and the poor are more likely to lack such representation. He also argues that economically advantaged persons are able to redistribute the cost of formalism either to their former opponents or to other disadvantaged persons, e.g. a landlord charging more rent; an employer paying less wages or not hiring "potentially litigious persons". Finally, Simon, argues that formal procedures can subvert conflict and induce acquiescence by convincing the disadvantaged that

\begin{itemize}
  \item \textsuperscript{60} \textit{Ibid.}
  \item \textsuperscript{61} Delgado et al, \textit{supra} note 34 at 1389.
  \item \textsuperscript{62} \textit{Ibid.} at 1403.
  \item \textsuperscript{63} Abel, R., "Informalism : A Tactical Equivalent to Law?" (1985) 19 Clearinghouse Review 375 at 381-3.
  \item \textsuperscript{64} Simon, W. H., "Legal Informality and Redistributive Politics" (1985) 19 Clearinghouse Review 384
\end{itemize}
their losses are a result of a "fair" contest or by making them feel incompetent and powerless to conduct their own affairs by making them dependent on professional helpers (lawyers)\textsuperscript{65}.

ADR mechanisms are also regarded as problematic for women when used to resolve matrimonial disputes. Bottomley\textsuperscript{66} is of the view that women's interests are more likely to be subverted in informal settings (such as mediation), particularly those of women who are non-mothers or those whose children are adults (because of the emphasis on the welfare of young children). She also observes that in the case of abused women, the pressure to settle (amicably) silences their fears of continued contact with the abuser. She further observes that women face their partners with lack of equality (of power) and they also face a supposedly "neutral" mediator who is actually the purveyor of dominant social values which are oppressive to women. She is also concerned about the relegation of fundamental problems of the role of the family in society to the "private" sphere. She posits:

"The particular invidiousness of this mode of informal justice is that it reproduces power relationships much more effectively than formal justice because of the construction and manipulation of the images of party control, privacy, neutrality and "back to the people" grassroots appeal".\textsuperscript{67}

Woods\textsuperscript{68} expresses similar views. She comments:

"Only the legal system has the power to remove the batterer from the home, to arrest when necessary, to enforce the terms of any decree if a new assault occurs, to discover hidden assets, and to enforce support order. Only the legislatures and courts can create, develop, expand and enforce women's rights. Mediation offers no protection, no deterrence, no enforcement, and no opportunity to expand women's rights."\textsuperscript{69}

\textsuperscript{65} \textit{Ibid.} at 386-388.


\textsuperscript{67} \textit{Ibid.} at 180.

\textsuperscript{68} Woods, L., "Mediation : A Backlash to Women's Progress on Family Law Issues" (1985) 19 Clearinghouse Review 431

\textsuperscript{69} \textit{Ibid.} at 436.
There are no easy answers to the problem of ADR mechanisms and power imbalance. It can be pointed out from the outset that courts are not the panacea for power imbalances either. Parties with more economic resources and social power are still better able to utilize courts than those without. The critiques of ADR mechanisms suggest that the imbalances are less likely to have an impact in formal adjudication than in informal settings such as ADR. This is an assertion which can neither be affirmed nor refuted in the absence of empirical evidence. However, some general observations can be made about the critiques. Firstly, the ability of formal proceedings to counteract bias and prejudice is limited. Judges can be just as biased or prejudiced as other decision makers. This is particularly so when they have discretionary power. In exercising their discretion they may be motivated by prejudice and bias but offer some rational justification for their decisions. In this case the bias becomes even more problematic because it is hidden. Secondly, Simon's counter-arguments to Richard Abel's observations about the poor and informalism are a reflection of legitimate concerns with the over-emphasis on formalism although he probably exaggerates the danger of legal losses being perceived as a result of "fair" contest. The unfairness of the legal system (and its procedures) is probably less hidden to those adversely affected by it (including the poor) than is apparent to most people. It should also be noted from the concerns of Delgado and others that informalism also carries risks. Thirdly, the critiques of the use of mediation in matrimonial disputes raise some salient issues. Again, it can be noted that courts are not always free of some of the problems raised. Supposedly "neutral" judges can just be as much "the purveyors of dominant social values which are oppressive to women" as mediators. In addition, one would like to believe that not all mediators (and judges) fit this mould. It is also worth noting that reliance on legal rights by women (or any other disadvantaged group) can be problematic. These rights can easily be taken away by "backlash" legislation or the assertion of "counter-rights" in the courts. Finally, a common thread that runs through all these critiques of ADR mechanisms is their unsuitability to deal with certain disputes. Most proponents of ADR mechanisms agree that they are not suitable for all disputes. This raises problems of allocation of disputes to "suitable" mechanisms in those cases where ADR mechanisms are state sanctioned.

iv. ADR and problems of allocation
The issue of allocation of disputes to "suitable" mechanisms including ADR raises political, social, economic and cultural questions. The political questions include questions such as: who makes the choice? and a related question: Is there a possibility of the use of unrecognized criteria such as race, gender or class? There are a number of interests that would like to have a say in deciding what disputes are allocated to what mechanisms. The state is one such interest. One of the state's interests which is shown in the current debate about ADR mechanisms is the need to save costs. ADR mechanisms are being presented, among other things, as being cheaper than formal adjudication. Where they are not court-related, the state does not have to provide courthouses and personnel. Where they are court related, the state still saves costs because the procedures are quicker and therefore cost less in terms of time and money. Hensler contests the financial cost saving claim based on her study of court-annexed arbitration in the U.S.A.. However, the view that ADR saves costs is still pervasive despite this empirical data to the contrary.

The other interest is the judiciary. Judges may want certain cases out of the courts because they consider them to be inappropriate for adjudication e.g. because they are too routine or because they are too difficult to decide. They may also want to keep certain cases within the court system and oppose any suggestions that they should be dealt with elsewhere.

Lawyers also have an interest in the allocation process - they may want some cases included and others excluded. There is also a tendency among lawyers who are used to the adversarial process of adjudication to regard any deviations from it with suspicion or even hostility. Lawyers and judges are obviously not monolithic groups and their interests may clash internally.

An even more heterogeneous "group" with an interest in the allocation process are the disputants (both current and potential). The basic assumption of those who view ADR mechanisms as an issue of the quality of justice is that it is the views of this group which are paramount. It also makes sense to consider the views of disputants because disputes originate from them i.e. it is their interaction with others and interpretation of events that

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70 Merry, S. E., "Disputing Without Culture" (1987) 100 Harvard Law Review 2057 at 2067.

71 Hensler, D. R. in Ontario Law Reform Commission, supra note 7 at 236.
occur in their lives which gives rise to disputes. If a potential disputant does not regard an event as a "dispute" to be settled, there can be no question of an appropriate dispute resolution mechanism because the "dispute" is non-existent. This is not to say that dispute resolution mechanisms and the legal system have no impact on dispute creation. Disputes are socio-cultural events and the dispute resolution mechanisms and legal system in any given society not only resolve disputes or provide mechanisms for their resolution, they also contribute to their prevention, mobilization, displacement and transformation.

Disputants are a diverse group differentiated by race, class and gender and with different interests at different times. These interests are reflected in the choice of dispute resolution mechanisms they make.

There has been no comprehensive empirical study of when, how and why these choices are made but some general observations have been used to make tentative suggestions on how the allocation process should be made. The basic assumption of these suggestions is that disputants act in a rational manner to achieve instrumental goals. In other words, they choose (assuming the choice is theirs) to maximize their personal benefit by choosing the course of action (in dealing with a dispute) which will give them the best possible results in the most efficient way. It is obvious that this is not always the case. The social context (and the concomitant constraining factors) in which the choice is made must be taken into account.

One of the allocation proposals is that small (in monetary terms) claims should be resolved through ADR mechanisms. The most common of these is the small claims courts which are a form of arbitral or mediational courts. The obvious problem with such an approach is that what is "small" is relative. As one author has observed, a simple, multi-million dollar claim by General Motors can just be as "small" as a poor person's claim of $1,000 over her or his defective refrigerator. Any legislation providing for small claims courts must take this relativity into account. Furthermore "small" claims may raise complex legal issues and again, most provisions do not take this into account. This has led to the charge that small claims courts offer "second class" justice for the poor in that their claims.

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72 Gulliver, supra note 59 at 157

are more likely to be dealt with in the small claims courts, thus depriving them of the beneficial effects of formal adjudication such as normative ordering.

Another allocation proposal made by the proponents of state-sanctioned ADR mechanisms (e.g. Sander) is that cases involving conflict over interests should be resolved through ADR mechanisms whilst those involving conflict over values should be resolved through the courts. Straightforward (in terms of legal issues) monetary and property claims are seen by the proponents of state-sanctioned ADR mechanisms as falling into the former category whilst novel claims raising constitutional issues are seen as falling into the latter category. The separation of "interests" and "values" is problematic. As noted earlier in this chapter no decision making is strictly "value free". Furthermore, as Gulliver observes, every dispute commences with an alleged violation of one's rights which presupposes open or tacit reference to norms (and values).74

This pre-formulation of the dispute as one over values may overshadow whatever interests are involved. In other words, vindication (through a public declaration that the other party is wrong) may become more important (to the disputant) than monetary compensation. In such a situation the disputant will not be interested in a forum which will simply offer her or him monetary compensation no matter how efficient it is.

A third allocation proposal is that disputes involving persons in ongoing relationships should be resolved by ADR mechanisms rather than by the courts. This is premised on the claim that courts tend to exacerbate the dispute in such situations. Mediation is the preferred ADR mechanism because it is viewed as more empowering (through the parties formulation of their own solution) and also much more able to address the underlying conflict rather than the single dispute. The problems with this proposal are many. Firstly, it fails to address the concern with values raised above. People in interpersonal relationships may still want vindication. Another problem is that people in interpersonal relationships are sometimes also in situations of power imbalance e.g. children and parents; husbands and wives; landlords and tenants; employees and employers. In such situations the problem of the failure of ADR mechanisms to counter power imbalances discussed above becomes relevant.

74 Gulliver, supra note 59 at 192-3.
c. Routinization

Friedman,\textsuperscript{75} offers another solution to the lack of access to justice (by which he means access to state sanctioned dispute resolution mechanisms), which he calls routinization. Routinization (according to Friedman) eliminates discretionary power and the need for middlepersons such as lawyers, judges, social workers or other civil servants. He gives workmen’s compensation, social insurance and no fault accident insurance as examples of routinization. He points out that the problem is that benefits are fixed at levels that are too low for the poor.\textsuperscript{76} It is inconceivable that routinization would totally eliminate the need for middlepersons. However, it does lessen the burden on claimants in the case of no fault insurance and workmen’s compensation. They do not need to prove liability and they generally do not have to litigate.

2. Relevance of the North American (and other Western Perspectives) to Zimbabwe

According to Cappelletti and Garth,\textsuperscript{77} the solutions to the problem of lack of access to justice have been characterized by three "waves" in Western countries. The first wave dealt with making the legal system efficient. The second wave dealt with the inclusion of the excluded such as the poor (through legal aid) consumers and environmental groups (through public interest litigation). The third wave encompasses the first two but has a broader approach which includes ADR and concerns about substantive justice.\textsuperscript{78} The question is whether this is applicable to Zimbabwe? The second wave is definitely not a prominent feature of the Zimbabwean legal system. There is no comprehensive state funded legal aid for civil cases. Public interest litigation is not a feature of the legal system. However, concerns about inclusion of the excluded are equally pertinent in the Zimbabwean context although the methods addressing them may be different (see chapters four and five). The third wave’s


\textsuperscript{76} Ibid. at 16-21.

\textsuperscript{77} Cappelletti, M. and Garth, B., "Access to justice: The newest wave in the world-wide movement to make rights effective" (1977/8) 27 Buffalo Law Review 181

\textsuperscript{78} Ibid. at 196-7.
broader approach, particularly its emphasis on substantive justice, is also relevant to Zimbabwe. However, apart from the small claims courts that were introduced in 1994, arbitration and mediation are not part of the official court-based dispute resolution mechanisms in Zimbabwe. However, non-binding arbitration and mediation occur as part of the traditional dispute resolution mechanisms. These are discussed in chapter one.

Most of the discussion of access to justice in North America does not deal with substantive law. The debate on law reform through the courts as opposed to through the legislature is an exception in this regard. In the Zimbabwean context, the substantive law is very important. There is official legal pluralism introduced by the colonization process. In this context it is necessary to discuss the interaction of the received substantive laws and the indigenous laws. Sometimes these have different norms and values and it is necessary to decide whether the interests of justice are served by one of them or none of them. The choice calls for a change to the substantive law to reinforce the acceptable norm and outlaw the unacceptable one(s). The implications of pluralism on access to justice are discussed in the next chapter.

The discussion of access to courts and ADR mechanisms is also important to Zimbabwe. Unlike the position in North America and other western countries, the debate about the appropriateness of formal adjudication (as compared to ADR) is not significant to the challenge faced by the poor in Zimbabwe. The major concern in the area of dispute resolution is a lack of access to the forms of state sanctioned adjudication. In dealing with this problem one has to take into account the pluralistic nature of the Zimbabwean legal system. The concerns about the transplant of institutions raised in connection with ADR mechanisms based on prototypes from pre-industrial societies must also be expressed about the Zimbabwean situation. As noted earlier, (see chapter one), the traditional dispute resolution mechanisms were designed to deal with a particular social context which was characterized by pre-capitalist relations of production and strong kinship and community ties. The question that arises is how are these mechanisms adaptable to present day Zimbabwe with its capitalist relations of production and the breakdown of kinship and community ties? On the other hand, capitalist penetration has not been complete, neither has the breakdown of kinship and community ties. It is therefore questionable whether the wholesale adoption of the dispute resolution mechanisms of the received law is the solution. The problem of the
acceptability of the received law (both substantive and procedural) is worsened by the fact that it was introduced by aliens who had little or no respect for the indigenous institutions and culture. Given these differences between Zimbabwe and North America (and other western countries) how ought the problem of lack of access to justice be conceptualized?

C. Conceptualizing access to justice in Zimbabwe

This conceptualization of access to justice in Zimbabwe is informed by the North American (and other Western) perspectives discussed above but it takes into account the specificity of the Zimbabwean social context.

Zimbabwe is a politically democratic country in which the prevailing socio-economic conditions are capitalistic. There is unequal distribution of wealth and power which is characteristic of all societies in which capitalist social relations are dominant. As described earlier, (see chapter one) capitalist social relations were introduced into Zimbabwe through the process of colonization. This imperialistic capitalist penetration resulted in massive poverty among the indigenous population as their labour and resources were exploited for the benefit of foreign owners of capital. The situation was exacerbated by the racist policies of the colonizers which ensured that the indigenous black population shared very little of the profits produced from the exploitation of their labour and resources. Despite political independence in 1980, these inequalities continue in present day Zimbabwe.

The question arises as to whether there can be justice for the poor in the socio-economic circumstances prevailing in present day Zimbabwe. There is no doubt that the basic inequalities such as the division between labourers and the owners of capital constitute social injustice. A major redistribution of economic resources and power should be a long term goal for the poor in Zimbabwe. However, short term gains can also be made which can be regarded as "justice" for the poor. These can be secured through the substantive law and dispute resolution mechanisms.

1. The Substantive Law

The existing substantive law already provides certain entitlements for the poor in Zimbabwe. However, there are still areas where there are not enough entitlements such as gender equality (see chapter one). For these areas, it is necessary for the poor to seek justice
through changes to the substantive law. Changes to the substantive law can be made either through legislation or through law reform by the courts or both. Changes through legislation involve political organization and lobbying. The powerlessness of the poor is a hindrance to successful political lobbying. Their potential for organization is limited by their diversity. Poor people in Zimbabwe are a diverse group of men and women, the unemployed, the formally employed, the informally employed, the rural and the urban. Such diversity can result in conflicting interests in some areas. Nevertheless, it is still necessary to encourage political organization among the poor in Zimbabwe. Legislative changes can be supplemented by seeking law reform through the courts. Although courts are generally open as of right in Zimbabwe, in practice the poor do not have much access to them because of a lack of resources and other limitations. Assistance in the form of legal aid would make it easier for them to gain access. There is also the danger of reversal of favourable decisions through legislation. This can be countered if political organization and lobbying is carried out in conjunction with seeking law reform through the courts.

Finally, attempts at law reform through the courts are not always successful. The courts may make unfavourable decisions. Unfavourable decisions can be used as rallying points for political organization.

Reforms to the substantive law, whether through legislation or law reform by the courts, would not by themselves guarantee access to justice for the poor in Zimbabwe. The substantive law is not self-implementing. It is necessary for the poor to have access to dispute resolution mechanisms in order to effectuate the entitlements provided by the substantive law.

2. Dispute resolution mechanisms
Poor people in Zimbabwe engage in disputing as a result of their interactions with other members of society and among themselves. It is imperative that they have access to dispute resolution mechanisms for resolving these disputes.

As noted earlier, (see chapter one) the dispute resolution mechanisms available in present day Zimbabwe range from informal mediation and arbitration to formal adjudication in the courts. These are a product of the country’s history and social organization. In particular, they reflect the process of colonization and the plurality of the legal system.
Under the indigenous customary laws, the extended family played a significant role in dispute resolution, particularly in the area of family law. Changes in socio-economic relations have weakened the extended family, with the result that disputes which were previously resolved informally at the family level are being taken to the formal courts. Despite these changes, the extended family has not been completely eradicated in Zimbabwe and continues to be a source of informal dispute resolution and extra-legal social control.

The chiefs’ and headmen’s courts are a form of state recognized customary dispute resolution mechanisms. The customary laws applied in these courts and in the other state courts may vary. The same observation could be made about the customary law applied in non-recognized dispute resolution mechanisms, such as the extended family. These variations are discussed in chapters one and three.

Despite the existence of informal, non-state, dispute resolution mechanisms in Zimbabwe, it is imperative that the poor have access to state-recognized dispute resolution mechanisms such as courts. This is due to the problematic features of non-state dispute resolution mechanisms and the special roles of state-recognized dispute resolution mechanisms. It must be pointed out that little is known about the incidence, operation and effectiveness of non-state dispute resolution mechanisms in present day Zimbabwe. The only one that has been studied is the extended family. However, the existing studies of the extended family and its role in dispute resolution are dated. There is no study of how the extended family has continued to perform this role in the current social context. What is known is that the extended family is still based on the same kinship structure that it was based on in the past. This kinship structure is characterized by male dominance. This male dominance is problematic for women seeking equality. For these women there is need for dispute resolution mechanisms outside the male dominated extended family. The state’s dispute resolution mechanisms (other than those based on traditional customary law) are not formally premised upon male domination. They are supposed to be guided by the principle of equality before the law. Whether or not this is so in practice depends on the nature of the substantive law that they apply, the resources of the parties, and the attitudes of the presiding personnel. State-recognized courts that are based on traditional customary law i.e.

