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A SHONA URBAN COURT

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Preface

The primary aim of this book is to describe the operation of one Shona urban court and to examine its application of Shona customary law. Up to the present no study of this kind has been done in Zimbabwe, although the need for such a manual has been apparent for some time. Written accounts of Shona customary law at present are based largely on research done in the rural villages and many courts rely for their judgements on these records. But customary law is changing. It is changing in accordance with the changing values and standards of the society. A traditional court operating in an urban area has to adapt some of its decisions to the changing conditions of urban life. These decisions, then, are an important indicator of change in customary law and must be taken into account in the judicial process. It is also interesting to find out to what extent the influence of rural courts has persisted in town.

This is also a sociological study. The disputes that people bring to a court of law can be an important indication of the stresses and strains of social life. Many aspects of Shona life are changing as a result of such forces as urbanisation and industrialisation. Marriage customs are changing; the family structure is changing; the role of children is undergoing considerable modification; and there is some evidence of the greatly increasing importance of the role of women. We also know that many urban families are unable to deal with many of the urban needs of their members such as housing, financial support and social support. Kinship ties are becoming weaker and as a result kinship obligations are now evaded by many people. Thus a new situation has been created which requires new solutions.

In the present study the task involved attending and recording the proceedings of a Shona urban court over a period of time. This was done between September 1977 and January 1978. In addition I have also obtained a summary (although not always complete) of cases tried between October 19, 1970 and May 5, 1974. This information will be presented where necessary for comparative purposes. During 1978 and part of 1979 I continued to visit the court whenever I could and participated in its proceedings. The analysis presented in this book does not cover all aspects of Shona customary law since most traditional Shona courts are now allowed by government to try only civil cases of a minor nature. It could also be that the number of cases recorded and analysed is not large enough. The task of discovering customary law or changes in custom is a complex one which requires the examination and analysis of numerous cases. It is hoped, however, that the present study will stimulate further research in this field.

I have to acknowledge with gratitude the help given to me by several people. Firstly, to Mr L. T. Mutambira Makoni, the presiding headman of the court which is the subject of this study. Mr Makoni encouraged me to undertake the study and gave me all the help I needed. Without his assistance this book would never have been written. A tribute to Mr Manhungo and Mr Chirwere, the two main assistant headmen, is in place. Their knowledge and assistance has been invaluable. Thanks are also due to the court clerks and messengers, particularly to Mr Tendai Makoni, the senior court clerk, who allowed me to read the court records. Mr Tendai Makoni also read the first draft of this study and made some useful comments. I am also greatly indebted to Miss R. Katsere who kept a record of all court proceedings during the time of this study. She used a tape recorder. Miss Katsere was then a research assistant in the department of sociology in the University of Zimbabwe. I would also like to thank my colleagues, Dr Angela P. Cheater, lecturer in social anthropology and Mrs J., May, Senior Research Fellow in the Centre for Inter-racial Studies, all of the University of Zimbabwe, for their comments and suggestions. Finally, I must thank Professor D. H. Reader who was then Head of the department of sociology in the University of Zimbabwe for his encouragement and support particularly when I was in the field, and Mrs J. Taylor for her assistance in the preparation of the manuscript. Mr Dennis N. Masarirambi, a senior technician in the department of sociology, University of Zimbabwe, assembled some of the tables.

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CHAPTER 1

INTRODUCTION

This is a study of what is officially known as the Makoni Tribal Court, the only traditional Shona court which operates in the city of Salisbury at present. This court which has been in existence since 1962 and is held every Sunday in St Mary's Township is presided over by Mr L. T. Mutambirwa Makoni. He is generally assisted by Mr N. H. Manhungo and Headman Chirwere. Other recognised headmen who generally live in Salisbury can also participate and some do from time to time. Other court officials besides the headmen include clerks and messengers. Clerks receive court fees and write down a brief summary of cases heard and their conclusions. Messengers perfom two jobs. They deliver summons to the defendants. The summons is a court document and in this case usually a short letter bearing the headman's signature and the court's official stamp setting out the date when the trial will be held. The letter orders the defendant to attend the court hearing and informs him of the name of the plaintiff, and the nature of the allegations against him. Messengers also assist in maintaining order during the court hearing.

There are parallel legal systems which operate in Zimbabwe. On the one hand are traditional courts which apply customary law. Any village headman can hold a court to try to solve conflict within his community. Only minor cases are solved by a headman's court. If the headman cannot solve a case it is taken to a ward headman or sub-chief. The highest court in the traditional legal system is the chief's court. The other legal system consists of the district commissioners' courts, magistrates' courts and the High Court. These courts at present apply the law of Zimbabwe although district commissioners' courts apply customary law as well. District commissioners' courts try civil cases. Crimes and more serious civil cases come before the magistrates' courts and the High Court. There is also a Court of Appeal for African civil cases. From the Appeal Court cases may be referred to the Appellate Division.

Traditional courts are normally held in the rural villages where most people live. The Makoni Tribal Court is, therefore, unique in this respect. It was established as a result of a request made to the authorities by Mr Makoni and other township residents. They felt that there was a need for a traditional court in the township which would try certain cases which were not, in their view, being settled satisfactorily and sometimes not settled at all by the district commissioner's court. Township authorities and government officials gave their approval and the

court has been functioning successfully since its establishment. Many cases from all over Salisbury are brought voluntarily for trial each week and most of them are resolved to the satisfaction of the people involved. Where an individual is unable to attend the court on a Sunday his case is set down on a different day. People who brought cases for trial (on Sundays) during the time of this study came from the Salisbury suburbs shown in Table 1. Table 2 shows the suburbs from which people who brought cases between 1970 and 1974 came.

TABLE 1

Residence of Plaintiff (September, 1977 to January, 1978)

Residence of Plaintiff	N	%
St Mary	46	26,7
Zengeza	33	19,2
Highfield	16	9,3
Seke	10	5,8
Kambuzuma	9	5,2
Hillside	9	5,2
Mandara	8	4,7
Highlands	8	4,7
Harare	8	4,7
Lawson's Farm	8	4,7
Glen Norah	6	3,5
Mabvuku	5	2,9
Tafara	4	2,3
Mufakose	2	1,2
Total	172	100,1

TABLE 2

Residence of Plaintiff (October, 1970 to May, 1974)

Residence of Plaintiff	N	%
St Mary's	196	69,3
Highfield	2	0,7
Harare	2	0,7
Mufakose	3	1,1
Seke	1	0,3
Glen Norah	1	0,3
Air Port	2	0,7
* European Suburbs	3	1,1
* European Farms	4	1,4
* African Rural Areas	3	1,3
Not stated	66	23,3
Total	283	100,2

* (Since the removal of racial laws by the government in 1979, there are no separate European and African areas any more in the country).

Although the Makoni court is kept busy, and the number of cases referred to it appears to be increasing, there are many people in Salisbury who are unaware of its existence. But most people in St Mary's township and the neighbouring suburb of Zengeza know about the court and many attend the hearings.

When Mr Makoni and other residents argued in favour of the establishment of a traditional court in St Mary's Township they made, although not always clearly, a number of important points. One point which was later stated more clearly by Bourdillon (1975, pp. 140-149) concerns the difference which sometimes occurs between what people themselves regard as customary law and the rules and regulations accepted by the district commissiner's courts as constituting customary law. This difference, when it arises, between what people themselves regard as customary law and what the district commissioners' courts regard as customary law, is due mainly to the following reason. District commissioners, who at present are Europeans, have to rely heavily for their judgement on three main sets of sources: on rules written out by some authority on traditional courts; on precedents created by the Court of Appeal for African Civil Cases; and on the statutory law of Zimbabwe. District commissioners have to rely heavily on rules written out by some authority on traditional courts, because they are not always fully in touch with the changing norms of the communities for whom

they must arbitrate. But these written accounts of customary law are often based on research done in rural areas many years previously. Thus as Bourdillon (1976, p. 167) points out, a district commissioner can, for example, be years behind local chiefs in raising payments of damages in accordance with rising standards and costs of living. Another example has been the insistence on the part of many district commissioners that according to customary law women are legally minors long after many traditional courts have been accepting their emancipation for certain purposes. Traditional courts on the other hand have an advantage. Since they operate without a written code of law they are able to adjust their decisions in accordance with the changing values and standards of the community.

Precedents created by the Court of Appeal for African Civil Cases can sometimes be misleading. Authorities on whom the courts must rely for the principles of traditional law can give erroneous opinions or opinions giving only one narrow point of view (Holleman, 1958, p. 34). Bourdillon (1975, p. 147) has given one example in which it appears that the courts have been misled by an authority. This is in the application of the statement:

> Should a woman go out to work with the approval of her husband, while under his marital control, any money she earns belongs to him under both Shona and Ndebele law (Child, 1965, p. 77).

Athough many Shona men as well as some women today would support the above statement, there is no basis for it. Bourdillon has rightly argued that in pre-colonial times there was no possibility of a woman acquiring cash income since no cash was circulated. But a woman could acquire property in other forms. For example, when a daughter is married, one of the traditional marriage payments is the "cow of motherhood" **(mombe youmai)** paid by the son-in-law's family to his bride's mother. These beasts and their progeny belong to the woman and are inherited by her own kin (traced through the female line only) on her death. Nowadays the traditional gifts to the bride's mother are supplemented or replaced by gifts in cash and kind which become her own property. Moreover, a woman could always earn livestock in other ways which would be hers, such as where the woman was a diviner or healer. Payments made in kind by her patients were always her own. Nowadays the cash earnings of such a woman are indisputably hers though of course she is expected to use them to help her husband with family expenses. Payments in cash and kind for the produce of traditional skills of a married woman such as pottery or basket-making belong to her alone. Should a woman grow surplus crops in her piece of land, she can sell or barter the surplus and keep the proceeds. It

was the custom in many parts of Shona country for the husband to give each wife her own field. Nowadays, a woman can earn her own money in any of these traditional ways. Thus traditional Shona practice certainly allows a married woman to earn and keep her own money.

How, then, did the custom arise according to which the salary of a married woman belongs to her husband? Bourdillon suggests that:

> With the arrival of colonial settlers, men alone were forced to pay taxes and the men were first to earn a cash income by hiring out their labour. The men learnt to cope with a cash economy which was completely foreign to their women (even today in backward areas, women are far less able to deal in cash than men). When women first began to earn cash wages, it was to supplement their husbands' meagre incomes on European farms by seasonal work such as cotton picking, or possibly the wives of domestic servants earned a little from perfoming occasional chores. Negotiations with employers and the money were both the domain of men and so the custom arose that men received their wives' wages (Bourdillon, 1974; p. 148).

The legislators have also modified Shona customary law in a number of ways. I will take marriage as an example. What is known to the formal courts, that is the non-traditional courts, as customary marriage is not customary marriage at all. It has been modified by the legislators in a number of ways. Firstly, there is the Order in Council of 1898 which fixed the public policy in respect to marriages by Africans under customary law. In 1901 the Legislative Council passed the first of a series of enactments designed to regulate African marriages. This led to the Native Marriages Ordinance of 1901. A few changes were again made in 1905 and 1917. Further changes were made in 1929. The more recent changes in marriage law and custom are contained in the African Marriages Act (Chapter 238) and the Marriages Act 1964. The main aims of the legislators at every stage were, firstly, to eliminate what were regarded as abuses and evils of the African marriage system such as child marriages and marriages without the woman's consent; secondly, to regulate bridewealth; and thirdly, to have African marriages registered, and thus bring them as far as possible in line with European marriages. Clearly, these changes modified customary marriage considerably. Thus a distinction must be made between customary law and what the formal courts of Zimbabwe regard as customary law. The usefulness of this distinction will become clearer in the chapters that follow.

Another criticism which was made and is still often made is that district commissioners' courts as well as magistrates' courts do not always go to the root of a dispute; that they appear to deal instead with legal superficialities (Bourdillon, 1976; p. 166). This critism indicates a difference in approach between traditional courts and the formal courts of Zimbabwe. The main aim of a traditional Shona court, wherever possible, is to reconcile disputing parties within the community and to restore social harmony rather than merely to rule on the overt dispute which has been brought to court. The reason for this approach has been explained by Holleman (1955, p. 42). In traditional Shona society a spirit of interdependence between members of local communities is dominant, and a split within a community threatens essential collective activities in social, religious, political and economic life. Consequently, the courts have as their primary aim the reconciliation of disputing parties rather than merely deciding on the legal aspects of the case in terms of law. Thus in handling a case a traditional court sometimes extends the subject matter far beyond the particular incident that sparked off the dispute in an attempt to get to the root of the conflict (Bourdillon, 1976, p. 152). There are also instances in this and other studies where the traditional court has gone against accepted law and custom in order to appease the disputants. This is not to say that the law is not always important in traditional Shona legal practice. Where there is a complete break up, for example, and no further contact is necessary between the disputants such as in some marital cases, reconciliation is superfluous and a brisker, more legalistic approach is adopted (Bourdillon, 1974, p. 14). On the other hand formal courts generally act in all cases according to the established laws. Decisions are mainly based on the legal aspects of the case in terms of law.

There is another important difference between the two legal systems. The formal courts do not always take full account of the traditional legal system. In other words it is argued by Mr Makoni and others that the sentences imposed by the formal courts in cases such as murder and witchcraft are not always adequate. Because of this a number of cases concluded in the formal courts are later re-opened in a traditional court so that the neglected aspects of the traditional legal system are taken into account. There are many cases where, for example, a person was sentenced to death for murder by the High Court, and yet his family was later made to pay heavy compensation as well to the victim's family who raised the case anew in a traditional court. Such compensation is necessary in terms of Shona law and religious beliefs. It is believed that if no compensation is paid the spirit of the murdered person will return and cause trouble in the murderer's family.

Since its establishment the Makoni Tribal Court has become popular because of other reasons. Like other traditional courts it recognises unregistered marriages. In the formal courts a marriage contracted according to Shona law and custom, including the case where a man takes to wife the widow or widows of a deceased relative, is no longer valid unless such marriage is solemnized in terms of section 3 of the African Marriages Act (Chapter 238) which will be examined in Chapter 4. This means, for example, that a husband who is married according to Shona law and custom but whose marriage was not solemnized in terms of the Act mentioned above has no right of action for adultery in a formal court. The Appelate Division of the High Court has also held that a claim for bridewealth is not enforceable if the customary marriage was not registered in terms of the African Marriages Act (Goldin and Gelfand, 1975; p. 136). But many marriages are not registered and yet parties to these unsolemnized marriages regard them as binding and continue to seek dissolution and repayment of bridewealth. Many people regard solemnization of marriage as a technical legal triviality. The Makoni Tribal court accepts this view. Unsolemnized marriages are dissolved, actions for adultery are considered, and claims for bridewealth are enforced.

Another attraction of the Makoni Tribal Court as far as the disputing parties are concerned is the possibility of receiving free advice at no cost at all before or during the hearing from the headmen as well as from members of the public. As in most African traditional courts the presiding headman plays two roles; he is the judge as well as the counsel. The disputing parties may seek his advice before and during the hearing. He also plays the role of counsel in cross examining parties and witnesses. He has to do this because the parties, lacking trained counsel's advice, may not be able to present their grievances in a coherent, logical and relevant form. The court is also open to all and anyone may speak. Cases are generally, although not always, decided on a consensus of public opinion. Thus it is possible for both the plaintiff and the defendant to seek advice from members of the public or to appeal to them for leniency. Many parties often use this device with success. Participation by members of the public is essential because a traditional court is more than a court of law; it is also a repository of the moral values of the community. Epstein (1958, p. 211) is right in saying that the judgement of an African traditional court is never simply a finding in terms of specific legal rights and duties; it is also a process in which judges and litigants alike work towards the re-affirmation of norms and values commonly recognised throughout the community. Court officials, members of the public and litigants alike

operate not only with the same rules of law which regulate claims but also with the same norms of behaviour, the same notions of how people ought to behave. Litigants describe their behaviour and evaluate it themselves in terms of commonly accepted norms, and they manipulate these norms to justify the propriety of their own conduct and at the same time to denigrate their opponents. In this way they provide the court with a kind of juridical tuning-fork which enables it to assess the behaviour or testimony of the litigants against the very norms they have themselves invoked. (Epstein, 1958; p. 210).