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the headmen's and chiefs' courts, are in a distinct category. In these courts the state simply adds its sanctions to the traditional practices without dealing with any problematic features that may exist in them, such as male dominance and other power imbalances. However, unlike the non-state, recognized traditional mechanisms such as the extended family, they are barred from applying those aspects of the substantive customary law which have been expressly overruled by the legislature or by the decisions of the superior courts. Another limitation on the ability of non-state recognized dispute resolution mechanisms to give effect to substantive entitlements is their lack of enforcement powers similar to those of the state. They often rely on consensus and moral sanctions rather than legal ones. Where these are not effective, they are powerless. The state-recognized dispute resolution mechanisms have the coercive powers of the state at their disposal in the event of non-compliance with their decisions. State-recognized dispute resolution mechanisms are necessary in those "areas of social life susceptible to neither the norms of private life nor the rigors of democratic processes"80 and to challenge unacceptable norms. They become more necessary with the weakening of institutions such as the family and the community due to changes in socio-economic conditions such as urbanization and industrialization81.

In present day Zimbabwe, there are roles which can be performed only by the courts. The poor need access to the courts if they are to have any input in these areas. Firstly, courts and other state-recognized dispute resolution mechanisms are a means of using state power to achieve personal ideals82. This is of course subject to the limits imposed by both the substantive law and the procedural rules. It is an injustice for the poor to be denied this opportunity to utilize state power because of lack of means and other barriers. Secondly, courts and other state recognized dispute resolution mechanisms, are a "means of authoritatively identifying, interpreting, and applying" the principles and rules of the

80 Cavanagh, R. and Sarat, A., "Thinking about courts: Toward and beyond a jurisprudence of judicial competence" (1979/80) 14 Law and Society Review 371 at 413.

81 Ibid.

82 Fiss, supra note 11 at 1089.
In Zimbabwe, this process is essential to the development of the case law as part of the country’s common law. If matters dealing with issues affecting poor people do not come before the courts, the case law that is developed will be skewed in favour of the rich. Thirdly, poor people in Zimbabwe need the public vindication of their rights which is sometimes gained through the courts. Not all court decisions offer this vindication. Unfavourable decisions vindicate their opponents. Decisions that are not based on the merits, such as dismissals for breach of procedural rules, do not provide this vindication. Vindication is particularly important where the entitlement that is being enforced is new. The more it is asserted, the more it becomes an acceptable norm and less susceptible to challenge. This entrenchment of norms is particularly important with regard to the changes to customary substantive law. When the new norms are entrenched they will gain legitimacy over the old order. Entrenchment of norms will be speeded up if the decisions setting the new norms are widely publicized in a favourable way. Publication in law reports and legal journals will not be sufficient because of the restricted nature of the readership of these publications. The popular media (print and electronic) needs to be utilized in this endeavour.

The entitlements conferred upon the poor in Zimbabwe through the substantive laws do not always have to be effectuated proactively. They may be effectuated defensively as well. Most of the rights conferred upon the poor as tenants, employees, consumers etc. can be asserted as defences to claims by landlords, employers and merchants. In most cases, it is a prerequisite to the absolute vindication of any rights that the claimant must not have violated the rights of the defendant. Any violation of the defendant’s rights by the claimant either defeats or, at least, reduces the claim. When poor people fail to contest claims by this counter-assertion of rights because of a lack of access to dispute resolution mechanisms, it becomes an issue of injustice.

Access to courts and other state-recognized resolution mechanisms, does not just mean ability to use them. It is not sufficient to provide the poor with the resources to access these institutions. The composition and processes of these institutions must also be critically examined in order to expose and remove any hindrances to their making decisions that are in accordance with substantive justice. Most of the dispute resolution mechanisms of the

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received law in existence in Zimbabwe today have remained more or less the same in terms of their procedure as they were almost a hundred years ago. This is despite the fact that socio-economic conditions have changed. In particular, traditional dispute resolution mechanisms are becoming less and less relevant to the majority of disputants. This is in part due to the displacement of customary substantive law by the received law and statutes. At the same time, the jurisdiction of the traditional dispute resolution mechanisms remains confined to matters determinable according to customary law. On the other hand, the courts applying the received law and statutes were designed mainly for the affluent, white minority during the colonial era. They have been maintained in almost the same state in the post-independence era despite the increase of their jurisdiction to cover poor, indigenous disputants. There is a need to reexamine the entire court system in order to align it with changes in the social context and the substantive law.

D. Conclusion

It is contended that there is a problem of lack of access to civil justice for the poor in Zimbabwe today. This problem arises in part from the colonization process and the introduction of a new legal system in the country but also due to the inability of the indigenous customary law to adapt to changes in the socio-economic conditions. This inability to change was partly due to policies of the colonial state.

Access to justice for the poor in Zimbabwe encompasses the need for changes to the substantive law in order to create new legal entitlements (such as equality for women in all areas of customary law) that are in tune with the current socio-economic conditions particularly in the area of family relations. This can be achieved through both legislation and the law reform efforts of the courts. It is also necessary to enhance the poor’s access to state-recognized dispute resolution mechanisms for the purpose of effectuating the entitlements provided by the substantive law. Access to these dispute resolution mechanisms does not just mean the ability to utilize them as they are. It also includes removal of the barriers that hinder them from making decisions that are in accordance with substantive justice for the poor.

The next chapter discusses the implications of pluralism on access to justice.
CHAPTER THREE: CONNECTING LEGAL PLURALISM TO ACCESS TO JUSTICE

A. Introduction

Legal pluralism in Zimbabwe occurs at two levels. Firstly, there is the pluralism that is common to all societies that have a state sanctioned legal system. The state’s legal system in these societies is not the exclusive source of normative propositions and social control. There are other self-regulating social fields.¹ This is the phenomena that Galanter refers to as "justice in many rooms".²

The other way in which legal pluralism occurs in Zimbabwe is the feature that is common to most post-colonial states in Africa in which foreign laws were introduced into the country during the period of colonial rule. In Zimbabwe, indigenous legal systems were recognized in some areas of substantive civil law and in dispute resolution. There was interaction, competition and conflict between the received laws and the indigenous laws which continues in the post-colonial era.

This chapter discusses some of the problems with pluralism in Zimbabwe focussing on the divergence of concepts, alienation, differences in accessibility, and resistance to change. The discussion will draw from the discussion of specific substantive laws in Chapter 1. The second part of this chapter raises some tentative issues about what is to be done about pluralism.

B. Problems with pluralism

1. Divergence of concepts

The most serious problem about pluralism is the divergence of concepts which often translates into different and contradictory laws. Both Shona and Ndebele customary law place some emphasis on kinship and communal duties and responsibilities. The Roman-Dutch common law³ places emphasis on the individual’s rights and obligations. This


³As it has been developed through case law.
divergence is due to the differences between the socio-economic and cultural context in which the customary laws were developed and those that gave rise to the application of the Roman-Dutch common law in Zimbabwe (and the supporting statutes).

Although the underlying concepts of Shona and Ndebele customary law are basically the same, sometimes there is divergence in the actual laws. There is also divergence within the various systems of Shona customary law (Zezuru, Karanga, Korekore, Ndau, Manyika). There may also be variations within geographical areas among people of similar cultural backgrounds e.g. urban people and rural people probably do not observe customary laws and practices in the same way.

As noted earlier, (see chapter one) the colonisation process and capitalist penetration increased the divergence within customary law. Roberts categorises customary law into six different phenomena.

1) pre-colonial customary law
2) colonial customary law (as practised by the people)
3) colonial customary law (as applied by the colonial courts)
4) customary law as observed and written by anthropologists and others
5) contemporary customary law (in practice)
6) customary law as applied by contemporary customary courts.

It is not always possible to distinguish between these categories and Roberts admits that there are links between them. Nevertheless, sometimes the divergence between customary law and the received law is not the divergence between all customary law and the received law but rather between one specific category of customary law and the received law.

In post-colonial Zimbabwe, the categories may be reduced to three. Firstly there is that customary law which survived (in whatever form) the changes brought in by the colonial era. This is the "traditional" customary law. Then there is the customary law which was

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5 Ibid. at 1.

6 The designation "traditional" has been used because it is often claimed that this type of customary law is the "true" reflection of the pre-colonial customary law which is assumed to have been immutable.
applied by the colonial courts and has, through precedent, become the customary law applied by the non-customary state courts. This category includes the changes that have been made due to post-colonial legislation. Finally there is the contemporary customary law which is practised by the people. It may be traditional or may be more adapted to current socio-economic conditions than that applied by the non-customary state courts. The key feature is that it is at variance with the officially recognized customary law. Hellum refers to this third category as "living" customary law. Hellum's categorisation will be adopted in this discussion with a further distinction being made between "traditional living customary law" and "progressive living customary law". The term "progressive" is used to underpin the dynamism and adaptability to socio-economic and other changes that characterizes this variety of customary law.

Gender is a critical variable in analyzing the divergence of customary laws. It is in this area as applied to family law, that the conflict between customary laws (all variations) and the received law (and post-colonial statutes) has been most evident. This conflict has implications for the meaning of "justice" for women in Zimbabwe. The Constitution of Zimbabwe excludes personal law including family laws (marriage, divorce, inheritance) from the ambit of its anti-discrimination provisions. This means that divergences in the area of personal law between the received law and customary law are legally recognised subject to any overriding statutory provisions. The important statutory provisions in the area of family law include provisions relating to divorce, custody, guardianship and maintenance. As discussed in chapter one, the Legal Age of Majority Act (15 of 1982) has been interpreted as overriding some of the discriminatory customary laws.

In the area of marriage, the practice of polygyny is an example of a customary law that has been upheld despite being contrary to the norms of the received law. The statutory

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7 One would like to believe that it is more of "progressive" customary law than "traditional" customary law but this has to be empirically tested.


9 Section 23(3) as cited by Armstrong, A. "Zimbabwe: Away from customary law" (1988/89) 27 Journal of Family Law 339 at 340. The provision does not mention "sex" as a prohibited ground for discrimination but it mentions "race" and "tribe" among others.
law provides for the official registration of polygynous marriages. Some limitations have been placed on polygyny. Men who marry in terms of the Marriage Act (Chapter 37) are legally bound to remain monogamous during the subsistence of such marriage. Any purported marriage by a man who is so married is invalid and bigamous. This creates a potential area of conflict for those men who marry under this law while still holding onto some traditional customary views. Hellum cites a case in which this conflict was revealed. In a case decided by the Supreme Court in 1987 a man who was married in terms of the Marriage Act "married" another "wife" because his wife was childless. He claimed that this was done with the approval of his wife which she allegedly later withdrew. He further alleged that he had previously attempted to "marry" a different woman but had abandoned her because his wife did not approve of his choice. The court was not sympathetic to his argument and held that he had committed adultery and that his wife could divorce him on that ground. The wife had left him stating that "love cannot be shared". This case illustrates two contradictions in pluralism. Firstly, polygyny is acceptable, from a customary perspective, in some instances but not in others. Secondly, polygyny is acceptable even though some women feel that "love cannot be shared".

The other problematic feature of pluralism in Zimbabwe is the co-existence of different types of marriages with different legal consequences. Registered marriages can be according to the received law or according to customary law. The differences in these two categories have been narrowed by statute but there are still some remaining ones such as the acceptability of polygyny (above) and different inheritance laws. There is also a distinction between registered marriages (of all types) and unregistered customary law unions. The latter are legally recognized for limited purposes such as the legitimacy of the children, custody, guardianship and maintenance (for both children and spouses). Maintenance for

10 African Marriages Act, Chapter 238.

11 supra note 8.

12 SC187/87 - Hellum does not provide the names of the parties.

13 Ibid, at 266.

14 Ibid, i.e. two women cannot share the same husband.
spouses in unregistered customary law unions does not extend to ex-spouses.\textsuperscript{15}

Divorce laws also indicate the divergence in pluralism. Registered marriages can only be dissolved by a competent court whereas unregistered customary law unions are dissolved in accordance with customary law. The question of whether official state courts can adjudicate on matters relating to the dissolution of unregistered customary unions is an open one in respect of non-customary courts. Customary courts can adjudicate on such matters on the basis of their traditional jurisdiction. In fact that is the only marriage they can adjudicate on because they are expressly barred from adjudicating on matters involving the dissolution of registered marriages (including registered customary marriages) and the ancillary matters of custody guardianship and maintenance.\textsuperscript{16} They can adjudicate on bridewealth issues because they are regarded as separate from the issue of the dissolution of the marriage. Divorce from a registered marriage entitles the parties to seek a share of the matrimonial assets in terms of the Matrimonial Causes Act (33 of 1985). Parties to unregistered customary law unions do not have this entitlement. The question that arises is whether or not this diversity should be sanctioned, particularly when it tends to have a disproportionately adverse effect on women because of the socio-economic conditions that make them dependent on men.\textsuperscript{17}

In custody and maintenance matters, Armstrong\textsuperscript{18} highlights the contradiction between the position under the received law and statutes on one hand and the one under traditional customary law on the other. She points out that obliging men to support their children without giving them custody signifies a "rift between right and obligation which was unknown under (traditional) customary law."\textsuperscript{19} The right referred to is what has become

\textsuperscript{15}The relevant statutory provisions pertaining to marriage are contained in the Marriage Act (Chapter 37); African Marriages Act (Chapter 238) and the Maintenance Act (Chapter 35) as amended by section 30 of Act 2 of 1990.

\textsuperscript{16}Section 15 (1) (d) to (f) of the Customary Law and Local Courts Act (2 of 1990).

\textsuperscript{17}For a full discussion of the impact of socio-economic conditions see chapters 1 and 4.

\textsuperscript{18}Armstrong, A.,"School and sadza : custody and the best interests of the child in Zimbabwe" (1994)8 International Journal of Law and Family 151

\textsuperscript{19}Ibid at 159.
known as the "father right principle" of patrilineal societies. This is the principle that children born in marriage automatically "belong" to the father and his lineage. Illegitimate children could also be claimed as of right by making specified payments to the mother's family. The received law and statutory law provides that the "best interests of the child" should be the overriding factor in resolving custody disputes and that both parents are obligated to support their children (legitimate and illegitimate) regardless of whether or not they have custody.

In inheritance laws, the divergence between traditional customary law and the received law (and statutes) is still being maintained. Widows married according to customary law are still barred from inheriting directly from their deceased husbands' estates although they are entitled to maintenance under both traditional customary law and the statutory law. Although widowers are also barred from inheriting from their deceased wives' estates, this provision disproportionally affects women because of their economic dependence on men and because of the patriarchal nature of property relations. The issue of whether or not widows can inherit under customary law is one area which illustrates the divergence that may occur between customary law applied in the courts and the living customary law. As discussed earlier, (see chapter one) in Murisa v Murisa, the Supreme Court of Zimbabwe held that the widow cannot inherit. On the other hand research by Women and Law in Southern Africa (WLSA) (Zimbabwe) revealed that widows were being appointed heirs in some cases and the community courts were approving such appointments.


Under the Roman-Dutch common law, fathers of illegitimate children do not have a right to custody of the children except in exceptional circumstances e.g. when the mother is unfit to be custodian due to mental illness or other serious reason.

The exceptions are the cases discussed in Chapter 1.


SC41/92.

WLSA (Zimbabwe) as cited by Hellum, Anne, "Actor Perspectives on Gender and Legal Pluralism in Africa" in Petersen and Zahle, eds., supra, note 1, 13 at 25-6.
The people had developed a living customary law to meet the contemporary conditions while the Supreme Court chose to rigidly apply the customary law in the case law and books. The community court (a lower level court which has since been eliminated) was much more flexible in its approach to customary law in these particular instances.

2. Alienation

The problem of pluralism is compounded by the manner in which the received law was introduced in Zimbabwe. As discussed earlier, there were different categories of the colonial population and administration. They had different views and attitudes toward indigenous people and indigenous laws and culture. However, most of the colonizers believed that their laws were the "best rules of conduct for guidance and regulation of social affairs". They regarded the indigenous laws as primitive. Some of them saw themselves as being on a "civilizing" mission to transform the "primitive natives" into "civilized" citizens. They applied themselves to this mission with missionary zeal. On the other hand, there were others who were less noble (particularly during the U.D.I. era) in their attitudes towards indigenous laws. They still regarded them as primitive but nevertheless manipulated them as a means of keeping the indigenous people from political and socio-economic power. They were also racist motives in trying to avoid cultural contact between the two races because the white race was deemed to be superior to the black race. In the eyes of these racists, cultural contact would "contaminate" the superior white race.

Regardless of the motivations and attitudes of the colonizers, their treatment of indigenous laws as "primitive" law alienated some of the indigenous people. They saw it as an onslaught on their self-autonomy and culture and resisted the changes. Some of this resistance was carried into the post-colonial period. Some indigenous people still regard the indigenous laws as "their" laws and the received laws as "the white man’s laws". Post-

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26 Legislative Assembly Debates (1937) at Col. 2074 (per Captain Bertin).

27 This attitude sometimes showed in the courts’ treatment of various customary laws particularly in the light of the "repugnancy clause" (see Chapter 1).

28 Summers C., From Civilization to Segregation : Social and Social Control in Southern Rhodesia, 1890-1934 (Athens, Ohio :Ohio University Press, 1994) demonstrates that these distinct attitudes towards indigenous culture were already apparent before 1934.
colonial statutory laws are judged and analyzed according to the extent to which they conform to the assumptions and underlying concepts of the indigenous laws. If they radically depart from these, they may still be regarded as impositions similar to those of the colonial era even though they are the result of the operation (at least in theory) of popular democracy.\textsuperscript{29}

The opposite of these views are those indigenous people who may have internalized the colonial view that indigenous customary laws were "primitive" and that abandoning them made one "civilized".

3. Differences in Accessibility

One of the consequences of pluralism is the differences in accessibility between the received law and the indigenous laws. This occurs at both the substantive and the procedural levels. Knowledge of the substantive norms of indigenous traditional customary law was passed on through observation of court proceedings and oral histories from elders.\textsuperscript{30} The received laws and statutory laws are embodied in books and documents which are not physically accessible to everybody. These books and documents are also written in a language which most people do not understand (both literally and technically).

There are differences in the accessibility of the dispute resolution mechanisms of the indigenous systems and those of the received law and statutory law. The former are characterised by informality whilst the latter often have complex technical procedures which cannot be adequately utilised without the help of professional advocates.

However, it must be reiterated that there are problematic features within the indigenous dispute resolution mechanisms. In promoting pluralism in dispute resolution mechanisms, one should bear in mind that dispute resolution mechanisms, "enable particular types of power over others, and particular sorts of economic advantage".\textsuperscript{31} In other words it

\textsuperscript{29} Some of these indigenous views emerge from the research reports on Maintenance Laws and Inheritance Laws published by WLSA (Zimbabwe).


\textsuperscript{31} Chanock, M. Law, Custom and Social Order : The Colonial Experience in Malawi and Zambia (Cambridge : Cambridge University Press, 1985) at 222.
is important to find out who benefits from particular forms of dispute resolution mechanisms. The power imbalance issue was addressed in chapter one. It is very important for women to access non-customary dispute resolution mechanisms in order to enforce the non-customary entitlements conferred upon them by the received law and statutory law.32

The other problematic feature of traditional customary dispute resolution mechanisms is their link to kinship and neighbourliness and family ties. This affects disputants in three different ways. Firstly those who lack family support cannot adequately utilize them. This affects women more than men because the traditional structure has since been reinterpreted to emphasize the minority status of women. Whereas in traditional societies both men and women were, regardless of their adult status, expected to consult their family elders in times of crisis, including situations involving potential litigation, the colonial era interpretation of customary law emphasized women’s (particularly married women’s) lack of legal capacity and ignored the restrictions on adult young men. Thus women are expected to appear before traditional courts with the support of their families.33 The requirement of the support of the family may have served as a counter to power imbalance in traditional society34 but it now works hardship for women pursuing claims in which their families are reluctant to support them.

The other way in which kinship ties (and neighbourliness) operate as a disadvantage to disputants in traditional dispute resolution mechanisms is where one of the disputants is not from within the community. An "alien" claimant may be subjected to bias or, through conciliatory procedures, pressurized to compromise when she/he has no reason to do so (i.e. ties to the defendant are not important to the claimant). An "alien" defendant will not be

32 Armstrong, supra note 18 at 160. See also Paliwala, in supra note 8 (citing Rwezaura (1983)).

33 Griffiths, A., "Support for women with dependent children under the customary system of the Bakwena and the Roman-Dutch common law and statutory law of Botswana" (1984) 22 Journal of Legal Pluralism and Unofficial Law 1 at 2 discusses the problems with this expectation in the particular context of her study. Some of these problems could occur in the Zimbabwean context if the chiefs’ and headmen’s courts operate under a similar expectation.

subject to the pressures that arise from the necessity to maintain good kinship ties (or neighbourliness). Therefore, the claimant will find it difficult to get him/her to submit to the conciliatory procedures of traditional customary dispute resolution mechanisms.\textsuperscript{35}

A third way in which kinship ties affect traditional dispute resolution mechanisms is in relation to the nature of the judges and mediators. In relation to the former, the traditional customary law courts of Zimbabwe are presided over by chiefs and headmen. These are hereditary leaders who may or may not have the requisite customary judicial skills. When the Customary Law and Primary Courts Act (6 of 1981) was passed the chiefs were opposed to it because it took away their powers as the "natural rulers" of the people. They also claimed that they had the allegiance of the people.\textsuperscript{36} This latter claim proved to be unfounded (at least for Shona chiefs) when put to the test. This was due to the chiefs' collaboration with the colonial governments (see chapter 1). The Customary Law and Primary Courts Act provided for the replacement of chiefs' courts by community courts and (ward) headmen's courts by village courts. The former were presided over by government appointed civil servants. The latter were presided over by people elected by local communities. Chiefs and ward headmen were eligible for election. Of the 900 people elected to preside over village courts, only 9 were chiefs and the elected chiefs were all from Matabeleland.\textsuperscript{37} This is why the subsequent re-instatement of the chiefs and ward headmen's judicial powers (through the Customary Law and Local Courts Act (2 of 1990) which repealed and substituted Act 6 of 1981) may be a worrisome development.

4. **Legal Pluralism and Cultural Pluralism**

Legal pluralism in Zimbabwe occurs in a context of cultural pluralism. There are certain cultural factors that constrain people to make, or not to make, certain choices within Zimbabwe's pluralistic legal system. These cultural factors are strongest within indigenous


\textsuperscript{36} Seidman, R., "How a Bill became law in Zimbabwe : On the problem of transforming the colonial state" (1982) 52(3) Africa 56 at 64.

\textsuperscript{37} Ibid at 61, 64.
societies because of their multi-functional institutions e.g. the extended family in traditional societies is a reproductive unit, an economic unit, a dispute resolving institution and a forum for spiritual expression. When only one function is removed or duplicated from the multi-functional institution, the remaining ones tend to act as constraining factors preventing people from utilising the institution that has replaced or duplicated the institution’s function. The ward and the ward headmanship and the chief and the chieftaincy are other examples of multi-functional institutions.

Griffiths\textsuperscript{38} theorizes about the relationship between multi-functional institutions (which he refers to simply as social groups) and the individuals in them in relation to disputing. He theorizes that the social groups have a law that he refers to as "the law of inside washing of dirty linen".\textsuperscript{39} This law makes the group strive to process disputes between its members internally and makes it punish those who dispute externally because external disputing threatens the internal cohesion of the group.\textsuperscript{40} He observes that groups tend to be "imperialistic" in what they regard as "their" dirty linen i.e. they gather dirty linen which is not really theirs.\textsuperscript{41} Griffiths gives the family as an example of a social group that tends to function according to this law.

Nahanee\textsuperscript{42} is of the view that the "cultural values of kindness, reconciliation and cohesiveness may prevent some Aboriginal women from reporting violence in the home".\textsuperscript{43} Although she is writing about the Aboriginal people in Canada, there are some similarities with the Zimbabwean context. These include the experience of colonization by people with different legal systems and cultures. In the ensuing interaction and conflict, some indigenous


\textsuperscript{39} Ibid. at 218.

\textsuperscript{40} Ibid.

\textsuperscript{41} Ibid.

\textsuperscript{42} Nahanee, T. in Aboriginal Peoples and the Justice System: Report of the National Round Table on Justice Issues (Ottawa: Royal Commission on Aboriginal Peoples, 1993)

\textsuperscript{43} Ibid.
people respond by seeking to preserve indigenous culture at all costs. They regard criticism of indigenous culture and seeking assistance from "outsiders" in times of conflict as subversive to indigenous culture and threatening to the internal cohesion of indigenous society.

Both the observations of Griffiths and Nahanee are pertinent to the Zimbabwean context. The social control and functions of the ward and chieftaincy have been significantly curtailed over the years. The extended family, although weakened, remains a significant source of social control among indigenous Zimbabweans. The implications of this control in family law are many.

Although bridewealth is not legally necessary for marriage if the woman is of majority age (18 years), fathers are still receiving bridewealth for their major daughters. The reasons why the women accept this may include the fact that they are culturally expected to do so. The other reason is the economic insecurity that comes with divorce. A divorced woman without the means to support herself may need to turn to her natal family for help. This help may be withheld as a way of punishing her if she had insisted on a marriage without bridewealth.

Cultural expectations may be used to challenge (or even reverse) gains that have been made by women through the received and statutory laws. Writing on the situation in Swaziland, Nhlapo states that customary family law is being used to reverse the entitlements of women under the received law e.g. a woman who successfully claims custody of her minor child through the received law may still lose that custody through a counter-suit (in the traditional dispute resolution mechanisms) by the father of the child.

Although culture is dynamic, cultural expectations are usually expressed in

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45 Banda, F., "Custody and the best interests of the child: Another view from Zimbabwe" (1994) 8 International Journal of Law and the Family 191 Her research in 1990 found divorced women who depended on their natal families for support.

46 Nhlapo, R.T., "The mixture of civil and customary law in Swaziland" (1989) 4 Law and Anthropology (Vienna) 47

traditionalistic and conservative forms. Any deviation from the traditional norms, although necessary to accommodate socio-economic changes, may be regarded as deviant and punishable. The punishment usually involves some mystical threat from the ancestral spirits who are regarded as the guardians of culture.\(^\text{48}\)

There are several instances from both colonial and post-colonial Zimbabwe in which mystical spiritual threats have been used or cited as a form of social control. Holleman's research during the colonial era revealed that it was believed that the property of a woman (particularly the motherhood cow and its progeny) was specially guarded by the spirits of her ancestresses. Any misuse or withholding of this property (upon death of the woman or divorce) would make one liable to punishment\(^\text{49}\). Hellum's research (during the post-colonial era) revealed that some women were still relying on this mystical threat. They were using this mystical threat to control their ex-husbands and their new spouses by refusing to make property claims or accept property settlements upon divorce.\(^\text{50}\)

Armstrong\(^\text{51}\) reports another post-colonial example of the manipulation of mystical threat. A witness in a custody dispute (in which a mother was the claimant) who was a paternal relative of the child threatened that if the mother was awarded custody, she would have to "do it alone" if the child fell ill. This was an allusion to the practice of enlisting the help of paternal ancestral spirits in the event of illness or other misfortune.\(^\text{52}\) Armstrong does not report the effect, if any, that this threat had on the mother. As a woman without kinship links with the child's paternal ancestors, she could not propitiate them. She would need the cooperation of the child's paternal kin to do so.

In her study during the colonial era (between 1972 and 1975), Weinrich asked her


\(^{50}\) Hellum, *supra*, note 8 at 265.

\(^{51}\) *supra*, note 18.

\(^{52}\) *Ibid.*, at 168.
interviewees if bridewealth should be abolished. Some rural elders expressed the view that abolition would invite punishment by the ancestors.\textsuperscript{53} Weinrich argues that this was an ideological justification. She bases her argument on the fact that bridewealth was no longer being received by fathers for the purpose of providing bridewealth for their own sons and other needy members of the extended family which would increase the lineage and "please" the ancestors. They were spending it on themselves or their children. The poorer ones were buying clothes or paying school fees for their children or simply banking the money as some form of security for old age. The richer ones were buying farms, farm equipment, cattle, lorries, shops or houses.\textsuperscript{54}

Weinrich did not investigate the part of bridewealth that was closest to the links with ancestors (maternal). This was the "motherhood cow" which was linked to the woman's maternal ancestresses who were the guardians of her reproductive capacity. It could be that the elders were referring to this part of bridewealth whose spiritual significance was much more obvious than that of the portion received by fathers.

The above illustrates some of the problems with pluralism in Zimbabwe's legal system. The next section highlights some of the questions that may have to be asked in deciding the future of legal pluralism.

C. What is to be done with legal pluralism?

Bennett\textsuperscript{55} suggests some critical issues to be taken into account in considering the future of legal pluralism. His framework is not specific to Zimbabwe but is designed for Africa in general. His issues can be summarised as follows:

1) The "population's sense of identity with the legal system" is essential.

2) Should individuals have complete freedom to choose their own legal system?

3) What is to be done about the inferior status of women under customary law?

One might add to number (2) above whether sections of the population (tribes, etc.)


\textsuperscript{54} Ibid. at 109 -111.

\textsuperscript{55} Bennett, T.W.,"The interpersonal conflict of laws : A technique for adapting to social change" (1980) 18 Journal of Modern African Studies 127
communities, etc.) should be allowed to operate their own legal institutions and enforce their own norms. Bennett's issue number (1) raises more questions: Who decides what the population's needs are in terms of a legal system? The obvious answer is that the views of the population itself are paramount but the problem is that there is a diversity of views within the population. Should the views of the majority prevail over the views of the minority?

Bennett emphasizes the fact that if there is incongruence between the proposed laws and the population's sense of justice, the legal system will become dysfunctional or, worse, people may violently react against the unpopular law. Allott emphasizes the limits of law and points out that the law-subjects need to be "persuaded that the new laws are broadly acceptable to them."

Allott's suggestion of "persuasion" raises other issues such as how the persuasion is to be accomplished i.e. what kinds of dialogue need to be entered into so that some form of consensus can be reached?

On Bennett's second issue, Allott offers a possible response (in similar but separate discussion) which is that there should be no "unrestricted individualism". The implications of this in a pluralistic legal system would be that people should be "assigned" legal systems and not allowed to move from one legal system to another on a case by case basis. The problem with such an approach is the difficulty of assigning legal systems to people. In Zimbabwe, there are people who live plural lives (culturally and legally). In certain aspects of their lives they have adopted "western" culture and the received law but in others they are following customary law e.g. an educated professional who lives in an urban area (with no rural ties) but is also a polygynist. Should this kind of pluralism be allowed?

The question of sections of the population being allowed to choose their own legal systems is more complex than that of individuals. Most settlements in Zimbabwe have become heterogeneous in terms of factors such as race, tribe, culture or religion. How will community be territorially defined in this context? Abandoning territorial definition will not

56 Ibid. at 128.


58 Ibid. This is not a direct response to the issues raised by Bennett.
resolve the issue because people in the same tribe or other group may prefer to choose legal systems in accordance with the context in which they live rather than factors such as being a member of a particular tribe or other features which may have become of less significance to them.

A further problem with allowing sections of the population to choose their own legal systems is that it impedes the goal of national unity and integration. Bennett’s response is that it is the appropriate approach in dealing with the cultural transition that is taking place and offers evolutionary rather than revolutionary change.

On the problem of the status of women under customary law, Bennett suggests that the state should intervene to correct the injustices and justify its intervention on the grounds of the standards set out in international human rights instruments. Most of the customary family laws in Zimbabwe (traditional customary law and state customary law) are premised upon inequality between men and women. A suggestion that this should be rectified will probably be met with resistance by supporters of these versions of customary law. The question is how to deal with this anticipated resistance.

Suttner offers a different justification (than Bennett’s) for maintaining legal pluralism. He argues that there should be no imposition of a particular legal system (customary or otherwise) but a development of a legal system which responds to the social structure. In other words, the test of any legal system should not be respect for pluralism but social efficacy. Pluralism should be retained only because it is socially efficacious (and abandoned when it ceases to be so). The question is how does one decide whether or not a


60 Ibid.

61 Ibid. at 133.

62 Suttner, R.S., "Legal pluralism in South Africa: A reappraisal of policy" (1970) 19 International and Comparative Law Quarterly 134

63 Ibid. at 137-148.

64 Ibid.
legal system is socially efficacious? Is it signified by the general population's apparent satisfaction with the legal system? or Should there be some other objective standard by which the legal system is judged?

There will be an attempt to address all these pertinent issues in the discussion of future directions for pluralism in Zimbabwe which will conclude this thesis. The next chapter discusses some of the specific problems encountered by poor people in Zimbabwe in attempting to access justice.
CHAPTER FOUR: BARRIERS TO ACCESS TO THE COURTS FOR THE POOR IN ZIMBABWE

A. Introduction

This chapter discusses the barriers to access to the courts for the poor in Zimbabwe in the light of their legal needs. The first section outlines some of the legal needs of the poor in Zimbabwe. The next section outlines some of the current attempts to meet these needs by providing legal services. The third section deals with specific barriers to access to the courts by the poor in Zimbabwe including poverty, lack of access to information, procedural barriers, linguistic barriers, geographical barriers and the problem of social distance between poor people and judicial officers.

Macdonald criticizes the use of the "barriers" metaphor because it is premised upon the perception of a problem as "legal" and a "commitment to solving the problem through the formal legal system". This premise is not always accurate. Some people (including poor people) may consciously reject the formulation of their problems as legal while others may accept such formulation but choose to use means other than the formal legal system to solve the problems.

While Macdonald’s critique is valid, there is no doubt that there are instances when poor people accept (expressly or impliedly) the formulation of their problems as legal. The same applies to their acceptance of the formal legal system’s solutions to those problems formulated as "legal". The "barriers" metaphor enables us to focus on some of the specific problems that poor people may encounter in such instances.

B. The Legal Needs of the Poor in Zimbabwe

1. Problems ascertaining the needs of the poor in Zimbabwe


2 Ibid, at 302.
The legal needs of the poor in Zimbabwe are not easily ascertainable. Firstly, the concept of "legal need" itself is a nebulous one. As Curran notes:

"the concept of "legal need" encompasses a variety of perceptions and beliefs held by both lawyers and non-lawyers as to when and under what circumstances a lawyer's services are necessary, desirable, useful or appropriate? Similarly, what constitutes met or unmet need depends not only on what definition of need one adopts but also on what test or tests are applied in assessing whether need, by any definition, is being met".3

Curran's comments were made in relation to the utilization of lawyers and hence the equating of legal needs with seeking the services of lawyers. However, it should be noted that her observation is still valid when considering the issue of the legal needs of the poor in Zimbabwe in order to determine what they might use courts for. Nevertheless, it is still contended that the legal needs of the poor in Zimbabwe can be deduced from an examination of the instances in which they have sought to use the courts. Making use of the court system or attempting to do so in order to resolve a problem necessarily involves a perception of the problem as "legal". There is no data available on the actual utilization of the courts by the poor in Zimbabwe. However, organizations that provide legal assistance to the poor have documented the types of cases for which assistance is sought. These include the Legal Resources Foundation which has nation-wide offices. This documentation gives some general indication of the legal needs of the poor in Zimbabwe although it should be acknowledged that:

"Any given legal agency, be it a private law firm, a neighbourhood law office, or a civil rights commission, in part receives and in part generates a clientele. The agency has a public definition, including a reputation for various competencies and incompetencies. There are both channels of access and barriers to access to every agency. The policy of the agency, indeed its mere existence, stimulates certain kinds of demands and discoustages others".4

Thus there are problems in using data from legal services agencies. Firstly, the legal needs reflected in the data are confined to those of the people who had access to the agencies.

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Secondly, the agencies usually have specific mandates or emphasis in their services e.g. family matters (generally), domestic violence and human rights issues. The data will be skewed in favour of these areas of emphasis.

Despite its shortcomings, the information from legal services agencies is a useful indication of the legal needs of the poor in Zimbabwe. An attempt will also be made to extrapolate some possible legal needs of the poor in Zimbabwe from the socio-economic context in which they live. The rural poor and the urban poor have different needs but there are needs that they have in common.

2. The Needs of the Rural Poor
There is hardly any information on the legal needs that are unique to the rural poor. The major legal agency that provides legal assistance for the poor in Zimbabwe is the Legal Resources Foundation. It operates through Legal Projects Centres. It currently has five of these and they are situated in the country’s major urban centres - Harare, Bulawayo, Gweru, Masvingo and Mutare. The Legal Projects Centres operate smaller outreach centres in rural communities which are staffed by paralegals. The only centre that reported unique rural needs was the Bulawayo Legal Projects Centre. The first need involved the issue of birth certificates for the children of men who have gone to work in neighbouring countries (mainly Botswana and South Africa). Young men in the rural areas of Matabeleland (the Bulawayo Legal Projects Centre’s catchment area) cross the borders (both legally and illegally) to look for work. This is due to the high unemployment rate in the country as a whole. The mothers of their children (both legitimate children and illegitimate ones) are required to produce proof that the father of the child is a Zimbabwean when seeking birth certificates. This is because in Zimbabwe citizenship is conferred only if the father of the child is a Zimbabwean when seeking birth certificates. Proof of citizenship is through the production of the father’s national registration card. This is difficult where the father is out of the country.