Public opinion may, of course, result in injustice as well. It often leads to injustice in two kinds of situations. Public opinion may result in injustice to an unpopular person or in rash judgement in emotional situations. A few litigants complained during the time of the peresent study that they had received unfair treatment from members of the public at the Makoni court. The first group of people who said they had been treated rather harshly by members of the public consisted of those who held unpopular positions in government, commerce and industry such as policemen, security guards, and supervisors. Others who felt that they had been badly treated were those who were seeking divorce, accused of witchcraft, had beaten their wives or in-laws, and men who denied responsibility for a girl's pregnancy. A claim for divorce and assaulting a woman or in-laws is regarded as unacceptable behaviour by many members of the public. Witchcraft is also regarded as evil and some members of the public become hostile when an individual is alleged to have practised witchcraft. A girl who reports that her boy friend is denying responsibility for her pregnancy usually gets much public support at the Makoni court. Thus some members of the public become harsh in their examination of the boy's evidence. Public opinion can also lead to injustice where there is a conflict of values or of legal norms. This usually happens when one of the disputing parties has adopted values different from those of the majority of the community or where one of the disputing parties comes from a society with different systems of laws. At the Makoni court such conflicts mainly arose in marital cases where one of the spouses was a non-Shona from one of the groups where the payment of bridewealth is not generally practised. Most decisions, however, even in cases of this nature in the end appeared to give satisfaction to the litigants. This is because there is an underlying consensus about the norms of behaviour associated with particular forms of social relationship. As Epstein (1958, p. 223) points out, these norms by and large form part of an ancient heritage, and appear to be common to most of the indigenous peoples of a particular region of Africa.

Like most traditional courts, the Makoni Tribal Court performs another important function briefly mentioned above, besides settling disputes. It is a place where laws and customs are examined and re-examined for the benefit of younger members of the community. Girls and boys are encouraged to attend and take part in the deliberations. I have seen on a number of occasions the presiding headman stop a case in order to give a lecture on an interesting and important point of law or custom. Simjlarly whenever there was a breakdown of public order during a hearing the presiding headman each time stopped the court proceedings and gave a lecture on the importance of social order both in a court of law and in the society as a whole. Formal courts, of course, play this role as well such as when the magistrate or judge makes a statement intended to warn members of the public about the seriousness of a certain kind of behaviour. Traditional courts, however, put more emphasis than formal courts on the educational function of a court of law.

The last important advantage of the Makoni Tribal Court is its convenience. Many people refer their cases to this court because it is more convenient than the formal courts in that it is held on Sundays, as mentioned above, when most people are not at work. Thus permission from an employer to appear in court which sometimes leads to loss of pay is unnecessary.

Athough the Makoni Tribal Court is used by many people, others, particularly some highly urbanised and educated people, regard it as unreliable and unsatisfactory when compared with the formal courts. Such people are unwilling to have their cases tried by the Makoni court or any other traditional court. The differences between the less urbanised and the highly urbanised and educated people in their preference for the different types of courts also emerged in Stopforth's (1973 (a)) survey of two areas of Highfield township. Stopforth's study compared differential change between Highfield and Chitepo Road (now known as Mangwende Drive). Although Chitepo Road is in fact part of Highfield, socially it was different from the rest of the township in many respects. At that time accommodation on Chitepo Road was relatively more expensive and better than in most parts of the township. The people who lived in Chitepo Road could also be defferentiated from the mass of Highfield by such stratification criteria as income, occupation and education. While educational achievement for Highfield adults tended to peak between Grades Six and Seven, the select group of Chitepo Road showed a strong trend toward secondary and high school education with a high proportion reaching university status. Most of the household heads held professional jobs, such as teachers, university lecturers, doctors, nurses and journalists. By contrast in the rest of Highfield most of the workers were

in semi-skilled and unskilled employment. Income was also correspondingly higher in Chitepo Road than in the township as a whole. Average income among the Chitepo Road sample was almost five times that of the average worker in Highfield.

Respondents were asked which court authority they preferred. In general the preference for modern courts by respondents of Chitepo Road was significantly different from the preference recorded for the township sample. Seventy-five per cent of Chitepo Road respondents chose the jurisdiction of either a magistrate's court or the High Court compared with 38 per cent among the township sample (Table 3). Nobody in Chitepo Road chose a District Commissioner's (D.C.) court.

TABLE 3

Preferences for court authorities among a Highfield sample (Traditional, D.C., Magistrate, High Court)

Court	Chitepo Road		Highfield Township	
	N	%	N	%
Traditional	2	5,4	15	17,2
D.C.			23	26,4
Magistrate	16	43,2	19	21,8
High Court	12	32,4	15	17,2
No preference	6	16,2	13	14,9
Don't know	1	2,7		
No response			2	2,3
Total	37	99,9	87	99,8

X^2=18,8892 with 1 d.f., p) .001 (Traditional and DC. — Magistrate's and High Court (Adapted from Stopforth, 1973 (b) Table XLIV).

Reasons given by the Highfield sample for general preference for the different courts are interesting. These are shown in Table 4. In general, District Commissioners' and Magistrates' courts were praised for their fairness and competence in criminal matters, but in specific contexts such as civil cases, or in many family matters, traditional authorities were often preferred, (Table 5 and 6).

TABLE 4

Reasons advanced for general preference for courts by a Highfield sample

Reasons	Chitepo Road		Highfield Township	
	N	%	N	%
Traditional is lenient	2	5,4	15	17,2
D.C. lenient, obeyed, fair, knows customs			23	26,4
Magistrate fair and competent	16	43,2	19	21,8
H.C. top authority and just	12	32,4	15	17,2
Not familiar with courts	6	16,2	13	14,9
Don't know	1	2,7		
No response			2	2,3
Total	37	99,9	87	99,8

(Stopforth, 1973 (b); Table XLIVa).

TABLE 5

To which Court would you take a dispute over Roora? (Highfield sample)

Court	Chitepo Road		Highfield Township	
	N	%	N	%
D.C.	19	51,4	52	59,8
Traditional	12	32,4	29	33,3
Magistrate	1	2,7	4	4,6
Don't know			2	2,3
No preference	1	2,7		
No response	4	10,8		
Total	37	100,0	87	100,0

(Stopforth, 1973 (b), Table XLV).

TABLE 6

To which Court would you take an Assault?
(Highfield sample)

Court	Chitepo Road		Highfield Township	
	N	%	N	%
Traditional			8	9,2
D.C.	1	2,7	3	3,4
Magistrate	31	83,8	66	75,9
High Court	2	5,4	7	8,0
No preference	1	2,7		
Don't know			3	3,4
No response	2	5,4		
Total	37	100,0	87	99,9

(Stopforth, 1973 (b), Table XLVa).

In the present study many of the traditional complaints made by those who are unwilling to appear in the Makoni court are similar to those recorded by Bourdillon in 1976 (pp. 161-165). Three major criticisms which were made concern the part that public opinion plays in the court proceedings, deficiency in the sifting of evidence, and the conflict of values and customs that may result in an urban situation. I have already referred to the injustice that may result to an unpopular person or in rash judgements in emotional situations due to the participation of members of the public in the court proceedings. Although most members of the court public are generally well behaved and serious, I have seen a number of people from time to time who come while drunk, particularly in the afternoon sessions. A few boys also come in search of free entertainment. There is, therefore, a feeling on the part of many people that judgement must be placed in the hands of persons trained to assess evidence and to make a sound judgement based on it. This leads to the question of sifting of evidence. Some people argue that certain types of evidence accepted by the Makoni court is unsatisfactory; that public rumours and gossip about a person are sometimes presumed to be true. On the matter of evidence the question of relevance was also raised. It was pointed out to me that a lot of evidence not strictly relevant to the case in question is accepted by the court thus leading to inefficiency and a waste of time. This point is not, however, supported by the present study.

I heard the headmen at the Makoni court warn the participants from time to time "not to tell us stories but to stick to the facts." The last criticism made is supported by the present study. This concerns conflict of customs and values that may arise. The Makoni Tribal Court is run by Shona headmen who apply or attempt to apply Shona law and custom. But Salisbury is socially heterogenous. Urbanisation has introduced a diversity in values and norms. Thus conflict of values arises when one or both disputing parties operate with a different system of law and customs or when one of the disputing parties has adopted values different from those of the majority of the community. Such people do not see why they should be bound by traditional Shona values and customs. Indeed the Makoni court is used by many people who are not Shona as shown in Table 7. Table 8 shows complainants and their tribal affiliation in the period between October, 1970 and May, 1974. But as I have already pointed out conflicts between African legal systems are usually minimized by the underlying consensus that exists about the norms of behaviour associated with particular forms of social relationships.

TABLE 7

Complainants and their tribal affiliations
(September, 1977 to January, 1978)

Tribal group	N	%
Shona (Zimbabwe)	59	34,3
Chewa (Malawi)	34	19,8
Sena (Mocambique)	19	11,0
Bemba (Zambia)	19	11,0
Kalanga (Zimbabwe)	19	11,0
Ndebele (Zimbabwe)	1	0,6
Not stated	21	12,2
Total	172	99,9

TABLE 8

Complainants and their tribal affiliation

(October, 1970 to May, 1974)

Tribal group	N	%
Shona	129	45,6
Malawian	14	4,9
Micambican	2	0,7
Zambian	1	0,3
Kalanga	1	0,3
Not stated	136	48,1
Total	283	99,1

Tables 7 and 8 may be somewhat misleading. Although the tables show a large number of people claiming to have come from Malawi, Mozambique and Zambia, in fact many of them were born in Zimbabwe; they speak Shona and have adopted Shona culture. To many of them Zimbabwe is their home. Considerable intermarriage between the Shona and other groups has taken place since the beginning of this century.

CHAPTER 2

COURT PROCEDURE

The procedure at the Makoni court is as follows. A plaintiff lodges his complaint or his alleged cause of action with the senior headman. The date of the trial is then fixed with the plaintiff and he is told to bring any witnesses in support of his allegations. The senior headman then causes a summons to be served upon the defendant. The summons is delivered by a court messenger. The defendant is also instructed to bring any witnesses he may wish to call. Where the plaintiff or defendant is a woman the headman instructs that she be accompanied by her father, husband, brother or responsible male relative. The same applies to young men. Where no male relative can be found a woman can accompany the plaintiff or defendant. The court, however,can proceed with a case if the plaintiff or defendant is unable to find relatives to assist her. Usually one of the headmen or an approved member of the public acts as her guardian for the purposes of the trial where necessary. This is necessary when the court feels that the woman is too young and too inexperienced to conduct her own case. If for any reason a defendant refuses to appear before the court, the matter is handed over to the police, township authorities or to the district commissioner of Salisbury. Some people do not bother to lodge their complaints with the senior headman in advance. They merely appear at the court and ask for their case to be tried. If the parties to the case are present the court may proceed. But this depends on the availability of time. If the court decides not to hear the case on that day a date is fixed for the hearing of the case.

Unlike many rural traditional Shona courts, members of the public are allowed to wear hats and smoke while the court is in session. The court is held in the open air. There are no trees nearby. Drinking of beer is not permitted. Males and females generally sit separately.

At the commencement of the hearing the clerk tells the court the names of the parties whose dispute is ready to be tried. The parties come forward and pay the hearing fee which at the time of this study was one dollar. The court fee is now two dollars. The hearing fee is important partly because it indicates the willingness of the parties to come under the court's jurisdiction. Failure to pay the hearing fee may mean postponement of the case. In cases of hardship, however, the hearing may continue and the persons involved told to pay the fee at a later date. Oaths are sometimes administered, particularly when a case is considered serious. The plaintiff or defendant is asked to utter or affirm with a solemn appeal to God that the evidence he is about to present is true. The plaintiff then states his complaint

followed by the defendant's reply. Each is liable to be questioned by the headmen and members of the public when they have given their evidence and sometimes while in the process of doing so. Long winded presentations by the plaintiff, the defendant, witnesses or members of the public are discouraged. No plaintiff or defendant is represented by counsel or attorneys. One reason for this is that the system of representation by attorneys or counsel is not part of the Shona legal system. Secondly, the type and nature of most disputes heard by the Makoni court does not justify the employment of representation. As already mentioned in Chapter 1, a lot of assistance is obtained from relatives, members of the public and sometimes from the headmen themselves. A third reason is that a lawyer trained say in a European system of law would find the task of representation difficult. As mentioned earlier everybody present, including headmen, members of the public, clerks and messengers, is entitled to express opinions, and engage in argument concerning the merits of the dispute. Thus a lawyer trained in a Western system would be incapable of perfoming his duties in a manner in which he was trained and to which he is normally accustomed. I also doubt that a lawyer trained in say the European or American systems would do any better than some of the men and women who frequently attend court, bearing in mind that reconciliation of the parties to the disputes is often the major aim of the court. The headmen and some members of the public have participated in the Makoni court proceedings for many years. They have over the years acquired considerable experience of Shona law and custom as well as considerable knowledge of human problems and human psychology. Some of them are very impressive indeed in their handling of court cases.

A record of the proceedings is kept by the clerk of the court, but this is usually restricted to the particulars of the plaintiff and the defendant, that is, name, sex, marital status, address, occupation, etc; type and nature of the dispute; and the court's conclusions. There is no time to write much more than this. Below I reproduce a record of a case tried on the 9th January, 1977. The court records are usually in Shona, some are in English.

Messenger: Mackenzie

Plaintiff: Chidakwa; Residence: St Mary's Township.
(Chidakwa's identity number, house number, and district of origin were recorded).

Defendant: Herbert; Residence, New Canaan, Highfield.
(Herbert's surname, house number, identity number and district of origin were recorded).

Case: Plaintiff complains that the defendant committed adultery with his wife.

Statement by defendant:
Iam Herbert. I fell in love with Maria in Harare in August, 1976. We met for the first time in a beer hall known as Mapitikoti where we drank beer together. Maria told me that she was a divorcee. So I said I love you and she agreed. It was not proper love, however; she agreed to be my prostitute. Since that day I have been seeing her from time to time, thinking that she had no husband.

Discussion
The court asked Maria's father whether she was married to the plaintiff. The father said yes; the plaintiff is married to my daughter, Maria, and he paid the bridewealth which I demanded.

Conclusion
The court found Herbert guilty of committing adultery. He was fined $3 for admitting that he committed adultery. The $3 was given to the plaintiff. The plaintiff was then asked to demand damages. He asked for $270. The court agreed and Herbert was ordered to bring the $270 to the court on January 23, 1977.

After the plaintiff, the defendant and their witnesses have testified and have been questioned the presiding headman usually asks a few members of the public to suggest a conclusion. After hearing suggestions from members of the public the presiding headman announces his decision. If the headman wishes to consider the decision further or discuss it with another headman or the district commissioner, judgement may be postponed.

A number of cases are not concluded at the Makoni court. They are transferred to other courts. The senior headman has power to stop a case at any stage of the proceedings, whether before or after judgement has been given, and transfer the case for rehearing by another court. Such transfer may also be at the request of one or both parties to the dispute. During the time of the present study twenty-two cases were referred to other courts as shown in Table 9.

TABLE 9

Settlement of the Cases brought for trial during the time of the present study

Type of Settlement	Cases N	Cases %
Compensation paid	60	34,9
Obtained reconciliation	58	33,7
Case referred to other courts	22	12,8
Judgement postponed	18	10,5
Case dismissed	10	5,8
Case not completed	4	2,3
Total	172	100,0

The majority of cases where compensation was paid involved unlawful sexual intercourse, assault, abuse, witchcraft accusations and theft. Many young men who appeared before the Makoni court did not know that any man who has sexual intercourse with any woman, with or without her consent, but without the consent of her guardian, is liable to pay damages to her guardian regardless of whether the woman is single, married, widowed or divorced. In the case of a married woman damages are payable to her husband; in the case of a single, widowed or divorced woman damages or compensation is paid to her guardian. The amount of damages is not fixed; it is a matter for negotiation between the accused and the woman's guardian. The court, however, intervenes if the amount demanded by the woman's guardian is too high. The status of the woman is also taken into account, that is, whether she is single, married, widowed or divorced. Where the woman is married, the type of marriage is sometimes taken into account as shown in the case below.

> Peter told the court that his wife, Maggie, had sexual intercourse with White. Both White and Maggie pleaded guilty. The court then asked Peter to demand damages. Peter demanded $58. The court, however, reduced the damages to $25 because Peter had never paid bridewealth for his wife. Peter and Maggie had lived together for four years as husband and wife but no bridewealth had ever been exchanged between Peter's family and that of Maggie (Peter v White, Case No. 6; 3.1.77).

The charge usually made to the court in cases of unlawful sexual intercourse involving widows and divorcees is a breach of promise to marry. What happens is that a man lives with a divorcee or a widow for a number of years as man and wife and

implicitly or explicitly promises her marriage. If the man should decide to abandon her, she can report the matter to her parents or guardian who will, if they wish, lodge a complaint of a breach of promise to marry. Such cases are entertained by the Makoni court. Should the man refuse to marry the woman, he faces an alternative charge, that is, having unlawful sexual intercourse. The court's view is that polygyny is permitted in Shona society and, therefore, any man who desires the friendship of any unmarried woman is free to marry her. This argument is due, at least in part, to the traditional Shona emphasis on the reproduction of children. Children are highly valued in traditional Shona society. They are regarded as an important source of labour. Children are also an important source of political and social support. Thus because of these reasons and others which will be discussed in Chapter 4, society encouraged every grown-up man to marry as many wives as he could afford and produce many children.

Where a girl has fallen pregnant, a man who does not want to marry her usually resorts to one of two tactics. He may try to argue that there were other men who had sexual relations at the time with the girl and, therefore, could be responsible for the pregnancy. The onus here is on the accused to present to the court the names of such persons, which is not always easy. The court, however, is usually able to determine by examining the dates which act of intercourse resulted in the woman's pregnancy. If more than one man has had intercourse with the same woman and each is accused of causing her pregnancy, the court may award damages against them all if it is not possible to determine which act of intercourse resulted in the pregnancy (Goldin and Gelfand, 1975; p. 212). I have not, however, attended a case where more than one man was made to pay damages for the same woman. The second line of argument usually taken by a man who wants to deny responsibility for a girl's pregnancy is to argue that the girl is a prostitute; that he never promised her marriage but gave her money from time to time. But this line of argument creates more problems for the man. The Makoni court takes the view that any man who encourages prostitution is guilty of an offence.

In one case a man was asked by the court whether he wanted his sister to become a prostitute, to which the answer was, no. The court then ruled that since he and most men do not want their sisters to become prostitutes, a man who encourages someone's sister to become one is, therefore, liable to a fine in addition to damages for unlawful sexual intercourse, (Phineas v Livingstone, Case No. 8; 2.10.77). Both the fine and the compensation are paid to the girl's guardian. Cases of adultery will be described in Chapter 3.

Other actions which led to claims of compensation such as assault, abuse, witchcraft accusation and so on will also be discussed more fully in chapters that follow. Assault and witchcraft, for example, can be serious criminal offences. On the other hand they may be minor civil matters; it depends on the circumstances in which the act was committed, the attitudes and the relationship between the individuals involved. The headmen can usually determine very early in the proceedings whether the matter should be treated as a criminal or civil offence. They have acquired such knowledge from experience.

The amount of compensation is a matter for negotiation between the plaintiff, the court and the defendant. The outcome, however, depends on one or two important factors; firstly, whether the defendant acted with negligence, maliciously or intentionally. The second important factor is the defendant's attitude throughout the trial. If the defendant shows an aggressive attitude, this will justify a larger amount of compensation than that which would otherwise have been awarded. The amount demanded need not be paid at once. The method of payment is again a matter for negotiation. Most people prefer paying by regular instalments. The court insists, however, that such moneys must be paid to the clerk of the court who will forward it to the plaintiff in order to prevent further friction between the two individuals.

Strictly speaking the Makoni court has no jurisdiction in criminal cases and yet a number of such cases are tried each week. There are three reasons for this. The first reason is that there are two aspects to many criminal acts, the legal and the social aspect. If the legal aspect of a particular criminal act is more important than the social aspect, the case is referred to the police who will take it to the magistrate's court. But if the Makoni court feels that the social aspect is more important than the legal aspect, the case is entertained. Let me illustrate this distinction with two cases of witchcraft accusation which were brought to the Makoni court.

In the first case the evidence presented to the court was as follows. One afternoon two married women, Janet and Monica, went to have a drink at a bottle store in their neighbourhood. They bought several packets of Chibuku beer which they drank together. The two women returned to their homes at about 6 p.m. On reaching her home Monica began to vomit. Janet was informed about this. At about 9 p.m. Janet arrived at the home of Monica accompanied by a herbalist who she had hired to come and help her friend. She was not asked by Monica's husband to seek the services of a herbalist. However, Monica was given some medicine by the herbalist but the vomitting continued. At about midnight Monica died. Before her death Monica made a statement to those who were present at the time. She reported that Janet had bewitched her. She recalled that before the two women finished drinking their last packet of beer at the bottle store she, having had enough, went to the toilet. When she came back from the toilet Janet forced her to finish the remaining beer. She eventually drank the remaining beer after much persuasion. After drinking the beer she felt a pain in her stomach although she did not mention this to Janet at that time. She was, therefore, sure that some poison was put in the beer that she drank (Janet v Peter, Case No. 8; 28.1.79).

The above account was accepted by the court as a statement of fact. Moreover, the fact that Janet had gone out to look for a herbalist without being asked to do so by Monica's husband raised further suspicions. Why did Janet before she saw Monica's condition decide on her own that the services of an importtant herbalist was required? The court decided to transfer the case to the police.

In another case Susan told the court that her deceased husband's brother, John, accused her of being a witch. She told the court that her husband had been dead for about seven months. One morning John came to her house and told her that she should vacate her house and go and live with relatives in another part of town because he was no longer able to continue paying rent for the house. Moreover, since she was not legally married to the deceased, John felt that he did not have any responsibility for her (John v Susan, Case No. 13, 11.2.79). Although Susan lived with her deceased husband for years no bridewealth was paid for her and the marriage was not registered.

The court agreed to proceed with Susan's case. The charge that John accused Susan of being a witch was later dropped. Two issues became important. The first issue concerned Susan's marital status. The decision of the court was that Susan was a widow. Her marriage to the deceased was recognised for the purposes of her status although no steps had been taken to formalize the union before the death of John's brother. The second issue concerned Susan's residence. The decision of the court was that Susan could not be removed from her deceased husband's house until the **Kurova guva** ceremony had been held. **Kurova guva** (to beat the grave; to prepare the spirit; to bring the spirit home) is an important ritual which takes place about a year after death. Beer is normally brewed and close relatives attend. The estate (if any) of the deceased is distributed at the ceremony. The attempt by John to remove Susan from her home before the **kurova guva** ceremony was regarded by the court as tantamount to accusing her of bewitching her deceased husband. The only exception to the rule that a widow may not be sent to

her home before the **kurova guva** ceremony is where the widow is known to have caused the death.

The point I am making is that accusations of witchcraft perform a number of functions in Shona society. Where the court believes that an individual may indeed have been bewitched the case is transferred to the police. It is regarded as a criminal case. There is a difference of opinion, however, between the Makoni court and the formal courts regarding the crime of witchcraft. The Makoni court in general believes that witches exist in society. In the past a diviner was sometimes brought to court to help identify the witch. Once the witch was identified, he or she was sentenced by the court. The sentence took various forms. In extreme cases the witch was sentenced to death. In some cases the witch was ordered to leave the village and settle elsewhere. Some witches were cured. In such a case a doctor was ordered to neutralise or eliminate the evil spirit that possessed the witch. Ostracism was the mildest form of punishment. The formal courts on the other hand, begin by saying that witches do not exist. The aim of the formal court is to punish those individuals who name others as witches. Mittlebeeler (1976 describes this conflict between Shona customary law and common law very clearly.

> In the witchcraft field, the values of the European state and African custom were reversed. In the eyes of the African, the witch was the public enemy; the person who could neutralize or eliminate the witch was the public benefactor and even the guardian of the health and security of the community, just as a European doctor is a public benefactor because he cures diseases that his society regards as a menance to health. But in the European's world, the witch did not exist, and the person who purported to locate him and render him harmless, if not eliminate him entirely, was the real public enemy. In other words, the African's meat was the European's poison, and the machinery of the state was employed to rid the country of the poison. (Mittlebeeler, 1976; p. 140).

Witchcraft accusations play other social functions. It has been shown by sociologists and social anthropologists that witchcraft accusations bring tensions in social relationships to the surface. Open accusations of witchcraft are almost always preceded by tension and conflict within the community or household. Accusations of witchcraft may be the result of conflict over succession, or they may come from misunderstandings over the distribution of family wealth or some other dispute within the family or community. Tensions created in this way readily find expression in accusations of witchcraft so that the "witch", that is, the person causing the trouble can be publicly identified and denounced. Accusations of witchcraft also act as a force buttressing the moral code of society since it particularly acts against the moral code of society which are likely to bring about acts of sorcery or accusations of witchcraft. A man who commits incest for example, is regarded as a witch. Thus the Makoni court has learnt from experience that sometimes it is not helpful to try and prove whether an individual accused of witchcraft is in fact a witch. It is generally more useful to examine the events that lead to the accusation of witchcraft.

Another reason why some people prefer to have minor criminal cases tried at the Makoni court rather than in the formal courts is the fear of disrupting social relations. Usually in such cases the plaintiff and the defendant are either related or live in the same neighbourhood. In the formal courts offences such as theft, common assault, and abuse are regarded as crime punishable by the state. Such punishment usually leads to disruption of social relations between the individuals involved. But the Makoni court like most traditional courts tends to regard such cases as civil cases between two disputants. Thus a case of theft is a case between two individuals or parties and concerns the return of the stolen property and in some cases with compensation to be paid to the rightful owner. As Bourdillon (1976, p. 158) rightly points out, in a small closely knit community, the owner is as likely as anybody else to find out who the thief is, and once this is established the court need only to consider how the breach in community relations can be repaired in a way which will discourage future breaches: there is no need for retributive punishment over and above this.

The last important reason why the Makoni court finds it necessary to try some criminal cases concerns the role of ancestral spirits in deviant behaviour. An example of this is the case of incest.

Individuals who commit incest not only offend others in their community; they also offend their own ancestors and sometimes clan or tribal ancestors as well. In such a case the Makoni court is interested in the social aspects of the matter; it is more concerned with making a sacrifice to the spirits in the hope of appeasing their wrath as well as restoring normal relations between the parties involved and thus promoting social harmony.

In dealing with incest the question of whether a marriage is valid or not does not arise at the Makoni court. In the formal courts the first question for decision in a case of incest is whether such marriage is marriage for the purpose of the common law crime of incest. A full bench of the High Court decided that a customary African marriage was not a marriage for the purpose of the common law crime of incest.

> Beadle C.J. explained that:
> a valid marriage according to native custom would never have

been recognised in Holland as a valid marriage under the Political Ordinance of 1580 as it is a marriage which permit polygamy (R V Tshipa 390) (quoted by Goldin and Gelfand, 1975; p. 272).

The Makoni court is not concerned with what kind of marriage would have been recognised in Holland as a valid marriage under the Political Ordinance of 1580. It is concerned with what people in Zimbabwe regard as marriage. Thus the court deals with the question of incest without inquiring whether the relevant marriages are customary marriages, marriages by civil rites, or **mapoto** marriages. (I will have more to say about **mapoto** marrages in Chapter 4).

Nyikadzino appeared before the Makoni court charged with having sexual intercourse with his wife's mother on a number of occations. The evidence was led by Nyikadzino's wife, Rosalind. Both Nyikadzino and Rosalind's mother pleaded guilty. In terms of statute law of Zimbabwe Nyikadzino and Rosalind are not legally married. They have lived together for several years and have children. Nyikadzino did not pay any bridewealth, and the marriage is not registered although Rosalind's mother has lived with them for a number of years. The decision of the Makoni court was that Nyikadzino had committed incest. He was ordered to pay compensation to the aggrieved party, his wife, in order to restore normal relations between them. This amounted to twenty-five dollars. The case was then referred to Nyikadzino's tribal chief in Mtoko so that the second aspect of the case may be dealt with; that is a ritual to appease the ancestors (Nyikadzino v Rosalind, Case No. 17, 17.12.78).

Case referrals were as follows:

Where referred	No. of Cases	%
District Commissioner	7	31,8
Police	7	31,8
A Chief's court	6	27,3
Township authorities	2	9,1
	22	100,0

There are a number of reasons why some cases are referred to the district commissioner. One reason is to seek his opinion on a matter which the court has been unable to resolve. This happened in the case of Gedion (Samuel v Gedion; Case No. 10, 2.10.77). The evidence presented to the court was as follows: Samuel's wife Punha went to spend a short holiday with her

parents. While she was away Samuel discovered a letter alleged to have been written by Punha to a boy friend. On her return from holiday Punha was accused by Samuel of committing adultery. The matter was taken to the Makoni court. After examining other documents written by Punha the court was unable to tell whether the letter alleged to have been written by her to a boy friend was, in fact, written by her. The case was referred to the district commissioner for a second opinion. As mentioned earlier some cases are referred to the district commissioner because the Makoni court is not competent to deal with them such as divorce or disputes over custody and guardianship of children where the marriage was solemnized in terms of the African Marriages Act (Chapter 238). Arguments over a child's paternity are also usually referred to the district commisioner "so that qualified physicians may test the blood samples of the people involved." Criminal cases and cases where a person refuses to obey court orders and is likely to become violent are normally sent to the police. In the case of Zebediah, for example, (Zebediah v Zuze; Case No. 6, 21.8.77) the matter was referred to the police. Zebediah told the court that his wife, Mary, had been found a number of times committing adultery with Zuze. Attempts by the court to obtain reconciliation failed and Zebediah threatened to kill Zuze. Another case was referred to the police because the defendant refused to carry out court orders. The man Jacob was charged $200 for having sexual intercourse with his mother's brother's wife (Jacob v Mate, Case No. 3, 4.12.77). Jacob refused to pay the compensation demanded.