Another unique legal need in rural Matabeleland is the need to have persons declared missing and subsequently presumed dead in terms of the Missing Persons Act so as to have

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5 Legal Resources Foundation, Ninth Annual Report: Year ended (sic) 30th June 1993 (Harare: Legal Resources Foundation, 1993)
their estates distributed. A number of people from this particular area went missing during the early 1980s when insurgents operated in the area. It is alleged that some of them disappeared at the hands of government security forces.

The responses to the two needs of the poor people of rural Matabeleland are different. The birth certificate problem is resolved by assisting the clients with providing other proof of the father's Zimbabwean citizenship such as affidavits and witnesses. A more radical and more permanent solution would be to challenge the citizenship law by seeking to have it reformed in order to allow citizenship to pass from either parent. The mothers of the children involved in these cases would then not be required to prove that the absentee fathers are Zimbabwean citizens. The reform can be sought either through legislation or, if the legislature does not respond favourably, through the courts. The latter would be an example of the poor utilizing courts for law reform.

The missing persons issue is a purely administrative one. The courts are mandated to administer the relevant statute. The clients receive assistance in preparing the necessary documents.

3. The Needs of the Urban Poor

There are many legal needs that are peculiar to the urban poor. One such need is the need for assistance in landlord and tenant disputes. Most of the disputes involve evictions mainly due to failure to pay rent. This is primarily an economic problem. However, in some cases the evictions are unjustified and the tenants seek legal assistance in resisting them. There are two main types of accommodation for the urban poor in Zimbabwe. The first category is municipal housing which is leased directly by the tenants mostly under Deed of Sale arrangements. The second category is housing which is being sub-leased by municipal tenants. The sub-tenants are referred to as lodgers. Municipal tenants are generally poor people and most of them are retirees who rely almost entirely on the rents they collect. This is because most of them would have worked as unskilled or semi-skilled labourers without pensions during their working life. Lodgers tend to be younger and also poor. There is a critical shortage of urban housing in Zimbabwe's urban centres particularly in the larger centres of Harare and Bulawayo. This results in rents that are high in proportion to the
income of the tenants. However, municipalities must seek the approval of the government before increasing rents. The result is that municipal tenants tend to pay less rent than lodgers. Indeed the whole process of sub-leasing hinges upon this difference. Sub-leasing would not be profitable if municipal tenants paid as much rent as lodgers. Rental income is vital to most municipal tenants and therefore, they are reluctant to give lodgers any leeway in the payment of rent. The critical shortage of accommodation also encourages them to evict tenants. They can easily find replacements. The municipalities sometimes also have the same attitude to their tenants. In the case of properties under deed of sale, they repossess the properties and auction them off in the event of default in the payment of instalments. The processes of evictions and repossessions raise several legal issues for those involved and access to the courts may be necessary for the resolution of those issues.

A second need that is unique to the urban poor is the problem of debt. Rural poor people have no problem of debt because they are such high risks that nobody offers them credit facilities. The only exceptions are small scale commercial farmers who are offered loans by the Agricultural Finance Corporation, a special bank (government funded) for farmers. The urban poor are generally able to buy goods on credit or hire-purchase. Failure to meet the instalment obligations may result in repossession of the goods by the seller and/or a lawsuit for the recovery of the amount owing. In most cases, there is nothing that can be done apart from negotiating a repayment plan that would accommodate the current financial status of the debtor. However, in some cases, debtors have defences to the claims asserted by the creditors such as breach of warranty and other remedies offered by statutes. These remedies may be partial or complete defences to the claims made by the creditors but they are not self-implementing. The debtors must respond to the court claims and assert any relevant defences. The debtors need access to the courts for that purpose.

A third need that is relevant to the urban poor are labour disputes. Rural people are generally self-employed peasant farmers whereas urban poor people are generally employed by other people as unskilled or semi-skilled labourers. Commercial farm workers are the exception. The Labour Relations Act offers workers protection against unfair labour practices, unlawful dismissal and protects collective bargaining agreements between employers and workers’ unions. Its provisions are not self-implementing and it is incumbent upon any worker or group of workers whose rights have been violated to make the necessary
claims. A special procedure for making such claims is provided for through Labour Relations Hearing Officers and the Labour Relations Tribunal. However, the jurisdiction of Labour Relations Hearing Officers and the Labour Relations Tribunal is not exclusive. Employers and employees can choose to take their claims to the ordinary courts if it is expedient to do so. Furthermore, the decisions of the Labour Relations Tribunal are reviewable by the High Court and appealable to the Supreme Court. The Labour Relations Act also excludes domestic workers from its coverage. It is therefore conceivable that workers would still need access to the ordinary courts for labour issues.

A related issue to that of labour matters for which the urban poor might require access to the courts is compensation for injuries suffered through work-related accidents. The compensation claims are processed administratively through the National Social Security Authority’s Workers’ Compensation division. The assessments of disability and the quantum of damages can still be challenged in an ordinary court and the urban poor would require access to the courts if this should become necessary.

4. The Common Needs
The urban and rural poor have some common legal needs. The most common of these appears to be matters involving child support or maintenance as it is called in Zimbabwe. The majority of the people who sought advice from the Legal Resources Foundation’s Legal Projects centres in the year ending 30th June 1993 had maintenance problems.\(^6\) A lawyer at the Bulawayo Legal Projects Centre informed the writer (in March 1995) that the office had decided, due to overwhelming demand, to confine its involvement in maintenance cases to cases where the client sought to appeal against an unfavourable decision. All other clients are simply referred to the courts where they will receive some assistance in the preparation of the necessary documents (in a much more limited way than they would receive from lawyers) and would not receive legal representation for the actual court proceedings.\(^7\)

Maintenance is an issue that mostly affects women particularly poor women for two reasons.

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\(^7\) The difficulties of appearing in court as self-actors are mitigated by the fact that, according to the Maintenance Act (Chapter 35) proceedings in a Maintenance Court are not adversarial. The proceedings take the form of an inquiry.
Firstly, women are generally more likely to be unemployed and poorer than men. Secondly, women almost always have the custody and consequently the responsibility to provide for children born to parents who are not married to each other. For children born to parents who are married, the mothers tend to have custody more than the fathers. Custody is generally not contested in such matters. Because of their poverty, poor women always require financial assistance in bringing up their children. The primary source of this assistance would be the father of the child if he is able to assist. The problem of maintenance is compounded by an unwillingness by a significant proportion of men to support their children outside the marriage relationship. The reason for this unwillingness appears to be a reluctance to accept the new legal status of women which contradicts traditional customary law (see chapter one). Under traditional customary law a woman was generally regarded as a perpetual minor. Her children were the responsibility of her husband or, if she was not married, her father or other male family member. The father of a child born outside marriage had a right to seek custody of his child (usually when the child was at least seven years old) from the woman's father or other male guardian. The father or other male guardian would normally agree to giving up custody upon being compensated for supporting the child from birth until the time of the claim for custody. He would also demand seduction damages. The woman had no say in this arrangement. The conferment of majority status upon adult women who are subject to customary law\(^8\) introduced a new system. The adult woman is now the sole guardian and sole custodian of a child born outside marriage and is a joint guardian of a child born to parents who are married. She can also seek custody of a child born within marriage and if the claim is contested, the court will consider the best interests of the child regardless of which system of law applies to the marriage and its legal consequences (i.e. customary law or the received law).

The result of this change is that whereas in the past, and under customary law, a man had no obligation to support a child born outside marriage unless he sought custody of the child, the man is now required to support such a child and generally has no right to custody of the child. Where there is divorce or separation, the non-custodial father now has an obligation to support the children born within the marriage. Under customary law, he was in

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\(^8\) Through the Legal Age of Majority Act (15 of 1982).
the same position as the father of a child born outside marriage, that is, he was under no obligation to support the child unless he claimed custody. However, traditionally it was very rare for a man to give up custody of his child if he was married to the mother. What normally happened was that the divorced woman would return to her own natal family and leave the children with her husband. The customary law way of dealing with custody and support of children born within marriage was superseded by the requirement that the interests of the children are paramount in custody matters at an earlier point in Zimbabwe's legal history than the one regarding custody and support of children born outside marriage. The result is that the majority of the cases in which maintenance claims are resisted involve children born outside marriage.9

Poor women need recourse to the courts to ensure that they receive the financial support that is due to their children. In cases where the men involved have no means of support, the legal claim would be futile. The women often turn to their own family (including the extended family) for assistance and, as a last resort, to the state. There is no general state social assistance programme in Zimbabwe but a department of government known as the Department of Social Welfare offers assistance in cases of extreme destitution.

A legal need of poor unmarried women which is often connected to that of maintenance is the need to assert claims for seduction damages and damages for breach of promise to marry. The former claims were recognised under customary law but treated as the claims of the fathers or guardians because of the minority status of the women and the practice of paying bridewealth. Seduction was generally regarded as diminishing the prospects of a woman's marriage and consequently the father or guardian's prospects of receiving bridewealth. The customary law claims are still recognized in cases where the women involved are minors (under 18). In the case of adult women, the right to claim seduction damages is now vested in the seduced woman. Claims for breach of promise to marry are alien to customary law10. They originate from the received law, that is, the Roman-Dutch common law. Claims for damages based on seduction and breach of promise to marry are important to poor women where the seduction results in the birth of a child

9 The details of the changes to the laws regarding marriage, divorce, custody and guardianship are provided in chapter 1.

10 For details regarding breach of promise to marry, see the discussion in chapter 1.
because, if successful, they increase the amount of money available to the women to support their children. Maintenance claims often result in very small awards due to the little income of the men against whom claims are made and also due to a general conservative approach by the courts.

Divorces constitute another area of legal need for the poor in Zimbabwe. Where there are no minor children and no property to be shared, people tend to just separate. There are three types of marriages in Zimbabwe. Firstly, there are marriages in terms of the Marriage Act, Chapter 37. These marriages must be monogamous and the ceremony itself must be performed by a person who holds a designated office (generally magistrates or Christian ministers of religion). Secondly, there are marriages in terms of the African Marriages Act. These are marriages which only African (black) people can enter into. They may be polygynous and must be registered by designated officials. Finally, there are unregistered customary law marriages. These are also marriages between Africans only. They are conducted according to customary practice but not registered. They are recognized for limited purposes only including legitimacy of the children, guardianship and custody. Despite this curtailed recognition, these are the most common marriages in Zimbabwe among the African population. This may be because the concept of registering marriages is not part of customary practice and the process of marriage is still governed by customary practices in most instances. Urbanites tend to have more registered marriages than their rural counterparts because in the past, municipalities segregated the allocation of housing on the basis of whether a man was married or not. "Married" men got the better family accommodation whilst those who were "not married" were allocated accommodation in crowded hostels. The only acceptable proof of marriage was a marriage certificate. No formal divorce is required for an unregistered customary law marriage. The other two marriages can be legally dissolved only by an order of a competent court, thus access to the courts is necessary for the purpose of obtaining a divorce from a registered marriage.11

The information from the Legal Resources Foundation also indicates that poor people seek legal assistance in relation to the making of wills and the distribution of deceased estates. The making of wills is necessitated by the inadequacies of the current law of

11 See note 7.
intestate inheritance in Zimbabwe. The law is a complex assortment of various provisions whose application depends on the characteristics of the deceased and the nature of the property. A valid will overrides the law of intestate inheritance. Intestate distribution of the estates of non-Africans is according to much simpler statutory provisions in terms of which the preferred beneficiaries are the surviving spouse and the children or, if none exist, the parents of the deceased, and, if there is no spouse, children, or parents, the siblings of the deceased. For Africans, the law is more complex and is an assortment of statute and customary law. For Africans married in accordance with the provisions of the Marriage Act or who were not married and whose parents were married in terms of those provisions, the intestate distribution is similar to that for non-Africans. For Africans married according to customary law (regardless of whether the marriage is registered or not) or who were not married and whose parents were married customarily, the intestate distribution of the movable property is according to customary law. The immovable property is also distributed according to customary law but subject to a statutory provision which provides that the heir at customary law shall inherit immovable property "in his individual capacity". This provision was passed because the concept of heir at customary law is different from that of the received law. At customary law the heir does not exclusively benefit from the inherited property but also "substitutes" the deceased. He is obliged to take over the deceased's obligations. This would mean that he would have no title to immovable property.

The differences between inheritance under customary law and under the received law and statutes (and the changes to the former) have already been discussed (Chapter 1).

Another area of legal need for the poor in Zimbabwe is claims for damages arising from road traffic accidents. Zimbabwe has a very high rate of traffic accidents including bus accidents. Most of the bus accidents involve rural buses. The possible causes of these accidents are speeding and unroadworthy vehicles. Vehicles are very expensive to buy and maintain in Zimbabwe and some owners take shortcuts. All vehicles are legally required to be insured against third party risks. In the event of an accident, the injured party usually submits a claim to the insurers. The fault of the driver must be established. In most cases insurers usually pay without contesting the claim but the claimants still require legal

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12 Section 6A of the Customary Law and Primary Courts Act 6/81.
assistance in quantifying their claims. Should the claims be rejected, the claimants would have to sue the insurer and/or the driver (and his employer) in court.

Other matters that have been dealt with by legal services agencies in Zimbabwe and which provide some indication of the legal needs of the poor in Zimbabwe include matters involving delict (tort), human rights violations, breach of contract and property disputes. All these are needs for which access to the courts may be needed.

C. The Legal Services Available to the Poor in Zimbabwe

1. Court-Appointed Lawyers
   a. In the magistrates court

   Zimbabwe is a developing country whose economy cannot sustain a state-funded legal aid programme. The current legal aid in Zimbabwe is provided through various mechanisms including provisions in the rules of court procedure and charitable organizations. The Magistrates Court (Civil) rules\(^\text{13}\), make provision for poor people to apply to the court for permission to sue or defend proceedings as "paupers".\(^\text{14}\) A successful application will result in a waiver of court fees and the appointment of a lawyer to act for the applicant. However, the lawyer will be appointed only if the applicant is "illiterate or is for some other good reason unable to conduct his (sic) case in person."\(^\text{15}\) The written consent of the lawyer is also required before he/she can be appointed. This provision appears to be hardly used, probably because the potential applicants are unaware of its existence. In any event, it would be difficult for most poor people in Zimbabwe to find a lawyer who is willing to act for them. They are unlikely to know any lawyers. In addition, lawyers may be reluctant to take on the poor client’s case because of the lack of remuneration. They can recover from the client’s ex-opponent only if successful. The provision in the Magistrates Court (Civil) Rules providing for the application to sue or defend as a pauper also provides (as an alternative to the appointment of a lawyer) that the court may order the clerk of court\(^\text{16}\) to draft all the

\(^{13}\) Statutory Instrument 290 of 1980.

\(^{14}\) Order 5 Rule 1.

\(^{15}\) Order 5 Rule 3.

\(^{16}\) A court official whose duties are similar to those of the registrar in the High Court.
necessary court documents for the applicant. The provision does not oblige the clerk of court to represent the applicant in court. Clerks of court are not lawyers and it appears that this may be one of the reasons why the provision is hardly utilized.

b. In the High Court

In the High Court, the rules provide for a poor person to apply to the Registrar to sue or defend in forma pauperis. The Registrar appoints a lawyer to act for the applicant and exempts him from paying court fees. The Registrar keeps a list of all practising lawyers from which he/she makes the appointment. The lawyer will recover his or her costs from the poor client's opponent if the client is successful otherwise he or she does not recover anything. The provisions for legal assistance in the High Court are used more frequently. This is probably because the rules of procedure are more strictly enforced in the High Court and the Registrar will actually reject any document which does not strictly comply with the rules. Self-actors are most likely to fail to meet the high standards and the registrar will probably advise them to hire lawyers and inform them of the provisions for free assistance if they advise him or her that they cannot afford to hire a lawyer. The cooperation of the lawyers is guaranteed by the fact that lawyers are not permitted to reject referrals.

2. Other Forms of Legal Aid

Other forms of legal aid in Zimbabwe include that which is provided by the Legal Aid Unit of the Ministry of Justice, Legal and Parliamentary Affairs. The unit was established in 1984 and is an informal legal advice centre with no legislative basis for its creation. It has only one office (in Harare) and is staffed by qualified lawyers but they are not allowed to represent clients in court. They only offer advice and provide assistance with drafting court documents.

Several non-governmental organizations provide legal advice in Zimbabwe. These include the Legal Resources Foundation (through its Legal Projects Centres), the Citizen's Advice Bureau (through volunteer private practice lawyers), the Catholic Commission for Justice and Peace, (restricted to human rights issues) the Msasa Project (restricted to issues of domestic violence) and the Consumer Council of Zimbabwe (restricted to issues of
consumer law). Apart from the Legal Resources Foundation, these organizations confine their services to the giving of advice and assistance with the drafting of documents.

The office of the Ombudsman is not a legal service agency but it may resolve legal problems in the course of its investigations. The office of the Ombudsman has power to investigate complaints by members of the public against all government ministries and departments (except the defence forces, the police and the prison service), all local government (municipal) authorities, hospitals, educational establishments controlled by the state and statutory bodies. High ranking public officials and judicial officers are not subject to investigation by the Ombudsman. The Ombudsman's investigative powers include the power to summon documents and witnesses, to hold formal inquiries and to have witnesses committed for contempt. However, he/she has no enforcement powers. In the event of non-compliance with his/her recommendations, the Ombudsman tables a special report of the case before parliament.17

The piecemeal efforts towards the provision of legal aid to the poor in Zimbabwe are largely inadequate. They are mostly confined to the urban centres, particularly the larger ones such as Harare (the capital city), and are still inadequate even for those areas. The Government does not have the resources to launch a nation-wide legal aid programme. The result is that the services of lawyers are beyond the reach of many people in Zimbabwe and they have to approach the courts as self-actors if the need arises. This is very difficult when faced with a legal system such as Zimbabwe's which is dual and complex.

D. Barriers to Access

1. Poverty

Poverty is widespread in Zimbabwe. It is a pervasive barrier to access to the courts for poor people. It is the underlying cause for most of their inability to access the courts. Its major impact is that it makes it impossible for the poor to hire lawyers and to acquire other resources which would assist them in accessing the courts.