The majority of the cases referred to a chief's court are those that require a ritual for their final settlement such as incest. Such cases cannot be settled satisfactorily in town. A ritual must be held at which senior members of the extended family must be present. It is also wise to involve the chief of the area as well because cases such as incest as mentioned above are believed to offend not only a man's ancestors but clan or tribal ancestors as well. It is believed that when a man commits incest he may be punished by his ancestors. Usually the ancestors punish the individual with sickness. When a number of people belonging to the same clan commit incest over a period of time the clan spirits may punish all members of the clan in order to warn them against the dangers of such behaviour. The punishment in this case is usually an epidemic, lightning, drought or excessive rain which destroys the crops. Thus when an individual has committed incest it is wise, therefore, to ask for forgiveness both from one's ancestors and from the clan ancestors through the chief who is the direct descendant of the clan ancestors. Thus Goldin and Gelfand (1975, p. 260) are right when they say a Shona who commits incest is liable to three distinct forms of punishment. Firstly, he is liable to be punished

for incest under the statute law of Zimbabwe. Secondly, his own ancestors may punish him with sickness or other misfortune. If punishment by the clan spirit is included, this becomes the third form of punishment. This, of course, applies to those Shona people who believe in the power of ancestors to harm the living members of the society; some Shona people do not believe in ancestor spirits. There are certain forms of incest that are not considered serious and marriage can take place provided the relationship is cut by a ritual. Examples of this are marriages between descendants of the fourth generation. If the couple are agreeable to marry one another the ritual of **cheka ukama** (cutting off relationship) is carried out and the matter is resolved.

CHAPTER 3

PEOPLES AND THEIR PROBLEMS

Much of the time of the Makoni court is spent settling or attempting to settle family disputes such as disputes between husbands and wives and disputes between in-laws. Other cases that frequently came up for trial during the time of this study include disputes between neighbours; disputes between a boy and his girl friend; and disputes between friends. Cases involving strangers were few (Table 10). For comparative purposes I also show in Table 11 the type of cases brought for trial between October, 1970 and May, 1974.

TABLE 10

Cases brought for trial on Sundays between September 1977 and January 1978

Type of Case	No. of Cases	%
Family disputes	107	62,2
Disputes between neighbours	20	11,6
Disputes between a boy and his girl friend	18	10,5
Disputes between friends	18	10,5
Disputes involving strangers	9	5,2
Total	172	100,0

TABLE 11

Cases brought for trial between October, 1970 and May, 1974

Type of Case	No. of Cases	%
Family disputes	176	62,2
Disputes between neighbours	30	10,6
Disputes between a boy and his girl friend	38	13,4
Disputes between friends	10	3,5
Disputes involving strangers	7	2,5
Disputes between traditional doctors and patients	2	0,7
Disputes between house seller and buyer	2	0,7
Disputes between builder and client	11	3,9
Not stated clearly	7	2,5
Total	283	100,0

Family disputes include quarrels between husbands and wives quarrels between in-laws, quarrels between fathers or mothers and their step-children, and quarrels between co-wives (Table 12). In Table 13, I show the nature of family disputes for the period between October, 1970 and May, 1974.

TABLE 12

Nature of family disputes (September, 1977 to January, 1978)

Nature of Disputes	No. of Cases	%
Quarrels between husband and wife	57	53,3
Quarrels between in-laws	36	33,6
Quarrels between father or mother and stepchildren	8	7,5
Quarrels between co-wives	6	5,6
Total	107	100,0

TABLE 13

Nature of family disputes (October, 1970 to May, 1974)

Nature of Disputes	No. of Cases	%
Quarrels between husband and wife	91	51,7
Quarrels between in-laws	83	47,2
Quarrels between mother and stepson	1	0,6
Quarrels between co-wives	1	0,6
Total	176	100,0

Major causes of disputes between husband and wife are: adultery, breach of promise, cruelty, desertion, disobedience, incest, failure of husband to give his wife adequate financial support and the wife's wastefulness. A husband whose wife has committed adultery has three choices open to him. He may condone the act and take no further action; he may condone the act but demand compensation for the adultery from the lover of his wife, or seek to dissolve the union. But he cannot pursue both actions at the same time. What many husbands do, however, is to demand compensation at the Makoni court and later seek to dissolve the union at the district commissioner's court. Pursuing both actions at different times and in different courts is only possible where a marriage was solemnized in terms of section 3 of the African Marriages Act (Chapter 238). But many marriages are not solemnized in terms of the Act already mentioned. Such marriages are not valid in terms of the statute law of Zimbabwe and cannot, therefore, be dissolved by divorce in a formal court. Unsolemnized marriages are, however, recognised by the Makoni court and claims for divorce are entertained.

Confession by the wife is usually considered sufficient proof of adultery, but such cases are treated with great care as it is known to the court that some women may make a false claim. In many cases the court has demanded that such confession be corroborated by other evidence. Women usually confess as a result of sickness in the family which is believed to have been caused by the adultery such as in the case of David (David v Antonio, Case No. 2, 25.2.79). David's wife confessed when her child caught measles. The condition of the child continued to deteriorate and when it appeared that the child was about to die she admitted that she had had sexual intercourse with a certain man called Antonio a few weeks previously. It is believed in traditional Shona society that if the husband or wife commits adultery when they have an infant, the child will be attacked by measles. Failure to confess on the part of the wrongdoer may lead to the death of the child. Some women confess when confronted with a letter written by her to her boy friend or vice versa, or by evidence of eye witnesses. In all cases the lover must appear in court to answer charges against him. An attempt by the lover to prove that the woman is a prostitute is not accepted by the Makoni court. It has been held by the formal courts that if a married woman is known to behave like a prostitute and accepts money from a male client, her husband is not entitled to any damages (Goldin and Gelfand, 1975; p.218). Her conduct in this case is attributed to the husband's failure to control her, for which he is blamed. The Makoni court has taken a different view. The court is concerned with stamping out prostitution in society. They have taken the view that a

man who gives any woman some money in return for her sexual favours is guilty of promoting prostitution. Thus a plea by the lover that the woman was a prostitute when he met her has been rejected by the court. The husband is entitled to compensation (Jamu v Terere, Case No. 17, 6.12.77).

In Shona law a wife whose husband has committed adultery has no right of action for damages against the woman with whom the adultery was committed. The Makoni court, however, entertains such cases not with a view to claiming damages against the woman with whom adultery was committed but to discover whether the husband has been unable to give his wife adequate financial support as a result of his extra marital relations. Infact, many women are now aware of the Makoni Court's attitude on this matter. Women who feel that their husbands are not giving them adequate financial support have a right of action by citing the husband's extra marital relations as the cause of such financial problems. The Makoni court will order that part of the husband's wages be paid for a certain length of time to the clerk of the court each month who will in turn pass it on to the wife. However, this device is only used where the court feels that the husband has been acting in a very irresponsible manner. Other ways by which some wives attempt to get the court to investigate their husband's extra marital relations include, beating and abusing the husband's girl friend, disobedience, breaking household utensils and so on. The aim is to get the court to ask them why they behaved in that way, and then cite the husband's extra marital relations as the cause.

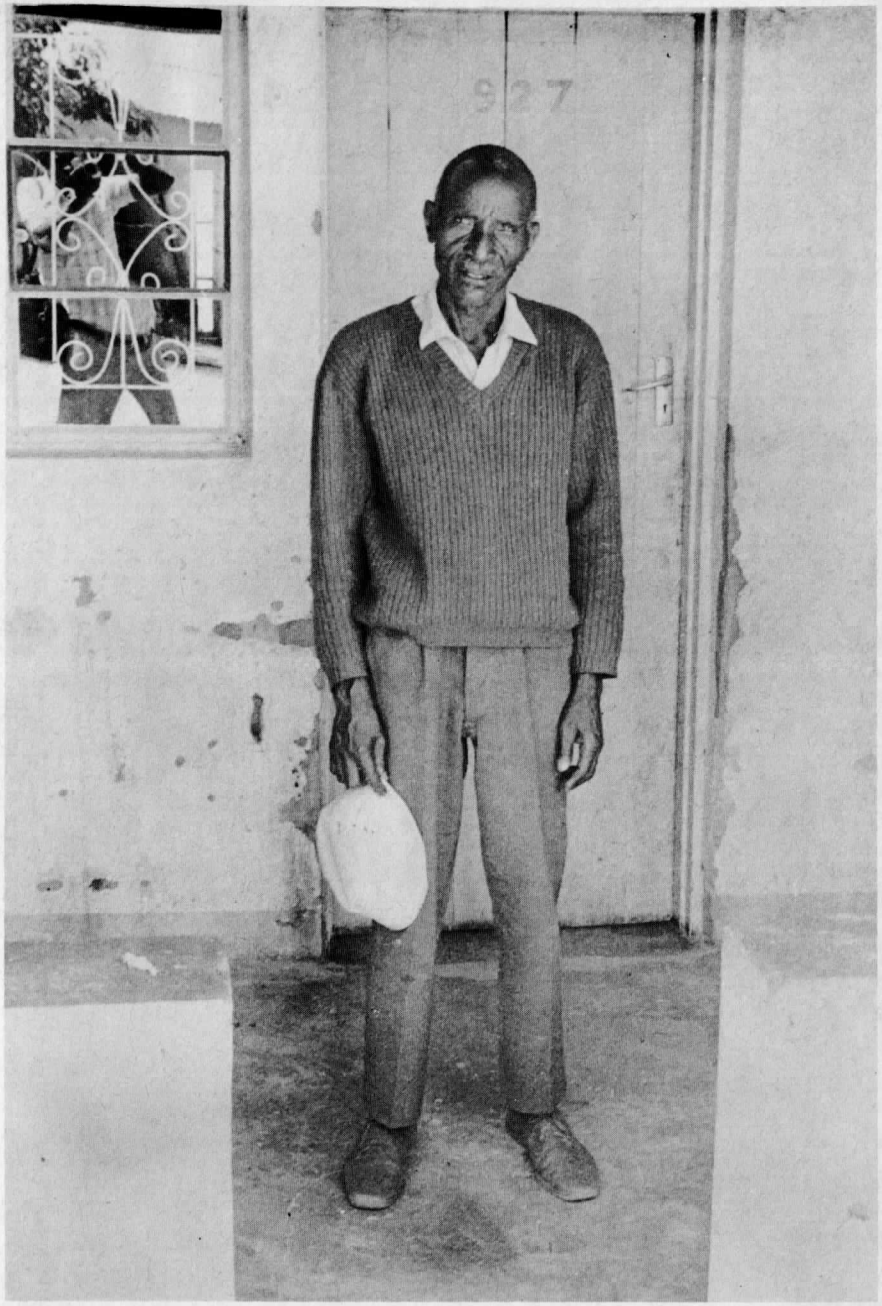
In assessing damages for adultery the circumstances under which it took place are considered. The five common varieties of this offence have been described by Gelfand (1975, p. 197).

1. Adultery anywhere other than in the husband's bedroom.
2. Adultery committed in the husband's bedroom.
3. Adultery plus elopement of the couple.
4. Adultery at the woman's father's home.
5. Adultery with a woman whose husband has died but before the ritual ceremony of **kurova guva** is held.

Another factor which affects the amount of damages demanded is whether the woman had repeated the act after an earlier condonation by the husband. The most important factor, however, appears to be the lover's attitude during the hearing. The lover usually has public opinion against him throughout the trial. Thus the way he conducts himself during the trial will largely determine the amount of damages awarded against him. Anything between two and three hundred dollars is not regarded as excessive by the court.

Breach of promise to marry is another frequent cause of disputes between a man and a woman. Such a dispute eventually involves the woman's parents and other close relatives. A breach of promise arises where a man with an unregistered union attempts to abandon the woman. As I will show in Chapter 4 many couples live for years without registration and without the usual bridewealth being paid. In such a case the Makoni court has inferred that the man had made a promise to marry the woman. Claims by the woman for breach of promise are, therefore, entertained. A plea by the man that the woman's parents knew about the relationship and had by their silence given their consent is accepted by the court. But where this is the case, the union is then considered valid for the purpose of divorce. Since the man had not paid any bridewealth, compensation is demanded before the union is dissolved. Where the couple had children, these belong to the woman's lineage. The question of guardianship and custody of such children may be considered if it has been specifically claimed by the father by separate action. A complaint by a woman of her husband's cruelty, that is, assaults, serious abuse or ridicule, is generally regarded as a symptom of a more serious social problem. Here the task of the court is to delve very deeply into grievances of each side and to try to expose the root cause of the behaviour. In most cases the court refuses to allow the dissolution of a marriage and demands instead that a compromise be attempted for some months to see if the marriage can be salvaged. Desertion on the part of the wife is handled in the same way. Again the court regards these complaints as symptoms of a more serious social problem. As in the case of cruelty, the aim always is to get to the root cause.

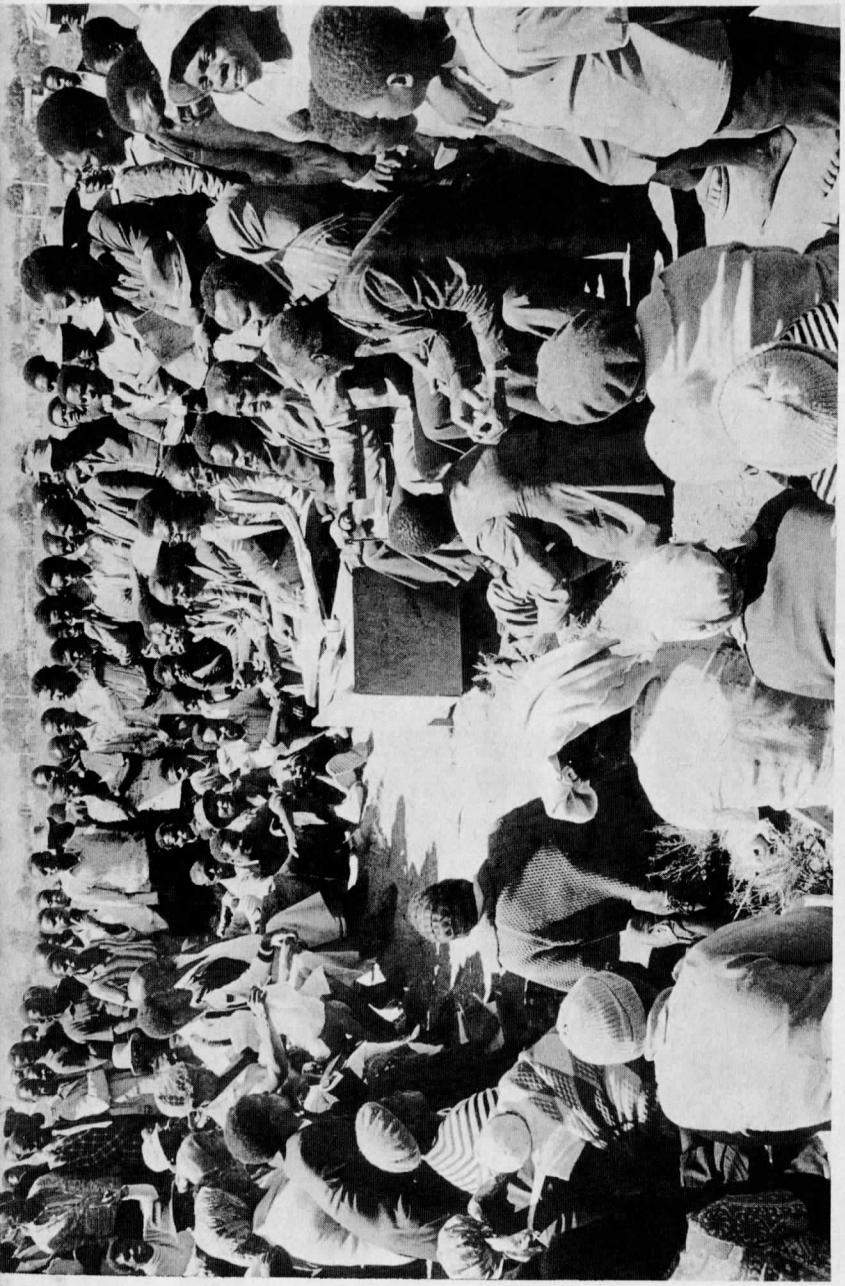
Another common cause of dispute between husbands and wives is the wife's disobedience. A husband who makes such a report has in most cases assaulted or repeatedly assaulted his wife and fears that she may report the matter to her kinsmen, police or to the Makoni court. The most common complaint made by the husband is the woman's refusal to go and live at the family's rural home and look after the dwellings, cattle and crops. Many urban women are reluctant to return to the rural areas even for part of the year as in the past. A return to the rural area means in most cases a drop in the standard of living. It also means separation from one's urban friends and relatives. It also means living with the husband's rural relatives some of whom may not be very friendly to her. The matter, however, is often more complicated than that. Most women who appeared before the Makoni court charged with disobedience argued that the real reason why their husbands wanted them to return to the rural home area was that they had recently acquired a girl



Headman Makoni standing outside his house in St. Mary's Township, Salisbury.
(Foto: Bester Kanyama)

Headman Makoni with a white hat is making a point during a hearing. On his right is the senior clerk, Tendai Makoni. On his left is Headman Manhungo and Miss Rachel Katsere, a research worker from the University. (*Foto: Bester Kanyama*)

Headman Manhungo is making a point during a hearing. On his right is Headman Makoni. (*Foto: Bester Kanyama*)



Part of the crowd of about 200 people who attended Headman Makoni's court on Sunday, May 13, 1979. Headman Makoni is on the right of the bespectacled man holding the big book, and sitting in line with him are the court officials. On the bench and opposite the court officials are the parties being tried. (*Foto by courtesy of THE HERALD, Salisbury*)

friend. Their refusal to return to the rural home was intended to frustrate the husband's attempt to live with the new girl friend in their urban houses while they are away. In most cases this turned out to be true. In such a case the court can only make a suggestion. The court usually suggests that both women, that is, the wife and the girl friend be sent to the rural home for sometime if the husband is serious in wanting to marry a second wife. The husband is also warned that he is committing an offence for which damages may be claimed for living with someone's daughter illegally. Any claim for such damages may, of course, be made by the girl friend's guardian.