17 The information on the Ombudsman is from the Ombudsman Act, 1982 as cited by Hatchard, J., "The institution of the Ombudsman in Africa with special reference to Zimbabwe" (1986) 35 International and Comparative Law Quarterly 255
The details of the colonial dispossession of the rural population’s land and the resultant land shortage and poverty have already been discussed. Urban poverty is also widespread in Zimbabwe.

Zimbabwe’s urban population is fairly small but the rate of urbanization is increasing rapidly due to overcrowding in the communal rural areas. Most of Zimbabwe’s semi-skilled and unskilled industrial workers earn wages which are below the level required for sustenance. Domestic workers (house cooks, housemaids, child minders and gardeners) also earn very low wages. They are the lowest paid workers in Zimbabwe.\(^\text{18}\)

The situation is worsened by increasing inflation which results in wages that fall behind the rate of price increases.\(^\text{19}\) Inflation is affecting lower income urban households disproportionately. In 1992 the inflation rate for lower income households was 47% as compared to 35.9% for higher income ones.\(^\text{20}\) Lower income urban households spent (in 1992) more than half of their incomes on food as opposed to 20% for higher income ones.\(^\text{21}\)

Low income workers (in industry, commerce, the public sector and the agricultural sector) are also being adversely affected by the retrenchments (lay offs) that are taking place in these sectors as a result of the economic structural adjustment programme required by the IMF and the World Bank.

The urban unemployed also constitute a part of the urban poor. Unemployment is rising in Zimbabwe. There are about 200 000 new entrants to the work force each year and the formal sector cannot create sufficient jobs for them.\(^\text{22}\) In fact, it is worsening the situation by shedding some of its workforce through retrenchments. Opportunities for self-

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\(^{18}\) In November 1995, the minimum wage for domestic workers (most employers pay minimum wages only) was Z$247 (approximately U.S.$27) per month. For commercial and industrial workers it was Z$585 (approximately U.S. $65).

\(^{19}\) ILO, “Zimbabwe: falling wages and rising unemployment, the negative side effects of structural adjustment” (1993) 132 International Labour Review 567 at 567.

\(^{20}\) Ibid. at 569.

\(^{21}\) Ibid.

\(^{22}\) Ibid at 567.
employment through the informal sector are also very limited and tend to produce very little income.

Poverty affects both men and women. However, the current socio-economic conditions tend to result in more poverty for women (both rural and urban).

Adams\textsuperscript{23} conducted some research on rural women in Masvingo province, Zimbabwe during 1986-1987. She found that there were economic and social differences between women particularly between women with male partners working in urban centres and single, widowed or divorced women. The former were more prosperous (due to remittances received) than the latter.\textsuperscript{24} Female headed households (with no absentee male partners) were poorer with less land. Some of them did not own any cattle or ploughs and worked as casual workers in the fields of others to earn cash.\textsuperscript{25}

Adams also surveyed female casual workers at Zimbabwe's largest agro-industrial enterprise (Triangle Ltd). She found that most of them were single (never married) with children and were so poor that they could not afford to live with their children. The children lived with relatives in the rural areas.\textsuperscript{26}

Jacobs\textsuperscript{27} did a survey of women in resettlement areas in three provinces (Mashonaland East, Mashonaland Central and Manicaland). Resettlement areas are former commercial farms which the government has purchased, subdivided and allocated to families on a lease (rent free) basis. Jacobs noted that land permits were being issued to men because they were deemed to be "household heads" by both the government and "popular opinion".\textsuperscript{28} Men had

\textsuperscript{23} Adams, J.A., "Female wage labour in rural Zimbabwe" (1991) 19 World Development 163

\textsuperscript{24} Ibid. at 165.

\textsuperscript{25} Ibid. at 167.

\textsuperscript{26} Ibid. at 170.

\textsuperscript{27} Jacobs, S., "Land resettlement in Zimbabwe : Some findings" (1991) 29 Journal of Modern African Studies 521

\textsuperscript{28} Ibid. at 522.
to be full time farmers. Women could be allocated land if widowed or divorced\textsuperscript{29}. Women who got divorced after settlement would lose their access to land allocated to the household. Some men were allocating their wives land for personal use. The mean holding of such portions was 1.2 acres out of a total household portion of 12 acres.\textsuperscript{30} Only 10\% of the wives surveyed owned cattle.\textsuperscript{31}

Women in the urban areas also experience poverty differently from men. Drakakis-Smith\textsuperscript{32} makes the following observation about women in third world economies (such as Zimbabwe's):

"Female participation in the wage economy of the formal sector...tends to be unstable, short-lived and poorly paid; in no way does it comprise a step up the socio-economic ladder."\textsuperscript{33}

Drakakis-Smith's survey of married women in three Harare suburbs showed that women from the poorest suburb were less likely to be engaged in remunerative work (both formal and informal). The few who were involved in economic activities in the informal sector "were very much at the marginal end of the petty commodity range of activities." They were involved in activities such as scavenging and recycling bottles from the garbage dump and sewing pillow cases from factory scraps.\textsuperscript{34} The informal remunerative activities of other women include petty trading in vegetables, poultry or knitted (crocheted) articles.\textsuperscript{35} These activities are unlikely to produce income which is sufficient for sustaining a family. Women married to wage earners use this income to supplement their husbands' wages.

\textsuperscript{29} Ibid.

\textsuperscript{30} Ibid. at 527.

\textsuperscript{31} Ibid.

\textsuperscript{32} Drakakis-Smith, D.W., "The changing economic role of women in the urbanization process: A preliminary report from Zimbabwe" (1984) 18 International Migration Review 1278

\textsuperscript{33} Ibid. at 1280.

\textsuperscript{34} Ibid. at 1287.

\textsuperscript{35} Ibid. at 1285
2. Duality/Plurality of the Legal System

As discussed earlier, the duality\textsuperscript{36} of the Zimbabwean legal system is a phenomenon which came about as a result of the colonization process. The duality of the legal system affects both the substantive and the procedural law. As indicated in the discussion of the legal needs arising from problems relating to child and spousal support, divorce and inheritance, and the earlier discussion in Chapters 2 and 3, the duality of the legal system affects both the nature of legal rights and the choice of fora for the effectuation of those rights. The former is mainly an issue of substantive law whilst the latter is mainly a procedural matter. There is obviously a dialectic relationship between the two which is illustrated by the fact that some of the changes to the substantive customary law are a result of judicial decisions which have expanded the ambit of legislation. For the majority of Zimbabweans generally, and poor Zimbabweans in particular, customary law is the system that they are most familiar with either through experience (as participants or as observers) or through information passed on by older relatives. The received law is more obscure. The media coverage of the received law tends to focus more on criminal law than civil matters. The earlier discussion of child and spousal support, seduction and inheritance illustrates the differences in values underpinning the customary law on one hand and the received law on the other.

Both the legislative and judicial reforms of customary substantive law are basically merely displacements of customary substantive law which substitute it with the received law as amended by statutes. As a result, the differences between the two systems become a barrier to knowledge of the substantive law to people who are more familiar with the customary law system which in turn becomes a barrier to access to the courts (for the beneficiaries of the "new" entitlements) because they cannot seek the enforcement of what they do not know.

The displacement of customary law also has procedural implications. These stem from the duality of the court system in Zimbabwe. The lowest courts in Zimbabwe’s hierarchical court structure are the primary courts and the local courts. These are the only courts whose jurisdiction is confined to matters governable by customary law. They are also

\textsuperscript{36} The official legal system is presented as dual with customary laws and dispute resolution institutions on one hand and those of the received law and statutes on the other.
the only courts that follow customary procedure in their proceedings. Customary procedure is much more simple than that of the received law (see discussion in chapter 1). Therefore in practice the displacement of customary law means that matters previously determinable by customary law and consequently within the jurisdiction of the customary law courts and their simpler procedure are now resolvable only by the courts applying the received law and with more complex and less accessible procedures. Therefore the duality of the legal system constitutes a barrier to access to the courts for the poor in Zimbabwe. The problem is compounded by the fact that, even for matters falling under customary law, the customary courts' jurisdiction is further restricted to claims where the monetary compensation sought or the value of property forming the subject matter of a dispute does not exceed five hundred Zimbabwean dollars in the case of a primary court or one thousand dollars in the case of a local court. Customary law based claims that are affected by this restriction will have to be taken to the other courts (the magistrates court or the High Court) but these courts are not required to apply customary procedure. Thus even the existing customary law is not always enforced through the most accessible courts.

The duality of the legal system and the lack of professional assistance make it imperative that poor people have access to information on the legal system.

3. Lack of Access to Information
a. Generally
Access to information on the legal system enables people to know their rights and obligations under the existing law. This is a matter of substantive law. The information should be more than a listing of rights and obligations. It should encourage the recipients to challenge the basic assumptions of the rights and obligations provided for by the law and lobby for desired change. This is particularly relevant in Zimbabwe where the received law was imposed on the indigenous population without any dialogue. Furthermore, the need to preserve local culture has in some cases, resulted in a traditionalist attitude towards customary law which opposes any changes despite the changing socio-economic and political environment. A full discussion of the issues involved in a critique of the substantive laws (particularly the interaction of customary and received laws) in Zimbabwe has already been undertaken in Chapters 2 and 3. It suffices in this case to emphasize that there is a need for information on
the substantive law which addresses people from their experiences and perceptions of the dichotomy between customary law and the received law.

The underlying concepts of the traditional customary law have to be made explicit and critiqued in the light of changing political and socio-economic conditions particularly with regard to the status of women. The changes to traditional customary law that have already occurred through law reform (legislative and judicial) must be explained in terms of the changes in the political and socio-economic conditions and with regard to the status of women rather than simply stated ahistorically and without analysis.

There is also a need for similarly analytical material on those areas of law for which customary law did not develop solutions (due to its development in pre-industrial societies) such as labour laws and consumer laws.

Information on existing entitlements is necessary to enable poor people who have suffered legal wrongs to identify them as legal wrongs, apportion blame and transform the blame into a legal claim. This is particularly crucial in Zimbabwe because of the general absence of the assistance of lawyers. If lawyers were available, it would be possible for poor people to approach them and tell their stories in their own way and then ask the lawyers to advise on whether or not there was a legal case and if so, what could be done about it. The conduct of the actual court proceedings would also be left to the lawyers. Most of the poor people in Zimbabwe do not have all of these opportunities. This means that information on legal issues should include not only substantive law issues, but procedural ones as well. The challenge to provide information is also compounded by the duality of the legal system. Without the requisite information, poor Zimbabweans face an insurmountable barrier to access to the courts.

The information gap is not unnoticed in Zimbabwe. The Legal Resources Foundation produces information pamphlets on various aspects of the legal system particularly those in which there have been various changes (child and spousal support and inheritance). In addition a non-governmental organization known as Women and Law in Southern Africa Research Trust (WLSA) undertakes empirical research on various substantive law matters in collaboration with researchers from other countries in the region (Botswana, Lesotho, Mozambique, Swaziland and Zambia). To date, the researchers have studied the laws relating to child and spousal support and inheritance. Each country produces a country
report and a regional report is also compiled. The research methodology adopted by the Zimbabwean researchers from WLSA is relevant to the issue of access to information. The researchers have conducted group discussions in diverse communities in which the participants are informed of the current law and encouraged to comment on it. Specific legal needs of the discussants are also identified and the affected people are referred to the appropriate agencies for assistance. The results of completed research are used to lobby for necessary changes.

b. Illiteracy and lack of access to information

In considering lack of information as a barrier, one has to take into account the problem of illiteracy. A significant proportion of people in Zimbabwe are illiterate. It can be assumed that most of these are poor people since the rest of the population can afford the costs of education. Of those who can read and write, some are more proficient in the indigenous languages than in English. (More details on illiteracy in Zimbabwe are provided in the discussion of language (below)). This makes it imperative to produce material in forms other than in print (for those who are illiterate) and in the indigenous languages (for those who are more proficient in indigenous languages). Non-print methods for the dissemination of information include group discussions (such as the ones conducted by WLSA researchers), drama/theatre (particularly through community drama/theatre groups) and the use of the electronic media. The use of the electronic media is the least effective because very few poor people have access to radios and even fewer of them have access to televisions. All these methods are being utilized on a small scale. What is needed is a more widespread and systemic (perhaps more coordinated) approach to ensure the majority of poor people in Zimbabwe have access to information on the legal system.

4. Procedural Barriers

This section deals with the barriers that the poor in Zimbabwe are likely to encounter once they have been able to identify a problem as legal. These barriers are unique to the non-custodial courts in Zimbabwe. The customary courts have simpler procedures. The procedural barriers in the non-custodial courts include lack of advocates in an adversarial system, complex procedural rules, and lack of adequate access to non-judicial court officials.
a. Lack of advocates in an adversarial system of adjudication.

Although the received substantive law in Zimbabwe is based on the Roman-Dutch common law, the procedural law is based on the English system. The procedure in the magistrates, High and Supreme courts is adversarial. The adversarial system of procedure has been linked to a laissez faire socio-economic policy which is associated with classic liberalism.  

Brooks defines the adversarial system as "a procedural system in which the parties and not the judge have the primary responsibility for defining the issues in dispute and for carrying the dispute forward through the system." This is a summary of the three main ingredients of adversarial procedure, namely, party autonomy, party-prosecution and judicial impartiality.

The concept of party autonomy means that the parties to a dispute have the right to pursue or dispose of their legal rights and remedies as they wish. According to Thibault and Walker, party autonomy is essential for just results because it gives the parties more control over the process, thus enabling them to "present their claims from their own perspectives and particularities and contexts." This contention ignores the fact that there is a constraint imposed upon the framing of legal disputes by both the substantive and the procedural law and the resources available to the parties. Therefore the parties' freedom to frame their claims as they wish is not unlimited. Brooks observes that rules that allow judges to summarily dismiss claims or defences that they deem to be without merit encroach upon party autonomy.

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38 Ibid. at 91.

39 Ibid. at 93ff.

40 Ibid. at 93.


42 Brooks, supra, note 37 at 94-5.
The principle of party prosecution requires that the conduct of the litigation up to the point of trial be left entirely in the hands of the parties. It further requires that evidence at the trial be elicited by the parties adversarially questioning witnesses and that the judge refrain from questioning or calling witnesses unless it is absolutely necessary to do so in order to clarify unclear evidence. A strict adherence to party prosecution would also mean that, where the rules of court are not complied with, no sanctions will be imposed on the party in default except at the request of opposite party.

 Judicial impartiality requires that the judge should not have any personal interest in the matter to be adjudicated upon by him or her. The judge must also refrain from active participation in the adjudication until the parties have presented all the evidence at trial. This is supposed to prevent premature judgment.

 The adversarial system of adjudication is premised upon several assumptions. Firstly, it is assumed that disputants are rational competent actors who actively pursue their self-interest. Secondly, there is an assumption that the disputants have access to the resources (money and power) which would enable them to exercise their chosen options. Thirdly, it is premised upon the disputants having access to lawyers. It has been acknowledged that:

 "[w]here there is no legal representation, and save in the exceptional case of the skilled litigant, the adversary system, whether or not it remains in theory, in practice breaks down."  

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43 Eggleston, R., "What is wrong with the adversary system?" (1975) 49 Australia Law Journal 428 at 429.

44 Ibid.


46 Resnik J., "Failing faith: Adjudicatory procedure in decline" (1986), 53 University of Chicago Law Review 494 at 513. See also Brooks, supra, note 37 at 98.

47 Ibid.

A final assumption of the adversarial system is that a competitive presentation of the parties' claims or defences is the best way to achieve correct results. The parties' self-interest and the resultant possibility of them suppressing "undesirable" evidence is supposed to "check and balance" each other.49

None of these assumptions have been proven to be true with respect to Zimbabwe. In fact, it has been demonstrated in the previous discussion that poor people in Zimbabwe lack adequate access to information and sufficient resources to hire lawyers. The lack of information seriously inhibits their ability to make choices to pursue their legal rights and entitlements. The concept of party-autonomy does not mean much to them. The problem is worsened by the lack of resources. The adversarial system's reliance on lawyers means that poor Zimbabweans have no effective access to the courts that apply it.

There are objections to the adversarial system of procedure on both substantive and procedural grounds. In relation to the former, the assertion that the system leads to more "correct" results has been challenged.50 The adversarial system has also been criticized for its over-emphasis on procedural process rather than substantive outcomes. Referring to it as the "conflict solving process", Damaska opines that it "values fairness above justice."51 "Fairness" in this context means treating the parties in the same way procedurally despite the differences in wealth and power. Inequalities which spring from sources other than "abstract" procedural rules are not taken into account.52 When procedural rules are contextualized, it will be apparent that the adversarial system does not produce just results both substantively and procedurally. The link between substantial outcomes and procedure is not always direct but it cannot be denied that some substantive outcomes are distorted by inappropriate procedures.

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52 Ibid. at 106-107.
In Zimbabwe, one can argue that the adversarial system of procedure produces unfair substantive outcomes because poor people are unable to utilize it to effectuate their substantive legal entitlements. It has also been argued that the adversarial procedure is alienating. It is difficult to draw conclusions as to whether this is true of the poor in Zimbabwe but it can tentatively be argued that, for those who are aware of the adversarial system's complexity and their inability to utilize it, the frustration with the system can result in alienation. Also, for those in favour of the simpler customary procedure, the adversary system may seem to introduce unnecessary complexity.

b. Procedural complexity

The procedure in the non-customary courts of Zimbabwe is not only adversarial. It is also complex. It requires the filing of several formal pleadings and notices (by both parties) such as summonses, notices of intention to defend (referred to as "appearances to defend" in the procedural rules), pleas, notices with regard to discovery of documents and others. There are other equally complex rules dealing with pre-trial motions. The rules also require the parties to attend formal pre-trial conferences. Then there are rules dealing with the procedure at trials including such matters as the calling, examination and cross-examination of witnesses and the presentation of argument. Failure to observe any of these complex rules may be detrimental to a disputant's claim or defence. These rules are so complex that even legally trained lawyers sometimes fail to properly grasp them. The position of self-actors would be worse.

Information obtained from court records in the Harare magistrates court indicates some of the problems that poor people might experience in trying to deal with the adversarial system in that court and also with procedural complexity in general. The data from the records is insufficient to make any scientific analysis and draw conclusions. A search of more than 20,000 records from the year 1991 revealed only seven contested cases in which self-actors were involved. It will be used merely for purposes of illustration in this discussion. A cautionary note must also be added. The records studied were those of cases

53 The relevant rules of court procedure are generally contained in the Magistrates Court (Civil) Rules, (Statutory Instrument 290 of 1980) and the High Court Rules (Rhodesia Government Notice 1074 of 1971).
involving self-actors either as plaintiffs or defendants. Self-actors are not necessarily poor people but it is contended that their difficulties in attempting to conduct their own litigation give an illustration of the kind of problems that poor people would face if they attempted to do the same due to their inability to hire lawyers.