Incest is a serious offence. In the formal courts it is regarded as a criminal offence. But as mentioned earlier incest can also be treated as a civil offence in the Makoni court. It is this aspect which is generally emphasised by the Makoni court. The reason for this has already been mentioned. Individuals who commit incest do not only offend other members of the society; they also offend their own ancestors and sometimes the clan or tribal ancestors as well. Thus to treat incest as a crime only punishable by the state leaves the problem largely unresolved. Many Shona people believe that deceased kinsmen continue to take an interest in the affairs of their descendants. It is believed that they protect their descendants at all times. They have power to prevent evil and they also help the living in solving their daily problems. They are interested in the behaviour of their descendants and may punish the wrong doers with illness and, in extreme cases with death. The clan or tribal ancestors, when offended by the deviant behaviour of members of their territory, can send an epidemic, drought or excessive rain which destroys the crops. Thus in cases such as incest, State punishment is not enough; it is not even regarded as punishment by many people. What is important is to right the wrong by paying compensation to the aggrieved parties and to make a sacrifice to the spirits in the hope of appeasing their wrath.

The main complaints brought to the Makoni court where there is a dispute between a man and his in-laws are as follows: breach of promise; failure to pay bridewealth; failure to complete bridewealth; divorce; and assault. Breach of promise has already been discussed above and need not be repeated here. The two other complaints, that is, failure to pay bridewealth and failure to complete bridewealth, traditionally were solved by impounding the wife. The father of the woman has a right to do so until the man pays his debt. Many parents no longer use this divice for two reasons. The first danger of impounding a daughter is that the husband may decide to abandon his wife and marry another. Moreover, if the woman commits adultery or falls pregnant while in the hands of her parents, the husband has a right

of action against his wife's father or guardian. The second reason why many parents do not impound their daughters is that bridewealth is often not the real issue at all. There are usually more serious social problems needing attention. This point was made very clearly by one man during a hearing at the Makoni court. The man accused his son-in-law for failing to complete the bridewealth. The son-in-law was charged $100 at the time of his marriage four years previously and only five dollars had been paid. However, the plaintiff went on, "it is not the money which is important to me. To me a hundred dollars is nothing. What I would like to see is happiness between my daughter and her husband. But these two people are not happy together. My son-in-law has insulted my daughter several times because she has a deformed leg. Surely when he married her he knew that she had a deformed leg." Thus when the Makoni court is faced with questions concerning the payment of bridewealth it attempts to do two things. Firstly, the court investigates any grievances that each party may have and attempts to settle such grievances. The second aim of the court is to obtain judgement for the amount due and to seek its enforcement like any other debt.

As pointed out earlier the Makoni court has no power to grant divorce where a couple have a marriage which was solemnized in terms of section 3 of the African Marriages Act (Chapter 238). Such cases fall under the jurisdiction of the district commissioner's court. The Makoni court only hears such cases with a view to obtaining reconciliation. The court is usually successful. From my experience many couples who say they have come to seek divorce at the Makoni court have not come to seek divorce at all. They have come to look for assistance in resolving their family problems. The Makoni court is particularly suited to play this role. The Makoni court dissolves unregistered marriages. Where bridewealth is involved the court enforces the payment or refund of bridewealth or part of it. But as pointed out earlier divorce is difficult to obtain at the Makoni court. The court sees its role as that of salvaging marriages and not to break them. Members of the two parties involved in a marriage do sometimes fight particularly over arguments concerning bridewealth. The individual who has been injured in such a fight has a right to claim compensation. In one case brought to the Makoni court a man was alleged to have assaulted his son-in-law's marriage negotiator (Kangai v Mutero, Case No. 18, 13.11.77). The cause of the fight was an argument over the outstanding bridewealth. The man was found guilty and made to pay one goat or $10 as compensation for the injured person. In another case a man assaulted his mother-in-law. The man was found guilty and a cow was demanded as compensation (Jotam v Susan, Case No. 21, 2.10.77). Disputes involving a man or woman and his step-child or children also occur. There are two main

sources of such conflicts: dispute over property and defamation and abuse. A dispute over property between a man and his stepson arises in two kinds of situations. The first situation is where a woman had children and her own personal property such as a house before her marriage. Such a case was brought to the Makoni court for trial. There was a dispute between Godfrey and his stepson John (Godfrey v Christina; Case No. 2, 2.10.77) over the ownership of the house which John's mother Christina bought before her marriage with Godfrey. The decision of the court was that none of them was entitled to succeed to Christina's property as she was still alive. Upon her death (assuming she dies intestate) her house would be administered by her father or brother. The court refused to answer the question whether John would succeed to the property when his mother dies since the situation had not yet arisen. The court, however, proceeded to investigate any grievances that John had against his stepfather, because these appeared to the court to be the fundamental cause of the dispute. A dispute over property between a man and his stepson may also arise where the woman inherited the property from her deceased husband. Again the court ruled that the woman's present husband and her son were not the proper persons to lay a claim on the property (Gwenzi v Elisha; Case No. 6, 10.12.77). Defamation and abuse constitute another common cause of conflict between a man and his step-children. In all cases of this nature which were brought to the Makoni court during the time of this study it was a son who had scolded a step-father. Using abusive language towards or scolding a step-father is actionable because he is entitled to special consideration. There will be cause for action if the step-father proves that the words used by the step-son upset him irrespective of whether his reputation or status was affected. The court, however, often orders the son to apologize so as to ensure harmony between them in the future.

Complaints which usually bring co-wives to the Makoni court are witchcraft accusation, assault and abuse. Where the court feels that witchcraft or sorcery may have been practised the case is referred to the police or the district commissioner's court. Circumstances which led to the accusation usually indicate to the court whether the matter should be treated as a criminal case or one of defamation. Witchcraft accusations indicate, and to some extent reconcile, breaches in social relations. The court knows this. Thus where the case appears to be one of defamation the court proceeds with an investigation of social relations in that particular household. The court awards damages for defamation, and in assessing these damages the circumstances under which the alleged defamation was made, are taken into account. Disputes between co-wives generally arise from

sexual jealousy and unfair distribution of economic tasks in the household. At the centre of these disputes is the husband. The Makoni court apportions most of the blame for disputes between co-wives on the husband himself. Husbands are told to cohabit with each wife in rotation in order to prevent sexual jealousy. Husbands are also advised to assign their wives separate dwellings or rooms in order to minimize friction, and to give one wife, usually the first married, a superior social status.

The main causes of friction between neighbours are: adultery, witchcraft accusations, assault, abuse, theft, and failure to pay rent. Cases involving a boy and his girl friend are a result of two main causes: pregnancy and assault. Pregnancy becomes an issue either when the boy friend denies any responsibility for the pregnancy or when he refuses to marry the girl. In both cases,however, the boy is charged as has already been mentioned with having unlawful sexual intercourse. Any man who has sexual intercourse with any woman, with or without her consent, but without the consent of her guardian, is liable to pay damages. A plea by the boy that the girl was a prostitute is not accepted. In fact, such a plea leads to further charges; that is, defamation and promoting prostitution. The boy is liable to pay further damages to the girl's guardian for such a plea. Where the boy is willing to marry the girl damages for unlawful sexual intercourse may be dropped. This largely depends on the attitude of the girl's guardian. Common assault also leads to court action. In all cases it is the girl who has been assaulted because of her unfaithfulness or suspected unfaithfulness. In such a case, however, the boy has either to promise to marry the girl or face charges of common assault and unlawful sexual intercourse. The main causes of friction between friends are: assault, abuse, theft, and unpaid debts. Cases between strangers are due to assault and theft.

There are a number of interesting points about the cases briefly described above. What is interesting about many of these cases is that they should be referred to a court at all. In traditional Shona society many of the problems now referred by some to the Makoni court such as family disputes of various kinds and quarrels between a boy and his girl friend, are resolved within the family. When a serious quarrel develops within a family, an attempt is made to solve it at a gathering of the senior members of the family or families. But, of course, when a rift within a family is irreconciliable the case is taken to court.

The reason why some people in Salisbury now refer many of their family disputes to a court is not difficult to find. It is mainly the absence of many of their key kinsmen. In rural Shona society when conflicts arise between a man and his wife which appear to threaten the marriage kinsmen quickly intervene in

order to stabilize the union. Similarly, when boys and girls are in difficulties there are kinsmen readily available who are eager to assist. But Salisbury like most towns in Africa is largely inhabited by people who have come from the rural villages in search of employment. These people have come to town without all their relatives. In fact, some of the key persons in the kinship system such as an aunt or uncle may be missing. Moreover, one's rural home area may be far from town and as a result frequent contact with rural family members becomes difficult and expensive. Furthermore, in the town, one has to take accommodation where one can find it which is usually away from urban kinsmen. Urban houses are also generally designed for small elementary families each consisting of the husband, his wife and their children. Where it is possible to take in additional persons these are likely to be unrelated lodgers who can be expected to pay for their accommodation to help the family defray the expenses of town life. The result of this has been the isolation of the family and the weakening of the extended family. The weakening of kinship ties does not usually mean that these ties are broken off completely. It means that many people can no longer rely on their kinsmen in times of difficulties. The Makoni court is to a certain extent taking the place of missing kinsmen.

People who are not related to one another such as neighbours and friends also take some of their cases to the Makoni court. The advantage in taking such cases to Makoni is that decisions made there will not often lead to a disruption of social relations as already mentioned. In cities like Salisbury a spirit of interdependence between members of local communities still exists to a certain extent. People co-operate in many social, economic, political and religious activities. Thus any behaviour which breaks friendship or community spirit threatens these essential collective activities. Thus the Makoni court is taking the place of rural headmen and chiefs in their attempts to reconcile differences and promoting social harmony. This is not to say that headmen and chiefs would be accepted by urban people as leaders in other spheres of social life. In fact, there is little support for the leadership of headmen and chiefs in other urban situations.

CHAPTER 4

UNREGISTERED MARRIAGES

A marriage contracted according to African Law is not legally valid unless solemnized in terms of the African Marriages Act (Chapter 238), and neither is a marriage where a man takes to wife the widow or widows of a deceased relative. However, a marriage under African law only although not legally valid in terms of the Act is regarded as valid marriage for purposes of status, guardianship, custody and right of succession of children of such marriage. There is another form of unregistered union known as **mapoto** marriage which has not received much attention in the past. The term **mapoto** comes from the English word, "pots". The new term literally means, "cooking together" or "sharing pots." Although **mapoto** marriages are not registered, they are regarded as marriages by those involved. They can be distinguished from ordinary love affairs in that the woman agrees to sexual fidelity in return for social and economic support although the man may have another wife. In an ordinary love affair a man may also want and expect his lover to be sexually faithful, and she may be faithful or pretend to be so to please him, but the man has no authority to demand it although some men think they have such authority. Moreover, in a **mapoto** marriage the man must and does acknowledge any children born as his own. Then there is also the emphasis that the partner is husband or wife and not a mere lover. It appears that many of the men who have entered into **mapoto** unions already have another wife. This leads to a new kind of polygyny.

In traditional Shona society polygyny offered a number of advantages. When wars were still common, clans or tribal groups, which won these wars were usually those that among other things, had a good supply of human resources. Thus in order to have an adequate supply of manpower for the defence of the territory, society encouraged every grown-up man to marry as many wives as he could afford and produce many children (Gluckman, 1960; Mitchell, 1963; Egboh, 1973).

From the point of view of the men, polygyny offered several advantages. Plural marriage made farm work easier. Wives and children provided most of the labour needed for farm operations such as ploughing, planting, weeding, harvesting and looking after livestock. Then there was the prestige value of many wives. Since it is generally expensive to enter into plural marriage, a man's wives served as a measure of his wealth. Thus the more wives a man had the more society looked upon him as a man of wealth. In fact, some women were keen to become wives of

polygynous men because of the belief that such men had the wealth to keep them happy. Children were also an important source of political power. In general men with many children and descendants were more likely to occupy positions of influence than those without. Lineages and clans were the building bricks of the political system. A man also looked to his children and other descendants for support in times of ill-health and old age. The larger the number of children the greater was the expectation and continuity of such social support. Some men entered into a plural union because of the sexual outlet offered by polygyny when continence was demanded during pregnancy and lactation. It was taboo for a husband to have sexual intercourse with his wife during the lactation period. Furthermore, the lactation period was long — two to three years in many cases. There was no artificial milk for child feeding. Polygyny was also sometimes resorted to as a means of preventing divorce. If the relationship between a man and a woman became bad because of the woman's laziness or other reasons, she could be retained as a wife for some other quality of hers such as beauty, and another married for her industry. The rule of widow inheritance also led to polygyny. When a man's brother died, society generally expected the surviving brother to look after the widow and her children.

Some women felt that there were some advantages in entering into a plural union. In the home the woman was expected to bear the whole of the domestic burden. Because of this, some married women urged their husbands to marry more wives so that they did not have to bear the whole of the domestic burden alone. Companionship was another advantage. In traditional society it was not necessary that husband and wife should share the same interests and activities or that they should be with each other all, or nearly all, of the time. A man was expected to seek companionship with his fellow men, and a woman with her fellow women. Thus for the sake of companionship some wives urged their husbands to bring another woman into the establishment. To some women the rule of widow inheritance also offered some advantages. It ensured continued social and economic security after the death of the husband. Partly because of this need for social and economic security some widows encouraged their husband's surviving brothers to enter into a husband-wife relationship with them.

Nowadays many of the advantages of polygyny have disappeared. The need to have many wives and children for the defence of the society has largely disappeared because of the absence of such wars. In farming children are no longer an economic asset in many areas. Nowadays children, wherever possible, have to spend most of their time in school and after completing their education move into the towns and other

employment centres in search of work. Many parents today pay school fees, often at great sacrifice, with the hope that their children later on will gain those urban jobs that now provide better financial rewards and prestige. Farming in many parts of the country is increasingly becoming unprofitable due partly to the diminishing amount of land, lack of finance, insecurity and poverty of soils. And since it is difficult nowadays for many men to provide good education for the children born of only one wife, many men refrain (usually because of the wife's concern for the children's education) from entering into a plural union because of the extra economic burden it would place upon them.

The economic inability of many men to support several wives is another factor which has made monogamy more popular than polygyny. Many adult men are no longer self-employed on their farms. They now work in towns and other employment centres as wage earners and depend for their livelihood largely on their wages which can barely meet the now numerous needs of modern society. Some wealthy men argue that polygyny would divert their capital from more profitable uses such as investing it in business. In general economic wealth now confers more prestige than polygyny. In competition for modern jobs polygyny can sometimes restrict one's opportunities for social advancement. Some business managers, government officials and missionaries are reluctant to hire or promote polygynous men mainly because of Christian education which has propagandised for a long time in favour of monogamy. Many employers also feel that the chances of wanting leave of absence from work to attend to family problems are greater among polygynous men than among monogamous workers.

Although monogamy is now more popular than polygyny there are still a number of factors which favour plural marriage: factors which will be described below such as the strong desire for children, family conflicts, poverty, and loneliness. But many people nowadays are Christian and Christianity forbids polygyny on principle. Furthermore, civil law supports this Christian doctrine. Since the promulgation of the Native Marriages Act (now the African Marriages Act, Chapter 238), when a man married by civil rites subsequently marries an African woman before a district commissioner by African law, he commits bigamy. Faced with this situation, that is, for example, a strong desire for children on the one hand, and their Christian faith and the statutory marriage law on the other, some people have found some way of acquiring additional wives without abandoning their Christian faith or breaking the law. This takes two main forms. One form is the unregistered customary law marriage described earlier where an additional wife is taken after customary marriage obligation have been fulfilled at least in part. The second form which is very common nowadays is **mapoto**

marriage. A man married by civil rites who subsequently acquires an additional wife or wives by either of the two methods just described has not committed bigamy (the legal wife can sue him for adultery).

Where the wife is unable to produce children, a man might be tempted to look for another wife. This is mainly a desire to have children, particularly male children, who will succeed the father after death, inherit his property and perpetuate his name and lineage. To many people absence of children causes more suffering than almost anything else.

One consequence of this strong desire for children is the great temptation on the part of many Christian men nowadays to try and prove before marriage that the girl they are about to marry is fertile. In other words while a polygynist could tolerate one barren wife, it is much more essential nowadays for a man to ensure that his one wife is fertile. Although there are no figures which indicate the percentage of women who now enter Christian marriage already pregnant, the number of such women could well be rising. Sterility on the part of the husband although shameful is not generally regarded as a sufficient cause for the dissolution of marriage. In the past the husband could make a secret arrangement with a close relative to impregnate his wife in his name. Many people no longer accept this device and as a result relations between husband and wife may in some cases become intolerable because of the man's failure to satisfy his wife sexually and may result in the dissolution of the contract.

Other Christian men do not try to prove before marriage that the girl they are about to marry is fertile. However, should the woman prove to be barren after marriage the temptation to divorce her is often very great. Many such marriages end in divorce. Before taking this action many Christians in this position often consult traditional and scientific medical specialists in an attempt to improve their chances of getting children.

Some Christian men who are married to barren wives do not divorce them, but faced on the one hand with the great urge to have children and on the other with the church's ruling on polygyny, many Christians in this position often find some way of producing the desired children without abandoning their Christian faith. They generally do this by taking a leave of absence from the church, and devote a few years of their lives to the production of children. For this an additional wife is acquired. The man regards the new marriage as a temporary arrangement to be terminated when he has achieved his objective of getting a reasonable number of children (Egboh, 1973; Chavunduka, 1976).

Take the case of Joseph who married his first wife in 1942. This wife is barren. In 1949 Joseph married another wife with

whom he produced two children. This marriage was dissolved in 1956. Joseph told me that he found it difficult as a Christian to continue with his second marriage. The children have been adopted by his childless first wife. Today Joseph is a leading member of his church and also an active member of the Moral Rearmament Association.

Another example is that of George, a prosperous businessman and a member of the Methodist Church. His legal wife has seven children — all girls. What forced George to look for another woman was the desire to have at least one son who will inherit his property and name. The second wife who now has one son lives in another part of town some distance away from the first wife. No bridewealth has been paid for the second marriage. George's first wife as well as other kinsmen know about the second marriage.

The rule of widow inheritance is another factor which may lead to some form of polygyny among Christians. As mentioned earlier, when a man's brother dies, society generally expects the surviving brother to look after the widow and her children. Pressure from kinsmen (some of whom may not be Christians) to make the relationship between the man and his dead brother's wife strong, is often very great. The widow, too, partly because of the need for social and economic security, may encourage her husband's surviving brother to enter into a husband -wife relationship with her. Some relatively wealthy widows encourage their husband's surviving brother to enter into a husband-wife relationship with them because of the desire to remain with their children. Refusal to be inherited by the husband's surviving kinsman can mean separation between the widow and her children. The widow may (although this is not often done nowadays) be sent back to her family of origin while the children remain with their father's kinsmen. If the man is of little faith he may be forced to work out an arrangement whereby the relationship with the widow is strengthened without placing his Christian identity in an embarrassing position.

All close kinsmen of the widow's husband may, of course, refuse to inherit her. In this case the widow remains with her children or may re-marry. On the other hand some relatively wealthy widows who want to retain their social identity avoid actual inheritance by appointing their sons as their future "husbands". This device is acceptable and some Christian women use it nowadays.

The case of Lovemore is a good example of how the rule of widow inheritance often presents a dilemma among Christian men and women. Lovemore has been a leading member of the Anglican church for over ten years. He is a very successful carpenter. He is married and has seven children. During the last

three years he has been maintaining his dead brother's wife. In fact, people around them now regard the widow as the man's second wife. This relationship is not known by many members of Lovemore's church as the widow lives at a place remote from that of his legal wife. In his community Lovemore poses as a monogamist. He told me that as a Christian he did not want to live with his brother's widow as husband and wife, but pressure from some of his kinsmen and the widow herself was so strong that he had to show his Christian charity by agreeing to the arrangement.

Serious family disagreements may also lead to some form of polygyny among Christians. Today as in traditional society polygyny, or at least some form of it, is sometimes resorted to as a means of stabilising marriage. Some men believe that if a wife has a rival she does her best to please the man in order to retain his love which would otherwise be transferred to her rival.

Polygyny may, of course, create family problems as well. An internal family struggle may develop between one wife and her children on one side, and another wife and hers on the other. Inheritance problems may arise as well as sexual jealousies and adultery, but many marriages, too, have been saved by it.

Obediah, who was a supervisor in a business firm in Salisbury for thirty-one years also had a **mapoto** marriage for seventeen years. He told me that his first wife "is a trouble-maker". They could not get on well together particularly during the early years of their marriage. The first wife lived at their rural home while Obediah lived in town with the other wife. The **mapoto** has now been terminated and Obediah now lives at his rural home in retirement.

Economic difficulties nowadays may lead to plural marriage. This happened in the case of Oliver, who until 1976 was a lorry driver in Salisbury. Stencia, his legal wife lives at their rural home with their four children. They married in 1960. In 1972 Oliver established a **mapoto** marriage with Patricia who had just completed her nursing training at Harare Hospital in Salisbury. Patricia is now a nursing sister and receives a relatively good salary. She didn't know that Oliver had another wife until early 1975 after the birth of her daughter. By 1976 Oliver and Patricia had saved enough money between them to open a butchery shop in the rural area which is now being run mainly by Stencia. Oliver told me, "Had I not married Patricia, I would be in very serious financial problems today. My children would never have gone to school. Although my first wife was mad when she heard about Patricia, now she is happy because she runs our butchery".

Some men who are happily married to illiterate or semi-educated wives acquire additional wives on obtaining higher

education, good jobs or wealth. As in Iboland (Egboh, 1973) such men feel that their illiterate or semi-educated wives are not sophisticated enough to cope with their new way of life. As a result they acquire other more sophisticated and highly educated wives with whom they appear at public functions while the uneducated ones are left behind. Chitambo, who claimed to be a lay preacher in the Methodist church is a good example. He married his first wife in 1952 and they have four children. At the time of their marriage Chitambo had eight years of formal education and his wife had completed grade 3. While in town Chitambo took correspondence courses and completed his high school education. A few years later he completed a diploma in business administration. In 1970 he established a **mapoto** marriage with Rhoda, a school teacher. Rhoda was a divorcee and has two children by a previous marriage. Chitambo and Rhoda have no children of their own.

Other reasons which appear to encourage some Christian men into a plural union are, interest in some other woman, loneliness, and reluctance on the part of some divorcees and widowers to contract another Christian marriage.

Obert, a senior clerk in a transport firm established another union because of his love for Juliet. He married his first wife in the Methodist church in 1958. They have five children. He began living with his second wife Juliet — a divorcee — in 1970. He does not intend to have any children with this second wife. In the case of Jacob, loneliness appears to have played a part in the establishment of his second union. He loves his first wife who lives with their seven children in the rural area about 100 kilometres from Salisbury. He told me that he could only visit his first wife about two or three times a year. The last example is that of Martin who divorced his first wife in 1969. He established a **mapoto** marriage because of his reluctance to contract another Christian marriage at least for the time being. He has been living with Maria as husband and wife for over four years. They have two children.

It should be pointed out that men do not always acquire the additional wives described above without the knowledge of their Christian wives. In fact, in some cases the Christian wife may be in sympathy with the husband, particularly where she is barren, and so may tacitly give blessing to the husband's practice, and connive at whatever he does in this respect. One woman living in the rural areas told me that she doesn't mind what her husband does in town as long as she receives financial support enough for her and others living with her. Samson's first wife made the same point. She did not oppose his second marriage because as she put it, "it was my fault. I only have one child. I can't produce any more children. The second wife will produce

more children for us." Some women who are opposed to polygyny succeed in preventing their husband from marrying a second wife. As already mentioned a Christian wife can, in fact, succeed in an action for divorce on the grounds of adultery in the formal courts (Child, 1965; p. 57) if her husband takes another wife without her consent.

Many Christian women agree to enter into these unions for a number of reasons. Some do so because they consider themselves incapable of securing a good Christian marriage. These are women who may have had children out of wedlock or consider themselves too ugly to find a suitable young man. Sipiwe's case is a good example of this behaviour. She was made pregnant by one of her teachers before she completed her primary school education. The teacher refused to marry her. After the birth of her child, Sipiwe moved into Salisbury and eventually obtained a job as a shop assistant. She now lives with a man as husband and wife, in a **mapoto** marriage. The man has another wife. Sipiwe told me that she had lost hope of ever having a Christian marriage because single men are reluctant to take on responsibility for a woman's children by a former union.

Other Christian women agree to marry or live with Christian polygynists because of their age. They fear that if they remained unmarried, they may be exposed to contempt in the society. To many women it is better to be married to a polygynist than not to be married at all. Thirty-four year old Virginia gave this as her reason for agreeing to establish a **mapoto** marriage. Some women agree to marry polygynists in the hope that the first wife will eventually be divorced. This expectation is usually the result of the man's promises. Sophie who has a **mapoto** marriage reported that her husband had promised to divorce his first wife within a year of marriage. "He has not done so after eight years of marriage; in any case it is useless now because I already have two children with him". Some young Christian girls are cheated by polygynists. Patricia mentioned above, who now has three children with a polygynists, reported that she had fallen in love with him while she was doing a nursing course at Harare Hospital. The man told her that he was single. She discovered after the birth of her daughter that the man had a wife and three children living in the rural area. A large number of women married to polygynists are divorcees and widows who want social and economic support even for a limited period. Many divorcees express reluctance to enter into a more formal union again. They know that a formal marriage does not guarantee a secure future. One woman with a **mapoto** marriage boasted that she was much happier than most women who have Christian marriages.

Some women mentioned the disire to retain their social

identity, freedom, and equality with the husband as reasons which make **mapoto** marriage more attractive than formal Christian marriage. One woman said, "I am happy as things are now, because I am free to do whatever I want in a **mapoto** marriage". Another said there was "equal responsibility in matters related to clothing, food and so on in a **mapoto** marriage". And Elizabeth, a school teacher said she didn't like a legal Christian marriage, "because it ties the woman to the man thus making her subservient". These replies are an indication of the changing position of women in Shona society.

When faced with a choice between customary and **mapoto** marriage, older working or professional women who intend to spend most of their lives in town, generally prefer **mapoto** marriage. In a **mapoto** marriage as mentioned by the three informants above, the woman largely retains her social identity. Relations between husband and wife are also more equal than those in a Christian or customary marriage. Another advantage in a **mapoto** marriage is that the woman need not be greatly concerned with maintaining good, orderly relations with kin and she is also less attached to the values and practices of traditional rural life.

Terminating the husband-wife relationship described above is not always easy. Some remain married for life. In some cases the marriage may become so strong that the legal Christian wife is eventually abandoned. In some Christian churches the man may then have a Christian wedding again with the second wife.

There are three courses of action open to the father of a woman who has entered into a **mapoto** marriage. He can demand bridewealth in order to make the marriage more formal. Some parents succeed in obtaining such bridewealth. But since formalization of the marriage may not be in the interest of the husband or wife or both, many men with **mapoto** wives avoid, by using a number of techniques, the payment of bridewealth. The most common technique is to promise to pay the bridewealth in the near future. This promise can and is often made a number of times as years go by. Parents know this and have devised their own techniques of forcing men living with their daugters to pay the bridewealth. They are not always successful. The most common method used by parents to force their sons-in-law to pay the bridewealth is to impound their daughters and their children until the sons-in-law produce the bridewealth. Irene's father tried this method without much success. He took Irene to his home leaving her husband alone. Irene's husband knew it was a trick to get him to pay bridewealth. He did not follow his wife. After about three months Irene ran away from her father's

home and returned to her husband. No further attempts have been made by Irene's father to recover the bridewealth.

The other course of action open to the parents of a woman who has established a **mapoto** marriage is to sue for damages. Many parents, however, do not claim for damages because their own daughters may be opposed to such payments. Moreover, daughters may use a number of techniques to frustrate the efforts of their parents to recover the damages. This is because payment of damages is not always in the interest of the husband or wife or both. An example of this is the case of Rosemary. She had a child with a Christian polygynists. They had a **mapoto** marriage. When her father and other kinsmen demanded damages, Rosemary by prior agreement with her husband argued with her parents that she was unsure about the paternity of the child since she had a number of lovers. No further attempts were made by her father to demand damages.

The last course of action open to the parents of a woman who has established a **mapoto** marriage is to accept the marriage as such and refrain from making any claims for bridewealth or damages. In many cases the payment of bridewealth or damages will lead to the break-up of the marriage. It has already been pointed out that the attraction of **mapoto** marriage as far as many Christian polygynists are concerned is the expectation of impermanence. To many Christian women, particularly widows and divorcees **mapoto** marriage permits the pleasures and comforts of a legal Christian union without its constraints. Rosemary, whose marriage has been mentioned above stated this point very clearly. Her father wanted her husband to pay damages. Rosemary frustrated this attempt. She told me; "If I allow my father to claim damages this may lead to the break-up of the marriage. My husband will take away the child after paying the damages, and stop supporting me and my three children by a previous marriage as he is doing at present".