Self-actors have problems understanding and applying the procedural rules. Where the other side is represented, lawyers seem to insist on procedural compliance to the detriment of self-actors. In two cases the plaintiff's lawyers sought to challenge defendants' notices of intention to defend the proceedings (known as "appearance to defend" in the court rules) on the basis that the defendants had failed to provide an "address for service" within 15km of the courthouse as required by the rules. This was despite the fact that alternate addresses were provided by the defendants. The defendants were saved from having their defence dismissed on a technicality by a rule which required the lawyers to first give them notice of the defect and an opportunity to rectify it. The defendants rectified the defects in response to the notices but in one case the lawyers actually complained when the clerk of court pointed out that they have to give the requisite notice. They wanted judgment on the basis of the defect.

All of the cases studied indicate that self-actors do not know how to plead. Their "pleadings" are conversational instead of being framed in the language that lawyers would use. For example a lawyer would refer to "the plaintiff" or "the defendant" whereas self actors are most likely to say "you" or refer to the party by name. The self-actors' pleadings also include a lot of irrelevant material. They seem to be unaware of the fact that pleadings are a preliminary stage which is meant to provide only the basic allegations of each party. As a result of these irrelevances one of the self-actor defendants' plea was challenged by the plaintiff's lawyers by way of motion on the basis that it contravened a procedural rule which provides that pleadings should not be "vague and embarrassing" or "argumentative". However in cases where both parties were self-actors, the failure to comply with the requirements of pleading was not challenged. In one case (a claim for adultery damages by a married woman against another married woman) the defendant seemed to be unaware of the nature of the proceedings. She stated in her "plea": 
"--- I was never found in bed with plaintiff's husband. You came to my house and broke my property. Why did you not go and make a report to the community court..."\(^{54}\)

and

"This case should have been reported to the courts if that was the case (i.e. if she had committed adultery) so that I could answer the allegations."

It is apparent that she was not aware that the pleadings were a part of placing the matter" before the courts" (the magistrates court in this case). This quote also demonstrates the conversational style discussed earlier.

Interviews\(^{55}\) with magistrates who have handled civil cases involving self-actors illustrates similar problems. One magistrate who has been handling civil cases since 1982 indicated that he had never (as of April 1995) tried any civil case in which both parties were self-actors. The more usual scenario was a situation where the other party was represented. He opined that this was because self-actors do not know how to prosecute their cases beyond the initial filing of the claim and defence.

According to all the magistrates, self-actors facing legally represented opponents are often unable to pursue their claims or defence up to the trial stage because the lawyers file motions on technical procedural issues which the self-actors fail to adequately respond to resulting in the dismissal of their claims or defences. The magistrates stated that they try to explain the technical requirements to the self-actors and give them more time to comply but they cannot do so where the opponent’s lawyers insist on immediate judgment (as they are entitled to under the rules of court procedure). Furthermore they advise self-actors to seek legal assistance and inform them of organizations that provide legal aid.

The precarious position of self-actors in the magistrates court in Zimbabwe makes it clear that poor people cannot utilize these courts effectively without legal assistance. This is due to both the adversarial nature and the complexity of the procedure. It can therefore be

\(^{54}\) A predecessor of the local court (with some jurisdictional differences). See chapter one.

\(^{55}\) Unstructured interviews with three current magistrates and one former magistrate conducted in April 1995.
concluded that there are procedural barriers to access to the courts for the poor in Zimbabwe.

c. Access to Court Officials Other than judicial Officers

Apart from interpreters and judicial officers, the other court officials that litigants in Zimbabwe deal with are the messenger of court and the clerk of court in the magistrates court and, in the High Court, the Sheriff and the Registrar. The Sheriff acts through a Deputy Sheriff. The messenger of court is responsible for the delivery of court documents that are regarded as "court process". "Court process" means documents which need to be issued (i.e. signed and officially stamped) by the clerk of court in order to be valid. These include all summonses, warrants and subpoenas. The messenger of court charges fees for his services. There is no provision for the exemption of anyone from paying the fees of the messenger of court. This is because the messenger of court is a private individual who contracts with the government to provide the service. The government could assist litigants who cannot afford the messenger of court's fees by paying for them itself but so far there has been an unwillingness to take this step. The messenger of court's fees can be quite substantial particularly in cases involving the enforcement of judgements by warrants of execution against property. The messenger of court attaches the property, removes it, stores it and then sells it by public auction. He is entitled to recover his costs from the proceeds of the sale but he normally requires a surety from the person seeking enforcement (in case the proceeds realised are not sufficient to cover his costs) and indemnity against liability in the event of third party claims arising from the attachment and sale of the property. In cases in which lawyers are involved, a written undertaking from the lawyers is sufficient but self-actors have to pay a cash deposit. This causes hardship for those who are unable to pay. Thus poor people in Zimbabwe may find themselves unable to pursue their claims to the very end (i.e. enforcement of judgment) due to lack of financial resources. The Deputy Sheriff operates on the same basis as the messenger of court with regards to proceedings in the High Court.

56 Currently there are no female messengers of court in Zimbabwe.
The clerk of court is, as already stated, responsible for the issuing of all court process. He or she is also responsible for providing assistance to pro deo litigants by writing out for them all the required documentation without charge.\(^57\) However, as pointed out in the discussion of legal aid, this assistance is hardly required in practice because of the lack of utilisation of the relevant provision in the rules of court procedure. With the exception of this provision, the clerk of court is expressly prohibited from writing any documents for any party to litigation. In practice, this rule is strictly construed and officials in the clerk of court’s office refuse to give any assistance other than issuing process although they sometimes refer people to legal aid organisations. In the office of the clerk of court of the Bulawayo magistrates court, the address of the Bulawayo Legal Projects centre is prominently displayed. The clerk of court’s office is the office that many litigants who cannot afford lawyers are likely to turn to for assistance and yet, at the present moment, they have nothing to offer these litigants. Even referrals to appropriate organisations are not always given. The office also operates within the normal working hours (generally 8:30 am to 4:30pm) and is closed during lunch hour. In contrast, the messenger of court can deliver court documents on any day and at any time except between 10 pm and 6am. There are two exceptions. Firstly, a warrant for civil imprisonment may be effected at any time but may not be effected on Sunday, Christmas day or Good Friday unless a magistrate orders otherwise.\(^58\) Secondly, delivery by post, telegraph, telefacsimile or courier may be effected at any time. People who receive court documents after working hours will have no means of consulting the clerk of court if they wish to do so immediately. The clerk of court must be more accessible.

5. Language As a Barrier to Access

Apart from the barriers to access to the courts described above, language also constitutes a barrier to access to the courts in some cases. The official languages in Zimbabwe are Shona, English and Ndebele with English being the dominant one. English is the language of instruction in all schools and it is the language used in most official

\(^{57}\) Order 5 Rule 3 (c) of the Magistrates Court (Civil) Rules, 1980.

\(^{58}\) Order 28 Rule 5 (a) of the Magistrates Court (Civil) Rules, 1980.
communications. Shona and Ndebele are often used in conjunction with English when used in an official communication. Seventy-five percent of Zimbabwe's population speak Shona as their mother tongue. Shona is a generic term for several dialects (Karanga, Zezuru, Manyika, Korekore, and Ndau) which are intelligible to one another in varying degrees. However, the Shona used in official communications is usually almost exclusively Zezuru. Fourteen percent of Zimbabwe's population speak Ndebele as their mother tongue. Five percent speak Kalanga. Ndebele speakers can understand Kalanga speakers and vice versa. Four percent of Zimbabwe's population speak other indigenous languages as their mother tongue. These are Tonga, Venda and Shangaan.  

a. Language and Literacy

Written communication presents problems for Zimbabweans who are illiterate. According to the Adult Literacy Organization of Zimbabwe (ALOZ), the last literacy survey in Zimbabwe was carried out by the Ministry of Education soon after independence in 1980. The results indicated that there were between two and half to three million illiterate adults in Zimbabwe at that time. Sixty percent of the illiterate adults were female and forty percent were male. There was more illiteracy in rural areas than in urban areas. The worst affected areas were commercial farms. An ALOZ official explained that the reason for the high illiteracy rate on commercial farms was because most of them are privately owned and therefore the government and other local authorities who were responsible for the construction and maintenance of schools could not establish schools on the farms without the consent and cooperation of the farm owners. The situation has not changed to date. Some commercial farmers have established schools on their farms for the benefit of the farm workers but these are generally poorly maintained and fail to attract qualified teachers.

ALOZ carries out an adult literacy training programme in Zimbabwe. The organization is a non-governmental organization which was founded in 1962. It was known

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60 Interview with ALOZ officials.

61 Ibid.
as the Adult Literacy Organization of Rhodesia (ALOR) at that time. The ALOZ programme involves the training of adult literacy tutors who are employed by industries, mines, commercial farmers, urban communities, churches and other non-governmental organisations. ALOZ also produces the materials that are used in adult literacy classes. The work of ALOZ has expanded significantly since 1980. Therefore it can be assumed that there might be less illiteracy now than there was at that time. Another factor that might have reduced illiteracy (among those who became adults after 1980) is the government's expansion of the education of children through the construction of more schools, training of more teachers and the provision of financial assistance to parents who cannot afford the costs of sending their children to school. However, this expansion has now stopped and the progress made is being threatened by the cuts to government spending (including spending on education) which are being made under the Economic Structural Adjustment Programme (ESAP) endorsed by the IMF and the World Bank.

Accessing the legal system in Zimbabwe involves dealing with written material in the form of legislation, court documents and procedural rules. People who are illiterate are paralysed by their inability to access this material. To them, illiteracy is a barrier to access to the courts.

Language presents another problem in Zimbabwe due to the multi-lingual nature of Zimbabwean society. Apart from documents and proceedings in the customary courts, all documents and proceedings in Zimbabwean courts are in English. This presents problems for people who do not read or understand English and for those who are more proficient in languages other than English. In relation to documents, these people have to rely on the interpretation of lawyers (if they can afford to hire them) or, most likely, family, friends or other non-expert helpers. There is no doubt that this causes frustration and hardship. Moreover, the competency of the non-expert helpers cannot be guaranteed.

b. Language and interpretation in the courts
For the actual court proceedings, people who are not conversant with the English language can get the services of official court interpreters. In Zimbabwe, court interpreters are required to be fluent in at least three languages one of which must be English.\(^{62}\)

They receive in-service training and sit an examination but receive no certificates upon passing the examination.\(^ {63}\) Most interpreters are proficient in Shona, Ndebele and/or Chichewa\(^ {64}\) apart from English.\(^ {65}\) The use of interpreters in Zimbabwean courts raises some problems including the following:

1) Interpreters do not have sufficient understanding of the court procedures to be able to adequately explain them to the party who needs interpretation.
2) Interpreters do not have sufficient training to deal with technical language including legalese.
3) Interpreters are sometimes not aware of the socio-linguistic complexities in Zimbabwe e.g. the same word may have different meanings in different Shona dialects. One such word is the word “kunyenga”. In Zezuru it means "to make a proposal of marriage" but in Korekore it means "to have sexual intercourse".
4) Sometimes it is difficult for interpreters to translate informal language such as slang and idiomatic expressions.\(^ {66}\)

All the above problems may affect the quality of service offered by court interpreters to the disadvantage of the people using their services.

Interpreters also present problems if they do not maintain neutrality. They may become biased against a party to the court proceedings and the bias may affect the quality of their interpretation. They may also feel that a witness is being verbose and try to do their own sifting to separate the "relevant" from the "irrelevant". The result may be an incomplete account of what the witness intended to say which may affect the outcome of the proceedings.


\(^{63}\) Ibid.

\(^{64}\) A language spoken mainly by Malawian immigrants.

\(^{65}\) Mparutsa and Feltoe *supra* note 62.

\(^{66}\) Ibid.
c. Legalese

Sometimes language is a problem because the language used is not ordinary language. This complex legal language has been referred to by various writers as "legalese". Legalese is characterized by, among others, the following features:

1) The use of archaic, obsolete English words such as "aforesaid, forthwith, hereafter, herein, hereof, heretofore, herewith, thence, thenceforth, thereabout, therein, thereto, theretofore, thereupon, therewith".

2) The use of Latin and sometimes, French words to express a rule, principle or doctrine e.g. bona fide, ab initio, ex parte, mandamus, nulla bona, res judicata.

3) The corruption of English words having a commonly understood meaning by assigning to these words an unusual and purely legal meaning e.g. "save" meaning "except", "said" meaning "mentioned before", "serve" meaning "deliver legal papers", "without prejudice" meaning "without loss of any rights".

4) The use of unnecessary formal expressions such as "wherefore defendant prays.....".

5) Wordiness e.g. "annul and set aside" instead of simply "annul".67

Several justifications for the use of legalese have been offered. Legalese is seen by some as a way of enhancing lawyers' professional identity and distinctness. It is argued that:

"To function as a profession, every group of practitioners needs its own symbols, rituals and practices to set it apart from the rest of the world."68

Friedman also supports legalese as a way of enhancing professional identity. He claims that:

"Specialized training and skill in a learned art are signs of professional status, and law is primarily a verbal art, its skills verbal skills."69


68 Ludlow L., "Legalese" (1990) 47 Etc 257 at 259 quoting Goldstein and Lieberman.

Mellinkoff, who criticises legalese, is of the view that it is merely ritualistic and symbolic when used in court proceedings. He sees legalese as "instilling respect for the process of law and misleading no one" when used in court proceedings.\textsuperscript{70}

Another justification for the use of legalese is that it provides precision which eliminates litigation caused by ambiguity:

"Overblown language is seen as a way to slap paper over loopholes. Legalese is defended as professional shorthand."\textsuperscript{71}

Aiken argues that legalese must be maintained because it is the best way of conveying technical meanings.\textsuperscript{72} Friedman supports this view by arguing that: "Some Latin terms like "res gestae" and "res ipsa loquitur" are difficult to convert into manageable English".\textsuperscript{73}

There have been several criticisms of legalese and of the attempts to justify it. It cannot be contested that legalese is a problem for lay persons in that it makes it difficult for them to understand legal documents and proceedings. It impedes their ability to gain access to legal information. The only way they can gain access to legal information in legalese is through lawyers. This creates a relationship of dependency. It also creates problems for those who do not have the resources to hire lawyers. The use of legalese effectively denies these people access to legal information which is necessary for them to defend their legal entitlements in court. This is particularly true of the vast majority of poor people in Zimbabwe because of the lack of comprehensive legal aid. As Rose and Scott aptly observe:

"Summon forms, written in a language and style familiar only to lawyers, are confusing and often totally unintelligible to their lay recipients."\textsuperscript{74}

\textsuperscript{70} Mellinkoff, \textit{supra} note 67 at 447.
\textsuperscript{71} Ludlow, \textit{supra} note 68.
\textsuperscript{72} Aiken R.J., "Let's not oversimplify Legal Language" (1959 - 60) Rocky Mountain Law Review 358 at 364.
\textsuperscript{73} Friedman, \textit{supra} note 69.
\textsuperscript{74} Rose J.I. and Scott M.A., "Street Talk Summonses in Detroit's Landlord and Tenant Court: A Small Step Forward for Urban Tenants" (1975) 52 Journal of Urban Law 967 at 983.
Although the authors are writing about a study carried out in the United States of America, there is nothing to suggest that Zimbabwean recipients of court documents in legalese would be in a different position. The implication of this inability to understand court documents is that all the guarantees and entitlements given to people who are parties in court proceedings are rendered useless in respect of those who are unable to hire lawyers.

Lawyers may attempt to justify legalese on professional grounds as pointed out above, but there is no doubt that it creates injustice. It is "a symbol and a tool of power, creating dependence and ignorance on the part of the public." Lawyers have a self-interest in maintaining legalese because it guarantees them a clientele. People who can afford it will have no choice but to consult lawyers when faced with legal documents and/or proceedings which they cannot comprehend. It also shields the lawyers from being accountable to their clients. It is difficult for a client who does not understand the document and/or proceedings to question the lawyer's interpretation, advice and actions. For those who cannot afford to hire lawyers, the lawyers' insistence on legalese becomes more problematic. Firstly, it enables them to take advantage (on behalf of their paying clients) of the unrepresented poor people. Secondly, where both parties are unrepresented, it unnecessarily complicates proceedings in which the lawyers have no interest. In these two instances, legalese is an undesirable barrier to access to the courts whenever court proceedings are involved.

The argument that legalese is necessary as a form of "verbal art" for lawyers has been aptly criticized by Hager:

"...[law] deals with the ordinary day-to-day events and occurrences. For these, law does not need Latin and French words; it does not need unusual definitions for ordinary English words; and it does not need obsolete terms and phrases. The language of the law should be as dynamic as the society which law seeks to serve."

This is more so where the reality is that the law may be utilised by lay persons without the assistance of lawyers such as is the situation in present day Zimbabwe.

76 Friedman, supra note 69 at 567.
77 Hager, supra note 67 at 83.
Finally, on language, the argument that legalese is more precise than ordinary language cannot be sustained. It is trite that there is litigation that centres on the meanings of words and phrases that are contained in legal documents. The use of legalese does not preclude such litigation.

6. Geographical Barriers
Access to the courts does not only entail access to legal information, advice, assistance and resources. It also involves access to the actual courthouses. In Zimbabwe (as discussed earlier in Chapter 2), the court structure is pyramidal with more courts at the lower level and fewer at the higher level. There are thousands of primary courts (i.e. headmen’s and chiefs’ courts) although these are not always held in actual courthouse buildings but may be held in homes, public buildings and any other convenient places. In comparison, there are only two places where the High Court sits although each place has more than one courtroom. The Supreme Court sits only at one place in one courtroom. Most litigants who wish to utilize courts other than primary courts will have to travel considerable distances. This is particularly true of rural litigants because all the magistrates courts, the High courts and the Supreme Court are situated in semi-urban and urban centres. Travelling costs money and, for those with limited financial resources, the costs might be prohibitive. The availability of reliable public transportation is also a factor to be considered in Zimbabwe where the majority of the population does not own private motor-vehicles. The quality of the transport infrastructure is also a factor to be considered. Some rural areas are inaccessible by road or rail. In urban areas, geographical accessibility is also a factor although to a much more limited extent. Courthouses are generally situated far from residential areas. This means that residents of urban centres would still have to commute to courthouses and issues of the availability, reliability and cost of urban transportation have to be considered. Public transportation in Zimbabwe’s urban centres is mainly unsatisfactory. The service is generally unreliable (no set timetables). The cost (generally two Zimbabwean dollars per one way journey\textsuperscript{78}) might also be a hindrance to a person without any or with limited financial resources.