Although many men with **mapoto** marriages are reluctant to pay bridewealth, they remain an important economic asset to their wive's parents throughout the duration of their **mapoto** marriages. Many men send gifts of clothes, food and money to the woman's parents from time to time. One man whose two daughters are married — one by Christian rites and the other established a **mapoto** marriage, told me that he was now more fond of the husband of the second daughter. Further investigations showed that the husband of the daughter with a **mapoto** marriage is a fairly wealthy man. He has built an expensive house for his father-in -law and sends him cash gifts from time to time.

The question of how people who apparently uphold in theory the monogamous Christian teaching on marriage manage to

depart from it in practice has not yet been fully explained. In other words we must ask how some Christians manage to avoid the impact of their Christian commitments.

There are a number of techniques of neutralisation which make such deviant behaviour possible, as well as rationalisations which protect the individual from self-blame and the blame of other Christians. One way of reducing self-blame and the disapproval of other Christians has already been mentioned; that is, taking leave of absence from the church. A Christian who enters into a plural union is regarded as having broken with or betrayed his faith. He is denied certain rights which are the prerogatives of practising Christians. In order to reduce the impact of such disapproval the Christian polygynist makes it clear that the plural marriage is a temporary arrangement to be terminated as soon as he has achieved his objective of getting a reasonable number of children. The man argues that he has the opportunity of reforming his life at any time and becoming a good Christian again before he dies. In doing this, as Egboh (1973) points out, the disapproval of self is reduced in effectiveness. There are many people who have abandoned polygyny and have become active members of the church.

A technique used by other Christians is what Sykes and Matza (1957) have called the denial of responsibility. In this case the individual defines himself as lacking responsibility for his deviant actions. He sees himself as helplessly propelled into a new situation. By so doing the disapproval of self or others is sharply reduced in effectiveness as a restraining influence.

The case mentioned earlier of Lovemore is a good example of this. He is a leading member of the Anglican church. He is married and has seven children. During the last three years he has also been maintaining his dead brother's wife. In fact, they now regard each other as husband and wife. Lovemore told me that as a Christian he did not want to live with his brother's widow as husband and wife, but pressure from some of his kinsmen and the widow herself was so strong that he had to show his Christian charity by agreeing to the arrangement. Many women use this technique as well. The woman blames the man for propelling her into this situation. As one woman put it, "it is my husband's responsibility. What could I do as a woman". A man who entered into a **mapoto** marriage told me that his barren Christian wife urged him to take another wife so that they might have children. The man argued that he has not abandoned Christianity.

The other technique used to reduce self-blame and the blame of other Christians is to shift the responsibility for the behaviour onto the ancestors. The individual sees himself in a dilemma that must be resolved. On the one hand there is the

church which teaches the doctrine of one man, one wife, and on the other hand there are the ancestors who may be offended in the case of failure to produce children who will perpetuate the lineage and clan. Faced with this situation the individual accords precedence to the believed demands of the ancestors while not rejecting the Christian doctrine. An example of this is the case of Thomas whose Christian wife is barren. In town where he works he has another wife. He now has three children with his second wife. His first wife lives in the rural area. Thomas told me that the views of the ancestors are just as important as those of the church. "If I don't produce children the ancestors will be angry with me. They want descendants. I still want to be a Christian, but I must also please my ancestors".

A technique of neutralisation used by some men and women involves the condemnation of those who appear to be upholding the monogamous Christian teaching on marriage both in theory and practice. In this case the individual claims that others are hypocrites. One informant told me, "at least my husband and I are doing it publicly. We have not attempted to hide our **mapoto** marriage. There are many church men who have concubines, and many church women with boy friends. I know some of them". Thus by attacking others the wrongfulness of her own behaviour is then more easily repressed.

This does not mean that Christian women who have established **mapoto** or customary unions do not attach any value to Christian marriage. In fact, many of them do.

Since the district commissioners' courts as well as magistrates' courts do not recognise **mapoto** marriages as valid marriages, the only court in Salisbury where such marriages are entertained at present is the Makoni court. In terms of the statute law of Zimbabwe, to establish adultery it is essential that the woman be validly married to the plaintiff. A husband who is married by customary law but whose marriage was not solemnized in terms of section 3 of the African Marriages Act (Chapter 238) has no right of action against his wife for adultery. The Makoni court, however, has ruled that sexual intercourse with another man by a woman with a **mapoto** marriage gives rise to an action for damages by her husband for adultery. I will give a few examples. In Cephas v Pemise (Case No. 6, 23.10.77) it was reported that Cephas' wife, Sarah ran away from home and went to live with her boy friend called Davy. When questioned, Sarah said she was no longer in love with Cephas. She was now in love with Davy. Cephas and Sarah had lived together as husband and wife for four years and had one child. No bride-wealth was paid. The decision of the court was that Davy committed adultery. Cephas claimed damages amounting to $200 which was awarded by the court. The case of David v Antonio

(Case No. 2,25.2.79) has already been mentioned. Evidence presented to the court was as follows. David's wife Sylvia went to her parents' home for a short holiday. When she returned to her husband after the holiday her child was suffering from measles. After a few days the condition of the child deteriorated. David was told by some of his friends that his wife may have committed adultery during her holiday. As mentioned earlier, it is believed in traditional Shona society that if the husband or wife commits adultery when they have an infant, the child will be attacked by measles. Failure to confess on the part of the wrongdoer may lead to the death of the child. Armed with this information David, in the presence of witnesses, accused his wife of committing adultery during her holiday. Sylvia at first denied the charge but when it appeared that the child was about to die she agreed. In her defence Sylvia told the court that she was raped by a certain man called Antonio who works in the same factory as her father. After cross-examination Slyvia later modified her statement; she agreed that the act was committed voluntarily. David and Sylvia had a **mapoto** marriage. Sylvia's father who was present in court confirmed that David was his son-in-law although no bridewealth had been paid. The court found Antonio guilty of committing adultery. David demanded $150 damages which was awarded by the court.

The view of the court is that a binding marriage exists despite failure on the part of the husband to conduct the preliminary negotiations with the woman's guardian required under statutory customary law. But since the woman's father or other relatives are usually present at the hearing the court often makes another order; that steps be taken by the man to make the marriage more formal by paying bridewealth or part of it. A plea by the defendant that he was ignorant of the fact that the woman was married is usually not acceptable defence in an action for demages for adultery. The court's view is that every man knows or is in a position to ascertain whether a woman is married or not. A strong argument can, however, be made that in the urban situation there is a large number of people and therefore a knowledge of a woman's status can no longer be presumed. But this line of argument ((assuming the defendant was successful) leads to an alternative charge, that is, having sexual intercourse with a woman without the consent of her guardian. I have already shown that an attempt by the defendant to prove that the woman was a prostitute leads to the third possible charge; that is, promoting prostitution.

Parties to a **mapoto** marriage seek divorce at the Makoni court. Take the case of Sebastian (Sebastian v Zacharia, Case No. 8, 6.11.77). His wife Sophie, told the court that Sebastian was attempting to divorce her. In his defence Sebastian told

the court that he was angry because Sophie had refused to go to his rural home in Mtoko to look after the crops. Sebastian and Sophie had a **mapoto** marriage. The court ordered Sebastian to pay bridewealth amounting to $44 as soon as possible. Divorce was not granted. Musekiwa aslo failed to obtain divorce (Musekiwa v Hubert, Case No. 2, 25.9.77). His wife's guardian, Hubert, told the court that Musekiwa had "chased my daughter away". Hubert said although Musekiwa and his wife had lived together as husband and wife for several years no bridewealth was paid. He had not yet demanded bridewealth. The court turned its attention on the bridewealth. Musekiwa was ordered to pay $3, being the fee charged for beginning bridewealth negotiations. Hubert was then asked to claim his bridewealth. The agreed figure was $150. Divorce was not granted. Where the court fails to obtain reconciliation between husband and wife an alternative charge is brought up, that is, damages for living with someone's daughter without the consent of her parents or guardian. This point is interesting. In a **mapoto** marriage, usually the woman's parents and other relatives know about the marriage. In many cases they have seen their daughter's husband. The husband may have visited his wife's parents and given them gifts from time to time. Thus when a claim for damages arises for living with someone's daughter without the consent of her parents or guardian, men usually argue that the wife's parents were aware of the marriage and had by their silence given their consent. But this is difficult to prove. The position usually adopted by parents of a woman with a **mapoto** marriage when this question arises is that no such consent was given although the relationship between their daughter and her "husband" was known to them. In other words an attempt is made to make a distinction between consent and a reluctant acceptance of the marriage. In the case of Garikayi v Marco (Case No. 1, 16.10.77) divorce was granted. Garikayi and Jane had a **mapoto** marriage. In fact, when Garikayi decided to divorce his wife he gave her a **gupuro** of four cents. **Gupuro** is a sum of money usually ten cents which is handed to the woman saying as the husband hands it to her, "I no longer love you. Go to your home". In the past a hoe or some other item was given. But since Garikayi was no longer prepared to continue the marriage an alternative charge was made, that is, living with someone's daughter as husband and wife without the consent of the parents or guardian. Marco claimed damages amounting to $250. The court, however, reduced the amount to $100 since the woman was a divorcee.

Normally the children of a **mapoto** marriage are regarded as members of the husband's lineage and therefore adopt the father's surname unless there are objections from the mother and her guardian. The mother and her guardian can, of course,

object relying on the law that "children go where the bridewealth has come from". If no bridewealth was paid (and no exemption was granted) the children belong to the mother's lineage. On the other hand a man with a **mapoto** marriage may not want the children of such marriage to adopt his surname for fear of other obligations that may flow from such an arrangement such as the possibility on the part of such children of succeeding him after death and inheriting his property. There are other reasons such as fear of the first wife or fear of being excommunicated from one's church. At the Makoni court a mother has a right of action against a man who is unwilling to let his children by a **mapoto** marriage adopt his surname. A ruling on this issue was made in the case of Simon v Duster (Case No. 3, 16.10.77). Simon's wife told the court that her son George was now old enough to obtain a registration certificate from the district commissioner's office. She asked Simon to accompany George to the district commissioner's office in order to assist him in obtaining the registration certificate. Simon refused to accompany George to the district commissioner's office. (District commissioners usually require the boy's father to be present so that some of the information on the father's registration certificate may be transferred onto the boy's certificate. They also want the father to be present so that he may answer any questions that they may have concerning the boy). It became clear to the court after questioning that Simon had refused to accompany George to the district commissioner's office in order to prevent him from adopting Simon's family name. Simon suggested that George be accompanied by his mother's brother since he had never paid bridewealth. The court ordered Simon to accompany George to the district commissioner's office and give all relevant information to the district commissioner. A letter to the district commissioner was written by the clerk of the court introducing Simon as George's father. In another case Thomas refused to go to the district commissioner's office to obtain his child's birth certificate. He asked that the mother and her guardian obtain the certificate on his behalf. As in the case of Simon, the court ordered Thomas to appear in person at the district commissioner's office and assist the child in obtaining the birth certificate. A letter was written to the district commissioner introducing Thomas as the father of the child (Thomas v Mandengu, Case No. 11, 28.1.79).

CHAPTER 5

TRADITIONAL SHONA MARRIAGE

In this chapter I describe the main features of traditional Shona marriage, that is, customary law marriage before the Order in Council of 1898 and the subsequent amendments. This is important for three main reasons. Firstly, such a description will show more clearly the reasons for the differences in approach between the Makoni court and most district commissioners' courts in dealing with marital problems. The second reason is that a description of the main features of Shona marriages during the last century will illustrate the present differences between customary law and what the formal courts regard as customary law. Lastly such a description will provide a base from which to measure changes in customary law marriage.

In traditional Shona society marriage is not the exclusive concern of two individuals. The families of both the man and the woman are intensely interested in their union, and many relatives of both partners play an important role throughout the subsistence of the marriage. The essential part of the marriage contract is that the woman must produce children. As mentioned in Chapter 4 children are highly valued in traditional society because they are an important source of labour and political power. Children are also an important source of social and economic support. A man looks to his children and other descendants for support in times of ill-health and old age. The larger the number of children the greater the expectation and continuity of such social and economic support. Another important principle of Shona marriage and family is the payment of bridewealth. At the time of marriage the father of the boy and other close kinsmen provide the necessary payment for marriage which goes to the girl's family, (in certain cases which will be described below bridewealth is not demanded). The amount of bridewealth varies. It is a matter for negotiation between members of the two groups. In the past cattle and other livestock were normally given at the time of marriage, but nowadays money is becoming an important substitute for cattle. This is mainly due to the scarcity of cattle and other livestock in recent years and the difficulties of moving livestock from one district to another.

One important person who perfoms a crucial role in marriage is the go-between (negotiator). Usually the go-between is not related to either family. His main function is to bring the two families together, and to smooth out difficulties which may block the conclusion of the marriage. Should tensions arise which threaten to disrupt the union in the future, the go-between inter-

venes and tries to reconcile the parties, or witnesses the dissolution of the marriage.

Bridewealth perfoms a number of important functions. Firstly it legalises the union. The transfer of bridewealth or part of it or the agreement to pay is the public sign that the couple is now married. Bridewealth also acts as a sort of insurance policy against the possible dissolution of marriage. If the wife behaves badly, her husband may divorce her and demand the return of his bridewealth or part of it. In fact, the girl's father and other kinsmen who receive the bridewealth at the time of marriage do so with the understanding that they may be called upon to refund it should a divorce occur. Thus the stability of the marriage is in their own interest. When marital conflicts arise which threaten to disrupt the union, they will put pressure on their kinsman — the wife — to behave herself so that they may not be called upon to refund the bridewealth. The man, too, may lose his wife if he ill-treats her or fails to support her satisfactorily. She may leave him and if he is found to be at fault he may lose both the wife and his bridewealth. The third important function of bridewealth is to procure children. As mentioned earlier, in principle, the children of any union belong to the woman's lineage until bridewealth has been paid. Thus bridewealth confers genetricial rights upon the husband's kin group, that is, rights in the woman as a mother and refer particularly to the ownership of children.

Since bridewealth confers the woman's procreative power on her husband's lineage for life, when the husband dies an approved relative of his lives with the widow and the children. This prohusband begets more children for the lineage. Similarly, when the woman is barren or dies a replacement may also be made. These arrangements often lead to polygyny. There are, of course, other factors mentioned in Chapter 4 which may lead to polygyny such as the prestige value of several wives; interest in some other woman; and the sexual outlet offered by polygyny when continence is demanded during pregnancy and lactation.

The effect of the rule or bridewealth is to give greater permanence to marriage. Traditional Shona marriages generally endure beyond the death of the husband and father, for he is still married to his widow now living either in levirate marriage with a kinsman of his, or as a concubine. Similarly, the death of the wife need not break the marriage. If the man has been a good spouse and son-in-law, the dead wife's younger sister or other approved relative will come to take her place. In a sense, the younger sister or relative becomes the dead woman and the family is reconstituted.

The actual payment of bridewealth is not essential to the validity of the marriage. In most cases full payment does not

take place for years. Some old men die before completing their bridewealth. Another important point is that bridewealth is not always a tangible object. Service marriage is accepted in traditional society. Thus a poor man who has no way of raising the necessary bridewealth can arrange to work for his father-in-law instead of paying bridewealth. There is also a custom to exchange daughters without payment of bridewealth. Other marriages which take place without the exchange of bridewealth include sororate and widow inheritance mentioned above and **mukadzi weropa,** that is, a woman given to a bereaved family by the family of the person responsible for a killing or murder. Child marriages which are now rare took place. It was possible for a man to favour a friend with the promise of a small daughter in marriage. More often child marriages were a result of economic problems. A family might marry off a small girl and use the bridewealth to buy food for the family. The girl stays with her parents until she reaches a marriageable age. Should the union not take place either because the girl has refused or some other reason the bridewealth is returned. Any girl reaching puberty was considered marriageable.