\textsuperscript{78} As at January 1996.
7. Social distance between poor people and judicial officers

Gundersen\textsuperscript{79} defines social distance as "the manner in which judges can be distinguished from other members of the community in terms of occupation, age, education, sex and social class and the way in which the judicial process may be distinguished in terms of surroundings, degree of specialized knowledge, and a distinctive knowledge and mode of reasoning."\textsuperscript{80} The manner in which the judicial processes in Zimbabwe are distinguishable in terms of the factors enumerated by Gundersen has already been indirectly covered by the above discussion. This section is concerned with the social distance between judicial officers and poor people in Zimbabwe.

In the customary courts, poor people are faced with judicial officers who are hereditary leaders (i.e. chiefs and headmen). The judicial officers are also male and elderly. These differences may affect the way in which poor people interact with these judges.

In the non-customary courts the social distance may be even greater. The judicial officers are all legally trained, well-educated, middle class urbanites. They may even be of a different race, culture, or speak a different language. The judicial officers in non-customary courts are of diverse ages and sex although they tend to be younger in the magistrates court and predominantly male in the High Court.\textsuperscript{81} The differences may affect the way in which the judicial officers can understand and empathize with poor people. However, some of the indigenous judicial officers either grew up in poor urban neighbourhoods or in the communal rural areas. This experience may help to bridge the gap between them and poor people.

\textsuperscript{79} Gundersen, A., "Popular Justice in Mozambique: Between State and Folk Law" (1992) 1 Social and Legal Studies 257

\textsuperscript{80} Ibid at 262.

\textsuperscript{81} The current Supreme Court judges are all male.
CHAPTER FIVE: LOOKING TO THE FUTURE

A. Introduction

This chapter concludes this thesis by examining possible ways of resolving the problems that have been highlighted. In summary, earlier discussions and analyses in this thesis have demonstrated the following:

a) Poor people in Zimbabwe lack access to justice (which is conceptualized as both substantive and procedural justice).

b) Access to justice in Zimbabwe must be understood in the socio-economic, cultural, political and legal context in which poor people (and Zimbabweans in general) live which in turn can only be properly understood in its historical context including colonization and its impact.

c) Zimbabwean society is characterized by legal and cultural pluralism which has resulted in conflict and interaction between the various laws and cultural practices. This pluralism has sometimes compounded the problem of lack of access to justice although indigenous systems themselves are not free from the problems of injustice particularly in the area of gender relations.

The first and second parts of this chapter deal with the problems of reforming the customary laws and practices particularly in the light of legal and cultural pluralism. A process of cultural dialogue is suggested. The third part deals with procedural reforms in the non-customary court system to ensure better access by poor litigants. The final part is a general conclusion to this thesis.

B. Reforming Customary Laws and Practices

The previous analyses of customary family laws (chapters 1 and 3) have demonstrated that there are areas in which these laws are discriminatory against women. Although this discrimination affects women of all classes, it is experienced more acutely by poor women because they are the ones least likely to take advantage of the reforms introduced by the received law and statutes. This is due to several factors, including poor women's greater economic dependence on men and their lack of formal education. The current legal system in Zimbabwe allows for the operation of some of the discriminatory customary laws as part of the official pluralism which recognized customary laws which have not been overruled by statutory law as part of the legal system. The question that arises, from an access to justice perspective, is whether this pluralism should be maintained.
1. Should pluralism be maintained?

a. The population’s sense of justice.

Bennett’s view on this question is that law reform should not violate the population’s sense of justice.¹ Ssekandi is of the view that customary law cannot be abolished because:

"Its efficacy does not depend on statutory provision. Customary law is indigenous to our soil and flourishes and will continue to flourish whether or not attempts are made to kill it...."²

Neither Bennett nor Ssekandi specifically addresses the situation in Zimbabwe in the writings cited above.³ However, Bennett does address the problem of pluralism in Africa generally. Unlike Ssekandi, Bennett also specifically addresses the question of the status of women under customary law. His views on this question are discussed below.

In the Zimbabwean context, one must address the question of whether or not the state should interfere with customary family laws if such interference is perceived as violating the population’s sense of justice. The indigenous population of Zimbabwe has, as outlined previously in this thesis, been subjected to a process of colonization and imposition of alien laws in the past. Should the new democratically established state seek to change indigenous laws, there might be a perception that it is following the same process as the colonial administration. However should such objections be made, they would need to be carefully analyzed. In particular, it would be important to know who is objecting and why. The status quo in discriminatory customary family law favours men. If the objections come mostly from men, and most women support the process of change, then the women’s views must be taken more seriously because they are the ones who currently bear the disadvantages. It is acknowledged that some women might have internalized the patriarchal norms of customary laws. Others may value their kinship ties to such an extent that they

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³ Bennett’s other writings discuss Zimbabwe e.g. his book, The Application of Customary Law in Southern Africa: The conflict of personal laws (Cape Town: Juta and Company, 1985)
will not risk losing them by questioning customary norms. Their preference of kinship ties to justice must not be a result of constraining factors such as economic dependence.

b. Customary law and international human rights standards

A more compelling reason for the state to intervene is provided by Bennett. He argues that international human rights instruments can be used to justify the state’s intervention. Harries also observes the importance of the norms articulated through international human rights instruments, such as the Convention on the Elimination of All Forms of Discrimination Against Women in outlining standards and setting normative goals which signatory countries are to adhere to in their legal systems, including customary substantive laws. She also observes the importance of international human rights norms to women’s groups within countries in which discriminatory customary laws are operational. They can use them to lobby their own governments for change as well as gain international support for their cause.

The problem with using international human rights instruments is that the norms incorporated in them might be rejected as being culturally alien. Nhlapo makes this observation and notes particularly that equality for women is one of those norms likely to be regarded as alien by some indigenous African people. Nhlapo argues that this objection no longer holds in the African context because of the African Charter on Human and People’s Rights which was drafted by indigenous Africans (and accepted by most African states) and

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4 supra, note 1.

5 Ibid at 133.


7 Ibid. at 507.

8 Ibid.

9 Nhlapo, R.T., "International protection of human rights and the family: African variations on a common theme" (1989) 3 International Journal of Law and the Family 1

10 Ibid. at 4-5.
also reinforces the notion of human rights in general and women’s equality in particular.\textsuperscript{11} He offers a possible solution to the rejection of international human rights norms by suggesting that they be interpreted in a manner which seeks to reconcile them with positive local cultural values. This requires an in-depth study of local cultural values in order to identify the positive and reconcilable values.\textsuperscript{12}

Zimbabwe is a signatory to most international human rights instruments including the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Convention on the Elimination of all forms of Discrimination against Women, the Convention on the Rights of the Child and the African Charter on Human and People’s Rights. The obligations imposed upon Zimbabwe by these instruments should be effectuated in domestic law including customary law.

After acknowledging that the "equality clause" in the Bill of Rights in South Africa’s interim constitution which guarantees "equality before the law and equal protection of the law" and protection against discrimination on the grounds inter alia of "race, gender, sex", threatens customary law because of its "patriarchal principle", Bennett proceeds to argue that customary law should be used to achieve the ultimate goal of human rights. According to Bennett, this ultimate goal is human dignity. He argues that customary law should therefore not be abrogated by the equality clause.\textsuperscript{13} In other words, cultural relativism must be accepted. However, he seems to qualify that acceptance because he proceeds to recommend the abolition of specific discriminatory customary laws through the application of the equality clause, particularly its horizontal application.\textsuperscript{14} The laws that he recommends for abolition include the laws limiting the legal capacity of women and laws that restrict divorce and proprietary rights for women.

Bennett’s discussion of the South African interim constitution reveals how provisions

\textsuperscript{11} Ibid. at 6 citing Article 18 (3) of the African Charter.

\textsuperscript{12} Ibid. at 18-19.

\textsuperscript{13} Bennett, T.W., "The equality clause and customary law" (1994) 10 South African Journal on Human Rights 122 at 123.

\textsuperscript{14} i.e. application between private parties as opposed to application between the state and a private party.
in the Bill of Rights can be used as standards for judging customary laws. In the Zimbabwean context, the possibility of removing the exemption of personal laws, including family laws, from the anti-discrimination provision should be examined.

c. Deconstructing "culture" and customary law

A further way of dealing with possible resistance to change to customary family laws based on cultural defences is to deconstruct the concept of culture. As Weinrich points out when opposition to law reform (and other changes) is presented in terms of cultural preservation, one needs to ask "Which culture?"15 As pointed out in earlier discussions (chapters 1 and 3), Zimbabwe's indigenous societies have been transformed by changes in the political, socio-economic, and legal spheres. None of these factors remains as it was in pre-colonial Zimbabwe and culture has changed with them. Culture is dynamic and not static. The question is who defines culture and how is it defined?16 In terms of the debate on customary family laws those who benefit from the status quo, tend to present culture as immutable. The reality is otherwise. In respect of the law itself, (as discussed earlier) there is even doubt on the extent to which the current customary law reflects the values of the traditional customary law. For example, it is now being argued that women have no right to own property under customary law despite the fact that traditional customary law permitted them to own property acquired through their own efforts and the motherhood cow and its progeny. The latter was subject to restrictions because of its link with ancestral spirits but the former was not subject to any restrictions. (See chapter one for details).

Even if it is accepted that the current customary family laws are in some respects a true reflection of traditional customary law, there is still the need to adapt them to current socio-economic conditions. Customary law should not become an ossified law but a "living" law.17 In general terms, the traditional customary law emerged at a time when indigenous

15 Weinrich, A.K.H., "Changes in the political and economic roles of women in Zimbabwe since independence" (1982) 8 No.3 Cultures 43 at 62.


17 Robinson, Ibid. at 460 expresses similar views in relation to customary law in South Africa.
societies were living in agrarian communities based on kinship ties with the extended family being the basic unit of the society. Currently capitalist penetration and other socio-economic changes have resulted in industrialization and urbanization and a reduction in the significance of kinship ties and the extended family. A detailed examination of this transformations is provided in chapter one. Family laws must address contemporary socio-economic relations.

It is contended that the discussion in this section (and earlier discussions) have established that there is a need for reform of customary family laws in that:

1. Customary law has not been sufficiently adapted to socio-economic changes.
2. Some customary family laws violate the principle of gender equality as reinforced in international human rights instruments.

The following section offers a methodological approach which could produce the necessary changes while reducing perceptions of alienation and coercion.

C. Cultural Dialogue

In order to alleviate perceptions of alienation and coercion, it is suggested that the necessary reforms to customary family laws be undertaken through a process of cultural dialogue.

1. The nature of participation

Drawing from Bennett’s idea that any law reform efforts must conform with the population’s sense of justice, and the general principles of democracy, it is recommended that every individual in Zimbabwe should be given an opportunity to participate in the dialogue. In practice, the dialogue’s focus on customary laws and practices is likely to attract participation mostly from the indigenous population although a few non-indigenous individuals are likely to participate. Individuals are most likely to participate as groups - political, social, economic and other associations. Grassroots participation is crucial in order to avoid elitism. The participation of grassroots women and other marginalized social groups is also crucial.

The practical difficulties in conducting this dialogue include lack of education and

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18 Bennett, supra. note 1.
adequate channels of communication. The lack of adequate channels of communication can be partially alleviated by making full use of the existing ones through a coordinated effort between government agencies, political parties, the industrial and commercial sector, community groups, church and other religious groups and the groups formed and supported by non-governmental organizations. Such a coordinated approach should be supported by the use of the print and electronic media as well as community based theatre. If all these channels are used, a significant proportion of the population will be able to participate in the dialogue. (See the discussion of access to information in chapter four).

2. The Risks in Dialogue

There are risks in dialogue. One such risk is that the voices of the powerful will be heard more than those of the powerless. To avoid this shortcoming, it is essential that special efforts be made to reach the powerless and encourage their participation. Poor women, particularly those in the rural areas must be reached, together with poor men and poor people in marginalized areas such as the mine settlements and commercial farms.

A further risk of dialogue is that it will turn into a debate on cultural preservation, rather than a genuine way of seeking to reform the laws to meet contemporary needs. While it is acknowledged that men and women and various social classes may promote different opinions on issues such as the propriety of polygyny, the value of bridewealth, the relative merits of customary marriage, patriliny and the status of women, there is still a need to avoid a debate which seeks to defend these practices as immutable. This problem can be avoided by explicitly setting out the parameters of the dialogue.

3. Setting out the parameters of cultural dialogue.

It is proposed that before embarking on any cultural dialogue about the content and practice of customary family laws, a study should be carried out to find out the exact content of existing customary family laws. This study should cover both the customary laws applied in the state recognized courts (customary and non-customary) and the "living" customary laws

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20 The problems with such an approach have already been pointed out (above).
as applied by the people in their day to day lives. A full discussion of the variations in customary law is provided in chapter three. The study should be representative of all indigenous cultural groups, regions and cover both urban and rural areas. The study should also examine the underlying assumptions of each customary law and practice - cultural, political and socio-economic. These assumptions will then be critiqued in the light of contemporary cultural, political and socio-economic conditions. Law reforms that have already taken place in the area of customary family laws such as marriage, divorce, custody, maintenance, seduction and inheritance should then be discussed and evaluated using the same criteria. Finally, recommendations for reform would be made based on the ability to meet current cultural, political and socio-economic challenges and compliance with principles of justice such as gender equality. The principles can be derived from international human rights instruments as discussed above. Dialogue will then take place on the proposed reforms and on the reforms that have already taken place.

The advantage of a prior detailed analysis is that it will focus the dialogue on why change is necessary. It will not leave room for debates that are formulated in terms of cultural preservation because the explicit premise of the analysis is that culture, and by implication law, is dynamic and must change with changes in the socio-economic and political sphere. It is the nature of the required changes that will be debated and not the necessity of change. The prior analysis will also defeat any notions of cultural relativism by explicitly setting objective standards (principles of justice) by which all laws are to be judged. Any objections to these principles should offer plausible alternatives.

The challenge would be to present the various analyses and the parameters of the dialogue in simple non-technical language which can be understood by ordinary people including those without formal education.

In order to avoid endless debate, the dialogue on necessary reforms must be for a specific period. When that period is over the various responses should be analyzed by a special body like the Law Development Commission of Zimbabwe and reduced into draft legislation which will then be passed through the normal legislative process.

An impact study must be carried out after the implementation of the law reforms. If the study reveals that the reforms were beneficial, the beneficial effects of the reforms would then be publicized as a means of convincing the dissenters that the reforms were good. If
not, then further reforms would have to be suggested and negotiated through a similar process of dialogue.

4. **Merging Laws**

Once reforms to customary family laws have been completed, a unified family law system must be created merging the customary law (as produced by the dialogue) and the received law and statutory law. In this process, the origins of the laws (customary, received or statutory) will no longer be important. In particular, the dichotomy between customary family laws and the received law will no longer be valid. The received law will have to be accepted as part of the Zimbabwean legal system and not "dismissed as an imposition by the colonial power." The customary laws will also cease to be regarded as particularistic culturally based laws but will now be regarded as laws for the entire population of Zimbabwe i.e. an integral part of Zimbabwe’s legal system. The overall result will be the elimination of pluralism in the official legal system with respect to family law and the inherent problems of pluralism such as internal conflict of laws. Pluralism in non-state institutions will continue and the problem of what is to be done about vestiges of the old discarded customary laws and practices which may continue to be applied as part of the unofficial pluralism must be addressed.

5. **Dealing with unofficial customary laws and practices**

Unofficial customary laws are likely to be applied by informal dispute resolving institutions such as the family. Writing about Mozambique during its post-independence era, Sachs reports that although "reactionary" laws including some customary laws were officially abolished, they were not penalized. They were simply ignored and unenforceable through

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22 This would probably lead to an end to pluralism in almost all laws because there are very few areas outside family law in which customary law is still applicable.

the official legal system although there were efforts to counter them through education in the political and cultural spheres. Informal institutions for dispute resolution such as the family could still resolve disputes but their decisions were not officially recognized.

In the Zimbabwean context, it is proposed that, in addition to education (which the cultural dialogue is likely to achieve), additional measures be taken to ensure that the extralegal social control coming from institutions such as the family does not negatively contradict the norms of the official legal system thus subverting access to justice. As pointed out in the discussion in Chapter 3, in the extended family, the rights of women are likely to be subverted. This is in part due to women's socio-economic dependence on the male members of the family for material support. The improvement of the socio-economic conditions of women through creating opportunities for them to be formally educated and trained in professional skills and ensuring their full participation in remunerative economic activities will enhance their ability to resist the subversion of their rights by the family. It will also enhance their ability to assert equality rights in marital relationships. Banda's study of married women revealed that educated professional women were more likely than their less educated and less economically independent counterparts to marry according to civil rites (thus securing monogamy) and, upon divorce, to claim custody of their children.

The extended family's non-material sources of social control such as its role in spiritual expression are harder to eliminate. They call for different kinds of dialogue (from the one on laws) on such issues as intergenerational relationships and forms of spiritual expression. However, those forms of spiritual expression that directly violate the principles of justice embodied in the norms of the official legal system must be declared illegal as there can be no plausible justification for maintaining them in present day Zimbabwe.

24 Ibid.

25 Ibid. at 105.


27 Examples would be the giving of young girls as compensation for homicide and the child marriages practised by some indigenous "Christian" sects.
6. The chiefs and headmen's courts

A final point on cultural dialogue is the question of officially recognized customary dispute resolution mechanisms. These are currently the chiefs' and the headmen's courts. The proposals in respect of these are short term and long term.

The discussion of traditional customary dispute resolution mechanisms (see chapter one) in this thesis has shown that they are characterized by informal procedures which make them easier to access than those of the received law and statutory law. They also involve more public participation. However, there are problematic features of these mechanisms which include the problem of power imbalance and the subversion of women’s rights. In Zimbabwe, the chiefs and headman’s courts were transformed by the colonization process. Chiefs and headmen were coopted into the formal administration. This gave them a source of coercive power which (at least for Shona chiefs) they did not have traditionally. Traditionally, Shona chiefs would lose followers and prestige through emigration if they were unjust in their judicial decisions and political policies. Ndebele society was much more militarized and it could therefore be said that the chiefs and the king had more coercive powers at their disposal. The cooption of chiefs and headmen into the colonial administration put the entire force of state power at their disposal. Moreover, the appropriation of most indigenous land deprived dissatisfied followers of the emigration option.  