There has been a lot of misunderstanding on the part of the legislators in connection with the part a girl played at the time of marriage. As will be seen later many early European legislators believed that girls were compelled to enter into marriage without their consent. This is not correct. Holleman (1952) is right in saying that in most cases marriages were not undertaken against the children's will. At various stages during the marriage negotiations, the parties particularly the bride expressed willingness or unwillingness to enter into the proposed marriage. When marriage negotiations began the whole family council of the young woman's relatives, including her father's brothers and sisters, and also her own brothers and sisters and her mother, was present. Since marriage was a group affair all were required to give their consent to the marriage. In many areas each member of the family showed his consent to the marriage by accepting a gift from the go-between. Even today this practice is generally followed in many areas. Aquina observed one such meeting. She writes:

> "The go-between places some $40 on the table, and every member of the family takes some money. At one such occasion the following amounts were taken by family members: the young woman's father took $4, each of her father's four brothers took $2, her mother and her father's sister took $2 each, and her two brothers took $1 each. The young woman, at the prompting of her father's sister took $20".

Aquina continues:

> "If a member of the family were to refuse money, this would be taken as a refusal to recognise the prospective marriage. The young woman, who takes the largest amount of money, expresses in the acceptance of the gift her free consent to the marriage." (Aquina, 1967; p. 28).

Since 1898 Shona customary marriage has been modified in a number of ways by the legislators (see, for example, Goldin and Gelfand, 1975; Mittlebeeler, 1976). The main aims of the legislators were as follows. Firstly, to remove those Shona customs relating to marriage which European public opion condemned as barbarous, such as child marriages and what were believed to be consentless marriages. Some Europeans condemned bridewealth as well. Thus efforts were made to fit African marriage into the framework of European moral standards, mores and government. The second aim of the legislators was to have African marriages registered so that officials could easily ascertain with precision just when a state of matrimony began. No ceremony marked the beginning of an African marriage; the various stages of courtship, negotiation, affination and cohabitation shaded into each other, sometimes over a long period of time. Precision became necessary largely for administrative purposes.

Other important forces which have affected family life include urbanisation, industrialisation, Christianity, and formal education. One major problem which has arisen as a result of these changes is the weakening position of the wife after the death of her husband. Frequent disputes over the distribution of assets of the deceased occur nowadays between co-wives, between a widow and the brother or brothers of her dead husband or between a widow and her children on the one hand and a distant kinsman or kinsmen of the deceased on the other hand.

In the absence of a will any property belonging to the deceased devolves according to African law and custom. This means that a wife cannot inherit from the estate of her husband. Similarly a daughter cannot inherit from the estate of her father. Only a son may inherit from the estate of his father. Where the heir is a minor, property is handed over to the minor's guardian, usually his father's surviving brother, for safe-keeping until the minor attains his majority. In the case of movable property, however, provision is made for a wife to retain property which is recognized as hers such as household utensils and cattle given to her in her individual capacity at the marriage of her daughters.

This system worked reasonably well in traditional African society. At the time of marriage, custom required that a man's kinsmen help to raise the necessary bridewealth. Because of this custom the children of any union belonged not to the husband

alone but to his kin group. Similarly, the rights in the woman as a mother were held not by the husband alone but by the kin group as a whole. As a result a man's kinsmen shared the economic burden as well as the inconvenience and effort of child care. And when the husband died his close kinsmen had a right to appoint one of their number to live with the widow and the children. The extended family acted as a unit. If the widow agreed to become the wife of her deceased husband's brother, disputes over the distribution of assets did not usually arise. If the woman rejected widow inheritance three courses of action were open to her. She could return to her home, enter into a new union or remain a widow in the village of her deceased husband. Again these courses of action did not usually lead to disputes over distribution of assets. A woman who wanted to retain her social identity but at the same time continue to live in her deceased husband's village avoided actual widow inheritance by appointing her son as her future "husband' at the distribution ceremony.

While bridewealth is still demanded at the time of marriage, its form has changed over the years. As already mentioned in the past cattle and other livestock were normally given, but nowadays money is becoming an important substitute for cattle. Since many parents and other close kinsmen are no longer in a position to raise the necessary bridewealth in cash, marriage custom has altered to the extent that boys are now expected to earn an appreciable sum in wage employment in order to fulfil their marriage obligations. One consequence of this change in marriage custom is that members of the boy's kin group can no longer lay strong claims to the ownership of the children of the union since they did not help to raise the bridewealth. Moreover, because of poverty and the new emphasis on individual success, kinsmen are no longer willing and able to share the economic burden of rearing children other than their own. Similarly, when a husband dies his kin group can no longer easily appoint one of their number to live with the widow and the children since the woman's procreative power was not strictly conferred on her husband's kin group at the time of marriage as in the past. The position of the woman has also changed. While in the past the woman was first and foremost a wife and mother, today she has assumed other responsibilities. In the rural areas much responsibility both for food production and for bringing up of children rests with the woman since many men are in wage employment in the towns and other employment centres and only come home intermittently. Today there are many women teachers, clerks, nurses, industrial workers and so on who make considerable contribution to their family finances. Many grown-up children also make a considerable contribution to the family

property by working on their father's farms or businesses, or if they are in wage employment, by sending money and goods to their parents. It is not surprising, therefore, that many urban workers nowadays want to ensure that their wives and children inherit all their assets. And yet these men know that after death African law and custom may make it difficult if not impossible for their aspirations to be fully realised. The women also know that the property which they and their husbands have built up over the years may be given to someone else after the death of their husbands. This situation is causing considerable anxiety and insecurity in many modern African families.

There are possible customary and legal solutions to this problem. One possible customary solution is to encourage widows to appoint their own sons as their future "husbands" at the distribution ceremony **(kurova guva)** and thus prevent the brothers and other kinsmen of the deceased from laying any claims of inheritance or succession. This device, however, is no longer an adequate solution to the problems of succession and inheritance because of the following factors. Firstly, the widow may not have her own son. Secondly, movable property such as money, cars and bicycles may nowadays be taken and used by the dead man's kinsmen before the distribution ceremony is held. The ceremony is held at the earliest one year after the death of the property holder. Thirdly, the ceremony may not be held in the customary way. In this case the widow may not be consulted adequately or her views may be disregarded.

In the case of pension schemes, disputes over the distribution of assets are minimized to a certain extent by asking the pension holder to nominate the dependant when application is made for a joint and survivorship pension. The problem, however, is that the distribution ceremony will still be held even if a beneficiary is named and if the nominated dependant is not the rightful heir in African law she may be asked to surrender the assets, thus ignoring the legal pension document. If the nominated individual refuses to surrender the assets, she will be regarded as an outcast and all social support will be withrdawn. Moreover, nominating a dependent before death is seen as an attempt to bypass the distribution ceremony and, therefore, an indication of lack of faith in one's kinsmen.

Men can, of course ensure that their wives and children have a fair share of all their wealth by leaving a will. But this is also a partial solution to the problem of succession disputes in modern African communities. Firstly, many people in most societies never draw up wills. Even where a will is drawn up, disputes between a widow and her husband's kinsmen often arise. Disputes concerning a will are decided by a court. But this method of settling family disputes still leaves a number of problems un-

solved. Firstly many widows may not be aware of their right of appeal to the district commissioner's court. Secondly, court cases can be expensive. As a result some widows may consider it unprofitable to spend the little money that they may have to contest a case whose outcome may be uncertain. Moreover, male kinsmen of the deceased sometimes threaten to and can in fact make life extremely difficult for the widow even if she wins the case in a court of law. Women know this. They know, for example, that if the male kinsmen of their dead husbands withdraw their cooperation their daughters may find it difficult to enter into or dissolve a marriage in the future since a woman's guardian must give his consent in both cases. Thus some widows will allow kinsmen of the deceased to distribute their assets according to African law and custom in the interests of future social harmony and co-operation. But in doing so the widow and her children may lose most of their assets since the heir at African law may not be interested in their welfare.

It seems to me that disputes over distribution of assets after the death of the head of the family which often arise in modern African society can be prevented by changing the law relating to succession and inheritance. Payment of bridewealth inevitably resulted in rules governing inheritance and succession which tend to regard a woman as a minor in as far as succession and inheritance are concerned. But I have argued that in many cases nowadays bridewealth is raised by the man himself (sometimes with the help of his prospective wife). I have also argued that many women nowadays make considerable contributions to family finances. Moreover, the communual character of the extended family has weakened. There is no reason, therefore, why the law should continue to reward persons who have not played a significant part in building up the assets in question. I am, therefore, appealing to the law makers to allow under African law a man's wife and her children to inherit directly from the property of the family head. In some cases this is already being done by the people themselves. Thus the law must be brought into line with changing values, standards and practice.

Ownership of immovable property was unknown to customary law. Present decisions on this matter are based on the African Wills Act which provides that in the absence of a will immovable property devolves upon the heir in African law in his individual capacity. I have already mentioned the fact that the heir in African law nowadays may be a kinsman who at heart has no interest in the family of the deceased. The heir in African law should always be interpreted to mean the man's surviving eldest son. In the absence of a son property should devolve to his eldest surviving daughter. (This recommendation is a complete

departure from custom). Where the son or daughter is still a minor, the widow should inherit the property in trust for her children.

The changes proposed here will go a long way toward removing disputes that now often arise after the death of an urban household head; they should go a long way to removing the fear on the part of many men that their pensions and other assets will fall into the wrong hands when they die. These proposals will also remove the anxiety and insecurity on the part of many urban women that when their husbands die all that they have worked for will be lost.

CHAPTER 6

CONCLUSION

This study has revealed five types of marital unions common in African society today. The first two types of unions are unregistered; **mapoto** marriage, and customary marriage. There are three types of registered unions. The first is customary marriage solemnized in terms of section 3 of the African Marriages Act (Chapter 238). The second type of registered marriage is civil or Christian marriage, that is, marriage by civil rites in terms of the Marriage Act (Chapter 37). The last type of marriage common in African society today is a combination of customary marriage solemnized in terms of section 3 of the African Marriages Act (Chapter 238) and civil or Christian marriage. Some couples who entered into a solemnized marriage under customary law also enter, at a later stage, into Christian marrage or civil marriage. The Makoni court deals mainly with **mapoto** marriages and unregistered customary marriages although registered marriages are also entertained mainly for the purpose of obtaining reconciliation.

Although there is a need from a legal and administrative point of view for registration of all marriages, many people are reluctant to do so. Increased urbanisation has made it all the more necessary to ascertain precisely whether a person is married or not, and when marital status was assumed. In criminal cases involving husband and wife it is necessary to know this fact if a wife is to be competent to testify against her husband. In cases of rape it is also necessary to know whether the marriage had

actually taken place. The question of bigamy also depends on whether the marriage had actually taken place. There are many other examples.

Many people, particularly men, avoid registration of marriage because of some of its implications. Some of the implications of registered marriage (particularly civil or Christian) which are disfavoured by many men include; the possible enhancement of the social status of women, the position of independence possible to widows, the disallowance in certain cases of customary grounds for claiming the custody of children, the application in certain cases of non-customary principles to the devolution of property, the obstacles placed in the way of divorce, and the legal obligation of monogamy. This reluctance to enter into civil or Christian marriage appears to be common throughout Africa (Philips, 1971; p. 28).

The need for change cannot be over-emphasised. Marriage procedure is changing. Bridewealth has changed in form. The functions of bridewealth are changing. The position of the woman is changing and so on. The way in which the Makoni court applies customary law indicates in some way many of the needed changes. Areas of particular importance to women include the wife's right to maintanance by her husband and the wife's position after the death of her husband. Customary law itself needs to be taken more seriously. Athough customary law has been given recognition in certain matters in the past, the judiciary has tended to regard it as something rather less than law proper. An example of this attitude is the way customary marriages have been treated in the past. Customary marriages were regarded as having an inferior status to marriages under the statute law.

Mention has been made of the need for a unified system of law in Zimbabwe. This idea is not new. The policy of abolishing the dual system of courts has been adopted in a number of African countries. This means abolition of the African courts by their integration into a single court system comprising High Courts and magistrates' courts. It appears, however, that even where a single court system now exists, the lower courts in that system still retain many of the characteristics of the African traditional courts they have replaced, both as regards the personnel who staff them and the type of case which they in practice entertain. Furthermore, as Phillips (1971, p. 46) points out, customary law where a unified system has been established, "has shown a marked degree of resilience, and in large areas of civil litigation customary law still plays a predominant role. This is particularly evident in matters relating to marriage and the family. Here the customary law, modified by, and adapted to, social and legislative change, remains, and is likely to remain for

the foreseeable future, a vital part of the legal systems of the common law African countries". Another approach is the maintenance of the dual system of courts. Malawi has adopted this policy. Whichever policy is adopted I agree with Phillips (1976) that there should be a move towards the provision of one general body of enacted marriage law, governing all marriages, whatever their form. This should give all marriages an equal status; provide a common system for their registration, and contain certain basic provisions to ensure that the status of a wife and widow are in keeping with views of morden society. Within this framework, however, the customary law of marriage, if adequately adapted to modern social concepts, must continue to have a part to play.

The Makoni Court clearly plays an important role in that part of the society it serves. Much of the time of the court is spent settling or attempting to settle family disputes. In traditional society many of the problems brought to this court are resolved within the extended family. When such disputes arise the role of other members of the extended family is to investigate the grievances that husband and wife may have and suggest ways by which such grievances may be removed. The aim is to restore harmony and thus salvage the marriage. In Salisbury this role has been taken over to a certain extent by the Makoni court.

It is clear that many couples who say they have come to seek divorce at the Makoni court have not come to seek divorce at all. They know that the Makoni court, like members of an extended family, will not easily permit the break-up of a marriage. What they have come to look for is assistance in resolving their family problems. The Makoni court is particularly suited to play this role. One of its attractions is its informality. Parties to a dispute are able to report their grievances freely. Some members of the public assist by citing their own experiences when they were faced with similar situations. The parties to a dispute are told how others in similar cicurmstances have solved such disputes in the past.

The Makoni Court's concern with family stability is seen in its frequent attack of prostitution. As pointed out earlier the court regards prostitution or the promotion of prostitution as an offence; it is regarded as a threat to stable family life. This concern with stable family life is also seen in the court's attempt to get men with a **mapoto** marriage to pay bridewealth. Although cases involving **mapoto** marriage are entertained the court usually orders the man to pay bridewealth in order to make the marriage more formal. Husbands and wives are sometimes given a lecture on how to live together as man and woman. I see a need for courts such as the one at Hunyani to deal particularly with family disputes.

Many family problems are of course resolved within the extended family and even in a city the size of Salisbury but mobility and urban conditions are making it increasingly difficult to maintain strong kinship and family ties. In the urban situation many of the individual's kinsmen have remained in the rural area and thus many of the positions in the kinship system, in which the individual may have been reared, remain vacant. The grandparental generation, for example, may be lacking. Moreover, in the towns, "where the emphasis is on heterogeneity and on mobility the conditions prevent the daily participation of unilineal kinsmen in joint activities. There are no cattle, there is no land to focus the activities of say a partilineage, and the working hours and conditions preclude their participating in joint ritual and ceremonies for protracted periods. The emphasis in town is on individual success in a competitive environment and this emphasis cuts across the ideology of corporate descent groups" (Mitchell, 1963; p. 324).

Criticisms of the Makoni court have been made such as the participation of members of the public during a hearing which can sometimes lead to injustice. In my opinion, however, the advantages outweigh the disadvantages. In any case the plaintiff or defendant or both have a right to ask that their case be transferred to another court if they are not satisfied with the way their case was being handled.

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