The chiefs and headmen lost their judicial powers at independence mainly due to their political collaboration with the colonial administration. Chiefs also lost their power to allocate land which was handed over to district councils. However, chiefs are ex-officio members of district councils. The judicial powers of chiefs and headmen were reinstated through the Customary Law and Local Courts Act (2 of 1990). This means that the problematic features of the relationship between the chiefs and the government which occurred in the colonial period have resurfaced although in a different context. Chiefs are now working with a democratically elected government but they are still combining judicial and administrative functions. The problem is further complicated by the fact that the chiefs have representation in Parliament. The chiefs who sit as Members of Parliament are

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therefore members of the legislature, the executive (through their position on district councils) and the judiciary. The contradiction in these roles is more pronounced in modern government than in traditional society which did not delineate these functions with the same precision. An example of these contradictions was illustrated by the fact that during the debate on the Customary Law and Local Courts Act (above), some Members of Parliament argued that since most chiefs were opposed to the Legal Age of Majority Act (15 of 1982) (as it applied to African women) it should be amended.\(^29\) The very same chiefs who were opposed to this legislation (which gives women equality of status) and who have power to change it as members of the legislature, are now required to apply it as part of the laws of Zimbabwe in their judicial capacities. This raises serious questions about whether women will receive impartial hearings before these chiefs.

The other complication with chiefs is their power (as traditional elders) to interpret culture. If their view of culture is traditional, it will affect their views on women's equality in contemporary society. This may impinge upon their decisions in court.

The writer has no knowledge of the procedure in the newly resurrected chiefs' and headmen's courts. However, the concerns expressed above are still valid given the history and traditional roles of chiefs and headmen.

Despite all these shortcomings, there is some advantage in the concept of accessible community based dispute resolution mechanisms. However, it must be acknowledged that communities are not homogenous. There are characterized by gender differences and disparities in power and socio-economic status. Women are most vulnerable in terms of the negative effects of these differences. The following proposal is made with these factors in mind.

The short term proposal is that while the dialogue on customary family laws takes place, these courts should be retained but made more accountable by mandatory requirements for local community participation (based on the traditional pattern) of both men and women. In addition, the chiefs and headmen must be given some training to sensitize them to the problems of gender and power imbalance and traditionalism.

The long term proposal, which is to take effect after the dialogue, is to abolish the

\(^{29}\) Legislative Debates.
chiefs’ and headmen’s courts and replace them with local tribunals (with specified limited jurisdiction) presided over by elected lay judicial officers (similar to the village courts of 1981). Elected judicial officers are proposed because it presumed that they would be more accountable to and sensitive to the community’s sense of justice. These lay judicial officers should receive some training to sensitize them to gender and power imbalance and on the basic principles of justice which they should not override in their decisions.

7. Other Substantive Laws

The focus on cultural dialogue emphasized the process of reforming customary substantive family laws. However, this does not mean that there are no problems with the other customary laws and received and statutory substantive laws. The focus of this thesis has been on customary substantive family law and pluralism, hence the emphasis on cultural dialogue in this particular area. It should however be borne in mind that other substantive laws also need to be critically examined and reformed where necessary in order to ensure a just legal system. The process of reform may be different in respect of the received law and statutory law because of the absence of the complication of cultural factors but it must also involve the participation of all sectors of the population.

C. Procedural Reforms

1. Assumptions

In making proposals for changes to the procedural rules of the courts, it is being assumed that the current status of civil legal aid is going to continue. Firstly, because the state currently lacks the resources for a state funded legal aid programme (civil or criminal). (Chapter four provides a detailed discussion of the legal assistance currently available in Zimbabwe). In any event, even if limited resources were to be found, priority would likely be given to criminal prosecutions because of their more serious repercussions (e.g. loss of freedom) than to civil matters. Secondly, even if the money were to be found to fund all legal aid through a state-funded programme, it is unlikely that every civil litigant would find a lawyer to act for her/him. There are not enough lawyers in Zimbabwe today and not likely

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30 see supra note 22.
to be in the near future. Thus a rationing of lawyer resources would have to take place and
criminal proceedings would again be prioritized.

An assumption is also being made that there will be more poor litigants seeking
access to the magistrates courts than to the High Court. This is based on the usual trend
with current litigation generally i.e. there is more civil litigation in the magistrates courts
than in the High Court. A further assumption will be made based on this assumption; it will
be assumed that the current system of legal aid in the High Court is sufficient to deal with all
poor litigants (in terms of availability of lawyers to whom they can be referred) and will be
sufficient, with appropriate amendments,(see below) for an increase in litigation by the poor
in the near future. On the contrary it is assumed that there are currently not enough lawyers
to deal with the demand that could arise, if the legal aid provisions in magistrates court rules
were utilized, either presently or in the near future.

2. Reforming Procedure in the High Court

No major procedural reforms are proposed for the High Court because of the
assumption that legal representation will be available for all poor litigants. In order to
ensure that this is so, the limit for eligibility for in forma pauperis assistance in terms of the
High Court Rules should always be set at a level that includes most poor people. In other
words, it should be revised from time to time as the cost of legal services and other
consumer goods rises.

a. Simplified Summons

Legal language has been identified as a barrier to access justice in Zimbabwe. (See
chapter four). In order to ensure that poor defendants (and others) understand the nature of
proceedings against them, it is proposed that the summons in the High Court be reduced to
plain English and simplified. Rose and Scott\(^{31}\) provide an example of how summons can be
simplified. Their example is from the Detroit Landlord and Tenant Court. Features of the
simplified summons include inter alia:

1) Clear bold titles

\(^{31}\) Rose, Jonathan I. and Scott, Martin A., "Street Talk Summons in Detroit’s Landlord and
Tenant Court : A Small Step for Urban Tenants" (1975) 52 Journal of Urban Law 967
2) Clear language
3) Liberal use of repetition e.g. repeating time and place instead of using "the said time" and "the said place".
4) Specification of dates e.g. instead of saying "within seven days of ", the exact date is given.
5) Clearer outline with each statement or command listed separately in a numbered sentence. Alternatives are listed separately and numbered as subpoints.
6) Consequences - both positive and negative - of taking/not taking action are clearly outlined.
7) Elimination of information not intended for the recipient of the summons e.g. separate forms for bailiffs
8) Inclusion of a section on "How to get help" which lists the relevant legal aid agencies and their telephone numbers.32

It may not be possible to adopt all these features to the summons in the High Court, but they constitute a useful guideline on how summons can be made more intelligible to lay recipients including poor people.

b. Helpline in the Registrar’s office

It is further proposed that the Registrar of the High Court should have an official telephone Helpline which litigants would call for basic information on how to apply for in forma pauperis assistance. This line could operate after normal working hours as an automated service. The information on the automated service must be available in English, Shona and Ndebele.

c. Investigating the quality of in forma pauperis representation

Issues about the quality of in forma pauperis assistance must also be addressed. These would require research into what the obstacles are to ensuring that, as much as possible, in forma pauperis litigants receive the same quality of service from lawyers as their

32 Ibid. at 989-99.
paying counterparts. At present some senior lawyers tend to refer their *in forma pauperis* clients to the junior lawyers in their firms. The implications of this practice on the quality of representation should be investigated.

d. Assistance with Deputy Sheriff’s fees

The possibility of offering *in forma pauperis* litigants assistance with payment of the Deputy Sheriff’s fees must also be looked into, particularly in those matters where the nature of service required is costly e.g. serving summons in remote areas.

e. Judges

Finally, all these procedural reforms will not benefit poor people if the quality of judging is unsatisfactory. Rose and Scott observed that the simplification of the summons in the Detroit Landlord and Tenant Court had had little impact because judges were biased (consciously or subconsciously) against tenants. The existence or non-existence of biases (conscious or unconscious) against poor people in the decision making of High Court judges in Zimbabwe can only be verified through empirical investigation.

However, it cannot be denied that there is some social distance in terms of race, culture, gender and class between judges and poor litigants. (See chapter one for a description of the judiciary in Zimbabwe). With the exception of class, some of these factors are not relevant to all judges. Ways of bridging this distance by sensitizing the judges to the needs of poor people must be devised.

3. Reforming Procedures in the Magistrates Court

The aim of the proposals on reforming procedures in the magistrates court is to enable poor litigants to access the magistrates court without having to secure legal representation. Legal assistance and advice may still be obtained (through legal aid agencies) for specific stages of the proceedings but it will not be required for the entire proceedings.

a. Initial Assistance for Plaintiffs

It is imperative that poor plaintiffs receive assistance in formulating their claims. This assistance can be provided by the existing legal aid agencies. The clerk of court should
refer all poor litigants whose summons indicate that they have not been able to properly formulate their claims to the legal aid agencies.

b. Assistance for poor litigants

i. Assisting Poor Defendants

It is proposed that the summons in the magistrates court be simplified in the same manner proposed for the High Court. The clerk of court should also have a helpline outlining procedures for obtaining assistance. In the event of default by a poor defendant who is being sued for a debt claim related to purchase of consumer goods or is being evicted by a corporate landlord (including a municipality), the plaintiff should be required to serve him a notice (in plain English) of his/her/its intention to apply for default judgment and inviting him or her to submit a written statement to the clerk of court if he or she has any objection.

ii. Special Investigators

It is proposed that each civil magistrates court should have a special investigator. The special investigators should be lawyers with some experience in civil litigation. In the large urban centres such as Harare and Bulawayo, the special investigators would be assisted by two or more trained paralegals.33

The special investigator's duties would include examining the responses of the defendants to the notices referred to above. If the response reveals a possible defence, the special investigator would require the defendant to substantiate it and the plaintiff to refute it. The plaintiff would be granted default judgment only if he/she/it can refute the defendant's defence. If the matter is too complicated to be resolved summarily, the parties will have to proceed by way of trial.

In proceedings that go to trial, the role of the special investigator will be to assist poor plaintiffs and defendants in gathering facts that are necessary to prove their claims or

33 The idea of special investigators is borrowed from Rubenstein's idea that the Supreme Court should have an investigatory agency connected to it. See Rubenstein, Leonard S., "Procedural Due Process and the Limits of the Adversarial Process" (1976) 11 Harvard Civil Rights - Civil Liberties Review 48-96.
defences. He or she would also assist them in drafting the necessary notices and documents and in preparing for pre-trial conferences. He/she would also prepare special legal briefs for poor litigants in cases that involve complex legal issues. In cases that involve complex issues (either factual, legal or both) the special investigator would recommend that a lawyer be appointed (in terms of the Magistrates Court (Civil) Rules to act on behalf of the litigant. The special investigator would assist the litigant in getting a lawyer. In all other cases, the special investigator’s report on the facts and the legal brief (if any) will be submitted to the trial court with copies being given to both parties. The court may rely on the report or call any of the witnesses whose evidence was relied upon by the special investigator in compiling the report. Expert opinions must be presented in writing as separate appendices to the special investigator’s report.

iii. Problems with the special investigators proposal

One basic problem with special investigators is the problem of cost. The response is that it is a cost that is necessary to ensure that poor people, who are the majority of Zimbabweans today, have meaningful access to the magistrates courts to pursue legitimate claims and to defend themselves against unjust claims.

The other problem is that objections may be raised to the special investigator’s inquiry as being inquisitorial whereas proceedings in the magistrates court are supposed to be adversarial. There are two responses to this objection. Firstly, the proceedings at the actual trial would still be adversarial although limited by the court’s prerogative to rely on the written report. It also should be admitted that where both parties are poor unrepresented litigants, the whole procedure would in fact have become inquisitorial even though adversarial in theory. However, the adversarial system itself is premised upon the presence of lawyers on both sides and does not work in situations where only one party is represented or where neither party is represented. The second response to the objection is that the inquisitional mode has, though to a lesser extent, been adopted in other courts in Zimbabwe. Proceedings in the small claims court take the form of an investigation into the factual and legal issues by the judicial officers. However, legal representation is not permitted in the small claims court. The maintenance court combines both inquisitorial investigation and legal representation. Proceedings before a maintenance court take the form of an inquiry
into the relevant factual and legal issues by the court and not an adversarial adjudication. Legal representation is permitted in the maintenance court. Thus the procedure in the maintenance court closely approximates the procedure suggested in this proposal.\textsuperscript{34} A further objection that may be raised is that the special investigator may not be impartial where he/she is assisting both parties. This objection is premised upon adversarialism which assumes that there are always two versions to every fact situation and that each party needs its own advocate to promote its version of the facts. However in practice, most facts can be established objectively. If the facts can be objectively established then the special investigator's task is simply to establish them without forming an opinion as to the merits of either party's case. Where the facts cannot be objectively established i.e. where matters of opinion are involved, the fact that the final adjudication of the matter rests with the magistrates court and not the special investigator may help in counteracting any bias. The court can call the relevant witnesses and ask its own questions.

c. Other Procedural Reforms
i. Reducing procedural stages
The current procedural rules in the magistrates court were designed for lawyers. There is a need to simplify them so that they can be utilized by self-actors with minimum legal assistance. This would benefit poor litigants who are most likely to be self-actors because of their lack of resources to hire lawyers and the state's inability to provide them with lawyers.

The current stages in a contested trial in the magistrates' court (assuming that there are no intervening motions) is as follows:

1) Summons (and particulars of claim) issued and served
2) Defendant delivers\textsuperscript{35} an "appearance to defend"
3) Defendant delivers a "plea"
4) Plaintiff delivers a reply to the defendant's plea and joins issue with defendant
5) Both parties deliver notices of discovery of documents
6) Both parties deliver statements of issues for a formal pre-trial conference before a

\textsuperscript{34} It is doubtful that a hearing before a maintenance court remains an "inquiry" in the light of legal representation. Lawyers tend to introduce adversariness into the proceedings.

\textsuperscript{35} "Deliver" means file with the clerk of court and serve on the other side.
7) Both parties attend a formal pre-trial conference before a magistrate.
8) The actual trial takes place.

In addition, the defendant may deliver a request for further particulars to the plaintiff’s particulars of claim. The plaintiff may also deliver a request for further particulars to the defendant’s.

Both parties may deliver additional requests for particulars for the purpose of preparing for the trial. It is proposed that these stages be reduced to the following:

1) Summons (and particulars of claim) issued and served
2) Defendant delivers notice of intention to defend
3) Defendant delivers statement of defence
4) Both parties deliver statements of issues for a formal pre-trial conference before a magistrate
5) Both parties attend a formal pre-trial conference before a magistrate

The change from "appearance to defend" to "notice of intention to defend" and from "plea" to "statement of defence" will simplify the language and make it easier for the parties to understand what is required. In addition, poor litigants would receive help in drafting these and all other documents necessary for trial from the special investigator. Documentary discovery will be eliminated and substituted as follows:

1) In cases not involving poor litigants, (or involving legally represented poor litigants), parties will be required to provide a listing of all the documents they intend to use for trial as part of their statements of issues for the pre-trial conference.

2) In cases involving poor litigants (assisted by the special investigator), the special investigator will obtain a list of all the necessary documents from both parties and attach copies of all non-privileged documents to the factual report. It is recommended that the factual report be made available before the pre-trial conference. This will have the advantage of assisting the magistrate presiding over the pre-trial conference to examine the possibilities of settlement as required by the
court rules.36

ii. Plain language notices and documents

It is proposed that all notices and documents be reduced to plain language for the benefit of self-actors including poor litigants

iii. Assistance with enforcement of judgments

It is proposed that the role of the special investigator should extend to assisting successful poor litigants in enforcing the favourable judgements. In addition, the special investigator should have a special fund for disbursements to the messenger of court

iv. Dealing with social distance

It is proposed that similar measures to those proposed in respect of High Court judges be taken to deal with social distance between magistrates and poor litigants.

v. Improving the training of court interpreters

The training of court interpreters must be improved in order to address the problems highlighted in the discussion of interpretation services (see chapter four).

4. Other Reforms

a. Utilization of other resources

Providing poor litigants with access to lawyers (or other forms of legal assistance e.g. the proposed special investigators) and enhancing the accessibility of court procedures and court personnel is not going to resolve the disparity in other non-legal resources between poor litigants and their wealthier counterparts or opponents. In particular, the latter’s superior financial resources will give them better access to non-legal experts whose testimony may be required to support or refute claims. To resolve this problem, it is proposed that all lawyers acting on behalf of poor litigants and all special investigators be given the power to call on the assistance of experts from government (state and municipal) departments and government funded institutions e.g. universities and technical colleges. In cases in which these departments and institutions are involved as litigants, private professional organizations may

36 The magistrate’s conciliatory role at the pre-trial conference does not collide with the adjudicatory role because the magistrate who presides over the pre-trial conference is barred from presiding over the subsequent trial if the matter is not settled.
ask their members (i.e. those in private practice) to volunteer their services. Experts working for non-governmental organizations may also assist.

b. Funding for appeals
Appellate decisions, particularly those with a law reform effect, contribute to the creation of the common law of Zimbabwe. It is important that poor people in Zimbabwe should have an input in this process (see the discussion in chapter two). Therefore, it is proposed that the state establish a special appeals fund to fund appeals by poor litigants in cases that have a wide impact and are likely to have a law reform effect that benefits the poor or a section of the poor. In order to avoid a conflict of interest in those cases in which the state would be interested in maintaining the status quo i.e. where it is not in the interests of the state to pursue the appeal, it is proposed that an independent committee be set up to oversee the appeals fund and make specific decisions on which cases to fund.

c. Public Legal Education
The discussion of barriers to access to the courts (in Chapter 4) revealed that one of the barriers to access to the courts is lack of information. Information is essential to enable poor people to identify possible legal claims or defences. Procedural information should also be available to enable them to know how to pursue their claims or defences.

Information can also contribute to the prevention of legal problems by alerting poor people to the situations that give rise to legal problems and showing them how to avoid them. For example, information on consumer rights may prevent poor people from entering into unfair contracts, information on landlord and tenant law may assist them in resisting unfair evictions. These preventive measures are much better than seeking remedies after violation of the legal rights.

It is proposed that public legal education be incorporated into every form of public education that currently takes place in Zimbabwe e.g. agricultural educational programmes for communal farmers, special skills training programmes for women, adult literacy classes etc. The information would have to be packaged in such a way that it can be relayed by lay

37 The possibility of making it part of their professional responsibility to assist may also be examined.
persons with limited formal education.

d. Conclusion
The discussion in this thesis has revealed that poor people in Zimbabwe currently lack access to justice. This is because of problems with both the substantive law and procedural law. The problems are compounded by legal pluralism. The problems with customary substantive law, particularly in relation to the status of women in family law and family relationships have been highlighted. The problems with customary dispute resolution mechanisms have also been highlighted. Problems of a more general nature have also been highlighted in the discussion of barriers. This chapter has offered some possible ways in which these problems can be resolved.
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